

**CITATION:** Tomkins v. Che, 2020 ONSC 2424  
**COURT FILE NO.:** 182/20  
**DATE:** 2020-04-20

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Lindsay Tomkins, Applicant

- AND -

Nari Che, Respondent

**BEFORE:** Madam Justice L. Madsen

**COUNSEL:** Anthony Colizza, Counsel for the Applicant

Nari Che, Unrepresented

**HEARD:** In Chambers

**ENDORSEMENT – COVID-19 PROTOCOL**

[1] **AS A RESULT OF COVID-19**, the regular operations of the Superior Court of Justice are suspended at this time, as set out in the Notice to the Profession dated March 15, 2020 available at <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/> .

[2] In accordance with the Regional Notice to the Profession dated March 24, 2020, electronic materials were filed by the Applicant mother, Lindsay Tomkins. She seeks a range of relief including return of the children, primary residency, and police enforcement. In the alternative, she seeks liberal and generous access.

[3] This matter was referred to me as Triage Judge for a determination of urgency and of how this matter should proceed.

[4] Ms. Tomkins has filed an affidavit of service indicating she served Mr. Che by email on April 16, 2020.

[5] Ms. Tomkins' materials state that she was the primary caregiver for the children before the parties' separation in July 2019. Those materials also state that she has had difficulties with alcohol use and that on March 11, 2020, the last day the children were in her care, she suffered a relapse in terms of alcohol use. She alleges that Mr. Che has been withholding the children since that time and that she does not know where they are.

[6] Determinations of urgency are summary in nature, and wholly without prejudice to both parties on the hearing of the motion itself. A determination of urgency is not intended to be a motion unto itself and is intended to be simple and expeditious.

[7] Ms. Tomkins filed the following materials by email to the Superior Court of Justice in Kitchener, Ontario:

- a. Notice of Motion dated April 16, 2020;
- b. Affidavit of Ms. Tomkins dated April 16, 2020, with exhibits;
- c. Further affidavit of Ms. Tomkins dated April 17, 2020 with details regarding Mr. Che's email address;
- d. Affidavit of Ms. Joanne Dye, mother of Ms. Tomkins, dated April 15, 2020.

[8] Ms. Tomkins' materials set out the following:

- a. The parties were in a relationship between 2012 and July 2019. They have twins who are 6 ½ years old.
- b. Ms. Tomkins says she was the children's primary caregiver during the relationship.
- c. She indicates that she and Mr. Che have both used alcohol as a coping mechanism to deal with stress.
- d. Ms. Tomkins states that she had difficulties with alcohol after the children were born due to post-partum depression, but that she addressed those issues successfully. She relapsed when the parties separated. In October 2019, she started attending Alcoholics Anonymous, but relapsed again on March 11, 2020.
- e. On March 11, 2020, Ms. Tomkins states there was an incident. She had consumed three beer. Mr. Che came to the home. The parties had an argument. After the argument, Mr. Che said he was taking the children shopping, but he never brought the children home thereafter.
- f. Ms. Tomkins called the police. Ms. Tomkins indicated that the police located Mr. Che but would not advise of Mr. Che's location.
- g. On March 17, 2020, Mr. Che advised via text message that he was self-isolating with the children, but would not advise where he was staying or who he was with. He stated that "**the children are in a local but isolated**

**location, not in contact with anyone who has been out of the country...”**  
[emphasis added]

- h. Ms. Tomkins states that she has received no communication from Mr. Che since that date. She does not know where the children are. She advises that if Mr. Che is still working, she does not know who is caring for the children while he is at work.
- i. Ms. Tomkins states that although she was previously working at Bay Shore Home Health Care, she was let go on March 31, 2020. She says this is because Mr. Che took the vehicle that she usually used to get back and forth to work.
- j. Ms. Tomkins seeks the return of the children to her care. She states that she would not terminate access to Mr. Che and that she would follow the government recommended precautions with respect to COVID 19.
- k. Ms. Che states that her plan for caring for the children during COVID-19 includes her mother, Ms. Dye, residing with her to help her. She states that her mother has been following all government recommendations, does not show signs of COVID-19, and has an excellent relationship with the children. Ms. Tomkins has filed an affidavit from her mother confirming this plan.

[9] The court does not yet have the Mr. Che’s perspective on the issues set out above.

[10] The Notice to the Profession issued by the Chief Justice provides that urgent matters may include matters related to the safety of a parent or a child, or urgent issues related to the wellbeing of a child.

[11] In *Ribeiro v. Wright*, 2020 ONSC 1829, released March 24, 2020, Pazaratz J. set out principles to aid in the determination of urgency with respect to parenting issues in this difficult time. He held that in most situations, there is a presumption that existing parenting arrangements will continue, subject to modifications to ensure that COVID-19 precautions are adhered to, including social distancing. Specific circumstances in a family, such as the need to self-isolate, personal risk factors of a parent, could necessitate restrictions on parenting time. He stressed that would be “zero tolerance” for a parent who recklessly exposes a child to any COVID-19 risk.

[12] Pazaratz J. also emphasized that no matter how difficult the challenge, or what modifications or restrictions may be appropriate, we must find ways to maintain important parental relationships, above all in a safe way.

[13] In *Thomas v. Wohleber*, 2020 ONSC 1965, at paragraph 38, Kurz J. provided guidance on what constitutes urgency at the present time:

1. The concern must be immediate; that is one that cannot await resolution at a later date;
2. The concern must be serious in the sense that it significantly affects the health or safety or economic well-being of parties and/or their children;
3. The concern must be a definite and material rather than a speculative one. It must relate to something tangible (a spouse or child's health, welfare, or dire financial circumstances) rather than theoretical;
4. It must be one that has been clearly particularized in evidence and examples that describes the manner in which the concern reaches the level of urgency.

[14] In my view, applying the Notice to the Profession and the caselaw, the motion brought by the mother is urgent. On Ms. Tomkins' evidence, the children were removed from her care and she does not know where they are. She says that Mr. Che has not responded to texts for over one month now. Ms. Tomkins' concern is immediate and serious. If Mr. Che has concerns about Ms. Tomkins' admitted alcohol use, a plan must be developed having regard to that issue – it does not give license to unilaterally withhold the children with no information as to their whereabouts.

[15] Mr. Che was served by email. However, Ms. Tomkins states that the most recent email she received from Mr. Che from that address was now six months ago, in October 2019. I am concerned about whether he received the motion materials. The parties communicated predominantly by text until March 17, 2020.

[16] Mr. Che's evidence on these issues is required. It is possible that with both parties' evidence before the court, the circumstances would be understood quite differently.

[17] I direct the following next steps in this matter:

- a. Ms. Tomkins shall immediately serve the motion materials and this endorsement on Mr. Che by email, as well as by text to the phone number most recently used by Mr. Che in communicating with Ms. Tomkins;
- b. Mr. Che shall have until **Friday April 24, 2020 at 4:00 p.m.** to serve and file responding materials. Materials shall be served on Ms. Tomkins by email to her lawyer at [colizza@mgdlawyers.ca](mailto:colizza@mgdlawyers.ca);
- c. Ms. Tomkins shall have until **Tuesday April 28, 2020 at 4:00 p.m.** to serve and file reply materials. The materials shall be served by email and text on Mr. Che;
- d. All materials shall be filed with the court at **Kitchener.Superior.Court@ontario.ca** with the style of cause and file

number in the subject line of the email. Service of all materials related to this motion may be by email between counsel.

- e. This motion will be heard by teleconference no later than **Friday May 1, 2020 at a time to be determined by the Trial Coordinator**. The Trial Coordinator will advise counsel for Ms. Tomkins as well as Mr. Che of the call-in information for the motion by email (and by text for Mr. Che).

[18] The timelines for the exchange of materials in this matter are short, recognizing the urgency of the issue. It is preferable for Mr. Che's perspective to be before the court before a temporary decision is made, but the matter must be heard quickly.

[19] Court staff are requested to serve Ms. Tomkins' counsel and Mr. Che with a copy of this endorsement by email.

[20] Notwithstanding rule 25 of the *Family Law Rules*, this endorsement is effective from the date it was made and enforceable as an order of the court without the need for an order to be prepared or approved by the parties and then issued by the court. No formal order is necessary unless an appeal or a motion for leave is brought, or alternatively unless one is necessary for enforcement by a third party. A party who wishes to prepare a formal order for approval and issuance may do so, and submit materials by Form 14B to the court.



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L. Madsen, J

**DATE:** April 20, 2020