

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

FILED
APR 11 2008
03 APR 14 PM 12:00
D. Long
DEPUTY CLERK

KYNESHA DHANOOALAL,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES DEPARTMENT OF)
 THE ARMY)
)
 Defendant.)

Civil Action No. 4:08-CV-42 (CDL)

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

COMES NOW, Plaintiff, Kynesha Dhanoolal, and hereby moves pursuant to Federal Rule of Civil Procedure 65(b) for a temporary restraining order enjoining and restraining Defendant from embalming or otherwise altering or disposing of the remains of Dayne Dhanoolal and to furthermore make the remains of Dayne Dhanoolal immediately available to medical representatives of Kynesha Dhanoolal, for the purpose of harvesting the sperm belonging to Dayne Dhanoolal.

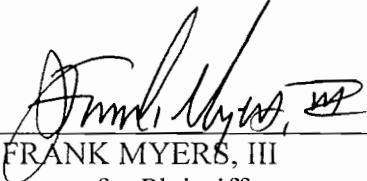
The Court should grant the temporary restraining order for the reasons set forth in the accompanying memorandum of law.

A proposed order accompanies this motion.

This 4th day of April, 2008.

Respectfully submitted,
Charles W. Miller
CHARLES W. MILLER
Attorney for Plaintiff
Georgia Bar Number 506425

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

FILED
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d. Long
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KYNESHA DHANOOALAL,)
)
Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
THE ARMY)
)
Defendant.)

Civil Action No. 4:08-CV-42 (CDL)

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER
EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER**

FACTS

The Plaintiff, Kynesha Dhanoolal, was married to Dayne Dhanoolal on February 14, 2007 in Columbus, Georgia. Dayne Dhanoolal was a Sergeant in the United States Army serving in Iraq. On March 31, 2008, at approximately 9:00 A.M. E.D.T., Sgt. Dhanoolal's vehicle was struck by an improvised explosive device ("IED").

Sgt. Dhanoolal died immediately from injuries sustained by the detonation of the IED. His body was transported to Dover Air Force Base in Dover, Delaware, where it currently remains. Sgt. Dhanoolal died without any children. Under controlling law in the state of Georgia the Plaintiff is Sgt. Dhanoolal's sole heir at law.

Although Plaintiff and Sgt. Dhanoolal had not had any children yet they spoke of doing so many times. Plaintiff, who suffered from uterine fibroid tumors, had surgery to remove same in November, 2007 in order to be able to conceive a child with Sgt. Dhanoolal upon his return from active duty in Iraq. Sgt. Dhanoolal was scheduled to return from Iraq in approximately three weeks when he was killed.

Sgt. Dhanoolal died without a will. On April 3, 2008, the Probate Court of Muscogee

County, Georgia issued Temporary Letters of Administration to Plaintiff appointing Plaintiff the Temporary Administratrix of Sgt. Dhanoolal's estate. A copy of such Letters is attached to this motion as Exhibit "A". As such, under Georgia law the Plaintiff has the authority to control the remains of Sgt. Dhanoolal, including disposition thereof and application of procedures to such remains.

Plaintiff wishes to have a medical procedure performed upon Sgt. Dhanoolal's remains in order to extract and preserve sperm from same. This will allow Plaintiff the future option of artificial insemination in order to have the child that she and Sgt. Dhanoolal so desperately wished to conceive.

Prior to his deployment to Iraq Sgt. Dhanoolal executed a DD Form 93 with the United States Army. This form allows a soldier being deployed to designate certain actions he wishes performed regarding financial and personal matters. On this form he designated his mother, Monica Mary Brown, as the person to handle disposition of his remains. Sgt. Dhanoolal did designate Plaintiff to receive his financial benefits and similar items.

The Plaintiff has attempted to discuss her and Sgt. Dhanoolal's desires regarding conception of a child with Ms. Brown. Further, Plaintiff wishes to have Sgt. Dhanoolal receive a full military burial with honors at Ft. Benning, Georgia. This will allow Plaintiff to visit her husband's final resting place and pay proper honor to him.

Unfortunately, in spite of Plaintiff's efforts to discuss these matters with Ms. Brown, Ms. Brown has refused to do so or acknowledge in any way Plaintiff and Sgt. Dhanoolal's wishes regarding children and Plaintiff's wishes regarding final interment of Sgt. Dhanoolal's remains.

Plaintiff's attorneys have been informed by appropriate officials of the United States Army that embalming of the body is imminent. The extraction of the sperm must take place before the body is embalmed in order for such sperm to remain viable. Finally, such officials have stated that if a Federal judge issues a temporary restraining order then they will not proceed with the embalming until after Plaintiff is able to have the extraction performed.

Unless this Honorable Court intervenes immediately Plaintiff's rights will be irreparably harmed.

ARGUMENT AND CITATION OF AUTHORITY

In this Circuit there is a four factor test for granting a temporary restraining order ("TRO").

To be entitled to a TRO, a movant must show: (1) a substantial likelihood of ultimate success on the merits; (2) the TRO is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the TRO would inflict on the non-movant; and (4) the TRO would serve the public interest. Harden v. Donald, Slip Copy, 2006 WL 3060018, M.D. Ga. 2006, Ingram v. Ault, 50 F.3d 898, 900 (1995) . A temporary restraining order is a drastic remedy used primarily for maintaining the status quo of the parties. Cate v. Oldham, 707 F.2d 1176, 1185 (11th Cir.1983); Fernandez-Roque v. Smith, 671 F.2d 426, 429 (11th Cir.1982).

Ultimately the question of control of Sgt. Dhanoolal's remains and final disposition thereof is a question of state law. Sgt. Dhanoolal and Plaintiff were domiciled in Georgia which confers jurisdiction on this issue to Georgia law and the courts of Georgia. In the instant case the Plaintiff is the surviving spouse of Sgt. Dhanoolal. It has been held by the Supreme Court of Georgia that in the absence of a testamentary disposition a surviving spouse has a quasi property right regarding disposition of a deceased spouse's remains. Welch v. Welch, 505 S.E. 2d 470 (Ga. 1998). Interference with a surviving spouse's right of burial or disposition of the deceased is a tort under Georgia law. In Re Tri-State Crematory Litigation, 215 F.R.D. 660 (N.D. Ga. 2003)(applying Georgia law). Furthermore, Plaintiff has already been duly appointed by the Probate Court of Muscogee County, Georgia as the temporary administratrix of Sgt. Dhanoolal's estate. As his sole heir at law under Georgia law she will be appointed as his permanent administratrix.

Thus, under the law which will ultimately control these questions there is little doubt, if any, that Plaintiff will not succeed on the merits. Neither Ms. Brown nor any other person has any true standing to prevent or otherwise change this result. Accordingly the first of the four factors has been met in the instant case.

If the TRO is not granted immediately the medical evidence is clear that the extraction will

not be able to occur in time to allow Plaintiff to carry out her and Sgt. Dhanoolal's wishes. As a result, the Plaintiff will suffer irreparable harm. There will be no remedy that can restore this opportunity to her. This particular factor does not require lengthy discussion or citation in that the irreparable harm is clear. Accordingly the second of the four factors has been met.

The harm to the Plaintiff will be irreparable. However, there is no discernible harm to the non-movant in this case. The non-movant will not be harmed by the extraction. The Plaintiff will pay all costs thereof and there is little chance of any harm, let alone irreparable harm to the non-movant as a result of the extraction. Although Plaintiff is mindful of Ms. Brown there is no demonstrable harm that she will suffer by granting the TRO. The state courts will almost certainly appoint the Plaintiff as the permanent administratrix. The Plaintiff will cover all costs of the extraction. Final disposition costs will be covered by the United States Army and/or the Plaintiff. Accordingly the third of the four factors has been met.

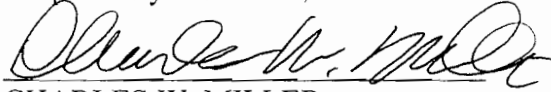
The public has an interest in preserving the sanctity of marriage and the right of reproduction. Advances in medical technology have made the concept of post-mortem conception by a surviving spouse almost routine. Courts regularly decide issues regarding the right to possession of sperm, eggs and embryos. The Plaintiff and her husband shared a deep and abiding love. They openly expressed a desire to have one or more children together.

Unfortunately the tragic timing of Sgt. Dhanoolal's death in the service of his country robbed both he and Plaintiff of the chance to have such children through normal methods. Thankfully there are procedures which are well-accepted which will allow Plaintiff to overcome the effects of this tragedy. Conception and birth of issue from the marriage of the Plaintiff and Sgt. Dhanoolal will serve as a fitting tribute to the sacrifices that both Sgt. Dhanoolal and Plaintiff have made for their country. Denial of the Plaintiff's request will only add to Plaintiff's immeasurable heartbreak over this tragedy. That can serve no public interest. The grant of the TRO can and will serve a public interest. Accordingly the fourth and final factor of the test has been met.

The Plaintiff respectfully requests the Court grant her Emergency Motion for Temporary Restraining Order.

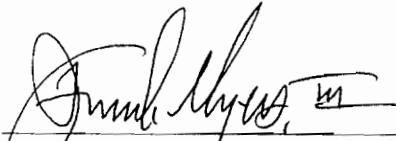
This 4th day of April, 2008.

Respectfully submitted,



CHARLES W. MILLER
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Georgia Bar Number 506425

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

Kynesha Dhanoolal,)	
)	
Plaintiff,)	
)	CASE NO. 4: 08CV42
v.)	
)	
United States Department of)	
The Army,)	
)	
Defendant.)	

ORDER

Plaintiff has filed a Motion for Temporary Restraining Order and Injunctive Relief seeking to restrain the Defendant from embalming or altering the remains of Plaintiff's deceased husband until his sperm can be preserved. The Court grants Plaintiff's motion.

Plaintiff's motion establishes the following: Dayne Dhanoolal ("Sergeant Dhanoolal"), a Sergeant in the United States Army, died in Iraq on March 31, 2008 at approximately 9:00 A.M. E.D.T., when his vehicle was struck by an improvised explosive device. At the time of his death, he was married to Plaintiff, having been married on February 14, 2007. Subsequent to his death, his body was transported to Dover Air Force Base in Dover, Delaware, where it currently remains.

Sergeant Dhanoolal died without a will and without any children. Plaintiff, his surviving wife, has been appointed as Temporary Administratrix of his estate and contends that she has the legal right to control the disposition of Sergeant Dhanoolal's remains. Plaintiff wishes to have a medical procedure performed to extract Dhanoolal's

sperm and preserve it so that Plaintiff will have the future option of being artificially inseminated with her deceased husband's sperm.

Prior to his death, Sergeant Dhanoolal signed an Army issued DD Form 93 which designated his mother, Monica Mary Brown, as the person to handle the disposition of his remains upon his death. Mrs. Brown has not consented to the extraction of her son's sperm, and Defendant refuses to delay the embalming of Sergeant Dhanoolal's remains unless ordered to do so by a United States District Judge.

Plaintiff's attorneys have been informed by representatives of Defendant that the embalming of Sergeant Dhanoolal's body is imminent. Plaintiff further alleges that in order for Plaintiff's sperm to remain viable, it must be extracted prior to the embalming of the body. To avoid the permanent and irreparable loss of the opportunity to make a claim to her deceased husband's sperm, Plaintiff seeks to maintain the status quo and prevent Defendant from embalming Dhanoolal's body until Plaintiff has had the opportunity to have his sperm extracted. Plaintiff seeks this temporary restraining order without notice to Defendant or Mrs. Brown.

A temporary restraining order may issue without notice to the adverse party only if: (1) "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition;" and (2) "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1).

Plaintiff alleges that to preserve the sperm of her deceased husband it must be extracted within a relatively short time after the decedent's death. Therefore, time is of

the essence if Sergeant Dhanoolal's sperm is to be preserved. The Court finds that the loss of Sergeant Dhanoolal's sperm will be permanent if the Court waits for any adverse party to be heard. The Court further finds that Plaintiff will suffer immediate and irreparable harm if this temporary restraining order is not issued because she will be prevented from making any future claim to Sergeant Dhanoolal's sperm absent this order.

Accordingly, it is hereby ordered:

- (1) That a Temporary Restraining Order is hereby issued enjoining and restraining Defendant from embalming or otherwise altering or disposing of the remains of Dayne Dhanoolal until a medical representative of Kynesha Dhanoolal is permitted to extract the sperm of Dayne Dhanoolal; and
- (2) The remains of Dayne Dhanoolal are to be made available immediately to medical representatives of Kynesha Dhanoolal, for the purpose of extracting the sperm of Dayne Dhanoolal, which extraction shall be done within 72 hours of the date of this Order unless otherwise modified by the Court; and
- (3) The sperm that is extracted by Plaintiff's medical representative shall be preserved and maintained within the sole custody and control of that medical representative and shall not be provided to Plaintiff or any other person until further order of this Court.

The Court makes no finding in this Order as to the final disposition of the sperm of Dayne Dhanoolal or who has legal rights to it. This Order simply seeks to preserve the

status quo by allowing the sperm to be extracted and maintained, until a final legal determination can be made as to its future use.

In addition to serving Defendant with this Order and Plaintiff's accompanying motion, Plaintiff shall serve this Order upon her medical representative who will extract the sperm and shall highlight for that medical representative the provisions of this Order which order that representative to maintain sole custody and control of the extracted sperm. Plaintiff shall also serve this Order and her motion upon Monica Mary Brown. Service of this Order upon Monica Mary Brown shall be made via email, fax, hand delivery or some other method designed to provide her with the most expeditious and immediate notice possible.

This order is issued at 1:55 P.M. on April 4, 2008.

SO ORDERED.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

KYNESHA DHANOOALAL,)

Plaintiff,)

v.)

UNITED STATES DEPARTMENT OF)
THE ARMY)

Defendant.)

Civil Action No. 4-08-cv-42 (CBC)

VERIFICATION

Before me, the undersigned authority, personally came and appeared, **KYNESHA DHANOOALAL**, who after being duly sworn, deposed and said: I have read this complaint and every fact in it is true to the best of my knowledge.

Kynessa E. Dhanoolal
Affiant

Sworn to and subscribed before me, this

4th day of April, 2008

Mary S. Wallace

Notary Public, Muscogee County, Georgia

My Commission Expires: 9-22-2009

(Notary Seal)

Notary Public, Muscogee County, GA
My Commission Expires on
September 22, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

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CLERK

KYNESHA DHANOOALAL,)
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Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
THE ARMY)
)
Defendant.)

Civil Action No. 4-08-cv-42 (POL)

**ATTORNEY'S CERTIFICATION OF EFFORTS TO GIVE NOTICE TO DEFENDANT
REGRADING PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure I hereby certify that on April 3, 2008, I personally had numerous telephone conversations with the Defendant's attorney in this matter, Captain Christopher Nuneviller, regarding same. I informed Captain Nuneviller of our intentions to obtain the relief requested in Plaintiff's Emergency Motion for a Temporary Restraining Order.

Captain Nuneviller acknowledged same but did not request to be present or have a representative present, at any initial hearing on this matter.

I further certify that subsequent to the filing of the instant motion I informed Captain Nuneviller of same. He acknowledged this and asked that I forward a copy of any order signed by this Honorable Court in this matter.

At no time did Captain Nuneviller express any intention to oppose or support Plaintiff's motion.

I hereby attest that the above facts are true and correct to the best of my knowledge.

Charles W. Miller

Affiant

Sworn to and subscribed before me, this
4th day of April, 2008

May S. Wallace
Notary Public, Muscogee County, Georgia
My Commission Expires: 9-22-2009

**Notary Public, Muscogee County, GA
My Commission Expires on
September 22, 2009**