

Case Name:

P. v. C.

Between

L.V.P, Applicant, and

M.E.C, Respondent

[2004] O.J. No.

200 ONCJ

N

Ontario Court of Justice

E.B. Murray.

Heard: June 9, 2006.

Judgment: June 16, 2006.

Before Justice Ellen B. Murray

Motion Decision released on February 21, 2012

Mr. P.E. / L.N. for the Applicant

Mr. Steven Benmor for the Respondent

1. The Applicant and the Respondent are mother and father of the children J.P.C, born April 9, 2003, and M.R.C, born July 14, 2004. This court made an order in a default hearing on October 12, 2006, which provided that the Respondent have no access to the children; that he be restrained from contacting the Applicant; and that he pay child support. A previous order had granted the Applicant custody of the children.
2. The "no access" order was made on the basis of the Applicant's evidence that the Respondent was a violent man, an alcoholic and cocaine addict, who had endangered the life of his daughter M.R.C.
3. Almost two years ago, the Respondent commenced a variation motion, seeking access to the children and rescission of arrears of support. He says that he has successfully completed treatment for substance abuse, and wants his daughters to have a relationship with him.
4. The Respondent was unsuccessful in his efforts to serve the Applicant. On October 18, 2010 , an order was made for substituted service on the Applicant's mother in T.O.; the Applicant had been living with her mother at the time of the 2006 order. The Applicant did not respond, On December 10, 2010, I made an order for access at a supervised access centre, with the Applicant to attend an intake appointment by January 7, 2011. The Applicant did not respond, Finally on October 18, 2011, I made an order that the Applicant attend court and produce the children on November 14, 2011. On November 14th, counsel for the Applicant attended, but the Applicant and the children did not.
5. The Applicant filed material in which she stated that she had been unaware of this proceeding until quite recently, and was unable to attend. She is living in D. with her spouse, B.M., and daughters J.P.C and M.R.C, as well as O.F., the Applicant's daughter from a previous relationship.
6. The Applicant is opposed to any access at this time between the daughters J.P.C and M.R.C as well as the Respondent.
7. A trial on the Respondent's motion to change has been scheduled for June 2012. I gave trial directions providing that evidence in chief by the parties and other

witnesses shall be given by way of affidavit, allowing the Respondent to give additional limited viva voce evidence in chief.

8. Each party brings a number of pre-trial motions. This is my decision on those motions,
  1. The Applicant seeks orders;
  2. Allowing the Applicant and Mr. B.M. to be cross-examined by Skype at trial;
  3. Directing the T.O. Police Service to provide a copy of all police records, incident reports and officers' notes concerning the Respondent to the Applicant's solicitor;
  4. Directing the Respondent to provide extensive disclosure;
  5. Asking that the court set aside or stay its orders of December 10, 2010, and October 18, 2011.
  
9. The Respondent seeks orders:
  1. Directing the Applicant to provide extensive disclosure;
  2. Vacating the order of October 12, 2011 - the order which he seeks to vary.

### **CROSS EXAMINATION BY SKYPE**

10. The Applicant's request that she and her spouse be permitted to have their cross-examinations conducted on Skype is opposed by the Respondent.
  
11. The Applicant requests that cross-examinations be conducted in this way for two reasons:
  - She and her spouse are financially unable to travel to T.O. for the trial. The cost of airfare for the Applicant and Mr. B.M. would be approximately \$2000.
  - Either the Applicant or Mr. B.M. must stay in their home in D. to care for the children.
  
12. Mr. B.M. is the sole financial support for the Applicant, J.P.C, M.R.C., and O.F. His income is \$72,000 annually, earned from his post-doctoral position at the University of A. The Applicant and the children moved to D. with Mr. B.M. in August 2011, when he began work. The Applicant has been unable to secure employment in D.

13. Expenses for the family exceed Mr. B.M.'s income by approximately \$1600 monthly. Major expenses include tuition of \$18,000 annually for the three children at a private international school; rent of \$2000 monthly; and \$6,000 paid annually to V., another daughter of the Applicant from a prior relationship, to assist with her post-secondary expenses. Neither the Applicant nor Mr. B.M. has savings or other significant assets. In addition to Mr. B.M.'s hefty student loans, the parties owe about \$25,000 on credit card debt. The Applicant is not assisted in meeting daughters J.P.C and M.R.C's expenses by the Respondent, as he does not pay child support.
14. The Applicant and Mr. B.M. have been unable to return to T.O. to visit family since their departure in August 2011 and have no plans to do so in the foreseeable future because of their financial situation.
15. The Respondent submits that he will be prejudiced if the Applicant can't and her spouse are permitted to be cross-examined by Skype. His lawyer argues that the "ebb and flow of cross-examination" will likely be hampered if he has to "rely on technology to transmit my question and then to transmit the answer". He submits that it will be impossible for a judge to assess the Applicant's demeanour, a crucial task as her credibility is in issue in this case,
16. The Applicant offers uncontradicted evidence about the operation of Skype:
  - "Skype is a free computer program that allows people to make video conferencing calls over the internet in real-time for free, To make a video conferencing call, both parties only need a computer that is connected to the Internet, a microphone, and a web camera (which many computers have built-in). The connection between computers can remain open for hours without any charge.
  - Skype is well-known for its clear quality. It has a built-in tester to ensure that the call will go through without problem and constantly detects the bandwidth of the Internet connection so that it can determine and adjust handling the line of communication. Skype video conference calling can now take place in high definition,"
17. If I allow the motion, this trial can be heard in courtroom equipped for the presentation of electronic evidence, with the video imaging shown on individual screens for counsel and the judge, and with a large screen facing into the courtroom.

## **Statutory Framework**

18. The Family Law Rules do not address the issue of participation in a trial by video conference. Rule 14(8) does allow a party to participate in a motion for temporary relief by video conference.
19. Rule 1.08 of the Rules of Civil Procedure deals with participation by video conference at any stage of a case. If a matter is not adequately covered in the Family Law Rules, Rule 1(7) of the allows reference to the Rules of Civil Procedure to assist in deciding the issue by analogy, The relevant sections of Rule 1.08 are set out below.

## **TELEPHONE AND VIDEO CONFERENCES**

### Where Available

1.08 (1) If facilities for a telephone or video conference are available at the court or are provided by a party, all or part of any of the following proceedings or steps in a proceeding may be heard or conducted by telephone or video conference as permitted by subrules (2) to (5):

1. A motion (Rule 37).
2. An application (Rule k).
3. A status hearing (Rule 48.14).
4. At trial, the oral evidence of a witness and the argument.
5. A reference (Rule 55.02),
6. An appeal or a motion for leave to appeal (Rules 61 and 62).
7. A proceeding for judicial review. .
8. A pre-trial conference or case conference

.....

1.08 (3) If the parties do not consent, the court may, on motion or on its own initiative, make an Order directing a telephone or video conference on such terms as are just.

.....

### *Factors to Consider*

1.08 (5) In deciding whether to permit or to direct a telephone or video conference, the court shall consider,

- (a) the general principle that evidence and argument should be presented orally in open court;
- (b) the importance of the evidence to the determination of the issues in the case;
- (c) the effect of the telephone or video conference on the court's ability to make findings, including determinations about du-, credibility of witnesses;
- (d) the importance in the circumstances of the case of observing the demeanour of a witness;
- (e) whether a pa or lawyer for a party is unable to attend because of infirmity, illness or any other reason;
- (f) the balance of convenience between the party wishing the telephone or video conference and the party or parties opposing-, and
- (g) and other relevant matter.

### **Analysis**

21. My analysis of the issue is set out in reference to the factors in Rule 1.08(5), and the Family Law Rules,

#### ***The primary objective***

22. I approach this analysis through the lens of the primary objective of the Family Law Rules: "to enable the court to deal with cases justly". This includes:
- ensuring that the procedure is fair to all parties;
  - saving expense and time;
  - dealing with cases in ways that are appropriate to its importance and complexity; and
  - giving appropriate court resources to while taking account of the need to give resources to other cases.

#### ***Evidence should be presented orally in open court***

23. It is a general principle in both civil and criminal cases that, there is a trial, that evidence at trial should be presented orally in open court . That principle is reflected in Rule 1.08 (5) (a), and in the criminal cases cited by the Respondent, It is important to note, however, that it is not every case in which a litigant is entitled to a trial with. viva voce evidence.
24. This case is a motion to change a final order, not an application of first instance. Pursuant to Rule 15 of the Family Law Rules, such a motion is to be determined

based on affidavit evidence and not a viva voce hearing, unless the court is of the opinion that another process is required to dispose of the matter justly. I have already decided that in this case evidence in chief will be introduced by affidavit, and that viva voce cross-examination will be permitted. The manner in which that cross-examination will be conducted is within the court's discretion.

### ***Importance of the evidence***

25. The Applicant does not argue that her evidence is unimportant. She will testify as to her experiences with the Respondent and the reasons why she believes that access is not in the children's best interests, as well as to the children's current circumstances. The presiding judge will be called upon to assess the credibility of the Applicant as well as of the Respondent.

### **Effect of video-conferencing on court's ability to make findings and determine credibility**

26. In my view, if the technology that facilitates the video conference operates effectively, then the court will be able to observe the Applicant and make judgements about her credibility.
27. Other courts have found that it is possible to make findings of fact and decisions about credibility based on video conference evidence. In *Wright. v. Wasilewski*, 2001 O.J. 248, a personal injury case, Master Albert observed that while attendance of a witness in person is always preferable, that:
- Video conferencing is an interactive technology. It is conducted in real time. The [witness]...[is] able to see and hear what is going on in the courtroom\_ Those in the courtroom in Toronto are able to see and hear the witness 'live'. Questions can be asked and answered, Examinations in chief, cross-examinations and redirect examination could be conducted live, though not in person.
  - "...evidence presented by videoconferencing ....gives the [trier of fact] an opportunity to observe the demeanour of the witness and hear the inflections of voice and other visual and verbal cues that are part of oral testimony," and that
  - videoconferencing evidence can " provide the evidence necessary for the judge and jury to reach a just determination of the claim on its merits" and is "a reasonable and appropriate alternative".
28. Master Albert permitted 20 witnesses, including medical experts, to give evidence by way of video-conference. The Applicant cites similar decisions in several civil

cases, including family proceedings, in which courts have permitted such evidence from witnesses, including parties.

29. The Respondent's counsel relies upon a number of criminal cases in which the court did not permit evidence to be given by video conference. Under section 714.1 of the Criminal Code, a court has discretion to allow such evidence if it is appropriate in all the circumstances, including
  - the location and personal circumstances of the witness;
  - the costs that would be incurred if the witness had to be physically present; and
  - the nature of the witnesses anticipated evidence.
30. Courts in those cases were concerned that taking evidence by video link would impede the effectiveness of defence counsel's cross-examination and thus "compromise the accused's right to make full answer and defence". Many of these cases involved motions by the Crown to allow video conference evidence because of the cost of transporting the witness to the place of trial.
31. It is worth noting that there are other criminal cases decided under section 714.1 in which video conference evidence was permitted because of a complainant's personal circumstances, including the cost of travelling to trial. These were cases of domestic assault and sexual assault in which assessment of the credibility of the complainant was crucial; judges in those cases found that they were not hampered in any substantial way in making credibility assessments.
32. If video conference evidence is permitted, it is important that the party who is presenting such evidence liaise with court administration in advance of the hearing to insure that the proposed video link is workable and effective.
33. The Applicant deposes that she and her spouse are unable to attend the hearing because they cannot financially afford the trip, and secondarily because one of them must stay in D. to care for the children. The Respondent, in opposing the motion, refers to criminal cases in which courts have found that the cost to the Crown of transporting an important witness to trial is not, in and of itself, a sufficient reason to permit video-conference evidence.
34. The Applicant did not address whether she has the ability to borrow further to finance a trip to T.O. to attend the hearing. I will assume for the purpose of this motion that she is able to incur further debt.

35. Having said that, I observe that the Applicant and her spouse are already heavily in debt and are solely responsible for the support of daughters J.P.C and M.R.C as well as O.F. If I require them to travel to T.O. to be cross-examined, that decision will place further financial pressure on their household by requiring that they borrow \$2,000 to finance the trip. This decision will affect the household in which the children reside,

### **Balance of convenience**

36. It is clear to me that the balance of convenience on this motion favours the Applicant. With the conditions which I set out 1;,.F.iow, the Respondent should suffer little or no prejudice in his counsel's ability to cross-examine. The cross-examination will be conducted in real time, and the "lag" which counsel fears in the transmission of questions and answers should not exist. Requiring the Applicant and her spouse to travel to T.O. would have a negative impact on their already financially -stretched household, and would be damaging to the children's best interests.
37. Cross-examination of the Applicant and Mr. B.M. by Skype will be permitted. The Applicant shall bear any of the costs incidental to facilitating this video conference. Applicant's counsel shall contact court administration well in advance of the trial to insure that the connection between the facilities to be used in D. and Courtroom 1E in T.O. is effective.

### **RESPONDENT'S POLICE RECORD**

38. The Respondent consents to the relief requested, provided that the Applicant bears any costs associated with the production and that he receive a copy of such records. My order is that the T.O. Police Service provide the records requested to the court, so that they may be redacted if necessary with respect to information concerning third parties. After screening by the court, these records will be released to counsel for the Applicant and the Respondent.

### **DISCLOSURE REQUESTED**

39. The respondent requests extensive disclosure of information and documents from the Applicant. No objection is raised by the Applicant to the disclosure requested. The Respondent is entitled to disclosure that is relevant to the issues in the case. I order disclosure from the Applicant of the documents and information set out in Schedule "A" by at least 30 days before trial.

40. The Applicant also requests extensive disclosure from the Respondent. The Respondent agrees to much of the disclosure requested, but questions the relevance of some requests for his financial history. Given that the Respondent seeks to set aside the support order of October 12, 2006 and to rescind arrears, and given that he denies the Applicant's original evidence that he did not contribute to the family's support during cohabitation, this financial information is relevant. I order disclosure from the Respondent of the documents and information set out in Schedule "B" by at least 30 days before trial.

### **PRIOR ORDERS**

41. My orders of December 10, 2010, and October 18, 2011 required the Applicant to take certain actions on or before specific dates. Those dates have come and gone. The Applicant asks that the orders be set aside or stayed, saying that she was unaware of the case until shortly before November 14, 2011. I am not persuaded that this was the case, given her former lawyer's contact with the Respondent's lawyer shortly before the case began, and the substituted service in October 2010 upon the Applicant's mother, whom she had listed as an emergency contact with the children's school in E. The issue of when the Applicant became aware of this case will no doubt be determined by the trial judge.
42. To the extent that my order of December 10, 2010 may be interpreted as providing that the Applicant has a current obligation to produce the children in T.O.
43. for supervised access, I order that it be stayed. The issue of what access to the Respondent, if any, is in the children's best interests will be decided by the trial judge.
44. I decline to set aside my order of October 12, 2006, as requested by the Respondent. This is part of the very relief he seeks in his motion to change. It is undisputed that this order was made after the Respondent had an opportunity to file an answer and did not do so.
45. If the Applicant is pursuing a claim for costs, counsel should serve and file written submissions of no more than two pages within 15 days. The Respondent shall serve and file reply submissions of no more than two pages with 15 days of service upon him of the Applicant's submissions.

February 21, 2012

Schedule A

1. Date that the children, J.P.C, born April 9, 2003, and M.R.C., born July 14, 2004, ("the children") last resided in T.O.;
2. Date that the Applicant re-located with the children to A.;
3. Date that the children last resided in A.;
4. Date that the Applicant re-located with the children to D.;
5. Date that the children will leave D.;
6. All addresses in T.O. where the children resided since 2006;
7. All addresses in A. where the children resided since 2008;
8. All addresses in D. where the children resided since 2010;
9. Names and addresses of all schools that the children attended since 2006;
10. Names and addresses of all doctors that the children visited since 2006;
11. All dates that the children have been present in T.O. since May 27, 2010;
12. All future dates when the children will be present in T.O.;
13. All future travel plans for the children;
14. Contract of employment and/or fellowship for the Applicant's spouse's in A. and D. including the start and end dates and terms of compensation, and benefits plan for B.M.'s employment include airfare to and from T.O.;
15. Copies of all records of any type that verify the Applicant's allegations of theft; domestic violence, drug abuse, alcohol abuse or lack of parental capacity;
16. Copy of the children's school records in D., A. and T.O. referring to the Respondent as the children's father;
17. Copy of any adoption application or records made by B.M.;
18. Copy of the children's name change application and records.

## Schedule B

1. Dates of attendances at any and all drug treatment and/or rehabilitation programs at which you have attended and/or participated at any time, from April 9, 2003 (the date of birth of the parties' first child) to present;
2. A list of all drug treatment facilities and/or centres at which you have attended from April 9, 2003(the date of birth of the parties' first child) to present;
3. Length of any stay at any and all drug treatment facilities and/or centres at which you have attended from April 9, 2003 (the date of birth of the parties' first child) to present, including any reason(s) for non-completion of program and/or whether the facility was an out-patient or in-patient program;
4. Copies of records and/or notes from any and all drug treatment facilities and/or centres at which you have attended from April 9, 2003 (the date of birth of the parties' first child) to present;
5. Information of your involvement in any drug rehabilitation and/or treatment programs, including but not limited to the description of program, location, date of commencement, completion date, location, and/or notes regarding your attendance and/or involvement at same, from April 9, 2003 (the date of birth of the parties' first child) to present;
6. Information of your involvement in any alcohol rehabilitation and/or treatment programs, including but not limited to the description of program, location, date of commencement, completion date, location, and/or notes regarding your attendance and/or involvement at same, from April 9, 2003 (the date of birth of the parties' first child) to present;
7. Employment history from and after March 2005 to present, including but not limited to the name of the employer, salary, and hours worked;
8. Copies of all employment records from and a r March 2005 to present;
9. List of amount(s) and date(s) of any and all child support payments made since October 2006 to present;
10. A list of all places of residences and addresses for the last six years;
11. Information regarding your criminal conviction in connection with the charge of assault with weapon, including but not limited copies of the agreed statement of fact (if any), copies of the plea (if any), and copies of the transcripts of trial (if any);
12. A list of any non-prescription drugs used and dates of use since April 9, 2003 (the date of birth of the parties' first child) to present, including but not limited to the names of the substances used;
13. Copies of monthly bank statements for all acct is and credit card statements in your possession held in your name alone or jointly with another parson, from April 9, 2003 (the date of birth of the parties first child) to ;resent, including details

as to cash withdrawals made, and if not in ;your possession, execution of a direction allowing the Applicant to obtain the same at her cost;

14. Copies of your complete personal income tax returns for the past three calendar years, including all schedules and attachments;
15. Your original daytimers/calendars (setting out your daily appointments) for the calendar years 2006 to 2012; and
16. An updated sworn Financial Statement and copies of statements confirming the amounts set out therein.