2006 CarswellAlta 893, 2006 ABCA 224, [2006] A.W.L.D. 2463, [2006] W.D.F.L. 2885, 28 R.F.L. (6th) 5, 152 A.C.W.S. (3d) 194

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P. (V.M.) v. P. (D.B.)

V.M.P. (Appellant / Applicant / Plaintiff) and D.B.P. (Respondent / Respondent / Defendant)

Alberta Court of Appeal

K. Ritter J.A.

Heard: July 13, 2006
Judgment: July 13, 2006
Docket: Calgary Appeal 0601-0188-AC

Counsel: D.P. **Castle** for Applicant

R. Guthrie for Respondent

Subject: Family; Civil Practice and Procedure

Family law --- Custody and access — Appeals — Stay pending appeal

Parties married in 1996, had two children, and separated in 2003 — Divorce order provided father with certain access to children, including that he have unsupervised access to children for two weeks in summer of 2005, with further unsupervised access for following years — Following father's access in summer 2005, child made statements suggesting sexual interference on part of father — Doctor concluded child had been sexually abused — Father denied any inappropriate touching, and passed polygraph test — Police closed files — Mother's application to amend access order to restrict father's access rights to supervised access was dismissed — Although chambers judge found that child had been sexually assaulted, judge was not satisfied on balance of probabilities that father had committed assault — Mother brought application for stay of order pending appeal — Application granted — Father's access to children was restricted to telephone and supervised visits — Balance of convenience and irreparable harm favoured stay — Given age of children and fact that they were not in school, father's lost summer access could be made up after appeal date — Father could still see children during non-working hours — Issue relating to whether or not child would suffer irreparable harm is not necessarily determined in favour of party who won trial.

Cases considered by *K. Ritter J.A.*:

B. (C.) v. C. (P.) (2003), 2003 ABCA 321, 2003 CarswellAlta 1543, 346 A.R. 121, 320 W.A.C. 121, 24 Alta. L.R. (4th) 53 (Alta. C.A.) — followed

APPLICATION by mother for stay of order dismissing her application to amend access order restricting father's access rights.

***K. Ritter J.A.*:**

Background Facts

1 The parties were married in 1996, separated in 2003, and divorced in June, 2005. There are two children of the marriage. The divorce order provided the respondent with certain access to the children, including an entitlement to unsupervised access for two weeks in the summer of 2005, with further unsupervised access for following years. The respondent's access was to be increased in subsequent years by one week each year, to a maximum of six weeks.

2 Following the respondent's access in the summer of 2005, the children were returned to the appellant in late August, 2005. On September 1, 2005, one of the children, M.P., made certain statements suggesting that she experienced sexual interference on the part of the respondent. The appellant videotaped some of these statements.

3 M.P. was taken to her family doctor, who then referred her to the Children's Hospital Sexual Abuse Clinic. On September 21, 2005, Dr. J. MacPherson examined M.P. and concluded that she had been subjected to trauma in her vaginal area that was not likely to have been accidental. It was Dr. MacPherson's view that M.P. had been sexually abused.

4 M.P. was taken to the police the following day, where she was interviewed by a constable. M.P. provided similar information to her earlier statements to the appellant. That interview was also videotaped. The respondent was interviewed and he denied any inappropriate touching of M.P. He volunteered to take a polygraph test to prove his innocence, and the respondent passed that polygraph test "with flying colours". The police closed their files (after administering a polygraph test to the appellant's then boyfriend).

Procedural Background

5 The appellant applied to amend the access order to restrict the respondent's access rights to permit only supervised access to both children. The appellant alleges that the respondent sexually assaulted M.P. A chambers judge heard this application initially on June 12, 2006, adjourning it to July 4th and 5th, 2006, for an oral hearing. The appellant's affidavit in support of her stay application indicates that she intended to call four witnesses, though only one witness was available on such short notice.

6 On July 6, 2006, the chambers judge found on a balance of probabilities, that M.P. had been sexually assaulted within six months of her examination by Dr. MacPherson, but was not satisfied on that basis that the respondent was the person who committed the sexual assault. The chambers judge expressed concerns with the videotaped interview tendered by the appellant that impacted on whether the disclosure to the appellant was spontaneously given. In light of these findings, the chambers judge refused to deny the respondent access.

7 The appellant applied for a stay of this order pending appeal, which was granted by the chambers judge only to the extent of today's date.

Serious Issue

8 The appellant argues that there is a serious issue for appeal: whether the respondent's access rights should be varied in light of the alleged sexual assault of M.P., and her disclosure suggesting that the sexual assault was committed by the respondent. Further to this, the appellant argues that the court adversely prejudged the appellant's credibility, and gave improper weight to the appellant's credibility and the "glitches" in the videotape evidence in light of the physical evidence and M.P.'s voluntary disclosure to the appellant and the police. The appellant further states that she could not have "coached" M.P.'s disclosure since she was unaware that M.P. had been sexually assaulted at the time this disclosure was made to her. She also argues that failure to grant a stay would render her appeal rights nugatory.

Modified Test for Custody/Access

9 In *B. (C.) v. C. (P.)*, 2003 ABCA 321 (Alta. C.A.), this Court held that the second and third branches of the test required for a stay (being irreparable harm and the balance of convenience) are modified where the court considers custody and access orders to require a consideration as to what is in the best interests of the child or children in question. In other words, this Court must consider whether the child will suffer some irreparable harm from the denial of the stay, which in turn will be practically determinative of the balance of convenience.

Irreparable Harm/Balance of Convenience

10 In this case the respondent argues that the issues relating to whether or not the child will suffer irreparable harm have been determined in his favour. That is often the case when a stay application is made, as stay applications are normally made by the party who has lost at trial. That, by itself, is not determinative of the issue.

11 As to the questions of irreparable harm and balance of convenience, the appellant submits that failure to grant a stay would cause irreparable harm in light of the potential danger to the children. She adds that the best interests of the children would be to have the Appellant maintain access, subject to continued telephone and supervised access to the respondent, pending a final determination by this Court. In light of this submission, the appellant argues that the balance of convenience favours the children staying with her and that respondent's two-week access rights be set aside for the summer of 2006, pending this appeal.

12 The respondent has seen the children for three days in Calgary, seven hours on each day. The appeal of this matter can be heard as early as September 11, 2006. Given the age of the children and the fact that they are not in school, the lost summer access can be made up after the appeal date, assuming that the respondent is successful. It is also clear that he has further leave and even if working, would still see his children during non-working hours. The balance of convenience favours a stay, provided the appeal proceeds on September 11th, 2006.

13 I have decided to grant the stay. I am directing that the matter is to be set for September 11, 2006 in terms of the actual appeal hearing. That is subject to the discretion and control of the list manager and the associate list manager in Calgary. In the interim, the respondent may continue to telephone the children. If he is able to arrange for supervised access in Calgary, that supervised access should be provided to him. If the respondent is successful on the appeal, I expect that his lost summer access will be restored to him. If either party has any difficulty in terms of getting this matter to appeal by September 11, 2006, either party should contact the list managers in Calgary who are Madam Justice Conrad and Mr. Justice O'Brien.

Application granted.

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