

***Barry v. Lindner*, 119 Nev. Adv. Op. No. 45 (2003).¹**

EVIDENCE

Summary

Beginning in 1977, Appellant Jeffrey A. Barry created several successful businesses, one of which was liquidated in the early 1990s and the assets transferred to another entity to operate. In return, Barry received compensation from the operation of the business that totaled over \$716,000 between 1993 and 2000.

In 1993 Barry married Respondent Robyn Lindner. Lindner later became pregnant and quit her part-time job as a personal trainer. Barry used the compensation from the transfer of his business to pay the family's expenses, about \$1,500 per month, while Lindner acted as the child's primary caregiver. In 1997 Lindner returned to work as a personal trainer.

On March 8, 2000 Lindner filed a complaint for divorce. Almost two weeks later, Lindner filed a motion requesting temporary child custody, child and spousal support, exclusive possession of the marital residence, fees, and costs. Since Barry failed to respond to the motion within ten days, the district court granted Lindner's motion through a default order. Barry's subsequent motion to set aside the default order was denied by the district court. On appeal, the denial was upheld by the Supreme Court of Nevada.

The district court also ordered Barry to produce all of his financial records and appointed a special master to review Barry's financial status. Although the master cited no fraudulent concealment or misrepresentation, he noted the unusual nature of Barry's business transactions and claims as to assets.

A two-day bench trial took place on March 29, 2001, during which Barry claimed to be destitute. Although he admitted to periodically working as a consultant in 2000, he declared that he only received \$16,000 for his work. He also claimed that the compensation from the operation of his former business was his separate property.

In addition, Barry claimed to have borrowed \$375,000 from Glovill Enterprises, a business entity incorporated in Panama and located in Switzerland. Barry's dealings with Glovill involved the alleged establishment of a business in Brazil. However, Barry was unable to produce any documentation proving Glovill's existence. Instead, he declared that Carlos Bauman, Barry's friend and business partner, was Barry's sole contact with Glovill. Since Bauman was in Europe at the time of trial, Barry motioned for Bauman to testify telephonically. The unsuccessful motion served as one of Barry's primary grounds for appeal.

As evidence of his relationship with Glovill, Barry produced three promissory notes identifying Glovill as the creditor and Barry and Lindner as jointly liable for the debt. However, the notes were signed solely by Barry. He testified that he owed Glovill more than \$580,000 including interest.

At trial, Barry declared that Lindner knew about the Glovill debt while Lindner maintained otherwise. Lindner requested that the district court impute income to Barry based on evidence of his personal expenses and community expenses totaling \$100,000

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yearly. The district court ultimately imputed an annual income of \$35,000 to Barry and ordered him to pay spousal support.

With regard to the Glovill debt, the district court noted that Barry failed to produce any evidence that Glovill existed, that he ever received any money from Glovill, or that he ever repaid any of the money. Although Barry contested the district court's findings of fact on appeal, the Supreme Court of Nevada found that substantial evidence supported the district court's findings and upheld the imputed income.

Additionally, the district court granted the couple joint custody of their son with Lindner as the primary physical custodian. Barry was ordered to pay child support.

Issue and Disposition

Issue

Is telephonic testimony permitted at trial in Nevada absent a showing of special circumstances?

Disposition

No. Although some courts have established general guidelines governing the use of telephonic testimony, most courts do not permit it absent special circumstances such as exigency or consent coupled with knowledge of the witness' identity and credentials. Without an opportunity to depose a witness before trial, and without the ability to cross-examine a witness and observe their demeanor at trial, all parties unfamiliar with the witness are prejudiced. Also, owing to the lack of statutory authority for telephonic testimony at trial, the court would lack contempt power over the witness.

Commentary

NRCP 43(a) states: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules or by statute." There is not a Nevada statute governing telephonic testimony at trial *per se*. Nevertheless, the Nevada Supreme Court noted in *Barry* that some jurisdictions permit telephonic testimony as long as certain guidelines and procedures are followed.

Survey of the Law in Other Jurisdictions

Florida law allows the testimony of nonparty witnesses to be presented telephonically, but still empowers the state court to hear the testimony at its discretion.² Additionally, Florida law mandates that all procedural safeguards normally employed during the testimony of witnesses at trial are to be maintained by the court during telephonic testimony.³

² See The Florida Bar: In re Rules of Summary Proc., 461 So.2d. 1344, 1345 (Fla. 1985).

³ *Id.*

The Wisconsin Supreme Court held that telephonic testimony could be used in a civil jury trial as long as discretion is used to preserve the right to a fair trial.⁴ However, in *Town of Geneva*, the use of telephonic testimony “as a last-minute determination by the trial judge, when there was no inkling that such a procedure would be used and when it became apparent that counsel was handicapped on cross-examination, constituted an abuse of discretion.”⁵ There is, therefore, an obligation on the party moving for telephonic testimony to ensure that reasonable notice is given.

In *Barry*, the Nevada Supreme Court agreed with the majority of American courts and decided to apply a special circumstances standard to the use of telephonic testimony at trial. For instance, a New Jersey procedural rule allows attorneys to argue motions via telephone, but distinguishes that from the routine taking of testimony.⁶ If telephonic testimony is to be used, New Jersey requires that there first to be a showing of exigency or consent, and that “the witness' identity and credentials are known quantities.”⁷ In other jurisdictions, expert witnesses who submit reports to the court can be allowed to testify telephonically.⁸

Since the witness, Bauman, was neither an expert nor was he testifying to a report Lindner did not have an opportunity to depose him before trial nor could she review the basis of Bauman’s testimony in order to effectively cross-examine the witness at trial. Lindner, therefore, argued that she would be prejudiced if Bauman were allowed to testify telephonically. The Nevada Supreme Court, like the district court, determined that the inability to cross-examine a witness and observe the witness’ demeanor was a violation of the Confrontation Clause.⁹ Absent the elements of exigency or Lindner’s consent, Bauman was not allowed to testify.

Conclusion

In Nevada, telephonic testimony is only allowed under a showing of special circumstances such as exigency or consent and the credentials of the witness must be known. Generally, an expert witness who has submitted a report to the court and who is to testify to that report will have a greater likelihood of being granted the opportunity to testify telephonically than a witness whose demeanor needs to be scrutinized during cross-examination.

⁴ *Town of Geneva v. Tills*, 384 N.W.2d 701, 705 (Wis. 1986)

⁵ *Id.* at 708.

⁶ *Aqua Marine Products, Inc. v. Pathe Computer Control Systems Corp.*, 551 A.2d 195, 200-201 (N.J. Super. Ct. App. Div. 1988)

⁷ *Id.*

⁸ *See, e.g., Elson v. State*, 633 P.2d 292, 302 (Alaska Ct. App. 1981) (chemist allowed to testify at a sentencing hearing by telephone where defense had a copy of the chemist’s report and the chemist was testifying to that report).

⁹ U.S. CONST. amend. VI.