

CANADA / JUDGMENT

Cavanagh v. Anderson

2013 BCCA 22

COURT

British Columbia Court of Appeal

DECIDED

15 January 2013

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2013 BCCA 22 Cavanagh v. Anderson COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Cavanagh v. Anderson, 2013 BCCA 22 Date: 20130115 Docket: CA040171 Between: Sarah Jane Cavanagh Appellant And Susan-Jayne Christine Anderson Respondent Before: The Honourable Madam Justice Kirkpatrick The Honourable Mr. Justice Frankel The Honourable Mr. Justice Hinkson On appeal from: Supreme Court of British Columbia, August 9, 2012, (Cavanagh v. Anderson, Victoria Docket No. 07 1775) Oral Reasons for Judgment Counsel for the Appellant: W. Murphy-Dyson Counsel for the Respondent: A.L. Faux E. Thomas Place and Date of Hearing: Victoria, British Columbia January 15, 2013 Place and Date of Judgment: Victoria, British Columbia January 15, 2013

- [1] KIRKPATRICK J.A.: The appellant, Sarah Jane Cavanagh, appeals the August 9, 2012 Supreme Court order that dismissed Ms. Cavanagh's application to vary the overnight access of the respondent to J., the child of the marriage, as provided by the Court of Appeal order made on January 26, 2010. That order was temporarily varied by a judge of the Supreme Court on May 1, 2012. By that order, overnight access was suspended pending the hearing of the application to vary.
- [2] The application to vary access was heard over three days in May and June 2012. The chambers judge reserved his decision. Reasons were pronounced on August 9, 2012. Central to the appeal are the remarks made by the chambers judge at paragraph 51 which formed the basis on which the application was dismissed: There has been no expert evidence to support a finding of any adverse effect upon J. arising from any of the alleged conduct. From the correspondence from Ms. Fletcher, she could have been available to give evidence had she been called, but she was not called. Ms. C. has included in her affidavit material things she says Ms. Fletcher has told her. However, that is not an appropriate way to introduce expert opinion evidence. There is no evidence of Ms. Fletcher's qualifications nor, in my view, is there any reliable evidence of any sexual impropriety by Ms. A. or any impact upon J. of any of Ms. A.'s conduct. If such evidence is available, it is assumed that it would have been called.

- [3] It is apparent that the chambers judge overlooked the fact that Ms. Fletcher was called to give evidence on the first day of the hearing, was qualified to give expert opinion evidence in the area of child therapy, was examined and cross-examined by the parties, and questioned by the judge.
- [4] On appeal, both parties have essentially asked this Court to consider and weigh (for the first time) Ms. Fletcher's viva voce evidence in support of their respective positions. In my opinion, it is not the role of this Court to weigh this evidence and draw inferences from it. That is the function of the trial court.
- [5] The custody and access issues relating to J. have been protracted and seemingly intractable. It is impossible to know whether, if considered, the expert evidence would have resulted in a different order. In my opinion, the only proper recourse is for us to direct the matter to be returned to the Supreme Court for consideration on all of the evidence presented, including any other recent evidence the parties choose to tender, including recent expert evidence.
- [6] I would therefore allow the appeal and order that the matter be remitted to the Supreme Court. I would set aside the chamber judge's order, including the order of costs in favour of the respondent, and restore the order of the Court of Appeal of January 26, 2010.
- [7] During the course of the hearing, it became evident the parties agree that the child is in need of counselling. We have been advised that the appellant has arranged for a therapist with the Comox Valley Transition Society to commence counselling with J. on January 21, 2013. We do not have the details of the therapist's qualifications or, indeed, even her name. However, if the parties do not agree that such counselling should take place, then within two weeks of January 21, 2013, the appellant shall apply to the Supreme Court for a determination of an appropriate counsellor or therapist, the terms of the child's attendance, compliance by the parents with any recommendations of the counsellor, and the cost of the therapist, and any other direction that the Supreme Court considers necessary to make.
- [8] I would order that each party bear their own costs of the appeal.
- [9] FRANKEL J.A.: I agree.
- [10] HINKSON J.A.: I agree. "The Honourable Madam Justice Kirkpatrick"

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