
CANADA / JUDGMENT

Jiwani v. Jiwani

2018 BCSC 1517

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1517 Jiwani v. Jiwani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jiwani v. Jiwani,

2018 BCSC 1517

Date: 20180817

Docket: E151269

Registry: Vancouver

Between:

Gillian Myra Jiwani also known as Gillian Myra Lochhead

also known as Gillian Jiwani

Claimant

And

Altaf Jiwani

Respondent

Before: The Honourable Madam Justice Burke

Oral Reasons for Judgment

Counsel for the Claimant:

J.M. Stein

Counsel for the Respondent:

P.F. Schmidt

Place and Date of Hearing:

Vancouver, B.C.

August 13, 2018

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2018

- [1] These are my oral reasons for judgement. I reserve the right to edit any published reasons but the substance will not change.

INTRODUCTION

- [2] Ms. Lochhead, also known as Ms. Jiwani, the claimant in this matter, seeks a declaration that Azim Jiwani is no longer a child of the marriage and that she is no longer responsible for section 7 expenses. In conjunction with this, the claimant seeks that paragraph four of the final order of Mr. Justice Smith pronounced May 2, 2016 be vacated.
- [3] The issue in this family law case is whether Azim Jiwani is a child of the marriage. My reasons will be brief as they impact on the upcoming university term commencing in September 2018.

BACKGROUND

- [4] I will briefly outline the background. The parties were married on September 3, 1994, separated in June 2014 and granted an order for divorce by Mr. Justice Smith on May 2, 2016. The parties have one child Azim Jiwani, born in May 1996. He is presently 22 years old.
- [5] The claimant maintains that the parties separated in June 2014 as a result of family violence. The claimant commenced an action on May 18, 2015 and a five-day trial was set for May 2, 2016. The parties managed to settle all outstanding matters in the days prior to the trial.
- [6] The final order provided that the claimant would pay spousal support of \$2,900 per month to the respondent, all of Azim's expenses and that family property would be divided equally.
- [7] Term four of that order specifically noted that the claimant shall be responsible for Azim's section 7 expenses, estimated at \$24,550 annually, including:
- (a) Dalhousie University Commerce Co-op Tuition and Program fees of \$10,030 annually;
 - (b) Books at approximately \$1,200 annually;
 - (c) Rent and utilities of \$610 per month; and

(d) Living expenses at \$500 per month.

[8] There is a dispute as to whether allegations of family violence are relevant to the question of whether Azim is still a child of the marriage. I will deal with that as part of my analysis.

Issue - is Azim still a child of the marriage as defined under the Divorce Act?

Legal principles

[9] Section 2(1) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) defines a child of the marriage as follows:

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

[10] The pursuit of post-secondary education can result in an adult child remaining a child of the marriage: *Nordeen v. Nordeen*, 2013 BCCA 178 at para. 15. It qualifies as an "other cause" for continuing dependency under s. 2(1) (b): see *Neufeld v. Neufeld*, 2005 BCCA 7 at para. 18.

[11] In the well-known case of *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.), a list of eight factors is set out that may assist the court in making this determination. These factors are, however, not a checklist nor requirements. Rather, they are considerations for the court in assessing whether the child's situation is consistent with the definition of "child of the marriage".

DISCUSSION AND ANALYSIS

[12] As noted, the factors in determining whether an adult child retains the status of child of the marriage have been set out in *Farden*. In considering whether a child's educational pursuits justify the child retaining a child of the marriage status, the Court said as follows:

(1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;

(2) whether or not the child has applied for or is eligible for student loans or other financial assistance;

(3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;

(4) the ability of the child to contribute to his own support through part-time employment;

(5) the age of the child;

(6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;

- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
 - (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.
- [13] The factors in *Farden* are helpful in determining whether the pursuit of education is a valid reason for continued dependence.
- [14] An adult child who completely rejects his or her parent must be aware of the consequences of his or her actions towards the parent: *Marsland v. Gibb*, 2000 BCSC 471 at para. 34. A parent and child relationship is not just an economic dependency. If a child expects to receive support, it is reasonable that the child have a relationship with a parent who is being asked to pay that support in the absence of conduct by that parent justifying neglect of the child's duties towards his or her parent: see *Law v. Law* (1986), 2 R.F.L. (3d) 458 (Ont. H.C.J.).
- [15] The facts on Azim's educational pursuits are largely undisputed. I will summarize them here largely from the claimant's application materials.
- [16] Azim has been unable to pursue his education in a timely fashion.
- [17] In September 2014, he attempted one semester at SFU but was unable to keep up with the workload. He did not finish that term.
- [18] In September 2015, Azim began his studies at Dalhousie University. Azim is currently enrolled in the Bachelor of Commerce Co-op program, but wishes to change to a Bachelor of Management. A full course load is 15 credits per term; 120 credits are required to graduate.
- [19] From September 2015 to January 2017, Azim enrolled in seven academic terms, but completed only 42 credits or 35% of the 120 credits he needs to graduate. This, however, assumes he can transfer all of his Commerce credits to the Bachelor of Management program.
- [20] Since the end of the fall term of 2016, Azim has been on academic probation, with a GPA under 2.0 [below the average]. He received no credit for the winter 2017 co-op term as he did not complete the two required academic courses that semester.
- [21] Since September 2015, the claimant has paid more than \$80,000 for Azim's education and living expenses. The claimant is required to dip into her retirement savings by \$1,600 per month in order to support Azim. The claimant has paid for Azim's tuition, books, and residence fees for a single room, phone and additional out-of-pocket expenses. To date, the claimant has paid \$34,452.85 [31,308.71 + 3,114.14] to date to Dalhousie for education expenses and approximately \$48,700 for Azim's living expenses. This averages out to \$34,700 per year. The original estimate of Azim's expenses in 2016 was \$24,550 per year. There is no doubt this has been an expensive proposition. The claimant earns at present approximately \$160,000. The respondent's imputed income as per the May 2016 Consent order is \$37,600.

- [22] While the Farden factors are not meant to be a checklist, they are a useful guideline in concluding whether a child remains a child of the marriage.
- [23] I turn to them now.
- [24] In considering whether Azim is in fact enrolled in a course of studies and whether it is full-time or part-time, I note first that since the end of the fall 2016 term, Azim has been on academic probation with a GPA under 2.0. Azim was ultimately academically dismissed from Dalhousie sometime in 2018 for a period of one year.
- [25] Since that time, however, Azim has obtained a diagnosis of depression and ADHD. In March 2018 he attended two doctors' appointments in Halifax; one with Dr. Kathy Connell, GP on March 12, 2018 and one with Dr. Erin Awalt on March 28, 2018. He is now taking medication for depression.
- [26] In April 2018, the respondent Mr. Jiwani took Azim to an appointment with Dr. Emiko Moniwa who diagnosed Azim with ADHD. These reports were submitted as part of an appeal of Azim's academic dismissal from Dalhousie.
- [27] On July 19, 2018, Azim was readmitted to the Bachelor of Commerce, co-op program, on academic probation with specific terms. The academic dismissal from Dalhousie was therefore deferred. Finally I note that counsel provided a letter report from Dr. Anthony Ocana dated August 9, 2018 who also diagnosed him with ADHD. I will deal with this later.
- [28] It is apparent from this material that Azim is now enrolled in a course of studies albeit with specific conditions, due to the deferral of academic dismissal by Dalhousie University. The current plan mandating an attainment of nine credits per semester is considered a full-time, although lighter, load.
- [29] As to whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do, I conclude Azim does have a reasonable plan of pursuing a business degree of some sort and working in a related area. I refer to it as a business degree "of some sort" because of his expressed desire that he change to a Bachelor of Management degree.
- [30] The parents also clearly made a plan for the education of Azim as reflected in the May 2, 2016 Consent Order. At that time, Azim was attending Dalhousie University and expected to continue with the claimant agreeing to pay those expenses as per Term 4 of the Consent Order.
- [31] It is evident that Azim has not been diligent in the pursuit of his education to date. I am, however, prepared to consider his recent diagnosis and its potential impact on his diligence and his ability. While I admitted the late report from Dr. Ocana dated August 9, 2018, and note its statement that "the confluence of these deficits is associated with the spectrum from academic underperformance to failure" I am troubled by deficiencies in this report. I am, however, prepared to accept that the deficits identified do have some impact on academic

performance.

- [32] With respect to whether the child has applied for or is eligible for student loans or other financial assistance, the evidence is clear that he has not. This is a deficiency that may have to be remedied going forward.
- [33] With respect to the ability of the child to contribute to his own support through part-time employment, I note the parties have indicated Azim's present summer employment at an entry-level retail position earning \$13 per hour. Assuming he is enrolled in three semesters each year and works 15 hours per week, the claimant points out he should be able to contribute a minimum of \$8,137.50 to his expenses being [$\$10.85 \times 15 \times 50$]. I conclude Azim should contribute to his own support and will deal with the amount later.
- [34] In considering the age of the child, I note Azim is 22. While this is the age many students graduate from university, it is relatively young and not unusual for a 22-year-old taking some longer time to finish a first degree. It does, however, lead me to conclude Azim should be able to contribute to his own support. Azim is not an adolescent who has just graduated from high school.
- [35] Azim's past academic performance is, however, troubling. As pointed out by the claimant, his best semester occurred when he was living on his own and not with his father. The current plan is for Azim to return to Dalhousie and live in Halifax with his father who owns, in conjunction with his siblings, a residence in that city. Although Mr. Jiwani disputes the allegations of family violence, the record of texts that he sent his son as recently as one year ago is very disturbing. The nature of the texts are such as to fundamentally undermine his son's confidence and ability to perform in an academic environment and otherwise.
- [36] The claimant has also identified a concern about the long-term damage this living arrangement will have on Azim as well as the negative impact on his academics. The claimant is willing and able to have Azim live with her in Ontario.
- [37] In conjunction with this is an allegation that the respondent is interfering with the relationship of Azim, a mature child, with his mother who is funding his education. There are disrespectful texts from Azim to his mother and also what appear to be texts from Azim indicating his expectation of the funding of a significant standard of living while pursuing his education.
- [38] After taking all these factors into account, however, I have concluded that it would be premature at this point in time to conclude that Azim is not a child of the marriage. Azim is young and has made some progress to achieving his first degree. His status as a "child of the marriage" will therefore continue for the fall term of 2018 while he undertakes the very specific conditions of readmission that have been set out by Dalhousie University in the letter of July 19, 2018. Those conditions include: meeting with his Academic Advisor every two weeks; "taking a maximum of 3 one half credits, for a total of 9.0 credit hours each semester until reinstated in good standing"; registering with the Accessibility Centre to

determine what accommodation he may be entitled to; and participating in the fall term Study for Success workshops and providing proof of attendance after each workshop is completed.

- [39] I have reached this conclusion in part because of this opportunity presented to Azim by Dalhousie University to resurrect Azim's ability to achieve an education. The opportunity is time-limited with very specific conditions, as set out above. These conditions are designed to assist Azim in returning to an educational performance that will allow him to finish his degree.
- [40] To decline to allow this process to unfold would, in my view, prematurely eliminate this opportunity at a critical time for Azim. While the evidence as to the medical condition is somewhat wanting, I am prepared to accept that Azim's medical condition has impacted on his educational performance to date, for the purposes of considering this limited opportunity to pursue his education.
- [41] I am, however, concerned about Azim's perspective, as reflected in the material, that he was not really committed to attendance and should be funded to a certain lifestyle. There is also a concern about the fact he will be living with his father who has, as noted earlier, clearly undermined his son's confidence and ability to perform in an academic environment by sending disturbing texts (e.g.: calling his son a loser). There is a history of such texts from the respondent to his son.
- [42] In view of all this, I conclude that if Azim does not meet the conditions as set out by Dalhousie University, and his academic dismissal is no longer deferred, at that time he will no longer be considered "a child of the marriage". The claimant is also at liberty to revisit this issue on the completion of two terms at Dalhousie should there still be concerns with Azim's living situation with his father and its impact on his academic performance.
- [43] I do not accept the proposition of the respondent that Azim should be allowed to finish his first degree taking only 9 credits per term. The medical evidence presented indicated Azim's focus and abilities may improve with treatment. With that Azim should expect to move to a fuller course load. A parent is not expected to finance a 9-credit semester education plan indefinitely without more specific information as to ongoing abilities that may be directly affected by a medical condition, including necessary expert medical evidence filed within the appropriate time limits, if necessary.
- [44] The medical evidence presented does not support such an education plan indefinitely or even for the amount of time argued by the respondent. Furthermore, the medical evidence does not address possible issues that may be attributable to the relationship between the respondent and his son, which may have adversely affected Azim's educational performance to date. These issues, as reflected in both emails and texts, have not been addressed with the medical professionals.

- [45] I am of the view that Azim can contribute to his education by working part-time at a job during the semester or summer months to a minimum amount of \$2,400 a year. The evidence shows he has worked this summer at a retail operation. There are presently no demonstrated impediments to that being a realistic option for Azim.
- [46] With respect to the amount at issue, the claimant's original estimate was \$24,400 annually. The claimant has been paying significantly more. The evidence demonstrates, however, that Azim's expenses will be reduced and were in part due to his unrealistic view of what he hoped would be his living situation while attending school. In my view, this original estimate should be adhered to and reduced by the \$2,400 noted. The claimant will be responsible for a maximum contribution of \$22,000 a year for two years. The claimant is then at liberty to reapply in any event and the matter will be reassessed based on a number of factors, including Azim's efforts and progress to date.
- [47] I expect the respondent to contribute to his son's education as well. It is difficult to be more specific on amounts as the evidence shows conflict between all parties as to the appropriate amount to spend as part of Azim's education plan. It is clear however that the claimant has borne a significant burden to date and is using her retirement savings to fund the amounts so far. Accordingly I have limited the claimant's contributions to the amount set out above for a two-year period.
- [48] Finally I note it is somewhat troubling that Azim did not file an affidavit in this matter. All information has been provided by either the claimant or the respondent. While the parties have agreed this information can be used, I direct that a copy of this judgement be provided to Azim so he can recognize both his responsibilities and the opportunity that this educational plan presents to him. I will be providing a copy of the judgement to the parties in the near future.
- [49] Azim is therefore still a "child of the marriage" pursuant to the Divorce Act as per the findings and conditions set out above. The Final Order dated May 2, 2016 is modified to reflect these changes.
- [50] I have heard counsel's submissions on costs and conclude that the parties should bear their own costs.

The Honourable Madam Justice E. Burke

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