
CANADA / JUDGMENT

Kristmanson v. Kristmanson

2012 BCSC 1750

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Supreme Court of British Columbia

DECIDED

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2012 BCSC 1750 Kristmanson v. Kristmanson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kristmanson v. Kristmanson,

2012 BCSC 1750

Date: 20120712

Docket: ED27678

Registry: Nanaimo

Between:

Terry Marie Kristmanson

Claimant

And:

Robert Henry Kristmanson

Respondent

Before: The Honourable Mr. Justice Harvey

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

B. Vining

Counsel for the Respondent:

M. Warsh

Place and Date of Hearing:

Nanaimo, B.C.

July 12, 2012

Place and Date of Judgment:

Nanaimo, B.C.

July 12, 2012

- [1] THE COURT: The applicant mother seeks a declaration in respect of the parties' 25-year-old daughter, Brittney, that she is once again a child of the marriage for support purposes. Thereafter, she seeks a determination of the sum payable by the respondent father as his share of the child's post-secondary educational expense.
- [2] The background of this matter is as follows.
- [3] The applicant is 52 and totally disabled from employment as the result of a motor vehicle accident she was involved in, in 2004. Currently she receives disability insurance and some rental income, said to total approximately \$35,000 annually. She resides with a new partner in the Peachland area of British Columbia.
- [4] The respondent is 57 and works as a welder for an enterprise in which he has a one-quarter interest. His income is said to be approximately \$114,000 annually, when one couples the income from his holding corporation with that declared on his T1 General. He, too, has re-partnered and resides in Campbell River.
- [5] Brittney is 25 and, through a combination of summer employment and part-time work, earns approximately \$15,600 annually.
- [6] Each of the parties and Brittney has filed material in this application.
- [7] The parties separated in the mid-'90s. Arrangements have been in place since that time for Brittney's support and there is no suggestion the respondent has not abided by orders of the court or the parties' original agreement in respect of his child support obligations. There was an application in 2007 to reset his income and seek retroactive arrears, and that was granted by Madam Justice Holmes on the basis of a change in his income.
- [8] Brittney has a learning disability or disabilities which are well documented. Despite them, she has achieved academic success in high school, North Island College, and now Camosun College. I accept that she has had to work harder than others to achieve this level of success.

- [9] After graduating from high school, while still living in Campbell River with the claimant, Brittney began a two-year diploma course in tourism at North Island College. She completed the course in three years and achieved good marks. While attending school, she worked some 28 to 32 hours per week. Her income for that period is unknown to me but, I assume, based on minimum wage, that it exceeded \$1,000 per month. All the while, the respondent paid full Guidelines support to the claimant.
- [10] In 2007, an order was made, as I noted, resetting support and allowing the respondent to pay Brittney directly. By the date of that order, Brittney was no longer residing with the applicant, but instead was sharing an apartment with a roommate. The respondent paid her directly from that time onward, and Brittney has never resided with the claimant since that time.
- [11] After graduation in 2007, Brittney enrolled in Malaspina College taking a mixed bag of courses. She deposed to the fact she was uncertain at that time of her career options, and at the end of that year took a year out of her educational pursuits. She worked that year for Victoria Tourism, that would be the remainder of 2008, following the end of the spring term, until September 2009. She earned approximately \$10 an hour.
- [12] Following her departure from Malaspina, the respondent sought and obtained an order by consent declaring that Brittney was no longer a child of the marriage, but there was liberty in the order to reapply if Brittney recommenced her education. In that same year, after the cessation of support, the respondent provided Brittney with furnishings he says were worth eight to ten thousand dollars, so as to establish herself in Victoria.
- [13] Brittney worked the year at essentially minimum wage and decided that her credentials were insufficient to allow her to earn a living. There is no evidence she looked beyond that one job to determine what other opportunities exist for her in the field of tourism. In September of 2009, she enrolled in Camosun College in their business program. The program consisted of a two-year program leading to a diploma in business, which may then be augmented by a further two years, four in total, for a degree program. In total, 40 credits are required to graduate. By virtue of her two-year diploma course from North Island College, together with her year of Malaspina, Brittney was credited with 12 of those 40 credits necessary to obtain her degree.
- [14] She made known her re-enrolment to the respondent, who then provided her with nine post-dated cheques in the amount of \$950 a month. In September of 2010, he provided a further nine cheques in the amount of \$850 a month to assist Brittney with her ongoing expenses for the upcoming school year. Using these funds, together with her income of approximately \$15,000 annually, and some undefined contributions from the claimant, she met her modest budget of approximately \$24,000 annually.

- [15] I pause to note that her work consists of working as a ticket agent at an hourly rate of over \$18 an hour. The bulk of her work is done during the summer months and part-time during school.
- [16] Sometime following the order of Holmes J., but before the consent order was made in 2008, the claimant filed the support order in her favour against two properties in which the respondent has an interest. In December of 2010, he asked the claimant, firstly through Brittney, for the release of the lien so he could refinance the properties or one of them. At the time of the request, there was no support order in effect and no arrears owing. The respondent was making voluntary payments to Brittney of \$850 a month and had provided her with post-dated cheques to the end of the school year.
- [17] The claimant refused, unless the respondent had papers drawn which would hold him responsible for the remainder of Brittney's educational costs, which were at that time undefined. He declined to do so and the liens remained in place until he eventually brought on an application for their removal. They were removed, I believe by consent, in April of 2012.
- [18] When Brittney approached the respondent for further support to assist her with her expenses in 2011, he declined. This application was brought and eventually \$1,000 was paid by the respondent to the applicant's solicitor in exchange for an adjournment of the application scheduled for December 2011. Nothing further has been paid. The respondent's position is that he should not be required to pay further support, whether to the claimant or Brittney directly. She, according to him, is no longer a child of the marriage for support purposes.
- [19] According to the claimant, Brittney has regained her status as a child of the marriage and is entitled to a contribution from the respondent for her expenses in completing her degree. He, on Brittney's behalf, acknowledges the operable provision of the Federal Child Support Guidelines, SOR/97-175 is s. 3(2)(b) which reads:

Child the age of majority or over

Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- [20] The claimant says s. 3(2)(b) is applicable here in that Brittney resides with neither parent. Each, including Brittney, should make a contribution to her educational expenses.

- [21] Based upon an income of \$114,000 for the respondent, \$35,000 for the claimant, and \$15,600 for Brittney, the claimant says the respondent should pay 76% of Brittney's annual shortfall between her income and expenses. This is suggested to be 76% of \$9,100 or approximately \$580 monthly, which the claimant says should be paid from September 2011 to date, and then prospectively until May 2013, when Brittney should graduate.
- [22] The respondent contests Brittney's status as a child of the marriage. He notes he funded approximately six years of post-secondary education for her. She has a diploma in tourism and presumably a diploma from Camosun for business, based on the course work she had completed by the end of the 2011 school term. She is not in the care of the claimant. She earns over \$15,000 a year and lives with a friend in rental accommodation.
- [23] Alternatively, the respondent says if she is a child of the marriage, that he has overpaid his proportional contribution in 2009 through 2011, and ought to be credited with that, plus the further thousand dollars paid in December of 2011. He says that that results in an obligation by him of some \$3,600 calculated as follows: given she had 12 credits at the commencement of entering Camosun College, it should have taken her three years to graduate, and based on his proportionate contribution, his contribution should be in the order of \$21,000, of which he has already paid over \$17,000. Hence, even if a child of the marriage, he disputes his obligation is as requested by the claimant.
- [24] The Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) provides the following definition for the term "child of the marriage" where a person is over the age of majority:
- "child of the marriage" means a child of two spouses or former spouses who, at the material time, . . . 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;
- [25] Case law has interpreted "other cause" to include an adult child in attendance at post-secondary schooling.
- [26] The onus rests upon the applicant to establish that the person for whom a support order is sought is still a child within the meaning of the Act. Authority for that proposition is found in *Farden v. Farden* (1993), 48 R.F.L.(3d) 60 (B.C.S.C.).
- [27] While no question was raised as to Brittney's status during her years at North Island College, nor could it have been, in my view, the respondent disputes that Brittney is currently enrolled in full-time studies. Further, he denies those studies will consume a further two to two and a half years as Brittney first deposed in her first affidavit filed in these proceedings. He deposed that she advised him in the summer of 2011 that she could complete her studies in one more year. Brittney never denied this in the two affidavits she filed. In counsel's submissions, he suggested support be limited to the period from September of 2011 to May 2013 on her behalf. In further submissions, he stated she has but six courses left to graduate.

[28] A review of her academic record discloses she has taken three courses of a possible five in the fall term, and four in the winter term. A full course load is five courses each term, fall and winter. I accept, for the purposes of determining whether Brittney has met the threshold of demonstrating she is in full-time attendance in school, that I must take into account her learning disabilities, as described in the report of Dr. Penner. He fully sets out the challenges facing Brittney, and I find it not unreasonable that she would take a reduced course load to accommodate those challenges.

[29] That, however, does not end the matter. In the leading case of *Farden*, Master Joyce, as he then was, set forth the following template for determining the status of an adult child:

Whether or not attendance in a post-secondary institution will be sufficient cause for a finding that the child is still a "child of the marriage" requires examination of all of the circumstances. It is not a conclusion which follows automatically from proof of attendance at the institution . . . In my view the relevant circumstances include:

- (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.
- [30] Claimant's counsel referred me to *Neufeld v. Neufeld*, 2005 BCCA 7. In *Neufeld*, the Court of Appeal expressly adopted the above passage from *Farden* as being a non-exhaustive list of considerations which apply. In *Neufeld*, support was being sought for an adult child seeking a post-graduate degree, specifically medicine. This was found by the trial judge to be "in accordance with the family's plans for her education before . . . separation."

- [31] Neufeld makes clear there is no arbitrary cut-off point, based either on age or scholastic attainment, although acknowledging those factors make the onus of proving dependency more burdensome on a claimant. There is no prohibition against support for an adult child seeking a second degree.
- [32] Neufeld makes clear that the determination is fact specific. That is to say there is no one predominant feature of the Farden inquiry which governs the result.
- [33] Here the adult child, Brittney, is doing well in her studies. Her attendance, albeit part-time, is in accord with acceptable evidence indicating she is meeting the challenge of her disabilities appropriately. Both these factors militate in favour of the declaration sought. As opposed to that, Brittney will soon be 26. She has obtained not one, but two diplomas. Each was of her choosing. Her evidence that she could not support herself with the credential obtained from North Island rings hollow when one considers she sought only one job in the field for which she was trained and knew it was an entry-level position. She now has a further diploma in business administration. She would like a degree.
- [34] Nothing in the evidence suggests she has a clear career plan utilizing the degree she has yet to achieve, as opposed to diplomas she now has in both business administration and tourism. Brittney makes over \$15,000 a year working in the summer and part-time. Her budget requirement is approximately \$9,000 in excess of that. About \$1,500 of that sum is for furniture storage at a locker. Other than that, I have no criticism of the budget.
- [35] She has been applying the whole of her income to her studies and acknowledges it is proper she do so. She has not sought any student aid or loans, beyond a bursary payable in respect of tutoring which she receives in the amount of \$1,200 per semester to help her with her learning disabilities.
- [36] Unlike the situation in Neufeld, there is no evidence of the parties' educational plans for Brittney. The respondent is a welder and the claimant was a professional housekeeper when she worked. Neither, it would appear, have much by way of post-secondary training.
- [37] The relationship between Brittney and the respondent is strained, more so by this litigation. I am unable to determine what role she played, if any, in the placement of the lien on the respondent's property. In her affidavit sworn February 22, 2012, responding to the respondent's complaint about the lien, she deposed:

... Again the Respondent blames my mother for the liens placed on his property. I understand that my mother did this as the Respondent was refusing to come forth with any reasonable cooperation on the issue of my post-secondary education.

- [38] Whatever the situation in 2007 and 2008 when the liens were filed, in December of 2010, when the removal was requested through both the claimant and Brittney, the respondent was voluntarily paying more than is now being sought as his monthly contribution to Brittney's expenses. In short, whatever the reason for the current estrangement, it is not because the respondent abandoned his daughter and walked away from her.
- [39] Were the parties still together, they would jointly make a decision as to whether they were prepared to further contribute to Brittney's education. Brittney has no legal enforceable right as against her parents at age 25 to compel a contribution. The claim here is founded on the premise that Brittney is, although over the age of 19, "unable by reason or illness, disability or other cause to withdraw from their charge or to obtain the necessities of life".
- [40] Brittney is not in the charge of her mother, the applicant, nor has she been for the past four years, nor can it be said she is unable to obtain the necessities of life. She has done so when not in school in the past and is capable of doing so in the future. She is now better prepared than she was in 2008 to earn a living.
- [41] I find her learning disability has played no role in her ability to secure employment. In more dramatic circumstances than these, Barrow J. in *J.D.C. v. R.B.T.*, 2011 BCSC 488, a case involving a cognitively disabled young man, declined to find he was a child of the marriage for support, stating:

Turning to the issue directly, there is no doubt that S has cognitive limitations. Those cognitive limitations amount to a disability but, as the New Brunswick Court of Appeal noted in *Crawford*, at paragraph 7, the issue is not whether a disability has been proven but rather whether the person is "unable" by reason of disability to withdraw from the charge of his or her parents or to obtain the necessities of life.

There is also no doubt on the evidence that S is capable of gainful employment. As already noted, S was able to translate his "work experience" position at Safeway into a paying job. In addition, and while S was working at Safeway and completing his modified high school curriculum, he had a job at Prospera Place. He acquired that position in September 2006. His responsibilities included delivering food to suites in the arena during hockey games and concerts. According to his father, S "took tremendous pride" in this job. He was being considered for promotion to a position in the restaurant when he quit. He quit this job when he moved from his father's home to his mother's home. None of this is denied by S. S also enjoyed success as a volunteer at a local food bank. As with his position at Safeway, this volunteer opportunity was arranged through the work component program of his high school curriculum, however S continued to volunteer at the food bank after the conclusion of his program. Since S has moved back with his mother, he has provided physical labour on the ranch that Mr. and Mrs. C operated. He performed these duties admirably. As with his other jobs, they contributed to his sense of self-worth.

- [42] Here, on the whole of the evidence, I conclude that Brittney is well-equipped to support herself with her current level of education. That she wishes to add to her academic résumé is admirable, but does not mean she is entitled to the support the claimant seeks on her behalf.
- [43] The respondent has paid support, likely in excess of his legal obligations, during her attendance at North Island when she worked almost full-time, and latterly when he voluntarily paid from 2009 to 2011. He has provided her with between eight to ten thousand dollars in furnishings. It can hardly be said that the respondent has shirked his responsibilities. Until recently, he maintained her on his medical insurance. He removed her from it only when it became apparent she was not using it.
- [44] She is now 25, rapidly approaching 26. She is in her seventh year of post-secondary education. She has no debt. She has never applied for financial aid or a student loan, or if she has, she has not satisfactorily put that evidence before the court. She is currently possessed of two diplomas in what I consider to be complementary fields. It can hardly be said she is unable to leave the charge of her parents and be able to provide for herself. Her efforts to pursue a career in tourism/hospitality were lacklustre at best. She sought one job only.
- [45] This case is not like Neufeld, in that the evidence discloses that Brittney is currently debt-free and has one year left to complete the degree program at Camosun. She will not emerge from school heavily in debt, even were she obliged to borrow to complete her final year.
- [46] There is no evidence the parties had educational plans for Brittney at all, let alone the acquisition of two diplomas and a degree.
- [47] On balance, I find that after consideration of all of the facts in this case and consideration of those factors enumerated in Farden, the claimant has not discharged the burden upon her. Accordingly, I decline to make the declaration sought that Brittney remains a child of the marriage.
- [48] Had I so concluded, I would have set the respondent's monthly obligation for support at \$500 per month for the eight months, September 2011 to April 2012, starting again in September of 2012 to April of 2013. This I arrive at by acceding to the submission of counsel that some recognition ought be accorded the overpayment during the years 2009 through 2011. For those years, both parents ought to have been contributing. The evidence as to the claimant's actual contribution is vague and it is impossible to place a monetary value on it.
- [49] Gentlemen, anything further?
- [50] MR. WARSH: Well, the -- so the finding is that she is not a child of the marriage for further costs.
- [51] THE COURT: Indeed.

[52] MR. WARSH: And what about costs? Can they --

[53] THE COURT: I will hear submissions on costs.

[SUBMISSIONS RE COSTS]

[54] THE COURT: All right. As to the matter of costs, it is my view that the respondent has enjoyed total success. Costs generally follow the event. I am mindful of the economic circumstances of the claimant. I am mindful that any order I make might impact Brittney, and I suppose as an aside I say it is tragic that the money that has been spent on arguing this matter has not been devoted to her education, but that is not something I control.

[55] I am of the view there ought be an order for costs, but I am going to set those costs in the amount of \$1,250 all inclusive, which I recognize is a far cry from what might otherwise be ordered if the matter were simply left to party-and-party costs, given there have been discoveries and the like, but there is no reason, in my view, to depart from the principles enunciated in *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.).

[56] The respondent having been entirely successful, costs should follow the event and I so order the amount of \$1,250 payable forthwith.

"Harvey J."

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