

ONTARIO

SUPERIOR COURT OF JUSTICE
FAMILY COURT
(Newmarket)

B E T W E E N:

NAFISA JIWAJI

Applicant(s)

- and -

SAJJAD JIWAJI

Respondent(s)

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)
) Nafisa Jiwaji
) **Appearing in Person**
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) Audrey A. Shecter
) **Counsel for Respondent**
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) Debra L. Snider
) **Counsel for Children’s Lawyer**
) **HEARD: October 23-31, 2008 in**
) **Newmarket**

REASONS FOR DECISION

Wood J.:

1. The principal issues for this trial were a proposed change in the children’s country of residence, quantum of child and spousal support, and net family property equalization.

Findings of Fact

Background

2. The applicant Nafisa Jiwaji was born in Mombasa, Kenya in 1958. The majority of her family still resides in that area. The respondent Sajjad Jiwaji was born in 1952 in Tanga, Tanzania. Most of his immediate family has immigrated to Canada.
3. The respondent received training in India and England in the air-conditioning industry. He also received practical instruction in the operation and maintenance of injection molding machines in Germany. He returned to Tanzania where he managed the production of his uncle's pharmaceutical and cosmetic manufacturing business. When that business wound down as a result of import competition he ran a small store with his father. Throughout his work in Tanzania he helped pay for his younger brother Altaf's degree in pharmacy and business degree.
4. In 1988 he followed his brother to Canada where Altaf was working as a locum pharmacist in a number of locations throughout Western Ontario. He settled in Windsor where Altaf had a house and began looking for work. After a number of short term jobs he was able to go back to school to obtain Ontario certification in the heating and air-conditioning field. This led to long-term employment with a heating and air-conditioning firm, which continued until 1997.
5. In 1990 Altaf sponsored the brother's parent's immigration to Canada. The four family members lived together in Altaf's house in Windsor although Altaf was on the road much of the time doing locum work.
6. In 1993 Altaf opened the first of what was to become a successful string of pharmacies located on university campuses. The first store at the University of Windsor was a success and Altaf soon found that he needed Sajjad's assistance. Sajjad began going into the store after work, to stock shelves do routine maintenance and perform some of the banking functions.
7. In 1994 Sajjad went to Kenya for a vacation to visit relatives. There he was introduced to Nafisa and they became engaged after two weeks. Sajjad immediately began the process of sponsoring Nafisa. This took about one year at the end of which he traveled to Kenya to marry her and they returned to live in the Windsor duplex with Altaf and his parents.
8. Sajjad and Nafisa moved into the upstairs flat of the duplex. His parents and Altaf lived in the downstairs flat when Altaf was not on the road. Unfortunately conflicts soon arose between Nafisa and her mother-in-law. Nafisa felt that she was being unfairly criticized. Her mother-in-law felt that Nafisa was not shouldering her share of the household responsibilities. This conflict led to

- increasing tension between Nafisa and Sajjad and was a major cause of their eventual separation.
9. In 1996 the family moved across the street to a smaller home. The duplex was placed in Sajjad's name and both flats were rented out. Altaf decided to open a second pharmacy on the campus of the University of Western Ontario in London. And Sajjad and Nafisa's first child, Mohamed, was born.
 10. By the summer of 1997 Altaf was ready to open the London ,Ontario pharmacy and needed Sajjad to manage it. Sajjad left his job with the air-conditioning firm to work full-time for his brother. The family moved again this time to a home Altaf owned in Kitchener, Ontario. Sajjad began work at the London pharmacy in September 1997. His duties were those of a store manager and included ordering, stocking, hiring, and managing the London store as well as accounting and payroll for both the London and Windsor stores.
 11. In 1998 the family moved yet again, from Kitchener to rented accommodation in London. This was a small town house, which clearly was not large enough for Sajjad, Nafisa, and Mohamed plus Sajjad's parents, and the new baby Fatema who was born on November 29, 1998. Therefore in 1999 the family moved once again to a large house on Springbank Drive in London purchased by Altaf.
 12. Unfortunately this latest move did not defuse the growing tension between Nafisa and her mother-in-law. Sajjad had unwisely attempted to ignore the difficulties for some time but things came to a head when Nafisa gave him an ultimatum. Either they move out of the Springbank Drive home to their own apartment or she and the children would leave.
 13. The combination of this ultimatum and the fact that Altaf was about to marry and bring home a bride, finally convinced Sajjad that he should find an independent home for his family. In January 2001 they moved to an apartment about one kilometre from the family home.
 14. The tension between Nafisa and her mother-in-law was not the only difficulty troubling the parties. Tension between Nafisa and Sajjad had been growing for years over his split loyalties. He and Altaf had almost stopped speaking over Sajjad's concerns about his brother's management style and risky stock market investments. This combination of tensions was a lethal one for Sajjad. It led to a mental breakdown from which he has never recovered. Under the care of Dr. Susan George he has been on an unbroken regime of anti-depressants, ulcer medication, and sleeping pills since that time.
 15. Sajjad was not the only one in the family to experience mental health difficulties. Mohamed, who was now five and enrolled in kindergarten, also exhibited signs of serious disturbance. He began acting out, soiling himself, and showing such aggression with other children that he was sent home from school.

16. These many difficulties proved too much for the marriage and despite attempts at counseling through their religious community the parties separated early in 2002. Nafisa and the children remained in the apartment. Sajjad moved back into his brother's house with his parents.
17. On March 27, 2002 the Court in London, Ontario made a consent order for joint custody with specified access to Sajjad. That order also provided for child support of \$609 per month based on an income of \$43,000 and spousal support of \$800 per month. It has never been altered.
18. Following separation Nafisa enrolled in a nine-month course to train to become an executive assistant. However Mohamed who was enrolled in a French immersion public school began to deteriorate further. He continued to soil himself and was frequently expelled for aggression towards other children. Nafisa has testified that she frequently had to interrupt her classes to care for Mohamed when he was expelled for the day. The school authorities placed him in a special program called Steps to Success, which gave him one on one instruction every second day. He was also placed on the waiting list for the child and adolescent center in London. Although there was marginal improvement, Mohamed continued to cause difficulties in the classroom for both himself and the other children.
19. In 2003 Nafisa and the children moved to the Richmond Hill area where the family's mosque was located. Sajjad and his parents also relocated, this time to Mississauga. This was because Altaf had opened a third store located on the campus of McMaster University in Hamilton and Sajjad was employed as its first manager to get it up and running as he had the London store.
20. Mohamed and Fatema were enrolled in Walter Scott Public School in Richmond Hill. Mohamed's behaviour in the new school was no better than it had been in London. However the school authorities seem to have been more proactive than those in London. The Board arranged his attendance at the Thistleton Regional Center, a child and adolescent mental health facility. That institution performed a full assessment that addressed not only his school behaviour but also his emotional and mental health.
21. The assessment, which was completed in February 1995 diagnosed Mohamed with a probable learning disability exacerbated by the continuing conflict in his family which caused him great distress and confusion. The report recommended a lessening of conflict between his parents, which has yet to occur, as well as individual therapy and individual assistance at school which were put into place. Two years of therapy with a Thistleton social worker Essa Egal, an individual education program at the school, and medication to treat his attention deficit disorder and agitation have worked wonders. There has been a significant improvement in both his behaviour and self-image. Sajjad reports that access

visits, which used to be problematic, are now joyful and pleasant for both children. Nafisa believes that the improvements are so significant she feels that he could be weaned from medication and handle school in Kenya where no individual program would be available.

22. In the last eighteen months access has settled into a relatively stress-free pattern following the March 27, 2002 order. Sajjad sees his children every second weekend from Friday evening to Sunday evening. He had them for half of the summer school vacation this year and the parties seem able to negotiate sharing of the other large school vacations. He also telephones the children once per week at a prearranged time. Although he would like to resume mid-week access, he does not seek anything further at the present time.

Discussion

The Children's Country of Residence

23. Nafisa wishes to return to Mombasa, Kenya to reside with her family. She has testified that she cannot afford to reside in Canada on the support paid to her by Sajjad and that her physical health prevents her from working. She says she has exhausted the assistance that her family can provide which has amounted to over \$110,000 to date. She feels that the children's best interest would be served by living in Kenya where the funds would go much further and she could afford a relatively affluent lifestyle complete with servant and private school for the children. Somewhat troubling is her assertion that she intends to return to live in Kenya whether or not the children are permitted to go.

24. Where one parent wishes to move the residence of the children to a location which would frustrate any form of normal ongoing contact between the children and the other parent, the court must determine whether such a move is in the children's best interest. The Supreme Court of Canada has set out the approach to be taken in the well known decision in *Gordon v Goertz* [1996] 2.S.C.R. 27. At paragraph 49 of the majority judgment the law is summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold test is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and the evidence of the new circumstances

4. the inquiry does not begin with a legal presumption in favor of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interests of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia:

(a) the existing custody arrangement and relationship between the child and the custodial parent

(b) the existing access arrangement and the relationship between the child and the access parent;

(c) the desirability of maximizing contact between the child and both parents;

(d) the views of the child;

(e) the custodial parent's reasons for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

(f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50. In the and the importance of the child remaining with the parent whose custody of his be come accustomed in the new location must be weighed against the continuance of for contact with the child access parent, it's extended family and its community. The ultimate question in every case this: what is in the best interests of the child in or the circumstances, old as well as new?

25. *Gordon v Goertz* was an application to vary a final order. In this case custody and access have been governed by a consent interim order in place since May 2002. Therefore the first part of the *Gordon v Goertz* test does not apply. There is however a long status quo to be considered.

26. I make the following findings with respect to the factors set out above.

The existing custody arrangement and relationship between the child and the custodial parent

27. Nafisa has been the primary caregiver for the children all their lives. They remained with her after separation and she has had care and control under the joint custody order of March 22, 2002. The children have made it quite clear through their counsel that they look to her as their primary caregiver and wish to remain with her.

The existing access arrangement and the relationship between the child and the access parent

28. The entire focus of this litigation since 2002 has been over access. Sajjad has exercised access since the March 22, 2002 order generally in accordance with its terms. When he has failed to exercise it he has done so because, in his opinion, to continue access would not have been in the children's best interest. When he exercised more access than in the order it has been to accommodate Nafisa who wished to visit her family in Kenya.
29. The Children's Lawyer through her social worker has led clear evidence that the children enjoy their time with their father and that they have a warm and loving relationship with him although they do not wish to expand the access presently exercised. Sajjad to his credit does not wish to expand his access against the children's wishes.

The desirability of maximizing contact between the child and both parents

30. The evidence of both the parties and the Children's Lawyer is that these children love both their parents and enjoy the company of each. Mohamed, in particular, has suffered immensely as a result of the separation. He is presently making great progress a part of which is his improved relationship with his father. I consider that the facts of this case are such, that particular emphasis should be placed upon maintaining contact between the children and each of their parents. The two households provide a good balance of parenting styles and opportunities and the children need each.

The views of the child

31. The evidence of the social worker called by the Children's Lawyer was that the children expressed a clear wish to move with their mother to Kenya. However in cross-examination it became clear that the desire they were expressing was to remain with their mother wherever she might decide to go.
32. In argument the Children's Lawyer expressed some concern that the views expressed by the children were not independent. I share this concern and find specifically that the children's expressed views reflect their mother's wishes and

their desire to remain with her, rather than any independent desire, or even enthusiasm, for moving to Kenya.

33. Although the children have each been to Kenya for extended stays as infants, in recent years their longest stay has only been a three-week vacation. They have no conception of what life would be like in that country, nor do they fully understand how difficult it would be for them to have access to their father were this move to occur.

The custodial parent's reasons for moving

34. Nafisa has stated that she believes it would be in the best interests of the children to move to Kenya. It is clear however from her evidence as a whole that her primary reasons for wishing to move are her desire to be with her family, and her belief that she could live on her existing support at a much higher standard of living in Kenya than she can in Canada.
35. Her proposed budget includes private school for the children, and a household servant. Despite the exchange rate her budget exceeds the amount of support she is presently receiving by a significant amount.
36. It is also clear that she has done little real research with respect to the cost of living, the cost of schooling, the cost of medical care, the availability of suitable schooling particularly for Mohamed, or where and how the family would live once they got to Mombasa.

Disruption to the child consequent on removal from family, schools, and the community he or she has come to know

37. This factor is perhaps the most important in this case. Both Mohamed and Fatema are well-settled in their present school. They have sets of friends at school, at religious school, and at their father's home. Their paternal grandparents have been a constant factor in their lives.
38. The move to Kenya would put an end to all these relationships. This type of disruption common to all children moved from an area where they have lived for some time would be particularly hard on Mohamed and Fatema. Their circumstances have been such that their circle of friends has developed late and for that reason is all the more precious.
39. Mohamed's situation is more critical than Fatema's. He has only recently begun to emerge from six years of acute mental distress, which have retarded his school progress by three years and his social progress almost as severely. He is enrolled in an independent learning program at his present school. He has been under the care of the same physician for three years, an adolescent medicine specialist who has successfully regulated his medication allowing him to function in school, and

he has received extensive counseling through the Thistleton Regional Center. The combination of these factors has only just allowed him to begin a normal life in which he can enjoy his family, his friends and his school.

40. The expert evidence is that Mohamed does not adjust well to change and that things should be kept just as they are for him for the foreseeable future. A move to Mombasa would undo all of the supports presently in place. There is no indication that there are facilities in Kenya comparable to either Thistleton or the Board of Education's independent education program, which currently provides him with a one-on-one worker for much of the day. While medications may well be available in Kenya there is no evidence that a doctor similar to Dr. Levin who specializes in adolescent medicine and has successfully treated Mohamed for three years, would be available.

Disruption to the child of a change in custody

41. Sajjad does not seek a change of custody. In fact, he has conceded sole custody to Nafisa. The only reason custody would change would be if the children were not allowed to move to Kenya and their mother decided to move without them. Sajjad has testified that should this occur he would move to Richmond Hill immediately to ensure that the children could stay in the same school with all the present supports in place. He has also testified that he would do everything in his power to minimize the disruption and trauma the children's abandonment by their mother would cause.
42. There is no question that a unilateral move to Kenya without the children by Nafisa would be traumatic for them. I am aware of the damage that such a change would cause in the short term. However my analysis of the foregoing factors convinces me that in the long term it remains in their best interest to remain in Canada where their family, friends, and most importantly support systems are in place.

Conclusion

43. It will be clear from the findings set out above that in my opinion it is not in the children's best interests to move to Kenya with their mother. Rather they should remain here in their present school and with the present supports in place. Access should continue as set out in the original order of March 22, 2002 with some small variations to remove irritants and give the children control over whether mid-week access occurs.

Passports

44. Kenya is not a signatory to the Hague Convention. In view of Nafisa's stated determination to return to live in that country whether or not the children are allowed to accompany her, the children's passports should be surrendered to this

court for safekeeping. In the event that either party wishes to have the children travel outside Canada that party may obtain the passports for that purpose on the consent of the other party upon undertaking to return them to the court at the end of the trip. In the absence of consent either party may apply to the court for a summary determination of the issue by filing a notice of case conference.

Support

Sajjad's income

45. Considerable evidence was led with respect to Sajjad's income for support purposes. At present he is paying \$609 per month child support and \$800 per month spousal support based on an income of \$43,000 pursuant to the consent order of March 22, 2002. His employment income as shown in his tax return for that year was \$24,583. Since then he has received a salary of \$24,000 per year either reduced or increased by rental and expenses on a condominium owned by him in Hamilton.
46. The applicant argues that prior to separation he was receiving much higher amounts from his employment in his brother's stores and that his income should be set at a much higher level than either his tax returns reflect or he consented to in the March 22 order.
47. I have heard evidence on the issue from Sajjad, his brother Altaf who owns the string of pharmacies for which he works, and the corporate accountant for those companies. I am satisfied that the evidence given by each of the first three each gave on the subject was reliable and I accept it. I have also heard evidence from an accountant called by Nafisa who testified after reviewing disclosure and meeting with Altaf's corporate accountant.
48. The evidence provided by Altaf, Sajjad, and Altaf's accountant is that Sajjad is a "technical guy" whose training and background are in the heating and air-conditioning business. In keeping with the close familial bonds of their culture the Jiwaji family provide for each other in many different ways. Sajjad and his father worked in Tanzania to put Altaf through pharmaceutical training in England. Altaf in return sponsored his parents' move to Canada and has supported them since they arrived. He also offered Sajjad employment in the drugstore business.
49. Sajjad operated the store portion of the pharmacy at Western Ontario performing all of the functions of a store manager plus doing the accounting and payroll for the entire group. He was paid \$20.00 per hour for this work. As the stores got busier and more profitable his salary was increased reaching a maximum of \$25.00 per hour in 2000.

50. However Sajjad and Altaf came into serious conflict over the management of the store and in particular Altaf's heavy loss of corporate funds in the stock market. Sajjad whose marriage was breaking up at the time could not handle the stress and Altaf did not wish interference with the way he ran his companies. Accordingly the companies were reorganized taking away Sajjad's voting shares and reducing his responsibilities from general manager of store operations for several pharmacies to operating only the London store, then later the Hamilton McMaster store and most recently the York University store where he presently remains.
51. As Sajjad's difficulties over his marriage breakup continued and his health deteriorated he took more and more time off. Altaf therefore changed his payment from an hourly rate to a yearly salary of \$24,000. It was his evidence that he could obtain a manager to do the work done by Sajjad for less money than he presently pays his brother. While I have no independent evidence of this, and somewhat doubt that it is correct, I am satisfied that the salary paid to Sajjad since separation is not a manipulation by the family to artificially lower his salary but rather a reflection of what Altaf is prepared to pay his brother.
52. Sajjad's most recent financial statement places his income at \$40,980 per year based on salary, GST rebate and rental income. In addition to these amounts, he has use of a corporate credit card upon which he charges some \$1200 per year of personal expenses. He also has the use of an automobile owned by Altaf for which the company pays repairs. Altaf also owns the home in which Sajjad lives rent-free with his parents. I value these benefits at \$4,000 per year for the automobile and \$9,000 per year for the accommodation. (The accommodation figure is well below market value as Sajjad helps to care for his elderly parents.) These three amounts come to \$14,200.00 tax free. If this figure is factored in, his income for child support purposes is the equivalent of \$62,100 per year. Base child support for two children at that figure is \$931.00 per month.

Nafisa's Ability to Earn Income

53. Nafisa has not worked since coming to Canada. Before her marriage she was employed as a secretary for a group of small companies in Mombasa. After her marriage she spent some months while on a trip to Kenya upgrading her computer skills. However that upgrade is now somewhat dated. In June 2003 she took a nine-month course at Westerveld College funded by the Ministry of Community and Social Services. This was to provide her with training as an administrative assistant.
54. She has made no serious attempt to find a job since separation. She has testified that the only work she has done has been as a volunteer for her community center and her religious community. The reasons she gives for her lack of employment are twofold. The first is her ongoing responsibility for the children. The second is her health.

55. There is no doubt that Mohamed has taken a great deal of his mother's time and energy. It has only been in the last three years that he has been able to attend school regularly for the whole day. It is now clear that there is no child related reason why Nafisa could not obtain part-time work coinciding with the hours that the children are in school.
56. Nafisa has led evidence through her family physician that she suffers from osteoarthritis which affects her knees and her wrists. She has had two knee operations and has refused a third as there is no guarantee that it will provide significant relief. She wears wrist splints when performing tasks such as typing or preparing meals.
57. In her physician's view these difficulties while not preventing her absolutely from working would certainly cause difficulty. She has assisted Nafisa to fill out an application for a disability pension but the evidence as to what has happened to the application is unclear.
58. I find that Nafisa is capable of part-time work. However her relative lack of training, her age, and her medical condition limit her options. It is reasonable to assume that she could contribute \$8,000 per year towards her household's income and I attribute that amount to her in assessing spousal support and for Section 7 child support purposes.

Spousal Support

59. As indicated above, Sajjad has an actual income of \$40,980 per year. He receives the equivalent of \$14,200 tax free in the form of accommodation, motor vehicle benefits, and personal use of a company credit card. Using these figures and attributing the ability to earn \$8,000.00 per year to Nafisa the Spousal Support Advisory Guidelines indicate a range of spousal support between \$450.00 and \$745.00 with the mid-range number being \$597.00. Maximum duration is suggested to be 15 years.
60. Sajjad has already paid spousal support for almost six years which is the same length of time the parties were living together. During that period Nafisa has made no real effort to obtain employment. Although for the first three years Mohamed's behaviour was such that employment was probably impractical that situation no longer exists. Nafisa's osteoarthritis presents her with challenges but not insurmountable ones. She manages the operation of her household without restriction. She has also conducted her own case in the Superior Court including the production of all paperwork. This demonstrates organizational and physical abilities that would stand her well in the workplace.
61. Her background and that of the family may be her largest difficulty. She came to Canada leaving her family and support group in the expectation that her husband's family would take her in and care for her. Her role was to be

homemaker and mother. Now all those expectations and supports have disappeared. The adjustment is a difficult one and no doubt plays a large part in her desire to return to Kenya where a continuation of the life she had expected would in her view, be possible.

62. Nafisa is 50 years old. She has no work experience in Canada. She also has limiting but not insurmountable, health problems. It is not reasonable therefore to place an arbitrary cut off on spousal support. However the expectation and requirement of the legislation is that she will do everything in her power to become self-sufficient. This can best be achieved by a continuation of spousal support at the mid-range level of \$597 for two more years followed by a reduction to the lower level of \$450 for a further two years at which time either party may seek a review as of right without demonstrating material change in circumstances.
63. At the initial figure Nafisa and the children will have 53.1% of the family's net disposable income based on attributed income for both parties. While this may appear low, in terms of dollars available from money actually earned the percentage in her household is 62.9% which is more than adequate.

Retroactive Support

64. Nafisa has requested retroactive support in the form of an adjustment of child and spousal support back to the date of separation. Sajjad has been paying a combined figure of \$1409.00 since May 22, 2002. I have found that while child support should increase, spousal support should decrease in the future. The combined total of child and spousal support will now come to \$1528.00 a difference of \$119.00 per month.
65. Each side has accused the other of failing to settle this action. It has dragged on for six years without either side seeking to vary the interim support order. Sajjad has paid on time throughout that period. In these circumstances given the small change and the lack of clarity as to why the action took so long I believe that an adjustment back one year is appropriate. Sajjad will pay \$1428.00 rounded down to \$1200.00 to allow for tax consequences, by way of lump sum support arrears.

Net Family Property

66. There was considerable confusion during the course of the trial over whether or not appropriate disclosure had been made by Sajjad in order to allow Nafisa to properly calculate the net family property equalization payments owing to her. The principal figures in contention were Sajjad's interest in his brother's holding company at marriage and on separation. On the second last day of hearing it came to light that these interests had been valued by a certified business evaluator and that Nafisa had been provided with funds to have the valuations critiqued. The critique was done and confirmed the original numbers.

67. Neither side called evidence from the authors of the reports. Each side has filed a Net Family Property Equalization Statement using the number. In the absence of any evidence to the contrary I find that the values of Sajjad's corporate interest on marriage and at separation as set out in the Equalization Statements are correct.
68. I have heard evidence on a number of small disputes in the figures set out in each of the Net Family Property Equalization Statements. Neither side could produce backup documentation on the issues in question. I have determined those numbers based upon the evidence of the parties such as it was, the figures in the statements filed by each side, and the arguments made. I have allowed contingent tax liabilities where the investments were actually cashed or will have to be cashed to pay the equalization payment.
69. I find the net family property equalization payment owing by Sajjad to Nafisa to be \$132,437.13. The calculation upon which this is based is set out in Schedule A attached hereto.

Adjustments to the Net Family Property Equalization Payment

70. A number of orders for costs and disbursements remain outstanding and must be adjusted in order to determine the correct amount of the final payment from Sajjad to Nafisa. On March 6, 2002 Sajjad was ordered to pay a \$2,000.00 advance on equalization. On February 19, 2008 he was ordered to pay a further \$10,000.00 to finance a critique of the valuation of his shares in Altaf's holding company. This was to be characterized at trial as either a disbursement or advance on equalization. No proof of the cost of the critique has been produced. It was four pages long and agreed with the original valuation. I allow \$5,000.00 for the production of the document by way of advance and characterize the other \$5,000.00 as an advance on equalization.
71. On May 14, 2008 Nafisa was ordered to pay \$400.00 to Sajjad and \$250.00 to Altaf by way of costs. On June 25, 2008 she was ordered to pay a further \$1000.00 costs to Sajjad. Making these adjustments and factoring in the lump sum arrears award set out above, I fix the net payment to be made by Sajjad to Nafisa at \$125,237.14. The calculation is set out at Schedule B.

Interest on Net Family Property Equalization

72. The parties separated in January 2002. To date Nafisa has received \$7,000.00 towards the equalization as a result of two court orders. This litigation has gone on far too long. Much of the delay has been the intransigence of both parties on the issue of custody. It should be noted however that the primary residence of the children has not been in issue for years and custody was conceded at trial by Sajjad. It is clear from the evidence at trial and the recent cost awards that the last year of delay has been as a result of Nafisa's pursuit of disclosure she already had. In view of these circumstances, I limit the interest to be paid on the net family

property equalization payment, to two years and order that it be paid on the net rather than the gross figure as set out above.

Order

(1) In the event that the applicant elects to stay in Canada custody of the children to the applicant with access to the respondent as follows:

- (a) Every second weekend from Friday at 5:00 PM to Sunday at 6:00 PM or Monday at 6:00 PM if Monday is a school holiday.
- (b) For three hours after school on Wednesday of each week in the event that the children wish to attend.
- (c) The second half of the December two-week school vacation in even numbered years and the first half in odd numbered years.
- (d) The March school vacation in odd numbered years.
- (e) For three hours from 5:00PM to 8:00 PM on Father's Day each year if Father's Day does not occur during a regular access period. (The applicant shall have the children for the same three hours on Mother's Day if it falls during an access period).
- (f) One half of the summer school vacation in the form of alternate weeks beginning with the first full week after school ends provided however that either party may give notice to the other by May 30th in any year of a planned trip with the children of up to 3 weeks. In that event the alternate week schedule will be interrupted for that interval with the time to the other party made up in straight weeks either following the trip if there is sufficient time left in the vacation period or prior to it if there is not.
- (g) Telephone access twice per week on Tuesday and Thursday evenings at 7:00 PM or such other time as the parties agree to on a permanent basis in writing. The applicant shall be responsible for ensuring that the children call the respondent at the set time. If the call has not been made within 15 minutes of the set time then the respondent shall call the children and the applicant shall be responsible for ensuring that the children are available to take the call and that the telephone is personally answered and not picked up by an automated answering device.

(2) The Applicant shall surrender the children's passports to this court for safekeeping by November 15th, 2008. In the event that either party wishes to have the children travel outside Canada that party may obtain the passports on the consent of the other party on undertaking to return them to the court at the end of the trip. In the absence of consent either party may apply to the court for a summary determination of the issue by filing a notice of case conference.

(3) In the event that the applicant elects to return to reside in Kenya, custody of the children to the respondent.

(4) Access to the applicant as arranged between the parties to include unlimited time with the children for any period up to four weeks in Ontario providing that such access does not interfere with their attendance at school. Access outside Canada as agreed to by the parties or determined by the Court in accordance with clause (2) of this order.

(5) In the event that the applicant retains custody of the children the respondent shall pay child support to her based on an attributed income of \$62,100 of \$931.00 per month commencing December 1, 2008. He shall also pay 88% of any Section 7 expenses properly incurred for the children.

(6) The respondent shall pay spousal support to the applicant of \$597.00 per month from December 1, 2008 to November 30, 2010 and thereafter \$450.00 per month. Provided that either party may apply for a review of quantum of, and entitlement to, spousal support as of right after November 30, 2012.

(7) The respondent shall make a net adjusted payment to the applicant of \$125,237.14 together with interest thereon calculated in accordance with the *Courts of Justice Act* from January 1, 2006 to the date of payment, in full satisfaction of his obligation to pay net family property equalization and support arrears, and her obligation to pay previous cost awards. This payment shall be made within thirty days of this court fixing the costs of trial or by December 31, 2008 whichever first occurs.

(8) The parties may arrange to speak to costs through the trial office either in person or by telephone conference call.

Justice T.M. Wood

Released: November 4, 2008

Schedule A

NET FAMILY PROPERTY STATEMENT

ITEM	HUSBAND	WIFE
1. Assets		
Household goods and furniture		\$900.00
1992 Pontiac Grand Prix	\$500.00	
B of M account #8054-657	\$1,346.92	\$1,346.92
B of M account #3193 981	\$1,159.98	
CIBC Wood Gundy RRSP	\$86,713.00	
B of M RRSP		\$8,816.27
Shares in 1386315 Ontario Inc.	\$240,000.00	
RBC Account		\$875.01
TOTAL 1.	\$329,719.90	\$11,938.20
2. Debts and Liabilities		
Tax Liability for B. of M. RRSP which was cashed shortly after separation.		\$1,495.23
Tax Liability for either CIBC Wood Gundy RRSP or some portion of Corporate holdings which will be needed to pay NFP equalization 20% of 130,000	\$26,000.00	
TOTAL 2.	\$26,000.00	\$1,495.23
3. Property and debt at Marriage		
Savings	\$21,842.66	
Interest in 1046313 Ont. Inc	\$41,760.00	
Debt	(\$35,200.00)	
TOTAL 3.	\$28,402.66	\$0.00
4. Excluded Property		
TOTAL 4.	\$0.00	\$0.00

5. Net Family Property <i>(Total 1 minus Totals 2, 3 and 4)</i>	\$275,317.24	\$10,442.97
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6. Equalization Payment	Husband pays to Wife	\$132,437.14
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Schedule B

Net Family Property equalization	132,437.14	
Net support adjustment	<u>1,200.00</u>	
	133,637.14	133,637.14
March 6, 2002 advance	2,000.00	
February 19, 2008 advance	5,000.00	
May 14, 2008 cost award to Sajjad	400.00	
June 25, 2008 cost award to Sajjad	<u>1,000.00</u>	
	8,400.00	<u>8,400.00</u>
		125,237.14