
CANADA / JUDGMENT

Biemond v. Biemond

2008 BCSC 424

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 424 Biemond v. Biemond

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Biemond v. Biemond,

2008 BCSC 424

Date: 20080411

Docket: E4119

Registry: Chilliwack

Between:

Martina Biemond

Plaintiff

And

Martinus Willem Biemond

Defendant

Before: The Honourable Madam Justice Baker

Reasons for Judgment

Counsel for the Plaintiff

Lester A. MacDonald

Counsel for the Defendant

Rory Krentz

Date and Place of Trial/Hearing:

September 24, 25, 26, 27 and 28, 2007

Chilliwack, B.C.

[1] Martina Eits and Martin Biemond were both born and raised in the Netherlands. They moved to British Columbia together in 1994 and were married on July 19, 1995. They have four children. The Biemonds initially separated in October 2002. They reconciled in February 2003 but separated a second time in June 2003 and have lived separate and apart since that time. An order for divorce was made on April 17, 2007. Ms. Biemond married Robert Vander Heide in June 2007 and I shall therefore refer to her as Ms. Vander Heide in the balance of these Reasons.

[2] The parties have agreed on the following relief, which is ordered, by consent:

1. The plaintiff and the defendant shall share joint custody of the infant children of the four children of the marriage, whose names and dates of birth are set out here:

Johannis Arie Biemond, born April 9, 1996

Wilhemina Martina Biemond, born July 22, 1997

Aletta Adamina Biemond, born April 24, 2001

Hendrik Willem Biemond, born March 28, 2003.

2. The parties shall share joint guardianship of the children, to be defined as follows:

(i) The parents shall be the joint guardians of the estates of the children;

(ii) In the event of the death of either parent, the remaining parent shall be the sole guardian of the person of the children;

(iii) The plaintiff shall have primary responsibility for the day-to-day care of the children, and shall advise the defendant of any matters of a significant nature affecting the children;

(iv) The plaintiff shall discuss with the defendant any significant decisions which have to be made concerning the children, including significant decisions concerning health care and treatment (except in emergencies), education, religious instruction, and general welfare of the children;

(v) The defendant shall discuss the foregoing issues with the plaintiff and both parents shall try to reach an agreement on significant decisions affecting the children;

(vi) If the parents cannot reach an agreement with respect to a significant decision despite their best efforts, the plaintiff shall have the right to make such decision;

(vii) The defendant shall have the right under section 32 of the Family Relations Act to seek a review of any decision that he considers to be contrary to the best interests of the children;

(viii) Each parent shall have the right to obtain information concerning the children directly from third parties, including teachers, counsellors, medical professionals and caregivers.

3. The primary residence of the children shall be with the Plaintiff.

4. The defendant shall have the children with him as follows:

(i) One half of all school holidays exceeding three days in length, not specifically referred to hereafter;

(ii) One half of the Christmas school break providing that:

(a) The plaintiff shall have the children with her on December 24 of each year, which date is the plaintiff's birthday;

(b) Christmas Day shall alternate between the plaintiff and the defendant, with the defendant having the children for the day commencing at 8:00 a.m. on December 25 in even numbered years;

(iii) One half of the school Spring break;

(iv) A period of 14 days commencing the Monday closest to July 1 in each year; the children being returned to the plaintiff for the following 14 days; followed by the Defendant having the children with him for a further 14 days;

(v) During the Christmas, Spring, and Summer breaks, regular weekend access shall be suspended;

(vi) The exchange of the children for Spring, Christmas (excluding Christmas Day), and Summer breaks shall take place at 10:00 a.m.;

(vii) Each party shall have reasonable telephone access to the children when they are in the care of the other parent;

(viii) The defendant shall have the children with him on every Father's Day and subject to the school calendar, shall have the children with him for at least part of December 15 each year, which date is his birthday;

(ix) Notwithstanding any other order, the plaintiff shall have the children with her on every Mother's Day;

(x) The time the children shall spend with the Defendant on weekends shall be as ordered by the court but shall be extended to start on Thursday after school if Friday is a statutory holiday or school professional development day, and shall be extended to Tuesday morning if Monday is a statutory holiday or professional development day.

5. The children shall reside in the Lower Mainland of British Columbia, defined as that area extending from Hope to Vancouver, unless the parties agree otherwise in writing or there is an order of the Court permitting the residence of the children to be outside that area.

6. The children's passports shall be renewed with the cost to be shared equally between the parents. Each party shall hold the passports for two of the four children, and shall, upon request, provide to the other parent the required passport(s) for travel outside of Canada along with a letter signifying parental consent to travel, the same not to be unreasonably withheld.
7. If the children, or some of them, are ordered to continue to attend at Mount Cheam Christian School, the defendant shall pay the full tuition to Mount Cheam Christian School for the children who attend that school.
8. If the children, or some of them, are authorized to be enrolled in Mennonite Educational Institute, the defendant shall pay to the plaintiff as his contribution to tuition, the amount he would otherwise be paying to Mount Cheam Christian School, with the balance of the tuition to be paid by the plaintiff.
9. Save and except for the expense related to the private tuition as set out in the immediately preceding paragraphs; commencing October 1, 2007, the defendant shall contribute 80% and the plaintiff 20% of the following expenses, which expenses may be estimated:
 - (i) Taking into account the necessity for the expense in relation to the child's best interest and the reasonableness of the expense in relation to the means of the parents and those of the child, and the family's spending patterns prior to the separation:
 - (a) child care expenses incurred as a result of the Plaintiff's employment, illness, disability, education or training for employment;
 - (b) that portion of the medical and dental insurance premiums attributable to the child;
 - (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy, prescription drugs, hearing aids, glasses and contact lenses;
 - (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet a child's particular needs;
 - (e) expenses for post-secondary education; and
 - (f) extraordinary expenses for extracurricular activities.

In determining the quantum of the expenses referred to above, the parents shall take into account any subsidies, benefits or income tax deductions or credits relating to the expense and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

10. The parents shall be permitted to take the children, or some of them, outside Canada for a maximum of two weeks each year, provided that trips to Washington State are not included within the two week provision and further provided that trips outside of Canada shall not interfere with the other parent's time with the children.

MATTERS IN DISPUTE

- [3] The parties have been unable to agree on a regular access schedule. Ms. Vander Heide seeks an order that all four of the children spend every second weekend with their father, and the intervening weekends with her; but Mr. Biemond is seeking an order that he have all four children on the first weekend of each month, two of the four children the second weekend, the remaining two children on the third weekend, and none of the children on the fourth weekend.
- [4] The parties have also been unable to agree on the arrangements for pick-ups and drop-offs at the commencement and end of each access visit. Ms. Vander Heide is seeking an order that the pick-ups and drop-offs take place at the children's school or the public library in Chilliwack. Mr. Biemond seeks an order that he pick the children up at Ms. Vander Heide's residence at the commencement of each access visit, and that she retrieve the children from his home at the end of each visit.
- [5] The parties have also been unable to agree on where the children should attend school. Mr. Biemond seeks an order that the children continue to attend Mount Cheam Christian School, while Ms. Vander Heide wishes to enrol the children at the Mennonite Educational Institute ("MEI") in Chilliwack.
- [6] Ms. Vander Heide is agreeable to the sale of the family home, but is seeking an order that the proceeds be reapportioned in her favour. Mr. Biemond is seeking an order that the home be listed and sold, with the parties having joint conduct of sale, but with Mr. Biemond having a right of first refusal upon an accepted offer being presented. He opposes Ms. Vander Heide's claim for reapportionment and seeks an order for equal division of the proceeds of sale.
- [7] Ms. Vander Heide is also seeking an order for spousal support, and payment of retroactive child support commencing April 1, 2004. Ms. Vander Heide submits that the retroactive child support should be adjusted to reflect the higher income that she alleges Mr. Biemond was earning during the years prior to trial.
- [8] Mr. Biemond concedes that his actual income since the date of separation has exceeded the income attributed to him by the two Masters who made interim support orders, but he disputes the level of income alleged by Ms. Vander Heide.

- [9] Mr. Biemond also concedes that Ms. Vander Heide has not been capable of financial self-sufficiency from the date of separation to the date of trial, but he submits that Ms. Vander Heide does not need spousal support in future, as she has remarried and has the ability to work as a teacher.
- [10] The parties have agreed that Ms. Vander Heide's husband, Robert Vander Heide, earned \$18,555.52 in 2006 and had earned \$20,639.71 between January 1, 2007, and the commencement of trial. Mr. Vander Heide works as a framer, and at time of trial was earning \$18 per hour, plus 4% holiday pay.
- [11] Ms. Vander Heide is also seeking an order that Mr. Biemond compensate her for the use of RRSP funds expended after separation, and she is seeking an order allocating responsibility between the parties for repayment of debts owed for school tuition and home care services. Mr. Biemond accepts responsibility for the debts for the tuition and home care services, but resists the claim for compensation for the RRSP funds.
- [12] Mr Biemond intends to dissolve a company known as MBE Consulting Ltd., which he operated during the marriage, and he submits that any associated costs, and any debts owed by that company, including any taxes payable to Revenue Canada, should be shared equally by the parties. Ms. Vander Heide submits that any debts owed by the company, or resulting from its dissolution, should be paid by Mr. Biemond alone.

FACTS

- [13] Martina Eits, now Martina Vander Heide, was born in the Netherlands on December 24, 1972, and is now 35 years old. She graduated from secondary school in Holland and then completed four years of post secondary education, which qualified her to teach grades 6 and lower in the Netherlands.
- [14] Mr. Biemond was also born in the Netherlands, on December 15, 1970, and is now 37 years old. He grew up with his parents, three brothers and four sisters on a farm in the Netherlands. His youngest sister now lives in the Chilliwack area, having moved to Canada in 2006.
- [15] Mr. Biemond attended high school and then obtained a Bachelor of Science degree in mechanical engineering. He and Ms. Vander Heide met at a bible study group while both were in college, and began seeing each other regularly soon after.
- [16] Around the time that Ms. Vander Heide was completing her teaching degree, she and Mr. Biemond read a church bulletin advertising teaching positions at Mount Cheam Christian School ("MCSS") near Chilliwack, B.C. This school is affiliated with the churches attended by the couple in the Netherlands while they were dating, and in Canada during their marriage. In Canada the church is known as the Reformed Congregation of North America. Ms. Vander Heide no longer attends this church.

- [17] Ms. Vander Heide did not and does not now have a British Columbia teaching certificate, but because MCSS is classified as a private religious school, the British Columbia Ministry of Education allowed her to teach there. She applied for a teaching job at MCSS and was accepted. She and Mr. Biemond moved to B.C. in the fall of 1994. Ms. Vander Heide taught Grade 1 from September 1994 until June 1995. The parties returned to the Netherlands in July 1995 to be married, and then returned to British Columbia. In the fall of 1995 Ms. Vander Heide began teaching Grade 6 at MCCS and continued doing so until March 1996, when she left work due to the imminent birth of the couple's first child, Johannis. She worked part time at MCCS after that for approximately four years, but testified that the work she did was more like teacher's aide work than teaching. One year she taught only two afternoons a week, and then just one afternoon.
- [18] Mr. Biemond initially obtained a one year Canadian work permit. He worked as a construction labourer and at a variety of other jobs to make ends meet, but eventually took a job working with a company that sold, installed and serviced computer software. When his employer went out of business, he started his own computer consulting firm, operating it initially as a proprietorship and then as a corporation called MBE Consulting Limited.
- [19] The parties purchased the home they currently own in the spring of 1997. Except for a few periods of a few weeks shortly after separation, Ms. Vander Heide has occupied the family home with the children since separation.
- [20] Ms. Vander Heide experienced an episode of depression at age 17 serious enough to cause her to miss school for several weeks, but she had never been treated for a mental health problem before the birth of the parties' first child. Following Johannis' birth, Ms. Vander Heide experienced depression for a period of 15 months, including during her pregnancy with Wilhemina. The depression was sometimes serious enough to impair her ability to look after Johannis. At some point Ms. Vander Heide began receiving treatment for her depression from her family doctor and a psychiatrist. She was diagnosed as having a bipolar disorder, and medication was prescribed for her that has assisted her, and which she continues to take regularly. She continues to see her psychiatrist and a mental health worker to monitor her condition.
- [21] Following Wilhemina's birth in July 1997, Ms. Vander Heide's depression subsided. However, at times she still needed help to cope with caring for the children and the family's home, and she found working outside the home and caring for the home and children to be overwhelming at times.
- [22] The Biemonds' third child was born in 2001. After this birth, Ms. Vander Heide testified, she has continued to have occasional periods of depression, but her depression has been less severe.

- [23] The Biemond marriage was not a happy one. Both parties were reticent about the circumstances leading to the failure of their marriage, but Ms. Vander Heide did testify that the couple disagreed about the extent and frequency of Mr. Biemond's use of corporal punishment for the children, and that she was afraid of Mr. Biemond because of what she characterized as his physical and mental abuse of her, and his behaviour towards the children.
- [24] In October 2002, the parties separated and Ms. Vander Heide went to stay at a Transition House for women. While living there, she sought counselling for herself and the children. She commenced an action seeking a divorce. At a judicial case conference in November 2002, the parties agreed that Ms. Vander Heide would move back into the family home and that she and the children would remain there, and that Mr. Biemond would pay household expenses and provide financial support to Ms. Vander Heide.
- [25] Elders of the couple's church visited Ms. Vander Heide and urged her to reconcile with Mr. Biemond, stressing that the church did not consider divorce to be an option. Ms. Vander Heide shared some of her concerns about Mr. Biemond's behaviour towards her and the children. The elders told her that men were more violent than women by nature, but that women had to listen to their husbands. The church elders did agree that they would try to get Mr. Biemond to seek counselling. The church also offered to provide the Biemonds with assistance with light housework and help with child care, and made arrangements for this assistance to be provided. Ultimately, the couple incurred expenses for home care provided by the church in the amount of \$15,173. This included assistance provided when Ms. Vander Heide was ill, but also assistance provided to Mr. Biemond when he was residing in the home with the children. Prior to trial Mr. Biemond had made a payment of \$4,000 to reduce this bill, and Ms. Vander Heide had made a small payment, but \$11,013 remained outstanding at time of trial. I am satisfied Mr. Biemond has had the ability to pay this, but had chosen not to do so.
- [26] In an attempt at reconciliation, Ms. Vander Heide amended her Petition to withdraw her claim for divorce, and on February 27, 2003, the couple reconciled and began living together again. Their youngest child, Hendrik, was born on March 28, 2003. In May 2003, Ms. Vander Heide discontinued her first lawsuit.
- [27] However, the reconciliation was short-lived and at the end of June 2003, Mr. Biemond left the family home and moved to Agassiz. Ms. Vander Heide's mental health had deteriorated significantly after her return to the family home and in July 2003 she was admitted to a mental health facility in Abbotsford, where she stayed for a few days. She returned to that facility for about two weeks in late August and early September and then was admitted to hospital on September 12, 2003, where she remained for just over two weeks. During this time, Mr. Biemond moved back into the family home, so when discharged from hospital at the end of September, Ms. Vander Heide moved to a Transition House where she remained until she was granted exclusive possession of the family home in an order made by Master Brine (as he then was) on October 31, 2003. Master Brine ordered that the children's primary

residence would be with Ms. Vander Heide. Mr. Biemond moved into a camper parked in the yard of friends. He continued living there until he purchased his current residence.

- [28] Mr. Biemond was ordered to pay all household bills issued up to October 31, 2003. Master Brine was advised that Mr. Biemond's Guidelines income was \$40,000 and ordered that he pay \$891 per month to Ms. Vander Heide for child support, commencing November 1, 2003, and \$509 per month for spousal support, commencing on the same date. The total of \$1,400 per month was to be paid in two monthly instalments of \$700 each on the 1st and 15th of each month.
- [29] This order also provided for the parties to share joint guardianship. Mr. Biemond was granted reasonable and generous access to the children. On March 25, 2005, the parties consented to an order that Mr. Biemond have access to two of the four children each weekend, from Saturday at 9:00 a.m. to Sunday at 6:00 p.m., with the pick up and drop off of the children to take place in the driveway of the former family home. When the two older children were visiting their father, the drop off was extended to 9:00 p.m. Mr. Biemond agreed not to denigrate the plaintiff in the presence of the children, agreed to initiate and participate in counselling with the children through the Ann Davis Transition Society, and agreed to surrender the children's passport to his counsel.
- [30] Following the making of the October 31 support order, Mr. Biemond paid some of the child and spousal support he was ordered to pay, but by June 30, 2006, he was significantly in arrears.
- [31] It is clear that the court did not consider Mr. Biemond to be unable to pay the support owing, however, because on July 1, 2006, Master Bolton made an order increasing the quantum of child support to \$960 per month, and the quantum of spousal support to \$855 per month, both commencing August 15, 2006. Mr. Biemond was also ordered to pay \$171 per month for day care costs, commencing September 15, 2006, and was also ordered to pay the full tuition fees for the three oldest Biemond children at MCCS.
- [32] Ms. Vander Heide testified that Mr. Biemond missed some further payments and that by April 15, 2007, he was \$11,794.20 in arrears of payments of spousal and child support. Ms. Vander Heide registered with the Family Maintenance Support Program in July 2006.
- [33] Ms. Vander Heide had approximately \$27,000 in a RRSP in her name when the couple separated. From October 2003 until July 2006 she had income of only about \$2,400 a month and was unable to support herself and the four children. In order to meet household expenses, she began cashing in the RRSP. Mr. Biemond appears to have agreed with this course of action, as at one point Mr. Biemond told Ms. Vander Heide that he could not pay the support he owed and that she should use the RRSP. Eventually she cashed in \$25,800 of the RRSP between November 11, 2003, and March 2006, receiving \$23,120 after the tax holdback. Some of these funds were used to purchase a newer used vehicle for the family's use; Ms. Vander Heide paid the property taxes on the family home for the years 2004 to 2007 inclusive, and the balance of the funds were used to meet the family's expenses. At times,

Ms. Vander Heide resorted to the Food Bank in Chilliwack when she had insufficient funds to meet the needs of the children and herself, and friends she met at a bible study group also helped out by buying groceries and gas for her and the children. She told Mr. Biemond she needed more money, but he told her she should be able to get by on the income she had.

- [34] Ms. Vander Heide has not been hospitalized for her mental health since September 2003 but she has continued to seek support from Mental Health Services in Chilliwack. In the fall of 2006, she attempted to return to work as a teacher's aide at the Mennonite Educational Institute in Chilliwack, working with children with special needs for one and a half days a week. She earned about \$2,400 doing this work. She completed the fall term, but found the work too stressful and demanding and was unable to return to work after Christmas of that year. In order to teach in the regular school system, Ms. Vander Heide would have to return to university for at least one year, and perhaps longer. Hendrik will start pre-school in the fall of 2008.
- [35] In June 2007, Ms. Vander Heide married Robert Vander Heide. Mr. Vander Heide was 21 years old at time of trial. After graduation from high school, he completed a two year program in architectural engineering at BCIT, but was unable to find work in that field in the upper Fraser Valley, so has found work as a framer. He has a student loan totalling \$14,000 and pays \$200 a month on that loan. I referred earlier to the facts concerning his income in 2006 and 2007 agreed by the parties. Mr. Vander Heide also borrowed money to replace the older vehicle that Ms. Vander Heide was driving when that vehicle became unreliable. He owes \$20,000 on that loan and pays \$450 a month in loan payments.
- [36] Ms. Vander Heide receives between \$892 and \$970 a month in child tax credits, plus \$100 as a subsidy towards her child care costs for Hendrik. She gets a GST refund of \$75 every three months, and her only other source of income, besides contributions to household expenses made by Mr. Vander Heide, is the child and spousal support paid by Mr. Biemond.
- [37] Since separating from Mr. Biemond, Ms. Vander Heide has found that the doctrine and beliefs of the church previously attended by her and still attended by Mr. Biemond no longer accord with her own beliefs. She remains a devout Christian and has since found a new church - the Alliance Church - in which she feels comfortable and has become very active. The children attend church with her when they are at her home on Sunday, and there are also activities during the week associated with the church community.
- [38] Ms. Vander Heide testified that the Reformed Congregation to which she formerly belonged, and which Mr. Biemond still attends, discourages contact between members of that church and non-members, and that after separating from Mr. Biemond, and having revised some of her thoughts and beliefs about religion, she has lost all her former friends. She feels unwelcome at her children's school, where women are expected to wear dresses, and to refrain from cutting their hair, or wearing jewellery. The beliefs of the church now attended by her and by the children, when they are with her, differ from those supported by the children's school and the church the children attend with Mr. Biemond. For example, the

Reformed Congregation does not believe in celebrating Christmas with gifts, trees or decorations, and Ms. Vander Heide and the children now celebrate Christmas in that way. Ms. Vander Heide also objects to the Reformed Congregation's insistence on recourse to one version of the Bible alone. She is concerned that the differences among beliefs and practices now encouraged in her home, and those required by MCCS, will cause confusion for the children, particularly the two youngest children. She is also concerned that her ability to volunteer at the children's school and participate in school activities involving her children is restricted, and that she is made to feel uncomfortable when she goes to the school or attends school functions.

- [39] At the time the parties separated, Mr. Biemond was doing construction and renovation work with a friend. In April 2004, he incorporated his current company - MBE Construction Ltd. This company does home renovations and constructs new homes, both for speculative sale, and on a custom basis, in the Chilliwack area. The company has done very well. Initially Mr. Biemond did all the work himself except on occasion when he hired temporary labourers. However, by June 2007 his company had become so busy that he hired a full time employee. Mr. Biemond purchases properties through his company, builds homes on the properties and sells those homes. The company now builds two or three homes at a time and Mr. Biemond estimated that the company earns a profit of between \$15,000 and \$40,000 on each home. The company's first financial statement indicates that in its first year of operations it paid a management salary of \$71,000. In 2005 the company paid Mr. Biemond \$51,000, according to his testimony. He testified that at some point he began taking a monthly draw of \$5,000. He had not yet prepared and filed a 2006 tax return at time of trial, either personally, or on behalf of the company.
- [40] It is clear that the company has been profitable throughout the past several years since its incorporation. Mr. Biemond has been able to use retained earnings in the company to acquire land and finance construction projects, as well as enabling him to acquire his present residence and support a comfortable lifestyle for himself. It is clear that in addition to the salary the company pays him, the company also provides him with other valuable benefits, including the use of a company vehicle.
- [41] Mr. Biemond testified that after the couple separated a second time, he lived in a camper in the yard of friends in the Agassiz area from July 2003 until September 2005, when he purchased a home in the Rosedale area. He paid \$236,000 for the property, and used \$65,000 of company funds to acquire the property, borrowing the balance from a bank. Mr. Biemond was able to repay the money borrowed from his company in April 2007, by refinancing the property. He believes the home is now worth about \$300,000.
- [42] In addition to the salary the company pays Mr. Biemond, he realizes other benefits. I have already mentioned that the company contributed funds to the acquisition of his home and that he drives a company vehicle and is able to have some other living expenses paid by, or subsidized by the company, with the resulting tax advantages. Mr. Biemond claimed to be spending in excess of \$40,000 a year in an earlier property and financial statement. He has

acquired a number of recreational vehicles, including a 4-wheel all-terrain vehicle purchased in 2006, a motorbike purchased to replace one he had at the date of separation, and a 21 foot recreational boat.

[443] Mr. Biemond testified about his plans to marry again. His fiancée, Hannah Elgersma, has three children from a previous marriage, whose ages were 9, 8 and 6 at time of trial. These children attend MCCS and the youngest of Ms. Elgersma's children is in the same grade as the Biemonds' daughter Aletta.

[444] Mr. Biemond's home and that of Ms. Elgersma are only 800 metres apart, and both homes are located only 5 kilometres from MCCS. There is school bus service between their homes and the school.

[445] Although I am satisfied that Mr. Biemond has paid less child and spousal support in the years since separation than he could, and therefore should have paid, the parties provided the court with little assistance on the financial issues. The parties have taken substantially different positions about the income to be attributed to Mr. Biemond for the purposes of calculating the child support that should have been paid in past years, and therefore the arrears of child support; and the income that should be used to set the quantum of child support and/or spousal support for the future. Neither party called the accountant who was said to be preparing the 2006 tax return for Mr. Biemond's company.

[446] Counsel for Ms. Vander Heide submitted that the court should conclude that the arrears of support should be set at \$56,000. Counsel for Mr. Biemond submitted that the court should set off any arrears against the funds from the RRSP utilized by Ms. Vander Heide and consider the arrears to be nil. The parties also disagree substantially about the income figure to be attributed to Mr. Biemond going forward. I turn now to the issues raised by the parties at trial.

1. Where should the children attend school?

[447] I have carefully considered Ms. Vander Heide's testimony about her misgivings about the religious doctrine the children are taught at MCCS, and about the potential impact on the children of the different beliefs and practices accepted at Ms. Vander Heide's home, but disapproved of by the school.

[448] I have, nevertheless, determined that it is in the children's best interests to continue to attend MCCS. I have made this decision taking the following matters into account.

[449] Ms. Vander Heide did not seek to demonstrate that the educational standards of MCCS are deficient, and the principal of the school testified to the standards maintained by the school and its adherence to Ministry of Education requirements. Ms. Vander Heide and Mr. Biemond decided together to have their children attend MCCS at a time when both of them accepted the religious beliefs incorporated into the educational philosophy of the school. Mr. Biemond continues to adhere to those beliefs. As Ms. Vander Heide has rejected some of those beliefs, the children will, quite naturally, be exposed to new ideas and different

practices and beliefs at the church they now attend with their mother, and in the home they share with their mother and Mr. Vander Heide. This is not uncommon in intact families, and even more common in families affected by marriage breakdown. Ms. Vander Heide and Mr. Biemond are intelligent individuals. I believe them both to be capable of assisting the children to understand that people can hold different religious beliefs and that tolerance is right and necessary. In any case, differences in the views of the parents and their friends about religion cannot be avoided in the circumstances of this case, and the children have no doubt already faced that reality.

- [50] The testimony of the principal of MCCS appeared to me to acknowledge that while the school expects that parents will encourage their children to adhere to the religious doctrine that is supported in the school's philosophy, Ms. Vander Heide's views can be accommodated. I understand she may feel uncomfortable, but as her confidence grows, I am satisfied that she will be able to participate more fully in the life of the school, notwithstanding her rejection of some of the religious doctrine underlying the school's philosophy and teachings, and the changes that she has made in her life.
- [51] Johannis and Wilhemina wrote letters introduced into evidence that indicate that they wish to remain at MCCS. Although Mr. Biemond suggested to the children that they write the letters, the content of the letters - their stated preference to continue to attend MCCS - appears to be a genuine expression of their wishes. Ms. Vander Heide acknowledged that these two children do not wish to change schools. The third child, Aletta, had just started Grade 1 at MCCS at time of trial, and she was more ambivalent. I am not persuaded, however, that it makes sense for the older children to attend one school and the younger children, another. Attending different schools could lead to conflict among the children, and would make the access arrangements more complicated and difficult.
- [52] These children have had a lot of changes and uncertainty in their lives in the past five years. The one constant - at least for the two older children - has been their school. I am not persuaded that it is in their best interests to require them to adjust to yet another major change in their lives.
- [53] Mr. Biemond lives close to the school and the children can travel to and from his home by school bus. This means that access exchanges can be accomplished, if arranged appropriately, without requiring Ms. Vander Heide or Mr. Biemond to pick up or drop off the older children. It would also make it possible for the three older children, and eventually Hendrik also, to spend mid-week overnight visits with Mr. Biemond, if the children and the parties found this to be convenient.
- [54] There is also the fact that Ms. Elgersma's children attend MCCS. If Mr. Biemond and Ms. Elgersma marry, it would make sense for all the children associated with their household to attend the same school, even though the four Biemond children will continue to have their mother's home as their primary residence.

[55] For all of these reasons, I have concluded that the children should continue to attend M CCS.

2. What should the access regime be?

[56] At the outset of these Reasons I outlined the respective positions of the parties regarding access. Mr. Biemond wishes to have all four children on two of four weekends each month, and two of the four children on a third weekend. Ms. Vander Heide wishes the access regime to include all four children spending alternate weekends with Mr. Biemond. Neither parent suggested any mid-week access for the children with Mr. Biemond, although given the proximity of the children's school and the apparent availability of school bus service, this would be convenient. Such an arrangement should be considered by the parties, as the mid-week access could be arranged for two children at a time.

[57] The parties also disagree about the arrangements for pick-up and drop-off. Ms. Vander Heide does not wish Mr. Biemond to come to her home to pick-up or drop-off the children.

[58] At present Ms. Vander Heide is not working outside the home so she is able to see the children before and after school every day. Mr. Biemond submits that this means that it is less important for Ms. Vander Heide to have weekend time with the children. Ms. Vander Heide submits, however, that she also needs to have opportunities for weekend activities with the children, including camping trips.

[59] I am satisfied that Ms. Vander Heide's proposal for access on every second weekend with all four children is in the best interests of the children. This allows both parents opportunities at the weekend to organize activities with the children. As a compromise, however, and in order to ensure that the bond between Mr. Biemond and the children remains strong, I am ordering that every second weekend that the children are with Mr. Biemond should be extended to begin Thursday evening after school until Tuesday morning before school. That is, on the first access weekend of each month, the children shall be with Mr. Biemond from Friday after school until Monday before school (unless a long weekend, which is already addressed in the consent portion of the order). On Mr. Biemond's second access weekend of each month, the children shall be with Mr. Biemond from Thursday after school until Tuesday before school.

[60] Each parent should consult with the other before committing the children to weekend activities, in order that the children's time with each parent not be overly committed.

[61] Ms. Vander Heide testified that she would prefer that Mr. Biemond not pick up the children at her home, as she feels uncomfortable having him on the property, and he has on occasion entered the home without her consent. Mr. Biemond testified that in the past 18 months he has entered Ms. Vander Heide's home only once, at Aletta's request, to see something in her bedroom that she wished to show to him.

- [62] I am not persuaded that it is necessary in the circumstances to have the exchanges take place at a neutral location. There will be an order that Mr. Biemond not enter Ms. Vander Heide's home without an express invitation from her or her husband. If the children are not ready when he arrives to pick them up, he is at liberty to make his presence known by knocking at the door, and speaking to the person who opens the door, but should then return to his vehicle and wait for the children there.
- [63] Once all of the children are in school, most of the exchanges may be able to be accomplished by school bus. In the interim, and during vacation exchanges, Mr. Biemond shall pick the children up at Ms. Vander Heide's home at the start of the access visits and Ms. Vander Heide shall pick the children up at Mr. Biemond's home at the end of the visits.
- [64] Each party should avoid situations where a request to shorten or extend a visit is made on short notice as this leads to conflict, and emotional upset for the children.
3. What are the arrears of support?
- [65] This issue is complex and, as stated earlier, complicated by the failure of the parties to call accounting evidence, and the fact that neither Mr. Biemond nor his company had filed current tax returns by time of trial. I expect that since the trial ended, he has filed those returns, and that the parties may need to make adjustments based on current information, or even return to court for further directions. The 2007 tax year returns will also need to be filed soon and there may be further adjustments required. If the parties are unable to agree on the income figure to be used to calculate child support at present and on an ongoing basis, they are at liberty to apply.
- [66] The first support order was made on October 31, 2003, by Master Brine (as he then was). The order recites that the court was advised that Mr. Biemond had a guideline income at that time of \$40,000. Mr. Biemond was ordered to pay \$891 monthly for child support, commencing November 15, 2003, and \$509 monthly for spousal support.
- [67] Counsel for Ms. Vander Heide made various submissions about the arrears of child support for this period. In his opening, he submitted that there were arrears of \$9,800 by the end of July 2006. I understood this submission to include arrears of both child and spousal support, based on Master Brine's October 31, 2003 order.
- [68] Counsel for Ms. Vander Heide also submitted, however, that Mr. Biemond's income during this period was considerably higher than the \$40,000 figure provided to Master Brine. As I understand his submission, it is that Mr. Biemond's income from April 1, 2004, to March 31, 2005, should be found to have been \$71,000 and that the child support alone should therefore have been \$1,448 per month during that period. Counsel suggested the arrears for this period would therefore be \$6,684. It is unclear, however, if counsel is suggesting those arrears are in addition to the arrears of \$9,800 referred to earlier, or part of those arrears.

- [69] I assume it is the former. The mixing of time periods, however, makes it difficult to make sense of the calculations proposed by Ms. Vander Heide's counsel, or the response of Mr. Biemond's counsel to those calculations.
- [70] The best evidence of the arrears based on Master Brine's order is Ms. Vander Heide's calculation, done at the time she enrolled with the Family Maintenance Enforcement Program in July 2006. I find the arrears owing under the order to the end of March 2005 to be \$5,600. Some of those arrears may relate to the order for child support and some to the order for spousal support. It is impossible to allocate the arrears mathematically, as the parties did not allocate them in a precise manner at the time. I have determined that the arrears should all be treated as arrears of child support.
- [71] Counsel for Ms. Vander Heide submits, however, that Mr. Biemond's income during this period was higher than the \$40,000 on which the court based the quantum of child support. He submits that Mr. Biemond's income should be considered to have been \$71,000 during the period April 1, 2004, to March 31, 2005, and that the child support payment during that period should therefore have been \$1,448 per month rather than the \$891 ordered by Master Brine. As I understand his submission, therefore, the actual arrears of \$5,600 together with the arrears based on the higher income figure would result in a total of \$12,284 in arrears for the period from October 31, 2003, up to and including March 31, 2005.
- [72] In his 2004 tax return, Mr. Biemond reported income of \$33,000. In his 2005 tax return he reported income of \$35,500. The financial statement for Mr. Biemond's company - MBE Construction Ltd. - for the year ending March 31, 2005, shows management salaries paid of \$71,000. Mr. Biemond said that included salaries paid for 2004 and 2005, but that evidence is questionable, since the company was only incorporated in April 2004, and therefore had only been in operation for 12 months when the March 31, 2005 financial statement was prepared. I conclude, therefore, that Mr. Biemond's income during the period April 1, 2004, to March 31, 2005, was \$71,000 and I accept the submission of plaintiff's counsel that the arrears of child support for that period should therefore be set at \$12,284.
- [73] The arrears based on Master Brine's order for the period April 1, 2005, to March 31, 2006, based on Ms. Vander Heide's record, are \$4,200. I shall treat this amount as arrears of child support.
- [74] In addition, however, counsel for Ms. Vander Heide submits that Mr. Biemond's actual income during this period should be considered to have been \$113,000. Mr. Biemond's counsel disagrees, although he appears to concede that Mr. Biemond's income during this period was higher than the \$40,000 figure used by Master Brine. He submits that the court should conclude that Mr. Biemond's income was actually \$55,500 during this period.
- [75] Although the trial took place in September 2007, Mr. Biemond had not yet filed his 2006 tax return (which was due April 30, 2007) and the financial statement for his company for the period ending March 31, 2006, was also unavailable. I consider it unlikely that Mr. Biemond's income during this period was less than the income in the preceding 12-month period. I am

not persuaded, however, that it was as high as the \$113,000 submitted by plaintiff's counsel. In addition, it must be recalled that the court had also ordered the payment of interim spousal support. If the child support figure had been based on the income submitted by plaintiff's counsel, it is possible, although by no means certain, that the interim spousal support quantum would have been adjusted downward.

- [76] I stated earlier that in addition to the salary paid to him directly by the company, Mr. Biemond was able to realize other benefits from the company, and had access to some of the retained earnings of the company for his own use and benefit. I understand and accept that some retained earnings must remain in the company to be used to acquire new properties and help to finance the early stages of construction. Taking this into account, I conclude that Mr. Biemond's income for this period should be considered to have been equal to his previous year's income and set it at \$71,000. The Guidelines amount for four children would have been \$1,448. The arrears resulting from the difference between that amount and the amount ordered to be paid is \$10,884.
- [77] Accordingly, adding the arrears for the first and second periods, we arrive at total arrears of child support of \$23,168 as of March 31, 2006.
- [78] It appears that after Ms. Vander Heide enrolled with FMEP at the end of June 2006, Mr. Biemond paid the child support and spousal support he was ordered to pay. On July 31, 2006, Master Bolton increased the quantum of child support to \$960 per month and the quantum of spousal support to \$855 per month, both commencing August 15, 2006. In addition, Mr. Biemond was ordered to pay \$171 a month for daycare costs for the children, and all of the tuition fees payable to MCCC.
- [79] Counsel for the plaintiff submits that Mr. Biemond's income should be considered to have been \$150,000 from May 1, 2006, to date. He selected that date, rather than April 1, because the new Federal Guidelines came into effect on May 1, 2006.
- [80] Counsel for Mr. Biemond submits that Mr. Biemond's income in 2006 should be considered to be \$75,000. He suggests the same figure for 2007 up to October 1, 2007, and a figure of \$85,000 after October 1, 2007.
- [81] Given my earlier conclusions that Mr. Biemond was already earning \$71,000 in the earlier years, I consider the figures proposed by Mr. Biemond's counsel to be too low. Because it is Mr. Biemond's failure to have financial statements and tax returns prepared in a timely fashion that makes this exercise somewhat speculative, I do not believe he should be given the benefit of any uncertainty. I am not persuaded based on the current evidence available, that Mr. Biemond has been earning in excess of \$100,000, although once the company financial statements have been prepared, the court's estimate may prove to be too low.

- [82] I have determined that Mr. Biemond's income for the period April 1, 2006, to March 31, 2007, should be imputed to be \$85,000 and that child support should be calculated on that basis. For the period April 1, 2007, to March 31, 2008, it should be imputed at \$100,000, and the child support should be calculated on that basis. In each case, of course, Mr. Biemond must be given credit for child support payments actually paid. Counsel should calculate the arrears using the relevant Guidelines figures based on these determinations of income.
- [83] In future, Mr. Biemond and Ms. Vander Heide are ordered to prepare and file their personal and any corporate tax returns on the dates mandated by the Income Tax Act, and to exchange those returns and any notices of assessment or reassessment within two weeks after filing or receipt. If Mr. Biemond's current tax returns and corporate financial statements demonstrate that his income for Guidelines purposes has varied materially from the levels of income imputed to him in the preceding paragraphs, then either party is at liberty to apply to vary the quantum of child support.
4. How should the depletion of the RRSP be treated?
- [84] It is clear that if the RRSP continued in existence, it would be considered to be a family asset and an equal division would be presumed. This asset had to be depleted because Mr. Biemond was not paying the quantum of child and spousal support that he ought to have paid. Because an award of arrears has been made, however, it would constitute double recovery if Ms. Vander Heide were also to be compensated for one-half of the value of the RRSP. I have therefore determined that no compensation order shall be made in respect of the RRSP.
5. How should the debts be allocated?
- [85] Mr. Biemond has agreed that he should be responsible for paying the debt for the home care expenses. I conclude he has had the ability to retire this debt for some time but has chosen not to do so. Master Bolton's order required Mr. Biemond to pay the children's school tuition, but Mr. Biemond has allowed arrears to accumulate there also, although he has made "donations" to the school while failing to pay the tuition. He shall be responsible for paying the arrears of tuition, and has agreed and shall be responsible for paying all future tuition as well.
- [86] Mr. Biemond submits that there may be debts associated with wrapping up the company under which he operated at an earlier debt. At the time he formed his new company, that company appropriated a \$10,000 term deposit belonging to the earlier company. I see no reason why Mr. Biemond should not remain liable for any debts incurred by the previous company, or to be incurred in the event the company is dissolved, as he or his new company have control of all the assets of the earlier company. I so order. If Ms. Vander Heide's signature is required to allow the company to be wound up or dissolved, I direct that she cooperate with Mr. Biemond by signing the necessary documents to permit this to occur.
6. How should the sale of the family home be organized?

- [87] The parties agree that the former family home should be sold and the proceeds divided. Mr. Biemond submits that he should have a right of first refusal, but I am satisfied that such an arrangement is likely to discourage legitimate buyers and could potentially depress the price at which the property is sold. Accordingly, I direct that the property be listed for sale, on a multiple listing basis, with the parties to have joint conduct of sale. Mr. Biemond is free to submit a competitive offer to purchase the property if he wishes to do so. If the parties are unable to agree on a sale, either may apply to the court to approve the sale. Any remaining mortgage debt and all the expenses of sale, real estate commission and taxes should be paid out of the proceeds and the balance should be held in an interest-bearing account by plaintiff's counsel pending payment out to the parties of their respective shares of the proceeds.
7. How should the sales proceeds be allocated?
- [88] Ms. Vander Heide is seeking reapportionment of the proceeds of sale of the family home. She proposes that she receive 70% of the proceeds and Mr. Biemond 30%.
- [89] The parties had obtained appraisals of the home. The first appraisal was done as of March 13, 2007, and indicated a market value of \$375,000. The second appraisal was done as of September 20, 2007, and indicated a market value of \$364,000. The balance owing on the mortgage was estimated to be less than \$10,000.
- [90] Assuming real estate commission payable in the range of \$15,000, and a payout of the mortgage estimated at \$10,000, and a sale at \$364,000 to \$375,000, the proceeds available for distribution will range from \$339,000 to \$350,000. Allocating 70% of the proceeds to Ms. Vander Heide by way of reapportionment would result in a payment to her of \$237,300 to \$245,000, leaving Mr. Biemond with the balance.
- [91] I am satisfied that some reapportionment of the family's only asset of significance is warranted. I have already said that Mr. Biemond had the benefit of a \$10,000 term deposit when he incorporated his new company. He also took some other assets - recreational vehicles - that he later sold without accounting to Ms. Vander Heide for the proceeds.
- [92] More importantly, however, are other factors, including Ms. Vander Heide's need to become self-sufficient; the fact that her earning potential is minimal in comparison to that of Mr. Biemond; the fact that her role as primary caregiver for the children has, and will continue to impact her ability to earn an income; as will the state of her health. Although her health issues predate the relationship, the evidence supports a conclusion that the stress of the marriage and its dissolution, as well as Mr. Biemond's conduct towards her and the children, contributed to the deterioration in her mental health.

- [93] Ms. Vander Heide's counsel suggested that it is unlikely that she will be able to afford to purchase a house and is likely going to have to re-enter the market with a townhouse. Counsel estimated that she will require funds in the range of \$275,000 for such a purchase. Given that the four children will reside with Ms. Vander Heide, she will need a fairly large town home to accommodate the children's needs.
- [94] It is true that Ms. Vander Heide has remarried, but her new husband's situation - his relative youth, and the debt load he currently has - means that his contributions to Ms. Vander Heide's maintenance and that of her children will be minimal for the next couple of years. It is likely, however, that he can make some contribution towards payments on a mortgage on a new residence to be acquired for the Vander Heide household.
- [95] In all of the circumstances, I am of the view that the proposed 70/30 reapportionment is reasonable and order that Ms. Vander Heide receive 70% of the net proceeds of sale of the family home.
- [96] The arrears of child support calculated in accordance with the directions provided earlier in these Reasons should be paid out of Mr. Biemond's share of the proceeds of sale of the family home.
8. Should Ms. Vander Heide receive lump-sum compensatory spousal support?
- [97] Ms. Vander Heide is seeking an order for lump sum spousal support, to be paid out of Mr. Biemond's share of the proceeds of sale of the family home. Her counsel proposes a lump sum award of \$16,000, calculated as \$1,000 a month for 16 months.
- [98] Ms. Vander Heide did not testify that she intended to attempt to upgrade her education to make herself more employable. Her most recent attempt at re-entering the job market was not a success. However, Hendrik will be entering pre-school in September 2008 and I consider it likely that Ms. Vander Heide may find that after the stress and uncertainty of these legal matters is behind her, and Hendrik in school, that she will be able to manage working outside the home, at least on a part-time basis. She is an intelligent and well-educated woman, and re-establishing a career for herself could prove to be best for both her and the children, in the longer term.
- [99] The Biemond marriage was a relatively short marriage - eight years prior to separation. Mr. Biemond has been paying spousal support - although not a significant amount - since October 2003, a period of nearly four years to date of trial. Ms. Vander Heide is a relatively young woman, who is clearly intelligent and has post-secondary education. Nevertheless, I consider that some further spousal support is warranted, given Ms. Vander Heide's mental health issues, which were exacerbated by child-bearing and rearing and the stress of the marriage and the breakdown of the marriage.
- [100] However, I also consider that it would be unfair to impose a lump sum award as that would cast all of the risk of future exigencies on Mr. Biemond. I have already mentioned that Hendrik will be starting pre-school in the fall 2008 and I anticipate he will start Grade 1 in

the fall of 2009. At that point, Ms. Vander Heide should be in a better position to seek employment outside the home, and more of Mr. Vander Heide's income may be available to help support the household. I therefore order that Mr. Biemond pay Ms. Vander Heide the sum of \$1,000 a month for a further period of 16 months, ending with the payment on August 1, 2009. I consider this to be both a compensatory award, taking into account the role played by her as primary caregiver during the marriage, as well as an amount required to maintain her until she is able to manage employment outside the home.

COSTS

[101] Ms. Vander Heide has succeeded in the majority of the claims advanced by her and I award her costs of the action, to be calculated on Scale B.

[102] The parties are at liberty to apply for further directions in order to carry out the orders made by the court.

The Honourable Madam Justice Baker

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