

CANADA / JUDGMENT

Burgie v. Argent

2014 BCSC 364

COURT

Supreme Court of British Columbia

DECIDED

5 March 2014

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2014 BCSC 364 Burgie v. Argent IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Burgie v. Argent, 2014 BCSC 364 Date: 20140305 Docket: E38728 Registry: New Westminster Between: Brian David Burgie Claimant And Martine Alexis Argent Respondent Before: The Honourable Mr. Justice Jenkins Reasons for Judgment In Chambers Counsel for the Claimant: L. Kahn Counsel for the Respondent: T. Macdonald Place and Date of Hearing: New Westminster, B.C. October 30, 2013 Place and Date of Judgment: New Westminster, B.C. March 5, 2014

[1] Under unusual circumstances, the claimant applies to cancel or reduce all arrears of child support he owes for the benefit of his son, Harrison, who is now 18 years of age. As well, the claimant seeks cancellation of "all default, interest and penalty fees" owing to the Alberta Maintenance Enforcement Program ("MEP") and a determination of his future payments of child support and an allocation of s. 7 special and extraordinary expenses under the Federal Child Support Guidelines, SOR/97-175 [the Guidelines].

Facts

[2] Most of the facts are not in dispute and I quote below from portions of the facts set out in the claimant's notice of application: FACTUAL BASIS

1. The parties:

- (a) married on December 20, 1995;
- (b) separated on July 31, 1996; and
- (c) divorced on July 7, 1997.

2. There is one child of the marriage, Harrison David Burgie, born on September 9, 1995.

3. Harrison is 18 years old. He resides with his mother, the Respondent, in Metro Vancouver, B.C.

4. The Claimant resides in Canmore, Alberta.

5. The Claimant is 43 years old. He is self-employed as a tile setter and expects to earn \$55,000.00 gross in 2013.
6. On October 2, 1996, the parties entered into a Divorce and Property Agreement ("Agreement"). Both parties received independent legal advice.
7. Pursuant to the Agreement, the parties agreed to the following regarding child support:
CHILD SUPPORT 3.1 The Husband and the Wife acknowledge their joint obligation to support the child in accordance with their ability to pay. The Husband shall pay \$500 to the Wife for support of the child, each month. The support shall start on the first day of September, 1996, and continue on the first day of each month until the child:
 - (a) ceases to reside with or be dependent on the Wife; or
 - (b) has reached the age of eighteen (18) years; or
 - (c) is past the age of 18 years if the child resides with and is financially dependent on the Wife and:
 - i. cannot become financially self-supporting because of physical or mental incapacity; or ii. is attending a recognized secondary or post-secondary school full-time and earning passing marks, until obtaining his post-secondary first degree or qualification.3.2. This child support may be varied if there is an important change in circumstances of either of the parties. 3.3. The parties understand that the obligation to pay child support is a legally imposed obligation and that the enforcement of this obligation will be within the Wife's control. The Wife specifically confirms herein that she has no intention of enforcing this obligation unless there is a material change of circumstances of the parties. If the Wife breaches this provision, she agrees to indemnify the Husband for all reasonable costs arising there from including solicitor/client costs. ENFORCEMENT OF SUPPORT 7.3 All spousal and child support shall be paid to the Wife through the Director of Maintenance Enforcement [Alberta] .
8. On October 3, 1996, the parties entered into a consent order ("Consent Order") which includes the following terms:
 - [3] The Respondent shall pay to the Petitioner the sum of \$500.00 per month for the maintenance and support of the infant child of the marriage commencing October 15, 1996 and on the 15th day of each month thereafter until the child is no longer a child of the marriage.
 - [4] IT IS FURTHER ORDERED that the amounts owing under this Corollary Relief Order be paid to the Director of Maintenance Enforcement, and shall be enforced by the Director unless the creditor files with the Court and the Director a Notice in writing that she does not wish the Order to be enforced by the Director, pursuant to Section 7 of the Maintenance Enforcement Act.

9. Following the Consent Order, no child support was paid or enforced.
10. In October 1996, the Respondent and Harrison left Canada for Tokyo, Japan. This was the last meeting between the Claimant and Harrison. 11.
 - (a) On November 29, 2006, the Claimant received notice from the Maintenance Enforcement Program ("MEP") by way of a letter dated November 29, 2006, informing him that he was in default of payment and that they had previously sent him correspondence to which no response was provided.
 - (b) The Claimant informed MEP that he had received no previous correspondence from MEP and that he believed that the Respondent's new husband had adopted Harrison.
 - (c) The Claimant began making payment of monthly child support.
12. On May 23, 2007, MEP sent correspondence to the Claimant informing him that they were seeking a child status report from the Respondent. 13.
 - (a) On July 3, 2007, MEP sent correspondence to the Claimant informing him that they were closing their file as the requested child status report had not been provided by the Respondent.
 - (b) MEP further indicated that this did not necessarily terminate the maintenance obligation but that payments were no longer required to be submitted to MEP.
14. MEP then returned the payments made by the Claimant to him. 15.
 - (a) In April 2010, the Respondent contacted the Claimant.
 - (b) The parties remained in contact for two months and the Claimant had some conversations with Harrison.
 - (c) The Respondent denied having any knowledge of MEP.
16. In May 2010, the Claimant left for Berlin, Germany. 17.
 - (a) While in Germany, the Claimant's parents forwarded him a letter, dated July 2, 2010, addressed to him by the British Columbia office of the Family Maintenance Enforcement Program ("FMEP").
 - (b) The letter indicated that the Consent Order had been enrolled with FMEP as of July 2, 2010 and the record of payments included payments due as of October 15, 1996 and the total arrears of \$82,500.00. 18.
 - (a) The Claimant's parents forwarded a letter from MEP, dated August 26, 2010, to the Claimant.
 - (b) The Claimant tried contacting MEP but he was unsuccessful.
 - (c) The Claimant left Berlin, Germany and returned to Canmore, Alberta to address this matter. 19.

- (a) Upon the Claimant's return to Alberta, he contacted MEP and he was informed that he had to apply in British Columbia to vary the Consent Order.
- (b) Accordingly, the Claimant travelled to Vancouver to seek legal advice and he was informed that he had to apply in Alberta to vary the Consent Order.
20. MEP sent a letter to the Claimant, dated October 13, 2010, which indicated that unless they received full payment or satisfactory payment arrangements within 40 days that the Director may instruct the Federal Government to deny any Federal licences to the Claimant.
21. The Claimant has had the same mailing address and telephone number since the parties' separation.
22. The Claimant's parents address and telephone number has remained the same since the parties' separation.
23. The Respondent did not provide notice to the Claimant that she was seeking child support until July 2010 and this notice was provided through FMEP.
24. On January 25, 2011, the Claimant's Application was before Mr. Justice B.E. Mahoney of the Court of Queen's Bench of Alberta.
25. Mr. Justice Mahoney made a provisional order that the Appellant pay arrears from September 1, 2010 forward and he effectively cancelled the arrears prior to that date.
26. On July 6, 2012, Mr. Justice Williams refused to confirm the provisional order of Mr. Justice Mahoney.
27. On May 16, 2013, the Claimant appealed the Order of Mr. Justice Williams.
28. The appeal was allowed and the matter was ordered to be remitted to a Judge of the Supreme Court of British Columbia for a hearing pursuant to Section 17.1 of the Divorce Act to determine if the arrears of child support owed by the Respondent to the Claimant for Harrison pursuant to the Consent Order should be reduced or cancelled and to determine the amount payable for ongoing child support and special and/or extraordinary expenses.
29. Based upon the Claimant's income, the following is summarized: Year Income Child Support
1997* 12,813 104 x 12= 1,248 1998 6,529 0 1999 7,102 8 x 12 = 96 2000 1,562 0 2001 7,650 22 x 12
= 264 2002 8,497 44 x 12 = 528 2003 16,680 138 x 12= 1656 2004 15,051 124 x 12= 1488 2005
14,091 115 x 12= 1380 2006* 41,523 355 x 5 = 1775 384 x 7 = 2688 2007 80,769 746 x 12 =8952
2008 56,887 531 x 12 = 6372 2009 67,182 629 x 12 = 7548 2010 51,806 482 x 12 = 5784 2011*
53,141 495 x 12 = 5940 2012 40,506 369 x 12 = 4428 2013 40,506 369 x 12 = 4428 Total: \$54,575
30.
- (a) The Claimant has limited income.
- (b) The Claimant is unable to pay arrears of child support.

- (c) This would cause him financial hardship.
- [3] In her application response, the respondent set out the following under the heading "Factual Basis":
6. The Respondent asked the Claimant to pay child support, but he did not.
 7. The Respondent tried communicating with the Claimant through his family with no response. The Claimant made no attempt to contact the Respondent or to see the Child.
 8. The Respondent tried years later, in 2010 to contact the Claimant as the Child was ill. There was a brief contact.
 9. The Respondent, being 16 years old and still in high school, had no knowledge of the Maintenance Enforcement Program ("MEP"). She learned of it in about 2006 and enrolled in the program to enforce child support.
 10. MEP apparently contacted the Claimant about the arrears of child support. Due to communication difficulties with MEP, the Respondent was unaware of any child support payments and lost contact with them until she followed up and had to re-enrol.
- [4] There are also facts in the affidavits before me which are in dispute on this application. Some of those facts, such as how many times the respondent remarried, are entirely irrelevant to liability for child support arrears. However, whether relevant to the legal issue or not, the evidence before me calls into question the respondent's credibility. I find that the claimant's evidence is more believable than the respondent's, and that the respondent's evidence is generally not credible. The specific reasons for my so finding will become apparent as I review the evidence and make findings of fact.
- [5] In her affidavit of March 19, 2012, the respondent deposed:
14. After the Consent Order was made, there were times that I needed the Claimant's help and financial support. I asked the Claimant directly and through his family, at various times, for assistance with the Child. Most of the time I asked him to buy something that I needed for the Child. On other occasions, I asked the Claimant for financial help. The Claimant did not offer any assistance on any of the times that I asked. There is no additional evidence, from the respondent or otherwise, demonstrating that the respondent made these attempts to contact the claimant or his family to seek support for Harrison. I do not accept the respondent's evidence that she made many attempts to contact the claimant regarding Harrison's health and to seek financial assistance, but received no replies. The claimant continues to reside in Canmore, Alberta, and the claimants' parents and siblings are known to the respondent and have been living at the same addresses in Canmore and Calgary, Alberta since the time when the parties were together. It would have been very easy for the respondent to contact the claimant through his family. Furthermore, if she had seriously wanted to contact the claimant, it would have been simple for her to ask MEP to locate the claimant through his family in Alberta. No such attempt was made.

- [6] It is telling that nowhere in her two affidavits does the respondent say that she demanded the claimant pay the child support provided for in the Agreement nor did she attempt to enforce collection of the same through FMEP in British Columbia or MEP in Alberta, an option which was available to her under the terms of the Agreement.
- [7] Her lack of action in pursuing child support is consistent with her not ever having made a demand and is consistent with clause 3.3 of the Agreement that stated: The Wife specifically confirms herein that she has no intention of enforcing this obligation unless there is a material change of circumstances of the parties.
- [8] It was not until October 2006 that the claimant received a demand for payment from MEP informing him he was in default of payment of child support. In the affidavit of March 19, 2012, the respondent stated she learned for the first time about the child support enforcement program (that is, MEP) in 2006. I find that evidence unbelievable since enforcement of the payment of support was specifically mentioned in the Agreement.
- [9] Presumably, the respondent did go to MEP in October 2006 and as a result of her contact with MEP, the claimant received a demand for payment for arrears for ten years. He then made payments for monthly child support and advised MEP that he understood Harrison had been adopted by the respondent's current husband. As the respondent did not reply to MEP after a request for a child status report, in July 2007, MEP returned all payments that the claimant had made following the demand received in late 2006. Therefore, in spite of the claimant having paid FMEP on demand, the respondent's failure to reply to FMEP (the evidence discloses that after going to FMEP, she travelled with Harrison to Central America for a lengthy period) would indicate the respondent was not in need of the funds. The claimant was not at fault as he had paid when demanded and then the funds were returned to him.
- [10] Following the July 2010 correspondence from FMEP demanding arrears of child support of \$82,500, the claimant eventually commenced this proceeding. Since that time, this matter has been before the courts of Alberta and British Columbia. FMEP and MEP have advised the claimant that his passport and other government issued documents will not be renewed while he is in default of child support payments.
- [11] The respondent's claim that she has only re-married once since the parties were married, while not relevant to the determination of liability for child support arrears, further calls into question the respondent's credibility. The respondent filed an affidavit stating she admits to having married Henry Chen in 2003, and adding, "[t]his was my only marriage after being divorced from the claimant, not my third marriage as the claimant states". The claimant filed a further affidavit appending a copy of a marriage certificate from Clark County, Nevada, indicating that a Martine Alexis Argent of Calgary, Alberta, had married Rodrique Menard on August 23, 1998.

- [12] The claimant has deposed that at one point he had understood that Harrison had been adopted by Mr. Chen, however, that fact is denied by the respondent. While I do not need to determine whether Harrison was adopted by Mr. Chen, for the purposes of determining credibility, I find that Mr. Burgie's belief was reasonable based on what he knew, and that this claim was not made in bad faith. There is certainly evidence to support the claimant having come to that opinion. He deposed he has not seen Harrison since October of 1996. The claimant also deposed that on his Facebook account, Harrison uses the last name of "Chen" and that he contacted a minister named "Todd" at the respondent's church in early 2013 and that person acknowledged that Harrison Chen attended that church. I accept that such evidence is hearsay, however, that statement was not rebuked by the respondent. Generally, I believe the statement is reliable.
- [13] The respondent filed a Form 8 in March 2012 which shows an income for 2011 and 2012 of \$6,000 each year. She derives her income as a model and has travelled extensively over the years for assignments. In 2012, the respondent indicated expenses of \$47,000 which included \$1,000 per month for Harrison's hockey activities. The respondent included debt of \$7,200 to her parents as her only debt. The respondent also deposed that her current husband is starting a new business, his income is minimal and they have been living off family savings. Based on the above information, the remainder of her Form 8, and other evidence in her affidavits, I find that her Form 8 does not reflect her true financial situation. With \$6,000 income per year, she could not afford her rent, let alone any other costs including the costs of supporting Harrison, without increasing her debt much more substantially. I therefore do not accept the respondent's claims about her financial situation. The claimant's Form 8 filed October 4, 2013, lists income for 2012 of \$53,141 from his one-man tile placing proprietorship. In the previous two years, his income was very similar to that of 2012. The claimant's assets are nominal and include two older vehicles, a very small RRSP of \$5,000 and minimal amounts in his bank accounts. He does not own real property. The claimant's 2012 income tax assessment form indicates he has been deducting child support payments from his income. These payments were commenced in 2010 and currently amount to \$438 per month. The total arrears for child support, MEP fees and interest is currently \$87,576.35. The respondent has been living in the Vancouver area with Harrison and her current husband for several years. Currently, Harrison is nearing graduation from high school, plays hockey competitively and is generally flourishing.
- [14] I now turn to a summary of the law applicable to applications for payment of arrears of child support. Legal Principles: Payment of Child Support Arrears
- [15] Section 17.1 of the Divorce Act, R.S.C. 1985, c. 3 (2d Supp.), permits a court to vary child support based on affidavit submissions of the parties: 17.1 Where both former spouses are ordinarily resident in different provinces, a court of competent jurisdiction may, in accordance with any applicable rules of the court, make a variation order pursuant to subsection 17(1) on the basis of the submissions of the former spouses, whether presented orally before the court or by means of affidavits or any means of telecommunication, if both

former spouses consent thereto.

- [16] The Divorce Act treats cancellation or variation of arrears as an application to vary child support, which must be done in accordance with the applicable guidelines: 17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
- (a) a support order or any provision thereof on application by either or both former spouses; .
 - (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order. (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.
- [17] Section 14 of the Guidelines outlines circumstances that would warrant variation of an order:
14. For the purposes of 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
- (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support;
- [18] Applications to cancel arrears of child support most commonly refer to Madam Justice Martinson's decision in *Earle v. Earle*, 1999 BCSC 283. Martinson J. set out the basic principles for these applications as follows: MAINTENANCE - SUMMARY
- [46] These basic principles can be summarized this way:
- 1. Maintenance Generally
 - a. Parents have a joint and ongoing legal obligation to support their children.
 - b. It is the child, not the other parent, who has the right to maintenance.
 - c. The payment of maintenance is based on not just what a parent does earn but what a parent can earn.
 - 2. Variation
 - a. There has to be a material change of circumstances, a change that is significant and long lasting.
 - b. A change to the Guideline amount is not automatic.
 - 3. Arrears Basic Principles

- a. There is a heavy duty on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so.
- b. If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away. Examples
 - a. Arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future.
 - b. A reduction or a cancellation requires detailed and full financial disclosure, under oath (usually in the form of an affidavit) that at the time the payments were to be made:
 - i. the change was significant and long lasting and ii. the change was real and not one of choice and iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.
 - c. Responsibility for a second family cannot relieve the parent of his or her legal obligation to support the first family.
 - d. Delay in enforcement is generally not a legal basis to cancel or reduce child support arrears.
 - e. Judges will not cancel arrears because the other party gets a lot of money at once. Otherwise, people would be encouraged to not pay maintenance and rewarded for not paying maintenance.
 - f. Judges will not cancel arrears because the children were looked after in spite of the non payment.
 - g. Nor will judges cancel arrears because the children no longer need the money. The children should be compensated for what they missed.
 - h. An agreement between parents that the maintenance for the children does not have to be paid will not be considered.
 - i. Lack of access between a parent and child is not a legal reason to reduce or cancel arrears.
 - j. Judges will not reduce or cancel arrears because other money has been spent to buy things for the children.
 - k. The fact that a person did not have legal advice when the order was made or during the time when the arrears added up, is not, by itself, a reason to reduce or cancel arrears.
- [19] Prejudice by delay, serious hardship or unfairness in the circumstances may all constitute "material changes of circumstance" depending on the situation: *Anderson v. Anderson*, 1999 BCCA 147 at para. 10; *Llewellyn v. Llewellyn*, 2002 BCCA 182; *Sidhu v. Sidhu*, 2014 BCSC 296 at paras. 47-48. The principle, as it applies to delayed enforcement of child support payment, was set out in *Anderson* at paras. 8-10:

- [8] If I were free to do so, I would cancel some of these arrears because of a lack of effort on the part of the wife to compel payment, and I do not think arrears should be allowed to accumulate for many years without some effort being made to enforce payment.
- [9] However, the authorities decided by this court are against such a proposition, the principal reason being that a parent has an obligation to support his children and such obligations should not lightly be set aside, particularly on the grounds of non-enforcement: *Meyers v. Meyers*, Vancouver Registry, CA018995, 13 February 1996.
- [10] As I read the authorities, it is necessary in order to obtain cancellation of arrears to establish prejudice by delay, serious hardship or unfairness in the circumstances.
- [20] Therefore, while delay in enforcement is not generally a basis to cancel or reduce child support arrears, delay in enforcement may be a factor in determining prejudice by delay, serious hardship or unfairness in the circumstances that constitute a material change in circumstances such that the payor would be unable to pay now or in the future.

Analysis

- [21] The claimant does not dispute that he has a joint and ongoing obligation to support his son. His conduct in the past has reflected his acknowledgement of this obligation as when child support payments were demanded of him in 2006 and again in 2010, he responded by making payments. He continues to do so.
- [22] On all the evidence, I find that the claimant has demonstrated on a balance of probabilities that there is a material change in circumstance based on prejudice by delay, and the serious hardship and unfairness in the circumstances that would be caused if he had to pay all the arrears.
- [23] From my review of the evidence, it is clear that the claimant thought his obligation to pay child support was within his former wife's control, as stated in clause 3.3 of the Agreement. I find that he did not understand that he had an obligation to pay child support even if he former wife did not demand support. As of the date of the Agreement, October 2, 1996, Earle had not been decided and it had not been clearly stated that "[a]n agreement between parents that the maintenance for the children does not have to be paid will not be considered": Earle at para. 46.
- [24] I agree with Madam Justice Martinson that an agreement foregoing child support is not to be considered in a determination of a child's entitlement to support, and Mr. Burgie's failure to understand these principles does not, without more, change his obligations. However, I accept that his failure to pay for approximately ten years after the agreement was executed was not in bad faith, as his evidence, which I accept, demonstrates. The claimant's good faith reliance on this agreement has contributed to prejudice to him caused by the delay in enforcement. Furthermore, I am conscious of the Court of Appeal's statement in *Llewellyn* at para. 19:

- [19] I do not agree with the chambers judge that no weight can be given to an agreement to vary support upon a change in circumstances. Such an agreement is a factor to be considered in determining whether the paying parent has established the "prejudice by delay, serious hardship or unfairness in the circumstances," Chief Justice McEachern held (in *Anderson*, supra) the authorities required. That expression of the rule regarding the defence of enforcement proceedings permits a payor who has defaulted to defend such proceedings by reference to facts that would render unfair the enforcement of the order. In some circumstances, an agreement to vary might carry significant weight in that regard. While the agreement between the parties was not an agreement to vary, as I interpret this passage, agreements regarding support between the parties that may not be otherwise operational may be considered in determining whether the payor has established prejudice by delay, serious hardship or unfairness in the circumstances.
- [25] As stated at para. 46, item 3(d) in *Earle*, the respondent's delay in enforcing the agreement should not cancel or reduce arrears. In dealing with delay, Madam Justice Martinson came to the same conclusion on delay as the Court of Appeal had decided in *Cherry v. Cherry* (1996), 24 B.C.L.R. (3d) 158: . . . The right to child support belongs to the child and not to the custodial parent. Delay in enforcing the child's right to support is not generally a relevant factor because the child cannot waive his or her right to support nor can the custodial parent waive those rights on the child's behalf. However, as *Anderson* adds, delay should be considered to the extent the delay has prejudiced the claimant's ability to pay the arrears.
- [26] The circumstances currently facing the claimant are completely different than they were in 1996. If a demand for payment had been made in or shortly after execution of the Agreement in October of 1996, the claimant would have had to pay monthly child support and would have been able to plan his financial obligations considering the requirement to pay child support in priority to other obligations. Seeking the commencement of monthly child support payments in 1996 is materially different than requiring a payment of over \$80,000 or some other large sum in 2014. Applying, *Anderson*, therefore, I find that the substantial delay in enforcement has caused prejudice to the claimant sufficient to constitute a material change in circumstances.
- [27] The most significant consideration in *Earle* applicable to this matter is the claimant's ability to pay the arrears. I find that the claimant is not able to pay the accumulated arrears and forcing him to do so would cause serious hardship and unfairness to the claimant in the circumstances.
- [28] Courts in British Columbia have often recognized that the reality of the circumstances must be taken into account. In *Birakowski v. Birakowski*, (1987), 8 R.F.L. (3d) 176, the Court of Appeal found the arrears to be: more than Mr. Birakowski could possibly pay in the balance of his life. ... I think an order [for payment of arrears] must be realistic in any event. ... I think, in that respect, we should not make an order that we think he could not pay, but the maximum order that we think he could pay. ...

- [29] In the recent decision of *Kennelly v. Kennelly*, 2013 BCCA 213, Madam Justice Warren reduced arrears of child support and after referring to Earle and the substantial onus on the applicant in such applications stated: At the same time, however, a support order must be realistic and if the magnitude of arrears is such that a payor will simply be unable to pay, a reduction in arrears is justified: *Birakowski v. Birakowski* (1987), 8 R.F.L. (3d) 176 (BCCA). This is so even where the reduction is substantial. For example, in *Rouleau v. Fawkes* [2009] B.C.J. No. 361 (S.C.), child support arrears of \$200,000 were reduced to \$100,000 in a case where it was held that the circumstances were largely of the payor's own making.
- [30] In *Rouleau v. Fawkes*, 2009 BCSC 257, Hinkson J. (as he then was) ordered a significant reduction in child support arrears when the payor was the person largely responsible for the arrears having accumulated whereas in the case at bar, responsibility is that of the respondent. As I stated, I accept that the claimant's failure to pay for approximately ten years after the agreement was executed was not in bad faith. Therefore, this is not a case where the circumstances are largely of the payor's own making. Even when they are, courts have been willing to reduce arrears where a payor is unlikely to be able to pay, and payment would cause serious hardship and unfairness to the claimant in the circumstances.
- [31] As required by Earle, the claimant has made full financial disclosure in his Form 8 Financial Statements. The claimant expected to make \$55,000 gross in 2013. As noted, the claimant's assets are nominal: he does not own real property, he owns two older vehicles, he has a very small RRSP of \$5,000 and he has minimal amounts in his bank accounts. The claimant has set out reasonable expenses and has significant debts. The total arrears and interest now amount to \$87,576.35, and he is still paying current child support. Payment of these arrears in full would cause serious hardship and unfairness to the claimant in the circumstances.

Conclusion

- [32] In the circumstances, it is completely unrealistic to think that the claimant should pay the arrears as claimed. The question for me is to determine a reasonable amount of arrears to be paid by the claimant and to set the terms for payment of the same.
- [33] Considering all of the circumstances of this matter, I order that the arrears of child support be reduced to a total of \$15,000, which is to be paid at a rate of \$300 per month commencing May 1, 2014, until the arrears are eliminated. I further order that the amount set for arrears will not bear interest so long as the claimant maintains his payments of \$300 per month.
- [34] The payments of \$300 per month shall be paid over and above the amount currently being paid for child support.
- [35] Also, all interest charges, penalties and service fees charged by MEP and/or FMEP are cancelled and any actions and sanctions implemented by MEP and FMEP resulting in the withholding of the claimant's passport, driver's license or other important documents are set aside.

[36] The claimant shall also take the child support payments out of the tax deductible regime.

[37] The parties will bear their own costs. "Jenkins J."

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