

CANADA / JUDGMENT

van Erp v. van Erp

2015 BCSC 203

COURT

Supreme Court of British Columbia

DECIDED

13 February 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCSC 203 van Erp v. van Erp

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

van Erp v. van Erp,

2015 BCSC 203

Date: 20150213

Docket: E042743

Registry: New Westminster

Between:

Angela Joy van Erp

Claimant

And

Matthew Phillip van Erp

Respondent

Before: The Honourable Madam Justice Ross

Reasons for Judgment

The Claimant:

Appearing In Person

The Respondent:

Appearing In Person

Place and Date of Trial/Hearing:

New Westminster, B.C.

October 6-9, 2014

Place and Date of Judgment:

New Westminster, B.C.

February 13, 2015

Table of Contents

1.	Introduction.	3
2.	Background Facts.	3
3.	Date of Separation.	6
4.	Divorce.	8
5.	Validity and Enforceability of the Separation Agreement.	8
	A. Was the Execution of the Agreement Flawed?.	12
	B. Is the Agreement Fair in its Operation?.	15
	i. Spousal Support	15
	ii. Property.	18
	C. Conclusion on Validity and Enforceability of the Agreement	21
6.	Reapportionment of Assets.	21
7.	Orders Sought Pursuant to the Agreement.	23
	A. Ontario Property Compensation Order	23
	B. Moving Expenses.	24
	C. RESP Contribution Arrears.	25
	D. Retroactive Child Support	26
	E. Special and Extraordinary Expenses.	29
	F. Child Support Going Forward.	31
8.	Cancellation of Arrears.	31
9.	Parental Responsibilities.	34
10.	Removal of Funds.	37

11. Order for Diversion of Mr. van Erp's Pension. 38

12. Life Insurance and Wills. 38

13. Costs. 38

14. Summary. 39

1. Introduction

[1] This is a family law proceeding between Angela van Erp, the claimant, and Matthew van Erp, the respondent. There are two children of the marriage. This case raises issues with respect to the date of separation and the enforceability of a separation agreement entered into by the parties. The parties seek orders respecting property division, child and spousal support, and parenting arrangements.

[2] Prior to trial the parties, to their credit, settled the issue of the parenting schedule.

2. Background Facts

[3] The parties met when both were members of the Canadian Armed Forces. They started to live together in October 2000 and were married on December 22, 2000. There are two children of the marriage, Jaedyn who was born May 3, 2005, and Taryn born October 18, 2006.

[4] The parties separated in 2011. At the time they were living in New Brunswick. Mr. van Erp had just returned from a tour of duty in Afghanistan at the end of October that year. The precise date of separation is an issue in the litigation.

[5] Ms. van Erp was injured while on duty in Bosnia. She is in receipt of a modest disability pension from the military. At the time of the separation she had completed approximately two years of a university degree. Except for extremely limited part-time work with the reserves, she had been out of the workforce for a number of years while she cared for the children of the marriage. Her income at the time of separation including the pension was \$8,100.

[6] Mr. van Erp was in the military at the time of separation. He had served in the military for 17 years and held the rank of Sergeant. His income at separation including taxable allowances was \$70,188.

[7] Following the separation, the parties commenced negotiation of a separation agreement. With the assistance of family mediation, the parties reached an agreement with respect to all of the issues in relation to the breakdown of the marriage. The agreement was reduced to writing, signed, notarized and dated December 14, 2011 (the "Agreement").

- [8] After separation, Mr. van Erp moved to Edmonton. Ms. van Erp remained in New Brunswick with the children and readied the matrimonial home for sale. The parties had been in the midst of renovations at the time of separation, which needed to be completed in order to maximize the market value of the home. Mr. van Erp provided support consistent with the terms of the Agreement with the exception of contributing to special expenses.
- [9] The house was sold and the purchasers took possession in June 2012. The Agreement contemplates that the military would cover the costs of moving all the household goods to Edmonton. Ms. van Erp was moving to Chilliwack to be closer to her parents. The plan was for the military to cover the costs of moving the goods to Edmonton and for Ms. Van Erp to deal with costs above that amount or to store the goods.
- [10] Shortly before the move, the parties learned that the military would only cover the costs of moving Mr. van Erp's goods. Ms. van Erp investigated alternate methods of moving her and the children's goods and found that the most economical method was to rent containers. She estimated that it would cost \$10,000 to move her and her children's goods with containers.
- [11] The parties discussed how to deal with the moving costs. Ms. van Erp contends that they reached an oral agreement to share the costs and that shortly before the move Mr. van Erp reneged and offered instead a loan applied over time to reduce her support payments. Mr. van Erp's position is that there was no agreement to split the costs and that he offered to advance \$5,000 as a loan to be repaid over time, following the final payments of spousal support.
- [12] The dispute over how to deal with costs associated with moving Ms. van Erp and the children became acrimonious. The parties failed to reach any resolution. The difficulty was compounded because Ms. van Erp had just learned that her grandmother had been taken ill and was not expected to live. She wanted to get back to British Columbia as soon as possible to be with her grandmother. She borrowed the funds for the move from her parents.
- [13] In October 2012, Mr. van Erp chose to leave his position in the military and stopped paying child and spousal support. His last day of employment was October 31, 2012. At the time he had two years left to a full 20-year pension. He stated that his plan was to apply to join the Edmonton police force. He stated that he had been encouraged to make the move and believed that by January he would have been accepted into the training program. Mr. van Erp stated that the police force offered the prospect of a superior salary and working conditions.
- [14] Litigation was commenced by Mr. van Erp in Alberta in November 2012 and then by Ms. van Erp in British Columbia in December 2012.

- [15] Mr. van Erp was receiving some income for part-time work done for St John's Ambulance commencing in December 2012. He also worked one evening a week with the reserves. This produced a combined income projected to be \$15,547 per year. The application process for the police force dragged on for much longer than he had expected. He stated that eventually he was told by the force that his application had been deferred for three years on account of this litigation.
- [16] Following a Judicial Case Conference in July 2013, Mr. van Erp commenced paying child support at \$380 per month pursuant to an interim order. He did not make any payments of spousal support. Ms. van Erp enrolled in the BC Family Maintenance Enforcement Program ("FMEP") in April 2013.
- [17] Mr. van Erp accepted a contract for full-time employment with the military reserves at a salary of \$57,509 in September 2013. His payments of child support increased to \$813 in December 2013 pursuant to an interim order. He made no payments of spousal support and no payments on account of special expenses. In the result, as of October 3, 2014, the arrears recorded by FMEP were \$23,072.05 for spousal and child support exclusive of s. 7 expenses.
- [18] Ms. van Erp's plan had been to complete the remaining two years of her degree and become an officer in the military in the field of health care administration. However, Mr. van Erp's failure to pay support created a financial crisis and Ms. van Erp was forced to put her plans on hold. She eventually did commence her course work in November 2013 with the assistance of student loans and is now in her second semester. She has achieved very high grades. Ms. van Erp anticipates that she will complete her degree in one to one-and-a-half years.
- [19] Ms. van Erp has secured a part-time position with the reserves. The position provides the flexibility she needs for her childcare responsibilities. Her employment income for 2013 including her disability pension income is \$13,475.

3. Date of Separation

- [20] The parties agree that in June 2011 they discussed ending the marriage. Mr. van Erp was about to be deployed for a tour of duty in Afghanistan. Ms. van Erp testified that they decided to leave the status quo in place during his tour of duty. It was her evidence that when Mr. van Erp returned from Afghanistan at the end of October, they had a further discussion and came to the conclusion that there was no chance for reconciliation. She stated that at that point they decided to separate. Mr. van Erp's position is that the separation occurred in June 2011. The Agreement states that the parties have lived separate and apart since November 12, 2011.
- [21] The financial arrangements were not changed during Mr. van Erp's tour of duty. His salary continued to be deposited in the couple's joint bank account and Ms. van Erp continued to manage the finances and pay the household bills. She held Mr. van Erp's power of attorney that was executed June 27, 2011.

[22] The parties exchanged emails following Mr. van Erp's deployment that appeared consistent with the maintenance of the status quo and inconsistent with a decision having been made to terminate the marriage.

[23] Mr. van Erp sent Ms. van Erp a statutory declaration dated October 19, 2011, declaring the date of separation to be October 19, 2011. The declaration states in part that:

Since, on or about 19 Oct 11 I have lived separate and apart from my spouse Angela Joy van Erp for other than for service reasons.

It is my intent to continue living separate and apart from my aforementioned spouse.

[24] Ms. van Erp responded with an email expressing surprise at his unilateral action.

[25] Separation is defined as follows in s. 8(3) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.):

(3) For the purposes of paragraph (2)(a),

(a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other;

[26] The key factor in determining whether there has been a separation is an intention to end the matrimonial relationship. Physical separation is a factor to be considered but it is not determinative: *Dorchester v. Dorchester* (1971), 3 R.F.L. 396 at 398 (B.C.S.C.).

[27] In the present case, the parties were physically separated as a consequence of Mr. van Erp's deployment. However, the other evidence is not consistent with Mr. van Erp's assertion that the separation occurred in June 2011. In particular, it is not consistent with his solemn declaration of October 2011.

[28] The Divorce Act makes it clear that the intention of one of the spouses to live separate and apart is sufficient. Accordingly, I find that the date of separation is October 19, 2011.

4. Divorce

[29] The parties have been living separate and apart since October 19, 2011. I am satisfied that the requirements for the granting of a divorce pursuant to the Divorce Act have been met. I grant an order that the parties are divorced, to take effect 31 days from the date of these reasons.

5. Validity and Enforceability of the Separation Agreement

[30] As noted above, both parties were concerned about the expense of litigation and concluded that they could not afford to retain counsel. They reviewed some materials available on the internet and attended several sessions of mediation in November and December 2011. They prepared financial worksheets and looked up the Federal Child Support Guidelines, SOR/97-175 (the "CS Guidelines"), and the Spousal Support Advisory Guidelines ("SSAG"). They drafted the Agreement using a form available on the internet. Mr. van Erp consulted with a lawyer using a free resource provided by his church. The lawyer was not retained and

did not provide a certificate of independent legal advice. The Agreement was signed before a notary on December 14, 2011.

[31] The Agreement provides in part:

BACKGROUND:

2. The Husband and Wife have made complete, fair and accurate disclosure to each other on all financial matters reflected in this Agreement.
3. The terms of this Agreement are intended to settle the matters addressed and may be incorporated into a final decree of divorce, unless specific matters are amended or addressed in a subsequent Separation Agreement.
4. The Husband and Wife have each consulted an attorney with regards to his or her legal rights arising out of the marital relationship and the terms of this agreement.

CHILD CUSTODY

8. The Husband and Wife agree that sole legal custody is in the best interests of the children. The Husband and Wife agree that the Wife is granted sole legal custody, and has the primary right to decide matters regarding matters of health, education and welfare in the children's best interests. The parent who has not been granted sole legal custody may make emergency decisions affecting the health or safety of the children when the children [are] in that party's physical care and control. The Husband and Wife agree that the grant of sole legal custody to one party does not deprive the other party of access to information regarding the children.

CHILD SUPPORT

10. The Husband will pay child support in the amount of \$1,016.00 monthly to the Wife. Child support payments will commence on January 1, 2012 and will be paid on the 1st day of each and every month. The amount of Child Support will be reviewed annually on April 1 and will be based on the rates/tables put out by the government. Any increase in earnings, especially non-taxable ones due to military deployments will need to be reflected in the Child Support payments.
11. The Husband will pay to the Wife for his share of special expenses such as Daycare and kids activities (within reason) on a monthly basis as set out in the mediation agreement dated December 9, 2011. As of right now, Matthew will pay \$50/month for half of the children's RESP payment.
12. The Husband will maintain health insurances, including medical and dental coverage, for the benefit of Jaedyn Helena Joy van Erp and Taryn Joyce Claire van Erp and will continue as long as a child is attending an educational institution.

13. Child support payments, contributions to health care costs, child care costs and extraordinary expenses, and the maintenance of health insurance and life insurance (SISSIP) will continue as long as a child is attending an educational institution up to the age of 25. Said life insurance will be maintained at the current level it is now and Angela Joy van Erp will act as their trustee.

SPOUSAL MAINTENANCE

14. The Husband will pay spousal maintenance in the amount of \$1,250.00 monthly to the Wife until July 15, 2014. Spousal maintenance payments will commence on January 1, 2012 and will be paid on the 1st day of each and every month.

MARITAL HOME

15. The parties will sell the marital home and divide the proceeds of the sale equally.

The Wife will reside in, and have temporary possession of the marital home, until it is sold.

The expenses relating to the marital home, including but not limited to mortgage payments and utility bills, will be paid by the Wife. Property taxes and repair costs will be shared proportionally between the Husband and the Wife according to income when and if they arise.

ASSETS

16. The parties acknowledge that they have agreed upon a division of all assets, owned or possessed by them as marital property or separate property.
17. The Wife to receive 50% of the fair market value of the property in Golden Valley, ON.

Roll number: 49 99 080 002 04600 0000

East Mills Con 8 PT Lot 12

PCL 4360

A valid current market analysis required to confirm actual market value.

18. The Wife to receive an amount equal to 50% of 11 years (October 1, 2000 - November 12, 2011) of the Husband's Federal Government Pension.

DEBTS

19. The parties agree that any indebtedness secured against, or attributable to, any item of property that either party is receiving under this Agreement will be the sole responsibility of the party receiving the particular property.
20. Neither party will incur any further debt or liability on the other party's credit. Any debt accumulated as of the date of this Agreement is the debt of the individual party, regardless if the debt was incurred as a result of joint credit.

ADDITIONAL CLAUSES

22. While the house is the process of being sold:

-The Wife to pay mortgage and bills associated with the residence

-The Wife to keep the 2009 Honda Odyssey and pay the monthly payment

-Both the Husband and the Wife to each pay \$600 month towards the minimum monthly debt payments

-The Husband will pay a total of \$2650/mo until the residence is sold and then the regular monthly spousal support payments, child support payments, RESP, and special expenses will commence. Said \$2650/payment will go into the joint Manulife Bank chequing account to be distributed to the various monthly bills. Once the residence is sold and the joint account is closed the Husband will place the monthly support payments directly from his pay into the Wife's bank account via a split allotment.

23. While Jaedyn and Taryn are with the Husband on his visitation week(s) no girlfriends will be introduced to them or be a part of the visitation time that are not of a long term/serious nature whereas they have been together for a period of one year or longer. As well, the children must not be in a situation where, in their presence, they will be subjected to people drinking, swearing or smoking.

27. Should any portion of this Agreement be held by a court of law to be invalid, unenforceable, or void, such holding will not have the effect of invalidating or voiding the remainder of this Agreement, and the parties agree that the portion so held to be invalid, unenforceable, or void, will be deemed amended, reduced in scope, or otherwise stricken only to the extent required for purposes of validity and enforcement in the jurisdiction of such holding.

28. The Husband and Wife may only amend this Agreement in writing after both parties have obtained legal advice on the changes.

30. Notwithstanding that the parties acknowledge and agree that their circumstances at the execution of this Agreement may change for any reason, including but without limiting the generality of the foregoing, the passage of years, it is nonetheless their intention to be bound strictly by the terms of this Agreement at all times.

36. This Agreement may only be terminated or amended by the parties in writing signed by both of them.

[32] Ms. van Erp takes the position that the Agreement should be enforced. Mr. van Erp submits that it should be set aside because of the circumstances surrounding its execution and because it is unfair.

- [33] The courts have recognized and supported the principle of contractual autonomy, acknowledging the right of parties to enter into enforceable agreements dealing with their property and their respective rights and responsibilities with respect to support following the breakdown of a marriage.
- [34] While contractual autonomy is respected, judicial intervention has been held to be justified where agreements are found to be procedurally and substantively flawed: *Miglin v. Miglin*, 2003 SCC 24; *Hartshorne v. Hartshorne*, 2004 SCC 22; *Rick v. Brandsema*, 2009 SCC 10. In *Miglin*, the majority explained at para. 81 that "the court should be alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities". The Court went on to explain that if one party's exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation, the agreement need not be enforced: *Miglin* at paras. 81-86.

A. Was the Execution of the Agreement Flawed?

- [35] The first stage of the inquiry is whether the agreement is flawed in relation to the procedure leading to its execution. One important component of procedural fairness is the adequacy of financial disclosure. The importance of financial disclosure was highlighted by Madam Justice Abella, for the Court, in *Brandsema* at paras. 46-48:
- [46] This contractual autonomy, however, depends on the integrity of the bargaining process. Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse's ability to do so.
- [47] In my view, it flows from the observations and principles set out in *Miglin* that a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.
- [48] Such a duty in matrimonial negotiations anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain. It also helps protect the possibility of finality in agreements. An agreement based on full and honest disclosure is an agreement that, *prima facie*, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.

[Internal citations omitted.]

[36] In the present case there is no suggestion that the Agreement is not based upon full and honest disclosure.

[37] In *Miglin*, in the context of discussion of a separation agreement, the majority judgment of Justices Bastarache and Arbour addressed the factors to be considered in the analysis of the circumstances of the execution of the agreement as follows at paras. 81-83:

81 It is difficult to provide a definitive list of factors to consider in assessing the circumstances of negotiation and execution of an agreement. We simply state that the court should be alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities, taking into account all of the circumstances, including those set out in s. 15.2(4)(a) and (b) and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance.

82 We pause here to note three important points. First, we are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. Next, the court should not presume an imbalance of power in the relationship or a vulnerability on the part of one party, nor should it presume that the apparently stronger party took advantage of any vulnerability on the part of the other. Rather, there must be evidence to warrant the court's finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement. If separating or divorcing parties were generally incapable of making agreements it would be fair to enforce, it would be difficult to see why Parliament included "agreement or arrangement" in s. 15.2(4)(c). Finally, we stress that the mere presence of vulnerabilities will not, in and of itself, justify the court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties.

83 Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

- [38] Mr. van Erp has submitted that he was in a vulnerable state because he had just returned from a tour of duty in Afghanistan and as such was not in a proper state to enter into the Agreement. However, he has not suggested that he was suffering from any conditions such as depression or post-traumatic stress disorder. There was no medical evidence or expert opinion with respect to his mental or emotional state.
- [39] There is no suggestion that Ms. van Erp was exerting pressure on him or taking advantage of any vulnerability. Rather, both parties recognized that the marriage was at an end and were taking the necessary steps to deal with that reality.
- [40] Mr. van Erp submits that the Agreement is procedurally unfair because he did not obtain independent legal advice. He submits that the legal advice he did receive was not adequate because it was not a clause-by-clause review of the Agreement, but merely based upon his summary of the terms.
- [41] While independent legal advice is an important factor to be considered, the absence of such advice is not determinative. For example, in *Gurney v. Gurney*, 2000 BCSC 6, Mr. Justice Pitfield concluded at paras. 30-31:
- [30] However, the lack of independent legal advice in this case is not fatal and the agreement should not be set aside because of its absence. On the evidence before me I cannot conclude that the respondent exercised undue influence over the petitioner in order to persuade her to execute the agreement. Nor did the petitioner agree to sign under duress. Her emotional state was that which one would expect to be associated with a marriage breakdown. None of her emotional state, duress or undue influence vitiated her consent to the agreement.
- [31] The pattern of the negotiations, the character of the legal advice received by the petitioner and the circumstances surrounding the execution of the agreement do not infuse it with a prima facie appearance of fairness. That being the case, the question is whether the agreement, particularly as it relates to the matrimonial home and the recreational property, is fair in its operation regardless of the circumstances in which it was prepared and executed.
- [42] In the present case, I am likewise satisfied that the circumstances of the negotiation and execution of the agreement were procedurally fair. While Mr. van Erp was in a stressful situation, I am satisfied that he was capable of appreciating and consenting to the terms of the Agreement. Ms. van Erp did not exert any pressure over Mr. van Erp. The only time pressure created was through Mr. van Erp's decision to change his plans to spend Christmas with the family and to instead leave to join his new partner. Mr. van Erp obtained some legal advice. In addition, the Agreement was negotiated with the assistance of a family relations mediator.

B. Is the Agreement Fair in its Operation?

[43] The next question to be determined is whether the Agreement is fair in its operation having regard to the objectives of the legislation. To that end I will address the Agreement's substantive provisions with respect to spousal support and property division.

i. Spousal Support

[44] Mr. van Erp disputes Ms. van Erp's entitlement to spousal support and submits that in any event the quantum of support in the Agreement is unfair. In addition, it was his evidence that the Agreement contains a mistake with respect to the term. He stated that the parties agreed that Ms. van Erp would receive a total of \$30,000 in spousal support based upon her estimate of the costs of training as a helicopter pilot. He stated that the actual agreement between the parties was for support to conclude on January 15, 2014, not July.

[45] Ms. van Erp submits that the Agreement is not in error. It was her evidence that her plan following the separation was to stay in New Brunswick for the first year to allow the children to complete their school year and to complete renovations on the matrimonial home. She was then going to move to British Columbia and finish her degree in Health Care Administration through Athabasca University distance learning. At the time of separation, she had the equivalent of two years' course work to complete. Her evidence was that, following completion of her degree, she planned to enter the full-time military as a Health Care Administrator. This would provide not only a good salary but an advantageous pension treatment because of her years spent in the reserves.

[46] I find that the Agreement was not in error as alleged by Mr. van Erp with respect to the end date of the support.

[47] The factors to be considered in making an order for spousal support and the objectives of the legislation are addressed in s. 15.2 of the Divorce Act as follows:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[48] The Supreme Court of Canada has identified three grounds for entitlement to spousal support: compensatory, non-compensatory and contractual: *Chutter v. Chutter*, 2008 BCCA 507 at para. 47.

[49] With respect to compensatory support, speaking for the court in *Chutter*, Rowles J.A. noted at para. 50:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise. The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success.

[Internal citations omitted.]

[50] In considering compensatory claims, particularly in the case of long marriages, standards of living of the parties are a relevant consideration with the parties being presumptively entitled to equal standards of living on the dissolution of the marriage: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 870; *W. v. W.*, 2005 BCSC 1010 at paras. 10-12.

[51] Economic disadvantage arising from the marriage or its breakdown may be addressed by the division of assets (including any need for reapportionment), spousal maintenance, or both: *Moge*; *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1 (C.A.); and *Tedham v. Tedham*, 2005 BCCA 502.

[52] In the present case, at the time of separation Mr. van Erp had full-time secure employment in the military. His salary including allowances was \$70,188 per year. Ms. van Erp had essentially been out of the workforce since the birth of the children. Her income including her disability pension was \$8,100. It is quite clear that Ms. van Erp would be entitled to an order for spousal support on a compensatory basis. She had sacrificed her career

development to look after the children during the marriage. Her doing so enabled Mr. van Erp to pursue his career including overseas deployments. At the time of separation she did not have full-time employment and remained responsible for the care of the children.

- [53] The SSAG are the starting point for the analysis with respect to the quantum of spousal support, but they are simply guidelines, and their formulas "need not be slavishly adhered to by judges": *McEachern v. McEachern*, 2006 BCCA 508 at para. 64. The SSAG calculation suggests that Ms. van Erp receive spousal support for a period of 5.5 to 13 years from the date of separation in the range of \$594 to \$937 per month.
- [54] The Agreement provides for spousal support in excess of that amount but for a substantially shorter duration. In that regard, as noted, I am satisfied that the Agreement reflects the intention of the parties with respect to the duration of the support. The terms are consistent with Ms. van Erp's description of her plan which I find is what formed the basis of the parties' agreement with respect to support.
- [55] I find that her plan was reasonable if somewhat optimistic in terms of her time estimate to complete her degree. In my view a decision to provide support at a higher level for a shorter term to facilitate Ms. van Erp's plans to complete her degree was consistent with the objectives of the legislation and reasonable in the circumstances. Moreover, the Agreement provided for less support in total to be paid to Ms. van Erp than the lowest level for the least duration recommended under the SSAG.

ii. Property

- [56] The one issue raised by Mr. van Erp with respect to the property division is in relation to the Golden Valley, Ontario property. The property is an 80-acre parcel of undeveloped rural land in Ontario. It adjoins a 20-acre parcel on which Mr. van Erp's parents have their home and another parcel owned by other family members. Mr. van Erp purchased the property before the marriage. He stated that the common intention of his family members is to hold the parcels in the family. Mr. van Erp's parents pay the taxes on the property.
- [57] While Ms. van Erp did not contribute to the purchase of the property, her financial contributions did contribute to the preservation of the property. The parties went into bankruptcy in 2001. Ms. van Erp then received lump sum compensation from the military for her injuries. She used this amount to pay off what the family owed in the bankruptcy. The parties were discharged and the Ontario property was released from the lien associated with the bankruptcy proceedings.
- [58] The first issue in considering whether the Agreement is fair having regards to the objectives of the legislation is which regime is to be considered. The Agreement contains a choice of laws clause that provides for the governing law to be that of New Brunswick. Neither party provided evidence with respect to New Brunswick law. Accordingly, in the absence of proof of foreign law, the law of this jurisdiction will be applied, as stated by the Court of Appeal in *Old North State Brewing Co. v. Newlands Services Inc.* (1998), 58 B.C.L.R. (3d) 144 at 154

(C.A.):

Foreign laws are questions of fact which must be proven by evidence of persons who are experts in that law: see *Allen v. Hay* (1922), 64 S.C.R. 76 at 80-81; and Castel's *Conflicts of Law* 4th ed., 1997 at 155-56. If foreign law is not proven, it is assumed to be the same as the law of the forum: see *Canadian Fire Insurance Company v. Robinson* (1901), 31 S.C.R. 488 at 493; *Sharn Importing Ltd. v. Babchuk*, [1971] 4 W.W.R. 517 (B.C.S.C.); and Castel *supra* at 153-4. No burden of proof lies on the plaintiff to adduce evidence of foreign law: *Alvarodiaz v. Sun Life Assurance Co. of Canada*, [1973] 3 O.R. 126 (Ont.H.C.) at 130.

[59] The notice of family claim was filed December 7, 2012, before the Family Law Act, S.B.C. 2011, c. 25, came into effect. The transition provisions of the Family Law Act provide that the proceedings will be determined pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128. Section 252(1) of the Family Law Act provides:

252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

(2) Unless the spouses agree otherwise,

- (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
- (b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

[60] This provision was interpreted in *S.L.C. v. C.J.R.C.*, 2014 BCSC 1814 at paras. 430-432:

[430] The Separation Agreement was dated November 15, 2011, and was executed on December 19, 2011. The Wife commenced this lawsuit on August 15, 2012. All those events were before the FLA came into effect on March 18, 2013.

[431] Pursuant to s. 252 of the FLA, unless the spouses agree otherwise, a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of the section, or a proceeding respecting property division started under the FRA, must be continued under the FRA as if it had not been repealed. The spouses did not agree otherwise.

[432] As a result, the FRA applies to the Wife's claim to set aside the Separation Agreement regarding property division and re-apportion property pursuant to s. 65.

[61] The fundamental scheme of the Family Relations Act concerning division of assets was one of the presumptive equal division of family assets. Section 56 provided:

56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

(a) a separation agreement,

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part or Part 6, or

(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after March 31, 1979.

[62] A family asset was defined in s. 58(2) as follows:

58 (2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

[63] In my view the Ontario property would be considered to be a family asset because it was used by the family for recreation purposes. Thus, absent an agreement or the application of the considerations for reapportionment, the parties would be entitled to an undivided half interest in the property.

[64] Considerations of reapportionment were dealt with in s. 65 of the Family Relations Act, which provided:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,

(b) the duration of the period during which the spouses have lived separate and apart,

(c) the date when property was acquired or disposed of,

(d) the extent to which property was acquired by one spouse through inheritance or gift,

(e) the needs of each spouse to become or remain economically independent and self sufficient,
or

(f) any other circumstances relating to the acquisition, preservation, maintenance,
improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

(2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.
- [65] In the present case, as noted, Mr. van Erp acquired the Ontario property prior to the marriage. This is a factor that could argue for a reapportionment. However, Ms. van Erp's funds were used to maintain the property from the effects of the bankruptcy. In addition, her financial circumstances following the breakdown of the marriage militate against such a result. In the result, I find the division of the Ontario property as set out in the Agreement to be fair.

C. Conclusion on Validity and Enforceability of the Agreement

- [66] I am satisfied that the Agreement was procedurally fair in the circumstances leading to its execution. In addition, I am satisfied that it is fair in its operation having regard to the objectives of the relevant legislation. In the result, I find that the Agreement is valid and enforceable.

6. Reapportionment of Assets

- [67] The final issue with respect to the enforceability of the Agreement regarding property division is the issue of reapportionment pursuant to s. 65 of the Family Relations Act. In *L.E.M. v. D.M.I.*, 2013 BCSC 450, Griffin J. summarized the legal principles as follows at paras. 88-91, 95-96:
- [88] The FRA provides in s. 65 that a court has discretion to not enforce the terms of a marriage agreement dealing with property division, where it would be "unfair" to do so, and to reapportion the division of property based on a number of factors set out in s. 65(1).
- [89] Section 65(1) of the FRA presents a lower threshold than the contractual defence of unconscionability to challenge a marriage agreement's terms as to property division, as noted in *Brandsema* at para. 35. This is because circumstances which may be unfair may be less oppressive than circumstances which are unconscionable. In other words, a court may, under the FRA, determine that the division of assets in a marriage agreement is unfair and should be re-apportioned but at the same time, the marriage agreement is otherwise enforceable.
- [90] The Supreme Court of Canada in *Hartshorne v. Hartshorne*, 2004 SCC 22, considered the interpretation of unfairness under s. 65 of the FRA in the context of a marriage agreement entered into between two lawyers at the time of their marriage. The Court held:

67 Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfill the obligations that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true that, in some

cases, agreements that appear to be fair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties have unfolded. It is also clear that the FRA permits a court, upon application, to find that an agreement or the statutory regime is unfair and to reapportion the assets. However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the s. 65 factors, that a different apportionment should be made.

[Emphasis added.]

- [91] In B.C. there is not a clear dividing line between the factors that may be considered when determining whether or not an agreement is unconscionable, and when addressing the statutory test of whether or not the division of property in the agreement is unfair. Determining unfairness in the context of the FRA to an extent overlaps with the approach of determining whether an agreement is unconscionable, in that it considers the perspective of the parties at the time they entered into the agreement, and any procedural unfairness in the context of the negotiations, as well as the degree to which the agreement deviates from the statutory objectives, and any changes in the parties' circumstances not contemplated by them and not in accord with statutory objectives: *Hartshorne; M. (R.S.) v. M. (M.S.)*, 2006 BCCA 362 at para. 25 [M. v. M.].
- [95] Under the statutory regime for property division in B.C., absent a valid marriage agreement, the starting point is that equal division of family assets is presumed fair, and a party who seeks to reapportion the division has the onus of showing that equal division would be unfair.
- [96] But where there is a valid marriage contract, the FRA presumes that the division of property under that marriage contract is fair, and a party seeking reapportionment of that division must demonstrate that it is unfair pursuant to s. 65(1). As noted above in the passage quoted from *Hartshorne*, a marriage agreement will not be unfair simply because it varies from the otherwise presumed equal division that would occur absent a marriage agreement.

[Emphasis in original.]

- [68] For the reasons discussed in the earlier paragraphs dealing with the s. 65 factors, I have concluded that the division of assets in the Agreement is not unfair pursuant to s. 65(1) and I would not grant reapportionment.

7. Orders Sought Pursuant to the Agreement

- [69] The parties seek several orders flowing from matters covered by the Agreement. I will deal with each of these in turn.

A. Ontario Property Compensation Order

- [70] Ms. van Erp seeks a compensation order to enforce the provision of the Agreement relating to the Golden Valley, Ontario property. There was, however, no expert report providing an opinion with respect to the value of the land. Ms. van Erp offered in evidence a document containing an opinion of value from a realtor. However, the witness was not produced and the document did not set out any evidence of the basis of the opinion. Mr. van Erp did not agree with the value proposed.
- [71] In the circumstances, the court cannot determine the value of the property in order to make a compensation order. The Agreement provides for the determination of the value of the Ontario property. The parties shall follow the provisions of the Agreement with liberty to apply for further directions if necessary.

B. Moving Expenses

- [72] Ms. van Erp seeks an order for \$5,000, representing half of the costs of moving herself and the children to Chilliwack from New Brunswick. As noted above, I have concluded that the Agreement is valid and enforceable. The Agreement contemplated that Mr. van Erp would cause the military to pay for the costs of moving Ms. van Erp and the girls, at least as far as Edmonton.
- [73] The parties cannot control the actions of a third party, in this case the military. Accordingly, a term should be implied that Mr. van Erp use his best efforts to cause the military to pay for the moving costs. I find on the evidence that he did satisfy this obligation; however, pursuant to the applicable rules, the military would not pay the costs because the parties were separated.
- [74] I find that that provision in the Agreement was founded upon a mutual mistake. However, the mistake was not with respect to a fundamental term of the Agreement and therefore it is not a basis to set the Agreement aside: *International Powertech Systems Inc. v. Chato*, [1992] B.C.J. No. 1714 (S.C.). In any event, clause 27 of the Agreement specifically provides for the provision to be severed in such circumstances.
- [75] Rectification is not available because the Agreement as drafted did reflect the intention, albeit mistaken, of the parties: *Fraser Valley Refrigeration (Re)*, 2009 BCSC 848 at paras. 17-18.
- [76] Ms. van Erp has asserted an oral agreement to share the costs. She bears the onus to establish such an agreement and I find on the evidence that she has not discharged this onus. In addition, there is the difficulty posed by the provision in the Agreement requiring any amendments to be in writing.

[77] Finally, Ms. van Erp submits that the court should grant the relief because it is a reasonable solution to the problem of the moving costs. I agree that her proposal that the parties split the costs was a reasonable solution; however what she seeks is to have the court rewrite the provision in the Agreement. There is no basis for the court to undertake such an exercise.

[78] Accordingly, the claim for an order for compensation for moving costs is dismissed.

C. RESP Contribution Arrears

[79] An RESP account in the name of Jaeden was opened on July 1, 2005. On April 1, 2007, an RESP account was opened in the name of Taeryn. Both parents are guardians of each account. The contributions were \$50 per month per account.

[80] Following the separation, Mr. van Erp was to pay \$50 per month to Ms. van Erp representing half of the RESP contributions pursuant to clause 11 of the Agreement. Mr. van Erp made these payments until November 2012, at which point he ceased making any payments. Ms. van Erp has kept the accounts current since that time. The arrears in relation to the RESP contribution are not included in the FMEP calculation of arrears. They amount to \$1,150 as at October 1, 2014.

[81] The Agreement has been found to be valid and enforceable. Accordingly, there will be an order in Ms. van Erp's favour for these arrears.

[82] Each party seeks additional orders with respect to the RESP accounts. Ms. van Erp seeks orders that would remove Mr. van Erp as a guardian of the plans. Her rationale was a concern that he would fail to make his required contributions and put the plans in jeopardy. Mr. van Erp seeks orders to split the plans with half of each being under the control of one parent. His concern was the potential for a windfall to Ms. van Erp in the event that one or both of the children do not pursue post-secondary education.

[83] I am not prepared to make any additional orders with respect to the RESP accounts. Pursuant to the Agreement, Mr. van Erp is to provide his share of the contributions to Ms. van Erp. If he fails to do so, she will be able to keep the account current, as she has done to date, and pursue Mr. van Erp for arrears. If one or both of the children decide not to pursue post-secondary education, the proceeds will be dealt with according to the terms of the plans.

D. Retroactive Child Support

[84] Ms. van Erp seeks an order for retroactive child support imputing income to Mr. van Erp based on the income he was earning at the time of separation and subsequent potential raises in pay, including taxable allowances. Clause 10 of the Agreement deals with child support payments. Clause 10 directs that the parties will review the child support payment amounts annually and determine them based on the "rates/tables put out by the government". I find that clause 10 refers to the CS Guidelines.

- [85] Mr. van Erp submits that there should be no order for retroactive child support. He argues that his decision to leave the military was reasonable. He states that his failure to look for full-time employment after his release from the military was reasonable given his expectation that he would in short order be accepted into the police force training program. Finally, he submits his acceptance of the contract with the reserves is reasonable given his expectation that he will be reconsidered with the police force once the litigation is concluded.
- [86] Section 19 of the CS Guidelines provides for the imputation of income as follows:
19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [87] In *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.), the court discussed the principles that apply when determining a parent's capacity to earn an income. When that parent is under or unemployed, the court considers what is reasonable in the circumstances. The age, education, experience, skills, and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate, and other obligations. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction in income: *Hanson* at para. 14. Imputing income for intentional underemployment or unemployment does not require a finding of bad faith on the part of the payor, only that the payor is not earning to capacity: *Hanson* at paras. 10-13. Imputing income is the way the court gives effect to the legal requirement that a parent must earn what he or she is capable of earning: *Hanson* at para. 9.
- [88] Income should not be imputed when a change is reasonable in the circumstances. However, what is reasonable must be assessed in light of the joint obligation of parents to support their children and the responsibility of a parent to earn to his or her ability: *Earle v. Earle*, 1999 BCSC 283 at para. 18.
- [89] In the present case, Mr. van Erp testified that while he was serving his tour in Afghanistan his superior advised him that he had little hope of promotion or advancement; his career was essentially stalled. He stated that he was seeking employment that would provide him with good prospects for advancement, a better income, and more time available to spend with his children. I am satisfied that Mr. van Erp's decision to change careers was reasonable in all of the circumstances.
- [90] However, I find that it was not reasonable for Mr. van Erp to leave the military without an alternate source of income in place, having regard to his obligations to support his children. It was also not reasonable for him to delay obtaining a full-time position.

- [91] In *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 100-116, the Court identified four factors that must be considered before an award of retroactive support is made:
- (a) Reasonable excuse for why support was not sought earlier.
 - (b) Conduct of the payor parent.
 - (c) Circumstances of the children.
 - (d) Hardship occasioned by a retroactive award.
- [92] In the present case, I am satisfied that Ms. van Erp did not delay in advancing a claim for retroactive support. She brought the claim as part of the notice of family claim that was filed in December 2012, shortly after Mr. van Erp stopped paying support.
- [93] I find that Mr. van Erp's conduct was blameworthy in that he did not make efforts to obtain income commensurate with his earning ability. In addition, when he received a severance allowance from the military he did not apply the funds to child support or special expenses. The children experienced hardship as a result. As Ms. van Erp testified, it was a struggle to put food on the table. Ms. van Erp was forced to cancel the children's participation in activities such as riding lessons and gymnastics that had been of great benefit to them. In their present circumstances the children would clearly benefit from the retroactive award.
- [94] Having concluded that the plan to change careers was reasonable, it is not appropriate in my view to impute income at the level Mr. van Erp was earning in the military when he left, nor is it reasonable to impute raises in that income. Mr. van Erp was able to secure the equivalent to full-time employment with the reserves at a salary of \$57,509. In my view it is reasonable to impute this level of income to Mr. van Erp from the time he left the military.
- [95] Arrears of child support were discharged when the proceeds from the sale of the matrimonial home were distributed in February 2013. Accordingly, the order for retroactive support will be for the period from March 1, 2013 to November 30, 2013. Mr. van Erp should have paid \$7,317 for CS Guidelines child support during this period, based on payments of \$813 over 9 months. He paid \$380 per month for the period from April 1, 2013 to November 30, 2013, for a total of \$3,040. The retroactive CS Guidelines child support is therefore \$4,277.
- [96] There will be an order for Mr. van Erp to pay \$4,277 on account of retroactive child support.

E. Special and Extraordinary Expenses

- [97] The Agreement provided for special and extraordinary expenses to be shared 90% by Mr. van Erp and 10% by Ms. van Erp, based upon their respective incomes at the time of separation. Mr. van Erp was to maintain coverage for medical and dental. It contemplated yearly adjustment in child support based upon any changes in CS Guidelines income. As noted above, Mr. van Erp has made no contributions to the CS Guidelines s. 7 expenses.
- [98] The following dental expenditures were incurred by Ms. van Erp for the children:

2012

\$167.76

2013

\$565.70

2014

\$196.00

Total

\$929.46

[99] The following were the expenditures for prescriptions:

2012

\$97.84

2013

\$315.19

2014

Total

\$413.03

[100] Mr. van Erp was responsible for providing for coverage for these amounts and accordingly is responsible for the total of \$1,342.49.

[101] In addition, I find that the riding lessons, gymnastics, swimming, childcare expenses, and school fees were all reasonable and appropriate s. 7 expenditures. I note that Mr. van Erp did not dispute that these were appropriate s. 7 expenses. These were:

Riding

2011

\$ 630

2012

\$1,320

2013

\$ 680

Total

\$2,630

Gymnastics

2012

\$ 208

2013

\$ 710

2014

\$ 597

Total

\$1,515

Swimming

2014

\$370.48

Childcare

2011

\$ 210

2012

\$ 320

2013

\$3,222

2014

\$1,590

Total

\$5,342

School Fees

2011

\$170

2012

\$250

2013

\$299

2014

\$150

Total

\$869

[102] The total for the s. 7 expenses to the date of trial is \$10,726.48. Mr. van Erp's share is 90% or \$9,653.83. There will be an order that Mr. van Erp pay \$9,653.83 on account of past s. 7 expenses.

F. Child Support Going Forward

[103] Mr. van Erp seeks to impute income of \$50,859 to Ms. van Erp. This amount is based upon the salary for full-time pay for a Reserve Corporal Incentive Pay Class Level 4 Class B. Mr. van Erp submits that Ms. van Erp holds this rank and incentive pay class on a part-time basis and that she should be working full time.

[104] I am not persuaded that it is appropriate to impute income to Ms. van Erp. First, I am not satisfied that there is full-time work for her at that pay level in Chilliwack at present. Mr. van Erp suggested that she should move to find full-time work but I think that is neither reasonable nor in the best interests of the children.

[105] In addition, Ms. van Erp is in the process of completing her degree. Had Mr. van Erp complied with his financial responsibilities pursuant to the Agreement, no doubt she would have completed her degree or be much closer to that goal. Completion of her degree should provide her with the opportunity for full-time work at a higher salary. However, at present her work provides her with the flexibility she requires to complete her education and care for the children and represents the best income she has been able to obtain. Accordingly, for child support purposes, Ms. van Erp's income will be \$13,475.

[106] Mr. van Erp will continue to pay child support in the amount of \$813 based upon his current CS Guidelines income of \$57,509.

[107] Based on their incomes, the parties will share s. 7 expenses in a ratio of 78% from Mr. van Erp and 22% from Ms. van Erp.

[108] The parties will exchange their income tax returns including attachments each year by June 1 for the purpose of determining CS Guidelines incomes for child support.

8. Cancellation of Arrears

[109] Mr. van Erp seeks an order setting aside arrears for support payments pursuant to the Agreement. The total arrears, exclusive of s. 7 expenses and RESP contributions as at October 3, 2014 is \$23,072.05. Mr. van Erp argues that Ms. van Erp was not in need of the support because she ought to have secured full-time employment. He submits further that his income dropped substantially when he left the full-time military.

[110] An order cancelling arrears is a retroactive variation under s. 17 of the Divorce Act, which provides in part:

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.

[111] Arrears will not be cancelled or reduced under the Divorce Act in the absence of a material and long-lasting change: Earle at para. 23.

[112] Cancellation of arrears is dealt with in s. 174 of the Family Law Act, which provides:

174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

- (2) For the purposes of this section, the court may consider
 - (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

- [113] The "grossly unfair" principle has been found to be appropriate for consideration on variation applications under the Divorce Act: *S.A.R. v. L.G.R.*, 2011 BCSC 712 at para. 45; *Lewis v. Lewis* (1999), 2 R.F.L. (5th) 417 at para. 16 (B.C.S.C.).
- [114] In *Green v. Green*, 2002 BCSC 576 at para. 19, Mr. Justice Crawford summarized the decision of Madam Justice Martinson in *Earle* with respect to the principles governing applications to reduce or cancel arrears of child support which included, in part:
1. The onus is on the applicant seeking to reduce or cancel arrears to show a change in circumstances.
 2. Arrears will only be cancelled if the applicant is unable to pay now and unable to pay in the future.
 3. The applicant must provide full financial disclosure under oath that the change in financial circumstances is significant and long-lasting; the change is not the result of choice, and efforts were made to earn money but were unsuccessful.
- [115] A spouse is not entitled without good reason, such as a medical inability to work or termination of employment without cause, to avoid his legal responsibilities to a spouse: *Szczerbaniwicz v. Szczerbaniwicz*, 2010 BCSC 421 at paras. 26-27. In determining the spouse's ability to pay maintenance, the court should consider, among other things, his pecuniary resources and his earning capacity: *Vey v. Vey* (1979), 11 B.C.L.R. 193 at 197 (C.A.); *McAndrew v. McAndrew* (1984), 43 R.F.L. (2d) 239 at 243 (B.C.S.C.); *Bullock v. Bullock*, 2007 BCSC 318 at para. 25, *aff'd* 2008 BCCA 162.
- [116] In the present case, Mr. van Erp chose to leave his full-time secure position with the military when he was under an obligation to pay both spousal and child support pursuant to the Agreement. He did so without having secured a new position. Thus the change in circumstance he relies upon was of his own choosing and therefore not a basis to cancel arrears.
- [117] In addition, Mr. van Erp received a \$16,000 severance allowance from the military and chose not to use any of the funds to meet his support obligations. He has not satisfied me that he was unable to pay at the time or that he is unable to pay now. It appears that he has simply ignored his obligation to pay support.
- [118] As noted above, I have concluded that Ms. van Erp's plan to finish her degree and then seek a position as an officer was a reasonable plan to promote her self-sufficiency. It is hardly surprising that her plan was disrupted when Mr. van Erp stopped paying support. It hardly lies in Mr. van Erp's mouth to criticize her for delay in completing the plan that was dependent upon the support that he chose to withhold.
- [119] In the result, I dismiss Mr. van Erp's application for cancellation of arrears. The outstanding balance of arrears as at October 3, 2014 was \$23,072.05. Mr. van Erp continues to be responsible to pay that amount.

9. Parental Responsibilities

[120] The parties seek an order with respect to parental responsibilities pursuant to the Family Law Act. Section 40 of the Family Law Act provides:

40 (1) Only a guardian may have parental responsibilities and parenting time with respect to a child.

- (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.
- (3) Parental responsibilities may be allocated under an agreement or order such that they may be exercised by
 - (a) one or more guardians only, or
 - (b) each guardian acting separately or all guardians acting together.
- (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:
 - (a) that parental responsibilities should be allocated equally among guardians;
 - (b) that parenting time should be shared equally among guardians;
 - (c) that decisions among guardians should be made separately or together.

[121] The best interests of the child are addressed in s. 37 of the Family Law Act:

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
 - (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;

- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

[122] In that regard it is clear that Ms. van Erp has been the primary caregiver for the children both pre and post-separation. In addition, since the separation, Mr. van Erp has had little contact with the children, although there is reason to be hopeful that there will be improvement in the future. Mr. van Erp lives in Edmonton and Ms. van Erp lives in Chilliwack with the children. A final factor that is of considerable importance in this regard is that the parties have not demonstrated respectful communication and cooperation since the separation.

[123] The parties, to their credit, did settle the parenting schedule prior to trial. The parenting times will be as set out in the Consent Order of August 13, 2014.

[124] Parental responsibilities are listed in s. 41 of the Family Law Act. I have concluded that in the circumstances, the best interests of the children will be best served by the following order:

- (a) Ms. van Erp will exercise all parenting responsibilities with respect to the children of the marriage;
- (b) Mr. van Erp will have responsibility to make day-to-day decisions affecting the children when the children are in his care;
- (c) Mr. van Erp will have the right to be consulted about decisions respecting the children's education and participation in extracurricular activities;

- (d) Mr. van Erp will have the right to be consulted about the children's cultural, linguistic, religious and spiritual upbringing and heritage;
- (e) subject to s. 17 of the Infants Act, R.S.B.C. 1996, c. 223, both parents will have the obligation to consult and the right to be consulted with respect to giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the children. The final decision with respect to such matters will be made by the parent who has care of the children at the time;
- (f) the parent who has the care of the children at the time will have the responsibility for giving, refusing or withdrawing consent for the child, if consent is required;
- (g) both parents are entitled to request and receive from third parties, health, education or other information respecting the children;
- (h) subject to any applicable provincial legislation, both parents have the responsibility for:
- (i) starting, defending, compromising or settling any proceeding relating to the children, and
- (ii) identifying, advancing and protecting the children's legal and financial interests;
- (i) both parents have the responsibility to exercise any other responsibilities reasonably necessary to nurture the children's development.

[125] Mr. van Erp moved during the summer during the time when the children were with him. He has refused to provide Ms. van Erp with his address. It is not acceptable that Ms. van Erp not be aware of the address and telephone number when the children are with Mr. van Erp. I direct him to provide this information forthwith and to notify Ms. van Erp of any changes.

10. Removal of Funds

[126] Mr. van Erp seeks an order that Ms. van Erp pay him \$37,487 as reimbursement for funds taken by Ms. van Erp post-separation. During Mr. van Erp's deployment, his salary was deposited in the family's joint account and the funds in question were withdrawn. I am satisfied that Mr. van Erp is not entitled to such relief. First, I have concluded that the date of separation was not June as he contended, but October 19, 2011. In addition, he has not demonstrated that the withdrawn funds were used for anything other than family expenses. During and following his deployment, renovations were being done to the matrimonial home. These accounted for the larger than usual expenditures.

[127] The claim for payment for funds taken post-separation is dismissed.

11. Order for Diversion of Mr. van Erp's Pension

[128] Mr. van Erp has accumulated substantial arrears of child support and spousal support. Ms. van Erp seeks an order for the diversion of Mr. van Erp's Canadian Armed Forces Military Pension to pay for his arrears. Ms. van Erp seeks this order separate and apart from her claim for an amount equal to 50% of 11 years of Mr. van Erp's pension, to which she is entitled under clause 18 of the Agreement.

[129] Part II of the Garnishment, Attachment and Pension Diversion Act, R.S.C. 1985, c. G-2, provides a mechanism for the diversion of pension benefits on account of arrears arising from financial support orders of a Canadian court of competent jurisdiction. However, the relevant mechanism provided under this Act in s. 33 is an application made to the Minister for diversion of pension benefits where, as in the present case, the applicant is a person named in the financial support order.

[130] Thus this court does not have jurisdiction to make the order for diversion of pension benefits sought by Ms. van Erp. The application is dismissed.

12. Life Insurance and Wills

[131] Ms. Van Erp sought an order directing Mr. van Erp to make appropriate provision for the children through life insurance and his will. While it would no doubt be prudent and appropriate for Mr. van Erp to make such arrangements, such relief is not within the scope of the relief sought in the notice of family claim. The court does not have a basis for such an order in all of the circumstances.

13. Costs

[132] Ms. van Erp seeks an order cancelling or reducing the costs awarded against her in the application of December 12, 2013. This court has no jurisdiction to cancel or vary a costs order imposed by a fellow judge of this court.

[133] She also seeks an order for special costs. An order for special costs is a discretionary order made in circumstances of conduct found to be reprehensible. In my view, Mr. van Erp's conduct has not been such as to warrant an order for special costs. However, Ms. van Erp has enjoyed success with respect to the most significant matters at issue. Accordingly, she is entitled to her costs of this action, with the exception of the costs of the December 12, 2013 application, which as noted, were awarded to Mr. van Erp.

14. Summary

[134] In summary, I make the following orders:

1. The parties are divorced, the divorce to take effect 31 days after the date of this judgment.
2. The Agreement, as signed by the parties, notarized, and dated December 14, 2011, is valid and enforceable.

3. The parties will follow the provisions of the Agreement for the valuation of the Golden Valley, Ontario property, with liberty to apply to the court for further directions if necessary.
4. Ms. van Erp is entitled to 50% of the fair market value of the property in Golden Valley, Ontario, and an amount equal to 50% of 11 years of Mr. van Erp's pension, as set out in the Agreement.
5. Mr. van Erp will pay Ms. van Erp \$1,150 in RESP payment arrears. In addition, Mr. van Erp will pay Ms. van Erp \$50 per month for RESP payments beginning November 1, 2014, as set out in the Agreement.
6. Mr. van Erp will pay Ms. van Erp \$23,072.05 for child and spousal support arrears.
7. Mr. van Erp will pay Ms. van Erp \$4,277 on account of retroactive child support.
8. Mr. van Erp will pay Ms. van Erp \$1,342.49 for past medical and dental expenditures for the children.
9. Mr. van Erp will pay Ms. van Erp \$9,653.83 on account of past s. 7 expenses.
10. Mr. van Erp will continue to pay Ms. van Erp \$813 per month in child support and will pay 78% of future s. 7 expenses. The parties will exchange their income tax returns including attachments each year by June 1 for the purpose of determining CS Guidelines incomes for child support.
11. The parties will exercise parental responsibilities as follows:
 - (a) Ms. van Erp will exercise all parenting responsibilities with respect to the children of the marriage;
 - (b) Mr. van Erp will have responsibility to make day-to-day decisions affecting the children when the children are in his care;
 - (c) Mr. van Erp will have the right to be consulted about decisions respecting the children's education and participation in extracurricular activities;
 - (d) Mr. van Erp will have the right to be consulted about the children's cultural, linguistic, religious and spiritual upbringing and heritage;
 - (e) subject to s. 17 of the Infants Act, R.S.B.C. 1996, c. 223, both parents will have the obligation to consult and the right to be consulted with respect to giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the children. The final decision with respect to such matters will be made by the parent who has care of the children at the time;
 - (f) the parent who has the care of the children at the time will have the responsibility for giving, refusing or withdrawing consent for the child, if consent is required;

- (g) both parents are entitled to request and receive from third parties, health, education or other information respecting the children;
 - (h) subject to any applicable provincial legislation, both parents have the responsibility for:
 - (i) starting, defending, compromising or settling any proceeding relating to the children, and
 - (ii) identifying, advancing and protecting the children's legal and financial interests;
 - (i) both parents have the responsibility to exercise any other responsibilities reasonably necessary to nurture the children's development.
12. Mr. van Erp will provide Ms. Van Erp with his address and telephone number and will notify her of any changes.
13. Ms. van Erp is entitled to her costs of this action, with the exception of the costs of the December 12, 2013 application, which were awarded to Mr. van Erp.

"Ross J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/15/02/2015BCSC0203.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/van-erp-v-van-erp-2015>

Prepared on 28 October 2026 · Esheria