
CANADA / JUDGMENT

Van Kooten v. More

2013 BCSC 1076

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 1076 Van Kooten v. More

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Van Kooten v. More,

2013 BCSC 1076

Date: 20130619

Docket: E9758

Registry: Chilliwack

Between:

Georgina Van Kooten

Claimant

And:

Csaba More

Respondent

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for the Claimant:

J.S. Steiner

Counsel for the Respondent:

N.J. Harold

Place and Date of Trial:

New Westminster, B.C.

February 18-22, 2013

and April 19, 2013

Place and Date of Judgment:

New Westminster, B.C.

June 19, 2013

Introduction

- [1] This is a family action in which financial and parenting issues require determination.
- [2] The parties, Mr. More and Ms. Van Kooten, commenced cohabiting in May 2002 and separated on February 14, 2011. On that day Ms. Van Kooten left the family home in Mission with their son and never returned.
- [3] The parties' child was born in May 2006 and is presently 7 years old.
- [4] This action was commenced August 16, 2011.
- [5] As the parties were not married, Ms. Van Kooten's claim in regard to property is based upon the restitutionary claim of unjust enrichment. She also claims child and spousal support.
- [6] The witnesses at trial were the parties and Ms. Westergard, a family friend and neighbour.

Background

- [7] Ms. Van Kooten is 42 years old. She holds a certificate in office administration and as a medical office assistant. However, she works as a restaurant server and a customer service clerk for a cheque cashing company. She earns \$9.25 an hour plus tips and \$11.25 an hour, respectively.
- [8] Ms. Van Kooten has a daughter from a previous marriage who is now in her twenties. This child lived with the parties for about nine months at the start of the relationship and then returned to reside with her father. This child returned to live with Ms. Van Kooten in 2007 for some time and then left.
- [9] Mr. More is 48 years old. He is employed as a welder and millwright. He also has a tree stump removal and earth moving business. His hobby is rebuilding cars. Prior to meeting Ms. Van Kooten, Mr. More resided with and cared for his mother who had Alzheimer's disease. He worked only on weekends, during which time a caregiver cared for his mother. This carried on for ten years, after which she was placed in a care home where she died two years later in July 2001. Mr. More continued to live in his mother's home on Steeves Street after her death. In settlement of his mother's estate, Mr. More and his siblings received

equal shares in her home and Mr. More purchased all of his siblings' shares in the property in late 2002.

- [10] In 2002, the parties met in Port Alberni, B.C. Mr. More was working on a three to four month project in the area. Ms. Van Kooten operated a restaurant which Mr. More frequented. A relationship developed. The restaurant Ms. Van Kooten owned was in financial trouble. She was essentially bankrupt and going through a divorce. She asked Mr. More if she could to move to the Fraser Valley with Mr. More and he agreed. Mr. More stated that he cared deeply for Ms. Van Kooten and felt that she had been "dealt some ugly cards". He told her, however, that he would never marry. Ms. Van Kooten shared the same view. The two began residing together in May 2002 at Mr. More's Steeves Street home. Ms. Van Kooten brought her 13 year old daughter with her to Maple Ridge, but she only stayed for about nine months and returned to the care of her father. His friend Gary lived there as well. Gary was down on his luck, and Mr. More opened his home to him to allow him to "regroup". Gary stayed rent-free for about two years. Though the parties kept their finances separate, a marriage-like relationship developed which included the conscious decision to start a family. As mentioned their son was born in 2006.
- [11] The parties resided at the Steeves Street home in Maple Ridge, B.C. until Mr. More purchased a log home on Wilson Road in June 2006, a 2.8-acre property. Their son was several months old at the time. Mr. More held onto the Steeves Street property, rented it, and used it to finance the purchase of the Wilson Road property. About five months later, Mr. More decided that the latter property was not as ideal as he thought. This led to Mr. More purchasing a 2.2-acre property on Richards Ave. in January 2007. This property had a large barn and two-car garage. Mr. More was able to sell the Wilson Road property in May 2007. The Richards Ave. property purchase closed in June 2007 and was the family home until the parties separated. Mr. More continues to reside there.
- [12] Mr. More also owned a townhouse in Maple Ridge which he had purchased in 1998 for \$166,500 with an initial mortgage of \$124,478. He rented it out and never lived in it. He sold the property in 2004 for \$192,000. The net proceeds from the sale were \$87,414.
- [13] Ms. Van Kooten never sought to have her name registered on the title of the aforementioned properties. She also did not make direct financial contributions to any of the properties. I find, however, that Ms. Van Kooten provided the following minor assistance to Mr. More: filling in some nail holes to prepare the townhouse for sale; painting a bathroom and a bedroom, changing some light fixtures and outlets, putting in flower beds and some gardening at the Steeves Street property; painting some rooms and replacing carpeting at the Wilson Road property; painting some rooms, removing some carpeting, putting in vegetable beds, and helping in putting up chain link fence at the Richards Ave. property.

- [14] In January 2003, on Mr. More's suggestion and encouragement, Ms. Van Kooten started an administrative assistance course after which she took the medical office assistant program and obtained a diploma upon completion. Mr. More provided the funding for the program, approximately \$13,000. The plan was for Ms. Van Kooten to pay Mr. More back when she had the financial stability to do so.
- [15] Ms. Van Kooten obtained a job based on her new skills but she did not enjoy it and quit. She went back to working in restaurants.
- [16] In 2005, Mr. More's work took him for a five-month project to High Level, Alberta. He called Ms. Van Kooten and advised her of job opportunities there and encouraged her to come out. He found her work with his employer at \$20 an hour as a fire watcher. She was able to save a considerable sum, approximately \$12,000. Mr. More told her to invest the money in a RRSP and did not require repayment of the \$13,000 at that time as she had not yet "gotten back on her feet". He also introduced Ms. Van Kooten to welding and gave her some opportunities to train at it. She showed interest and displayed skill.
- [17] However the parties decided to start a family which altered her plans in welding. Their son was born in May 2006.
- [18] After Mr. More had purchased the Richards Ave. property, Ms. Van Kooten expressed the desire to start a hobby farm where she could raise chickens, ducks, geese, turkeys to sell their eggs; keep Alpaca and llamas to sell their fleece; and at one point make ceramic items. Mr. More provided the start-up monies, paid for some of the feed, allowed her to take over the barn on the property as well as space in the house, did some renovations for the space, and paid for the electricity for the ventures. Ms. Van Kooten also obtained cows, a boar, pigs, sheep and goats on the property. None of these ventures succeeded. Ms. Van Kooten, however, was a gardener and grew vegetables and canned them for family use in the winter.
- [19] From the start of the relationship, Ms. Van Kooten did the cooking and cleaning of their home. She also did some basic bookkeeping for Mr. More. She also assumed the principal role in caring for their son including appointments to the doctor and dentist. However, after the arrival of their son and with the benefit of monies from the sale of the Wilson Road property, Mr. More did not take out-of-town jobs and took a leave of absence at one point to participate in parenting. This explains the reduction in his income post-2005.
- [20] The relationship was troubled for many years but seriously disintegrated in its last year. The two no longer slept in the same bed and intimacy, while it did occur, was infrequent. Ms. Van Kooten, in about the late summer of 2010, found employment at a cheque cashing company. Ms. Van Kooten purchased some kitchen items in contemplation of her leaving the home. The tensions appear to have boiled over on the evening of February 13, 2011. It occurred in Ms. Van Kooten's room where it is without dispute an argument ensued. Ms. Van Kooten stated that one point Mr. More raised his hand toward her. Mr. More denies that he did and says that he grabbed a blanket in his hands and pulled it up off Ms. Van Kooten to express his frustration with her. Mr. More then left the room. Ms. Van Kooten then called

911 and shortly thereafter the police arrived. Mr. More was asked to leave the residence for the night. The next day Ms. Van Kooten packed and left with their son to a transition house. Shortly after this move Ms. Van Kooten's parents came from Port Alberni to support her. Ms. Van Kooten asked her parents if they would take her son back with them for a while and they did. He was returned in late March. Ms. Van Kooten stayed at the transition house until the end of that month.

- [21] When Ms. Van Kooten left the family home she only took a few items, some dishes, an old wine bottle, a sewing chair that belonged to her grandmother, a pot set, cutlery that she had purchased, and her and her son's clothing. Subsequently, she rented a moving truck and removed her remaining things including three freezers.
- [22] On March 29, 2011, the parties appeared with counsel in provincial court. On a "without prejudice" basis, Mr. More was ordered to pay child support for their son \$436 per month based on a Guideline income of \$47,000. Further, supervised access to Mr. More was ordered on a "without prejudice" basis on a minimum access visit of once a week. But for a chance meeting at a drug store, Mr. More had not seen his son since the date of their separation. On that occasion, Ms. Van Kooten contacted the police to report Mr. More. Her stated reason was that she feared that Mr. More would follow her to the transition home where she was residing.
- [23] On April 18, 2011, the parties represented by counsel again appeared in provincial court and a restraining order was obtained by Ms. Van Kooten against Mr. More. Mr. More was permitted to contact Ms. Van Kooten by email for the purpose of arranging and facilitating access. Further, Mr. More was permitted to have telephone access to his son through a specified cell number once per day between 9:00 a.m. and 7:00 p.m.
- [24] Supervised access through the Ann Davis Transition Society started in late April 2011. The visits were twice a week. This continued to June 8, 2011, when the service was no longer available. Mr. More then sought to have the supervision requirement cancelled. Ms. Van Kooten would not agree and would not offer any suggestion for a supervisor. At trial, she agreed that she made no effort to suggest a supervisor. As a result, Mr. More did not see their son from June 8, 2011 through to late November 2011. Apparently, in September 2011, Ms. Van Kooten was prepared to accept Ms. Westergard as a supervisor of access. Ms. Van Kooten on October 20, 2011, emailed Mr. More and directed that access would be on Sundays starting October 23, 2011, from 11:00 a.m. to 3:00 p.m. She also advised that their son would not be able to visit with Mr. More on December 25, 2011, as she was taking him to Port Alberni for Christmas. On October 23, 2011, she emailed Mr. More and advised him that his access on Sunday October 30, 2011, was cancelled as their son had been invited to a birthday party.
- [25] While Ms. Van Kooten made scheduling difficult, access did occur at Ms. Westergard's home. However, the scheduling difficulties became too great a burden for Ms. Westergard as she had her own family responsibilities and she withdrew in May 2012. Ms. Van Kooten

continued to reject a request to cancel the requirement for supervised access. Mr. More then brought on an application for cancellation of supervised access. Ms. Van Kooten did not respond to the application and only on the date of the court hearing did she agree to cancel the requirement for supervision as well as the restraining order.

[26] Telephone access between Mr. More and his son was also difficult. Ms. Van Kooten was unwilling to accommodate Mr. More's request for a more defined time for calls than the 1.5 hour time period in which she would have their son call Mr. More. His request was on the basis that Mr. More worked in an environment where worker safety was significant and that if a narrower window for calls was established he could plan around those times. I found this to be a reasonable request in the circumstances.

[27] Ms. Van Kooten also unilaterally prevented Mr. More to contact his son on December 24, 26, 27, 2011. On December 25, 2011, she directed that Mr. More could contact their son only through his two cell phone numbers; no other number would be accepted even though she knew that Mr. More was going to be out-of-town during that period.

[28] Ms. Van Kooten says that she no longer has concerns regarding access by Mr. More. The access currently in place is that the child resides with Ms. Van Kooten during the week and then spends each weekend with Mr. More. However, Ms. Van Kooten has continued to be uncooperative in facilitating phone access for Mr. More and the contact in this manner has been limited. By the time of the trial, the last contact by phone between Mr. More and their son was in Ms. Van Kooten's estimation three weeks prior to the start of trial. Ms. Van Kooten's evidence of the difficulties in phone contact being related to her carrier was unconvincing.

[29] Mr. More has continued to work as a millwright and welder as well as operate his tree stump and earth removal business.

Issues

[30] I will address the issues in the following order:

1. Guardianship, parenting and contact.
2. Has there been unjust enrichment? if so, what remedy is appropriate?
3. Is Ms. Van Kooten entitled to spousal support?
4. If so, what level and for what term?

1. Guardianship, Parenting and Contact:

[31] While this action was commenced prior to the Family Law Act, S.B.C. 2011, c. 25 (the "Act"), coming into effect, the provisions of that Act which relate to parenting apply.

[32] The relevant provisions of that Act are ss. 37, 39-43, and 45. I will not reproduce them here.

- [33] Each of the parties have positive qualities which are beneficial to their child. I particularly noted Mr. More's generous spirit in assisting people. There is no question that each parent loves their child and that the child loves each parent. The child is somewhat conflicted because of the tensions that exist between the parents. He has been placed in an unfair position and the parents need to address this. Ms. Van Kooten's decision to keep the child away from his father was unfortunate and in my view without proper justification. I note that she agreed that her reasoning for seeking supervised access over Mr. More was flawed. Ms. Van Kooten's reasons for keeping the child from his father, which were not well expressed by her at trial, had more to do with her grievances against Mr. More than the best interests of their child.
- [34] While there is some evidence of a display of violence by Mr. More during the relationship (Mr. More admits that he is a tall man with a loud voice), they were not related to the child, were not as dramatic as stated by Ms. Van Kooten, did not involve physical violence to anyone, and only occurred on two brief occasions. I am not persuaded that the instances referred to at trial place the child at risk or will cause difficulties in each party's ability to deal with each other. I note that Ms. Van Kooten stated at trial that she no longer has concerns with Mr. More having access.
- [35] It is the position of Ms. Van Kooten that the child should reside with her during the week and that Mr. More have the child on the weekends.
- [36] It is the position of Mr. More that there should be equal parenting. He suggests an alternating schedule where he would have the child on Thursday and drop the child off on Monday morning. Ms. Van Kooten would have the child for the other days of the week. Mr. More says that this would permit Ms. Van Kooten to work on the weekends. Ms. Van Kooten is agreeable to this schedule if the court decides in favour of an equal parenting arrangement.
- [37] Mr. More also seeks a specific term prohibiting a party from relocating the child outside of Mission without the written agreement of the other or approval of the court. Mr. More seeks this because of a discussion that he had with Ms. Van Kooten in which she raised the idea of her moving to Langley. The submission of Mr. More is that the Act makes it too easy for relocation to occur.
- [38] Taking into consideration the factors in the Act, I am of the view that an equal parenting regime is in the best interests of the child. The terms of guardianship will be as set out below. Given, the unfortunate barriers that Ms. Van Kooten has put up in facilitating access and communications with Mr. More regarding their child, I have determined that the final decision-making in the event of an impasse is to be with Mr. More, subject to court review. Reluctantly, I am of the view that Ms. Van Kooten's present inability to engage in meaningful discussion with Mr. More regarding their child is not helpful to the child.
- [39] For specificity the terms will include the following:

The guardians will exercise all parental responsibilities with respect to the child on the following terms:

1. in the event of the death of a guardian, the surviving guardian(s) will be the only guardian(s) of the child;
2. each guardian will have the obligation to advise the other guardian(s) of any matters of a significant nature affecting the child;
3. each guardian will have the obligation to discuss with the other any significant decisions that have to be made concerning the child, including significant decisions about the child's health (except emergency decisions), education, religious instruction and general welfare;
4. the guardians will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;
5. in the event that the guardians cannot reach agreement on a significant decision despite their best efforts, Mr. More will be entitled to make those decisions and the other guardian(s) will have the right to apply for directions on any decision the guardian(s) consider(s) contrary to the best interests of the child, under s. 49 of the Family Law Act; and,
6. each guardian will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.
7. the guardians will maintain a common exchange journal which is to be exchanged when the child is transferred to the other guardians. Each guardian is to record on a daily basis while the child is in its care matters relating to the child including:
 - School - such as events, key dates, report cards, newsletters, outings, assignments, home reading, parent/teacher meetings and homework;
 - Health - observations of the child, child's complaints, doctors' appointments, dental appointments, medications, injuries, and diet;
 - Social - invitations, activities taken and family events;
 - Extracurricular activities - registration, schedules, equipment, and events;
 - Clothing;
 - Key contact information for doctors, dentists, daycare, sitters, parents emergency contact numbers; and
 - Any other matter relating to the care of the child.

[40] A review of term 5 above may be brought on after two years from the date of these Reasons.

- [41] It was encouraging that the parents, in recognizing they have difficulty communicating, have consented to attend communications counselling.
- [42] In terms of parenting time, the parents will share an alternating week schedule for their child in the manner proposed by Mr. More above. The party who is receiving the child out of the care of the other will pick up the child from the location agreed. Holidays and vacations are to be split equally unless the parents can agree in writing to a different sharing such as one Christmas vacation period being alternating years. If the parties cannot agree on details such as exchange times, location of exchanges, special days such as birthdays, professional days, Mother's Day, and Father's Day, even after best efforts, then the matter is to be taken to a parenting coordinator for assistance and determination under ss. 17 and 18 under the Act. The parties should note that under s. 15 of the Act, a parenting coordinator's authority ends two years after the court's order but can be extended by agreement or order for a period not exceeding two years.
- [43] In terms of Mr. More's request for a term prohibiting relocation of the child outside of Mission, I am of the view that the requirement for such a term has not been made out.
- [44] I now turn to financial issues.

2. Unjust Enrichment Claim

- [45] Ms. Van Kooten has few assets though she has gained additional skills and qualifications. She brought little into the relationship as she was bankrupt when the relationship commenced. She had little in her name at the end of the relationship. On the other hand, Mr. More had several assets at the start of the relationship and had acquired more over the close to nine years they were together.
- [46] It is the position of Ms. Van Kooten that while she did not make a significant direct contribution to the assets of Mr. More, she provided indirect contributions which entitle her to a proportion of the increase in value of the assets based on a claim of unjust enrichment.
- [47] There are three conditions which must be established. They are: an enrichment; a corresponding deprivation; and the absence of a juristic reason for the enrichment. The consideration of a juristic reason included whether the benefits provided were a gift or pursuant to a legal obligation. Absent this, a consideration of the legitimate expectations of the parties and public policy can be taken into account as to whether the enrichment was unjust. See *Kerr v. Baranow*, 2011 SCC 10 [Kerr].
- [48] Where the rights of third parties are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. The decision as to which property (if there is more than one) should be made the subject of a constructive trust is also a discretionary one. It too should be based on common sense and a desire to achieve a fair result for both parties: *Peters v. Beblow*, [1993] 1 S.C.R. 980. This case also includes the proposition that the provision of domestic services provided by a spouse can support a claim in unjust enrichment.

- [49] The recent court of appeal decision of *Ibbotson v. Fung*, 2013 BCCA 171 at para. 73, which applies Kerr, provides that the approach to an appropriate remedy is to determine first whether a monetary remedy would be inappropriate or insufficient in the circumstances. If it is found to be inappropriate then the court may award a proprietary remedy, a constructive trust.
- [50] Once a monetary award is chosen as the remedy, then consideration of the specific circumstances of the relationship in question is to take place, such as offsetting benefits conferred upon the claimant by the other. The remedy is to reflect the flexibility inherent in the principle of unjust enrichment.
- [51] The assets in Mr. More's name at the beginning of the relationship were some vehicles of relatively low value, an aluminum boat, an RRSP, an IWA pension, a GIC and real property. The value of the boat and vehicles amounted to approximately \$3,060. His GIC and savings amounted to \$35,000. His townhouse had a value of approximately \$170,000 with a mortgage of approximately \$100,000. Mr. More has been registered in an IWA pension plan since he was 21 years old. He has also had a RRSP. The values of these latter two items were not provided. However, the documents showed that Mr. More to the end of 2005 had contributed into the pension plan \$3,773.70. His contribution in that year was \$212.12. His net asset value was approximately \$108,060.
- [52] At the time of separation in 2011 the assets held by Mr. More were considerably more than when the relationship began. The value of vehicles and equipment was \$33,300. His RRSP was \$134,541. His IWA pension contributions had grown to \$14,154. The value of the Richards Ave. property was \$455,000. The mortgage was \$286,000 leaving net equity in property of \$169,000. Mr. More's net asset value equaled approximately \$351,000.
- [53] Ms. Van Kooten points to her contributions in small repairs, renovation, and maintenance at the various properties of Mr. More and her assuming childcare and homemaking duties as evidence in favour of a constructive trust.
- [54] It is the submission of Ms. Van Kooten that by remaining as a homemaker, including doing housework, cooking the family meals, and providing care for their son, this indirect contribution was a financial enrichment to Mr. More as this allowed him to work long hours, to keep a full-time job as a welder and to build a cash business on the side.
- [55] Ms. Van Kooten argues that while Mr. More built up his finances, she spent several years out of the workforce. She says that she was a business owner in a restaurant business when she met Mr. More and she is no further ahead financially now that their relationship is over. Her only savings were from one job she had in High Level, Alberta but that those savings are now dissipated.

- [56] Ms. Van Kooten submits that her direct contributions were minor but that the small income she had was used to cover many of her personal needs such as her telephone bill and groceries, which relieved Mr. More from covering these expenses. I note, however, that Mr. More provided a significant amount of the funds for groceries as well as for other necessities for the family.
- [57] Mr. More agrees that homemaking and childcare can be an indirect contribution to the value of a property but there must be a nexus to the property being claimed. He argues that there is no nexus. In this regard, he says that:
- (a) He owned a townhouse prior to meeting Ms. Van Kooten and rented it to tenants for the parties' entire relationship. Ms. Van Kooten made no contribution and there is no basis of a claim in the profit of this property.
 - (b) The Steeves Street property was lived in by the parties and Ms. Van Kooten contributed indirectly only. He purchased it for \$180,000.
 - (c) The Maple Ridge property was purchased during the time the parties resided together but they remained in it for less than a year. Some profit was made on this property.
 - (d) The Richards Ave. property lost value while Ms. Van Kooten resided there.
- [58] Mr. More says he also enriched Ms. Van Kooten and submits that if the court is to find that Ms. Van Kooten is entitled to any compensation for unjust enrichment. Mr. More argues that Ms. Van Kooten's claim for a share of the increased value of Mr. More's properties is far outweighed by the value of Ms. Van Kooten's own unjust enrichment in the following:
- (a) he provided a free room and board for her daughter for nine months at the start, then two years while she went to school;
 - (b) he provided all of Ms. Van Kooten's living expenses for the entire relationship;
 - (c) he set up a courier business for her including the purchase of a van for Ms. Van Kooten;
 - (d) he financially subsidized her hobby farm by paying the electric costs as well as for the chicks for her egg production;
 - (e) he loaned her \$13,000 to take courses to better her employment opportunities;
 - (f) he found her work in Alberta on a project he was working on and provided free room and board for a few months while she saved all of her own income in High Level, Alberta. He helped her get exposure to a career in welding.
- [59] Mr. More therefore seeks an order that any enrichment that he has retained, unjustly, is outweighed by the enrichment received and retained by Ms. Van Kooten during the relationship.

- [60] I note in reply to the closing argument of Mr. More, counsel for Ms. Van Kooten stated that she could not take much issue with Mr. More's argument as it related to property entitlement but focused on the unfairness in not having anything after an eight-and-one-half year relationship.
- [61] I find that Ms. Van Kooten provided benefit to Mr. More in her role as homemaker and caregiver for their son for about four-and-one-half years (though not exclusively). This provided Mr. More the opportunity to work and expand his tree stump removal business and to enhance his net worth. I also recognize that she performed some minor repairs, some renovations and some maintenance to the homes identified above. She also did some basic bookkeeping for Mr. More.
- [62] I accept that Mr. More provided considerable support and opportunities to Ms. Van Kooten including his financial support and encouragement in taking the office and medical assistant courses for which Mr. More was never repaid \$13,000; finding employment for her in High Level, Alberta where she earned and saved a relatively large amount; exposing her to and providing her with experience in the trade of welding; and supporting her in her hobby farm ventures (monies for which there is some indication that Ms. Van Kooten had agreed to repay Mr. More but never has), and setting her up with a courier business including the purchase of a van.
- [63] In reviewing the evidence, Mr. More's net asset value in property has increased significantly over the course of the relationship.
- [64] It is apparent that the parties maintained financial separation and that Ms. Van Kooten understood and accepted that the two would keep finances generally separate from the start. However, my view is that Ms. Van Kooten's contributions as accepted above entitles her to restitution. My assessment is that after taking into account the offsetting benefits provided by Mr. More to Ms. Van Kooten, which were substantial and not contested, she is entitled to \$35,000.

3. Child and Spousal Support

- [65] Ms. Van Kooten seeks spousal support on compensatory and non-compensatory grounds. She also seeks child support.
- [66] Mr. More opposes Ms. Van Kooten's claim for spousal support. In terms of child support, he states that under an equal parenting arrangement he would not be required to pay Ms. Van Kooten for any child support based on his and her level of income. However, he wishes to pay Ms. Van Kooten \$436 per month as child support. He also says this payment must be taken into account by the court in the determination of Ms. Van Kooten's spousal support claim.
- [67] It is the contention of Ms. Van Kooten that Mr. More earns far more than he has reported for taxation purposes. She says that Mr. More's side business was a "cash" business and that he earned three times what he reported. She based this on the fact that she would do the

bookkeeping for Mr. More. Her position is that Mr. More should be imputed with an annual income of \$80,000. Mr. More says that he has reported all of his cash income, that his reported income is correct and, as a result, that the amount for support purposes should be \$43,451.

[68] It is pointed out in response to Ms. Van Kooten's assertion that when Ms. Van Kooten left the family home she took all of Mr. More's financial documents. Ms. Van Kooten sent copies of all the documents and forwarded them to Canada Revenue Agency so that they could determine his income which she says was greater than what he had reported. It appears that nothing has arisen from the Canada Revenue Agency, and Ms. Van Kooten has not provided analysis of the financial documents which supports her contention. As mentioned earlier, Ms. Van Kooten did some bookkeeping for Mr. More.

[69] In terms of the income of Ms. Van Kooten, her present annual income is \$27,348 which includes Mr. More's payment of \$436 per month to her. However, Mr. More argues that Ms. Van Kooten has the qualifications to do more than working for a minimum wage.

[70] The income which Mr. More has report from his income tax returns are as follows:

Year

Income

2011

\$44,164.12

2010

\$24,932.40

2009

\$28,005.00

2008

\$73,186.00

2007

\$30,848.00

2006

\$39,645.00

2005

\$91,071.00

- [71] I do not accept Ms. Van Kooten's argument that Mr. More earns \$80,000. Even though Ms. Van Kooten did bookkeeping for Mr. More and took financial documents when she left, even sending the information to Canada Revenue Agency with the hope that an audit would be conducted (which did not occur), she was unable to produce any documentary evidence to support her position.
- [72] In my view, the past income tax filings of Mr. More support the level of \$45,000 per year for child support and spousal support purposes.
- [73] In regard to Ms. Van Kooten's income, I am of the view that Ms. Van Kooten's stated income level is reasonable though I believe she can earn a higher amount in the future.
- [74] I do not accept the proposition of Mr. More that an equal parenting arrangement negates the requirement for child support to be paid.
- [75] The provision applicable under the Federal Child Support Guidelines is s. 9 which states:
9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [76] A common approach to a shared parenting arrangement is one of setoff. I am of the view that such is appropriate in this case. The child support payable of Mr. More and Ms. Van Kooten would be \$411 per month and \$206 respectively.
- [77] The offset in the child support amounts from the Child Support Guidelines is \$205. Since, Mr. More agrees voluntarily to an order that he will pay monthly child support of \$436, \$231 will be used in the income calculation of Ms. Van Kooten in regard to the Spousal Support Advisory Guidelines. Spousal support under the Guidelines amounts to a mid-point value of zero support if it were ordered and ranged in duration from 4 to 14 years. In my view, Ms. Van Kooten is not presently entitled to spousal support. However, had entitlement be established as a result of higher income of Mr. More, I would have set the reasonable period of support at six years.

Conclusion

- [78] The parenting plan will be as set out above.
- [79] Ms. Van Kooten will be entitled to \$35,000 in regard to her unjust enrichment claim.

- [80] Mr. More will pay to Ms. Van Kooten child support in the amount of \$436 per month. Special and extraordinary expenses will be paid in proportion to the parties' incomes.
- [81] There will be no order for spousal support.
- [82] The parties by consent are required to obtain counselling to improve their communications in regard to parenting.
- [83] Mr. More is directed to complete a parenting course.
- [84] The parties are to exchange financial information annually on or before each June 1 including their most recent income tax return and notices of assessment and reassessment. If actual incomes vary from that utilized for the previous year's calculation of child support, a retroactive adjustment in support will be effective to January 1st of the previous year and any excess or deficiency will be paid to the other parent.

"The Honourable Mr. Justice Masuhara"

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