

CANADA / JUDGMENT

## Matheson v. Matheson

2023 BCSC 2029

COURT

Supreme Court of British Columbia

DECIDED

20 November 2023

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2023 BCSC 2029 Matheson v. Matheson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Matheson v. Matheson,

2023 BCSC 2029

Date: 20231120

Docket: E17541

Registry: Salmon Arm

Between:

Donald Malcolm Dukes Matheson

Claimant

And

Patricia Mildred Matheson

Respondent

Before: The Honourable Madam Justice Beames

Reasons for Judgment

Appearing in Person:

D.M.D. Matheson

Appearing in Person:

P.M. Matheson

Place and Dates of Trial/Hearing:

Salmon Arm, B.C.

October 31, November 1-3, 2023

Place and Date of Judgment:

Salmon Arm, B.C.

### **November 20, 2023**

- [1] The parties were married on October 7, 1978. They separated in 2019. The claimant says the separation occurred on May 15 of that year, when the respondent moved her belongings out of their shared home and relocated to Alberta. The respondent says the separation was earlier that year. She says that the parties stopped sharing a bedroom in mid-January, 2019, after she told the claimant she wanted a divorce, and that she started staying at her sister's home about a month or more before she moved to Alberta, returning to the home daily to pack. This action was started by way of a joint notice of family claim, filled out by the claimant, signed by both, and filed in March of 2019. For reasons that are not clear, even given the explanation provided by the claimant in his evidence, the date of separation set out in the joint claim was November 11, 2017.
- [2] Given the issues in this case, I conclude that not much turns on the precise date of separation, but I prefer the respondent's evidence as to the date of separation, January 15, 2019, being the date on which the parties, or at least the respondent, formed the intention to reside separate and apart and the parties ceased to cohabit as a married couple. That date is consistent with the filing date of the joint notice of family claim and with the date on which the respondent unilaterally removed funds from two different bank accounts.
- [3] It is clear that the marriage had broken down irretrievably by the time of the separation. Each has complaints about the behaviour of the other, which the parties were instructed during trial are not relevant to the issues to be decided and which I will not be addressing, except when the evidence in that regard has a bearing on an issue in the trial.
- [4] The claimant is 81 years old and the respondent is 74. They are both fully retired. The claimant had not worked for many years prior to separation, as a result of a head injury he suffered in 1989. He received a disability payment monthly for some undefined number of years, including for a period of years after he turned 65. The respondent worked full time, aside for some brief periods related to maternity leaves and one medical leave, until she retired from paid employment in February 2018.

- [5] Neither party claims support from the other. The divorce was not contested and on the last day of the trial, I granted a divorce order. The sole issues between the parties are identification of the family assets and debts; the division of the same, including any adjustments required to the division; and a claim advanced by the respondent for occupational rent for the period of time from when she moved out of the family residence until the date the property was sold.
- [6] I will first deal with an identification of assets and liabilities, and provide some details with respect to the same when required. I will then deal with division. Finally, I will address the claim for occupational rent.
- [7] One of the most significant assets the parties had at the time of the separation was a rural property near Enderby, British Columbia. The parties had purchased the property when they moved to British Columbia in 1985. By the time of their separation, the mortgage on the property had been paid out and it was unencumbered aside from two utility rights of way. The claimant, who remained living in the home on the property after separation, was opposed to a sale of the property.
- [8] In 2022, the respondent, then represented by counsel, applied for and received an order dated June 22, 2022 ("the order for sale") which included the following terms:
- a) The property be listed for sale within 45 days;
  - b) The parties would have joint conduct of sale;
  - c) Within 35 days, the claimant would ensure that the property was in clean and marketable condition, that the debris and garbage from the property, including the home and yard, were disposed of and that his personal belongings were stored and put away neatly.
- [9] The order for sale also included some terms with respect to a sign or signs the claimant had erected on the property. Shortly after the respondent had moved to Alberta, the claimant purchased and erected on the property a very large billboard sort of sign, on which were pejorative statements about the judicial system, lawyers, divorce proceedings and the RCMP. The Columbia Shuswap Regional District had, by petition, applied for an order requiring the removal of the sign based on the fact that the sign was in breach of the zoning bylaw which applied to the property, based on its size and not its content. An order was made requiring that the sign be removed and granting an order for \$2,500 in costs payable to the Regional District. That judgment was registered on title and eventually grew to \$2,615.06 including post-judgment interest. As I understand, after the sign was removed, the claimant put up another sign or signs, of a size or sizes that did not contravene the bylaws, and it was that sign or those signs which were addressed in the order for sale of the property.
- [10] Pursuant to the order for sale, the claimant was required to pay costs of the application to the respondent in any event of the cause. I will pause to note that although a draft bill of costs has been included in the evidence at trial, those costs were never taxed.

- [11] Following the granting of the order on June 22, 2022, the claimant took few if any steps to clean up the property. The respondent and her counsel made suggestions to the claimant of companies which could assist with clean up, which suggestions were essentially ignored by the claimant. The date upon which the property was to be listed, according to the court order, came and went. By October 27, 2022, both parties had agreed to list the property "as is", with the respondent's counsel advising the claimant that if eventual buyers imposed a holdback to ensure that debris and chattels in the home and outbuildings were removed, the respondent's position would be that the claimant would be solely responsible for the same.
- [12] On November 10, 2022, the parties accepted an offer of purchase and sale for the property, at the price of \$875,000, with a completion date of March 31, 2023 and a closing date of April 1, 2023. The following was a term of the contract:

The Buyer and the Seller hereby irrevocably direct the Buyer's Conveyancer to hold back a portion of the Purchase Price in the amount of \$20,000, (the "Holdback") until April 30, 2023 (the "end date"). The Buyer's Conveyancer will pay to the Buyer out of the Holdback any funds needed to pay for the removal and clean up of any personal items in the home and all debris that is left on the property and barns after the Completion Date and before the End Date. On the End Date the Buyer's Conveyancer will pay any remaining balance of the Holdback to the Seller if the work is completed and paid in full to the removal company before the End Date. On the End Date the Buyer's Conveyancer will pay any remaining balance of the Holdback as follows:

- (a) to the Buyer, that portion of the remaining balance of the Holdback required to pay any portion of the outstanding invoices paid after the End Date; and
- (b) to the Seller, that portion of the remaining balance of the Holdback, if any, in excess of the amount required to pay any portion of the invoices payable after the End Date.

- [13] At some stage after the contract of purchase and sale was made, the claimant did commence some clean up and removal of items and debris from the property. He conceded that the house, the barn and an open sided structure on the property were full of possessions when the contract of purchase and sale was made. Some possessions were burned, some were sold or given away, some were kept by the claimant and moved by him to his new residence in Alberta, and some were left behind. The photographs clearly illustrate nature of the challenge faced by the claimant in cleaning up and removing things from the house. In some rooms, possessions were piled up close to the ceiling. In others, possessions blocked the entrance into rooms, or fully covered pieces of furniture inside the rooms. The very large veranda to the house was full of items. The claimant himself testified that before he commenced clean up, it was impossible to even get inside the doors to the barn, although by the possession date, he says you could see right through the barn, from one end to the other, and that it was virtually or nearly empty.
- [14] The respondent took photographs of the residence before she left the family home. It is clear that the excess volume of furniture, paperwork, boxes, ornaments and other assorted chattels before the parties separated. The claimant does not dispute that most of the

excessive belongings were his--he described them as being collectibles and saleable--although he does say some of the things were purchased for the respondent. The respondent testified that some of the things she acquired, or that were acquired for her, were not accessible, either to be used during the marriage or moved by her when she left, as it was physically impossible to get between or around other things in order to reach them.

- [15] In any event, I accept that the claimant made efforts to, and did, reduce the debris and personal possessions on the property before the sale closed. However, it is clear that he did not completely remove personal items and debris, as required by the contract.
- [16] After closing, the purchaser's counsel sent invoices to the conveyancing counsel who acted for the respondent, totalling \$20,039.44, and claimed an entitlement to hold back the entire \$20,000. The respondent's counsel took issue with some of the amounts claimed, and the two lawyers dealing with the conveyancing agreed that \$2,524.29 of the holdback would be paid to the vendors. That sum was received by the respondent's counsel and held has been in trust, together with the other net proceeds of sale.
- [17] The claimant says that he should have been consulted about the distribution of the holdback, and takes issue with the amounts credited to the purchasers. While it may be that his input should have been sought before the issue of the holdback was finalized, that is an issue he should advance, if at all, with others. It is not an issue, I find, in this litigation. I would note that it appears that at least the invoices from a company called Got Junk, showing 17 full truck loads of material being picked up from the property, would properly be to the credit of the purchaser with respect to the holdback.
- [18] The net proceeds of sale, including the holdback, being held in trust by the respondent's former counsel pursuant to the June 22, 2022 order, totalled \$825,673.58 at the commencement of the trial. On the last day of trial, the claimant requested a partial distribution of the funds, and with the consent of the respondent, I ordered that the sum of \$50,000 be paid out to each of the parties. Consequently, the remaining amount for division between the parties is now \$725,673.58.
- [19] The next significant asset at the time of separation was a joint account at the Salmon Arm Savings and Credit Union which had a balance of \$101,518.59. On January 15 or 16, that amount was transferred into an account solely in the name of the respondent. The respondent also had other accounts in her name or sums she transferred into her name at separation in the amounts of \$1,498.91; \$555.81 and \$596.67, totalling \$2,651.39. She left in joint accounts, for the sole use of the claimant, accounts in the amount of \$5,809 and \$2,021.31, totalling \$7,830.31. I heard, during the trial, that the claimant had his own bank account or accounts prior to separation, but I have no evidence as to any balances he had at the time of separation.

- [20] In addition to the bank accounts the parties had registered accounts. The claimant had a TFSA with a value of approximately \$56,000 at the time of separation, which amount comes from a financial statement sworn in this case by the claimant, and the respondent had a TFSA valued at \$52,635.86 at the time of separation. The respondent also had three RRSPs at the time of or within a year or a year and a half of separation, with values of \$9,082.21; \$7,744.20; and \$246,341.02, for a total of \$263,167.43.
- [21] The claimant owned a whole life insurance policy at the time of separation. The claimant says that the policy should be excluded property, as he owned it before the parties got married. The respondent disputes that, but in her submissions, she advanced no claim of an interest in that policy. Consequently, I will not consider nor make any orders with respect to the whole life insurance policy.
- [22] Finally, the parties had various personal assets, including vehicles. Those assets included items on the property which the claimant sold before the closing date of the sale, and a few personal assets which the respondent was seeking to have returned to her. She testified that she had \$8,000 in 20-dollar bills, which was what remained from a retirement gift she had received, two fur coats, assorted jewellery with sentimental value, one piece of furniture and a sewing machine cover. The two fur coats were returned to the respondent by the claimant on the last day of trial. The claimant denied that there was that much cash in the house when the respondent left, denied that he had any of the respondent's jewellery or the sewing machine cover, and said that he was using the piece of furniture that the claimant sought.
- [23] At the time of separation, the parties had one debt, a line of credit in the name of the respondent only. The amount owing on that line of credit at the time of separation was \$13,455.63.
- [24] I turn now to the issue of division of assets, before any adjustments. There is no claim, and there would be no justification in this case, for an unequal division. Under the circumstances of this case, as addressed shortly, some of the assets will be valued as at the date of separation and others as at the date of trial.
- [25] The first asset is the money held in trust from the sale of the parties' property. It is the claimant's position that that amount should be divided equally between the parties. The respondent says that the amount should be divided equally, except that the amount of the holdback paid back to the purchaser should be the sole responsibility of the claimant, as he was ordered to clean up the property in June of 2022, and clearly failed to do so by the time of closing, March 31, 2023.

- [26] There is no question that the order of June 22, 2022 required the claimant to clean up the property and rid it of excess personal items and debris. He failed to do so, within the time before the property was ordered to be listed for sale or the time that he signed the offer of purchase and sale, which created the holdback. Despite the fact that he had between June 22, 2022 and the closing date of March 31, 2023 to do what he had been ordered to do, it is clear that he did not comply with the order. He also did not appeal the order.
- [27] Had the property been properly cleaned up, there would have been no holdback, and the net proceeds of sale, and consequently the amount of money held in trust, would have been increased by the amount of the holdback, \$17,475.71. One-half of that sum, \$8,737.85, would have been to the credit of the claimant, and the other half to the credit of the respondent. The respondent's entitlement to one-half of the holdback will have to be one of the adjustments to be credited to the respondent in the final distribution of assets between the parties.
- [28] With respect to financial assets, again, neither party seeks an unequal division of the same. The non-registered assets, being the bank accounts held jointly and in sole names, should be divided equally. As I said, I have no evidence of what, if any, balances the claimant may have had in accounts in his name only, and can make no order in that regard. With respect to the other accounts, the claimant was left with \$7,830.31 in joint accounts, which the respondent has had full use of since separation. The respondent, on the other hand, took \$104,169.98 from the bank accounts. Deducted from that should be the line of credit for which she was and is solely responsible, in the amount of \$13,455.63. She will have to account, in the adjustments, for the difference in the amount of money the parties have had access to since the date of separation. I will use the date of separation as the date for valuing those assets, as the evidence indicates that each party has used the money to which he or she had access since the separation, for their own purposes.
- [29] With respect to the parties' TFSAs, the claimant has provided little if any evidence about his account, except that he disclosed an approximate value in a financial statement filed early in these proceedings, and he testified that he has withdrawn funds from his TFSA since the separation. The respondent has neither deposited nor withdrawn funds from her TFSA since separation. The approximate values of the parties' TFSAs were similar at the time of separation. In these circumstances, it would be fair to value the TFSAs at the time of separation and order that each be entitled to keep the TFSA in his or her possession, without division or adjustment.
- [30] With respect to pensions, at the time of separation, as I said earlier, the respondent had one private pension and three RRSPs. The claimant had no private pension and no RRSPs. Both parties had made Canada Pension Plan contributions.
- [31] Dealing first with the pension, the respondent was fully retired and receiving monthly pension payments from her pension prior to separation. She irrevocably elected a joint life pension. In the event she predeceases the claimant, he will receive 100% of her pension for

as long as he lives. Her gross monthly pension as of 2021 was \$631.21. From her monthly pension is deducted private medical care and dental care premiums, for both parties. In 2021, her net monthly pension was \$479.68. From her bank statements, it appears that her current net monthly pension is \$528.19.

- [32] The respondent's Public Service Pension Plan will be divided between the parties pursuant to Part 6 of the Family Law Act, from the date of the marriage (or the entry by the respondent into the plan) to the date the pension started to be paid, which on the evidence appears to have been November 1, 2004. The order for division is to be effective the first day of trial. I am not intending for there to be any accounting for the monthly pension payments received by the respondent from the time of separation to present.
- [33] With respect to the respondent's RRSPs, when she turned 71, she was required to convert her RRSPs into RRIFs, and she has been required to make withdrawals from them. In 2021, she received \$17,352.81 in RRIF withdrawals and in 2022, she received \$18,171.28. Her 2023 bank statements indicate a deposit of \$1,251.02 per month from her RRIFs. Her 2022 tax summary, which is in evidence, shows that on her RRIF withdrawals plus her pension, CPP and OAS income, she paid income taxes of \$6,266.63. In 2020, the year before the RRIF withdrawals commenced, she paid income tax of only \$717.87.
- [34] Despite the withdrawals from her RRIFs, the respondent's three RRIFs were valued, as of June 30, 2023, at \$8,685.69; \$7,162.68; and \$276,774.83, a total of \$308,471.57. The increase in value has been due to market forces and the investment acumen of the respondent's fund managers, and not due to further deposits by the respondent. Consequently, the respondent's RRIFs, valued at the first day of the trial, October 31, 2023, will be divided equally by way of a tax-free spousal rollover, pursuant to the Income Tax Act. She will not have to account for her annual withdrawals.
- [35] With respect to the Canada Pension Plan, the parties' unadjusted pensionable earnings earned during the period of October 7, 1978 to January 15, 2019 will be divided pursuant to the provisions of the Canada Pension Plan Act, upon either party applying.
- [36] There are some personal possessions which I will address. The respondent testified that before she moved to Alberta, the claimant took and essentially hid an envelope containing \$8,000 in cash, which was what remained of cash she had received as a retirement gift, as well as her jewellery and her fur coats, which coats have now been returned to her. The claimant denied that he had her jewellery and testified that although he found some items related to her retirement gift, he did not have or take her envelope of cash, although he did acknowledge that there were some old currency bills in the house when the respondent left for Alberta. The state of the evidence in this case does not allow me to find that \$8,000 was left in the house or that the claimant should account to the respondent for that sum. With respect to the jewellery, I do accept that jewellery belonging to the respondent was in the house, and the claimant's possession, when the respondent moved to Alberta. However, I have no evidence as to value of that jewellery and indeed, the respondent describes it as

having sentimental value rather than assigning it an actual market value. Under the circumstances, I will order only that if the claimant finds any of the respondent's jewellery, he is to return it to her. The respondent also asks to have a piece of furniture given to her by the claimant, referred to by the parties as a chiffonier. The claimant testified that he has it and he is using it. Given that the claimant had the opportunity to keep, and in some instances sell, the majority of the parties' chattels, I will order that the respondent is entitled to the chiffonier. She is to arrange for pick up of that piece of furniture from the claimant and will have responsibility for the cost, if any, of transporting it to her home.

- [37] Although neither party made specific submissions about vehicles, I conclude that no adjustment is required with respect to vehicles. Although the respondent left with a vehicle that had more value than the vehicle the claimant was then driving, an older pickup truck, the claimant had and sold, for \$10,000, an old Thunderbird that was in the barn prior to the sale of the property. Consequently, the value of vehicles overall was approximately equivalent. I will not order the claimant to account for funds he received from the sale of other possessions before the property sale closed.
- [38] I turn now to adjustments which will apply before final distribution of funds. Both parties' advance claims for adjustments.
- [39] The claimant paid \$3,600 for tree removal on the property in May of 2022 and \$3,742.39 to replace pipes and the water heater that same month. The respondent agrees he should be credited an adjustment for those payments, and she is prepared to pay half of those costs, amounting to \$3,671.20. The claimant also says that he has a moral obligation to pay to his former neighbour a significant sum of money for work done on the creek running through both their properties, and that he plans to do that as soon as he receives proceeds from the sale of the property. He has provided no invoice for the work and no evidence as to the actual costs incurred by the neighbour, apparently using his own equipment, for the work done. On the evidence before me, I am not satisfied that any adjustment should be made between the parties related to that work.
- [40] The respondent claims that adjustments should be made in her favour for a number of expenses she paid after the separation which should have been paid by the claimant. I find that the claimant is responsible to reimburse the respondent for the following:
- Half of Telus home phone and Fortis - January to May 2019: \$1,001.63
  - BC Hydro - half to May 2019, full costs to February 2021: \$869.43
  - Telus mobility - half to December 2019: \$770.14
  - ADT alarm - half to May 2019, full cost to February 2022: \$940.00
  - Garbage pickup - half to May 2019: \$62.53
  - MSP coverage - half to May 2019: \$337.50

- 2022 property taxes: \$721.44
- 2022 home insurance: \$2,650.00

The total of those sums is \$7,352.67.

[41] I have dealt separately with registered accounts and pensions, including CPP. With respect to the distribution of the money held in trust, and the accounting for other financial assets and liabilities, I make the following calculation:

Claimant

Respondent

Bank accounts

\$ 7,830.31

\$104,169.98

Line of credit

-13,455.63

Money in trust

362,836.79

362,836.79

\$370,667.10

\$453,551.14

To equalize, the respondent would owe the claimant \$41,442.02

Adjustments

Claimant owes Respondent

Respondent owes Claimant

One-half holdback

\$ 8,737.85

Regional District judgment

2,615.06

Costs (Master Keim)

500.00

Costs (Justice Wilson)

2,000.00

Amounts paid by

respondent

7,352.67

\$21,205.58

Amounts paid by claimant

\$3,671.20

Claimant owes respondent net adjustments \$17,534.38

$\$41,442.02 - \$17,534.38 = \$23,907.64$

Money to be paid from trust

Claimant

Respondent

\$362,836.79

\$362,836.79

23,907.64

-23,907.64

\$386,744.43

\$338,929.15

[42] I turn now to the respondent's claim for occupational rent. She submits that she had to pay rent, and then mortgage payments, for alternate accommodations up to the time that the sale of the property closed, while the claimant lived in the family home on the property, mortgage free. The law with respect to occupational rent was set out by Sharma J in *Petrie v. Lindsay*, 2019 BCSC 371 at para. 136:

[136] Occupational rent is not a typically asserted as stand-alone claim, but is often considered in the reapportionment analysis. Even in that context, it is an exceptional remedy that should only be used cautiously and only to achieve a just and equitable result: L.W. at paras. 166-168; *Stasiewski v. Stasiewski*, 2007 BCCA 205 at para. 30. Additionally, *Shen v. Tong*, 2013 BCCA 519, contains a non-exhaustive list of factors to consider in assessing a claim for occupational rent (at para. 94):

- a) whether there has been ouster (although several authorities have indicated that this is not a requirement);

- b) whether children are residing with the occupying spouse;
- c) whether the occupying spouse has made a claim for contribution from the non-occupying spouse for the expenses related to the premises;
- d) whether child and/or spousal support was being paid by the non-occupying spouse;
- e) whether the occupying spouse increased the selling value of the property;
- f) the duration of the occupancy; and
- g) any other competing claims.

[43] In this case, the respondent chose to leave the property and move to Alberta. I am not satisfied she was ousted from the property. The claimant has successfully claimed for modest contribution from the respondent for tree removal, piping and a water heater, and the respondent did make other contributions, including paying property taxes and insurance one year, but she did that without consultation with or request by the claimant. The evidence in this case suggests that the property did go up in value between the date of separation and the date of trial, to the benefit of both parties, but not due to the claimant having taken specific steps to increase the value. Although the claimant was not paying rent or mortgage, I find it probable, on the evidence, that his costs of maintaining the property, a large rural property, exceeded the respondent's accommodation costs beyond her rent and then mortgage payments. More importantly, in my view, the claim for occupational rent is an equitable claim. Weighing against awarding occupational rent to the respondent is the fact that upon separation, she took \$104,169.98 from bank accounts and left the claimant with only \$7,830.31 (aside from any balances, of which I have no evidence, he had in accounts in his own name. Although that discrepancy is addressed in the division of assets now, the result of the removal of the funds was to deprive the claimant of access to family assets which he might have otherwise accessed to pay expenses. Further, the respondent has received and retained for her benefit, mandatory withdrawals from the RRIFs, which are family assets, and the claimant has not requested, and I have I required, that she account for those withdrawals.

[44] Weighing all of the evidence in this case, I dismiss the respondent's claim for occupational rent.

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

- a) Each party is entitled to keep the TFSAs now in his or her possession, without claim by the other.

- b) The respondent's Public Service Pension Plan will be divided between the parties pursuant to Part 6 of the Family Law Act, from the date of the marriage (or the entry by the respondent into the plan) to the date the pension started to be paid. The order for division is to be effective the first day of trial, October 31, 2023. The respondent shall not be required to account for the monthly pension payments she has received from the time of separation to present.
  - c) The respondent's three RRIF accounts, as valued on October 31, 2023, will be divided equally between the parties, by way of tax-free spousal rollover.
  - d) Upon application of either party, the parties' unadjusted pensionable earnings during the period of October 7, 1978 to January 15, 2019, will be divided pursuant to the provisions of the Canada Pension Plan Act.
  - e) The claimant will return to the respondent any of the respondent's jewellery that he has in his possession, and will make available, for pickup by the respondent, the antique chiffonier, which chiffonier will be the property of the respondent. All other personal possessions in the possession of either party will remain that party's property, without claim by the other.
  - f) From the money currently held in trust by the respondent's former counsel, the claimant will be paid \$386,744.43 and the respondent will be paid \$338,929.15.
- [46] Finally, on the issue of costs, I find there has been divided success in this matter. Unless there are matters of which I am not aware, and specifically I am referring to offers of settlement, each party will bear his or her own costs. If either party wishes to make submissions on the issue of costs, that party must, within 30 days of the date of these reasons, apply to reappear before me, by using the online request form.

"Beames J."

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