

CANADA / JUDGMENT

Zoeller v. Zoeller

2025 BCSC 769

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Supreme Court of British Columbia

DECIDED

25 April 2025

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2025 BCSC 769 Zoeller v. Zoeller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zoeller v. Zoeller,

2025 BCSC 769

Date: 20250425

Docket: E46259

Registry: Penticton

Between:

Bernd Zoeller

Claimant

And

Alexandra Zoeller

Respondent

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Claimant:

M.A. McLeod

Counsel for the Respondent:

A.N. Svetlichny

Place and Date of Hearing:

Kelowna, B.C.

April 10, 2025

Place and Date of Judgment:

Kelowna, B.C.

April 25, 2025

Introduction

- [1] The parties began cohabiting on January 1, 1992, were married on June 26, 1993, and separated on July 1, 2013. They have three adult children currently aged 30, 28 and 23 ("Children").
- [2] Following separation, the claimant moved into his new partner's home and the respondent remained living in the family home ("Family Home") with the Children. The Family Home was purchased in 2009 and was registered solely in the respondent's name. No application for child support was made and the claimant paid nothing by way of voluntary child support payments.
- [3] The couple incurred significant family debt during their cohabitation, mostly related to the claimant's failed auto mechanic business. The claimant made an assignment into bankruptcy on June 26, 2014, one year after the parties' separation. He was discharged from bankruptcy on September 26, 2019.
- [4] This action was commenced on February 4, 2021, some seven-and-a-half years after the parties separated.
- [5] The Family Home was sold on December 19, 2024, for \$670,000 and after payment of financial charges registered against it, including a mortgage, three judgments and a Provincial crown debt, there remains approximately \$338,000 in trust ("Net Proceeds").
- [6] Relying on s. 95 of the Family Law Act, SBC 2011 c. 25 [FLA] and Rule 11-3 of the Supreme Court Family Rules, the respondent applies by way of summary trial, for an order for unequal division of the Net Proceeds in her favour. She seeks an order that she be entitled to receive 100 percent of the Net Proceeds.
- [7] Despite there being a number of conflicts set out in the parties' affidavits, the claimant agrees to the matter proceeding by way of summary trial. He seeks an order that the Net Proceeds be split equally between the parties.

Summary of Decision

[8] For the following reasons, the respondent is entitled to 100 percent of the Net Proceeds to the claimant's exclusion. She is also entitled to her Scale B costs.

Brief Background

[9] The claimant is currently age 55 and the respondent age 54.

[10] The claimant is an automotive and boat mechanic and body man by trade and operated a business known as Zoeller's Auto and Marine Ltd. ("Zoeller Auto"). The claimant incorporated Zoeller Auto in the respondent's name after abandoning a similar business because he had creditors he couldn't pay. Zoeller Auto ultimately failed as well, leaving significant debt.

[11] The claimant left the Family Home in 2013 without warning while the respondent and the Children, then aged 11, 16 and 19, were in Germany. He moved in with Zoeller Auto's bookkeeper, Ms. Julia Pakula ("Ms. Pakula") with whom he lived in a marriage-like relationship until she died in 2019. On her death, the claimant inherited her home.

[12] Meanwhile, the respondent was left to support the Children without any financial support from the claimant.

[13] Without providing any medical backup, the claimant says he suffered two heart attacks, one in 2015 and one in 2016 that he contends affected his physical and mental health and left him unemployable. He says he has been collecting CPP disability and provincial disability as result of him being unable to work, through which he says he earns roughly \$17,000 annually.

[14] The respondent is employed by Penticton and District Society for Community Living earning in the range of \$60,000 annually. She details the financial struggles she had following separation, not only with raising three children with no financial support from the claimant, but also with paying down various family debts, mostly related to Zoeller Auto, again with no assistance from the claimant. Further, the claimant provided no assistance with the Family Home's maintenance, repair and upkeep costs.

[15] In short, the respondent and the Children were abandoned and left to fend for themselves.

[16] Between 2013 and December 2024, when the Family Home sold, the respondent paid mortgage payments of \$140,509.65, of which \$77,824.29 went towards principal, property taxes totalling \$26,083.67 and insurance totaling \$13,400. She also made payments on various judgments and serviced other family debts registered against the Family Home. In total, the respondent paid over \$263,000 towards family debt and property, including the Family Home mortgage.

The Relevant Legislation and Case Law

[17] Part 5 of the FLA governs the division of property and debt.

[18] The general presumption is that on separation, each spouse has a right to an undivided one-half interest in all family property and the obligation for one-half of all family debt, regardless of their respective use or contribution: FLA s. 81(a) and (b).

[19] However, that presumption may be displaced if an equal division of property and/or debt would be "significantly unfair": FLA s. 95. The relevant factors for consideration for the purposes of this case as set out in s. 95(2) are:

95 (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;
- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1)
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (i) any other factor, that may lead to significant unfairness.

[20] In *Singh v. Singh*, 2020 BCCA 21 at para. 134, the Court of Appeal, citing *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 41 stated:

[134] . . . it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.

[Citations omitted.]

[21] Thus, the respondent has the onus of showing, after a consideration of all the relevant background facts and circumstances, that an equal division of the Net Proceeds would be significantly unfair to her.

[22] Despite the general proposition in s. 81 of the FLA stating that spouses are each entitled to share equally in family property regardless of their respective contributions, that is not to say that unequal contribution will always be irrelevant: *Singh v. Chandi*, 2024 BCSC 771 at para. 104 [*Singh*] referring to *Mao v. Rao*, 2021 BCSC 2073 at paras. 208 and 209.

Discussion

[23] In response to the respondent's claim for reapportionment of the Net Proceeds 100 percent in her favour, the claimant asserts in his recent affidavit, among other things:

- a) That when the parties separated, they agreed that the respondent could remain living in the Family Home with the Children and that they would defer the division of the Family Home until their youngest child had graduated;
- b) That on separation, he had to bear the cost of a new place to live;
- c) That he did not make an application for occupational rent because he was entitled to equal division of the Family Home's equity;
- d) That because of his two heart attacks he has been unable to work and has been receiving CPP/PWD since 2015. Accordingly, he says he has earned very little income since 2015, with his highest income of \$17,396 in 2023;
- e) That due to his modest income over the years, he calculates that his child support obligations would have been the nominal amount of \$3,331.24 annually;
- f) That he "believes" that on his behalf his partner, Ms. Pakula, paid the respondent \$350 per week for a period of time to help with her expenses;
- g) That the respondent was involved in Zoeller Auto's operations and, as part of her duties, was responsible to pay its debts, including payroll, taxes, GST and accounts payable;
- h) That he filed for bankruptcy on June 26, 2014, with family debts in his name at the time totalling \$262,975. He says that because these debts were "handled by way of the bankruptcy" he should be given credit for these debts and they should be set off with the family debts the respondent paid;
- i) That had he forced the division of property in 2013, there would have been very little, if any, equity in the Family Home to divide and by delaying matters until now, the Family Home has gone up due to market forces from which both parties can now benefit;
- j) That the respondent ought to be responsible to pay him occupational rent which would be offset by the family debt she paid over the years since separation; and
- k) That the Family Home was purchased in 2009 using as the down payment the proceeds of \$120,000 from the sale of their previous home, and 50,000 Euro inheritance he received in cash from his mother.

[24] For her part, the respondent:

- a) Denies that there was any discussion or agreement on separation that the sale of the Family Home would be deferred until their youngest child graduated. She says that after she was abandoned, the claimant and Ms. Pakula tried to pressure her into selling the Family Home to allow them to live "happily ever after";
 - b) Denies that on separation the claimant had to bear the cost of a new place to live because he moved directly into Ms. Pakula's home;
 - c) Suggests that the claimant continued to work as a skilled auto mechanic for unreported cash;
 - d) Calculates that the claimant's unpaid child support obligations since separation, assuming a reasonable imputed income from the date of separation total between \$30,000 and \$40,000 at a minimum;
 - e) Denies that Ms. Pakula or anyone else paid any money to her for expenses, either weekly or otherwise;
 - f) Denies that she was ever involved in the day-to-day affairs of Zoeller Auto as a bookkeeper or otherwise. She says at all material times Ms. Pakula did the bookkeeping for the company;
 - g) Points out that there is no evidence that the claimant made any payments towards the bankruptcy debts from the time of his bankruptcy to his discharge from bankruptcy. The only evidence is that the debts were extinguished; and
 - h) Denies that the claimant ever received a 50,000 Euro inheritance from his mother.
- [25] It is trite that a party asserting a particular fact bears the onus of proving that fact on a more likely than not basis. If, on the evidence, the scales have not been tipped in favor of that fact, it is not proven.
- [26] Here, the claimant's evidence falls far short of proving several of the facts he alleges. First, they are denied by the respondent. Second, he provides nothing but his say so in backup. The facts upon which he relies that I conclude he has not proven are:
- a) That on separation there was an agreement to defer the division of family assets;
 - b) That he incurred the expense of renting new premises after separation;
 - c) That Ms. Pakula paid the respondent \$350 per week (or any amount) for expenses; and
 - d) That he received a 50,000 Euro inheritance from his mother that was used as part of the down payment for the Family Home.
- [27] In support of her claim for unequal division of the Net Proceeds, the respondent relies on the factors set out in s. 95(2)(a), (f) and (i) of the FLA which I will now address.

Section 92(2)(a) and (f): Duration of the relationship; Increase in value of the Family Home, or Decrease in value of Family Debt, beyond Market Trends

- [28] The parties cohabited for some 21 years and it has been 12 years since they separated. Since then, the respondent has been the sole payor of the Family Home's mortgage, property taxes, utilities and insurance. Without such payments, the Family Home would not have been preserved. The respondent was also the sole contributor towards paying down the parties' significant family debt.
- [29] The claimant argues that because his bankruptcy eliminated approximately \$263,000 of family debt, he should be given credit for that against the family debt the respondent paid. I disagree. The claimant is unable to direct me to any authority where such an argument was either made or had succeeded and I can think of no meritorious basis for entertaining it. There is no evidence that he made any payments to his bankruptcy trustee while he was undischarged. Given his position that he was unable to work, I suspect none of his creditors received anything. As an analogy, his argument is akin to a situation where a family debt lapses due to an intervening limitation period and the party owing the debt asserts that he/she gets credit for paying it.
- [30] The respondent emphasises that the claimant shirked his legal duty to support the Children. Further she notes that he contributed nothing towards general household expenses, including the mortgage or other expenses related to the Family Home.
- [31] To the contrary, the evidence is that over the 12 years since separation, the respondent made mortgage payments of \$140,509.65, property taxes of \$26,083.67 and property insurance of \$13,400. Without these payments, the Family Home would likely have been lost.
- [32] Respecting family debt, the evidence is that the respondent paid:
- a) \$16,402 to the CRA;
 - b) \$14,643.07 to the Royal Bank on the family line of credit ("RBC LOC");
 - c) \$4,500 on a Lordco debt;
 - d) \$20,341.71 on a BMO debt;
 - e) \$4,161.89 on a Scotia Bank line of credit; and
 - f) In addition, while the parties were still cohabiting, the respondent took out student loans so she could get re-educated. Those loans were also a family debt that she paid off over time with payments totalling \$23,373.22.
- [33] Currently there remains \$7,985.12 owing on the RBC LOC which the respondent proposes to pay out of the Net Proceeds.
- [34] All told, since separation and not counting the RBC LOC, the respondent has paid \$263,415.21 to maintain the Family Home and pay family debt. She argues that the claimant should be required to reimburse her for his one-half share, or \$131,707.60.

- [35] I agree. The evidence suggests, however, that the claimant has no realistic ability to reimburse her.
- [36] This factor militates in favour of a finding of significant unfairness and an unequal division of the Net Proceeds.

Section 95(2)(i): Any other factor that may lead to significant unfairness

- [37] Section 95(2)(i) of the FLA allows for the consideration of "any other factor" that may lead to significant unfairness. It is limited to factors that relate to the "economic characteristics of the spousal relationship": Singh at para. 110.
- [38] In the circumstances of this case and for the following reasons, I consider that the 12-year period of separation is a factor that favours a finding that equal division of the Net Proceeds would be significantly unfair because a) the claimant utterly failed to contribute anything towards either the maintenance of the Family Home or the Children's support; and b) the parties' comparative financial positions if the Net Proceeds were to be divided equally.
- [39] Respecting child support, the claimant's duty to support his Children exists independent of whether any application for support is brought. In *Michel v. Graydon*, 2020 SCC 24, the Supreme Court of Canada stated the point clearly:
- [41] Child support obligations arise upon a child's birth or the separation of their parents. Retroactive awards are a recognized way to enforce such pre-existing, free-standing obligations and to recover monies owed but yet unpaid. Such a debt is a continuing obligation which does not evaporate or fade into history upon a child's 18th or 19th birthday or their graduation from university. Under s. 152 of the Family Law Act, a debt exists if the child qualified as a beneficiary at the time the support was due, irrespective of their status at the moment of the application. This reading not only accords with the text, legislative scheme, and purpose of s. 152, it enhances access to justice, reinforces that child support is the right of the child and the responsibility of the parents, encourages the payment of child support, acknowledges that there are many reasons why a parent may delay making an application, and recognizes how the underpayment of child support leads to hardship and contributes to the feminization of poverty. In short, allowing recipient parents to make claims for historical child support is in the best interests of children and promotes equality and access to justice for all.
- [40] While the respondent does not seek retroactive child support from the claimant, she makes the point that his failure to make any effort to support the Children after separation, in favour of his new relationship, speaks to the unfairness of dividing the Net Proceeds equally.
- [41] I agree. While I accept the claimant's evidence that he suffered two heart attacks, there is no evidence showing that he was or continues to be totally disabled from work.

- [42] Respecting the parties' comparative financial positions, the claimant is now the sole owner of Ms. Pakula's home. According to the claimant's latest Form F8 Financial Statement filed Dec 5, 2023, its equity is approximately \$243,000. Based on the parties' financial statements, and not counting the Net Proceeds, it appears the claimant's current net worth is in the range of \$278,000 and the respondent's is in the range of \$15,000.
- [43] Further, I accept that the family debt servicing costs paid by the respondent after separation can be adjusted between the parties. In short, the claimant must account to the respondent for those payments: *Ostere v. Harding*, 2017 BCCA 157 at para. 22.
- [44] This too militates in favour of significant unfairness and an unequal division of the Net Proceeds.

Would an equal division of the Net Proceeds be significantly unfair?

- [45] Yes.
- [46] There can be no doubt on the evidence that the respondent has solely borne responsibility for servicing the family debt since the date of separation. There can also be no doubt that the claimant's focus was on neither the Family Home nor the Children but on Ms. Pakula instead. I conclude it would be manifestly unjust and significantly unfair in these circumstances not to order an unequal division.
- [47] In all the circumstances, I am easily satisfied that it would be unjust and significantly unfair not to unequally divide the Net Proceeds in the respondent's favor.
- [48] That leaves a determination of what the division should be. As noted, the Net Proceeds in trust are \$338,508.35. An equal division would give each party \$169,254.18.
- [49] The respondent has paid a total of \$263,415.21 to date towards the maintenance of family property and family debt. The claimant's one-half share is \$131,707.60. Without considering the issue of child support, the claimant's share of the Net Proceeds, after accounting to the respondent for his half of the payments, is \$37,546.58 (\$169,254.18 - \$131,707.60).
- [50] The RBC LOC balance of \$7,985.12 is yet to be paid. I have no confidence that the claimant will pay his one-half share (or any portion) of the RBC LOC balance (namely, \$3,992.56) which will necessitate the respondent paying. That leaves his share at \$33,554.02 (\$37,546.58 - \$3,992.56).
- [51] On balance, and taking everything into account, I cannot come to any other conclusion but to find that the respondent be entitled to 100 percent of the Net Proceeds to the exclusion of the claimant. In my view, and keeping an eye on the parties different levels of net worth, it would be manifestly unfair for the claimant to benefit from the Family Home's appreciation given that he abandoned both the property and the family.

Decision

[52] The respondent's application is allowed. There will be an order that the respondent is entitled to 100 percent of the Net Proceeds.

[53] The respondent is also entitled to her Scale B costs.

"G.P. Weatherill J."

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