# In the Court of Appeal of Alberta

**Citation: Tebbutt v Montgomery, 2026 ABCA 381**

**Date:** 20261126
**Docket:** 2501-0031AC
**Registry:** Calgary

**Between:**

**Telisa Tebbutt**

Respondent
(Plaintiff)

- and -

**Jason Montgomery**

Appellant
(Defendant)

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**The Court:**

**The Honourable Justice Jo'Anne Strekaf**
**The Honourable Justice Anne Kirker**
**The Honourable Justice Tamara Friesen**

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**Memorandum of Judgment**

Appeal from the Judgment by
The Honourable Justice O.P. Malik
Dated and Filed on the 14th day of January, 2025
(Docket: FL01-35941)

## Memorandum of Judgment

**The Court:**

**Overview**

[1] This is an appeal from a summary trial decision that divided the property of a couple who had lived in a common-law relationship from late 2011 to January 2020. The summary trial judge directed an equalization payment of $2,268.07 be paid by the appellant Father to the respondent Mother.

[2] The Father submits the summary trial judge erred in concluding the Father was responsible for debt on credit cards and lines of credit in the Father's name, which stood at $96,848 at the time of separation. The trial judge held that the Father failed to demonstrate this debt had been incurred during the relationship. The Father also submits the summary trial judge made a calculation error.

[3] The Father seeks to adduce new evidence on appeal, being credit card statements he discovered a few weeks prior to trial, some of which the summary trial judge refused to admit as evidence at trial.

[4] The new evidence is admitted and the appeal is allowed for the reasons that follow.

**Analysis**

[5] The division of property on the separation of a common-law couple who qualify as adult interdependent partners is governed by the *Family Property Act*, RSA 2000, c F-4.7. Property acquired by a spouse during a relationship of interdependence (except property referred to in subsections 7(2) and 7(3)) is distributed "... equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8": *Family Property Act*, s 7(4). The market value of property acquired by an adult interdependent partner before the relationship began is exempted from distribution: *Family Property Act*, s 7(2)(c.2).

[6] As this Court has commented, the obvious intention of section 7(4) is that the trial judge is to divide "net matrimonial property": *Carmichael v Carmichael*, 2007 ABCA 3 at para 21. "The trial judge must determine the matrimonial assets, subtract the matrimonial debts, and identify the net amount that is available for distribution": *Carmichael* at para 21. "A debt is generally considered to be matrimonial debt if it was related to the acquisition of matrimonial assets, or to the maintenance of the lifestyle of the parties": *Carmichael* at para 23.

[7] The approach to the treatment of debt in the context of property division was described by the majority in *Kretschmer v Terrigno*, 2012 ABCA 345 at paras 24 and 25:

> Under the Alberta regime, in order to equitably divide matrimonial property trial judges must determine what constitutes premarital, joint and post separation debt, all with a view toward fairness in property division. Where these numbers or their proper characterization are at issue, it is incumbent on trial judges to find the facts necessary to do a proper calculation of net matrimonial property and exempt property …
>
> ... We see nothing in the *Act* nor in the jurisprudence that would or should preclude a spouse who did not incur the premarital debt from arguing that he or she should not be burdened with that debt in a division of property, or from arguing that credit must be given where matrimonial assets, or matrimonial income, are used to pay off the other spouse's premarital debt.

***Treatment of the Father's debt***

[8] In calculating the equalization payment, the summary trial judge concluded the Father was responsible for the full amount of the debt that was in his name at the time of separation ($96,848) as he had failed to prove the debt had not been acquired during the course of the relationship.

[9] On appeal, the Father submits the summary trial judge erred by:

1. reversing the statutory presumption of the equal division of property under section 7(4) of the *Family Property Act*;

2. finding there was an absence of evidence that the debt was acquired during the relationship; and

3. refusing to admit 2011 credit card statements showing minimal balances at the time the relationship began.

[10] The summary trial judge addressed the treatment to be afforded the debt in the Father's name at the time of separation at paras 23–27:

> Apart from the mortgages on the real properties as discussed above, the only debt argued by the parties is the Father's credit card debt. The Father testified that when the parties met, he had virtually no credit card debt and that his balance on a CIBC Visa credit card stood at $369.00 in September 2011.

> He says that over the course of the relationship, the parties accrued debt which he earned on various credit cards (CIBC Visa, RBC Visa) and personal lines of credit (Scotia Bank LOC and CIBC PLC) which were in his sole name. When the parties separated, this debt stood at $96,848.00.
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> The Father says that the debt currently stands at approximately $103,000.00 and that the total interest payments which he has had to make since the parties' separation amounts to $68,000.00, for a total debt at the date of trial of approximately $171,000.00. He says that the principal amount of this debt was incurred during the parties' relationship and that this sum, plus the accrued interest, is equally divisible pursuant to section 7(4).
>
> The Mother disagrees. She says that the Father incurred this debt prior to their relationship and that all he could afford during the course of their relationship was to make minimum interest payments. In the result, she says that this debt does not comprise family property and is exempt from property division.
>
> Other than making a bare assertion, the Father did not provide any clear, convincing or cogent evidence that would satisfy me on a balance of probabilities that that this debt was incurred during the course of the parties' relationship. This is surprising. Throughout this trial, I generally found the Father to be highly detailed in his evidence, particularly as it related to parenting matters. However, he was unable to provide any details regarding the particulars of his credit card debt other than to generally assert that these accumulated in the course of paying for legitimate household expenses. He says that he did not preserve his credit card statements and that when he requested the Bank provide these to him, he was informed the Bank cannot go back more than 7 years.
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> From what I can tell, the Father lives a frugal life, spending most of what he earns or receives in child support for the benefit of the Children and their educational needs. I find it surprising that the Father would have assumed such a significant debt load prior to the parties' relationship. However, this debt is entirely in the Father's name and only he can prove when, and under what circumstances, this debt was incurred. In the absence of any evidence, I have little choice but to conclude that the Father has failed to prove that this debt comprises family property and should be subject to property division. In the result, I find that the entirety of this sum is exempt from property division and remains the Father's debt to pay.

[11] The Father's submission that the summary trial judge erred in the application of section 7(4) is misplaced. The Father suggests section 7(4) creates a presumption that property in the name

of a spouse at the time of separation is family property to be divided equally unless that would be unjust. Rather, the presumption is that property found to have been acquired during the relationship will be divided equally; there is no presumption that property owned by a spouse at the time of separation was acquired during the relationship. It is for the trial judge to determine what property was acquired during the relationship and the usual rules of evidence apply to that issue. To the extent that one party alleges an asset in their name was acquired before the relationship began, or a debt in their name did not predate the relationship and was incurred during the relationship, they are often in the best position to adduce such evidence. In this case the summary trial judge concluded the Father, who was claiming the debt was acquired during the relationship, was in the best position to establish that was the case and had failed to do so. We do not find that approach was unreasonable.

[12] However, we have concerns about the summary trial judge's refusal to admit credit card statements sought to be adduced by the father at the summary trial.

[13] The parties were self-represented. A case management order dated March 30, 2023 directed that evidence be provided in affidavit form at the summary trial. The Father claims he complied with the direction by the case management judge regarding the items to be included in his affidavit regarding property division.

[14] The case management order stated in part that the parties' direct evidence shall be set out in affidavit form and that:

> 4. The parties' Affidavit regarding family property division shall include:
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> a. A statement of assets and liabilities of all family property to be divided between them;
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> b. Values for all properties at date of co-habitation, separation and trial (with supporting documentation such as real estate purchase documents and mortgage statements);
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> c. Documentation for RRSPs, showing valuation at date of acquisition, date of separation and date of trial;
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> d. Documentation for valuation of vehicles;
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> e. Bank Documentation for claimed family debt as of the date of separation and date of trial;
>
> f. Corporate searches showing ownership of the Plaintiff's company; and

g. Accounting of rents received and disbursed from the rental property.

[15] The case management order further provided that at trial "the parties may provide an update only to their affidavit evidence limited to 15 minutes each unless otherwise permitted by the presiding Justice."

[16] The Father's affidavit contained the following information about debt at the date of separation:

1. CIBC PLC:

a. 2020 Balance: $44,651.63 - See exhibit W

b. Interest per month in 2020: $602.67 - See exhibit W

c. Current Balance: $48,522.28 - See exhibit X (2 pages)

d. Current Interest Per Month: $726.88 - See exhibit X (2 pages)

2. Scotia PLC:

a. 2020 Balance: $6,418.46 - See exhibit Y

b. Interest per month in 2020: $67.12 - See exhibit Y

c. Current Balance: $7,407.65 - See exhibit Z

d. Current Interest Per Month: $105.41 - See exhibit Z

3. RBC Visa:

a. 2020 Balance: $18,422.92 - See exhibit AA

b. Interest per month in 2020: $201.05 - See exhibit AA

c. Current Balance: $19,161.12 - See exhibit BB

d. Current Interest Per Month: $215.62 - See exhibit BB

4. CIBC Visa

a. 2020 Balance: $27,355.49 - See exhibit CC

b Interest per month in 2020: $313.99 - See exhibit CC

c. Current Balance: $28,062.00 - See exhibit DD

d. Current Interest Per Month: $334.60 - See exhibit DD

[17] Neither the case management order, nor the evidence submitted by the father, referred to or included evidence about when the debts were incurred.

[18] At the trial, the Father cross-examined the Mother with respect to her claim that his debt was acquired before the relationship commenced:

> Q Telisa, can you -- as far as, like, my debt when we entered the relationship, can you specifically identify any amounts that were tied to any -- any credit cards or lines of credit that you are aware of?
>
> A I do not have the documentation with me.
>
> Q But -- okay, but you're convinced that I was carrying -- how much debt was I carrying going into our relationship?
>
> A I do not have that information. I do not know.

[19] The Father then sought to introduce an old credit card statement from 2011 that he had found which he submitted demonstrates how low his debt was at the time the parties met. The summary trial judge declined to admit that evidence. Here is the exchange:

> MR. MONTGOMERY: Thank you. Now, I did actually manage to dig up a -- I found an old credit card document from just -- from 2011. Would you like me to enter that into the -- because that demonstrates how low the debt was prior to meeting --
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> THE COURT: I am not going to do that.
>
> MR. MONTGOMERY: Okay.
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> THE COURT: If there is evidence that either one of you could have adduced at the time of the filing of your affidavits, in fairness --
>
> MR. MONTGOMERY: Yeah.

> THE COURT: -- to either one of you, then that should have been adduced. So I am not going to allow any late tendering of evidence.
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> MR. MONTGOMERY: Okay. It was discovered afterwards. Just basically it was kind of -- it had fallen down in the file cabinet essentially. That's why I didn't -- well, yeah, I didn't include it before now. Okay.

[20] The Father submits that the summary trial judge erred in failing to admit this evidence.

[21] The Father seeks to adduce the following fresh evidence on appeal:

- a CIBC visa statement from September 2011 showing a balance of -$369.95
- a CIBC visa statement from October 2011 showing a balance of -$257.58
- a CIBC visa statement from June 2015 showing a balance of -$5606.78
- a TD visa statement from August 2010 showing a balance of +$102.73
- a TD visa statement from November 2011 showing a balance of -$440.68
- a TD visa statement from February 2012 showing a balance of +$6.41

[22] In his affidavit in support of the application to admit fresh evidence, the Father deposes he had previously attempted to obtain historical bank records in June 2022 but was advised by the banks that they only retained records for seven years and could not provide statements from 2011-2012. He further deposes he discovered the statements a few weeks before the trial in September 2024 when moving a filing cabinet and it appeared they had fallen behind the cabinet. The summary trial judge declined to introduce the CIBC statements and the Father mistakenly thought the TD statements would not be relevant because the account had been closed.

[23] The test to admit new evidence on appeal is outlined in *Palmer v The Queen*, 1979 CanLII 8, [1980] 1 SCR 759:

1) the evidence should not generally be admitted if, by due diligence, it could have been adduced at trial;
2) the evidence must bear upon a decisive or potentially decisive issue in the trial;
3) the evidence must be credible in the sense that it is reasonably capable of belief; and

4) the evidence, if believed could reasonably, when taken with other evidence adduced at trial, be expected to have affected the result.

[24] We are satisfied that the evidence should be admitted. We accept the Father's explanation that he discovered the credit card statements shortly prior to trial and that he attempted to introduce the CIBC statements at trial. The evidence is credible and relevant on a decisive issue and could reasonably be expected to have affected the result.

[25] A summary trial judge has a discretion on whether to admit additional affidavit evidence and the exercise of that discretion is entitled to deference on appeal. In the circumstances of this case, however, we find that the summary trial judge's refusal to admit the evidence was not reasonable. The case management order identifying the property evidence to be produced at the summary trial did not contemplate the parties' providing evidence regarding when debts arose. The case management order did contemplate that the parties could update affidavit evidence at trial. By the time the Father sought to adduce this evidence at the summary trial, it was apparent that when the debt arose had become a live issue. The Father provided an explanation as to why the evidence had not previously been available and the proposed evidence appeared to directly address the question of when some of the credit card debt had been incurred.

[26] The matter is returned to the summary trial judge to reconsider whether some or all of the debt in the Father's name should be treated as family property for the purpose of the equalization calculation and, if so, how the equalization payment should be adjusted.

***Calculation Error***

[27] The Father submits the summary trial judge made a mistake in his assessment of the evidence with respect to the $35,000 increase in the Waddy Lane mortgage and a resulting error in how that should be treated in the calculation of the equalization payment. We agree.

[28] The Mother acknowledged she was solely responsible for $21,500 of the $35,000 increase in the amount of the mortgage and that the remaining $13,500 was joint debt.

[29] The summary trial judge found $12,000 (rather than $21,500) was the portion of the increase that was the Mother's responsibility. As a result, he erred in giving the Father credit for $6000 (1/2 of $12,000) rather than $10,750 (1/2 of $21,500) when calculating the equalization payment.

**Conclusion**

[30] The appeal is allowed.

[31] The matter is referred back to the summary trial judge to recalculate the equalization payment in light of the identified error in the treatment of the mortgage calculation, and to reconsider whether some or all of the debt in the Father's name should be treated as family property for the purpose of the equalization calculation and, if so how, the equalization payment should be adjusted.

[32] Rule 9.4(2)(c) is invoked, and the Court will prepare the resulting order or judgment.

Appeal heard on June 18, 2026

Memorandum filed at Calgary, Alberta
this 26th day of November, 2026

Strekaf J.A.

Kirker J.A.

Friesen J.A.

**Appearances:**

Respondent T. Tebbutt

Appellant M. Montgomery