IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Bhatt-Standley v. Bhatt-Standley, 2008 NSSC 288

Date: 2008 10 02
Docket: 1201-061894 (SFHD-53601)
Registry: Halifax

Between:

Anjlee Bhatt-Standley

Petitioner

v.

Ian Bhatt-Standley

Respondent

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	September 2 and 3, 2008 in Halifax, Nova Scotia
Written Decision:	
Counsel:	Robyn Elliott counsel for Anjlee Bhatt-Standley Vanessa Tynes counsel for Ian Bhatt-Standley

By the Court:

[1] Anjlee Bhatt-Standley (the Petitioner) has petitioned her husband, Ian Bhatt-Standley (the Respondent) for a divorce.

[2] The only unresolved issues are how their various assets and debts should be distributed between them, whether the Respondent should pay occupation rent to the Petitioner and costs.

BACKGROUND

[3] The parties immigrated to Canada from England in March 2003. They met at the University of Wolverhampton in the U.K. in December 1994. The Petitioner was then eighteen years of age and the Respondent forty. Within just a few months the parties began cohabiting in the Respondent's home.

[4] After living together for over five years the parties were married in Cheshire, England on October 31, 2000.

[5] The Petitioner graduated from the University of Wolverhampton in July 1998. She then attended the University of Central England where she obtained her Masters of Science degree in Library and Information Studies in November 1999. Throughout her years at university, both before and during her cohabitation with the Respondent, she was supported financially by her parents who completely covered her living expenses, university fees and many of her other costs. She earned some additional money working at a temporary position in the summer of 1995 and as a co-op student in 1996/1997.

[6] After graduating from the University of Central England, the Petitioner held a number of short contract positions before obtaining full-time employment as a Digital Library Officer with the University of Central England in November 2000. She continued working at that position until early 2003 when the parties moved to Canada.

[7] During the course of the Respondent's studies he supported himself with funds obtained through student loans. He completed his university studies in 1998 and then began working at a number of part-time positions.

[8] After arriving in Canada the parties lived with relatives of the Petitioner. In June 2003 they purchased what is now the matrimonial home with money provided by the Petitioner's parents. It is the Petitioner's position that that money along with other funds provided by her parents at different times since 2003 were loans which must be repaid. How the money provided by the Petitioner's parents is now treated and what is to become of the matrimonial home are the primary areas of dispute between the parties.

[9] Neither of the parties were employed between March 2003 and March 2004. During that time they supported themselves with savings they had accumulated prior to leaving England, money advanced by the Petitioner's parents and with funds realized from the sale of their former home in England which was sold in July 2003.

[10] Beginning in March 2004 the Petitioner obtained part-time employment with a number of different employers before obtaining first a part-time and then a full-time position with Petroleum Research Atlantic Canada. She held that position until August 2006 when she resigned in order to attend university in Halifax to obtain her Master's of Business Administration Degree. She expects to graduate in May 2009. She is not currently employed.

[11] Beginning in July 2005 the Respondent began working part-time at Dalhousie University but has spent most of his time trying to develop his own computer consulting business. So far that business has demonstrated only modest success.

THE DIVORCE

[12] The parties separated on May 13, 2007 and have remained separate and apart since that date. There has been a breakdown of their marriage and there appears to be no possibility of a reconciliation. A Divorce Judgment will be issued.

IDENTIFICATION, QUANTIFICATION AND CLASSIFICATION OF THE PARTIES' ASSETS AND DEBTS

ASSETS:

[13] The parties have the following assets:

1) There is the matrimonial home in White's Lake, Halifax County, Nova Scotia, owned jointly by the parties. They have agreed that the property has a value of $300,000.00 before disposition costs. From that figure I would deduct notional real estate commissions and HST of $16,950.00 as well as legal fees and disbursements of $1,200.00 leaving a net value of $281,850.00.

2) For the most part the parties have agreed on a division of the household contents and have also agreed that their respective shares are equal in value. As part of the Petitioner's share the Respondent has agreed to give her a crystal decanter and its contents, some Christmas decorations (glass stars) and a Pentax 110 camera with leather case. He testified that he didn't know where those items are but he has no objection to the Petitioner having them. It will be ordered that she receive those items.

3) The Petitioner has a 2001 Mazda motor vehicle which both parties agree has a value of $6,000.00 for the purpose of this proceeding.

4) The Respondent has a 2001 Jeep motor vehicle which the parties agree has a value for the purposes of this proceeding of $4,900.00.

5) The Petitioner has a 1978 Glastron power boat. They disagree on its value. The Petitioner estimates that it's worth $4,000.00. The Respondent says it is worth approximately $2,500.00. Neither party had the boat appraised.

The boat has been in the possession of the Respondent since the parties separated. He claims that the boat's motor is not in working order but there is no evidence to establish what might be the problem or how much it would cost to have it repaired. Being a depreciating asset the boat's value as of the date of separation is the relevant figure. The Court heard from a Ms. Debbie Richardson who works for a mortgage brokerage company. The Respondent spoke to her in 2007 for the purpose of obtaining pre-approval for a mortgage so that he might later buy out his wife's interest in the matrimonial home. According to Ms. Richardson he told her that the boat was worth approximately $10,000.00. I note, though, that in his conversation with her he overestimated the value of other assets including the matrimonial home.

Under the circumstances, I am prepared to accept the Petitioner's estimate of $4,000.00.

6) As of the date of their separation, the parties had a number of bank accounts in Canada and Great Britain. They were as follows:

(i) The Respondent had an account at Lloyds having a balance as of May 18, 2007 of £11,963.19. Using a conversion rate of 2.2 Canadian dollars for each British pound (the approximate conversion rate as of the date of the parties' separation) the balance of that account was equivalent to $26,319.02.

(ii) The Respondent had a savings account at ING Direct having a balance in May of 2007 of $2,001.05.

(iii) The Respondent had a savings account at President's Choice Financial having a balance as of May 16, 2008, of $12,025.72.

(iv) In May of 2007 there was a joint chequing account at President's Choice Financial. On the date of the parties' separation there was a balance in that account of $5,931.79. There was at the same time student fees owing by the Petitioner of $3,030.00 which she paid from this account on May 14, 2008, leaving a balance of $2901.79. On May 15 a Visa bill of $498.00 was paid and on May 15 a phone bill of $200.00 and a Nova Scotia Power bill of $773.23 were paid leaving a balance of $1,430.56. I consider the student fees, the Visa bill, the phone bill and the power bill legitimate family expenses even though they were paid after the parties separated. Later that month the Petitioner withdrew $700.00 from the account for her own purposes leaving the Respondent with $730.56.

(v) The Respondent had a chequing account with TD - Canada Trust having a balance as of the date of separation of $2,342.69.

(vi) The Respondent had another account at TD - Canada Trust having a balance of $608.23. The account was called a Business Investor Account. While the name implies that the account could be used for business or investment purposes there is no evidence to suggest that was how it was used.

Counsel for the Petitioner argued that the Respondent had at least two other bank accounts the balances of which were not disclosed. I am satisfied that the Respondent once held two other accounts, one at Lloyds and one at another

financial institution, but I am also satisfied that those accounts were closed well in advance of the parties' separation.

(vii) The Respondent had two guaranteed investment certificates which as of the date of separation had a combined value, inclusive of interest, of approximately $5,480.00.

(viii) The Petitioner had her own account at Lloyds. A little over two weeks prior to the parties' separation she had a balance in that account of £19,157.98 before she gave £10,000 to her parents as partial repayment of funds she felt were owed to them. By the date of separation there was a balance in the account of £9,194.16, or $20,227.15.

(ix) The Petitioner had two other accounts with Lloyds; a chequing and a flexible savings account which together had a balance of £120.09 or $264.20.

(x) The Petitioner closed an account at First Direct around the time of the parties' separation and received the balance of £125.79 or $276.74.

7) The Respondent is entitled to a small pension through Friends Provident Life which is a company in the United Kingdom. The only evidence of that pension came from the Petitioner and it showed that as of December 31, 1998 the value of the pension was £2,566.95. According to the documentation it is reasonable to assume that its value has increased but the growth rate depends on the performance of the various "companies, properties and securities" in which Friends Provident invests. Up-to-date information on the value of this pension is not before the Court. If one assumed that the rate of interest that was applied in 1998 was applied each subsequent year the gross value of this pension would, as of the date of separation, be approximately £3,218.36 or $7,080.39. I assume that amount will be taxable in the hands of the Respondent when he receives it so I have discounted the gross amount by 30% to notionally account for income tax, leaving that asset with a net value of $4,956.27.

[14] Subsection 4(1) of the ***Matrimonial Property Act*** provides:

> 4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of
>
> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
> (b) an award or settlement of damages in court in favour of one spouse;
> (c) money paid or payable to one spouse under an insurance policy;
> (d) reasonable personal effects of one spouse;
> (e) business assets;
> (f) property exempted under a marriage contract or separation agreement;
> (g) real and personal property acquired after separation unless the spouses resume cohabitation.

[15] When classifying assets there is a presumption that an asset is a "matrimonial asset" unless it is excluded by one of the exceptions listed in subsection 4(1). I am satisfied that all of the assets listed above are "matrimonial assets".

DEBTS:

[16] The Respondent has a CIBC VISA account which had an outstanding balance as of the date of the parties' separation of $752.31. He argued that it's a matrimonial debt. The Petitioner's position is that the debt should be solely the responsibility of the Respondent as it was incurred in the operation of his business and not for family related purposes. In *Selbstaedt v Selbstaedt,* 2008 NSSC 19 at paragraphs 31 and 32 I wrote:

> [31] Similarly, debt should be classified as "matrimonial" or non-matrimonial. "Matrimonial debt" is not a term found in the ***Matrimonial Property Act***. However, it is commonly used by our Courts (Ellis v Ellis (1999), 175 N.S.R. (2d) 268 (C.A.) beginning at paragraph 31). Unlike the process followed in classifying assets, a debt is presumed to be non-matrimonial unless proved otherwise. The individual who alleges that a debt is matrimonial has the burden of proving such (Abbott v Abbott (2003), 2008 N.S.R. (2d) 79 (S.C. Family Division) at paragraph 46).
>
> [32]Once identified as "matrimonial" the presumption of an equal division found in section 12 that applies to matrimonial assets also applies to matrimonial debts.

[17] The onus is on the Respondent to satisfy the Court that the balance owing on his VISA account is “matrimonial” by showing that the debt was incurred for the benefit of the family or family related purposes. I am not satisfied that he has. There is no evidence of how the Respondent’s VISA account was used or that it was ever used by the Petitioner. Under the circumstances I am not prepared to conclude that the VISA account is “matrimonial”.

[18] The Respondent has a motor vehicle loan owed to the Toronto Dominion Bank. The parties have agreed to treat that debt as a matrimonial debt. The parties also agree that the outstanding balance of that loan for the purpose of these proceedings is $5,182.62.

[19] The Respondent testified that he owes on three different student loans and it is his position that those loans are also matrimonial debts.

[20] The Respondent returned to university as a mature student in the early 1990's. Although he said he had sufficient funds to finance his education he nevertheless borrowed to cover his university costs. According to him he continued to borrow even after meeting and cohabiting with the Petitioner. As proof of these loans the Respondent attached to his Statement of Property copies of documents that appear to be annual statements in relation to two student loans as well as a letter dated December 19, 2006 addressed to him from a law firm in England demanding payment with respect to a third loan. The Respondent said that these loans are still outstanding because he disagrees with how the balances were calculated. He claims that since moving to Canada he has made partial payments on these loans but no proof of those payments was provided.

[21] On behalf of the Petitioner it is argued that these loans, if they exist, are not matrimonial and that in any event she does not believe that the Respondent has any intention of repaying them.

[22] A determination of whether a student loan is a matrimonial debt depends on the circumstances of each case. If the money realized from a student loan is used by the couple or the couple’s children for living expenses or to purchase or preserve a matrimonial asset then there is a direct benefit to the family and the student loan could be considered matrimonial. See for example *Pranke v Pranke*, 142 Sask. R. 168; 1996 CasrswellSask 188 (Sask. Q.B.).

[23] The benefit, however, need not be direct. In those cases when the borrowing party applies the student loan funds solely to education costs such as tuition, books and the like, other family members may benefit indirectly from the loan as a result of the borrowing party's enhanced earnings resulting from his/her education program. In those circumstances it may be appropriate to classify the loan as matrimonial. See *Jeans v. Jeans*, 2004 NLSCUFC 11, 5 R.F.L. (6th) 63.

[24] After the parties began living together and while the Respondent was at university they kept their finances separate and each paid for their own expenses from their own resources. During that time the Petitioner does not appear to have received any direct benefit from the Respondent's loans.

[25] Subsequent to the Respondent's graduation he worked at a series of modest paying jobs while the Petitioner supported herself from money provided by her parents and with her own earnings. Since moving to Canada the Respondent has had some part-time employment but has spent most of his time trying to develop his business. His tax returns since moving to Canada disclose that he has so far produced very little income from any source. His reported "total income" on line 150 on his tax returns in the years 2004, 2005, 2006 and 2007 was $582.00, $6,586.00, $11,839.00 and $190.67 respectively. It would seem that the Respondent's income has not been enhanced by his university education.

[26] I cannot conclude from the evidence presented that the Petitioner received any direct or indirect benefit from the Respondent's student loans.

[27] There is also a question of whether the outstanding loans were incurred before or after the parties began living together. Further, it is impossible to tell what amount is now owing on the various loans. The current outstanding balances has not been presented.

[28] In the circumstances of this case I am not prepared to conclude that the Respondent's student loans are matrimonial.

[29] The Petitioner's parents provided the parties with considerable sums of money since their move to Canada. It is the Petitioner's position that those advances constitute matrimonial debts for which both parties are responsible. The Respondent says that no money is owed to her parents and that any money given to

them was given to them as a gift or alternatively was a loan which was subsequently forgiven.

[30] From January 1995 to March 2003 the parties' matrimonial home was a property registered in the name of the Respondent in England which he had inherited from his parents. Once the decision to move to Canada was made that property was listed for sale but was not sold prior to their departure.

[31] Knowing that the parties had not sold their house in England the Petitioner's father offered them financial assistance to purchase a home once they settled in Canada. Approximately one to two months prior to leaving England the Petitioner's father offered to match whatever funds the parties were able to invest in the purchase of a new home. The parties did not respond to that offer. He then made a second offer just a few days prior to them leaving England. At that time he offered to loan them $240,000.00 toward the purchase of a home in Canada. That offer was accepted. As a condition of the loan the Petitioner's father insisted that the parties sign a promissory note that was to be prepared by his lawyer. That promissory note was signed by both parties on March 20, 2003, the evening prior to their departure for Canada. The note contemplated that the money would be borrowed from the Petitioner's mother, Mrs. Christina Bhatt, and read as follows:

> We the undersigned Anjlee Louisa Bhatt and Ian Standley hereby confirm and acknowledge that Mrs Christine Lesley Bhatt has agreed to advance a Loan of Canadian $240,000 for the sole purpose of purchasing a residential property in the surrounding district of Halifax, Nova Scotia, Canada, for us to live in on emigrating to Canada on the 21 March 2003.
>
> The loan moneys will be transferred by Mrs Christine Lesley Bhatt to a designated Canadian Bank account within seven days of receiving a notice to do so.
>
> We hereby jointly and severally agree to repay the loan to Mrs Christine Lesley Bhatt on demand.
>
> **This agreement is subject to the English Law.**
>
> **Signed on the 20th March 2003 by:**
>
> **Anjlee Louisa Bhatt** **Ian Standley**

In the presence of:

Mr Chandresh M Bhatt

The Petitioner's father also insisted that once a property was purchased he and his wife would be given further security in the form of a mortgage on the property.

[32] It was not until June 2003 that the parties made an offer on what is now the matrimonial home. Their offer was accepted. The total cost to purchase the property (including legal fees, deed transfer tax and other expenses) came to $284,430.00. The Petitioner's parents provided all of the money needed for the purchase.

[33] The Respondent acknowledges that the $240,000.00 contemplated by the promissory note was originally a loan, however, it is his position that the additional $44,430.00 was never intended to be repaid.

[34] The Respondent and the Petitioner's father rarely communicated with each other. The Petitioner's father disapproved of her relationship with the Respondent for a number of reasons including their age difference and because the Respondent appeared to him to be financially irresponsible. For that reason almost all communication between the parties and the Petitioner's parents was made by the Petitioner as opposed to the Respondent.

[35] On June 4, 2003 the Petitioner sent her father an e-mail advising that the cost to purchase the house would exceed $240,000.00 and if the additional money was provided by her father those funds too would be a loan. The e-mail also states that the additional funds would be repaid when the parties' home in England sold.

[36] After the purchase transaction was completed in June 2003 the parties then began negotiating with the Petitioner's father over the wording of the mortgage. The wording proposed by the Petitioner's father was not acceptable to the parties. Among the reasons given by the parties was that their lawyer informed them that the suggested wording would not have been enforceable under Canadian law. In time the Petitioner's father told the parties to have their own lawyer prepare a

mortgage using their preferred wording. They then instructed their lawyer on the wording that was to be used. Their instructions included that the amount of the mortgage was to be $240,000.00 (as opposed to $284,430.00).

[37] The mortgage prepared by the parties' lawyer made no reference to the promissory note. It provided that the mortgage would be void upon the payment of the $240,000.00 to the Petitioner's parents and also stated:

> "...while interest does not accrue on the money borrowed and there are no scheduled annual payments required the annual sum is due in full upon sale of the property, if the mortgagors are in breach of any term of this mortgage or no later than June 26, 2013. A divorce or bankruptcy of either of the Mortgagers (sic) may, at the discretion of the Mortgagees, make the entire sum repayable."

[38] The mortgage was registered on August 14, 2003.

[39] Although the parties' house in England sold in July 2003 none of the sale proceeds was given to the Petitioner's parents.

[40] In April 2005 the mortgage was released. The Respondent testified that the released was obtained at the request of the Petitioner and that he had little or nothing to do with it. He said he was having some difficulty obtaining credit for his business and that someone had mentioned to him that it might be because of the mortgage on their home. He said he simply mentioned that possibility to his wife and she then asked her parents for a release. According to the Petitioner the Respondent put pressure on her to obtain the release and she in turn put pressure on her parents.

[41] No consideration passed from the parties to the Petitioner's parents in return for the release.

[42] It is now the position of the Respondent that the mortgage replaced the promissory note and whereas the mortgage was released the debt has been extinguished.

[43] The onus is on the Petitioner to satisfy the Court of the existence of a matrimonial debt and in order to do that she must show that the debt is capable of legal enforcement. See *Rossiter- Forrest v Forrest* (1994), 129 N.S.R. (2d) 130,

Walker v Walker (1990), 92 N.S.R. (2d) 127 and *Rivers v Rivers* (1994), 130 N.S.R. (2d) 219.

[44] In the Petitioner's affidavit she said:

> "My parents agreed to sign a Release. However it was made very clear to me that the debt was not forgiven. Ian and I discussed the fact that the monies still needed to be repaid. The arrangement was that the Release was purely a courtesy to make our lives easier and that all monies remained due and owing. The loan agreement we signed on March 20, 2003 was never released. A copy of the Release of Mortgage my parents signed on April 1, 2005 is attached to this my Affidavit as Exhibit "10"."

Both of the Petitioner's parents testified and both agreed with the Petitioner's version of events.

[45] In his affidavit the Respondent stated:

> "That in 2005 me and Anjlee and I (sic) were having problems with our applications for credit. We assumed that it was because we had an outstanding mortgage on our home and we were not making payments. I never pressured Anjlee to ask her parents to release the mortgage. Mr. Bhatt [The Petitioner's father] would never no anything to make my life easier and would never agree to anything if it was suggested by me or if he had an inkling that it was suggested by me.....The release was drawn by Chandresh Bhatt, the family lawyer and executed by the Bhatt's (sic) on April 1, 2008. ..... Furthermore, we were told that we were not required to pay the full amount of money back to the Batt's (sic)."

[46] I do not accept the Respondent's evidence concerning the release. The Petitioner's evidence is more credible. I believe the Respondent did persuade her to ask her parents for the release. I don't believe that the Petitioner's parents told the parties that they were not required to repay the money. It is more likely that the Petitioner's parents were simply trying to make life easier for their daughter by removing a hurdle which may have prevented them from obtaining credit.

[47] As the Respondent acknowledged, his father-in-law was not inclined to do him any favours. It seems unlikely that after all of the steps taken by the Petitioner's father to ensure repayment that, without having received so much as a partial repayment, he would release the parties from all of their obligations to repay.

[48] Interestingly in another paragraph of the same affidavit sworn by the Respondent he stated:

> "...I am willing to repay $120,000.00 of the mortgage to the Bhatt's (sic) representing 50% of the $240,000.00 that they are claiming for the house....."

[49] I find that the full sum of $284,430.00 given to the parties by the Petitioner's parents is a matrimonial debt. There was a sufficient exchange of correspondence between the Petitioner and her parents to satisfy me that all of the participants considered not just the $240,000.00 that was originally contemplated, but the full $284,430.00 was intended as a loan. The promissory note signed by the parties and the exchange of correspondence between the Petitioner and her parents establish an indebtedness that is capable of legal enforcement.

[50] The mortgage did not replace the promissory note. It provided the Petitioner's parents with added security. Although the mortgage was released the promissory note continues to be enforceable. The release signed by the Petitioner's parents referred specifically to the mortgage and not the promissory note. As for the wording of the mortgage itself, I accept the evidence of the Petitioner's father to the effect that he did not complain about the wording of the mortgage document because he wanted to maintain family peace.

[51] It was the evidence of the Petitioner and her mother that in early April 2003 the Petitioner's parents' loaned the parties £10,000 for the purchase of a new vehicle (the Mazda). It was also their evidence that in May 2003 the Petitioner's mother loaned the parties a further £10,000 to help them with their living expenses since neither the Petitioner nor the Respondent were then working. The Respondent testified that the £10,000 given to them in April 2003 to purchase the Mazda was the only money that he ever requested from his in-laws. He repaid the car loan in June 2003 but does not acknowledge any obligation to repay the money provided in May 2003 for living expenses. No documentation or correspondence was presented to substantiate the Petitioner's position that the money was intended as a loan.

[52] According to the Petitioner and her mother the Petitioner's mother made a further loan to the parties on December 12, 2003 of $22,955.00 which was also

intended to help the parties with their living expenses. The Respondent does not deny that the money was received but he claims to have little knowledge of the transaction and questioned why that money would have been given to the parties at that particular time. Again, there was no documentation with respect to this transaction.

[53] Other than the £10,000 paid by the Respondent in June 2003 in repayment of the vehicle loan of April 2003 there were no payments made by the parties to the Petitioner's parents and no demands for payment were made by her parents with respect to these alleged loans until after the parties separated.

[54] In July 2006 the Petitioner asked her parents for more money to help her with the costs of her MBA course. That request was made with the knowledge of the Respondent. He says it was his understanding that the Petitioner's parents were prepared to help her with the cost of her education as they had done in the past. The Petitioner's parents gave her $31,000.00. No correspondence or other documentation was presented to shed light on whether this money was intended as a gift or a loan.

[55] On April 26, 2007 the Petitioner transferred to her parents £10,000 (approximately $22,285.00) as partial repayment of the $31,000.00 given to her the previous July. That transfer was made shortly before she left the Respondent and without his knowledge.

[56] While it has been established that the Petitioner's parents gave the parties money for living expenses in May 2003 and again in December 2003 and provided further funds to the Petitioner in July 2006 to help her with her university costs, I am not satisfied that those cash advances were intended as loans. There is insufficient evidence of an enforceable debt and nothing to convince me that there was any expectation of repayment notwithstanding the Petitioner's unilateral decision to repay £10,000 to her parents shortly before the parties separated.

THE DIVISION OF MATRIMONIAL ASSETS AND DEBTS

[57] Having determined and quantified the various matrimonial assets and debts the next issue is to determine how they should be divided. Subsection 12 (1) and section 13 of the ***Matrimonial Property Act*** provide as follows:

12 (1) Where
(a) a petition for divorce is filed;
(b) an application is filed for a declaration of nullity;
(c) the spouses have been living separate and apart and there is no reasonable prospect of the resumption of cohabitation; or
(d) one of the spouses has died,

either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

....

13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:

> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
>
> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
>
> (c) a marriage contract or separation agreement between the spouses;
> (d) the length of time that the spouses have cohabited with each other during their marriage;
>
> (e) the date and manner of acquisition of the assets;
>
> (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
>
> (g) the contribution by one spouse to the education or career potential of the other spouse;
>
> (h) the needs of a child who has not attained the age of majority;
>
> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (j) whether the value of the assets substantially appreciated during the marriage;

> (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
>
> (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
>
> (m) all taxation consequences of the division of matrimonial assets.

[58] Section 12 presumes an equal division of matrimonial assets and debts, however an unequal division can be ordered if the Court concludes that an equal division would be unfair or unconscionable taking into account the factors listed in section 13. There must be strong evidence showing that an equal division would be unfair or unconscionable (see *Harwood v Thomas* (1981), 45 N.S.R. (2d) 414 (A.D.) and *Young v Young*, 2003 N.S.C.A. 63). I am not satisfied that there is. While it could be argued that the Respondent profited from the money provided by the Petitioner's parents over and above the funds loaned for the purchase of the matrimonial home it is also true that the Petitioner benefited, at least indirectly, from assets the Respondent inherited from his mother and brought into the relationship. The parties' original matrimonial home in England was left to him by his mother. That property was sold in July of 2003 from which the parties realized £63,950. While a precise accounting was not provided by the Respondent I am satisfied that most if not all of those funds were depleted during their marriage.

[59] There is no other evidence that convinces me that an equal division would be unfair or unconscionable. Had I concluded that the money provided by the Petitioner's parents for the purchase of the matrimonial home was a gift as opposed to a loan I would then have been of the opinion that an equal division would be unfair and would have divided the assets unequally in favour of the Petitioner because of how and when the matrimonial home was acquired.

[60] Both parties seek ownership of the matrimonial home. The Respondent says he wants to continue living on the property. The Petitioner wants ownership of the home in order to ensure that her parents are repaid. As stated in her counsel's pre-trial brief she "will then be free to take over the responsibilities to her parents...".

[61] She believes that if the Respondent is permitted to keep the matrimonial home he will not be able to obtain a mortgage of an amount sufficient to repay her parents. She also fears that if he is allowed to retain possession of the house pending a court ordered sale he would not properly prepare the house for sale and its true value will not be realized and therefore the debt owed to her parents will not be satisfied.

[62] I agree with the Petitioner. While the Respondent seems to think he will be able to obtain a mortgage it is highly unlikely, in my view, that he would be able to secure a mortgage of an amount sufficient to pay off the debt owed to the Petitioner's parents even if he was to first apply all of his savings to that debt. He does not have an income sufficient to service a mortgage in the amount he will need and he has shown no propensity to seek meaningful employment. Also, during the time the Respondent has occupied the matrimonial home since the parties separated he has done little to maintain the property. I therefore order the following:

1. No later than October 24, 2008 the Respondent will surrender exclusive possession of the matrimonial home to the Petitioner. He will also convey his interest in the property to her by way of a quit claim deed by the same date. The Petitioner will assume full responsibility for the debt owed to her parents in the sum of $284,430.00 and will indemnify the Respondent with respect to that debt. The Respondent will be responsible for the payment of all household expenses up to October 24, 2008 including the payment of all utilities such as electrical bills, phone bills and the like.

The Respondent must not cause any damage to the matrimonial home property prior to this departure (other than normal wear and tear).

2. The parties will each retain the household contents now in their possession with the exception that the Respondent will immediately make available and provide to the Petitioner the crystal decanter and its contents, the Christmas decorations which she requested and the Pentax 110 camera and leather case. When the Respondent vacates the matrimonial home he shall take with him all of his household contents.

3. The Petitioner will retain the Mazda motor vehicle.

4. The Respondent will retain the Jeep motor vehicle and will be solely responsible for his motor vehicle loan.

5. The Respondent will retain the power boat and all of his savings and investments in his name at Lloyds, ING Direct, PC Financial and TD Canada Trust and his guaranteed investment certificates.

6. The Petitioner will retain her savings at Lloyds and the money she received when she closed her First Direct account.

7. The Respondent shall retain full ownership of his pension investment with Friends Provident.

8. The Respondent will pay to the Petitioner by October 31, 2008 an equalization payment of $16,646.42 in order to equalize the net matrimonial assets owned by the parties. That figure was calculated using the following schedule.

ASSETS	**RESPONDENT**	**PETITIONER**
Matrimonial Home		$281,850.00
Household Contents	in specie	in specie
Mazda		6,000.00
Jeep	$ 4,900.00	
Power boat	4,000.00	
Savings & Investments		
(i) Lloyds		
(ii) ING Direct	26,319.02	
(iii) PC Financial	2,001.05	
(iv) PC Financial chequing	12,025.72	
(v) TD Canada Trust	730.56	700.00
(vi) TD Canada Trust	2,342.69	
(vii) GIC's	608.24	
(viii) Lloyds	5,480.00	
(ix) Lloyds chequing & savings accounts		20,227.15
(x) First Direct		264.20
		276.74

Friends Provident Pension (net value)	4,956.27	
DEBTS		
Car Loan	(5,182.62)	
Loan to Petitioner's Parents		(284,430)
TOTAL NET ASSETS	**$58,180.93**	**$ 24,888.09**
Equalization Payment	(16,646.42)	16,646.42
TOTAL NET ASSETS AFTER EQUALIZATION PAYMENT	**$ 41,534.51**	**$ 41,534.51**

OCCUPATION RENT

[63] The Petitioner seeks occupation rent from the Respondent. On her behalf her lawyer stated in her Pre-trial Memorandum "in these circumstances it is appropriate for [the Petitioner] to receive compensation for [the Respondent's] continued residence in the mortgage-free matrimonial home over the many months since the separation. She has had no access to the home since [the Respondent] changed the locks shortly following the separation."

[64] I am of the view that occupation rent would not be appropriate in this case. The Petitioner voluntarily left the matrimonial home. She was not ousted by the Respondent and although he changed the locks to the home after she left I accept that he did offer her the opportunity to share the home with him while they attempted to resolve the terms of their separation. I am also not satisfied that his conduct was such that it was impossible for her to remain in the matrimonial home.

[65] After the Petitioner left the matrimonial home she lived rent free and was not put to any other expense because of the Respondent's possession of the matrimonial home. The Petitioner's claim for occupation rent is therefore dismissed.

[66] Counsel for the Petitioner will prepare the necessary Orders. If the parties are unable to agree I am prepared to hear them on the issue of costs.