SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Lockerby v. Lockerby, 2010 NSSC 282

Date: 20100721
Docket: 1201-063145
Registry: Halifax

Between:

Douglas Bruce Lockerby

Petitioner

v.

Ero Anna Lockerby

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	February 15 - 19, 22 - 23, April 26, 2010
Counsel:	B. Lynn Reierson, Q.C., for Douglas Lockerby F. Alexander Embree, for Ero Lockerby

By the Court:

[1] In the two years since Doug and Ero Lockerby told their children they were separating there has been no shortage of conflict in their children's lives. My decision attempts to bring the conflict about legal matters to an end. Whether conflict is eliminated from the lives of the Lockerby children is beyond my control; it is a choice to be made by their parents.

Family Background

[2] In 1991, Doug Lockerby and Ero Bourbouhakis met. He was a student and she was working as an airline flight attendant. They began to cohabit early in 1993 and married at the end of that year. Their first child was born in 1994 and, over the next six years, their family grew to include three more children. At present, their older daughter is 16, their younger daughter is 14 and their sons are aged 12 and 9.

Litigation History

[3] Mr. Lockerby filed his divorce petition in late 2008. He said the parties separated on June 22, 2008. In December 2008, Mr. Lockerby applied for an order dealing with parenting, child support, exclusive possession of the home and for the return of certain items of property. Ms. Lockerby asked to adjourn this application. Her request was denied. There was a second interim hearing to address parenting and support in July 2009.

[4] The Lockerbys participated in a number of settlement conferences. One settlement conference replaced two days of trial scheduled for March 2009. Both spouses applied for leave to bring contempt applications during the course of these proceedings.

[5] The divorce hearing was scheduled for November 2009. Ms. Lockerby asked that it be adjourned because she didn't have counsel. It wasn't necessary to deal with her request because by the end of October, the Lockerbys were told that their trial dates were pre-empted by a hearing under the *Children and Family Services Act* and the trial was adjourned to February 2010. During a pre-trial conference held in late October 2009, both parties were told there would be no further delays in bringing the matter to trial and that if Ms. Lockerby wished to retain counsel, she should do so right away. The trial was scheduled to start on February 15, 2010.

[6] On January 4, 2010, the parties participated in an organizational pre-trial conference to address their trial readiness and issues relating to trial preparation. Mr. Lockerby was awaiting information from Ms. Lockerby's employer and he wanted to complete real estate appraisals. Ms. Lockerby raised no concerns about her state of preparedness or any need for further disclosure. At this organizational pre-trial conference, Ms. Lockerby said that she would represent herself at the trial. Deadlines were set for each spouse to file affidavits and financial statements.

[7] Mr. Lockerby filed his materials though he did not have the information he had been seeking from his wife. Ms. Lockerby did not meet her filing deadline. On January 22, 2010, Ms. Lockerby asked her husband to agree to an adjournment. In the absence of his consent, she asked me to adjourn the trial because she had retained counsel. Ms. Lockerby was coming late to the task of trial preparation: her adjournment request said that her affidavit was not prepared, her financial materials had not been gathered and her witnesses had not been arranged. As well, her counsel was scheduled to appear in other court matters which conflicted with the trial dates.

[8] This was Ms. Lockerby's third request to adjourn a contested proceeding. The most important issue in the trial was the children's parenting arrangement. The children have lived in tumultuous circumstances since the summer of 2008 and this would be prolonged if the trial was delayed. The second most important issue was the deterioration of the family's financial circumstances. Since the separation, Mr. Lockerby lost his job and found a new job - at a much reduced income. Ms. Lockerby was both working - and earning - less than she had in the past. The spouses couldn't agree on steps to take to reduce their costs. The existing circumstances were taxing for the parents and their children. I denied the request for an adjournment. The parties, counsel and court staff all adjusted their schedules to accommodate the scheduling conflicts and I am grateful to them for doing so. Ms. Lockerby was allowed to call an additional four witnesses who had not been identified at the organizational pre-trial conference.

[9] It wasn't possible to conclude the hearing within the time scheduled for it. Again, I am grateful to counsel and the parties for making themselves available to continue the hearing during days when it had not been previously scheduled and for bearing with a further delay, when another *Children and Family Services Act* hearing pre-empted final submissions.

Legal Issues

[10] There are a number of issues to be resolved: custody, the children's living arrangements, property division, prospective and retroactive child support and spousal support. While costs were pleaded, the parties have deferred argument on costs until they have my decision.

Approach to Issues

[11] Where there are multiple issues, they must be approached in a sequence which places them in the appropriate and logical order. This means beginning with the children's parenting. Aside from the obvious importance of this issue, the parenting arrangement is the context for determining other issues. A parenting arrangement may be relevant to the division of assets, pursuant to section 13(h) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. Ms. Lockerby seeks a shared custody arrangement and the expenses of each parent are relevant under section 9(b) and (c) of the *Federal Child Support Guidelines*, SOR 97-175. Possession of the home and responsibility for debts will have an impact on expenses that are relevant to the children's support. In some cases, a property division may obviate a spousal support claim, as Justice Morrison noted in *Harwood v. Thomas*, (1980), 43 N.S.R. (2d) 292 (T.D.), affirmed at *Harwood v. Thomas*, (1981), 45 N.S.R. (2d) 414 (A.D.). Alternately, the division of property may play a

part in increasing or decreasing expenses that are relevant to spousal support. In dealing with support applications under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 15.3(1) child support must be addressed before spousal support. Finally, there may be the issue of costs.

Divorce

[12] At the hearing, Ms. Lockerby consented to the amendment of the petition to allow Mr. Lockerby to prove marriage breakdown on the basis of s. 8(2)(b)(i) of the *Divorce Act*. She admitted the allegation and I granted the divorce.

Parenting

[13] Justice Campbell's interim decision in December 2008 placed the children in their parents' joint and shared custody. In his brief, Mr. Lockerby seemed to suggest that continuing this arrangement was appropriate, by framing the parenting issue as "should the children be placed in the joint custody of the parties, but in the primary care of Doug Lockerby?" In his testimony, however, Mr. Lockerby said that he was seeking sole custody and, if the situation improved, eventually there might be joint custody. Mr. Lockerby says it would be best for the children if they had their main home with him and spent time with their mother. Ms. Lockerby wants the current joint and shared parenting arrangement to continue.

[14] Following the December 2008 interim hearing, the parents moved in and out of the matrimonial home at weekly intervals, while the children stayed there throughout. Eventually, Mr. Lockerby was able to move into the couple's rental property and the children began to move back and forth between this home and the former matrimonial home, where Ms. Lockerby lives.

[15] Ms. Lockerby says the children are "good kids" who are "socially adjusted, active, with parents involved in their activities". She says that despite the spouses' difficult relationship, the children have done well. She says that the parents co-operate and sit together at hockey games. She offered pictures of the family at Christmas and on a ski trip in January 2010.

[16] All of the witnesses offered evidence about the Lockerby children. While their testimony was not specifically structured to address the factors at paragraph 16 in *Foley*, 1993 CanLII 3400 (NS S.C.), it managed to do so. I have addressed those concerns identified by Justice Goodfellow which are relevant to the Lockerby children and those where there was evidence.

Statutory direction

[17] In *Foley*, 1993 CanLII 3400 (NS S.C.), Justice Goodfellow noted that the governing legislation may contain directions for my decision-making. The directions in the *Divorce Act* are found in sections 16(9) and 16(10) which require that past conduct be considered only where it is relevant to parenting ability, children should have as much contact with each parent as is consistent with the children's best interests and the willingness of each parent to facilitate contact should be considered.

[18] Ms. Lockerby raises some concerns about Mr. Lockerby's conduct. These concerns are not so significant that they mean she thinks shared parenting isn't appropriate. Her concerns relate largely to his parenting in the recent past - since they separated - though she feels that he didn't carry as significant a parenting load as she did during their cohabitation. In terms of Mr. Lockerby's parenting responsibilities during cohabitation, I don't accept Ms. Lockerby's evidence in this regard. Her employment requires her to travel. The children have not had significant involvement with a babysitter in many years. Mr. Lockerby met the children's needs while their mother travelled for her employment.

[19] Ms. Lockerby complains that her husband has put participation in a scuba diving course ahead of his time with the children, he has exposed the children to adult matters (such as leaving an adult dating website accessible on his computer where the children might view it and exposing them to a new partner when he ought not) and he is not as attentive to the children's activities as she is. To the extent he can, Mr. Lockerby has structured his work and extra-curricular commitments around his parenting time. I don't accept that because Ms. Lockerby saw a dating website on Mr. Lockerby's computer that he has not taken steps to shelter the children from seeing the site. The parents agreed in the summer of 2009 that neither would introduce the children to a new partner - though Ms. Lockerby did not tell her husband she had already introduced one or more of the children to the gentleman she was dating. On more than one occasion she drew the children's attention to their father's dating. Ms. Lockerby can't complain that the children are exposed to Mr. Lockerby's new partner when she is responsible for some, if not all, of the exposure. While the conduct Ms. Lockerby has described is relevant, she either hasn't proven this conduct has occurred or she hasn't proven that it has occurred to an extent that it impairs his parenting.

[20] The statutory direction regarding contact between parents and children is that there should be as much contact as is in the children's best interests. Ms. Lockerby argues that having the children alternate weeks between their parent's homes is in the children's best interests. Mr. Lockerby says it is not. Shared parenting arrangements position each parent as equal in importance to the children because it is best for the children that they spend equal amounts of time with each parent. Ms. Lockerby's position certainly maximizes the children's contact with each parent. Is this best for them? As will be seen from the remainder of my reasons, I do not accept that maximizing the children's time with each parent is best. For the Lockerby children, what is best is a parenting arrangement that isolates them from the conflict between their parents and protects them from being caught between their parents. The experience since December 2008 shows that a shared parenting arrangement places these children between their parents and in the middle of their conflict. This occurs largely because of Ms. Lockerby's actions.

[21] Facilitating contact is a great concern in this case. Mr. Lockerby has offered multiple examples where Ms. Lockerby has told one of the children that she wasn't required to spend time with him. This has not been denied. He also says that Ms. Lockerby's approach to the practical aspects of their separation (dividing household contents, refusing to allow the children to take items from their mother's home to his, refusing to allow him to use items such as the children's life jackets or the roof rack for his car) has positioned his home as a secondary and less attractive home. This undermines the children's desire to spend time with him. The older daughter

exemplifies this. When living at her father's, she returns to her mother's each day to get ready for school. On occasion, such as Christmas 2009 and a ski trip in 2010, Ms. Lockerby prevented the children from having contact with their father in her absence.

[22] While Ms. Lockerby suggests a parenting arrangement that sees each parent as equally important to the children, her conduct belies a belief in each parent's equal importance and undermines it.

Physical environment

[23] This consideration had a particular relevance to Justice Goodfellow in deciding *Foley*, 1993 CanLII 3400 (NS S.C.), which was an interim application. On an interim basis, parents' housing situations may be quite disparate and there may be little prospect this will change until matters stabilize. When addressing parenting in the context of a divorce hearing, each parent has either secured longer term housing arrangements or is on the brink of doing so. For the Lockerbys, the ultimate housing arrangements are yet to be determined.

Discipline

[24] Given the range of the children's ages (from nine to sixteen), discipline is largely a matter of setting boundaries and ensuring consequences.

[25] Ms. Lockerby says that Mr. Lockerby is attempting to win over the children and to make her "look like the 'bad guy' " because she restricts their behavior. For example, she says Mr. Lockerby kept one son up late on his birthday and bought him a video game that was too mature for him. She says he has bought their sons violent toys, like paint ball guns and BB guns. She also claims that he bought alcoholic drinks (coolers) for their older daughter.

[26] Mr. Lockerby says that the video game was one of a series and that the earlier games in the same series were purchased for the children while the parents were cohabiting. Similarly, the paint ball guns were bought before separation. He says there is no BB gun, but a "soft air gun" and Nerf guns and these existed in the home before the separation. He denies buying coolers for his daughter and says that after their older daughter got drunk, he initiated a discussion with Ms. Lockerby about this. Ms. Lockerby's evidence in these areas was incomplete and created the impression that pre-existing restrictions on the children's behavior were relaxed by their father. When the complete picture emerged through Mr. Lockerby's evidence it was clear that restrictions had not been relaxed.

[27] Ms. Lockerby says that all of the children "can talk back" to both parents and she considers most of this to be within the normal range "perhaps aggravated slightly" because of the changes the family has experienced. Still, she is concerned that Mr. Lockerby has harshly punished the children. There is only one example of a harsh punishment. Mr. Lockerby took his younger daughter's cell phone from her for one month to punish her for talking back to him, calling him names that included expletives and refusing to do what he told her to do. While this

was happening, the girl phoned her mother. It seemed that Ms. Lockerby reinforced the girl's behavior, rather than supporting Mr. Lockerby's discipline.

[28] Mr. Lockerby was critical of his wife's handling of this situation. He consulted with Jayne Simpson, the children's counselor, for advice on how to handle both the situation with his daughter and the situation with Ms. Lockerby. He was concerned about appropriate discipline and about what he saw as a lack of support, or undermining his discipline, by Ms. Lockerby. His approach, in seeking the assistance of Ms. Simpson, was the proper approach to take. After discussing the situation with Ms. Simpson, Mr. Lockerby modified the punishment.

[29] In contrast, Ms. Lockerby offered no explanation of situations where the older daughter was walking home alone at almost midnight or was drinking alcohol. She didn't say how she handled these situations or what steps, if any, she took to prevent them.

[30] Between the parents, Mr. Lockerby has demonstrated a greater awareness of the need to set boundaries and he has taken steps to ensure his discipline is appropriate.

Role model

[31] In assessing the parents as role models, I have the advantage of having heard testimony and read affidavits from the parents, family members and others. For example, Mr. Lockerby says that his wife has consistently informed the children that he is responsible for breaking up the family and that he won't reconcile, though she will. Ms. Lockerby doesn't deny this. As a result, the children might see their mother as a better role model based on their understanding of the circumstances. I won't review my considerations in the context of this heading, but will only state my conclusion because my considerations are reviewed under the various other *Foley* headings. Ms. Lockerby's complaints about her husband's conduct are either minor or not borne out. In contrast, the concerns about her behavior are not denied. Her efforts to disrupt Mr. Lockerby's relationship with the children and his work (threatening to damage his career, preventing him from going to work suitably attired) are significant. I cannot overstate their impact on the children.

Wishes of the children

[32] There has been no formal investigation of the children's wishes and no evidence of them, beyond one child's statement to a guidance counselor that she wanted to live with each of her parents all of the time. This wish was explained, by the counselor, as a desire to "have her family back". I take this comment not as an expression of a desire for a shared parenting arrangement, but as her wish that the current circumstances didn't exist.

Assistance of experts

[33] The children have been involved with two particular individuals outside their family to support them during the separation.

[34] All the children have spoken with Jayne Simpson who is a private counselor. She's worked as a counselor for ten years. Ms. Lockerby contacted Ms. Simpson through her Employee Assistance Plan in April 2009 when they met to discuss whether the children should see Ms. Simpson. Ms. Lockerby was concerned about how the parties' difficulties might affect the children and she gave Ms. Simpson a history of the parents' relationship.

[35] Ms. Simpson next heard from Ms. Lockerby in October 2009. Ms. Simpson says Ms. Lockerby told her she believed the children needed to be seen by a counselor. At this point, the parents were living in separate homes. Ms. Simpson met with the parents separately. Their major concerns were their inability to "read" the children and to know how the children were coping. Both wanted to provide the children with a safe place to discuss their feelings. Ms. Lockerby voiced concerns about the children adapting to alternating homes each week, while Mr. Lockerby voiced concerns about how the children would react to the disparity between the relative comforts of each home and a change he saw in his relationship with the couple's older daughter who was parroting her mother's highly critical comments about him.

[36] Ms. Simpson would arrange appointments with the parent in whose care the children were during a particular week and one or all of the children would attend, depending on the circumstances. Counseling was undertaken on a therapeutic basis. Ms. Simpson described the children as "very nice, polite" children who were "very caring of each other". They discussed their situation generally, such as wanting items which were at their mom's when they were at their dad's. Ms. Simpson described their concerns as being about "the mechanics of alternating between the homes". She said this concern was raised in pretty much every session. The older daughter talked about the inconveniences of alternating homes and how she might want to wear clothes that were at the other parent's. Mr. Lockerby arranged to meet with Ms. Simpson and Ms. Lockerby to discuss what he saw as Ms. Lockerby's interference with the younger daughter.

[37] Ms. Simpson's testimony was general and offered with the repeated *caveat* that she had made her notes expecting that she would not be testifying, so they were "sketchy". As well, Ms. Simpson testified without the benefit of her notes since the need to bring them was not mentioned in her *subpoena*. When counseling began, Ms. Simpson made clear to the parents that she didn't want her sessions with the children to be used in court and that if she became involved in court proceedings she would end her relationship with the children. She told the children that their discussions would be confidential unless they disclosed that they or others were in danger.

[38] Regardless, Ms. Lockerby compelled Ms. Simpson to testify. For my purposes, Ms. Simpson's testimony was of limited utility. Since she understood her counseling was not for court purposes, her notes were poor and she frequently wasn't able to answer questions. From Mr. Lockerby's perspective, Ms. Simpson's participation was counter-productive, because it meant the loss of Ms. Simpson as a person in whom the children could confide.

[39] The three older children have had some involvement with Jim Zelios. Mr. Zelios appeared pursuant to a *subpoena*. He works at the school the three oldest children attend. He teaches there and, this year, also acts as a guidance counselor. The older daughter was his

student last year and he described her as a "fantastic" student, in terms of her academic achievement and her behavior. As her teacher, he asked her how things were. He doesn't recall her answers, but he observed that she "wasn't happy".

[40] This year, when Mr. Zelios took on the guidance counselor role, Ms. Lockerby asked him to be a support to the younger daughter, saying that the daughter and the family were going through a difficult time. Without seeking permission or input from Mr. Lockerby, Mr. Zelios had about a half dozen conversations with the girl. When this began, he told the girl that their conversations were confidential, unless she told him that she or someone else was being harmed. During their conversations, the girl said she wanted to live full-time with both her parents; she wanted her family back together again. He acknowledged that, as a result of testifying in this proceeding, he will no longer tell the children that they can speak to him in confidence.

[41] What I take from this evidence is that the girls have had a more difficult experience coping with the situation than their brothers. This is to be expected where they have been drawn into the conflict to a greater extent than their brothers. All the children are bothered by the hardship created by the shared parenting arrangement. They do without items that have been left at the other parent's home or accommodate the need to go back and forth for them. This problem is persistent. The parents are aware of the problem but have not resolved it. Ms. Lockerby did not deny that she has refused to allow the children's belongings to follow them to their father's home and she has not explained why she would do this.

[42] Mr. Lockerby argues that in the interest of advancing her case, Ms. Lockerby was prepared to sacrifice the children's "safe places" by calling both Ms. Simpson and Mr. Zelios as witnesses. Certainly, this is the consequence of what Ms. Lockerby has done and this was known when these witnesses were brought to court. Ms. Simpson told Ms. Lockerby that her testimony would not be helpful before she was brought to court.

[43] The evidence of both Ms. Simpson and Mr. Zelios indicates that within six months of the hearing, Ms. Lockerby was concerned about the children's reactions to the shared parenting arrangement. Both Ms. Simpson and Mr. Zelios heard from the children about problems they had with the parenting arrangement. Regardless, the parents didn't take steps to resolve the children's problems prior to the hearing.

Each parent's time availability

[44] Ms. Lockerby's employment is based in Toronto. When she is working, she works fourteen to fifteen days each month and her travel between Halifax and Toronto adds an additional half-day or day to the time she spends at work. Ms. Lockerby described her work schedule as one of working alternate weeks (when the children were not with her) and, when they were with her, working eight hours during the week at a local restaurant.

[45] Mr. Lockerby works Monday to Friday, from 8:30 to 5:30. He says his schedule has some flexibility and he is able to work from home when needed.

Cultural development

[46] Ms. Lockerby's family is Greek and she spent part of her childhood living in Greece. There was no evidence of any significance being attached to this aspect of the children's background.

Physical and character development

[47] Three of the children are active in organized sports. The parents attend their activities. Ms. Lockerby is more often present for these than Mr. Lockerby. To their credit, the parents often sit together during these events. The parents encourage the children in their activities.

Development of self esteem and confidence

[48] The children are in or approaching their adolescence when they'll withdraw from the sphere of their family and move into the influence of their peers. If they are to avoid the pernicious influence of their peers, it's important that they have the self-confidence to make good decisions and to reject bad choices, however popular those bad choices appear.

[49] Neither parent denigrated the love the other has for the children in their testimony. Neither has prevented the other from attending the children's activities though Mr. Lockerby complains that Ms. Lockerby wasn't forthcoming with details of the younger son's Christmas concert at school last year, making it difficult for him to attend. As a parent, Mr. Lockerby should be attentive to this himself.

[50] Mr. Lockerby and his sister both offered evidence that Ms. Lockerby has actively worked to undermine the children's self-confidence by making negative comments to them. For example, during a phone call with Mr. Lockerby approximately a year ago, Ms. Lockerby remarked "so you won't be buying [one daughter] a graduation gift?" At the time, they weren't talking about the child or her graduation. Mr. Lockerby says this *non sequitur* arose because the daughter must have been present and Ms. Lockerby wanted to portray him in a negative way to the child. Karen Lockerby, Doug Lockerby's sister, says she has had a similar experience. Karen Lockerby says that during a phone conversation with Ms. Lockerby, she was told "don't be mad at the kids. This is a difficult time for all of us. They haven't done anything to you." Karen Lockerby could hear the children in the background during this phone call and felt it was inappropriate for her sister-in-law to make this comment in front of the children, especially where she wasn't upset or mad at the children. Mr. Lockerby says that Ms. Lockerby has told the children he "doesn't want to pay for his kids", that he was responsible for not paying one child's cell phone bill, that he was responsible for ruining the children's Christmas, that he would keep one daughter from taking part in her class trip and that Ms. Lockerby wanted to keep the family together but that Mr. Lockerby wanted to break up the family.

[51] Notably, some of these events occur after July 2, 2009. At that point both parents had attended the Parent Information Program. In deciding the interim application before her on July

2, 2009, Justice Lynch made it clear that the children had seen things they shouldn't have seen, and they had heard things they shouldn't have heard. She told the parents their "job" was to keep their children out of the fray. She directed that the parents speak respectfully of each other to the children and gave other directions to isolate the children from their parents' conflict.

[52] Ms. Lockerby doesn't deny making any of the remarks attributed to her. She doesn't demonstrate insight into the harm done to the children's self-confidence by these suggestions that their father cares so little about them that he won't provide for them and that their aunt is angry with them for circumstances they don't control.

[53] Ms. Lockerby's response to these complaints is to say that they relate to "long since past events". She characterizes the majority of the information in Mr. Lockerby's affidavit as "petty attacks" against her. The couple told the children they were separating in the summer of 2008. Ms. Lockerby's negative comments to the children continued through the summer of 2009. Similar remarks since then have been far fewer, so there is some merit to Ms. Lockerby's comment. Most of the behavior that is of concern came in the first year following the separation. However, while this behavior has dissipated, it has not stopped. I cannot agree that this evidence is merely a petty attack against her. The comments I've described are a direct challenge to any sense the children had that their father's love for them was unconditional. In this regard, her behavior is detrimental to their self-confidence.

Financial contribution

[54] Mr. Lockerby says that Ms. Lockerby has not made the financial contribution she was ordered to make to the children's activities and that she has told him if he "[doesn't] pay, the kids won't play".

[55] Mr. Lockerby says that the parents were ordered to share the children's extra-curricular activity cost in proportion to their incomes. I have reviewed the court orders issued in this matter and find no direction to that effect in any of the orders issued. However, that doesn't mean that either parent was excused from supporting the children's extra-curricular activities. Ms. Lockerby doesn't deny that she hasn't contributed to the children's expenses in proportion to her income. She says that it has been a struggle to keep her expenses in line with the money available to her. In 2008, she earned $44,000.00. In 2009, she earned $38,000.00 and received child support of over $7,600.00 during the final six months of 2009. Ms. Lockerby worked a reduced schedule in 2009 (working only twenty days in the first six months of 2009), though working more would have improved her income and assisted her in her struggle to keep her expenses in line with her income. At the July 2009 interim application, Justice Lynch encouraged Ms. Lockerby to work more. Repeatedly, Mr. Lockerby asked that the house Ms. Lockerby occupied be sold because it's expensive to operate. Ms. Lockerby wouldn't agree. He noted that Ms. Lockerby ran the house without attention to cost, relying on the electric heat in the winter rather than using the wood stove.

[56] There were a number of choices available to Ms. Lockerby which would have enabled her to meet her financial obligations to the children. She did not make them. Mr. Lockerby

ensured the children's needs were met. Between the parents, Mr. Lockerby has ensured that financially supporting the children is a greater priority.

Extended family support

[57] Ms. Lockerby's mother lives in Greece and has travelled to Nova Scotia to assist Ms. Lockerby in caring for the children during the separation. There was limited reference to Ms. Lockerby's brother, who seems to play little, if any, role in the children's lives. Mr. Lockerby has a brother and a sister. His brother lives in Nova Scotia and his sister lives in Australia. His parents are divorced. Both live in Nova Scotia. The Lockerby children enjoyed good relations with all members of their extended paternal family prior to the separation. Their aunt and paternal grandfather feel they have had less contact with the children since the separation. This is particularly the case for their aunt.

[58] Annually, the family vacationed at a cottage owned by their paternal grandfather, Wayne Lockerby, who has been the source of significant financial support for the family. The nature of Wayne Lockerby's financial assistance has been the source of some controversy which I will address later in my decision. While Doug Lockerby says the assistance came as loans, Ero Lockerby says that her father-in-law made monetary gifts to the family. Regardless, Wayne Lockerby has made more than $280,000.00 available to the family and his largesse has played a significant part in the family's financial well-being, providing for the purchase of a home and a van and seeding considerable savings for the children's post-secondary education. Ms. Lockerby says that her family has assisted her financially during the separation and she expects this will stop once the divorce is finalized.

[59] Relations among family members have been tainted by unfortunate incidents. As recently as last August, Ms. Lockerby telephoned her mother-in-law and left vitriolic messages for her, telling her she was "terrible", "pathetic" and "a monster". As well, Ms. Lockerby admitted that she told Doug Lockerby that he couldn't take the children to see his father. This behavior divides the extended family into factions. For the children, it minimizes the support they can draw from their extended family by making them feel disloyal to one parent if they seek support from the "other" side of the family.

[60] Wayne and Karen Lockerby both offered evidence at the trial. Karen Lockerby says she has tried to support the children through their parents' separation. After submitting an affidavit to the court, Karen Lockerby sent an email to her older niece, explaining why she had done this. Her email presumed the girl might have some awareness of the affidavit and tried to reassure her that the affidavit wasn't designed to say anything bad about her or her siblings and Karen Lockerby went so far as to offer to show the girl the affidavit "[w]hen you are a little bit older". I don't favour telling children about court materials or hearings or showing them court documents. While Karen Lockerby deplored the prospect that her affidavit would become known to the older daughter, the email drew the girl directly into the situation. For his part, Wayne Lockerby didn't directly involve the children in the situation. However, he sent a number of emails to his son which came into Ms. Lockerby's possession. His emails urged an aggressive stance in negotiations and engendered ill-will between the parents.

[61] Overall, Ms. Lockerby, Karen Lockerby and Wayne Lockerby have all acted in ways that have created factions within the extended family. By far, Ms. Lockerby has done this to the greatest extent. While Mr. Lockerby's sister and father have involved themselves in the situation, there is no indication that Mr. Lockerby has instigated or encouraged the actions I've described here.

Facilitating contact

[62] I have noted Ms. Lockerby's restriction on the children's contact with their paternal family. At various times she has told the older daughter that she doesn't need to visit her father.

[63] Prior to separation, children may relate to their parents as a unit. After a separation, the parents will generally function independent of each other. Facilitating contact between children and the other parent involves encouraging children to value their one-on-one relationship with the other parent. It is more than making time available for the children to be with the other parent. It is promoting the use of that time and promoting respect for the other parent.

[64] Oscar Lopez is a co-worker of Ms. Lockerby's and offered an affidavit on her behalf. Mr. Lopez says that both before and since the separation, the parents appeared to work well in parenting. In particular, Mr. Lopez says he spent time with the parents during a restaurant meal at the end of June 2009 and during a January 2010 ski trip. Mr. Lockerby says that when he finds he's compelled to be with Ms. Lockerby around the children he will always "put on a game face" for the children's sake. He says that he's a private person and didn't complain to Mr. Lopez that Ms. Lockerby was an uninvited participant on the ski trip.

[65] The January 2010 ski trip is reminiscent of Christmas 2009. At Christmas, Mr. Lockerby was allowed to spend time with the children - but only at the home Ms. Lockerby occupies and taking part in her Christmas celebrations there. The photographs Ms. Lockerby produced show that Mr. Lockerby does make the best of these situations, rather than miss the chance to spend time with the children or ruin that time for them. In January 2010, Mr. Lockerby arranged to take the children skiing. He needed equipment for this. Ms. Lockerby would not give the equipment to him, but insisted on driving the equipment to the ski hill herself and then spending the day with the children and their father.

[66] While Ms. Lockerby has made some time available for the children to spend with their father, she has made that time less attractive to them than time with her in her home. She has encouraged a lack of respect for Mr. Lockerby and this, too, reduces the children's desire to spend time with their father. Her complaints about him may make the children feel that they should punish him by not spending time with him and some of her comments may make the children feel torn between spending time with their father and supporting their mother by spending time with her, even when his visit beckons.

Long range plan

[67] There was little comment about long term plans for the children. Some funds have been set aside for their post-secondary education.

Financial consequences

[68] This consideration was notable in the interim application before Justice Goodfellow in *Foley*, 1993 CanLII 3400 (NS S.C.) because in an interim application, financial circumstances are addressed in a limited context: support addresses only interim needs and the property division hasn't occurred. In a divorce trial, the parenting arrangement will be determined first and financial matters will be resolved to reflect that arrangement, so this factor has less relevance.

Parenting arrangement

[69] There has been considerable turmoil for the Lockerby children since their parents separated. In the months following the separation, they've seen their mother assault their father and hear her describe his efforts to destroy their family. Within the last year, they've been interviewed by the RCMP as a result of their mother's questionable allegations to the RCMP. Ms. Lockerby raises few concerns that Mr. Lockerby has spoken to the children about the separation or that he has drawn them into the parents' conflict. In contrast, Mr. Lockerby has offered extensive examples of Ms. Lockerby discussing the separation with the children and saying things to them which challenge their relationship with him and make them question his love for them. Her actions have undermined the children's relationship and contact with their father. It is in the children's best interests that their relationship with their parents not be challenged by involving them in the separation. The parents were specifically cautioned about this by Justice Lynch in July 2009.

[70] As long ago as 1998, the court distinguished between an "inability" to cooperate and an "unwillingness" to cooperate in determining parenting arrangements in *Godfrey-Smith*, 1998 CanLII 1857 (NS S.C.) at paragraph 20. In that case, then-Justice Michael MacDonald relied on the parties' past cooperative relationship to determine that a joint custody relationship was appropriate. I distinguish the circumstances before me from those which existed in *Godfrey-Smith*, 1998 CanLII 1857 (NS S.C.). The Lockerbys have experienced a prolonged period of high conflict. This is not a situation where once cooperative parents now restrict their communications to curt emails. This is a situation where children have experienced more than one and one-half years of allegations that their father has consciously made decisions designed to hurt them, whether by failing to return items they take to his home or by sabotaging the hot water system in their home. After the experiences of the past years, the children cannot expect that their parents will cooperate in decision-making. It is in the children's best interests that decisions about them do not become an opportunity for conflict between their parents and that the children do not have to worry that their decisions will be buried under their parents' conflict. For the children to have the security of knowing that important decisions will not fall victim to their parents' conflict means there must be a sole decision-maker. A sole decision-maker will also ensure that decisions do not become a battlefield.

[71] Between the parents, Mr. Lockerby has done more to shield the children from the conflict. He says this has meant not responding to comments the children relay from their mother and not explaining his side of the story. He says that the consequence of this is that he is either left to let it go (leaving the children with the impression he has done something wrong) or explaining the adult situation to the children and thereby speaking negatively of their mother. He appreciates that silence has unfortunate consequences for him, but knows this is necessary, if the children are to be kept out of their parents' conflict. Between the parents, I rely on Mr. Lockerby to make decisions for the children without using the situation to perpetuate the parents' conflict. Mr. Lockerby shall have sole custody of the children. When important decisions are to be made, he shall advise Ms. Lockerby of the decision he intends to make and make the final decision.

[72] To ensure the children's relationships with their parents are not challenged by involving them in the separation and to ensure that their contact with each parent is maximized, the children should have their primary residence with their father beginning immediately. Any access arrangements the parents have already made for this summer will be followed.

[73] Ms. Lockerby made no proposal for the contact she would have with the children if they had their primary home with their father. Mr. Lockerby proposed that the children would alternate weekends between their parents' homes and that there would be such other contact as the parents agreed upon. This arrangement would require effective and successful communication between the parents. This has not existed to a sufficient degree since separation that I am prepared to base Ms. Lockerby's relationship with the children on it.

[74] It is appropriate for the children to spend time with their mother on alternate weekends. This time should start at the end of the children's school day or at 5 p.m. on Friday and continue until 5 p.m. on Sunday afternoon. If the Friday when access starts is a day when the children aren't required to attend school, access may begin on Thursday after school or at 5 p.m. Similarly, if the Monday following the end of access is a day when the children aren't to attend school, access may continue until Monday at 5 p.m. Both parents may attend the children's extra-curricular activities, such as hockey games and practices. I have not specified mid-week access, on the basis that Ms. Lockerby's attendance at the children's activities will allow the children contact with her beyond the alternate weekends.

[75] Starting in 2011 the children are to have six uninterrupted weeks of contact with their mother each year. Four weeks must be used during the months of July and August. Up to three weeks of this time may be taken consecutively. Annually Ms. Lockerby will have the first option to select the time she wishes to have. She must notify Mr. Lockerby of her choice by May 1 of each year. If she doesn't notify him, he may make his selection. Mr. Lockerby will have three uninterrupted weeks with the children during July and August. He may take up to two weeks of this time consecutively, if that is allowed by Ms. Lockerby's selection. If Ms. Lockerby has met her deadline of notifying Mr. Lockerby by May 1, Mr. Lockerby shall provide notice of his selection by May 15. During each parent's summer time with the children, Ms. Lockerby's weekend access is suspended.

[76] Ms. Lockerby's other two weeks will occur during the school year. Annually, she'll have the first option to spend the first seven days or the last seven days of the March Break with the children as part of her six week allotment, leaving Mr. Lockerby with the first or last weekend of the Break with the children. She must notify Mr. Lockerby by January 1 of each year, if she intends to have the children with her during the March Break.

[77] Regardless of the weekend rotation, the children will be with their mother from 9 a.m. until 5 p.m. on Mother's Day and with their father from 9 a.m. until 5 p.m. on Father's Day. I will make no special provision for religious or statutory holidays other than Christmas. The children will annually alternate spending December 24 and December 25 with their parents. In 2010 and in even-numbered years, the children will be with their father from 9 a.m. on December 24 until 2 p.m. on December 25. In odd-numbered years, the children will spend this time with their mother. All other holiday time will be governed by the regular schedule, unless Ms. Lockerby has specified that she wants to use that time as part of her annual six week allotment. She may use a maximum of one of her weeks (seven days) during the children's Christmas school holidays. If she wishes to do so, she must give notice by December 1.

[78] I have stated the amount of notice that Ms. Lockerby must provide if she wants to take one of her weeks (seven days) of block access during the March Break or the school Christmas break. I have specified weeks because this time isn't to be broken into days. At any other time during the school year, she'll provide Mr. Lockerby with four weeks' notice.

[79] Ms. Lockerby must continue to make her Employee Assistance Plan available to provide counseling for the children. The parties' affidavits and my decision should be provided to the children's counselor so that he or she may make reference to them.

Property Division Application

[80] Under the *Matrimonial Property Act*, I must first identify the assets and then classify them as matrimonial or non-matrimonial. Identifying assets is no more complicated than listing them. Classifying assets requires determining whether they are excluded under section 4(1) of the *Act*. Once items are identified and classified, they must be valued. The *Matrimonial Property Act* provides that matrimonial assets are to be divided equally. In limited circumstances the Act allows for an unequal division of matrimonial assets and a division of non-matrimonial assets. As simple as this statutory scheme is, its application involves many steps and most are present here.

[81] I asked the parties to prepare a joint balance sheet containing the information on which they agreed. Instead, each provided me with its own balance sheet. According to these, they agree on the value of Ms. Lockerby's home, her household contents and her car, Mr. Lockerby's home, his household contents and his car, the value of a Seadoo boat, an account receivable owed to them by a friend and the amount of the debt owed on Mr. Lockerby's car.

[82] The chart below (Matters to be Resolved) lists the contentious issues that the parties could not resolve. The issues have been extracted from the balance sheets given to me.

Matters to be Resolved	
Asset	**Comment**
Father's CIBC shares	Ms. Lockerby doesn't include in her balance sheet
Mother's deferred salary	Parties don't agree whether this is a matrimonial asset
Father's watches	Parties don't agree whether these are matrimonial assets
Children's RESP	Parties don't agree whether this is a matrimonial asset
Father's RBC account	Parties don't agree whether this is a matrimonial asset
Father's RRSP	Value not agreed
CIBC accounts	Values not agreed
Mother's pension	The parties agreed to divide this equally, but they have not specified the time period subject to the division
Father's pension	The parties agreed to divide this equally, but they have not specifically agreed on the time period subject to the division
Debt	**Comment**
Capital gains on Father's home	Mother doesn't include in accounting
Appraisal costs	Parties don't agree the costs relate to the family
Promissory notes to Wayne Lockerby	Parties don't agree the debts relate to the family
Mother's Visa credit card	Parties don't agree the debt relates to the family
CIBC overdraft (loan)	Parties don't agree the debt relates to the family
Mortgage on Mother's home	Amount owed is not agreed
Mortgage on Father's home	Amount owed is not agreed
CIBC joint credit line	Amount owed is not agreed
Father's Visa credit card	Amount owed is not agreed
Boat loan	Amount owed is not agreed
HBC credit card	Amount owed is not agreed
NS Power account	Amount owed is not agreed
Home Depot credit card	Amount owed is not agreed

[83] While some values have been agreed, the agreement isn't sufficient to let me know an asset's value. For example, I've said that the parties agree on the values of the homes. However, they haven't agreed on the amount of the mortgages on the homes. As well, for the home occupied by Mr. Lockerby, there is no agreement that any capital gains taxes that are due on the sale of the home should be considered or what the amount of those taxes might be. Until those additional issues are resolved, I don't have a final value for the homes.

[84] Often, when there are just a few issues, it's possible to determine the value of an asset (identifying its gross value and determining and deducting encumbrances and disposition costs) fairly easily. In a situation like this where there are so many disagreements, there's a great deal to be done before I can actually address the division of property. I have approached this by working my way through all of the disputes about the assets and then, all of the disputes about the debts. In this way, I hope to keep my discussion of the relevant law (whether it's about asset identification or debt classification) in one place, rather than applying the whole range of this jurisprudence to each asset or debt in turn. I am hopeful that this approach will result in a decision that is clearer to the parties.

[85] I start by resolving those issues relating to assets. First, there is the matter of identifying all the assets. Second, for some of the assets listed in the Matters to be Resolved table, the issue is classification. Ms. Lockerby's deferred salary, Mr. Lockerby's watches, the children's RESP and Mr. Lockerby's RBC account must be classified. Third, I will fix a preliminary value on assets. I say this is a preliminary value because the final value can only be determined once I resolve the issues relating to the debts. Once the asset issues are resolved, I'll address the debt issues by identifying and classifying the debts and, lastly, determining the amounts owed.

Identifying assets

CIBC shares

[86] Mr. Lockerby's CIBC shares don't appear on Ms. Lockerby's balance sheet. This isn't explained. Mr. Lockerby identifies the shares and claims they are matrimonial assets. According to section 4(1) of the *Act*, all assets are matrimonial unless they are proven to be specifically excepted. The shares were worth $1,655.70 as of the first of July 2008. I accept the shares form part of the property to be considered in the division. I have no evidence of any other value for them, so I use this value.

Classifying assets

Ms. Lockerby's deferred salary

[87] Ms. Lockerby participated in a deferred salary program in 2006 and 2007. When she took part in the program in 2007, gross earnings of $14,587.00 were deferred from 2007 and paid to her sole account on June 13, 2008 - just a few weeks before the couple separated. After the source deduction of income tax, Ms. Lockerby received $8,088.93. Ms. Lockerby didn't provide a Statement of Property at the trial. While she deposited her deferred salary into her sole account, this account would still be a matrimonial asset. Section 4(1) of the *Act* makes clear that all assets owned by either spouse are considered matrimonial assets unless specifically excepted.

[88] In *Yaschuk v. Logan*, 1992 CanLII 2595 (NS C.A.) at paragraph 22, Justice Chipman upheld Justice Grant's decision in *Yaschuk v. Logan*, 1991 CanLII 4392 (NS S.C.) that the unused vacation leave accumulated during a marriage which was paid to Mr. Yaschuk after the couple separated was a matrimonial asset. Ms. Lockerby's deferred salary is similarly a

matrimonial asset, representing a form of savings accumulated while the parties were together. More recently in *Cashin*, 2010 NSCA 51, the Court of Appeal reiterated its view that a service-based benefit earned during the marriage as part of an employment package is a matrimonial asset. As the Court of Appeal directed at paragraph 24 of its decision in *Yaschuk v. Logan*, 1992 CanLII 2595, the asset's value is the amount received after deductions.

Mr. Lockerby watches

[89] Mr. Lockerby's Statements of Property did not list or place values on his watches. He says they are excepted from the definition of matrimonial assets as reasonable personal effects, which are excluded under section 4(1)(d) of the *Matrimonial Property Act*. In her affidavit, Ms. Lockerby said the watches were worth approximately $25,000.00 to $30,000.00. In the balance sheet she provided at the end of the trial, she valued all the watches at $5,500.00.

[90] An email to Doug Lockerby from his father listed a number of watches which were in safe-keeping: a Tissot watch, two Tag Heuer watches (one costing $1,300.00 and one costing $2,900.00), one Rolex watch, a Precision watch which Mr. Lockerby says is "a Timex knockoff that cost $50.00" and a watch which was a CIBC promotional item. Mr. Lockerby said the Rolex watch was a gift from Ms. Lockerby's step-father and "a decent fake" which cost $100.00. Additionally, Mr. Lockerby said he had three watches that he kept for wearing: a Tissot Seamaster which cost $500.00; a Marathon watch which he described as "rare, but not valuable" and a watch which was either a Timex or a Calvin Klein costing less than $100.00.

[91] Mr. Lockerby's uncontradicted evidence was that the Marathon watch was a gift from a client and the ersatz Rolex watch was a gift from Ms. Lockerby's step-father. They are excluded from division by section 4(1)(a) which excepts gifts which a spouse receives from someone other than the other spouse and which are not used for the benefit of both spouses or the children.

[92] Of the other watches, most cost less than $100.00. There are three watches which each cost more than $500.00 and none of them cost more than $2,900.00. Together, these three watches cost $4,700.00. To be excluded by virtue of section 4(1)(d), the watches must be "reasonable" personal effects. As long ago as 1991, in her decision in *Bechard*, 1991 CanLII 4294 (NS S.C.), Chief Justice Glube accepted that reasonable personal effects included jewellery with a value in excess of $9,000.00. Mr. Lockerby's watches cost less than $5,000.00. All but three cost less than $100.00 and are probably worth less than they cost to purchase. I don't know the value of the three more expensive watches: the Tissot and Tag Heuer watches. At least one of these watches was purchased at Costco. The amount of $5,500.00 shown on Ms. Lockerby's balance sheet is consistent with the cost of the watches. They may have a lower value. I find that the watches are Mr. Lockerby's reasonable personal effects. For his part, Mr. Lockerby does not contest that the Tag Heuer watch he purchased for Ms. Lockerby at a cost of $3,500.00 and the diamond ring he gave her for their tenth anniversary, which cost $15,000.00, are Ms. Lockerby's reasonable personal effects and excepted from division.

Registered Education Savings Plan

[93] There is an RESP for the children. Mr. Lockerby asks that I order the plan be maintained for the children with each parent to have an equal say in how it is used. He also asks that the parties be entitled to return to court if disagreements arise over the plan's use. Ms. Lockerby allocated the RESP account to Mr. Lockerby.

[94] Most decisions relating to an RESP arise in child support applications. Less frequently an RESP is considered in a *Matrimonial Property Act* application and in most of these (*Conrod*, 2005 NSSF 1 at paragraph 31 and *Kapoor*, 1999 CanLII 13148 (NSSC) at paragraph 62), the RESP is not divided between the spouses and is ordered to be maintained for the children. In *Kennedy-Dowell v. Dowell*, 2002 NSSF 50 at paragraph 92, Justice Campbell specifically said that he was ignoring the RESP in the division of property because the Plan was for the benefit of the children. In *S.L.K. v. M.M.H.*, 2009 NSSC 319, Justice Campbell divided RESP contributions between the spouses where each had children from prior relationships and neither stood in the place of a parent to the other spouse's children. The contributions were divided equally so each spouse had funds with which to finance the education of his or her children.

[95] I accept that the RESP is for the benefit of the Lockerby children. It is not appropriate that the children's asset should be divided between the parents. In this regard, I view the RESP in the same manner that Justice Tidman viewed a children's bank account in *Matthews* (1990), 96 N.S.R. (2d) 376 (TD) at paragraphs 49 and 50, affirmed in *Matthews* (1991), 104 N.S.R. (2d) 140 (A.D.) at paragraphs 15 and 16. At paragraph 49 of his decision, Justice Tidman held that Family Allowance cheques which had been deposited into accounts in the names of the children from the husband's first marriage were beneficially owned by the children. As the children's asset, Justice Tidman declined to divide the account. However, savings surreptitiously accumulated by Ms. Matthews for the children of the second marriage - when the spouses had agreed all their finances should be pooled - were not excluded as belonging to the children, but were treated as matrimonial assets. While the Lockerbys disagree whether the contributions were a gift or a loan, they were made with the knowledge of both parents.

[96] The RESP contributions are the Lockerby children's asset. The parents shall consult about how the Plan is used. If they disagree, Mr. Lockerby shall make the final decision. I appreciate that Mr. Lockerby sought an order that the parents would share the power to make decisions about the Plan. As I've said earlier, I don't want important decisions about the children to get lost in conflict between the parents, so I am not ordering the parents have an equal say.

RBC account

[97] On her balance sheet, Ms. Lockerby lists an RBC account as subject to division. This account isn't part of Mr. Lockerby's balance sheet. The RBC account has a positive balance. Mr. Lockerby works in the banking industry. During the marriage he worked at CIBC and the couple banked exclusively with that bank. After the couple separated, Mr. Lockerby began to work for RBC. The RBC account did not appear on his 2008 Statement of Property, but it does

appear on his 2010 Property Statement. The statement for this bank account shows it is an "RBC Staff Banking" account. I conclude the account came into being with his RBC employment. It was acquired after separation and, under section 4(1)(g) of the *Act*, it is excluded from division.

Valuing assets

[98] In *Simmons*, 2001 CanLII 4617 (NS S.F.) at paragraph 34, Justice Campbell outlined general principles for determining the date on which to value an asset: use separation date values for assets which "tend to be consumed by actual usage or whose value has been earned or accrued by reference to the passage of time" and value other assets when the spouses do their accounting. While a trial decision, *Simmons*, 2001 CanLII 4617 (NS S.F.) has twice been lauded by the Court of Appeal: in *Moore*, 2003 NSCA 116 at paragraph 24, Justice Hamilton described the decision as "[a] good review of the rationale behind the choice of valuation date" and in *Morash*, 2004 NSCA 20 at paragraph 21, Justice Bateman said it provided "a comprehensive discussion of 'valuation date' ". Justice Campbell's general principles fit well within the context of the Court of Appeal's statement that there is "no requirement in Nova Scotia to assign a single valuation date for all matrimonial assets" in *Reardon v. Smith*, 1999 NSCA 147 at paragraph 38.

Mr. Lockerby's RRSP

[99] Ms. Lockerby values Mr. Lockerby's RRSP at $38,692.87 - discounting the November 2009 value by thirty percent to account for the deferred income taxes due on the withdrawal of contributions. Mr. Lockerby doesn't place a value on the RRSP, saying the exact amount will be determined when the RRSP is liquidated. He intends to do this immediately.

[100] I accept Mr. Lockerby's position on this issue. At his current income level, withdrawing funds from the RRSP will attract taxes at a high marginal tax rate. I order that he withdraw all the contributions in his RRSP and he provide documentation to Ms. Lockerby showing the amount in the Plan when contributions are withdrawn and the amount paid for the deferred income taxes. Taxes will be withheld at source when the withdrawal is made and additional taxes will be due when he files his 2010 tax return next spring. The RRSP's most recent value was $61,909.78. For the purpose of later discussion in my decision I have estimated the after-tax value of Mr. Lockerby's RRSP contributions. At Mr. Lockerby's current income level, adding an additional $61,000.00 to his income will trigger additional taxes of at least $23,500.00, based on the marginal rates of between thirty-eight and forty-seven percent that will apply. Proceeds shall be used to repay debt.

CIBC accounts

[101] On her balance sheet, Ms. Lockerby lists three CIBC accounts. One account has a zero balance and is described as "closed", while the other two have negative balances. With regard to the accounts, Mr. Lockerby says they are operating accounts and they shouldn't be divided.

[102] Justice Campbell discussed the division of bank accounts in *Simmons*, 2001 CanLII 4617 (NS S.F.) saying, at paragraph 21, that an operating bank account should be valued at the point

when the spouses separate their finances. Mr. Lockerby says that after the interim hearing in July 2009 an arrangement came into being where the spouses were to share expenses in proportion to their incomes. He made arrangements to sever joint financial obligations. I take this date of July 2009 to be the point when the spouses separated their bank accounts. The best information about the balances in these accounts at that time is found in Mr. Lockerby's January 2010 Statement of Property. This means that Mr. Lockerby has a deficit of $34.15 in the account in his sole name and there is a deficit of $449.44 in the parties' joint account. The closed account is, in effect, already divided.

Ms. Lockerby's pension

[103] Working in the airline industry, Ms. Lockerby's employment pension is governed by the *Pension Benefits Standards Act*, 1985, R.S.C. 1985 (2nd Supp.), c. 32 which provides in section 25(2) that the division of a pension on divorce shall be subject to the applicable provincial property law. In *Morash*, 2004 NSCA 20, the date of division for a similarly-regulated pension was the date of the couple's separation. At paragraph 32, the Court of Appeal held that "pension credits earned before and during the marriage (subject to valuation date issues) are a matrimonial asset and subject to equal division". The *Matrimonial Property Act* excludes assets acquired after separation in section 4(1)(g).

[104] In his petition, Mr. Lockerby claimed the parties separated on June 22, 2008. Ms. Lockerby disputed that date. She didn't identify any other date or offer any evidence of when the couple separated. Her agreement to allow the amendment to the petition so Mr. Lockerby could seek a divorce based on section 8(2)(b)(i) of the *Divorce Act* meant that her evidence relating to the date of separation wasn't relevant under section 8(3)(b)(ii) of that *Act*, though it was still relevant under sections 4(1)(g) and 4(3) of the *Matrimonial Property Act*. The only date of separation identified was June 22, 2008 and I use that date.

[105] For the Lockerbys, the relevant dates for the division of Ms. Lockerby's pension are the date of the commencement of her employment and June 22, 2008. I am excluding contributions made after the separation, pursuant to section 4(1)(g) of the Matrimonial Property Act.

Mr. Lockerby's pension

[106] Mr. Lockerby's employment began after the couple married and ended after their separation. Applying the same reasoning to his pension as was applied to Ms. Lockerby's, his pension shall be divided from the commencement of his employment until June 22, 2008.

Matrimonial assets

[107] Combining the results of my analysis with the parties' agreements in this area means that the matrimonial assets have preliminary values shown in the following table. Values are preliminary because I haven't yet considered any encumbering debts or disposition costs.

Asset	Preliminary Value
Mother's home	342,000.00
Mother's home contents	5,162.00
Father's home	207,000.00
Father's home contents	2,187.00
Mother's vehicle	6,000.00
Father's vehicle	13,000.00
Account receivable from W.R.	5,000.00
Father's RRSP	38,409.00
CIBC account - father's sole	(34.15)
CIBC account - parties' joint	(449.44)
Father's CIBC shares	1,655.70
Mother's deferred salary	8,088.93
Father's pension	Divide equally from date of employment to June 22, 2008
Mother's pension	Divide equally from date of start of her employment to June 22, 2008

Dealing with debts

[108] A similar process must be undertaken when dealing with debts: they, too, must be identified, classified and their amount determined. For the Lockerbys, identifying debts relates to capital gains taxes that would be due on the sale of Mr. Lockerby's home. The classification of debts relates to home appraisal costs, promissory notes given to Wayne Lockerby, Ms. Lockerby's Visa and the CIBC overdraft (loan). The amount of indebtedness needs to be determined for the mortgages on each home, the CIBC joint line of credit, Mr. Lockerby's Visa, the boat loan, an HBC credit card, the NS Power account and the Home Depot credit card.

Identifying debts

Capital gains on Mr. Lockerby's home

[109] The home which Mr. Lockerby occupies was rented for a period of time. After it was first purchased, the family lived in it. The Lockerbys then bought the house where Ms. Lockerby lives and the family moved there and rented out the property that Mr. Lockerby now

occupies. While rented, the rental income was claimed and related expenses were deducted in filing tax returns. When the house is sold, capital gains taxes will be due. Ms. Lockerby does not include these in her balance statement.

[110] To my mind, this issue was resolved with the decision in *Gomez-Morales*, 1990 CanLII 2349 (NS C.A.). At paragraphs 35 to 38 of its decision, the Court of Appeal determined that the tax consequences of disposing of an asset should be considered in fixing the asset's value. The rationale of this decision was re-affirmed by the Court of Appeal in *Reardon v. Smith*, 1999 NSCA 147 at paragraph 31, in the context of stocks, stock options and the tax consequences of their disposition. It is as appropriate to consider the capital gains taxes that will be due on the sale of this home as it is to consider the expenses that arise on the sale of a matrimonial home, as we do following the decision in *Clancey*, 1990 CanLII 2602 (NS S.C.).

[111] Prior to argument, I asked the parties to consider the issue of capital gains taxes on this home. Only Mr. Lockerby provided an estimate of the taxes that would be due on the home's sale. The sale will determine the actual taxes due. When my analysis needs it, I use Mr. Lockerby's estimate.

Classifying debts

[112] According to Justice Roscoe in *Bailey*, 1990 CanLII 4116 (NS S.C.) at paragraph 23, when determining if a debt is "matrimonial", I must decide whether it was incurred for the family's benefit, whether it is an ordinary household debt, and, if it arose after the couple separated, whether it was necessary to meet basic living needs or to preserve matrimonial assets. This decision was approved by the Court of Appeal in *Ellis*, 1999 CanLII 4274 (NS C.A.). In *Cameron*, 1995 CanLII 4433 (NS S.C.) at paragraph 24, affirmed at *Cameron*, 1996 CanLII 5598 (NS C.A.), Justice Goodfellow said that indebtedness incurred after separation and for the debtor's sole benefit is generally not "matrimonial", but personal.

Appraisal costs

[113] Mr. Lockerby arranged for both homes to be appraised in January 2010. Once done, the spouses agreed on the appraised values as the appropriate values for the properties. Mr. Lockerby incurred the appraisal cost after the separation. The family benefit from the expense since it resulted in agreement on the values of the homes. It is a matrimonial debt. I was not told the appraisal cost and this will need to be disclosed to Ms. Lockerby for the final accounting.

Promissory notes to Wayne Lockerby

[114] Mr. Lockerby filed two Property Statements. His 2008 Statement showed personal loans from his father of $229,000.00 as of August 14, 2008 and his 2010 Statement showed that another $53,306.00 had been borrowed as of January 6, 2010. Mr. Lockerby says these loans are matrimonial. The loans were incurred prior to separation and, he says, they were incurred for the benefit of the family. He asks that there be an unequal division of assets, such that the loans

incurred between May 14, 2001 to May 10, 2007 are shared equally between the spouses in the overall property division. The loans are outlined in the table below, "Promissory Notes to Wayne Lockerby".

Promissory Notes to Wayne Lockerby			
Date of note	**Amount**	**Purpose of loan**	**Details of note**
May 14, 2001	30,000.00	Van purchase	No interest. Paid by bank draft deposited to joint account
July 16, 2001	10,000.00	Pay Mr. Lockerby's student loan	No interest. Paid by cheque noting "loan to pay off student loan"
November 21, 2001	16,000.00	RESP contribution	5% interest. Paid by cheque noting "loan re RESP"
February 11, 2002	16,000.00	RESP contribution	5% interest. Paid by cheque noting "loan for childrens [sic] RESP"
December 27, 2002	16,000.00	RESP contribution	5% interest. Paid by bank draft.
August 18, 2003	15,000.00	Pay high interest debt	No interest. Paid by bank draft deposited to joint account.
October 17, 2003	5,000.00	For loan to friend's business	No interest. Paid by bank draft.
September 15, 2004	60,000.00	Home purchase	No interest. Prepared from precedent. Paid by bank draft.
March 31, 2006	16,000.00	RESP contribution	4.5% interest. Paid by cheque noting "RESP loan"
May 10, 2007	16,000.00	RESP contribution	4% interest. Paid by cheque noting "Grandchildren's RESP loan"

[115] The loans total $200,000.00. Mr. Lockerby doesn't ask for interest, nor does he seek to share liability for loans incurred after May, 2007 nor the loan incurred before the separation to purchase Ms. Lockerby's diamond anniversary ring.

[116] Mr. Lockerby testified that loans typically came about in the same way: when a need arose in the family, he and Ms. Lockerby would discuss whether to ask Wayne Lockerby for a loan. If they decided to do so, Mr. Lockerby would phone his father with the request and his father would consider it. If Wayne Lockerby was willing to make the loan, he would drive into the parties' home at the end of the workday and Mr. Lockerby would sign a promissory note "at the kitchen table". While Ero Lockerby was not always present for these meetings, Doug Lockerby believes she was frequently present. The money was provided by a bank draft or a cheque which would be deposited into the parents' joint account.

[117] The loans were secured by promissory notes from Doug Lockerby: Ms. Lockerby did not sign any of them. Copies of the original promissory notes and copies of the front of the original cheques or bank drafts by which money was advanced were exhibits. The original documents were inspected by Ms. Lockerby's counsel at the trial. These had earlier been available for inspection by Ms. Lockerby and her prior counsel for two to three weeks in April 2009. During that time, neither she nor her counsel examined them. Ms. Lockerby does not dispute that the funds which came from the cheques and bank drafts were deposited into the joint bank account which was used to finance the family's expenses.

[118] Mr. Lockerby says Ms. Lockerby was aware the money was borrowed and knew the circumstances of the loans. While the promissory notes sometimes specified interest rates, no payments of interest or on the principal amounts were ever made on the loans. Wayne Lockerby said that he had received some small payment (less than $1,000.00) on one loan that was made after the couple separated.

[119] Mr. Lockerby says that the loans from his father were used for a myriad of family needs: to finance the purchase of the family's home, to repay high interest debt, to repay his student loan, to purchase a van, to loan money to a family friend for his business and to finance contributions to an RESP for the children.

[120] Wayne Lockerby testified that he never gave his children or grandchildren a monetary gift that exceeded $300.00 or $400.00. He produced promissory notes relating to loans he made to Mr. Lockerby and loans he made to his other son. He testified that he had assisted his children financially with their education and that at least two of his children were given a car for their academic achievements in high school. There was evidence from Mr. Lockerby of one situation when he approached his father for a loan to buy a boat and his request was declined so the parties turned to a commercial lender for the money. According to Doug Lockerby, his wife felt that Wayne Lockerby should just give them money rather than loan it to them.

[121] One document introduced into evidence was described as a "gift letter". It was a letter drafted for Wayne Lockerby's signature which would confirm that $61,250.00 was a gift from Wayne Lockerby to his son and daughter-in-law for the purchase of the family home. It was signed by both the spouses. Wayne Lockerby refused to sign this letter.

[122] Ms. Lockerby acknowledges that money from Wayne Lockerby was used to purchase the van, to fund RESP contributions, to finance a loan to a family friend for his business and purchase the home. The amounts advanced for these purposes total $175,000.00. Ms. Lockerby says she was unaware her husband had a student loan and she wasn't aware that high interest debt was repaid. She says she and her husband "never completely merged" their finances and she routinely signed financial papers that he brought to her for signature, although she may not have understood them. Ms. Lockerby says all the money came as gifts and that her husband and her father-in-law are perpetrating a fraud on the court by swearing the money was loaned. The fraud is intended to rob her of all equity in the family's assets. Ms. Lockerby said that she first learned of the loans through her lawyer after the divorce began.

[123] Ms. Lockerby says that when they were looking for a new van, her husband told her that "Wayne [is] going to buy us a new vehicle". She accepted this as consistent with her belief that he had bought a total of six cars or motorcycles for all his children. The evidence indicates that while Doug and Karen Lockerby were each given a car for achieving academic success in high school, no other vehicles were given and Wayne Lockerby produced a promissory note documenting a loan to his other son to assist him in purchasing a vehicle. Doug Lockerby produced a statement of account showing an outstanding balance of over $9,100.00 owing on his student loan in 2000 and a receipt for its repayment.

[124] Wayne Lockerby testified that he kept the promissory notes in a safety deposit box because they are assets of his estate and he wants his executor to be able to deal with them if they have not been repaid during his lifetime. He said that if they were unpaid, then the outstanding amount would be offset against bequests to his son in his will: "Doug would get that much less off the top", Wayne Lockerby said.

[125] Wayne Lockerby has given financial gifts to the family: he paid some orthodontic expenses, bought ski passes, gave them use of an apartment and his cottage for different periods of time. These were gifts and were not documented. Wayne Lockerby also said that at different times, he was asked to loan money (to pay for a pool, to buy a boat, to invest in franchises) and he refused. Wayne Lockerby says that he has made inquiries about when he would be repaid.

[126] Justice Bateman addressed a similar situation in *Ellis*, 1999 CanLII 4274 (NS C.A.). During the marriage, Mr. Ellis had borrowed money. The loan was facilitated by his father who gave security for it. When the parties defaulted on the loan, the bank realized its security. The spouses' evidence about repaying Mr. Ellis' father conflicted. Mr. Ellis said he intended to repay his father and he later signed a document agreeing to do this. Ms. Ellis was aware of the assistance from her father-in-law, but said she had not agreed it would be repaid.

[127] At paragraph 25 of *Ellis*, 1999 CanLII 4274 (NS C.A.), Justice Bateman noted that, "When a marriage breaks down and monies have been advanced by a parent or other family member, the parties may have different recollections about the terms under which the money was provided." She identified a number of circumstances that support characterizing the advanced money as a debt: for example, a documented obligation to repay is "strong evidence" that the advances should be treated as debts (at paragraph 25); the failure to repay the funds over a prolonged period of time and the absence of a repayment schedule suggest the funds are not a debt (at paragraph 26); the absence of an expectation of repayment or an intention to enforce payment both suggest the advance of funds was an informal family arrangement rather than a debt (paragraphs 26 and 27).

[128] Mr. Lockerby bears the burden of proving debts relate to the family. The promissory notes are payable on demand. There is no schedule for their repayment and Wayne Lockerby has not demanded payment though he has asked when he would be repaid. By the time of trial, funds had been outstanding for between three and nine years. Wayne Lockerby spoke of repayment in the context of his own death and ensuring that the promissory notes recorded money that had been advanced to one child or another so that this money could be considered in dividing his estate among his children. He was adamant that the notes would be enforced

on his death. While this isn't a conventional repayment schedule, it is a deadline for the legal enforcement of the notes.

[129] I do note Ms. Lockerby's evidence that she was unaware of the debt and the promissory notes. I am not surprised that Ms. Lockerby's knowledge of financial dealings in her husband's family is imperfect. The Lockerby family didn't discuss financial matters openly. Neither Mr. Lockerby nor his sister was fully aware of their siblings' financial dealings with their father. Nor were they conversant with their father's financial situation. When Wayne Lockerby provided money to Doug Lockerby, he expressly asked his son not to reveal this. In *Selbstaedt*, 2004 NSSF 110 at paragraph 45, Justice Dellapinna acknowledged that it isn't essential that both spouses be aware of a debt for it to be a matrimonial debt. Certainly the criteria in *Ellis*, 1999 CanLII 4274 (NS C.A.) do not include such a requirement.

[130] The notes meet the requirements outlined by Justice Bateman in *Ellis*, 1999 CanLII 4274 (NS C.A.): there is a documented obligation to repay, the indebtedness is capable of legal enforcement and there is an intention to enforce collection. I find there is a matrimonial debt of $200,000.00 owed to Wayne Lockerby.

Ms. Lockerby's Visa account

[131] Ms. Lockerby claims she has a Visa debt of $11,000.00. Here, Ms. Lockerby bears the burden of proving the debt relates to the family. Information about this debt is sparse. She referred to the account twice in her affidavit, but didn't explain when or how the bill arose. The balance sheet she provided notes this amount is an estimate. Ms. Lockerby didn't provide a Statement of Property at trial which might indicate when this debt arose. I could only guess when the charges were incurred against Ms. Lockerby's Visa or why they were incurred. Ms. Lockerby has not provided enough evidence to show that this was either a debt incurred prior to the parties' separation or, if it was incurred after their separation, that it was incurred for the family or to preserve a matrimonial asset. I find that Ms. Lockerby's Visa debt is not a matrimonial debt.

CIBC overdraft (loan)

[132] The CIBC overdraft is an item that appears on Ms. Lockerby's balance sheet. According to notations on Mr. Lockerby's 2010 Statement of Property, the mortgage on Ms. Lockerby's home was debited from an account that was overdrawn each month. Because of the overdraft and the NSF charges, the account was closed and it was converted to a loan. The outstanding amount of this loan is $626.05. The mortgage on the home is a debt relating to the family and servicing the debt which encumbered the home (in whatever form) preserved a matrimonial asset. The conversion of debts relating to the mortgage into the CIBC overdraft (loan) does not change the nature of the debt. It remains a matrimonial debt.

Determining amount of debts

The mortgage on the home occupied by Ms. Lockerby

[133] On her balance sheet, Ms. Lockerby showed the balance of the mortgage on her home as $161,436.88. This amount is derived from a bank printout dated February 17, 2010. It is approximately equal to the figure used on Mr. Lockerby's balance sheet. I presume the difference is that Mr. Lockerby chose to use a round figure because there's no explanation why his figure is $1,436.88 lower than his wife's. From these figures, it seems the parties intend to use a current mortgage figure when deducting the mortgage from the value of the home. Because the spouses seem to share this approach, I adopt it and I use Ms. Lockerby's figure.

The mortgage on the home occupied by Mr. Lockerby

[134] Ms. Lockerby shows the balance on this mortgage at $127,564.16, while Mr. Lockerby uses a figure of $133,700.00. His 2010 Statement of Property shows the amount used by Ms. Lockerby, which is confirmed by a bank printout of January 6, 2010. The mortgage balance of approximately $133,700.00 is taken from Mr. Lockerby's 2008 Property Statement and reflects the mortgage balance November 21, 2008.

[135] Where parties agree on the amount of a debt, I won't disturb their agreement. When they disagree, I return to the applicable legal principles. In this circumstance, that requires me to return to *Simmons*, 2001 CanLII 4617 (NS S.F.) at paragraph 45, where Justice Campbell wrote that "the appropriate date for valuing the mortgage is the date of the division." This home is being divided at the present, so I will use the current amount of its mortgage which is $127,564.16.

CIBC joint credit line

[136] Both spouses acknowledge this debt. Ms. Lockerby says the balance was $14,995.00 on January 6, 2010. She took this amount from the statement of account attached to Mr. Lockerby's 2010 Statement of Property. Mr. Lockerby placed the balance of the credit line at $14,415.00. Transactions indicate the account is kept close to its $15,000.00 limit. The appropriate amount for this debt is that outstanding when it's repaid. I expect this will be in the vicinity of $15,000.00.

Mr. Lockerby's Visa account

[137] Both parties agree that this debt relates to the family, but they don't agree on its amount. Ms. Lockerby uses the figure of $33,195.16, while Mr. Lockerby uses $28,756.00. Her amount is taken from his 2010 Statement of Property, while his figure comes from his 2008 Statement. The 2008 Statement provides a figure that is closer to the parties' separation date. In the absence of any indication that the additional amounts added after 2008 relate to the family or the

preservation of matrimonial assets (which would be for Mr. Lockerby to provide), I adopt the figure from the earlier date.

Boat loan

[138] The parties disagree on the amount of the boat loan. Ms. Lockerby says that $11,748.92 is owed, noting this amount is "not verified": it's taken from Mr. Lockerby's 2010 Property Statement. Mr. Lockerby uses the figure of $14,309.00 which is taken from his 2008 Property Statement. The 2008 Statement uses a figure that is closer to the parties' separation date. The boat's value will be divided on its sale, so the amount of the debt at that time should be used.

HBC, NSP and Home Depot accounts

[139] I am addressing these debts together because I am dealing with them in the same way. Ms. Lockerby says the amounts owed on these debts should be the amounts owed in January 2010. In some cases these amounts are higher or lower than the amounts owed when the couple separated. Where the current amount is lower than the amount at separation, I adopt the current amount. However where the current amount is higher than the amount was at separation (as is the case for the Home Depot account), I use the separation date amount because it has not been proven that the additional debt was incurred for the family or the preservation of matrimonial assets. I presume that the additional NSP debt relates to providing electricity to one of the homes and treat it as a debt incurred for the family, so I use the current amount.

[140] Based on this analysis, the debts and their amounts are:

Debt	Amount
Debt on father's vehicle	13,000.00
Seadoo boat loan	11,748.92
Capital gains on Father's home	28,000.00
Appraisal costs	unknown
Promissory notes to Wayne Lockerby	200,000.00
CIBC account (loan)	626.05
Mortgage on Mother's home	161,436.88
Mortgage on Father's home	127,564.16
CIBC joint credit line	15,000.00
Father's Visa credit card	28,756.00
HBC credit card	1,092.52
NSP account	1,500.00
Home Depot account	285.11

Particular claims for individual items

[141] Before I address the division of property, I want to address particular claims that Mr. Lockerby has made. First, he wants Ms. Lockerby to return the guest book from Wayne Lockerby's cottage and a family farm sign. These items belong to others. They are not matrimonial assets. Ms. Lockerby did not contest the return of these items, but she didn't agree to their return until the parties were making their final submissions. She shall return the items to Doug Lockerby within fourteen days of the date of this decision if she has not done so already.

[142] Second, Mr. Lockerby also sought return of "items of a personal and business nature" which he listed in exhibit 45 to his affidavit. Ms. Lockerby did not contest Mr. Lockerby's entitlement to the return of these items. Reasonable personal effects and business assets are excluded from the definition of matrimonial assets, by virtue of sections 4(1)(d) and (e) of the *Matrimonial Property Act*, respectively. However, under section 13 of the *Act*, non-matrimonial assets may be divided. Ms. Lockerby has not sought the division of these items under section 13 nor has she argued that they are relevant to a division of property under that section. Ms. Lockerby shall return the items listed in exhibit 45 to his affidavit to Doug Lockerby within fourteen days of the date of this decision if she has not already done so.

[143] Mr. Lockerby has claimed compensation for his loss of flight passes available to his wife. It is unclear whether he wanted me to consider the flight passes as a matrimonial asset or pursuant to section 13(l) as a "benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring". He did not disclose the passes or attribute a value to them on either of his Statements of Property. I dismiss this claim. Mr. Lockerby has offered no evidence, in any regard, about the flight passes. I have not been told what the passes offer him, whether, when and why they ceased to be available, the extent of his use of them or their value.

Property Division

[144] The table below assembles information needed to consider the division of property. Pursuant to *Clancey*, 1990 CanLII 2602 (NS S.C.), I have deducted the notional disposition costs of each home. The appraisal cost should be deducted.

Asset	Mr. Lockerby	Ms. Lockerby
Mother's home - 342,000.00		
Less mortgage - (161,436.88)		
Less CIBC account (loan) - (626.05)		
Less disposition costs - (21,390.00)		
Less appraisal cost - (amount to be provided)		
Net value of mother's home		158,547.07

Mother's home contents		5,162.00
Father's home - 207,000.00 Less mortgage - (127,564.16) Less capital gains - (28,000.00) Less disposition costs - (13,627.50) Less one-half appraisal cost - (amount to be provided) Net value of father's home	37,808.34	
Father's home contents	2,187.00	
Mother's vehicle		6,000.00
Father's vehicle - 13,000.00 Less debt on father's vehicle - (13,000.00)	0.00	
Seadoo boat - 11,000.00 Less boat loan - (11,748.92)	(748.92)	
Father's RRSP	38,409.00	
CIBC account - father's sole	(34.15)	
CIBC account - parties' joint (equally allocated between the parties) - (449.44)	(224.72)	(224.72)
Father's CIBC shares	1,655.70	
Mother's deferred salary		8,088.93
Sub-total	**79,052.25**	**177,573.28**

[145] Mr. and Ms. Lockerby have a joint line of credit with $15,000.00 outstanding. Allocating this equally between the spouses reduces their sub-totals to $71,552.25 and $170,073.28, respectively (subject to the equal allocation of the cost of the appraisals), so an equal division of the value of the matrimonial assets - after repayment of this debt - would leave each spouse with a "net worth" of $120,812.76.

[146] Section 12(1) of the *Matrimonial Property Act* provides that matrimonial assets are divided equally notwithstanding the ownership of the assets. There is no similar treatment of debts. In *Cameron*, 1995 CanLII 4433 (NS S.C.), affirmed by *Cameron*, 1996 CanLII 5598 (NS C.A.), Justice Goodfellow noted, at paragraph 26, that a debt is not automatically shared simply because the debt may be labeled as matrimonial indebtedness. Whether the debt will be shared depends on whether the division of matrimonial assets in equal shares would be unfair or unconscionable. His Lordship did comment, again at paragraph 26, that " In most conceivable situations fairness and conscience dictate a sharing of matrimonial indebtedness."

[147] The table at paragraph 144 uses figures I've determined in my decision. To analyse the property division figures must be used, so I have used the figures I've determined. Some of these figures will be changed when assets' values are realized and debts are repaid.

[148] If matrimonial assets were divided equally, then each spouse would be left with approximately $120,812.76 after Ms. Lockerby paid $49,260.51 to her husband. Allocating debts based on the contractual obligations which underlie them would see Mr. Lockerby responsible for the loans from his father ($200,000.00), his Visa debt ($28,756.00), his HBC debt ($1,092.52), the NS Power debt ($1,500.00) and his Home Depot account ($285.11). In all, Mr. Lockerby would have debts of $231,633.63, while Ms. Lockerby would have no debts that relate to the marriage. The overall allocation of assets and debts resulting from an equal division of assets would see Ms. Lockerby left with assets having a net value of $120,812.76 and no debts from the marriage while Mr. Lockerby would have more than $110,000.00 in debts.

[149] Mr. Lockerby asks me to order an unequal division of property such that matrimonial assets and matrimonial debts would be equally divided between the spouses. The statutory basis for such a claim is found in section 13(b) of the *Matrimonial Property Act* which allows me to divide matrimonial assets unequally where I am satisfied that the equal division of matrimonial assets would be unfair or unconscionable taking into account the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred.

[150] The debts Ms. Lockerby seeks to have Mr. Lockerby keep are notable. She admits that $175,000.00 of the loans from Wayne Lockerby was used for the family. This money financed the purchase of Ms. Lockerby's van, the purchase of the home she occupies, a loan to a family friend and investment in the children's RESP. The debt owed to NS Power is for unpaid bills relating to the home Ms. Lockerby occupies. Seventy-five percent of the debt in Mr. Lockerby's name is clearly and directly related to the family. The remaining twenty-five percent of the debt dates from a time when the family was together and Ms. Lockerby did not question that these debts related to the family - she only questioned their amounts.

[151] In *Lawrence* (1981), 47 N.S.R. (2d) 100 (A.D.) at paragraph 31, Justice Hart said, "If substantial debts were borne by one spouse for the benefit of the whole family it would be unfair to divide assets without providing for the obligations of the matrimonial unit." Leave to appeal this decision to the Supreme Court of Canada was dismissed at *Lawrence* (1981), 49 N.S.R. (2d) 209 (A.D.). Justice Hart's comments are *à propos* in this case: it would be unfair or unconscionable to divide matrimonial assets equally and without regard to the debts in light of the substantial debts borne by Mr. Lockerby for the benefit of the whole family. I order that there be an equal division of matrimonial assets and matrimonial debts. Elsewhere in my decision I have fixed the values of certain assets or the amounts of debts. In some circumstances, I have noted that the value of an asset or the amount of a debt will be fixed on its sale or repayment. Schedule "A" to my decision outlines the assets and debts to be divided. Where I have fixed values or amounts, I have shown these. Other figures will need to be added as the parties give effect to my decision.

[152] Implicit in my order is the requirement that both homes and the boat be sold and that Mr. Lockerby withdraw all contributions in his RRSP. I want to be explicit about that requirement. In argument, Ms. Lockerby asked that once I rendered my decision, she be allowed the opportunity to try to arrange financing so that she could give effect to my decision while keeping the home she occupies. Mr. Lockerby opposes this. There was evidence before me that Ms. Lockerby was given multiple opportunities to make such an arrangement in the past. She failed to do so. I have reviewed section 11 of the *Matrimonial Property Act* and the considerations I should have where a party seeks an order for possession. I note that section 11(4) says that I may only make an order for possession where other provision for shelter is inadequate or it's in the children's best interests. Ms. Lockerby has offered no evidence that relates to those considerations, so I dismiss her request.

Prior costs award

[153] In July 2009, Justice Lynch ordered Ms. Lockerby to pay $3,000.00 in costs to Mr. Lockerby at the time of the property division. This order continues.

Account receivable from W.R.

[154] I have not specifically allocated W.R.'s debt to them. If and when W.R. repays the debt, the amount he repays shall be divided equally between the parties.
Prospective child support

[155] Mr. Lockerby earns a salary of $75,000.00. Ms. Lockerby agreed that it is appropriate to consider her income to be $50,000.00 and Mr. Lockerby did not contest this or argue that a different amount should be imputed to her. Pursuant to section 16 of the *Federal Child Support Guidelines*, SOR-97/175, and section 1(g) of Schedule III of the *Guidelines*, I am to deduct her union dues from her income. Her annual union dues are $624.00.

[156] The children will have their primary residence with their father. According to section 3 of the *Guidelines*, Ms. Lockerby shall pay monthly child support of $1,109.00 to Mr. Lockerby for the four children. Payments will start on the last day of this month and continue on the last day of each month thereafter.

[157] Mr. Lockerby also seeks a contribution to the children's special or extraordinary expenses, particularly child care expenses, health related expenses, extraordinary expenses for the children's primary or secondary school education and extraordinary expenses for extra-curricular activities. Only the expenses for the children's primary or secondary school education and extra-curricular activities need be extraordinary. Expenses for child care and health-related matters need not be extraordinary.

[158] According to section 7(1) of the *Guidelines*, the amount of the expense claimed may be estimated. In making an order under section 7, I am to consider the necessity of the expense as it relates to the children's best interests and the reasonableness of the expense in relation to the spouses' and children's means and the family's pre-separation spending pattern.

[159] In his 2010 Statement of Special or Extraordinary Expenses, Mr. Lockerby provided no information about the expense for child care or the expense for health-related matters. Mr. Lockerby prepared two Statements of Expenses: one was prepared in 2008 and one, in 2010. In neither of these does he estimate an expense for child care. In the 2008 Statement he shows a monthly expense of $50.00 for health-related matters, while in the 2010 Statement he declares the expense to be $25.00 per month. I accept that health-related expenses are currently $25.00 each month. Medications and orthodontia are in the children's best interests. The amount of $25.00 each month is reasonable having regard to the parents' means. Expenses for orthodontic treatment are part of the family's historic spending. Overall, this expense is one which should be shared in proportion to the parents' incomes. Mr. Lockerby's income is sixty percent of the parents' combined income and Ms. Lockerby's comprises the remaining forty percent. I order her to pay $10.00 each month toward the children's health costs.

[160] It was Mr. Lockerby's evidence that he generally did not require paid child care during his parenting time. He complained that Ms. Lockerby's actions made it difficult to arrange his parenting time on occasion, but he did not rely on paid child care providers. I do not have evidence that allows me to determine the necessity of child care (given his evidence that his work schedule can be flexible) nor the reasonableness of the expense (or what that expense might be) in the context of the parents' incomes. In the absence of the information required by the Guidelines, I decline to award an amount for child care.

[161] Expenses for primary or secondary school education or other educational programs that meet the needs of a child and expenses for extracurricular activities must be extraordinary to be subject to a claim under section 7(1). What constitutes an extraordinary expense may be determined either under section 7(1.1)(a) or section 7(1.1)(b) of the *Guidelines*. Pursuant to section 7(1.1)(a), extraordinary expenses are those which are too great for Mr. Lockerby to reasonably cover, considering his income and the child support he receives. Where the expenses can reasonably be covered, I am to determine if the expenses are extraordinary by considering the five factors listed in section 7(1.1)(b).

[162] According to Mr. Lockerby, the educational expenses are $1,217.00 annually. These expenses are comprised of two $60.00 school fees, $662.00 for an unknown number of school trips (for two children), $270.50 for a number of ski trips (for two children), $104.25 for two tracksuits and $60.00 for volleyball. Mr. Lockerby says there are extracurricular expenses of $500.00 annually for the older daughter's paddling, $1,500.00 annually for hockey for each of the younger daughter and the older son. Overall, these expenses are $4,717.25.

[163] Mr. Lockerby's annual income is $75,000.00. He will have an additional $13,428.00 in child support payments (including the contribution to health care costs), bringing his pre-tax income to $88,428.00. The Statement of Income he filed was based on the expenses he had at the time of the trial. While Mr. Lockerby's employment offer includes a base salary of $75,000.00, his paystubs indicate he is receiving slightly less than that amount. I assume that there is some mechanism which ensures he receives the $75,000.00 he was offered.

[164] Using an annual income of $75,000.00 and the child support I have determined, the pre-tax expenses of $8,824.00 shown in Mr. Lockerby's Statement of Expenses leave him with a monthly pre-tax deficit of $1,465.00. This deficit includes operating a home adequate for the children's needs while servicing monthly debt obligations of approximately $2,000.00 (comprised of the boat loan, the credit line, the credit card and the loan arising from Ms. Lockerby's non-payment of the mortgage). The Statement also indicates a monthly electricity expense of $500.00 which reflects the NS Power account I have considered in the property division. The debt amounts will be retired as a result of the property division I have ordered. This will leave Mr. Lockerby with a pre-tax surplus of $1,045.00. He has estimated his income taxes at slightly less than $1,710.00. These will be reduced when he claims a child as an eligible dependent and claims the children's fitness tax credit, leaving him with a more modest monthly deficit. Ms. Lockerby filed an Expense Statement prepared in June 2009. The figures on this Statement show that she spends $597.00 each month on obligatory pay roll payments (CPP and EI premiums, her pension contributions, medical insurance and uniform expenses). At an annual income of $50,000.00, after Ms. Lockerby has paid child support ($13,428.00 per year) and her obligatory pay roll payments ($7,159.00), she will have $29,413.00 with which to support herself and to provide for the children while they are with her.

[165] The amounts shown for school expenses and extracurricular activities on Mr. Lockerby's Expense Statement do not match the amounts shown on his Statement of Special or Extraordinary Expenses. Regardless, since some of the costs on the latter Statement do appear on the former, I conclude that Mr. Lockerby's deficit would not be as great as I have calculated in the preceding paragraph. As a result, I determine that the special or extraordinary expenses Mr. Lockerby has claimed do not exceed what he can reasonably cover given his income and the child support he will receive. As a result of this decision, I need to consider section 7(1.1)(b).

[166] Section 7(1.1)(b) of the *Guidelines* requires me to consider the relationship of the expense to Mr. Lockerby's income and his child support; the nature and number of the educational programs and extracurricular activities; any special needs and talents of the children; the overall cost of the programs and activities; and any other similar factor I consider relevant.

[167] I've noted the relationship of the expense to Mr. Lockerby's income and his child support and the overall cost of the programs and activities. As well, I've described the nature and number of the educational programs and extracurricular activities. The nature of the programs is not remarkable. The programs are typical of those in which any child attending school would participate: paying school fees, going on school trips (including ski trips), paying for gym clothes and for team participation. The extracurricular activities are modest (one activity per child for each of the three older children) and none of these activities costs more than $1,500.00 per year. No special needs or talents of the children have been described to me. I conclude that the children's educational programs and extracurricular activities do not constitute extraordinary expenses. Ms. Lockerby is not ordered to share in these expenses.

[168] Pursuant to section 6 of the *Child Support Guidelines*, I order that Ms. Lockerby continue to provide health insurance coverage for the children through her employment-based health insurance plan. I order that she annually provide a letter from her human resources or employee

benefits coordinator disclosing the amount of the premium for a single person's coverage and for family coverage under the plan. Mr. Lockerby and she will share the difference between the single premium and the family premium in a proportion of seventy percent by Mr. Lockerby and thirty percent by Ms. Lockerby, which roughly accords with their incomes of $75,000.00 and $49,376.00, respectively. The letter should be provided by June 15 of each year, at the same time the parties disclose their complete personal tax returns (including all schedules and attachments) and notices of assessment to each other. If Mr. Lockerby maintains similar insurance for the children, the same arrangement shall apply to the insurance he has.

Retroactive child support

[169] Mr. Lockerby asks that I order the mother to pay him retroactive "child support". Mr. Lockerby claims that Ms. Lockerby consistently refused to contribute to the family's expenses from June 22, 2008 to July 2009 and, in some circumstances, she refused to contribute to costs after Justice Lynch made her order on July 2, 2009 in the interim application. Mr. Lockerby provided an accounting of expenses for the period from July 2008 to October 2009. These are the expenses for the mortgages, electricity, water and phone costs at each home, along with servicing various debts (the boat loan, the car payment, the credit line, car and home insurance and one credit card). He asks that I allocate these expenses between the spouses on a pro-rata basis and claims that, since he paid them, Ms. Lockerby should reimburse him for thirty percent of the cost he paid. Many of these expenses were incurred while both parties were sharing the same home. He seeks reimbursement $16,356.00.

[170] Mr. Lockerby also seeks an additional amount of $6,385.69 from his wife because she would not, he said, allow him or the children to take items from her home, so he was required to purchase duplicates of items which were otherwise available. He itemizes these as "furniture, electronics, beds and bedding, linens, kitchen utensils and appliances, chinaware, stemware, towels, kids [sic] toys and sporting goods and household accessories". He has provided receipts for these items which run the range from a 50 inch plasma television, a dining room suite and queen size bed to tennis balls and facecloths. Mr. Lockerby wants to be reimbursed at a rate of ninety percent of the actual cost he paid for these items.

[171] Justice Lynch made an order for child support on July 2, 2009. Her order required Mr. Lockerby to pay child support to his wife. In the absence of adequate evidence to apply the analysis of *Contino v. Leonelli-Contino*, 2005 SCC 63, Her Ladyship determined child support solely on the basis of section 9(a) of the *Guidelines*. She specifically said that the income levels assigned to each spouse could be adjusted to reflect the parties' incomes based on further evidence. Justice Lynch did not allow that the order could be adjusted to reflect the parties' later efforts to adduce the evidence that could and should have been adduced at the interim hearing. The claim Mr. Lockerby makes now, styled as a claim for "retroactive" child support, is actually an attempt to bring forward evidence of the increased costs of shared custody arrangements (section 9(b) of the *Guidelines*) and the conditions, means, needs and other circumstances of each spouse (section 9(c) of the *Guidelines*). The cost of duplicating items needed to outfit two homes for the children are considered in section 9(b) and the overall ability of each parent to maintain and operate its home are considered in section 9(c). The July 2009 application to determine child support in this shared custody situation was marred by incomplete evidence. I reject Mr. Lockerby's efforts to re-litigate this issue under the guise of a retroactive child support

claim. I note that neither party sought to adjust the interim child support award on the basis of their actual (or imputed) 2009 incomes.

Spousal support

[172] Ms. Lockerby has claimed spousal support. She is forty years old. She has worked for at least nineteen years for the same employer and currently works as an airline service director. Her absences from the workforce arise from maternity leaves and other leaves of absence. There was no evidence of the length of her maternity leaves or about the number or length of other leaves of absence. I was not told whether her other leaves of absence during cohabitation were with or without pay or the reason they were taken. She has taken frequent unpaid leaves of absence during the separation. She claims these were required by the stress of the situation or her need to be in court. I have no evidence of the impact, if any, of the leaves on her employment security, seniority or earnings capacity. She works in a unionized workplace.

[173] In December, 2009, Ms. Lockerby started to work as a restaurant hostess. She says this was to supplement her income and to better enable her to manage financially.

[174] Ms. Lockerby was ordered to provide her work schedule. The schedule showed that in 2009, she did not work at all in January, she worked three days in February, she worked five or six days in March, she worked two days in April, nine days in May and not at all in June. During the first six months of 2009, she worked a maximum of twenty days. This schedule is far in excess of the time the parties were present in court. The children were with their father during alternate weeks, so their needs did not motivate this absence (nor did she suggest they did). Despite court orders requiring her to provide her current work schedule, she did not provide this until the mid-point of her cross-examination in this trial. At that point, the materials were declined and Mr. Lockerby opted to argue that I should draw an adverse inference from Ms. Lockerby's failure to disclose the records in a timely manner.

[175] Ms. Lockerby has offered no evidence that her employment prospects or her economic self-sufficiency have been impaired by her role or responsibilities as a parent or spouse and, for example, the time she has taken off from work to fulfill those responsibilities. In argument, she conceded her annual income should be treated as $50,000.00. The evidence she gave about her work schedule shows she could choose to work considerably more than she does, with significant positive impact on her income.

[176] I find that Ms. Lockerby has not proven an entitlement to receive spousal support and I dismiss this claim.

Conclusion

[177] In summary, the children shall have their primary residence with their father and they shall be in his sole custody. Their contact with their mother shall be as outlined in paragraphs 74 to 78 of my decision. I divide the property unequally, so as to effect an equal division of matrimonial debts. Ms. Lockerby will pay monthly child support of $1,109.00 pursuant to section 3 of the *Guidelines*. I dismiss Mr. Lockerby's claims for a contribution to expenses pursuant to section 7 of the *Guidelines*, except for medical expenses and health and dental insurance premiums that relate to family coverage. I require Ms. Lockerby to maintain the children's health and dental insurance, particularly to provide the children with counseling. If Mr. Lockerby has health and dental insurance, he, too, is to maintain it. I dismiss Mr. Lockerby's claims for retroactive child support and Ms. Lockerby's claim for spousal support.

[178] Mr. Lockerby's counsel will prepare the order. If the parties wish to be heard on costs, a time may be arranged with the Scheduling office.

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J.S.C. (F.D.)

Halifax, Nova Scotia

Schedule "A"

Amounts Determined

	Ms. Lockerby	**Mr. Lockerby**
Mother's home contents	5,162.00	
Father's home contents		2,187.00
Mother's vehicle	6,000.00	
Father's vehicle		0.00
CIBC account - father's sole		(34.15)
CIBC account		(449.44)
Father's CIBC shares		1,655.70
Mother's deferred salary	8,088.93	
Wayne Lockerby loans		(200,000.00)
Father's Visa debt		(28,756.00)
Father's HBC debt		(1,092.52)
NS Power account		(1,500.00)
Father's Home Depot account		(285.11)
Sub-total	**19,250.93**	**(228,274.52)**

Amounts to be Determined

Asset or Debt	**Figure to use**	**Asset value or debt amount**
Mother's home	Use sale price	
Less mortgage	Use amount on closing	
Less CIBC account (loan)	(626.05)	
Less disposition costs	Use costs incurred	
Less one-half appraisal cost	Use one-half of invoiced amount	

Net value of mother's home		
Father's home	Use sale price	
Less mortgage	Use amount on closing	
Less capital gains	Use actual amount	
Less disposition costs	Use costs incurred	
Less one-half appraisal cost	Use one-half of invoiced amount	
Net value of father's home		
Seadoo boat	Use sale price	
Less boat loan	Use amount paid when closed	
Less disposition costs	Use costs incurred	
Net value of Seadoo boat		
Father's RRSP	Use face amount when cashed	
Less taxes	Use actual taxes paid	
Net value of father's RRSP		

Once the value of the matrimonial assets and the amount of the matrimonial debts has been equalized, Ms. Lockerby shall pay Mr. Lockerby the costs award of $3,000.00 ordered by Justice Lynch.