

2001

SFH DIV 001438
1201-54246

IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

[Cite as: *Durant v. Durant*, 2001 NSSF1]

BETWEEN:

LEWIS DALE DURANT

APPLICANT

- and -

CAROL SUSAN DURANT

RESPONDENT

D E C I S I O N

HEARD: By The Honourable Justice Moira C. Legere on September 6 and October 24, 2000

DECISION: January 12, 2001

COUNSEL: Phillip Mix - for the Applicant
Margot MacDonald - for the Respondent

LEGERE, J.

[1] This Divorce Petition was commenced on September 15, 1999. The Petitioner seeks a Divorce on the grounds of separation for one year, joint custody, specified access and an equal division of matrimonial assets and debts. The Respondent seeks a divorce, an unequal division of the matrimonial property, sole custody, specified

access, retroactive and prospective child support. She further seeks to have an income imputed to the Petitioner. He is currently unemployed.

[2] The Petitioner was born on [...], 1948 and is currently 52 years old. The Respondent was born on [...] 1952 and is currently 48 years old. The parties were married on February 14, 1977 and separated after 22 years on July 3, 1999. The Petitioner lives in Parrsboro, Nova Scotia and the Respondent lives in the matrimonial home at [...] Drive, Portuguese Cove, Nova Scotia.

[3] There are no prior written or oral agreements or court proceedings.

[4] I am satisfied that there is no possibility of reconciliation and that the jurisdictional issues as well as the grounds for Divorce have been proven. The Divorce is granted pursuant to section 8(2)(a) of *The Divorce Act*.

Custody and Child Support

[5] One child was born of this union, Jillian Nicole, born [...] 1990. She is 10 years old. The child lives with the Respondent, Carol Susan Durant. The Petitioner testified that Ms. Durant has allowed him extensive opportunity to communicate with his daughter. He does so on a daily basis and she was permitted six weeks with him at his parents' home in Parrsboro. He admits that the mother has granted several extensions to visits for various reasons.

[6] Since separation, the parties have had very limited contact with one another and no fruitful dialogue respecting the decisions relating to their child. Their communication was further restricted when, immediately after separation, the

Petitioner entered into an undertaking with restrictions on his contact with the Respondent. While they have agreed that Jillian should have access to her father, the parties have not been able to resolve the times, locations, pick-ups and mode of transportation respecting these visits. As a result, the child visits the father in Parrisboro and does not return at scheduled times. His lack of transportation has been used as an excuse to delay return. The parents have been unable to discuss childcare issues. The child has been left to make the arrangements between the parents.

[7] While the Petitioner expresses a wish to be a joint custodial parent with the rights and responsibilities inherent in that status, he has not provided for the child on a day-to-day basis and has moved away from the child's ordinary residence, leaving the mother to make the decisions respecting the child and to provide for all of the child's basic needs. This conduct, coupled with the parties' inability to discuss even the most basic matters and the state of relations between the parents, causes me to conclude that sole custody should rest with the mother, allowing the father to continue his involvement in maintaining a significant connection through arranged access. Hopefully, he will resume his financial responsibility in short order.

[8] The Petitioner shall have liberal access as arranged between the parties in advance, including block access during Christmas, March Break and summer, liberal and unrestricted telephone access and the right to access medical information and educational information directly from source.

[9] **Transportation associated with access shall be the Petitioner's responsibility.** The Petitioner shall provide for and confirm in advance his ability to transport his daughter to and from Parrisboro on the agreed dates. His employment

situation as outlined by him may well bring him closer to the Metro area where transportation will be less of an issue.

Financial History

[10] The parties were married with no dependents for the first 13 years until their child was born in 1990. The Petitioner regarded himself as a traditional husband with a traditional role. His income was generally the principal income until 1998.

[11] The parties testified that they had specific duties with respect to payment of accounts during the marriage. They kept separate bank accounts and each was responsible for specific items. Mr. Durant paid the mortgage payments while the mortgage existed. He was also responsible for the following monthly expenses:

1	Municipal taxes	\$ 115.02
2	Property & fire insurance	\$ 35.00
3	Heat	\$ 70.00
4	Electricity	\$ 70.00
5	Telephone	\$ 35.00
6	Cable	\$ 35.00
7	Furnace Rental	\$ 66.10
8	Wood	\$ 33.75

[12] Ms. Durant paid the other expenses including:

1	Groceries	\$ 500.00
2	Toiletries	\$ 50.00
3	Clothing	\$ 50.00
4	Daycare	\$ 433.00

[13] The Respondent also paid the car payment, insurance and her own personal income tax. When she paid off the matrimonial home in 1996 (three years

preceding their separation) using \$26,300 from her inheritance monies, the Petitioner then took over responsibility for the car payment. The leased car was returned at separation and a debt is owed for the premature termination of the lease contract.

Employment History

[14] During the marriage, the Petitioner worked with Scotia Bank for seventeen years. When he left Scotia Bank in 1986, he was in the position of Assistant Manager. He assured the Respondent that he could make more money working outside the bank.

[15] From 1986 to 1991, he worked with O' Regan's in Halifax as a sales and leasing consultant and Fleet and Truck Manager. In 1992 to September 1997, he worked as leasing consultant, business manager and fleet manager with Steele Chrysler Halifax. Between May 1998 to January 1999, he worked with Carroll Pontiac as a sales and leasing consultant. Between May 1999 and August 1999, he worked as a sales and leasing consultant with Halifax Chrysler. He was suspended from this employment on August 5, 1999 due to the loss of his licence. His history of income earned and declared from 1994 onward is as follows:

1	1994	\$40,265.00
2	1995	\$47,505.00
3	1996	\$55,427.00
4	1997	\$46,453.00
5	1998	\$27,190.00 including \$10,000 from employment insurance earnings
6	1999	\$19,097.00 including \$8,774.00 from E.I. and \$899 from RRSP

7 2000 \$4,000.00

[16] The Respondent testified that during the 1998 year the Petitioner worked without recording his earned income for a car dealership on Wyse Road while in receipt of E.I. benefits. That income earned is not recorded above.

[17] The Petitioner's drivers licence was suspended from July 10,1999 to early October of the same year. He regained his licence in October 1999 and lost it again on March 28, 2000 when he entered a guilty plea to the impaired driving charge. Other than working for friends or his family, he remained unemployed throughout.

[18] The Petitioner has paid no support whatsoever other than Christmas and birthday gifts since separation in July,1999.

Respondent's Income History

[19] The Respondent's 1996 income was \$27,721.07; 1997 was \$27,070.25 and 1998 was \$27,237.52.

[20] Prior to October 1999, the Respondent was an employee of IGA stores. She was hired on as a term employee with Superstore in October 1999, and laid off at Superstore in May 2000. Commencing October 2000, she expects to receive \$307.00 gross weekly from E.I. benefits. Because of her severance package, from May to October she received no income from E.I. or employment. She has engaged in retraining in computer and accounting. Costs for this retraining are \$2,195.00.

“Deemed Income”

[21] The Respondent testified that once the Petitioner left his job with the bank she had a great deal of difficulty getting the Petitioner back to work. His work pattern indicates he works with various employers and has not remained with any one employer since the bank for long.

[22] The Respondent alleges that the Petitioner is deliberately unemployed. She advises that the Petitioner threatened her previous to the separation that if she left he would quit his job and would not have any money to pay child support. However, Mr. Durant has given to his daughter a Columbia jacket in Christmas of 1999, figure skates and other items, a Nike tracksuit on January 14, 2000 and for grading in the year 2000 a bike and helmet.

[23] The Respondent alleges that the Petitioner has a problem with alcohol. An incident occurred on the night of the separation resulting in a Recognizance prohibiting the Petitioner from any contact with the Respondent. The argument between the two spilled over to the Respondent's job site. The Petitioner arrived, intoxicated, at the Respondent's place of employment. When he was escorted out of the store, he attempted to drive home. He was arrested. His licence was temporarily suspended. He appeared in court on August 18, 1999 and entered a plea of “not guilty”. He appeared on March 28, 2000 at which time he plead “guilty” and had his license suspended to March 28, 2001.

[24] The Petitioner stopped work in the summer of 1999. He has been under doctor's care for depression. According to the doctor treating him, he was no longer

in need of medication. His doctor anticipated a return to work in January 2000. He has not done so.

[25] The medical information is certainly limited and does not support a finding that the Petitioner suffered from depression which has permanently interfered with his ability to seek employment.

[26] In spite of his depression, the Petitioner has been able to live a fruitful life since separation. He has participated in employment activities on a casual basis as well as fostered a relationship, enjoyed extensive access with his daughter and has been involved in community activities including coaching a hockey team, working with his brother-in-law on his farm, blueberry picking and unloading boats.

[27] He has earned approximately \$2,700.00 working on his sister's farm. While the Petitioner continues to live with his parents in Parrsboro, he has established a relationship with Carol Quinn and they live very close to one another. The evidence would cause me to conclude that he lives between his girlfriend's home and his parents' home.

[28] There is no evidence that the Petitioner has made a concerted effort to work since January 2000. Mr. Durant indicates that he is ineligible to apply for re-instatement of his driving privileges until March 28, 2001. He concludes, therefore, "I am unable to obtain any gainful employment in the area in which I worked for the past decade until I have my driver's license re-instated". This, however, does not preclude him from seeking other employment.

[29] The Petitioner lives with his parents. He advises his parents are very close to requiring 24-hour nursing care. The care they currently receive is provided largely, it appears, by his sister and to *some* extent the Petitioner. In return for his assistance, his parents pay out of their pension monies the interest on his outstanding indebtedness. Mr. Durant testified he is maintaining a debt payment of \$255.00 to the CIBC line of credit; \$255.00 to the Scotia line of credit, \$150.00 to TD Visa and \$276.00 to the TD line of credit for a total of \$936.00. Since his return to Parrsboro, his parents have paid down this debt monthly using their CPP and Old Age Security cheques.

[30] The evidence confirms that the Petitioner is not the primary caretaker for his parents and his presence is certainly not mandatory. He is of a supplemental benefit to his family and he has received the benefit of their generosity by providing him a place to live and payment of his debts. The total monthly payments on all indebtedness is \$936.00. I have no tally of the exact amount of their contribution.

[31] Mr. Durant admits that his best bet to obtain employment, given his circumstances, is within the automobile industry. He also acknowledges that outside of obtaining a casual labourer's job earning \$8.00 - \$10.00 an hour, he is not likely to obtain gainful employment in Parrsboro, Nova Scotia. However, because he does not have his license and has not had one for fifteen months, he considers this an obstacle to returning to the work force.

[32] There is no evidence that he has seriously considered relocating to pursue employment. The period for which he lost his license and the reason he lost his license were all entirely within his control. Certainly, had he addressed the impairment charge earlier he would have been in a position to reinstate his license

earlier. While he is entitled to all of the safeguards in the criminal justice system, the results and consequences of his choices affect his ability to support his child.

[33] The Respondent has cause to be concerned about the future of child support payments given the history of employment after the Bank, the lack of effort to support his child between separation and this hearing.

[34] I am satisfied on the totality of the evidence that the Petitioner has been underemployed and has failed to make serious efforts to find employment or pursue realistic options since January 2000.

[35] If I accept the Respondent's argument regarding the Petitioner's ability to be employed, the Petitioner suggests I deem his income to be \$25,000 for the 1999 year resulting in a base child support award of \$212.00 per month resulting in maintenance for the year 2000 of \$2,544.00. I accept that as a reasonable assessment of his most current employment history.

[36] Retroactive maintenance is ordered from January 2000 to December 2000. The Petitioner shall continue to pay a base amount of monthly maintenance in the amount of \$212.00 on the first of each month through Maintenance Enforcement. In addition, he shall share in accordance with his deemed income in the cost of necessary childcare expenses.

[37] He shall provide quarterly updates to the Respondent about his employment searches and within 24 hours of finding employment he shall provide the Respondent with full and complete details of his employment package to facilitate a maintenance review if appropriate.

[38] He shall provide a full copy of his income tax statement to the Respondent yearly before May 15th of each year. Should there be an underpayment given his income and the Child Support guidelines, an adjustment upward may be made upon application by the Respondent or agreement of the parties.

Spousal Support

[39] Although the Respondent's income over the course of the marriage has been supplemental and the Petitioner has testified to his role as financial provider over the bulk of the first 15 years of marriage, the Respondent does not seek spousal support. She has no income, is in the process of retraining and anticipates receipt of employment insurance. It is obvious based on the recent history, that while she may be entitled to support, the imputed income of \$25,000 is insufficient to pay beyond child support.

Debts

[40] I do not have all the statements of accounts for the following debts as of the date of separation and the date of trial.

[41] The outstanding debts subject to division are as follows:

1	Leased vehicle (1998 Sunfire) GMAC Leasco Ltd.	\$8,339.13
2	Toronto Dominion Bank Visa, Aug.31/99	\$3,140.78
3	Scotia Bank Line of Credit, July 4/00 Balance	\$7,160.11
4	Toronto Dominion Line of Credit, July01/00	\$7,850.34

5	CIBC Line of Credit, July/00	\$7,992.47
	Total	\$34,482.83

[42] I fix the outstanding debts at \$34,482.83.

[43] The outstanding car lease agreement with GMAC was entered into on June 30, 1998 by Mr. Durant. The car was driven by Ms. Durant and used for the family. This car was damaged by Mr. Durant on the eve of the separation. It was returned to the dealership, incurring a penalty with GMAC. The company is looking to Mr. Durant for the sum of \$8339.13.

[44] Mr. Durant also entered into a TD Visa Agreement in 1997. The August 31, 1999 balance is \$3,140.78. The debits include household expenses, gas, food and entertainment expenses. The use was both personal and family.

[45] After 1997, the Petitioner's income contribution decreased significantly and the family debts began to accumulate. On August 15, 1997 the Petitioner opened in his name only a Scotia Bank line of credit. The latest statement shows \$7,160.11 remains outstanding.

[46] The cheques written on this account include household renovations and \$10,958.45 to pay out the Royal Bank household loan in August, 1997.

[47] The Respondent also entered a credit line agreement with the Toronto Dominion Bank on January 29, 1997 in his name only. The balance as of August, 1999 is \$7850.34.

[48] Ms. Durant advises she knew nothing of the financial situation and of the three additional debts incurred by Mr. Durant, that is the Scotia Line of Credit, the TD Line of Credit and the TD Visa. Ms. Durant exercised no control over any of the above three accounts. The Petitioner admits that he has not previously informed Ms. Durant about the Scotia Line of Credit, the TD Line of Credit and the TD Visa, all debts in his name only.

[49] The receipts tendered show that their household was improved by some of the purchases made possible by this credit. The Respondent advised she always paid cash for her debts, gas, taxes, etc., while the Petitioner charged his obligations to create the matrimonial debt. He was a banker and she relied on him entirely.

[50] The Respondent's ignorance of these debts in itself does not result in a conclusion that they ought not to be considered matrimonial. There are other considerations.

[51] The parties jointly entered into an agreement with CIBC on July 3, 1996 for a personal line of credit. This debt increased from \$4931.37 to \$7467.51 in March, 1999. I have no explanation from either party on these expenditures. The Respondent advised that he withdrew \$2000 to pay legal fees. That will be deducted from the outstanding balance for the purposes of this division.

RRSP's

[52] The Petitioner has no existing RRSP's. His pension with Scotia Bank in the amount of \$5,884.93 was transferred to his RRSP with the Bank of Nova Scotia on June 11, 1986.

[53] The Petitioner advised that he had two RRSP's at separation:

[54] A CIBC deposit #20120705, redeemed in early 2000 for \$1036.50 less taxes for a net amount of \$932.85.

[55] A TD RRSP account #0452246, valued at \$797.01, redeemed September 3, 2000.

[56] He maintains that these monies, although cashed by him post-separation, went directly to pay outstanding marital debt including the car lease debt.

[57] The Respondent had an RRSP with Royal Bank in the amount of \$9,849.94 which she withdrew in the 1999 year to pay the outstanding house taxes and other matrimonial debts including the Bay for \$549.25; Zellers for \$798.50; Eatons for \$66.45; Sears for \$1862.72; property taxes for \$3324.08; Cunards for \$355.50 and Royal Bank Visa for \$586.94 for a total of \$7,543.09. Counsel were satisfied that the balance of the RRSP money went to withholding taxes with an additional tax liability billed to Ms. Durant by Revenue Canada.

[58] Ms. Durant was unaware of the property tax arrears until she became aware on August 30, 1999 in correspondence from the Petitioner's lawyer that there was a

scheduled tax sale. Ms. Durant became informed of this possible tax sale on August 30, 1999 by the Petitioner's solicitor.

[59] The parties do not seek further accounting or division of these assets.

[60] The Respondent has an IGA Pension Defined Benefit plan with the Oshawa Retirement Income Plan. There is no actuarial valuation for the purposes of division. The settlement of a spouse's entitlement can only be provided from the plan at the member's retirement or termination of employment. This is a matrimonial asset subject to division.

[61] In Ms. Durant's statement of property there is a Pension T-Bill valued at \$2103.27 as of January 2000. I have insufficient evidence from either party on this point. If this exists, it is a matrimonial asset subject to division.

[62] Ms. Durant testified about a remaining RRSP in her name, acquired with her inheritance. I have insufficient evidence that would allow me to draw any conclusions about the exact source and time of deposits to this asset nor do I know the current value of this RRSP. There is some evidence to suggest its value is approximately \$5000.00. Ms. Durant claims it was funded by her inheritance. She admits there was some money invested from Mr. Durant's contribution. Clearly, this is a matrimonial asset subject to division.

INHERITANCE

[63] The Respondent's remaining parent died on April 13, 1988. The Respondent received an inheritance in the approximate amount of \$71,626.44 excluding

personal items received from her father's estate. The summary contained in the final account filed in the Estate of Harry James Beazley by Susan Carol Durant, the Respondent, Executrix, indicates that the figure of \$56,026.44 was disbursed in cash with \$25,000.00 previously taken from the Estate prior to the Estate being settled.

Lot 3, Jacqueline Purcell Drive ,Portuguese Cove, Nova Scotia

[64] Section 4(1)(a) of the **Matrimonial Property Act** states:

In this Act "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of

(a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children.

[65] Ms. Durant testified that she was advised by the executor for her father's estate to invest her inheritance. The executor arranged an advance from her inheritance two years prior to closing, to effect the purchase of the Lot on Jacqueline Purcell Drive, in 1989. The cost of purchase was \$31,912.80.00 inclusive of all closing costs. Of that total purchase price, \$25,000.00 came directly from her inheritance and \$6,912.80 came from a separate account held by Ms. Durant. This \$6,912.80 was the profit she received from buying and selling a car. While this car was in her name, it was a car obtained with the assistance and efforts of her spouse. The car was a matrimonial asset. Thus \$6,912.80 of the purchase price of Lot 4 came from matrimonial funds, and \$25,000.00 came from the inheritance received by Ms. Durant shortly after November 30, 1988.

[66] The Petitioner testifies they purchased the lot with the intention of eventually building a matrimonial home. They engaged professional help to draft plans for this eventuality. They both agree that the building was never developed or used. The Petitioner wanted all their debts to be paid before embarking on a building project.

[67] The Petitioner indicates that he paid some of the property taxes on the building lot from the time of its purchase to the time of separation. He indicates it was well known that he and his spouse intended to build a dream home on the land, and in fact purchased a chandelier for approximately \$1,200.00 in the early 1990s.

[68] The allocation of the funds from the Respondent's inheritance can be traced in the purchase of this property in 1989. The Respondent's evidence about the purpose for which it was purchased by the Respondent is clear (as an investment of her inheritance monies). The Petitioner gave evidence that they discussed using this for a future matrimonial home. This use never materialized.

[69] In accordance with section 4(1)(a), I find that 78% of the value of this asset, representing the value of the inheritance used to purchase this lot is not matrimonial property subject to division between the parties. The remaining 22% of its current value will be deemed a matrimonial asset subject to division.

[70] The Halifax Regional Municipal Assessment in 1989, the year of purchase, was \$20,000.00. The current Municipal Assessment is \$16,000.00. Two appraisers have valued the lot currently at \$30,000.00 (by Fennell Appraisers as of August 15, 2000) and \$31,000.00 (by Alderney Real Estate Appraisals Limited as of August 28, 2000). Based on the most credible and reliable information, I fix the value for the purpose of division at \$30,500.00.

Matrimonial Home

[71] The child has resided at the matrimonial home since separation. She is ten years old, and it is anticipated she will remain in the day-to-day care of the mother.

[72] The matrimonial home was purchased in 1979 and mortgaged for approximately \$50,000.00. The Petitioner testified that he paid for extensive renovations by way of landscaping, driveway paving, new windows and basement renovations. It ought to be noted that some of these renovations were paid for out of credit arrangements made between the Petitioner and the financial institutions. Some of the later bank statements support the claim that the Petitioner paid household renovations through his credit arrangements. The Respondent testified that she spent money from her inheritance on renovations to the household including putting underlay and carpet throughout the house and renovating an entire bathroom, including sink, vanity, tub, toilet, flooring, etc. She put in new wall registers for hot water heating upstairs and put in a new lighting fixture in the two bedrooms.

[73] The Respondent paid for the renovations with money from her inheritance resulting in no residual debt to the parties. The renovations paid for by the Petitioner appeared at least in part to have resulted in a matrimonial debt, which is currently being serviced by the Petitioner's parents. This is a debt he seeks to be divided between the parties.

[74] The Respondent also used her inheritance to pay off the mortgage on the matrimonial home on March 14, 1996 by paying \$26,300.00 three years before their separation. She seeks repayment of this money.

[75] There are two appraisals for the matrimonial home, \$91,500.00 by Fennell Appraisers as of August 15, 2000 and by Alderney Real Estate Appraisals Limited for \$102,000.00 as of August 28, 2000. They are both credible assessments. The Petitioner, Mr. Durant, seeks to have the value assessed at \$130,000.00. The most reliable evidence is that of the appraisers. Both used a standard methodology and both came up with credible although different values. I average their appraisals and value the property at \$96,750.00 for the purposes of division.

[76] The matrimonial home is clearly a matrimonial asset.

Personal Possessions

[77] These have been appraised and valued by Crowther and Brayley Ltd. in a report dated July 31, 2000 at \$6,832.50. This includes the piano and computer currently used by their daughter.

[78] Some of the personal possessions have already been divided. Should this not have already taken place, the Respondent will convey to the Petitioner immediately the dining room set, one-half of the Royal Albert dishes, one-half of the crystal glassware, one-half of the Christmas decorations, the snow blower, the lawnmower; whipper snipper, chainsaw, barbecue, downstairs living room set, kitchen set, half of the Rockwell plates, downstairs bedroom set, one-half of the pots and pans, one-half of the Royal Doultons, one-half of the wall pictures, the wooden rocker, one brass lamp, the weather barometer, the black and white battery-operated television and the telescope.

[79] Of the assets and debts noted above I have begun by excluding 78% of Lot 3. Otherwise the other assets and debts are matrimonial. I set out below the valuation of assets and debts and the manner in which they are apportioned.

<u>ITEM</u>	<u>Value</u>	<u>Petitioner</u>	<u>Respondent</u>
Matrimonial Assets			
Matrimonial Home Value	\$90,575		\$90,575
Lot 3, Jacqueline Purcell Drive	\$6,160		\$6,160
22% of (\$30,500 - R.E. Comm. HST and Legal Fees			
IGA Pension(Oshawa Group)	value unknown	1/2	1/2
RRSP	<u>value unknown</u>	<u>1/2</u>	<u>1/2</u>
Total Matrimonial Assets	\$96,735	0	\$96,735
Debts			
T.D. Line of Credit	(7,850)	(7,850)	
Scotia Bank Line of Credit	(7,160)	(7,160)	
T.D. Visa	(3,140)	(3,140)	
GMAC Lease Debt	(8,339)		(8,339)
Joint CIBC Line of Credit	<u>(7,992)</u>		<u>(7,992)</u>
	(34,481)		(16,331)
Net Matrimonial Assets	\$62,254	(\$18,150)	80,404
Equalization Payment		<u>49,277</u>	<u>49,277</u>
		31,127	31,127

Section 13 Matrimonial Property Act: Unequal Division

[80] I have considered Section 13 of the *Matrimonial Property Act*, in particular:Sec.13

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

(a) the unreasonable impoverishment by either spouse of the matrimonial assets;

(b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;

.....

(d) the length of time the spouses have cohabited with each other during their marriage;

(e) the date and manner of acquisition of the assets;

.....

(h) the needs of a child who has not attained the age of majority.

[81] Mr. Durant has not provided for the child on a monthly basis. To the date of trial, Mr. Durant has not made serious efforts to support his child. There is a distinct possibility the child needs braces in addition to her other medical needs, and he has no medical plan to assist. Ms. Durant has not received any support from Mr. Durant at, during or after the separation to maintain herself.

[82] His absence from the area has a financial consequence to the custodial parent.

[83] Certainly subsections 13(a) and (b) allow for a consideration of the accumulation of debts against assets acquired during the marriage. The Petitioner's employment choices have placed the parties in a position where they continued a lifestyle above their incomes. The decline in his income has resulted in an indebtedness unknown to the Respondent. In contrast, her financial management was a more responsible approach that did not leave the parties with a relatively significant debt load.

[84] The Respondent injected \$26,300.00 of her inheritance into payment of the mortgage just three years before the separation, to their mutual benefit. The express intent as articulated by the Respondent was that the payment of the mortgage was intended to result in her withdrawing from her outside employment to stay at home with their child. The state of their finances and his employment situation did not allow her to withdraw from employment even after the mortgage was paid out of her inheritance.

[85] Mr. Durant has acknowledged that his alcohol consumption created financial difficulties for the family. The evidence suggests he had stopped this consumption subsequent to separation. There are obvious financial implications to this consumption, not the least of which was the loss of his licence resulting in the loss of his job.

[86] Recognizing section Section 13(a), (b),and (h) his employment choices which reflect on the creation and current state of liabilities, her cash infusions of \$26,300.00 to the matrimonial home and \$25,000.00 to the Jacqueline Purcell Lot, her payment of ongoing household debts in cash and his by credit; the date and

manner of acquisition of the Lot 3, and Section 13(h) the needs of this child, I order the following:

[87] The net value of the **matrimonial home** is \$90,445.00. In accordance with the above, I have determined an unequal division of the matrimonial home is justified. The Respondent's inheritance monies will be reimbursed before the equity will be divided equally.

[88] The Respondent will be credited with 78% of the net value of Lot 3. I have deducted disposition costs to account for the possibility that she may have to sell this lot to obtain interim financing for her support and her child's maintenance needs which are not now currently addressed. This leaves 22% of the value of the Lot 3 to be divided equally.

[89] The remaining RRSP and Pension in the Respondent's name will be divided equally after any necessary disposition costs.

[90] I have divided the debts in a fashion that will allow the Petitioner to assume responsibility for those in his name including the TD Line of Credit, the Scotia Bank line of Credit and the TD Visa. The two matrimonial debts in joint names will be the Respondent's responsibility. In this manner, she will have control over repayment and will not be held accountable for the debts in the Petitioner's name should he default. I note that I was not provided with the most up to date accounting of the outstanding balance of each debt. The parties will have to bear responsibility for that omission should the figures tendered be outdated. My goal was to determine the division of the debts with some degree of finality.

Disposition of Mr. Durant's share

Equalization: \$ 49,277

Credits to Mrs. Durant:
retroactive child support (2,544)

legal fees charged to CIBC (2,000)

Section 13 award to Mrs. Durant

(Return of Mr. Durant's ½ share of the inheritance invested in the matrimonial home) (13,150)

Net amount owing \$ 31,583

[91] In addition, Mr. Durant is entitled to one half of the Respondent's pension up to the date of the separation and one half of any RRSP's remaining at the date of separation. That transfer including instructions to the Oshawa Group may be documented immediately.

[92] Mr. Durant shall immediately transfer his interest in the matrimonial home to Ms. Durant, and she shall mortgage back to him the net amount owing, without interest, until the child reaches the age of 18, the house is sold or the mortgage is paid in full, whichever is earlier.

[93] This shall act as a security for maintenance payments and any outstanding arrears in maintenance may be deducted against the mortgage payout as well as any costs associated with recovery of maintenance arrears. This shall be in addition to any other remedy available to the Respondent in the recovery of ongoing maintenance.

[94] The Petitioner shall keep the Respondent advised of his employment search and provide her immediately with details of any employment and his income. He shall provide on a yearly basis full copies of his income tax return by May 16th of each year.

[95] To date the Petitioner has not exhibited an inclination to undertake a serious job search. I have been conservative in deeming his annual income. In the event he is not appropriately gainfully employed within the year, a review is in order to assess his income level and to consider a set off for what he ought to have earned against his remaining interest in the home.

[96] Counsel for the Petitioner shall draft the order.

Moira C. Legere, J.