

IN THE SUPREME COURT OF NOVA SCOTIA  
(FAMILY DIVISION)

**Citation:** Gallant v. Gallant, 2005NSSC151

**Date:** 20050531

**Docket:** 1201-057598  
(SFHD 023612)

**Registry:** Halifax

**Between:**

Allan Joseph Gallant

Petitioner

v.

Viola Mary Gallant

Respondent

**Judge:**

The Honourable Justice Deborah Gass

**Heard:**

November 29, 30, December 14, 2004 and February 2,  
2005, in Halifax, Nova Scotia

**Counsel:**

Terrance G. Sheppard, for the Petitioner  
Kathleen Hall, for the Respondent

**By the Court:**

[1] This decision is the result of a divorce trial which began November 29, 2004 and concluded February 2, 2005.

[2] I am satisfied that the jurisdictional and procedural requirements are met and that the grounds for divorce have been established as evidenced by the fact the parties have been living separate and apart since October 5, 2002. Thus a Divorce Judgment is hereby granted.

[3] Allan Joseph Gallant (Petitioner) and Viola Mary Gallant (Respondent) began living together in the spring of 1978 and were married July 31, 1982. They have two children, Jeremy Joseph Gallant, born November 10, 1986 (18 years of age) and Lyndsey Kathryn Gallant, born December 27, 1988 (16 years of age). They separated October 5, 2002 after 24 years of living together. Both children reside with their mother in the matrimonial home.

[4] The parties have joint custody of the children with primary residence being with their mother.

[5] An interim order was issued on March 1, 2004 which provided for, inter alia, child support of \$762.00 per month based on an averaged income of \$55,178.00; spousal support of \$1,400.00 per month and exclusive possession of the matrimonial home with the respondent being responsible for the payment of the expenses relating to the home.

[6] The outstanding issues are spousal support and division of matrimonial property.

**UNEQUAL DIVISION OF MATRIMONIAL PROPERTY**

[7] Each party contends that the other squandered money during the relationship. The petitioner says the respondent lost approximately \$8,000.00 at the casino. The respondent says the petitioner divested family savings between 1998 and the date of separation, and that he did so unwisely and without her consent.

[8] In order for the court to consider an unequal division of the assets, it must apply s.13 of the *Matrimonial Property Act*, R.S.N.S. 1989, Chapter 275 which reads:

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

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

(l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;

(m) all taxation consequences of the division of matrimonial assets. R.S., c. 275, s.13, revision corrected.

[9] The respondent denies that she has a gambling addiction and lost \$8,000.00 at the casino. Her evidence is that she spent \$60.00 per week at the casino, with her husband's blessing, and that initially they attended together for recreation.

[10] The burden is on the petitioner to satisfy the court, on a balance of probabilities that the respondent's conduct amounted to an unreasonable impoverishment of the matrimonial assets. While the sums spent on gambling at the casino seem staggering, it is not entirely clear what the actual losses were, and whether they were incurred by the respondent alone with matrimonial funds, nor do the facts represent such significant losses as were recognized in *O'Quinn v. O'Quinn* (1997), 165 NSR (2d) 330 (SC) and *Keeler v. Keeler* (2000), 185 NSR (2d) 389 (SC).

[11] In *Keeler*, the parties were married for 12 years and the husband lost over \$110,000.00 in gambling debt in the latter years prior to separation. The husband acknowledged his gambling addiction and the significant financial cost to the family.

[12] In *O'Quinn* where the parties were only married for five years, the wife's addiction to bingo forced the parties to take out a second mortgage and also resulted in her maximizing her credit cards to the limit. There the court concluded that the matrimonial debts were largely incurred by the respondent for her own gratification, and that she did by her actions, unreasonably impoverish the matrimonial assets.

[13] The facts in this case fall far short of that and do not lead me to conclude than an equal division of the matrimonial assets would be unfair to the petitioner.

[14] The respondent has asserted that the petitioner squandered money without her knowledge or agreement, thereby warranting an unequal division of the assets in her favour.

[15] The same test applies; the burden is on the respondent to satisfy me that an equal division would be unfair because of the petitioner's unreasonable impoverishment of the matrimonial assets.

[16] Her evidence is that he spent \$20,000.00 to invest in a company called STI and that when he left Investors Group in 1998, he invested \$90,000.00 in Berkshire Securities. His evidence is that as a self-employed investment counsellor all the money went to earn income for the family. The move he made was for a brighter financial future. The financial circumstances of the family deteriorated when the markets dropped. This occurred while they were together. The evidence of Ivan Burt, a colleague in the business, supports this.

[17] I am satisfied that the actions of the petitioner were the result of decisions made in an the attempt to improve the family financial situation. While they may not all have been prudent, or with her consent, I do not find that his conduct constituted unreasonable impoverishment of the matrimonial assets.

[18] Thus I conclude that there is no basis for an unequal division of the matrimonial assets in favour of either party.

**MATRIMONIAL ASSETS:**

[19] The major matrimonial asset is the home situated at 15 Wilson Lake Drive, Middle Sackville, Nova Scotia. It has been appraised at \$142,000.00. Ms. Gallant is of the opinion that the problem with the septic field was not considered in the appraisal, and that it would cost \$6,500.00 to fix. Her estimate of the value of the property is \$116,000.00.

[20] The evidence before me is that the septic problem was taken into account in the most recent appraisal of October 2004 and I accept this value at \$142,000.00. There is an outstanding mortgage of \$70,616.00.

[21] In addition, the parties own camp property in Cumberland County bordering on the game sanctuary. There are differing views on the value of this land and the value of the wood off the land. The respondent's evidence is that the wood is worth \$15,000.00 and the land is worth \$35,000.00 or more.

[22] The petitioner's sworn statement of property of July 28, 2003 valued the property at \$50,000.00.

[23] The evidence before me is that the land is appraised at \$25,000.00 and the stumpage is worth \$15,000.00. The petitioner believes he would be taxed at 40 percent on this income. I have considered this and conclude that if he were to sell this property, the value of the land and stumpage is \$40,000.00 for the purpose of this calculation. There are other considerations as well, being the potential for capital gains taxation if the property were to be sold and this would be at a lower rate than income tax. However, neither of these tax implications was actually demonstrated by the evidence. Nonetheless, it is appropriate to acknowledge and compute some tax implications respecting this property.

[24] I make this valuation of \$40,000.00 (less disposition costs and some tax) based on the appraisal, photos of the camp and the description given by both parties with respect to this property.

[25] The CRV sport utility vehicle in the possession of the petitioner in his sworn statement of property is said to be worth \$6,000.00. A sight unseen appraisal (undated) values it at \$3,500.00 - \$5,000.00. The respondent's evidence is that it is worth approximately \$14,000.00, based on the "red book" value, and a current vehicle advertisement.(exhibit 13) I find, on the whole of the evidence the value of this vehicle as of the date of separation to be \$10,000.00.

[26] The Acura I find to be valued at \$1,000.00, a figure that appears to be generally accepted by both parties.

[27] According to the petitioner's sworn statement of property, the RRSP account (NP2-0120-R) as of the date of separation is valued at \$17,285.00 - 30% = \$12,099.58. The locked in RRSP (NP2-0120-L) is valued at \$6,305.77. Investment account # BP2-0120-A is valued at \$7,249.99. This is held as security

against an investment loan which I do not include as a matrimonial debt and I therefore exclude this account as a matrimonial asset.

[28] With regard to furnishings, tools, et cetera, I have determined that it is impossible to value them or account for them on the evidence before me and I accept the suggestion that the value of the items in each person's possession offsets the value in the other's possession - including the coins, wherever they may be.

[29] Therefore the total value of the matrimonial assets is:

Matrimonial home (less disposition costs & mortgage payout)	\$ 60,836.00
Camp & stumpage less disposition costs & some tax (\$3,000.00)	33,490.00
STI Shares	20,000.00
CRV	10,000.00
Acura	1,000.00
RRSP \$17,285.00 - 30%	12,099.58
RRSP (locked in)	<u>6,305.00</u>
<b>TOTAL ASSETS</b>	<b>\$143,730.00</b>

[30] The assets in each party's possession is illustrated in the attached chart. Not shown but acknowledged are two smaller accounts in Mr. Gallant's name, the value of which is minimal and not computed.

<u>TOTAL</u>	<u>HIS</u>	<u>HERS</u>
<b>Matrimonial home</b> \$142,000 - 6% real estate commission (\$8,520); HST (1,278); Legal fees (\$750) & mortgage (\$70,616) = \$60,836.00		60,836.00
<b>Camp &amp; Stumpage</b> \$40,000 - \$2,400 (commission) - \$360 (HST); \$750.00 (legal fees); - \$3,000 (taxes) = \$33,490	33,490.00	
<b>STI Shares</b> - \$20,000	20,000.00	
<b>CRV</b> - \$10,000	10,000.00	
<b>Acura</b> \$1,000		1,000.00
<b>RRSP</b> at separation \$17,285 - 30% = \$12,099.58	12,099.58	
<b>RRSP</b> (locked in) \$6,305.77	6,305.77	
<b>TOTAL \$143,730.00</b>	<b>81,894.00</b>	<b>61,836.00</b>



**THE DEBTS:**

I have concluded the following to be matrimonial debts:

1)	CIBC (Line of Credit)	6,803.00
2)	CIBC Select Visa (balance)	11,653.00
3)	MBNA M.Cd (balance)	7,563.00
4)	CIBC Visa (balance)	1,257.61
5)	BMO LOC (70 % Matrimonial)	14,134.00
6)	CCRA Tax Liability for 2002	16,500.00
7)	CIBC Overdraft	<u>1,144.00</u>
	<b>TOTAL</b>	<b>\$59,054.00</b>

[31] I have reached this conclusion after considering the evidence of the parties and a perusal of the particulars of the statements. Those particulars satisfy me that these debts were incurred primarily for matrimonial purposes. In particular the CIBC Visa (ending in # 5066) (Visa # 1) shows significant expenditures (i.e. veterinarian, Gap, Esprit, Dentist, etc) which are matrimonial or family uses.

[32] Finally, it is my conclusion that the court cannot dissect debt accumulated during marriage to the extent that the respondent suggests. The expenses which were incurred on the BMO Line of Credit had an acknowledged business component, and I have apportioned it accordingly. The other expenditures are not significant enough to justify excluding them as matrimonial debt.

[33] I did however exclude the investment loan which was taken out without the respondent's knowledge and find this to be a business loan.

[34] Thus the total debt outstanding as at separation I find to be \$59,054.00.

[35] Therefore, the net worth of the family unit (excluding furniture, tools, appliances) is \$84,676.00 (\$143,730 - 59,054.00).

[36] An equal division results in \$42,338.00 each should all the assets be sold, the debts paid and the proceeds divided equally.

		<b>PETITIONER</b>	<b>RESPONDENT</b>
Total Matrimonial Assets	146,730.00	81,894.00	61,836.00
Total Matrimonial Debts	-59,054.00	-59,054.00	0
Net remaining to each party		22,840.00	61,836.00
Equalization Payment to Petitioner		+19,498.00	-19,498.00
<b>Total Net Worth</b>	<b>84,676.00</b>	<b>\$42,338.00</b>	<b>\$42,338.00</b>

[37] The respondent will owe the petitioner \$19,498.00 to retain the matrimonial home.

### **THE SALE OF THE MATRIMONIAL HOME:**

[38] Ms. Gallant seeks to postpone the sale of the matrimonial home indefinitely or until at least the children have finished school. She says it would be upsetting to them to have to leave their home. Mr. Gallant says he cannot continue to be on the mortgage with Ms. Gallant as it impedes him from moving forward. The debts are significant. The parties have now been separated for over two years. Ms. Gallant has had interim exclusive possession of the home. It is not intended to be an indefinite remedy. Maintaining joint ownership (and liability) is not justified.

[39] The respondent's arguments for keeping the house are compelling as it is the children's home and it is only 2 ½ years until the youngest child reaches the age of majority. In total, the petitioner would be waiting only five years for the payout of the amount owing to him. Of great importance is the cost of housing for Ms. Gallant and two teenagers. In their current location, their total shelter

costs are approximately \$800.00 per month, which includes mortgage, insurance, taxes and water, excluding heat and electricity. She would be hard pressed to find alternate adequate housing at such a low rate.

[40] On the other hand, the parties have a significant matrimonial debt of almost \$60,000.00, which is a compelling argument to dispose of the home, the proceeds of which would pay off the matrimonial debt.

[41] If the house were to be sold and all the matrimonial debt paid, the following is the scenario.

VALUE	PETITIONER	RESPONDENT
House (\$60,836.00) (Net Value)	60,836.00	-
Camp, Shares, RRSP's, CRVS \$81,894.00	81,894.00	-
Acura (\$1,000.00)	-	1,000.00
<b>TOTAL</b> (143,730.00)	142,730.00	1,000.00
-Debt (59,054.00)	(59,054.00)	-
Net - 84,676.00	83,676.00	1,000.00
Equalization Payment	-41,338.00	+41,338.00
	42,338.00	42,338.00

[42] Thus if the house is to be sold and the debts paid from the proceeds, Mr. Gallant would be required to liquidate the other assets to pay Ms. Gallant \$41,338.00.

[43] A third scenario, which would involve selling the house and not paying any debt, would result in the parties each receiving \$30,418.00 from the sale proceeds.

[44] This then leaves the petitioner, Mr. Gallant, holding assets of \$81,894.00 and debt of \$59,054.00. He would have an additional \$22,840.00 over the house proceeds. Ms. Gallant would have her car (\$1,000.00). He would owe her \$10,920.00 as follows:

VALUE		HUSBAND	WIFE
Acura	1,000.00	-	1,000.00
Misc Assets	81,894.00	81,894.00	-
<b>TOTAL</b>	82,894.00	81,894.00	1,000.00
Debt	59,054.00	59,054.00	
	23,840.00	22,840.00	1,000.00
		- 10,920.00	+ 10,920.00
	23,840.00	11,920.00	11,920.00

[45] He would then owe her \$10,920.00 to equalize their net outcomes. This however is not an appropriate remedy as the only reason for selling the house would be to pay off the debt.

[46] The ideal remedy would be for Ms. Gallant to buy out Mr. Gallant's interest in the home, but on the basis of the evidence before me, it would appear that this option is not feasible.

[47] It seems, therefore that the only remedy short of selling everything and dividing the proceeds, would be for the property to be transferred to Ms. Gallant with a mortgage back to Mr. Gallant for his interest in the home, with simple interest calculated at six percent, to be paid out on or before the youngest child reaches 19 in December 2007. This would require Ms. Gallant to make all reasonable efforts to have Mr. Gallant released from the existing mortgage. This then leaves Mr. Gallant with a secured investment at a better than competitive rate of interest.

[48] The question then is whether Ms. Gallant can afford to maintain the home.

[49] With current child support of \$762.00 per month and her child tax benefit, she has approximately \$1,200.00 per month. The shelter costs approximately \$800.00 with utilities of close to \$300.00. This leaves her with approximately \$100.00 per month.

**SPOUSAL SUPPORT:**

[50] The parties were together from 1978 - 2002. They were married in 1982. This was a long-term, “traditional” marriage. The respondent is disabled and unable to work. Although she is an educated woman, her condition “spastic torticollis” is such that she is unable to enter the workforce now or in the foreseeable future. This condition has existed for over 20 years. She last worked between 1981 - 1985.

[51] There is no question that the respondent is entitled to spousal support.

[52] This leaves the issues of quantum and duration.

[53] The court is urged to consider reducing or terminating spousal support on the petitioner’s contention that the respondent is living common law with Mr. Sabean. At an interim hearing, the court found that he should be contributing to the household and spousal support was reduced accordingly. Ms. Gallant says that Mr. Sabean did move in with her for a time, but that arrangement did not work out, so he now rents an apartment of his own. His landlady verified this. Mr. Gallant, on the other hand, maintains he is living there and produced photos showing Mr. Sabean’s car in the yard in the very early morning hours on several occasions.

[54] The relevant provisions of the *Divorce Act* are s. 15.2 (3), (4), (5) and (6) which address the issues relating to spousal support orders:

15.2 (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

(4) In making an order under subsection (1) or an interim order under subsection (2), the Court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[55] In *Soper v. Soper* (1985), 67 NSR (2d) 49 (CA), Morrison, J.A. at paragraph 19 stated:

[19] I think it would be fair to say that to establish a common law relationship there must be some sort of a stable relationship which involves not only sexual activity but a commitment between the parties. It would normally necessitate living together under the same roof with shared household duties and responsibilities as well as financial support. I would also think that such a couple would present themselves to society as a couple who were living together as man

and wife. All or none of these elements may be necessary depending upon the intent of the parties.

[56] I have considered the principles set out in *Gillham v. Gillham* (1993) 48 RFL (3d) 156 (Alta C.A.), referred to by Scanlan, J. In *Bahes v. Bahes*, 2003 NSSC 130, and those in *Soper*, supra. The facts clearly differ from those in *Bahes* where a common-law relationship was found to exist and a pre-existing agreement provided for that eventuality.

[57] On the whole of the evidence, while it appears that Mr. Sabeau does spend time at the residence and they have maintained some sort of relationship, I am not satisfied that the elements of a common-law relationship are established. There is no evidence of holding themselves out as a common-law couple, and he has his own residence. There is no evidence of a stable relationship, a shared commitment or a financial enmeshment. Even if I am wrong in reaching this conclusion, I would not be satisfied that the circumstance would warrant a termination of support. Rather its relevance would only be the extent to which he contributed to the household expenses thereby reducing her need. I am not satisfied that the respondent's conduct disentitles her to spousal support or an adjustment to her need.

[58] This then leads to the petitioner's ability to pay spousal support. Priority is given to child support. (s. 15.3 *Divorce Act*).

15.3 (1) Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

(2) Where, as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes a spousal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so.

(3) Where, as a result of giving priority to child support, a spousal support order was not made, or the amount of spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

[59] The respondent's monthly expenses are \$3,142.00. Her total shelter expense is low considering she is housing herself and two teenaged children. Her only income other than spousal and child support is the Child Tax Benefit. Her deficit is \$2,642.00 per month.

[60] Counsel indicated at a pre-trial conference March 25, 2004 there had been agreement regarding child support and that the only issues were division of property and spousal support. The parties' prehearing briefs addressed only these two issues. The existing order for child support is \$762.00 per month based on an averaging of the respondent's income. However as the evidence unfolded in this proceeding, it became apparent that there was no agreement as to Mr. Gallant's income.

[61] The respondent is employed as an investment counsellor with Berkshire Investment Group, as a commission sales person. He disputes Ms. Gallant's contention that his income was \$130,000.00 per year when they separated. He acknowledges that his gross commissions amounted to approximately \$130,000.00 but his net income was \$56,431.00 for 2002.

[62] The evidence before me is that his income has decreased significantly in that the 2000-2004 period had been a tough economic time frame for the investment business. This was verified by his colleague. His evidence is that his income for 2001 was \$56,830.00, in 2002 it was \$56,431.00 (excluding RRSP) and his evidence is that his income for 2003 was \$36,859.00. There was no concrete evidence regarding his 2004 income, except that he estimated it would be the same as 2003, although the market has been rebounding and his income would be expected to improve. Counsel argued that his 2004 income was the same as in 2003, but the evidence supporting that conclusion is tenuous, based solely on the petitioner's testimony.

[63] However, as is often the case with a self-employed party, there is always a suspicion that monies are diverted or hidden, and that in reality there is much more income than is revealed, but difficult to prove. In this case the best evidence is from Mr. Gallant and Mr. Ivan Burt, with regard to the general climate in the investment world. Thus for the purpose of determining spousal support only, I



find his income for 2004 to be less than the averaged income of \$55,178.00 found in December of 2003, and somewhat closer to his 2003 income of \$36,859.00.

[64] It is obvious that there is, on the basis of the evidence before me, insufficient income to meet the need of Ms. Gallant. This would be the case whether or not she keeps the house.

[65] The difficulty is that notwithstanding that the parties went into this hearing with the issue of child support purportedly agreed upon, at the end of the hearing the petitioner sought as part of the relief, an adjustment of the table amount of child support to \$516.00 per month based on income of \$36,800.00. If his tax return reflects the basis for such an adjustment, then it shall be made accordingly, effective January 1, 2005. While the respondent's need is significant, the petitioner's ability to pay spousal support, based on the information before me, is not. It is clear from the evidence that the interim spousal support order of \$1,400.00 per month together with child support, exceeds his ability to pay. Therefore, effective January 1, 2005 spousal support shall be fixed at \$700.00 per month.

[66] I make this spousal support order in an amount less than I otherwise would, as a result of giving priority to the existing child support order.

[67] I make this somewhat unusual order because of the difference between what was in issue at the outset and the evidence and argument which suggested otherwise.

[68] Either way, the result is a sober one for both parties here. It may not be possible to retain the home, although I conclude on the whole of the evidence that this is the preferable result for the benefit of the children. Ms. Gallant may have to take in boarders to defray expenses. Her housing options are more limited than those of the petitioner. However, if it is not possible, then the option of selling and paying off the debt will have to be invoked.

### **CONCLUSION:**

- 1) The net worth of the matrimonial unit is \$84,676.00.

- 2) The husband shall quit claim his interest in the home to the wife and should she be unable to forthwith pay him outright, the husband shall hold a mortgage against the property of \$19,498.00 together with simple interest of six percent to be paid no later than the youngest child's 19<sup>th</sup> birthday (December 2007).
- 3) The wife shall make all reasonable efforts to release the husband from the first mortgage currently in both their names.
- 4) The husband shall pay spousal support of \$700.00 per month effective January 1, 2005. The husband may elect to pay the mortgage directly from this sum.
- 5) If however the petitioner's income differs from that which is contemplated by the evidence, (\$36,800.00) that will constitute a change in circumstances to warrant an application to vary spousal support.
- 6) Finally, should the petitioner be unable to maintain the home under these conditions, then the assets shall be sold and the proceeds divided accordingly, after payment of the matrimonial debt.