NOVA SCOTIA COURT OF APPEAL
Citation: *A.M. v. K.W.*, 2021 NSCA 69

Date: 20211006
Docket: CA 499562
Registry: Halifax

Between:

A. M.

Appellant

v.

K.W.

Respondent

Judge:	The Honourable Justice Van den Eynden
Appeal Heard:	April 14, 2021, in Halifax, Nova Scotia
Subject:	Family law; custody; parenting plan; unjust enrichment; costs
Summary:	The appellant and respondent separated after an 8 year common law relationship. The parenting plan for their two children was in dispute as was the division of property. In the court below the judge rejected the appellant's request for a shared parenting arrangement. He awarded joint custody with primary care to the respondent as he determined that was in the best interests of the children. The respondent also successfully claimed unjust enrichment by the appellant. She was also awarded costs of $30,000. The appellant challenged these determinations on appeal, claiming the judge made multiple errors that warranted appellate intervention.
Issues:	1. Did the judge err in awarding joint custody with primary care to the respondent? 2. Did the judge err in his unjust enrichment award? 3. Did the judge err in his award of costs?

Result: Appeal dismissed with costs of $7,500. The appellant did not establish any error in law nor any palpable and overriding error. The judge applied the correct legal principles in his analysis and his findings of fact are well anchored in the record.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 18 pages.

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Respondent

Judges: Bryson, Van den Eynden, Derrick, JJ.A.

Appeal Heard: April 14, 2021, in Halifax, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of Van den Eynden, J.A.; Bryson and Derrick, JJ.A. concurring

Counsel: Amber Penney, for the appellant
Peter D. Crowther, for the respondent

Reasons for judgment:

Overview

[1] The appellant (Mr. M) seeks to set aside an order of the Nova Scotia Supreme Court (Family Division).

[2] Following a contested trial, Justice Samuel Moreau rejected Mr. M's request for a shared parenting arrangement. Instead he awarded joint custody with primary care to the respondent (Ms. W). He found that parenting plan to be in the best interests of their children.

[3] The parties also disputed property matters which the judge resolved mostly in favour of Ms. W. and as Ms. W was the more successful party at trial, costs were awarded against Mr. M in the amount of $30,000.

[4] On appeal Mr. M challenges these findings, claiming the judge made multiple errors that warrant appellate intervention.

[5] I am not persuaded the trial judge erred and would dismiss the appeal with costs. My reasons follow.

Background

[6] Some background is needed to contextualize the issues before us.

[7] Mr. M and Ms. W were in a common law relationship for approximately eight years. They have two children, ages six and four at the time of trial. The record reveals a significant degree of conflict and dysfunction between the parties both before and after their separation in June 2018.

[8] There was an incident in the family home on June 4, 2018, which led to a forcible confinement charge (s.279(2) of the *Criminal Code*) against Mr. M. On that day, Ms. W left the family home with the children. Mr. M was acquitted in April 2019. In the interim, a provincial court undertaking required that he have no direct contact with Ms. W. Their communication was facilitated through Mr. M's mother (the "paternal grandmother").

[9] Child protection services (Department of Community Services) became involved with the parties as their relationship broke down, and remained engaged

for approximately 18 months. During this period, each parent expressed protection concerns about the other. Although the Department substantiated concerns of family violence during its investigation, the protection file was closed in November 2019. The Department appeared satisfied appropriate protective steps had been taken and that the concerns no longer rose to the level that warranted ongoing child protection involvement.

[10] Through the operation of various interim orders issued by the Family Court of Nova Scotia, the children were in the primary care of Ms. W from the time of the parties' separation to the date of trial. These interim orders also granted parenting time to Mr. M and ordered him to pay child support and contribute to expenses. The orders were pursuant to an application filed under the *Parenting and Support Act*, SNS 2015, C.44 in Family Court. However, the Family Court has limited jurisdiction and could not adjudicate the division of property dispute between the parties. Thus, by agreement, the parties transferred their proceeding to the Supreme Court of Nova Scotia, Family Division, to allow for the property division issues to be dealt with in conjunction with parenting and support issues.

[11] Although the parties made efforts to settle their disputes short of trial, they were unable to resolve the terms of an appropriate longer term parenting plan and decision-making framework for their children. Child support and property division issues also remained contentious. The trial judge was called upon to determine these contested issues.

[12] That trial extended over three days (February 18 to 20, 2020). Each party filed extensive affidavit and financial evidence. There was cross-examination of most affiants. The parties filed both pre-and post-trial submissions.

[13] As to their competing positions at trial, Ms. W pursued joint custody with her having primary care of and final decision-making authority over the children. She supported Mr. M having regular parenting time but less than that afforded under the interim order. Her proposed schedule envisioned one evening every second week (no overnight), Thursday to Sunday every second weekend and extended time during other periods such as over the summer and other special holidays. The extended holiday schedule was not controversial and the parties were able to present an agreed schedule to the judge.

[14] Underpinning Ms. W's opposition to shared parenting was her view that it was not workable—primarily because of the unhealthy relationship and communication dynamic between her and Mr. M. She saw these problems as long standing and unresolved. From her perspective there was serious conflict between

them which the children had been exposed to at times. She said they argued frequently and Mr. M was verbally abusive and controlling of her. She viewed his communication style both prior to and after separation to be hostile and fault based. She believed his parenting style was inflexible, they disagreed about discipline methods and Mr. M was often uncooperative. All this did not bode well for a shared parenting arrangement, which depends upon a sufficient level of communication and cooperation between parents.

[15] As for support, at trial Ms. W sought retroactive child support, ongoing support and a contribution to the children's Section 7 expenses. Her property division claim was based on unjust enrichment. She wanted a fair share of her asserted interest in three properties the parties acquired during their relationship and half of the household contents. She claimed Mr. M owed her $80,228.05.

[16] Mr. M wanted to increase his parenting time and role. He contended at trial that a shared parenting arrangement was workable and would best serve the children. He saw Ms. W's unlawful confinement complaint as fabricated and pointed to signs of their improved ability to communicate by the time of trial. Mr. M saw no real barrier to a shared parenting plan; however, the record indicates he was dismissive of Ms. W's concerns respecting conflict, their ongoing communication struggles and ability to cooperate adequately in relation to the parenting of their children.

[17] As to their property dispute, Mr. M contended that Ms. W's valid claims were less than $8,200 ($3,732.50 for her half of the household contents sold by Mr. M and real property sale proceeds of $4,430.27).

[18] Justice Moreau rendered his oral decision on June 26, 2020. He found that a shared parenting arrangement was not in the children's best interests. He granted Ms. W's request for joint custody with primary care, and final decision-making when the parties could not agree and where no professional treatment provider was involved. As to Mr. M's scheduled parenting time, the judge ordered parenting time every Wednesday from 2:10 p.m. until Thursday at 6:00 p.m. and every second weekend from Friday at 2:10 p.m. until Sunday at 6:00 p.m., which was more expansive than the schedule proposed by Ms. W but short of the parenting plan proposed by Mr. M. As noted, the parties were able to agree to a holiday parenting schedule which was incorporated into the final order.

[19] Regarding child support, Mr. M was ordered to pay the table amount of child support and his proportionate share (based on the parties' respective incomes) of section 7 expenses. The judge's determination of income ($72,332 for Mr. M and

$63, 895.16 for Ms. W), child support and section 7 expense contribution are not directly challenged on appeal. Rather, Mr. M. argued that his success at appeal would require a re-determination of child support.

[20] Ms. W was also successful in her property division claim, although not to the extent she requested. The judge found the parties were engaged in a joint family venture and that Mr. M had been unjustly enriched. He ordered Mr. M to pay to Ms. W a lump sum of $48,490.63.

[21] After the oral decision, the parties filed written submissions on costs. Ms. W asked for costs in the amount of $45,386.55. Mr. M argued that no costs should be awarded to Ms. W; rather, he should be awarded costs of $10,000. The judge rejected Mr. M's position. He found that Ms. W was the more successful party. The costs submissions revealed the history of settlement offers exchanged between the parties leading up to trial. The offers did not favour Mr. M's submission on costs. The judge ordered Mr. W to pay costs of $30,000 inclusive of disbursements. His costs decision, rendered September 11, 2020, is unreported.

[22] Supplemental background will be provided, as required, in my analysis of the grounds of appeal.

Issues

[23] Mr. M advanced 11 grounds in his notice of appeal. His factum sets out complaints under an expanded list of 14 grounds. The grounds have significant overlap if not redundancy and can better be analyzed under a reframing of the issues as follows:

1. Did the trial judge err in rejecting Mr. M's request for shared parenting and awarding joint custody with primary care to Ms. W?
2. Did the trial judge err by ordering the lump sum payment for unjust enrichment without a division in favour of Mr. M. of Ms. W's employment pension, RRSP and TFSA?
3. Did the trial judge err in his award of costs against Mr. M?

Standard of Review

[24] The standard of review applied to my assessment of whether the trial judge erred and appellate intervention is warranted, was explained in *Laframboise v. Millington*, 2019 NSCA 43:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

Analysis

Did the trial judge err in rejecting Mr. M's request for shared parenting and awarding joint custody with primary care to Ms. W?

[25] Under this ground of appeal Mr. M says the judge was wrong to award primary care of the children to Ms. W. His allegations of judicial missteps are:

1. The judge erred by not making credibility findings to confirm the evidence he accepted where there was conflicting testimony;
2. The judge erred by failing to apply the "maximum contact" principle as described in section 18(8) of the *Parenting and Support Act*;
3. The judge erred in relying only upon details of communication that occurred between the parties during the period when Mr. M's contact with Ms. W was restricted as a result of the criminal charge against Mr. M;
4. The judge erred by failing to consider evidence led by the parties of the changes to communication and cooperation between them after April 9, 2019, the date of Mr. M's acquittal and the end of his Undertaking restricting contact with Ms. W;
5. The judge erred by failing to give weight to undisputed evidence of improved communication between the date of Mr. M's acquittal and the date of trial;

6. The judge erred by citing examples of poor parental communication as a central element of the reasoning when the examples cited were, in fact, exchanges between Mr. M's mother, and Ms. W;

7. The judge misapprehended evidence related to interim parenting arrangements;

8. The judge erred by not giving any weight to the evidence of the paternal grandmother (Mr. M's mother) and by failing to distinguish the evidence from the paternal and maternal grandmothers;

9. The judge erred in finding shared parenting to be inappropriate based on the level of communication and cooperation between the parties and by failing to give reasons based on all the evidence presented at trial; and

10. The judge erred by applying the *status quo* from the interim order and failed to rule on the evidence or base the parenting schedule on the circumstances existing at the time of trial and the attendant best interests of the children.

[26] The range of alleged errors engages questions of law, fact, and mixed fact and law. With respect, I do not accept any of Mr. M's complaints. On this record, I am satisfied the trial judge made no error. His decision demonstrates he was cognizant of and applied the correct legal principles to the issues he was called upon to determine. As to his factual findings, they are sufficiently anchored in the record and disclose no palpable and overriding errors.

[27] Turning to the appellant's specific complaints, I will explain why they lack merit and can be summarily dismissed.

The judge erred by not making credibility findings to confirm the evidence he accepted where there was conflicting testimony;

[28] In his factum, the appellant asserted the judge failed to make any credibility findings, made little reference to conflicting evidence and that he was not even alive to the issue of credibility at trial.

[29] During oral submissions before us, appellant counsel was asked to comment on several findings of the judge which demonstrate he was alive to the issue of credibility. Despite conceding in response to questions from the panel that the judge made findings which required him to assess credibility, the appellant still

contended that the judge did not sufficiently turn his mind to additional conflicting evidence and failed to resolve related credibility issues.

[30] Upon any fair reading of the judge's decision, it is clear he was alive to the issue of credibility. That is apparent in his factual findings, mostly unfavourable to Mr. M, made after weighing the evidence and expressly accepting or rejecting it. The judge was not required to detail each piece of evidence, conflicting or otherwise, nor required to make specific findings of credibility respecting the same.

[31] The judge did not do fall into error. Credibility findings are the domain of trial judges – absent an error, there is no cause to intervene.

> *The judge erred by failing to apply the "maximum contact" principle as described in section 18(8) of the Parenting and Support Act;*

[32] Section 18(8) provides:

> In making an order concerning custody, parenting arrangements or parenting time in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j).

[33] The appellant's written submissions on this issue were brief. In his factum he said:

> [40] It is the Appellant's respectful submission that the Learned Trial Judge erred in law by failing to consider s. 18 (8) of the *Parenting and Support Act,* which outlines the maximum contact principle. At no time during the Learned Trial Judge's discussion of parenting arrangements was reference made to this provision, and as noted above, this is a required consideration of any trial judge.

[34] In his decision the judge did not expressly refer to s.18(8); however, it is clear from his reasoning that he was mindful of this principle. Substantively, that is what matters.

[35] The judge was called upon to determine what parenting plan was in the best interests of the children. In his "best interests" analysis, the judge made specific reference to the factors often called the "Foley factors" (*Foley v. Foley*, (1993) 124 N.S.R.(2d) 198 (SC)) and the statutory factors set out in s. 18(5) and (6) of the

Parenting and Support Act. He was fully aware that Mr. M wanted a shared parenting plan to maximize his parenting time; as he was of Ms. W's competing plan. He had to assess the maximum contact principle in the context of what was best for the children. He did just that in a practical manner, and, on this record, cannot be faulted for failing to reference the precise section in the governing statute.

> *The judge erred in relying only upon details of communication that occurred between the parties during the period when Mr. M's contact with Ms. W was restricted as a result of the criminal charge against Mr. M;*
>
> *The judge erred by failing to consider evidence led by the parties of the changes to communication and cooperation between them after April 9, 2019, the date of Mr. M's acquittal and the end of his Undertaking restricting contact with Ms. W;*
>
> *The judge erred by failing to give weight to undisputed evidence of improved communication between the date of Mr. M's acquittal and the date of trial;*
>
> *The judge erred by citing examples of poor parental communication as a central element of the reasoning when the examples cited were, in fact, exchanges between Mr. M's mother, and Ms. W.*

[36] Beyond stating them, there is nothing of substance in the record nor the appellant's submissions that lead me to conclude the judge made any of these errors.

[37] These complaints relate to the judge's factual finding respecting the parents' ability to communicate and cooperate—something which was relevant to his assessment of the competing parenting plans and the determination of what is in the best interests of the children.

[38] The judge had extensive evidence before him respecting the parents' ability to consult, cooperate and communicate over matters related to the parenting of their children both before and after separation, including leading up to trial. The judge was aware that some communication gains were made. That point was prominently argued by Mr. M in his written submissions to the judge. However, the record demonstrates the judge doubted the parents' ability to effectively cooperate and communicate.

[39] In delivering his oral decision, the judge reviewed, in some detail, a number of examples which demonstrated why he was concerned with the parents' ability to realistically co-parent and why he concluded Mr. M's approach to co-parenting was "rigid and inflexible". After reviewing the evidence and the correct legal principles that must guide his analysis, he ultimately found:

> In this case, I am satisfied a shared parenting arrangement is not necessary to address or redress a power balance between the parents. I am also satisfied the parents are not presently able to consult, cooperate and coordinate in order to arrive at a consensus on a consistent basis. I find that a shared parenting arrangement is not in the best interest of these children.

[40] That finding was open to the judge and is well supported on the record. I see no misapprehension of the evidence, no failure to consider or improper weighing of evidence and no palpable and overriding error. None of Mr. M's complaints about the judge's findings on communication have any merit.

The judge misapprehended evidence related to interim parenting arrangements;

[41] The judge made a finding that Mr. M failed to follow a court order that stipulated his parenting time by refusing to return the children when required. The judge explained:

> The Interim Order (Parenting) issued on June 26, 2018 by Judge Dewolfe provided (Mr. M) parenting time between June 16, 2018 to July 15, 2018 inclusive, with dates specified and commencing July 16th, 2018, on an alternating two-week cycle; Wednesdays from 3:00 p.m. to Thursdays at 6:00 p.m. in week 1. Mondays at 10:00 a.m. to Tuesdays at 6:00 p.m. and Fridays at 10:00 a.m. to Sundays at 6:00 p.m. in week 2.
>
> The Consent Interim Order issued on September 21st, 2018 (granted during the July 12th, 2018 Family Court appearance) maintained the week 1 schedule and altered the week 2 schedule to Wednesdays at 3:00 p.m. to Thursdays at 6:00 p.m. and maintaining the Friday to Sunday schedule. (Mr. M) refused to return the children to (Ms. W) following his first Wednesday to Thursday visit. (Mr. M) made the unilateral decision to extend his mid-week parenting time to Fridays at 6:00 p.m. This continued throughout the summer months of 2018 until September, when counsel for (Ms. W) had the court proceeding transcribed. (Mr. M) then relented. (Mr. M) attributes his unilateral action to confusion over what was agreed to "because it was a Consent Order".
>
> I do not accept (Mr. M's) deduction. I note both parties were represented by legal counsel. Both Interim Orders are clear as to what was ordered and agreed to regarding his parenting time. I'm satisfied (Mr. M) made a unilateral decision not to abide by the Court Orders.

[42] Although Mr. M objects to this finding, he has failed to establish just how the judge erred. Once again, considering the evidence before him, this finding was open to the trial judge. Nothing more needs to be said about this complaint.

> *The judge erred by not giving any weight to the evidence of the paternal grandmother (Mr. M's mother) and by failing to distinguish the evidence from the paternal and maternal grandmothers;*

[43] Both the paternal and maternal grandmothers filed affidavit evidence and were cross-examined. The judge referred to relevant aspects of their evidence in his reasons when making various factual determinations. Towards the end of his review of the evidence and his "best interests" analysis he said:

> I shall comment briefly on the evidence provided by … the maternal and paternal grandmothers of the children. Each provided affidavit evidence (Court Exhibits 4 and 13, respectfully) and each were cross-examined by opposing counsel. Each grandmother supported the positions proffered by the respective party. I find there's little to no probative value in commenting on or analyzing the evidence offered by the grandmothers more than I already have. It is obvious they both love (their grandchildren) and the children are fortunate to have both grandmothers in their lives; however, further comment or analysis of their evidence is neither beneficial nor helpful to me in deciding the custodial arrangement best for these children.

[44] Mr. M contends the judge failed to give sufficient thought and consideration to the evidence from the grandmothers and suggests he made a palpable and overriding error by doing so.

[45] It cannot be said the judge was not mindful of their evidence. He was. He referred to some of it in his decision. Simply saying the judge's treatment of this evidence gives rise to a palpable and overriding error does not make it so. The appellant has not established any error, let alone a palpable and overriding one.

> *The judge erred in finding shared parenting to be inappropriate based on the level of communication and cooperation between the parties and by failing to give reasons based on all the evidence presented at trial; and*
>
> *The judge erred by applying the status quo from the interim order and failed to rule on the evidence or base the parenting schedule on the circumstances existing at the time of trial and the attendant best interests of the children.*

[46] These last two errors Mr. M says the judge made in rejecting his request for shared parenting are, to a great extent, repetitive of complaints already discussed and rejected. These characterizations do not reflect what the judge did.

[47] As noted, the judge found that "the parents are not presently able to consult, cooperate and coordinate in order to arrive at a consensus on a consistent basis," and that a "shared parenting arrangement is not in the best interest of these children." These findings are well supported on this record. There is really nothing new identified by the appellant under these alleged errors.

[48] As a general statement, determining what custodial/parenting arrangements are in the best interests of a child is a discretionary exercise and inherently fact based. Judges have the advantage of hearing directly from the witnesses and are able to appreciate the evidentiary nuances when being called upon to weigh the statutory considerations and governing principles. This is why such decisions, as Justice Moreau was called upon to make, are to be afforded considerable deference by this Court. (See *Haines v. Haines*, 2013 NSCA 63 at para. 5; *MacRae v. Hubley,* 2011 NSCA 25 at para. 8, *and M (A.) v. Children's Aid Society of Cape Breton-Victoria,* 2005 NSCA 58 at para. 26).

[49] In this case, the judge explained why shared parenting was not in the children's best interests at the time of trial. As noted, his reasons find support in the record. Although his reasoning path could have been clearer, it is sufficient. It is important to remember that an appeal is not a retrial. It is not for us to reweigh the factors and evidence and arrive at a different conclusion—as explained, our scope of review is narrow. I would dismiss this ground of appeal.

Did the trial judge err by ordering the lump sum payment for unjust enrichment without a division in favour of Mr. M. of Ms. W's employment pension, RRSP and TFSA?

[50] In the court below Ms. W successfully advanced a claim for unjust enrichment. She sought a monetary award for her interest in real property acquired during her common law relationship with Mr. M as well as a share of their household contents. The judge found that Mr. M was unjustly enriched, Ms. W suffered a corresponding deprivation and there was no juristic reason for Mr. M to retain the benefit and Ms. W be denied recovery. The judge concluded that a monetary award would be appropriate. Mr. M does not challenge any of these findings on appeal.

[51] The judge awarded Ms. W $48,490.63. On appeal, Mr. M asserts the judge erred by failing to order a division of Ms. W's pension and by failing to consider her pension, RRSP and TFSA when deciding her unjust enrichment claim. If successful on this ground, he asks we order an equal division of these assets as a remedy.

[52] There are fatal flaws in Mr. M's arguments. On appeal, Mr. M attempts to advance an unjust enrichment claim respecting the pension, RRSP and TSFA. This was something he did not do in the court below. It was Ms. W who pursued a claim of unjust enrichment. Mr. M strenuously opposed her claim and made clear he was not advancing any such claim, particularly as it related to Ms. W's pension, RRSP and TFSA. Although Mr. M was not advancing a claim to these assets, he still wanted the judge to consider them if he was inclined to order more than what Mr. M thought Ms. W was entitled. More importantly, contrary to Mr. M's assertion, the judge did not fail to consider these assets in the manner requested by Mr. M.

[53] It is helpful to review what Mr. M told the judge. He said this in his pre-trial submissions:

> (Mr. M) makes no claim to these assets, except to the extent that a court may offset these values against any amount that is ordered to be paid to her.
>
> For all of the reasons set out above in the context of the legal authorities, we submit that (Ms. W) cannot make out her claim in Unjust Enrichment. She suffered no deprivation and provided no tangible benefit to (Mr. M) that can be quantified under the legal test. (Mr. M) has agreed to sums from the two property flipping ventures and will compensate her for the value of household items that remained with him. This is the extent of her financial claim arising from their common law relationship. She may retain all of her own assets, the savings and the pension without claim by him.

[54] Similarly, in his post-hearing submissions he advised the judge:

> In it noteworthy that (Ms. W) argues for a finding of Joint Family Venture but does not acknowledge that such a finding would justify a division of her RRSP, TFSA, Long Service Award and Nova Scotia government pension. This demonstrates the unreasonable and selfish nature of her claim before the court.
>
> To his credit, (Mr. M) does not seek a claim to her assets, which remains consistent with his position that the parties were not engaged in a Joint Family Venture.
>
> For all of these reasons, we submit that the case for a Joint Family Venture has not been made out. However, if the court makes a finding to the contrary, we submit that it would

> be appropriate to divide the assets held by (Ms. W). She cannot have the benefit of a finding in her favour without the consequences of sharing her assets accumulated during the relationship.

[55] The judge acknowledged this position at the beginning of his unjust enrichment analysis. He said:

> (Ms. W) advances her claim pursuant to the common-law principle of unjust enrichment. She maintains entitlement to an equal portion of property acquired during the relationship based on the concept of joint family venture.
>
> I also note (Mr. M) is not advancing a claim with respect to assets acquired by Ms. W during the relationship; however, (Mr. M) maintains that if I find (Ms. W) is owed financial relief beyond what he has concluded she should receive, he seeks a division of her employee pension, service award and an equal division of the RRSP and Tax-Free Savings Account she accumulated during the relationship.

[56] The value of these assets was: RRSP $2,677.08; TFSA $874.44; Service Award (received after separation) $1,411.33 and Ms. W had approximately five years of pensionable service.

[57] After having found Ms. W had established her unjust enrichment claim the judge turned his mind to remedy. It was at the remedy stage, that the judge considered Mr. M's position. He reasoned:

> As noted, (Mr. M) does not advance a claim to (Ms. W's) assets acquired during the relationship. He describes her claim as unreasonable and selfish in that she does not account for the assets she acquired during the relationship. I must now consider whether a deduction be made to the monetary award due to (Ms. W) under the basis of mutual benefit conferral.
> …
> Mutual benefits must be considered in an unjust enrichment analysis. Mutual benefit conferral should be considered at the defence or remedy stage of the analysis, unless there is a determination made that there is a juristic reason for the retention of the benefits. I earlier found there is no juristic reason for (Mr. M) to retain the benefit and (Ms. W) be denied recovery.
>
> In contemplating this issue, the case **Ibbotson v. Fung,** 2013, BCCA 171, was helpful. **Ibbotson & Fung** re-establishes that I can and should undertake a mutual benefits analysis, regardless of the fact that (Mr. M) has not made a formal counterclaim. As noted, it is (Mr. M)'s position I consider a division of (Ms. W) employee pension, service award and an equal division of the RRSP and Tax-Free Savings Account accumulated during the relationship, should I find (Ms. W) is owed financial relief beyond what he has proposed.

> At paragraph 83 of **Ibbotson** & **Fung,** the court states:
>
> > "When conducting the analysis of mutual benefit conferral, it is clear that a court is to make a general approximation based on the evidence of the 'balance of equities' on both sides."
> >
> > …
> >
> > Based on the preponderance of the evidence available, I am satisfied that the equities as stated offset a thorough review of the evidence including each parties Statement of Property confirms my conclusion on this issue.

[58] Although the judge could have used more precise language, he was satisfied that the balance of equities did not require any offsetting of Ms. W's award through a division of these particular assets. He then goes on to consider reducing the award for other considerations. He found that Ms. W was able to pay off her student loan in the amount of $26,539.09 because of the mutual benefit she received during the relationship. After deducting this and a further amount of $20,341.13 for income tax paid by Mr. M, the award to Ms. W was reduced to $48,490.63.

[59] For the forgoing reasons, I am satisfied that the judge properly took into consideration what Mr. M asked him to. Mr. M may disagree with the result; however, I see no error. I would dismiss this ground of appeal.

Did the trial judge err in his award of costs against Mr. M?

[60] An award of costs is a discretionary decision. To succeed on this ground Mr. M must establish the judge applied wrong principles of law or the decision is so clearly wrong as to amount to an injustice (*Keasbey v. Creaser*, 2021 NSCA 56 at paras. 23 and 24).

[61] In the court below there was some division of success; however, it is clear from the judge's costs decision that Mr. M was not the more successful party—Ms. W was. Justice Moreau reasoned:

> 2. The Applicant (Ms. W) sought division of property based on a claim of unjust enrichment. …
>
> 3. The Applicant also sought primary care of the two children of the relationship. The Respondent sought a shared custody arrangement.

> 4. Other contested issues included decision making and child support, including the sub-issues of imputing income, retroactive and prospective child support, special and extraordinary expenses.
>
> 5. The Hearing was three days in duration: February 18, 19 and 20, 2020.
>
> 6. Following Trial, the Applicant was successful on the issues of primary care, unjust enrichment (division of property), decision making and prospective child support. The Respondent was successful on the sub-issue of retroactive child support. Both parties requested that special and extraordinary expenses be shared equally. The Court decided that these expenses be shared proportionally.
>
> 7. The Applicant was the more successful party.

[62] The judge went on to review the offers to settle exchange between the parties and noted, as the record before us confirms, that Mr. M's offers to settle all the outstanding issues were global in nature—meaning for there to be a settlement all terms had to be accepted; rejection of any term was rejection of all. The judge noted:

> 8. Post decision filings on the issue of costs revealed the Respondent made a formal offer to settle approximately two months prior to trial. The Applicant counter-offered approximately three weeks prior to trial.
>
> 9. The offer and counteroffer regarding the division of property was well within the range of the amount the court concluded due to the Applicant. The impasse during pre-trial negotiations appears to have centered around the parenting issue, specifically primary care versus a shared custodial arrangement. It appears the Respondent did not contemplate any form of settlement other than a global settlement.

[63] The judge then reviewed the relevant legal principles and concluded that Ms. W was entitled to a lump sum costs award of $30,000 inclusive of disbursements.

[64] The determination that Ms. W was the more successful party is unassailable and is not challenged on appeal. Mr. M raises no concern with the judge's articulation of the governing *Civil Procedure Rules* and authorities. Nor does he contend that the quantum is, in and of itself, unreasonable. Rather, Mr. M says the costs award should be set aside for these palpable and overriding errors:

1. the judge failed to consider his ability to pay;
2. the judge was wrong to say that it appears he "did not contemplate any form of settlement other than a global settlement"; and

3. the judge failed to consider the timeline of settlement offers.

[65] These claims of error cannot succeed.

[66] The claim that the judge failed to consider Mr. M's ability to pay any costs is novel, being raised on appeal for the first time. Both parties filed extensive submissions on costs in the court below. Mr. M had every opportunity to advance this argument. He did not. Nor did he pursue a motion under *Rule* 77.04 to be relieved from costs. This was not a live issue in the court below and the judge made no error in failing to consider Mr. M's ability to pay.

[67] As to the contention the judge erred when observing the global nature of Mr. M's settlement offers, this has not been made out. The settlement offers were provided to the judge as part of the written submissions on costs. Mr. M expressly stated the offers were global in nature. On appeal, he now says there was nothing to suggest he was unwilling to consider partial settlement. He says the judge's failure to recognize this and to have seen the offer only as a global settlement offer caused the judge to view the reasonableness of the offer through a lens less favourable to Mr. M. This must be rejected. First, the judge made no error in referencing the global nature of the settlement. There is nothing in the record that detracts from that finding. Second, Mr. M has failed to establish how this equates to a palpable and overriding error. Saying so does not make it so.

[68] The last complaint, which asserts the judge failed to consider the timeline of the offers, has no merit. Mr. M contends that had the judge turned his mind to the timeline (his offer being made earlier in the proceedings than Ms. W's) this would have affected the judge's assessment of the reasonableness of the respective offers. He goes on to say that in the judge's costs decision "there is no reference to the timeline on which the offers in this matter were made. It is therefore respectfully submitted that this is a clear and "palpable error."

[69] Mr. M's last offer was dated December 13, 2019. Ms. W countered on January 27, 2020. The trial commenced on February 18, 2020. It cannot be said the judge did not refer to timing in his decision. I repeat paragraph 8 where he said:

> 8. Post decision filings on the issue of costs revealed the Respondent made a formal offer to settle approximately two months prior to trial. The Applicant counter-offered approximately three weeks prior to trial.

Furthermore, there is nothing in Mr. M's submissions that persuade me the judge somehow erred in his assessment of the reasonableness of the offers. I see no

palpable and overriding error nor error in principle, nor is the award in any way unjust. I would dismiss this ground of appeal.

Disposition and Costs on Appeal

[70] Both parties submitted that $7,500 would represent reasonable costs on appeal to the successful party. I agree.

[71] For the foregoing reasons I would dismiss the appeal and order Mr. M to pay costs of $7,500 (inclusive of disbursements) to Ms. W forthwith.

Van den Eynden, J.A.

Concurred in:

Bryson, J.A.

Derrick, J.A.