IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Dimick v. Dimick, 2009 NSSC 172

Date: 2009/05/29
Docket: SBWD No. 032113
1203-001880
Registry: Bridgewater

Between:

Jon MacPee Dimick

Petitioner

and

Vicki Lynn Dimick

Respondent

Judge:	Justice A. David MacAdam
Heard:	July 3rd, 4th, & 6th, September 27th, and 28th, and November 19th and 21st, 2007
Final Written Submissions on Costs:	March 2, 2009
Written Decision:	May 29, 2009
Counsel:	B. Lynn Reierson,Q.C., for the Petitioner Mary Jane McGinty, for the Respondent

By the Court:

[1] Following the separation of the parties, and the initiation of divorce proceedings, the parties engaged in a lengthy and expensive series of manoeuvres relating primarily to issues of child support and a re-calculation of the division of their assets. The Respondent, alleging the two children spent more than 60% of their time living with her, sought child support. She also disputed the validity and/or enforceability of the executed Separation Agreement and Minutes of Settlement, seeking a recalculation of the division of assets provided therein.

[2] Other issues, arising at least in part from these issues, included her application to impute a level of income to the Petitioner in excess of his annual earned income, issues relating to s. 7 expenses advanced, in part at least, on her alleged inability to pay her share when calculated on the formula in the Separation Agreement and whether a house the parties had occupied during the marriage was a matrimonial asset, notwithstanding the Separation Agreement excluded it as a matrimonial asset, regardless of its use as the family residence by the parties and their children.

[3] The Respondent was unsuccessful on all but essentially one issue. The Petitioner and the two children, all of whom have an eye condition of varying severity, have regularly visited Boston for medical assessment and treatment of their eye conditions. The Petitioner said that when he was initially diagnosed the expertise to deal with this condition was not available in Nova Scotia and therefore it was necessary to obtain treatment in Boston. This continued when the two children were diagnosed with a similar condition. At trial, the Petitioner appeared to suggest that the treatment situation had not really changed, a position to which the Respondent appeared, without presenting any substantiating evidence, to take exception. The costs of the children's visits to Boston for medical assessment and treatment were part of the expenses that in the Separation Agreement were to be shared equally, regardless of the parties' individual incomes. On this issue, the Respondent may have been successful, in that the Petitioner is to receive only fifty percent of the costs on the basis the assessment and treatment is provided in Nova Scotia, unless he can demonstrate that the expertise to deal with the children's condition remains unavailable in Nova Scotia. In respect to the other issues raised by the Respondent, she was largely unsuccessful.

[4] Not surprisingly, the Petitioner now seeks costs.

ISSUE

[5] Should costs be awarded to the Petitioner, and, if so, in what amount?

[6] In view of this proceeding being initiated in the Nova Scotia Supreme Court, rather than the Supreme Court Family Division, it appears the relevant Civil Procedure Rules relating to costs remain Rules 57.27(1) and 57.27(2) of the Civil Procedure Rules 1972, which read:

> **57.27.**
>
> (1) Where the proceeding is for a divorce or matrimonial cause, the court may from time to time make such order as it thinks fit against a party for payment or security for the costs of the other of such parties.
>
> (2) The costs of a matrimonial cause shall be recovered in the same way as in an ordinary proceeding.

[7] After acknowledging that the impecuniosity of an unsuccessful party is one consideration as to whether there should be an award of costs, whether in family law cases or otherwise, counsel for the Petitioner states that, *"Even a lack of resources, however, is not a bar to an Order for costs of fairly significant magnitude."* Her submission on behalf of the Petitioner, continues:

> . . . (In) the recent Nova Scotia Court of Appeal decision in *McPhee, Hill and MacLean v. CUPE*, 2008 NSCA 104 . . . of September 29, 2008 Justice Cromwell, writing for the unanimous court said at paragraph 76:
>
> > [76] The reasons why costs should generally be awarded to the successful party were set out by Saunders, J. (as he then was) in **Landymore v. Hardy** (1992), 112 N.S.R. (2d) 410 (S.C.):
> >
> > > [17] Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. The parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. **Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged.** ..." [Emphasis added by Counsel]
>
> Justice Cromwell went on to state at paragraph 77 as follows:

> . . . I acknowledge the very sympathetic personal circumstances of the appellants. However, one must not lose sight of the fact that they made and persisted in very serious allegations of misconduct against the respondents. . . .

[8] The Respondent references *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 to the effect that, *"... family proceedings are different, and costs in family matters need not always follow the event."* Counsel notes the Court's reference, at para. 9, to **Orkin's Law of Costs (1968)**:

> Costs are a discretionary matter. It is normal practice that a successful party is entitled to costs and should not be deprived of the costs except for a very good reason. Reasons for depriving a party of costs are misconduct of the parties, miscarriage in the procedure, oppressive and vexatious conduct of the proceedings or where the questions involved are questions not previously decided by a court or arising out of the interpretation of new or ambiguous statute.

[9] The Respondent then excerpts from a paper entitled, *"Costs in Family Law"*, by Justice Dellapinna. Counsel notes that Justice Dellapinna, observes, *"a successful party in a family matter is generally entitled to Court costs,"* although for reasons departure from this general rule may be warranted. Justice Dellapinna continues:

> Although the successful party is generally entitled to costs, it remains within the Court's discretion to depart from that general rule. However as stated by Hallett, J., the Court should do so only for very good reasons and as stated by MacDonald, J.A. in *Kay v. Campbell (supra)*, "such reason must be based on

> principle. Reasons for departing from the general rule may include deference to the best interests of a child (*Paquet v. Clarke* (2005), CarswellNS 20 and *Ffrench v. Ffrench* (1995), 139 N.S.R. (2d) 39 (A.D.)), impecuniosity (*Kaye v. Campbell (supra))*, misconduct (including miscarriage of the proceeding), oppressive and vexatious conduct, misuse of the Court's time, unnecessarily increasing costs to the opposing party, and failure to provide full disclosure as may be required by the Rules or legislation such as the *Child Support Guidelines.* Costs may not be awarded if the case raises new issues not previously decided by the Court or an interpretation of a law or ambiguous statute (*Bennett (supra)).*

THE POSITIONS

The Petitioner

[10] Counsel suggests, in view of the Respondent's allegation, in support of her request for child support, that the children spent more than 60% of their time living with her, that this necessitated evidence that increased the trial by *"2 - 3 days."* From the Petitioner's perspective a great deal of preparation and trial time was required to defend against the Respondent's request for child support. In view of the Court's finding that the parties "shared custody," the Petitioner says the contention of the Respondent was not substantiated. This failure by the Respondent, in the submission of the Petitioner, should be *"one significant factor"* to be taken into consideration when awarding costs.

[11] The Petitioner notes the lack of success by the Respondent in seeking a recalculation of the sharing of s. 7 expenses, including the related application to have the Court impute an income to the Petitioner that would have increased his contribution to such expenses above the equal sharing provided for in the Separation Agreement. Counsel observes that there was, *"a significant amount of preparation time"* expended in presenting the evidence of the s. 7 expenses paid for by the Petitioner.

[12] The Petitioner also references the finding that the evidence did not support the Respondent's allegation, *"that her income was used to enhance the value of the matrimonial home and/or to pay the mortgage."*

[13] The Petitioner also takes note of the Respondent's unsuccessful assertions concerning the execution and validity of one of the amendments to the Marriage Contract. Although the issue at trial was the validity and enforceability of the Separation Agreement, the evidence established that in respect to the question of the division of the parties' assets, and, in particular, the home in which the parties had been residing immediately prior to their separation and the dissolution of their marriage, the provisions in the Separation Agreement continued the understandings

provided for in the parties' Marriage Contract. Prior to separation the Marriage Contract had been amended three times in respect to how the matrimonial residence would be dealt with on a divorce. Again, as noted by Counsel for the Petitioner, the Respondent was unsuccessful.

[14] Counsel says that although the Respondent, *"was not asking ... to transfer any of the household contents which were retained at separation by the Petitioner,"* the purpose of this evidence was, *"to support the value the Respondent placed on the Petitioner's assets, in her attempt to acquire a share of the value of the Petitioner's assets, contrary to the parties' agreements."* Counsel suggests, *". . . the Respondent's position with respect to the value of household contents was driven* ***exclusively*** *by financial considerations."* Counsel makes a similar claim with respect to her evidence on parenting time. In view of the Court's criticism of the appraisal conducted on behalf of the Respondent, Counsel says the Petitioner's appraisal of his assets was a complete waste of time, resulting in an increased cost to the Petitioner, *"not only in terms of disbursements but also for counsel's time."*

[15] The last factual issue raised by the Petitioner relates to the validity of the Separation Agreement and Minutes of Settlement and the allegation by the Respondent that, *"she was under some sort of pressure or vulnerability"* at the time of their execution. Counsel also notes the allegation of a physical assault or threat, which again was not found to be supported in the evidence. Lastly, the Petitioner says the reasons of the Court refuted the Respondent's suggestion that *"the waiver of spousal and child support in the Separation Agreement and Minutes of Settlement was not of benefit to her."*

[16] The Petitioner, in seeking costs, refers to the legal issues raised at trial as a factor supporting the awarding of costs. Counsel for the Petitioner writes:

> There were a number of discrete legal issues brought before the court by the Respondent, which had the effect of lengthening the trial considerably. Under the umbrella of the challenge to the Separation Agreement, counsel was required to address the very complex test set out in *Miglin*, the application of s.s. 13 and 29 of the *Matrimonial Property Act*, the Law of Mistake, and law relating to the execution of documents. In addition to the primary issue, the validity of the Separation Agreement and Minutes of Settlement, the Respondent raised legal arguments regarding payment of child support and s. 7 expenses based on imputing income to the Petitioner. Finally the issue of the sharing of photographs was not resolved by consent.

[17] In seeking costs, Counsel noted the Respondent's efforts to obtain child support by asking the Court to impute income to the Petitioner. As to the

photographs, the issue was the Petitioner's request to copy all the photographs and video tapes of the children that were in the possession of the Respondent. In this the Petitioner was successful. Counsel also notes the Respondent's unsuccessful raising of the issue of *"mistake"* as voiding the Minutes of Settlement. Also asserted by the Respondent, again unsuccessfully, was the invalidity of the Separation Agreement and Minutes of Settlement because of the failure of the second amendment to the Marriage Contract, due to the failure of the lawyer observing the signatures to himself sign as the witness.

The Respondent

[18] After noting Justice Dellapinna's observation that, *"[a]lthough the successful party is generally entitled to costs, it remains within the Court's discretion to depart from that general rule . . .,"* counsel for the Respondent raises the following points:

1. The delays and complications caused by the Petitioner's failure to provide even the most *basic disclosure as required by the Federal Child Support Guidelines,* on a timely basis;

2. The financial positions of the parties (and the relative *impecuniosity* of the Respondent) and the parties respective obligations to the children of the marriage;

3. The timing of the offers to settle, vis a vis, the timing of the disclosure necessary to assess said offers;

4. Use of the Court's time; and,

5. The relatively unsettled state of the law governing setting aside separation agreements and the judicial oversight provisions of provincial matrimonial property legislation.

[19] In respect to 1, 3, 4, and 5, I am not satisfied there is anything to support either an award or no award of costs in this case, nor to affect the amount, if it is decided that costs should be awarded.

[20] Issues of disclosure were addressed during the trial and in the Court's reasons, and I am not satisfied either party is without fault, nor unentitled to complain of the timing and extent of disclosure by the other party. As noted in my reasons, neither party sought to delay the trial to deal with any inadequacy in disclosure by the other party.

[21] There is nothing to suggest the timing of the offers to settle, made by the Petitioner, were not in compliance with the Civil Procedure Rules. The thrust of the submission appears to be that the offers made by the Petitioner, *". . . offered no compromise, but simply stated the Separation Agreement would remain intact."*

[22] As to the use of the Court's time, a great deal of the evidence presented, at least in the hindsight of the Court's decision and reasons, was obviously unnecessary. Whether this should have been obvious to Counsel, before preparing for and presenting this evidence, calls for speculation as to how Counsel to the Petitioner could assess the evidence that the Respondent might present in support of her various allegations and claims for relief. It is not a factor that I am prepared to take into consideration in determining any entitlement to costs on the part of the Petitioner.

[23] On the question of "novel point of law," Counsel for the Respondent excerpts from Justice Dellapinna's paper, "Costs in Family Law":

> Courts have declined to order costs in cases where difficult, novel, or evolving points of law have been raised. See for example, *Lawrence v. Lawrence* (1981) 47 N.S.R. 2(d) 100. Although setting aside Separation Agreements is certainly not a novel endeavor, and there is significant law governing such applications, it is indeed evolving, and the subject of much "judicial ink".

[24] Although there may be "judicial ink," that, of itself, does not make the question a "novel point of law." The fact of much judicial comment, including recent Supreme Court of Canada decisions, might even suggest the question, albeit at one time it may have been a "novel point of law," is no longer so.

[25] In the submission of Counsel for the Petitioner:

> The most legally complex issue before the court was the interpretation of the Supreme Court of Canada decisions in *Miglin* and *Hartshorne* and the family of cases dealing with overturning domestic contracts.

[26] A great deal of the Petitioner's submission at trial consisted of lengthy excerpts from the reasons in *Miglin*. Although the *Miglin* analysis was pivotal in determining the validity and enforceability of the Separation Agreement, this analysis is not new, nor, at least any more, novel. Both Counsel realized the relevance of the Supreme Court of Canada reasons in *Miglin*. The conclusion that the Respondent was unsuccessful, only reflected the finding that the facts did not support overturning the Separation Agreement.

[27] Counsel suggests, *"The legal argument raised by the Respondent regarding the . . . Separation Agreement and Minutes of Settlement was further complicated by the fact that one of the leading decisions on domestic contract law is based on marriage contracts rather than separation agreements and the other is based on spousal support rather than property division."* Again, in this, there is nothing unique or novel. The ability to analyse legal judgments, and to apply them to similar but not identical factual scenarios, is the hallmark of a skilled, and well trained, counsel. In this respect, it is what I would expect of the counsel involved in this proceeding.

[28] Also referenced by Counsel for the Petitioner is the issue of laches as it relates to the delay by the Respondent in asserting the substantiative issues raised in the Application. Counsel says, in having to defend against the Respondent's claims, she was left in the position of proving a negative, and the expense of doing so would have been considerably less had the Respondent brought the matter forward in a *"timely fashion."* As noted by Counsel, I ruled on the issue of laches at trial, as it related to the substantiative issues. I see no need to address it further on this application for costs. Had I found fault on the part of the Respondent, I

may then have been prepared to incorporate it as one of the factors in assessing the issue of costs, including quantum.

ANALYSIS

[29] The Petitioner, referring to Justice Dellapinna's paper, "Costs in Family Law," notes the comment that, *"the tariffs that follow Rule 63 do not lend themselves to many types of family law disputes."* The Petitioner submits that this is such a case, and continues by suggesting costs should be fixed. With this submission I agree. Counsel argues that costs should be fixed based on the positions taken by the parties and the cost to the successful party of pursuing the litigation. The former is certainly a factor, the latter not necessarily so. The costs of pursuing the litigation may be unrealistic in the context of the issues and the amounts involved. Also, there are other factors that can, and often are, considered when determining entitlement to and the fixing of the quantum of costs.

[30] Counsel for the Petitioner references *Kennedy-Dowell v Dowell* (2002), 209 N.S.R. (2nd) 392, where, at para 12, Justice Campbell observed:

> [12] In my opinion, the reasonableness of both the trial position and the bargaining position (including the timing of concessions made) is a very important factor in deciding whether an order for costs should be made. This is especially true in family law matters because the parties are often of limited resources and can often face legal fees after a trial which make the process uneconomical and devastating to the family including children. Family law disputes are capable of out of court resolution in many cases and the policy of the court regarding costs should promote compromise and reasonableness in the negotiating process. For that reason, the court should measure each party's bargaining position against the court's adjudication to measure the reasonableness of each position. It is also relevant to compare the court's award against each party's position at trial (which is often significantly different from their pre-trial bargaining position).

[31] The Petitioner's written submission on costs continues:

> We anticipate that [the Respondent] will argue that she is not in a financial position to pay the level of costs which we submit are appropriate under these circumstances. We urge you not to reduce the order for costs based on any sympathy for [the Respondent's] financial position or circumstances. There is a specific deterrence element to any decision on costs. This is particularly the case in family law decisions and even more so in this case where there may have to be future proceedings with respect to the payment of the children's education expenses, the sharing of s. 7 expenses and medical costs.
>
> In this regard I refer you to Justice William's decision in *Grant v. Grant*, 2002 NSSF 2 . . . as well as to the decision of the Nova Scotia Court of Appeal in *Ellis v. Ellis* (1999), 175 N.S.R. (2nd) 268 (C.A.). . . . Justice Williams in *Grant* ordered costs against the wife in the amount of $12,000.00 plus disbursements of $2,250.00. He stated explicitly that the unsuccessful parties financial ability is 'not a defence' and cited the March 2000 decision of MacKinnon (J.S.C.J.) in *Brit v. Brit* (Ontario) as to the concern that a 'party could litigate with financial immunity'. The financial circumstances of the wife in *Grant* were significantly more difficult than [the Respondent's] financial circumstances.

[32] Counsel suggests that the law on costs, since Justice Dellapinna's paper in the Spring of 2006, *"appears to reflect a level of frustration by the judges deciding family law matters with the conduct of litigation and the propensity for family law litigants to pursue unnecessary litigation."* Counsel continues by reviewing a number of cases in Nova Scotia where various amounts were awarded by way of costs. Those cases include:

(1) *MacLean v. Burke*, 2006 NSSC 35, where Coady, J. ordered costs at $4,000.00.

(2) *Ghosn v. Ghosn*, 2006 NSSC 214, where Coady, J. ordered costs in the amount of $10,000.00 plus 75% of disbursements for a total award of $15,807.78.

(3) *Shurson v. Shurson*, 2007 NSSC 270, where Legere-Sers, J. awarded costs of $10,000.00 plus disbursements and extra costs for a jurisdictional issue.

(4) *Leverman v. Leverman*, 2007 NSSC 271, where Legere-Sers, J. ordered costs of $12,500.00.

(5) *T. (D.M.C.) v. S. (L.K.)*, 2007 NSFC 39, where Levy Fam. Ct J. awarded costs of $109,054.06, where the payor had income in excess of $1 million per year. (Affirmed at 2008 NSCA 61. Leave to appeal refused: 2009 CarswellNS 37 (S.C.C.)).

(6) *Jachimowicz v. Jachimowicz*, 2007 NSSC 303, where Lynch, J. after a 13 day trial awarded costs of $50,000.00.

(7) *Jensen v. Jensen*, 2007 NSSC 354, where O'Neil, J. awarded costs of $8,750.00 plus H.S.T.

[33] Also summarized by Counsel is the decision of MacDonald, J. in *J. W. L. v. C. B. M.*, 2008 NSSC 387. Counsel's summary is as follows:

1. Divorce trial which extended over four (4) days of evidence and one (1) day of submissions

2. Note list of "several principles [which] emerge from the Rules and the case law" at pages 2 and 3 of the decision, including:

> The amount of a party and party costs award should "represent a substantial contribution towards the parties reasonable expenses in presenting or defending the

> proceeding, but should not amount to a complete indemnity".
>
> The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved" [required for the application of the tariffs].
>
> If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the 'amount involved', but rather, to award a lump sum". However, departure from the tariff should be infrequent.

3. Issues were determined to be "not particularly complex but they were time consuming and to some extent inter-related."

4. "To set a dollar amount in these circumstances would be an artificial exercise and I decline to do so."

5. The court declined to use the per day rate method of fixing the amount involved because it did not "provide a sufficient award after examining the husband's reasonable expenses and considering the impact of the offer to settle."

6. Husband's "reasonable offer" given great weight in consideration of costs award.

7. **The husband also contributed to increasing the cost of the trial.** Had he admitted the valuations provided by the wife's expert, much trial time would have been saved. (Emphasis by Counsel)

8. Costs awarded in the amount of $20,000.00.

[34] In many of the cases reviewed by Counsel the results were perhaps more mixed than in the present matter, and in some there were no offers to settle. Counsel also suggests the issues were usually less complex than in the present case.

[35] The Petitioner also submits that in some of the cases reviewed, as well as the present, *". . . counsel was required to expend considerable time travelling to conduct the trial, the costs of which we say should be borne by the unsuccessful party."* With this suggestion, in the present circumstances, I do not agree. If counsel is able to show that there were no reasonably competent counsel present in the locality of the trial, the suggestion would likely have merit. Absent such evidence, it is not for a party to retain counsel from afar and expect the opposite party to pay the travelling costs of such counsel, even if, in the final result, they are successful.

[36] As observed, although initially suggesting, *"the impecuniously of the unsuccessful party is only one consideration in the award of costs, whether in family law cases or otherwise, "* the Petitioner urges the Court *"not to reduce the*

order for costs based on any sympathy for . . . [the Respondent's] financial position or circumstances."

[37] Counsel for the Respondent, again referencing Justice Dellapinna's paper "Costs in Family Law", notes:

> One consideration in family law that may cause the Court to deviate from the general rule on costs that will rarely be found in any other legal proceeding, is concern for the best interest of the parties' children. This consideration is often closely linked to the parties' ability to pay. The Court has been known to alter costs that might otherwise be ordered because of the potential impact of the Court's decision on a parent's ability to provide for their children or to exercise access.

[38] Counsel briefly reviews her assessment, on the evidence, of the value of the parties' net worth, suggesting the Respondent's assets exceed her debt by $7,693.53 as at December 2006, while the Petitioner enjoys a net worth, exclusive of corporate assets of about $6,650,000.00, as of June 2007.

[39] Counsel reviewed the expenses the Respondent will have to contribute to the children's "Section 7" expenses and her employment income for 2007, calculating what Counsel says is the *"amount she is left to service debt, to provide food, clothing, shelter, transportation, etc. for herself and her two daughters. She*

contrasts the $3,301.50 available monthly to the Respondent with the Petitioner's monthly budget of $17,646.66, which includes almost nothing for taxes." Counsel also refers to a recent reassessment, which leaves the Respondent owing Revenue Canada $35,721.93. The submission continues:

> Where the ability of a party to bear expenses for costs might be irrelevant in most civil matters, it is often relevant in matters involving families. For example, the Nova Scotia Court of Appeal commented in *Cameron v. Cameron* 2006 NSCA 76, (Tab 5) that 'in view of the mothers limited financial circumstances costs should be $500 inclusive of disbursements and payable on or before July 1, 2007.'
>
> In *H. (T.) M. (C.)* 2006 NSCA 111, . . . the Nova Scotia Court of Appeal concluded its decision with the following, 'In view of the mother's limited financial circumstances, I would not make an order for costs.'
>
> In *Leopold-Demone v. Demone* 1998 Carswell N.S. 451, . . . Justice Hood stated 'In addition, there may be financial hardship to the Respondent from an award of costs. I therefore exercise my discretion to award no costs.'

[40] Also referenced is *Bennett v. Bennett, supra*, where, at para 21, J. Hallett observed that, "*on the facts, there is a reasonable inference that Mr. Bennett is not impecunious and it is clear that he unsuccessfully contested the application which Ms. Bennett was forced to institute to obtain an increase in the maintenance for the children. She has incurred legal fees."*

[41] The Respondent suggests that *McPhee, Hill* and *MacLean, supra*, referenced by the Petitioner, are of limited, if any, assistance in this case. Counsel observed that Justice Cromwell, although acknowledging the very sympathetic personal circumstances of the Appellant, ordered costs in any event, reversing the decision of the trial judge. Counsel continues:

> Four things are worthy of note in that case:
>
> 1) it was not a family case where children were likely to be indirectly impacted;
>
> 2) it was a nine day trial taken up entirely by the Appellant's own witnesses;
>
> 3) Costs were awarded in an amount equal to just over 20% of the legal fees incurred by the Respondent, and;
>
> 4) the trial judge had offered no rationale for denying costs.

[42] Suggesting that the tariffs do not lend themselves well to most family law proceedings because the "*amount involved,*" is difficult to determine, the Petitioner provides as an alternative, a calculation of costs using the tariffs. After suggesting the amount involved could total almost $800,000.00, Counsel suggests

scale 3 for approximately $600,000.00 and scale 2 for about $200,000.00, with six and a half trial days added, as well as two trial days for written submissions. The addition of $8,592.17 in disbursements from September 2005 to January 2009, gives a total of $111,530.17.

[43] In her suggested calculation of the amount for costs, Counsel says the relevant period is from mid-September 2005, and that during that period the Petitioner was invoiced $126,549.61 to defend the Respondent's challenges to the agreement reached between the parties. Counsel asks for the sum of $100,000.00.

[44] Counsel then reviews a number of offers, including a formal offer on April 18, 2006 that was apparently never revoked. The offer was to settle all the outstanding financial issues, *"on the basis of the Agreement and Minutes of Settlement executed by the parties on February 5, 2001."* The Petitioner, Counsel says, paid $117,497.12 in legal fees, disbursements and taxes from April 2006 to November 2008. Counsel suggests this should result in double costs to the Petitioner.

[45] Counsel then references the comments of Justice Campbell in *Kennedy-Dowell v. Dowell*, supra, as to the reasonableness of the bargaining position of the parties as a major factor in the court's exercise of discretion to award costs. In the submission of Counsel, the Respondent only *"wanted 100% of what she valued"* and that continued as her position until trial. Counsel says she did not have a *"bargaining position."*

[46] Counsel says a further offer was made, without revoking the first offer, on April 19, 2007. The Petitioner offered to pay the Respondent almost $70,000.00, including $50,000.00 in cash and almost $20,000.00, payable by waiver of the s. 7 expenses due from the Respondent to the Petitioner. This offer was revoked on June 19, 2007, the day pre-trial briefs were due and filed. Counsel suggests on this offer, the Respondent should be required to pay costs of $70,000.00.

[47] Finally, a further offer was made June 22, 2007 to pay a total of approximately $45,000.00, comprised of $25,000.00 and waiver of the entitlement to reimbursement of s. 7 expenses. This offer was made more than seven days before trial, and Counsel suggests that it should result in double costs. On this basis, costs payable would be $90,000.00.

[48] On the question of offers, the Respondent disputes the suggestion that she wanted only 100% of what she wanted. Counsel says that by letter dated April 26, 2007, she offered to accept an amount significantly less than what she asked for at Court ($200,000.00). Counsel's submission is that:

> All three offers from [the Petitioner] were so low as to be described as 'invitations to capitulate', rather than sincere attempts at compromise. Such low offers, even in the face of a dismissal of the cause, have had an adverse effect on indemnification of the successful party.

[49] Counsel goes on to quote *Independent Multi-Funds Inc. v. Bank of Nova Scotia,* 2004 CarswellOnt 1834, at para. 13:

> While there are elements in the case that could support an order for substantial indemnity costs, particularly the handling of the production of documents of the plaintiff, there are other elements contra. These include the enormous economic disparity between the parties, and the Bank's effort to exploit that factor by its derisive offers, as noted above. Although the case was lost by the plaintiff, it was a credibility case and there was some chance that it might be won. Considering what he felt was at stake, I cannot penalize the plaintiff for the act of taking the case to trial in the absence of any realistic proposal for settlement. Had the parties shown more realism in their offers, it might have been possible to avoid the trial, but each is to blame for that.

[50] The submission states:

> The Court is asked to consider [the Petitioner's] June 22 offer in light of this background. It was actually lower than the previous offer. This suggests that it was more an offer to gain a costs advantage, as opposed to settling the action, and an invitation to surrender rather than an offer of compromise.
>
> The Court is respectfully asked to consider this in view of the fact that [the Respondent] believed in the fairness and justice of what she was asking the Court to do. She was prepared to compromise, as evidenced in the letter of April 26, 2007. [The Petitioner's] offers were not true gestures of compromise, but rather high-handed invitations to capitulate, for the purposes of attracting costs.

[51] Counsel repeats her earlier submission on the failure of the Petitioner to file his documentation in sufficient time to make an informed decision with respect to any offer to settle.

[52] The position of the Respondent in respect to the offers to settle is difficult to reconcile with the outcome of the trial. By any measure, and despite some success on the matter of the children's need to attend in Boston for medical assessments and treatments and on the issue of laches, the Petitioner has been more successful than the effect of any of the offers he made to settle this matter would have suggested. It is difficult, in such a circumstance, to view his offers as a "*high-handed invitation to capitulate, for the purpose of attracting costs.*"

CONCLUSION

[53] For the reasons reviewed, the Petitioner is entitled to costs. On the evidence there was little to substantiate the Respondent's attack on the Separation Agreement and Minutes of Settlement she signed, after reviewing with and no doubt receiving the advice of her then-counsel. Similarly, to the extent the challenge to the Separation Agreement was based on any alleged invalidity or unenforceability of the Marriage Contract, the evidence was again unsupportive.

[54] Albeit this was a family law proceeding, the Petitioner is entitled to costs.

[55] In concluding her submission, Counsel for the Respondent references **Orkin, The Law of Courts Costs**, at s. 219.2:

> "The law as to costs in matrimonial matters is still evolving and cannot be said to be either consistent or wholly settled."

[56] The author continues:

> "The modern view is that matrimonial costs are subject to the same judicial discretion as costs in other civil proceedings, unless there is reason to depart from the rule that ordinarily costs should follow the event. In exercising the discretion to rule otherwise, a trial judge may take into account such factors as hardship, earning capacity, the purpose of a particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the judgment. Other relevant factors are success, the conduct of the parties prior to the litigation, and the income and assets of each party, which affect their ability to bear their own or other parties' costs. Unlike other civil proceedings, in family law cases the ability to pay a costs order, or the effects of a cost award, are taken into account as part of the financial arrangement on judgment."

[57] Relevant on my assessment of quantum is the reality that the parties must continue to interact for the benefit of their two children. In most civil proceedings the parties go their respective ways, and often never interact with each other again. Not so in family matters, particularly when there are children whose financial needs, as well as their emotional and educational needs, are the shared responsibility of both parents. Courts at all levels have repeated time and time again their responsibility is to ensure the *"best interests of the children."* Authority for this self-evident proposition is unnecessary.

[58] Does it serve the, *"best interests of the children"* to award a quantum of costs, that on the evidence is likely to endanger the ability of the Respondent to meet her responsibilities to these children? This is particularly so where the Petitioner has sought, and in this case successfully, to resist any change in her

financial obligations to their children. The quantum of costs claimed by the Petitioner, would, on the evidence presented, so impoverish the Respondent that she would, for the foreseeable future, clearly be unable to meet the financial obligations she undertook in the Separation Agreement and Minutes of Settlement and which were confirmed by the judgment and reasons rendered following the trial. It is therefore necessary to balance the entitlement of the Petitioner to costs with ensuring the financial viability of the Respondent to maintain her financial and other obligations to the children.

[59] The Petitioner, in his submission refers to disbursements of $8,592.17 from September 2005 to January 2009. The Respondent has apparently not filed anything objecting to the quantification or relevance of these disbursements. Providing the Petitioner, or his Counsel, files the appropriate affidavit substantiating these disbursements, the Petitioner is awarded costs of $15,000.00 together with disbursements of $8,592.17.

J.