

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Fermin v. Yang, 2009 NSSC 222

Date: 20090716

Docket: 1201-63121, SFHD-61603

Registry: Halifax

Between:

Rafael Alberico Fermin

Petitioner

v.

Jiang Yang

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: June 11 and 12, 2009 in Halifax, Nova Scotia

Written Decision: July 16, 2009

Counsel: Kim Johnson, counsel for the Petitioner
Kathleen Hall, counsel for the Respondent

By the Court:

[1] On June 12, 2009 I delivered an oral decision in this divorce proceeding. I refused Ms. Yang's request for an equal division or significant award in her favor in respect to the Matrimonial Property. With the exception of her interest in Mr. Fermin's pension, each party retained assets registered or owned by that party free from claims by the other. I did not grant spousal support in the quantum or duration requested by Ms. Yang. I gave her \$6,000.00 as a lump sum award. Mr. Fermin requests a cost award essentially based upon the offers he made to Ms. Yang to settle this proceeding before trial.

[2] I have reviewed the Civil Procedure Rules and several decisions commenting on costs, including *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (T.D.); *Campbell v. Jones et al.* (2001), 197 N.S.R. (2d) 212 (T.D.); *Grant v. Grant* (2000), 200 N.S.R. (2d) 173 (T.D.); *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.); *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (T.D.); *Kennedy-Dowell v. Dowell* 2002 CarswellNS 487; *Urquhart v. Urquhart* (1998), 169 N.S.R. (2d) 134 (T.D.); *Jachimowicz v. Jachimowicz* (2007), 258 N.S.R. (2d) 304 (T.D.).

[3] Several principles emerge from the Rules and the case law:

1. Costs are in the discretion of the Court.
2. A successful party is generally entitled to a cost award.
3. A decision not to award costs must be for a "very good reason" and be based on principle.
4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to a otherwise successful party or to reduce a cost award.
5. The amount of a party and party cost 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".

6. The ability of a party to pay a cost award is a factor that can be considered, but as noted by Judge Dyer in *M.C.Q. v. P.L.T. 2005 NSFC 27*:

“Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must “pay their own way”. In such cases, fairness may dictate that the successful party’s recovery of costs not be thwarted by later pleas of inability to pay. [See *Muir v. Lipon*, 2004 BCSC 65].”

7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
8. In the first analysis the “amount involved” required for the application of the tariffs and for the general consideration of quantum is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the “amount involved”.
9. When determining the “amount involved” proves difficult or impossible the court may use a “rule of thumb” by equating each day of trial to an amount of \$20,000 in order to determine the “amount involved” .
10. 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.
11. In determining what are “reasonable expenses”, the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.

12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties position at trial and the ultimate decision of the court.

[4] This proceeding involved a two hour interim application, two pre-trial conferences and a full day trial requiring the assistance of an interpreter. There were 3 offers made by Mr. Fermin to settle this matter. They were reasonable and two offers exceed the amount I awarded at trial. The final offer made on December 5, 2008 would have provided Ms. Yang with \$15,000.00 and one year of medical and dental coverage, considerably more than the award she did receive in this proceeding. Ms. Yang has limited ability to pay a cost award. However, her failure to accept the final offer should not be ignored even in the face of her financial challenges. I award costs in the amount of \$1,500.00 to be paid by Ms. Yang to Mr. Fermin.

Beryl MacDonald, J.