Docket: 2001-1764(IT)I

BETWEEN:

MARGARET WILVA TREVENA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 28 and 29, 2002, at Kitchener, Ontario,

By: The Honourable Judge M.A. Mogan

Appearances:

Agent for the Appellant: Fred Kalliokoski

Counsel for the Respondent: Steven Leckie

JUDGMENT

The appeal from the assessment of tax made under the *Income Tax Act* for the 1999 taxation year is dismissed.

Signed at Ottawa, Canada, this 23rd day of June, 2003.

"M.A. Mogan"

J.T.C.C.

Citation: 2003TCC436
Date: 20030623
Docket: 2001-1764(IT)I

BETWEEN:

MARGARET WILVA TREVENA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Mogan J.

[1] When the Appellant filed her income tax return for the 1999 taxation year, she deducted the amount of $21,600 at line 220 of the return as "support payments made". By Notice of Assessment mailed in July 2000, the Minister of National Revenue disallowed the deduction of the $21,600 on the basis that the Appellant did not meet the conditions in paragraph 60(*b*) or section 60.1 of the *Income Tax Act*. The Appellant has appealed from that assessment. The only issue is whether the amount of $21,600 is deductible in computing income. The Appellant has elected the informal procedure.

[2] The Appellant is an enterprising woman. She has been involved successfully in more than one business and she has owned commercial real estate. She was born in 1929; she married Clarence Trevena; and there were two daughters born of the marriage, Lynn and Cheryl. The Appellant and Clarence Trevena separated in 1972 and later divorced. At the time of their separation, the Appellant and Clarence were living in St. George, Ontario, a village 15 kilometres north of Brantford. They resided at 14 Main Street, a property comprising a grocery store on the ground floor with a three-bedroom apartment on the second floor. The Appellant was operating the grocery store known as "The Village Market" and the property at 14 Main Street was registered in her name. Upon their separation, Clarence released to the Appellant any interest he had in the property or in the store.

[3] Catharine Crawford was born around 1926. She was married; has two adult children (John and Leslie); and was divorced by 1972. Catharine Crawford's daughter, Leslie and the Appellant's daughter, Lynn were close friends at high school in the early 1970s. The Appellant and Catharine Crawford met and became good friends through the friendship of their respective daughters, Lynn and Leslie. In March 1974, Catharine Crawford (referred to hereafter as "Catharine") sold her home located at 12 Todd Street, Brantford and moved into the Appellant's apartment over the store at 14 Main Street, St. George. The Appellant and Catharine shared the same dwelling (but not at the same address) for about 21 years from March 1974 to October 1995.

[4] In October 1995, the Appellant and Catharine were residing in Bracebridge, Ontario when Catharine became ill. The Appellant called Catherine's daughter Leslie to ask that she come to Bracebridge to look after her mother. According to Leslie's evidence, she went from Brantford to Bracebridge on October 28, 1995 and arranged for her mother to move into "Bracebridge Villa", a retirement home. In February 1996, a doctor in Bracebridge sent Catharine to a medical facility in Penetanguishene where she was diagnosed in May as having Alzheimer's Disease. In the summer of 1996, Leslie arranged for her mother (Catharine) to be transferred to a nursing home in Brantford where she would be closer to Leslie.

[5] In the latter part of 1996, an action was commenced in the Ontario Court (General Division) under Court File No. 96-MC-2285 in which the following parties appear in the style of cause:

BETWEEN:

CATHARINE SEABORN CRAWFORD, by her
litigation guardian, John Crawford

PLAINTIFF

and

MARGARET WILVA TREVENA and
815760 ONTARIO LIMITED

DEFENDANTS

The plaintiff is the person already identified in these reasons for judgment as "Catharine". Her son John commenced the action as her litigation guardian because she had Alzheimer's Disease. The Appellant in these reasons for judgment was one of the defendants. The other defendant was an Ontario corporation which carried on business as a holding company for the Appellant.

[6] The litigation in the Ontario Court was a serious matter. Catharine (as Plaintiff) claimed in great detail a beneficial ownership in all or part of many parcels of real property which were (or had been) owned by the Appellant, and Catharine also claimed many other non-real property interests. Catharine's claims were based primarily on the following allegation which appeared in paragraph 5 of the Statement of Claim:

> 5. The parties cohabited in a relationship equivalent to marriage from March, 1974 to October, 1995, in which they had conjugal relations when the Plaintiff was ejected from her home by the Personal Defendant. …

The Fresh Amended Statement of Claim is Exhibit R-1, Tab 6 in this appeal; and the Amended Statement of Defence is Exhibit R-1, Tab 7. The Appellant and her holding company strongly defended the action denying the Plaintiff's primary allegation.

[7] The Appellant and Catharine's daughter, Leslie, both testified as witnesses in this appeal. The Appellant testified on her own behalf, and Leslie was subpoenaed as a witness for the Respondent. The testimony of the Appellant and Leslie is consistent with respect to the manner in which the litigation in the Ontario Court ended. There was a pre-trial conference set for August 13, 1997. On that day, the parties and their respective lawyers met with a judge of the Ontario Superior Court. According to Leslie, the presiding judge made a statement along the lines: "This is the day we are going to settle this case". The parties, their lawyers and the judge met most of the day and until 10:30 in the evening. The pre-trial conference was a success in one sense in that Minutes of Settlement were signed which ended the litigation.

[8] The Minutes of Settlement are handwritten on four pages of lined paper; signed on page 4 by the Appellant and John Crawford (as litigation guardian for Catharine); and dated August 13, 1997. The Minutes of Settlement are Exhibit R-1, Tab 3C in this appeal. There is a provision in the Minutes of Settlement for a confidentiality agreement to be drafted by the Defendant's counsel containing a consent to an Order sealing the Ontario Court file. Having regard to the provision for a confidentiality agreement, I will quote from the Minutes of Settlement only paragraph 3 which is essential to the resolution of this appeal:

> 3. The Defendant, Trevena shall pay, commencing July 30, 1992 and on the 30th day of each subsequent month until the Plaintiff's death for her expenses, the

> sum of $1,800, subject to paragraph 9 below, by way of direct deposit to a bank account number to be supplied by the Plaintiff.

[9] During the 1999 calendar year, the Appellant paid $1,800 each month for the maintenance of Catharine pursuant to paragraph 3 of the Minutes of Settlement quoted above. The aggregate amount paid by the Appellant in 1999 was $21,600. This is the amount which the Appellant deducted in computing income on her 1999 income tax return; it was disallowed by the Minister; and the disallowance is the only issue in this appeal. In order to deduct the $21,600 the Appellant must first bring herself within paragraph 60(*b*) or subsection 60.1(2) of the *Income Tax Act*.

[10] I can immediately dispose of the argument on subsection 60.1(2). There is no doubt that the amounts in issue were paid pursuant to the Minutes of Settlement which I accept as a "written agreement". I recently considered subsection 60.1(2) in the appeal of Susan Carmichael (Court file no. 2000-2091(IT)G – Judgment May 30, 2003). Under the present law, a written agreement does not need to contain a specific reference to subsections 56.1(2) and 60.1(2) but, if those subsections are to apply, it must be apparent from the terms of the document that both parties understand that one party paying a particular amount will deduct that amount in computing income, and the other party will include that same amount in computing income. There is nothing in the Minutes of Settlement to indicate that the parties were thinking about income tax when they agreed to the monthly payments of $1,800. Therefore, subsection 60.1(2) has no application to this appeal.

[11] If the Appellant is to succeed in the appeal, she must come within paragraph 60(*b*) of the *Act*. The relevant portion of paragraph 60(*b*) states:

> 60 There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable:
>
> (*a*) …
>
> (*b*) the total of all amounts each of which is an amount determined by the formula
>
> $$A - (B + C)$$
>
> where

> A is the total of all amounts each of which is a support amount paid after 1996 and before the end of the year by the taxpayer to a particular person, where the taxpayer and the particular person were living separate and apart at the time the amount was paid,
>
> B is the total of …

If the Appellant does not have any positive amount ($21,600) which qualifies under "A", the negative amounts subtracted as "B" and "C" become irrelevant. The phrase "support amount" is defined in subsection 56.1(4) and incorporated into section 60 by subsection 60.1(4). The phrase is defined as follows:

> "support amount" means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and
>
> (*a*) the recipient is the spouse or former spouse of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage and the amount is receivable under an order of a competent tribunal or under a written agreement; or
>
> (*b*) the payer is a natural parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

[12] Within the circumstances of this appeal, the basic conditions for a "support amount" in 1999 were as follows: an amount

(i) payable as an allowance on a periodic basis;
(ii) for the maintenance of the recipient;
(iii) the recipient is the spouse or former spouse of the payer;
(iv) the recipient and the payer live separate and apart because of the breakdown of their marriage;
(v) the amount is receivable under a written agreement.

If the above conditions were met, there could be a *Charter* question as to whether the Appellant and Catharine would be regarded as "spouses" in 1999. On the facts of this appeal, however, the Appellant does not satisfy the conditions for a "support amount" and so the *Charter* question becomes redundant. For the reasons set out below, the appeal will be dismissed.

[13] The Appellant testified for approximately two hours. She is a very believable witness. I rate her credibility as high. The Appellant was unequivocal in her resolute denial of any cohabiting or conjugal relationship with Catharine. In her examination-in-chief and in cross-examination, the following two paragraphs from the Amended Statement of Defence (Exhibit R-1, Tab 7) were brought to her attention:

> 8. At no time were Catharine and Wilva ever involved in a conjugal, spousal, sexual, co-dependant, affectionate, fiduciary and/or trust relationship; rather they were friends, boarder and landlord, business partners and at times, employee and employer.
>
> 95. The Defendants state and the fact is that at no time did Wilva and Catharine cohabit in a relationship equivalent in any way to marriage as alleged by the Plaintiff or at all. The Defendants deny that the Plaintiff is entitled to support as alleged or at all; or that the Plaintiff is entitled to the establishment of life insurance or other security as alleged or at all.

The Appellant confirmed to her agent and to the Respondent's counsel the truth of the statements in paragraph 8 and 95 quoted above. It was clearly against her interests in this appeal to confirm the truth of those statements and so her oral evidence is even more believable.

[14] The Appellant stated that there was nothing sexual in her relationship with Catharine. They were just friends. Catharine paid to the Appellant $300 per month for room and board except for those times when she was unemployed. The rate was later increased to $350 per month. In return, Catharine had the use of the apartment (later house) and could invite in her (Catharine's) friends. The Appellant was very clear that she was not, and did not want to be identified as, a lesbian.

[15] According to the Appellant, the only three properties and/or businesses which she and Catharine owned together were (a) 34 Main Street, St. George (a bake shop); (b) Willies Ice Cream Parlour in St. George; and (c) Willies Ice Cream Parlour in Cainsville (near Brantford). The grocery store in St. George which the Appellant owned and operated alone from and after 1972 (until its sale in the late 1980s) was the cornerstone of her commercial life and the source of her real livelihood. It provided a significant part of the capital on which she could retire.

[16] The Appellant explained her signature to the Minutes of Settlement by saying that she felt somewhat intimidated by the process and her lawyer advised that it was better to negotiate what a court might otherwise order her to pay.

Having regard to the five conditions set out in paragraph 12 above, the Appellant obviously satisfies the first, second and fifth. On the basis of her own very believable testimony, however, she cannot satisfy the third and fourth condition. Accordingly, the Appellant is not entitled to any deduction under paragraph 60(*b*) of the *Act*. The appeal is dismissed.

Signed at Ottawa, Canada, this 23rd day of June, 2003.

"M.A. Mogan"

J.T.C.C.

CITATION:	2003TCC436
COURT FILE NO.:	2001-1764(IT)
STYLE OF CAUSE:	Margaret Wilva Trevena and Her Majesty the Queen
PLACE OF HEARING:	Kitchener, Ontario
DATE OF HEARING:	October 28 and 29, 2002
REASONS FOR JUDGMENT BY:	The Honourable Judge M.A. Mogan
DATE OF JUDGMENT:	June 23, 2003
APPEARANCES:	
Agent for the Appellant:	Fred Kalliokoski
Counsel for the Respondent:	Steve Leckie
COUNSEL OF RECORD:	
For the Appellant:	
Name:	N/A
Firm:	N/A
For the Respondent:	Morris Rosenberg Deputy Attorney General of Canada Ottawa, Canada