Docket: 2007-2461(IT)I

BETWEEN:

CARL MELNYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 23, 2007 at Vancouver, British Columbia.

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Sara Fairbridge

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2005 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Ontario, this 14th day of December 2007.

"Wyman W. Webb"

Webb, J.

Citation: 2007TCC733
Date: 20071214
Docket: 2007-2461(IT)I

BETWEEN:

CARL MELNYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The issue in this case is whether the Appellant is entitled to claim a deduction in computing his income for 2005 for legal fees that he incurred in relation to child support payments.

[2] The Appellant married Kaila Melnyk on December 23, 2000 and they had one son together, Graeme Neil Melnyk, born on September 21, 2000. The Appellant and Kaila Melnyk separated on June 21, 2003. Following the separation the Appellant and Kaila Melnyk shared custody of Graeme Melnyk. In the Affidavit of the Appellant that was prepared for a proceeding in the Supreme Court of British Columbia and sworn on August 31, 2005, the Appellant stated that the approximate amount of time that Graeme spent with him was 41.5% of the time and the approximate amount of time that Graeme spent with his mother was approximately 58.5% of the time.

[3] The Appellant incurred legal fees in relation to the Court proceedings in 2005. The Court proceedings related to the amount of child support that was to be paid. The culmination of those proceedings was an Order of the Supreme Court of British Columbia which provided, in part, as follows:

> THIS COURT ORDERS that

> 1. Subject to Section 12 of the Divorce Act, (Canada), the Plaintiff, CARL NICHOLAS NEIL MELNYK, and the Defendant, KAILA DEANNA MYLNYK, who were married at Victoria, British Columbia, on the 23rd day of December, 2000, are divorced from each other, the divorce to take effect on the 31st day after the date of this order.
>
> 2. AND UPON the Plaintiff having been found to have a guideline income of $69,000.00 and the Defendant having been found to have a guideline income of $45,000.00;
>
> 3. AND UPON the one child of the marriage; namely, Graeme Carl Melnyk, born September 21, 2000 (hereafter referred to as "Graeme") having been found to spend 40% or more of the time with the Plaintiff;
>
> 4. The Plaintiff shall pay to the Defendant 60% of his guideline child maintenance obligation which is currently the sum of $336.60 per month for Graeme's support payable on the first day of each and every month, commencing retroactively the first day of February, 2005.

[4] The position of the Appellant is that this child support amount is only the net amount payable. His position is that because Kaila Melnyk was also employed (although at a lower salary than the Appellant), she was obligated to pay to him an amount of child support which was set off against his obligation to pay child support to her (based on 100% of the Guideline amount) and this amount payable by him is the net result of this set off. Hence it is the position of the Appellant that he did incur legal fees to earn income, i.e., the amount of child support that the Appellant claims was payable to him by Kaila Melnyk. I am unable to agree with this position.

[5] Paragraphs 8 and 9 of the *Federal Child Support Guidelines* provide as follows:

> Split custody
>
> 8. Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.
>
> Shared custody

> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[6] The Supreme Court of Canada in *Contino v. Leonelli-Contino,* [2005] S.C.J. No. 65 dealt with the interpretation of section 9 of the *Federal Child Support Guidelines.* The majority of the Supreme Court of Canada stated as follows:

> …
>
> 2. Analysis
>
> 2.1 *Interpretation of Section 9 of the Guidelines*
>
> 19 In order to determine the correct interpretation to be given to s. 9 of the Guidelines, it is necessary to examine the words of the provision in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Guidelines, the object of the Guidelines, and the intention of Parliament (see, e.g., *Rizzo & Rizzo Shoes Ltd. (Re),*[1998] 1 S.C.R. 27 at para. 21; *Francis v. Baker*, at para. 34; *Chartier v. Chartier*, [1999] 1 S.C.R. 242).
>
> 20 Before turning to the heart of this case, it is important to point out what is in essence an issue of semantics. Parties and courts across the country have inconsistently referred to the parents under s. 9 as the "custodial" parent, "non-custodial" parent, "payor" parent and "recipient" parent. There is no perfect terminology. However, it is clear that in a shared physical custody arrangement, given the nature of child support, one cannot ignore that a transfer of money from one parent to the other will almost always occur. Thus, for sake of clarity, I will use the concepts of "payor" parent and "recipient" parent.
>
> …
>
> 32 The underlying principle of the Guidelines is that "spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation" (*Divorce Act*, s. 26.1(2) (see Appendix)). The Guidelines reflect this principle through these stated objectives (Guidelines, s. 1):

> (*a*) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (*b*) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (*c*) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (*d*) to ensure consistent treatment of spouses and children who are in similar circumstances.
>
> …
>
> 36 … I agree with the father that the formula used to establish the standard Table amounts assumed that all of the expenditures for the children are met by the *recipient parent* and no account for any child-related expenditures is incurred by the payor parent at any level of access (see Canada, Department of Justice, *Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report* (1997), at p. 2; Wensley, at pp. 83-85; G. C. Colman, "*Contino v. Leonelli-Contino* -- A Critical Analysis of the Ontario Court of Appeal Interpretation of Section 9 of the Child Support Guidelines" (2004), 22 *C.F.L.Q.* 63, at pp. 71-74; P. Millar and A. H. Gauthier, "What Were They Thinking? The Development of Child Support Guidelines in Canada" (2002), 17 *C.J.L.S.* 139, at pp. 149 and 155-56).
>
> 2.2 Factors Under Section 9
>
> 37 The framework of s. 9 requires a two-part determination: first, establishing that the 40 percent threshold has been met; and second, where it has been met, determining the appropriate amount of support.

[7] In my opinion in determining the amount of support payable under paragraph 9 of the *Federal Child Support Guidelines*, the factors set out in section 9 of these *Guidelines* are to be analyzed to determine the amount of child support that will be payable by one parent to the other. While it is recognized that in situations where both spouses are earning income that each will contribute to the support of the child, the contributions are not made from one parent to the other. While Graeme was with Kaila Melnyk the amount that she would be paying for his food, clothing, shelter and other items that would be purchased for him would not be made by payments made from Kaila to the Appellant, but rather would be paid directly by Kaila to the provider of these goods and services. Kaila had an obligation to contribute towards the support of Graeme but not by making

payments to the Appellant, but by making payments directly to the persons who were providing the goods and services to Graeme while Graeme was with her. Her contributions to the support of Graeme would not be income to the Appellant.

[8] This is also confirmed in the Affidavit executed by the Appellant on August 31, 2005. In this Affidavit, which was completed in relation to the proceedings in the Supreme Court of British Columbia related to the child support, the Appellant stated as follows:

> 9. I have completed and attached to this my Affidavit the following:
>
> Supplementary Child Support Fact Sheet B
>
> and
>
> the amount of child support set out in the proposed order is $143.00, payable by the Plaintiff/Defendant.

[9] In the body of the Affidavit itself, it is not clear whether the Appellant (who was the Plaintiff in that matter) would be the person paying the child support or whether Kaila Melnyk (who was the Defendant in that proceeding) would be the person paying the child support amount. However, in the Supplementary Child Support Fact Sheet B which was attached to his Affidavit, this matter is clarified. At the bottom of this page, it is stated as follows:

> Child support as set out in the proposed order is $143.00 / month payable by the Plaintiff.

[10] Therefore, the Affidavit of the Appellant which was filed with the Supreme Court of British Columbia confirmed that only one amount was contemplated as a child support amount, which is the amount payable by the Appellant to Kaila Melnyk. There is no mention of any obligation of Kaila Melnyk to pay any child support amount to the Appellant. The Order that was issued, which was referred to above, confirmed that only one amount was payable and that is the amount that is payable by the Appellant to Kaila.

[11] In the case of *Rabb v. Her Majesty the Queen*, [2006] 3 C.T.C. 2266; 2006 D.T.C. 2674 the issue was the deductibility of legal fees in a split custody situation and not a joint custody situation. Therefore, the issue in that case related to section 8 of the *Federal Child Support Guidelines*, not section 9 of the *Federal Child Support Guidelines* which is the applicable provision in this case.

[12] Therefore, since the legal fees incurred by the Appellant in 2005 are related to his obligation to pay child support amounts to Kaila Melnyk, they were not incurred for the purpose of earning income and hence were not deductible as a result of the provisions of paragraph 18(1)(a) of the *Income Tax Act*. As noted by the Federal Court of Appeal in *Nadeau v. Minister of National Revenue*, 2003 FCA 400; 2003 D.T.C. 5735; [2004] 1 C.T.C. 293:

> 18 Conversely, the expenses incurred by the payer of support (either to prevent it from being established or increased, or to decrease or terminate it) cannot be considered to have been incurred for the purpose of earning income, and the courts have never recognized any right to the deduction of these expenditures (see, for example, *Bayer, supra*).

[13] From the time that the Appellant and Kaila Melnyk were separated through to the Order granted in 2005 the Appellant was always in the position of being the payer of child support amounts. Hence the expenses that he incurred in relation to his obligation to pay child support are not deductible.

[14] The Appellant also raised the issue of the application of *The Canadian Charter of Rights and Freedoms* ("*Charter*"). In the Notice of Constitutional Question that was circulated to the Attorney General the Appellant stated in part as follows:

> … CRA discriminates on prohibited grounds by applying third party circumstances when the constitutional right involved is not only independent but it came into existence in legal definition as an independent right. CRA violates this right by making it conditional on the income level of a third party, and that is the basis for them disallowing the child equal benefit of the law, equal protection under the law, equal access to the law and equal treatment to others in similar circumstances. CRA's reasoning in this way promotes prejudice against the appellant's child in the face of equality as other individuals, notwithstanding income discrimination, mutatis mutandis, are allowed this deduction. …

[15] In this particular case, it is the Appellant who is seeking the deduction, not the Appellant's child, and therefore there is no basis for any claim by the Appellant's child under the *Charter*. In this case, the Appellant also raised the argument that the basis for his claim for discrimination under the *Charter* was that the reason that he was denied the deduction for his legal fees was because he was the higher income earner and therefore was the person who was required to make

the payment to his former spouse. In the case of *Stanwick v. Her Majesty the Queen*, [1999] 1 C.T.C. 143 the Federal Court of Appeal stated that:

> … Level of income is not a personal characteristic enumerated in section 15, nor is it a characteristic analogous to those which are enumerated.

[16] As a result, the Appellant cannot succeed on this basis. Since no other personal characteristics enumerated in section 15 of the *Charter* or analogous to those which are enumerated in section 15 of the *Charter* were identified by the Appellant in relation to the basis for his claim of discrimination under section 15 of the *Charter*, the Appellant cannot succeed on this ground.

[17] As a result, the appeal is dismissed, without costs.

Signed at Ottawa, Ontario, this 14th day of December 2007.

"Wyman W. Webb"

Webb, J.

CITATION:	2007TCC733
COURT FILE NO.:	2007-2461(IT)I
STYLE OF CAUSE:	Carl Melnyk v. The Queen
PLACE OF HEARING:	Vancouver, British Columbia
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REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	December 14, 2007

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Sara Fairbridge

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada