

Docket: 2007-1790(IT)I

BETWEEN:

MARY ANNE SAVORY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on September 26, 2007 at Halifax, Nova Scotia

By: The Honourable Justice C.H. McArthur

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Ms. Lindsay D. Holland

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is dismissed.

The appeals from the reassessments of tax made under the *Income Tax Act* for the 2002 and 2003 taxation years are allowed, without costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant was not in a common-law relationship and did not have a “cohabitating spouse” or “common-law partner” during the 2002 and 2003 taxation years and the Appellant is entitled to claim an equivalent-to-spouse credit pursuant to paragraph 118(1)(b) of the *Act*

and child care expenses pursuant to subsection 63(2) of the *Act*.

Signed at Ottawa, Canada, this 31st day of January, 2008.

“C.H. McArthur”

McArthur J.

Citation: 2008TCC69
Date:20080131
Docket: 2007-1790(IT)I

BETWEEN:

MARY ANNE SAVORY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

McArthur J.

Introduction

[1] This appeal is from assessments by the Minister of National Revenue (the “Minister”), for the Appellant’s 2002, 2003 and 2004 taxation years. The Minister reassessed the Appellant’s tax liability for the period under appeal by disallowing child care expenses and the equivalent-to-spouse credit on the bases that the Appellant was living in a common law relationship. She was assessed \$2,454¹ for the recovery of the overpayment of the Canada Child Tax Benefit (“CCTB”) and \$522 for the alleged overpayment of the Goods and Services Tax/ Harmonized Sales Tax Credit (“GSTC”).

[2] The issues include:

- (i) whether the Appellant was in a common-law relationship with Philip Lamy during the period under appeal;

¹ In all instances the cents have been dropped.

- (ii) whether the Appellant was entitled to claim child care expenses for the 2002, 2003, and 2004 taxation years; and
- (iii) whether the Appellant ceased to reside with the Children as of April 2005.

FACTS

[3] The determination of this appeal is largely dependent on the facts. To decide whether the Appellant was in a common-law relationship, it is necessary to examine certain aspects of the Appellant's personal past. Neither of the parties required the Appellant's former partner, Mr. Philip Lamy, to testify at trial. The Appellant had obtained a restraining order and both parties sought to avoid a possibly difficult and perhaps explosive confrontation. While this made findings of fact more difficult, the parties' reasoning was reasonable and I draw no negative inference.

[4] The Appellant testified that she started to have a relationship with Mr. Philip Lamy in the 1990s. They have two children together; Chloe-Mae born on August 9, 1996 and Anthony born on October 11, 1998.

[5] She described their association as "*sort of an on again, off again*"² relationship and further stated that he never was a consistent member of her household. She concedes that they had lived together from September 1998 to December 1998 when he left. Not knowing his whereabouts, she would forward mail to his mother.

[6] In August 2001, the Appellant moved into a different apartment located at 2836 Connolly Street in Halifax. She stated that shortly thereafter, Mr. Lamy moved into the same apartment building but a different apartment unit; she in apartment B and he in apartment A. She was the only person named on the lease agreement and she paid all of the rent and utilities. She lived there until September 2004 and during this period of time (August 2001 to September 2004) he lived at different addresses. He was "*sort of an in and out sort of person*"³. The Respondent understandably questions the veracity of the evidence presented by the Appellant with regards to the apartment unit number and concludes that she and Mr. Lamy lived in the same

² Transcript of hearing held on September 26, 2007, in Halifax, Nova Scotia, at p. 12.

³ *Ibid.*

apartment unit. I conclude that they did live together at the same address for at least sometime during the period from August 2001 to September 2004.

[7] It is not disputed that from September 2004 to February 2005 they lived together in the same apartment. On September 25, 2004, they moved into a different apartment located on Rowe Avenue in Halifax. At the end of February, 2005, he moved out due to a breakdown in their relationship.

[8] The Appellant was the one taking care of the children during the period under appeal. He took little part in household and family responsibilities. She was the main income earner and provided for the children's needs. He did not make any significant monetary contribution to help with the children's daily needs. I believe she was and is a cook in a residential institution. When they separated in February 2005, the two children were living between the two addresses until June of the same year. Commencing in June 2005, the children lived solely with their father. It was only a year later that she was granted custody of both children.⁴

[9] Throughout the years under appeal, her net income was greater than his. She claimed child care expenses in the amount of \$1,630.00; \$3,036.00 and \$3,389.00 and an equivalent-to-spouse credit of \$6,482.00; \$6,586.00 and \$6,803.00 for each of the 2002, 2003 and 2004 taxation years.

[10] The Minister seeks to recover \$2,454 from the Appellant for alleged overpayment of the CCTB during the period from July 2003 to August 2005 inclusive. This amount is comprised of the computation of the following three amounts:

Base taxation year 2002:	\$ 108.71
Base taxation year 2003:	\$1,427.76
Base taxation year 2004:	\$ 918.04

[11] Further, the Minister assessed a total of \$522.33 for the recovery of the alleged overpayment of the GSTC that the Appellant received during the period from July 2004 to July 2005, inclusive, as follows:

Base taxation year 2003:	\$ 435.58
Base taxation year 2004:	\$ 86.75

⁴ *Ibid.* at p. 21.

POSITION OF THE APPELLANT

[12] The Appellant argues that she was not in a common-law relationship with Mr. Lamy and that they did not live in the same apartment unit. She adds that during the taxation years at issue, they never were in a steady relationship and that they only lived together as a couple for a period of less than four months. In addition, she testified that she was mainly the one taking care of the children, both financially and emotionally. Finally, she claims that he was never a consistent member of her household and he never supported her economically or in any other form. It is on those grounds that she submits she was not cohabiting in a conjugal relationship with Mr. Lamy and that he was not her common-law partner.

POSITION OF THE RESPONDENT

[13] The Appellant resided with Philip Lamy in a conjugal relationship during the period under appeal and she falls under the definition of “*common-law partner*” within the meaning of the *Income Tax Act* (“*Act*”)⁵. The Respondent states that Philip Lamy’s income has to be taken into account in the calculation of the Appellant’s entitlement to GSTC and CCTB. Additionally this determination also invalidates the Appellant’s claim for the equivalent-to-spouse credit pursuant to paragraph 118(1)(b) of the *Act*.

[14] Secondly, the Respondent states that since the Appellant is in a common-law relationship and given that her income exceeded the income of her common-law partner, for all the taxation years under appeal, she is not entitled to claim child care expenses pursuant to subsection 63(2) of the *Act*.

[15] Finally, the Respondent adds that the Appellant lost custody of her two children for a year, starting April 2005 and therefore the Appellant did not reside with a “*qualified dependent*” as defined in sections 122.5 and 122.6 of the *Act*. Consequently, this determination further affects the Appellant’s entitlement to GSTC and CCTB, for at least part of the years under appeal.

ANALYSIS

⁵ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[16] The first issue is whether the Appellant was in a common-law relationship with Philip Lamy during the period under appeal. While this is largely a question of fact, the *Act* is of assistance in the determination of the terms “*common-law partner*” and understanding the tax implications evolving around this rather elusive concept.

[17] The statutory provisions providing the GSTC and the CCTB require that the spouse’s or the common-law partner’s income be taken into account and the equivalent-to-spouse credit is not applicable if the taxpayer is living with a spouse or a common-law partner. To that effect, subsection 248(1) of the *Act* provides for the following definition for the words “*common-law partner*”:

"common-law partner" , with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and

(a) has so cohabited with the taxpayer for a continuous period of at least one year, or

(b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii),

and for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;⁶

[18] The “*cohabiting spouse or common-law partner*” is defined for matter pertaining to the equivalent-to-spouse credit, the GSTC and the CCTB under section 122.6 of the *Act* as follows:

"cohabiting spouse or common-law partner" of an individual at any time means the person who at that time is the individual’s spouse or common-law partner and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or

⁶ *Ibid.* at s. 248(1).

common-law partnership, for a period of at least 90 days that includes that time;⁷

[19] The notion of “*cohabiting in a conjugal relationship*” is not specifically defined in the *Act*. “*Conjugal relationship*” relates most specifically to family law and its meaning has been discussed extensively by provincial Courts. The wording used in the *Income Tax Act* is similar to the definitions of the words “*spouse*” and “*cohabit*” given under the *Ontario Family Law Act*⁸.

[20] This Court has often examined the meaning of “*cohabiting in a conjugal relationship*”. A helpful judgment is *Milot v. R.*⁹ In that case, Justice Lamarre Proulx adopted the following factors:

1. Shelter
2. Sexual and Personal Behaviour
3. Services
4. Social
5. Societal
6. Support (economic)
7. Children

[21] In *M v. H*,¹⁰ the Supreme Court of Canada stated:

Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely.

[emphasis added]

[22] With this in mind, I will attempt to apply these tests to the facts of this case.

Shelter

⁷ *Ibid.* at s. 122.6.

⁸ RSO 1990, c. F.3. and David M. Sherman, *Till Tax Do Us Part: The New Definition of “Spouse”*, 1992 Tax Conference (Canadian Tax Foundation) at p. 20:27.

⁹ [1996] 1 C.T.C. 2247.

¹⁰ [1999] 2 S.C.R. 3.

[23] Did the Appellant and Mr. Lamy live in the same apartment unit, during the period under appeal? This is very much at issue. As stated, she testified that while they lived in the same apartment building they each had their own apartment unit until September 2004. To that effect, she submitted copy of lease agreements, utility bills and other such documentation that only showed her name on it. She also provided a copy of Mr. Lamy's record of employment and a copy of a monthly employment insurance statement issued by the government of Canada, which show Mr. Lamy's address as 2836 Connolly Street unit A. The Respondent submits that the documents showing Mr. Lamy's address as being unit A have been altered and submitted evidence indicating the contrary, which seems to indicate that Mr. Lamy's address was the same as the address of the Appellant, namely 2836 Connolly street apartment B. While denying that Mr. Lamy lived with her, she did concede that he slept over from time to time. Shelter is only one factor among others. Clearly, it is possible for spouses to live under the same roof and not qualify as cohabiting in a conjugal relationship.¹¹

[24] Presently, it is not disputed that the Appellant and Mr. Lamy lived in the same apartment building for at least part of the period under appeal. However, whether or not they lived in the same apartment unit remains uncertain, but shy of any compelling evidence, I conclude that they lived at the same place for at least part of the period under appeal. While this finding weighs against the Appellant, as stated, this is only one part of the entire analysis, and other factors play an important role.

[25] The second factor takes into account the claimant's sexual and personal behaviours. During examination, counsel for the Respondent asked the Appellant about her relationship with Mr. Lamy. She testified that when he was living in the same apartment building, they did have sleep-overs and they had sexual relations as well. She added that during that time she did not see anyone else on a consistent basis. She further testified that they were committed to each other. On the other hand, it does not appear that he assisted her in moments of needs, such as helping her and the children when they were ill. When she was sick, she looked after the children. He did not help her with any chores and they never exchanged gifts on special occasions. They did not eat their meals together as a family and daily communication did not seem to be an essential part of their relationship. The second factor leans towards a rather functional relationship lacking key elements of a conjugal relationship. Their personal relationship falls short of an ideal love story. Overall, I find that the sexual

¹¹ See for example: *Kelner v. R.*, [1996] 1 C.T.C. 2687; *Rangwala v. R.*, [2000] 4 C.T.C. 2430; *Sigouin c. R.*, [2002] 1 C.T.C. 2596; *Uwasomba v. R.*, [2003] 2 C.T.C. 2295;

and personal behaviours test favours the Appellant. I now turn to the third element of the analysis, which deals with the services conducted by the parties.

Services:

[26] This branch of the test requires a look at the conduct and habits of the parties in relation to the services they rendered within their household. This would typically include tasks such as the preparation of meals, washing and mending clothes, shopping, household maintenance and any other domestic services. During her oral submission, counsel for the Respondent accepted that this factor doesn't indicate a conjugal relationship and favours the Appellant's case; I agree.

I believe the Appellant's testimony and have no doubt that she was the one taking primary responsibility of the children and the household tasks. The third factor clearly points against a conjugal relationship and favours the Appellant's case.

Social:

[27] The fourth criterion to consider is how the Appellant and Mr. Lamy viewed and portrayed themselves in a social context. In that regard, the Appellant testified that she did participate in social activities together with Mr. Lamy. Additionally, the Appellant had contact with Mr. Lamy's family and spoke to Mr. Lamy's mother on a regular basis. She agreed that they appeared to be a couple in the eyes of their family and friends. This factor points towards a conjugal relationship.

Societal

[28] Little information is available on this issue, but in light of the former point, I would tend to conclude that they were treated as a couple.

Economic Support

[29] This point can be dealt with very quickly since counsel for the Respondent conceded that there is no evidence that Mr. Lamy made any contribution towards necessities of life, such as food, clothing, shelter and so on. This factor does not draw the slightest indication of a conjugal relationship.

Children

[30] As I have already pointed out, the Appellant testified that for the years under appeal she was the one largely responsible for the two children. However, there is no doubt that Mr. Lamy was also, even if minimally, involved with them. He was living, for at least some period of time, in the same apartment building as the children, which could indicate that he wanted to be close by, in order to be part of his children's lives. After their break-up in February 2005, the Appellant and Mr. Lamy unofficially agreed to split the custody of their children. This arrangement fell apart and from about June 2005 through June 2006, both children were solely with their father. During that time the children had no contact with the Appellant. Obviously he must have had some interaction and contact with the children before they lived with him, and perhaps even before he moved in with the Appellant. However, the Appellant regained custody of the children in June of 2006. Again, I believe her when she says that during the period under appeal she was the one mainly responsible for the needs of the two children. After all, from a strictly financial point of view, she was the main income earner. She further testified that Mr. Lamy's contribution towards the children's needs was insignificant. However, in its entirety, this last element seems to indicate that Mr. Lamy was, at least, somewhat involved with his children and this factor is inconclusive.

[31] Taken in its entirety, the functional test shows mixed results, but it indicates that at certain times the Appellant appeared to cohabit in a conjugal relationship with Mr. Lamy. There are, however, many elements that point away from a conjugal relationship. I agree with the following statement of Justice Lamarre Proulx in *Sigouin c. R.*¹²:

The tests for a conjugal relationship are normally cohabitation and conjugal conduct. That conduct may be determined through sexual relations, emotional and intellectual exchange, financial support and common knowledge.

It is my view that, in appeals such as this one, it must also be taken into account that the provisions involved are intended to financially assist people who have

¹² [2002] 1 C.T.C. 2596.

limited means or low incomes. This Court's decision can have an impact on all the monetary assistance that a person has received, and these provisions which were intended to be of assistance may rather become extremely costly for that person where he or she is required to repay the assistance over several years. To dismiss the appeal, I must be thoroughly convinced that the appellant was cohabiting in a conjugal relationship.¹³

[32] I have no doubt that the Appellant did not cohabit in a conjugal relationship for at least part of the period under appeal. It is clear however that starting from September 25, 2004 they cohabited in a conjugal relationship. It is reasonable to conclude that they were in a conjugal relationship prior to the actual moving date. It is evident that the Appellant consciously decided to try again to live with Mr. Lamy and that such a decision had to be motivated by their immediate past relationship. The moving date ought not to be the determining factor.

[33] On a balance of probabilities, I find that during 2004, the Appellant had a common-law partner within the meaning of subsection 248(1) of the *Act*. Further, for the remaining period under appeal, namely for the 2002 and 2003 taxation years, she did not cohabit in a conjugal relationship. The calculation of the equivalent-to-spouse credit, the GSTC and the CCTB, for the taxation years under appeal, is to be made such as to comply with these findings.

[34] The second issue is whether the Appellant was entitled to claim child care expenses for the 2002, 2003, and 2004 taxation years by application of subsection 63(1) of the *Act*. Subsection 63(2) of *Act* provides that where two taxpayers are supporting a child, only the taxpayer with the lower net income shall be entitled to claim the child care expenses. I concluded that the Appellant cohabited in a conjugal relationship with Mr. Lamy for the 2004 taxation year and since the Appellant's net income was greater than that of Mr. Lamy she cannot claim child care expenses for the 2004 taxation year. She is entitled to claim such expenses for the 2002 and 2003 taxation years.

[35] The third and last issue of this appeal is whether the Appellant ceased to reside with the Children as of April 2005. This determination will further influence the Appellant's GSTC and CCTB amounts.

[36] With regard to the GSTC, section 122.5(1) of the *Act* defines the words "*qualified dependant*" as follows:

¹³ *Ibid.* at paras. 11 & 12.

"qualified dependant" of an individual, in relation to a month specified for a taxation year, means a person who at the beginning of the specified month

- (a) is the individual's child or is dependent for support on the individual or on the individual's cohabiting spouse or common-law partner;
- (b) resides with the individual;
- (c) is under the age of 19 years;
- (d) is not an eligible individual in relation to the specified month; and
- (e) is not a qualified relation of any individual in relation to the specified month.¹⁴

[37] Furthermore, section 122.5(4) of the *Act* explains "*months specified*" as follows:

- (4) For the purposes of this section, the months specified for a taxation year are July and October of the immediately following taxation year and January and April of the second immediately following taxation year.¹⁵

[38] The structure is similar for the CCTB.

[39] The residence of the children becomes relevant in the calculation of the GSTC and CCTB. At the end of February 2005, Mr. Lamy moved out of the Appellant's apartment and from that time until June 2005, the children were living between the two parents. After June 2005, until approximately one year later, the children were under the sole custody of Mr. Lamy. She has since regained legal custody of both children. The only period that is in question is from March to June, 2005. During that time the children were living between both parent's addresses. Based on the fact that the Appellant seemed to be the one mainly responsible for the children, to the exception of one year, I conclude that the children were living with the Appellant until June 1, 2005.

[40] The appeal is allowed, without costs, and the assessments are referred back to the Minister for reconsideration and reassessment according to the findings in these reasons.

¹⁴ *Supra*, note 4 at s. 122.5(1).

¹⁵ *Ibid.* at s. 122.5(4).

Signed at Ottawa, Canada, this 31st day of January, 2008.

“C.H. McArthur”

McArthur J.

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APPEARANCES:

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Counsel for the Respondent: Lindsay D. Holland

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