

Docket: 2008-3056(IT)I

BETWEEN:

ELIANOR KVITO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 10, 2009, at Toronto, Ontario

Before: The Honourable Justice François Angers

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Sharon Lee

JUDGMENT

The appeal from the determination of the Canada Child Tax Benefit under the *Income Tax Act* for the 2004 and 2005 base taxation years is dismissed in accordance with the attached Reasons for Judgment.

The appeal from the determination of the Goods and Services Tax Credit under the *Income Tax Act* for the 2004 and 2005 taxation years is dismissed in accordance with the attached Reasons for Judgment.

The appeal from the reassessments made under the *Income Tax Act* for the 2004 and 2005 taxation years is dismissed.

Signed at Ottawa, Canada, this 21st day of April 2009.

"François Angers"

Angers J.

Citation: 2009 TCC 207
Date: 20090421
Docket: 2008-3056(IT)I

BETWEEN:

ELIANOR KVITO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal under the informal procedure from assessments and determinations made by the Minister of National Revenue (“the Minister”) for the 2004 and 2005 taxation years and the 2004 and 2005 base taxation years. The issues are whether the appellant and one Irakli Kvitaishvili were living together in a conjugal or marital-like relationship (common law) from May 2004 to the end of the 2005 taxation year for the purposes of paragraph 118(1)(b) of the *Income Tax Act* (“the *Act*”) and the Goods and Services Tax Credit (“GSTC”) provided for in section 122.5 of the *Act* and the Canada Child Tax Benefit (“CCTB”) provided for in section 122.6 of the *Act*.

[2] In determining the appellant’s tax liability and GSTC for the 2004 and 2005 taxation years and the CCTB for the 2004 and 2005 base taxation years, the Minister relied on the following assumptions of fact.

- a) the Appellant and Yosef Rafailov (“Yosef”) were married on March 14, 2002 and have been living separate and apart since March 5, 2004 because of a breakdown in their marriage;
- b) the Appellant and Yosef were divorced from each other pursuant to a Divorce Order dated April 4, 2006, with an effective date of May 5, 2006, of the Ontario Superior Court of Justice, Family Court;

- c) the Appellant is the mother of [the first child], born November 26, 1986, and [the second child], born November 26, 1987;
- d) the Appellant and Irakli Kvitaishvili (“Irakli”) are the parents of [J.L.K.], born October 12, 2002;
- e) the Appellant and Irakli were living together in a relationship since May 2004;
- f) at all relevant times during the 2004 and 2005 taxation years since the commencement of the relationship the Appellant and Irakli were living together at 205 Tower Hill Road, Richmond Hill, Ontario (“the family home”);
- g) at all relevant times during the 2004 and 2005 taxation years since the commencement of the relationship the Appellant and Irakli were not living separate and apart by reason of a breakdown of their relationship;
- h) at all relevant times during the 2004 and 2005 taxation years since the commencement of the relationship the Appellant and Irakli shared the following in a conjugal or marriage-like relationship:
 - household expenses and responsibilities,
 - economic, including financial, responsibilities,
 - parental responsibilities,
 - property and resources, and,
 - social ties and social representations;
- i) at all relevant times from January 2004 until the commencement of the relationship the Appellant did not maintain either alone or jointly with one or more other persons a self-contained domestic establishment in which she lived with [JLK] and in which she supported [JLK];
- j) at all relevant times during the 2004 taxation year since the commencement of the relationship [JLK] lived with the Appellant and Irakli in the family home;
- k) at all relevant times during the 2005 taxation year [JLK] lived with the Appellant and Irakli in the family home;
- l) at all relevant times during the 2004 taxation year since the commencement of the relationship the Appellant did not maintain either alone or jointly with one or more other persons a self-contained domestic establishment, separate from the family home, in which she lived with [JLK] and in which she supported [JLK];

- m) at all relevant times during the 2005 taxation year the Appellant did not maintain either alone or jointly with one or more other persons a self-contained domestic establishment, separate from the family home, in which she lived with [JLK] and in which she supported [JLK];
- n) [JLK] was wholly dependent on the Appellant during the 2004 and 2005 taxation years;
- o) the net income of [JLK] for the 2004 and 2005 taxation years respectively was \$NIL;

RE : CCTB and GSTC –

- p) at no relevant time during the 2004 and 2005 taxation years since the commencement of the relationship did the Appellant and Irakli live separate and apart, because of a breakdown of their relationship, for a period of at least 90 days, including that time;
- q) [the first child] attained 18 years of age on November 26, 2004 and 19 years of age on November 26, 2005;
- r) [the second child] attained 18 years of age on November 26, 2005;
- s) Irakli claimed and was allowed GSTC in the amount of \$134.00, for July 2005 to April 2006, in respect of the Appellant, Irakli, [the second child], [JLK], and until November 2005, [the first child];
- t) Irakli claimed and was allowed GSTC in the amount of \$11.62, for July 2006 to April 2007, in respect of the Appellant, Irakli, [JLK], and until November 2006, [the second child];
- u) the net incomes of the Appellant for the 2004 and 2005 taxation years were \$15,681.00 and \$4,825.00 respectively;
- v) the net incomes of Irakli for the 2004 and 2005 taxation years were \$26,317.00 and \$39,140.00 respectively.

[3] The appellant admitted subparagraphs a), b), c), d), f), k), n), o), q), r) and u). She had no knowledge of t) and v) and denied the remainder.

[4] The appellant came to Canada in 1996 with her then husband and their two children referred to in subparagraph c) above. She later divorced her husband and married Yosef on March 14, 2002. At the time she got married, the appellant was two months pregnant with JLK, whose father is Irakli, also known as Paul Kvido, as admitted by the appellant. The appellant and Yosef separated on March 5, 2004. A

separation agreement was signed on August 26, 2004 and their divorce became official on May 5, 2006.

[5] The appellant and her three children moved into Irakli's house on Town Hill Road at about the end of 2003 or the beginning of 2004 and stayed there. According to her testimony, Yosef moved in with them but left after only a few weeks, and it was upon his return in March 2004 that the idea of separation came up and the separation actually occurred. The house had four bedrooms and all the standard facilities. In her testimony, the appellant said that Irakli would come to the house once a week but earlier in her testimony had said that it was 2 or 3 times a week and that he had girl friends. In 2005, she moved to another house located on Mapledown Way that also belonged to Irakli. Exhibit A-4 is a one-year lease between the appellant and Irakli with respect to this other house, which took effect on March 1, 2005. The lease was only signed on March 1, 2006 and provided for a monthly rent of \$950. An agreement to lease the same property for another 12 months was also signed by the appellant and Irakli on March 1, 2006. The amount of rent indicated in the agreement is \$780 per month. Notwithstanding the lease and agreement to lease, Irakli (Paul) also lived in the house.

[6] Exhibit A-6 shows the appellant's bank transactions from October 21, 2005 to March 16, 2006. She highlighted her rent payments for November 1, 2005, December 1, 2005 and January 5, 2006. These payments are amounts of \$750. No similar payments were highlighted or made for February and March of 2006. The appellant provided no explanation for the discrepancy in the rent amount other than to say that the rent was sometimes reduced because her sons would mow the lawn or shovel the driveway.

[7] The appellant said she paid for her family's food but invited Irakli to join the family at the table on occasion. No details were given as to other financial arrangements in terms of living expenses. The appellant had her own bank account and owned her car.

[8] On cross-examination, it was learned that Irakli had been living with the appellant and her family, in the appellant's house, even before they moved into Irakli's house. She admitted that at first there was no lease agreement and that there was not a landlord and tenant relationship. In her Notice of Objection, the appellant stated that her family and Irakli (Paul) had been living together since 2001 except for the time she was with Yosef, who moved out in 2004.

[9] The appellant's reported income in 2004 and 2005 is \$24,840 and \$4,893 respectively. She testified that she paid for everything herself and that, when she was short of money, her siblings would lend her some. The appellant described Irakli's role with his son as a best friend relationship. According to the appellant, Irakli did not pay anything for the support of his son and did not babysit. She drove the boy to school and was the only person responsible for him.

[10] In his 2004 and 2005 tax returns, Irakli indicated under marital status that he was married to the appellant. The address indicated is the same as the appellant's and his reported income was used to make the determinations with respect to the appellant's GSTC and CCTB.

[11] The term "common-law partner" is defined as follows in the *Income Tax Act*:

"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),

...

[12] Many factors may be taken into consideration in determining what a common-law partner is or whether a person is cohabiting with another in a conjugal relationship. These factors, which can be found in many decisions of this Court (see *Milot v. R.*, [1996] 1 C.T.C. 2247, *Kelner v. Canada*, [1995] T.C.J. No. 1130 (QL), *Roby v. Canada*, [2001] T.C.J. No. 801 (QL), are as follows:

1. Shelter:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

2. Sexual and Personal Behaviour:

- (a) Did the parties have sexual relations? If not, why not?
- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings toward each other?
- (d) Did they communicate on a personal level?
- (e) Did they eat their meals together?

(f) What, if anything, did they do to assist each other with problems or during illness?

(g) Did they buy gifts for each other on special occasions?

3. Services:

What was the conduct and habit of the parties in relation to:

(a) preparation of meals;

(b) washing and mending clothes;

(c) shopping;

(d) household maintenance; and

(e) any other domestic services?

4. Social:

(a) Did they participate together or separately in neighbourhood and community activities?

(b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community toward each of them and as a couple?

6. Support (economic):

(a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation, etc.)?

(b) What were the arrangements concerning the acquisition and ownership of property?

(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning the children?

[13] Since the appellant and Irakli are living under the same roof, I find it relevant to cite the following passage from the decision of Associate Chief Justice Bowman (as he then was) in *Roby, supra*:

[7] In *Kelner v. R.*, [1996] 1 C.T.C. 2687, I reviewed the case law in this area and concluded that it was possible for spouses to live "separate and apart" even where

they were living under the same roof. This is an unassailable proposition as a matter of law, but as a matter of fact in any given case the evidence should be convincing. Campbell J. in *Rangwala v. R.*, [2000] 4 C.T.C. 2430, and *Raghavan v. R.*, [2001] 3 C.T.C. 2218, reached the same conclusion.

[8] As good a starting point as any is the decision of Holland J. in *Cooper v. Cooper*, (1972) 10 R.F.L. 184 (Ont.H.C.) where he said at p. 187:

Can it be said that the parties in this case are living separate and apart? Certainly spouses living under the same roof may well in fact be living separate and apart from each other. The problem has often been considered in actions brought under s. 4(1)(e)(i) of the *Divorce Act* and, generally speaking, a finding that the parties were living separate and apart from each other has been made where the following circumstances were present:

- (i) Spouses occupying separate bedrooms.
- (ii) Absence of sexual relations.
- (iii) Little, if any, communication between spouses.
- (iv) Wife performing no domestic services for husband.
- (v) Eating meals separately.
- (vi) No social activities together.

See *Rushton v. Rushton* (1968), 1 R.F.L. 215, 66 W.W.R. 764, 2 D.L.R. (3d) 25 (B.C.); *Smith v. Smith* (1970), 2 R.F.L. 214, 74 W.W.R. 462 (B.C.); *Mayberry v. Mayberry*, [1971] 2 O.R. 378, 2 R.F.L. 395, 18 D.L.R. (3d) 45 (C.A.).

[9] Both Campbell J. and I took those criteria as useful guidelines, although they are by no means exhaustive and no single criterion is determinative. I tend to agree with what was said by Wilson J. in *Macmillan-Dekker v. Dekker*, [2000] O.J. No. 2957, August 4, 2000, docket 99-FA-8392, quoted by Campbell J. in *Rangwala* at pp. 2435-2436:

Based on a synthesis of prior case law, the court established a list of seven factors to be used to determine whether or not a conjugal relationship exists or existed. These organising questions permit a trial judge to view the relationship as a whole in order to determine whether the parties lived together as spouses. Reference to these seven factors will prevent an inappropriate emphasis on one factor to the exclusion of others and ensure that all relevant factors are considered.

...

I conclude that there is no single, static model of a conjugal relationship, or of marriage. Rather, there are a cluster of factors which reflect the diversity of conjugal and marriage relationships that exist in modern Canadian society. Each case must be examined in light of its own unique objective facts.

[10] Bearing in mind then that no single factor should predominate, and that it is the overall picture that must ultimately govern, can it be said that these spouses were living separate and apart because of the breakdown of their marriage?

[14] In a situation such as that in the case before me, where two individuals are living under the same roof, it is important that the evidence presented be convincing, and the burden in that regard rests solely on the appellant. She must establish on a preponderance of evidence that she did not cohabit with Irakli (Paul) in a conjugal relationship during the time relevant to this appeal.

[15] The evidence established that the appellant has been living with Irakli under the same roof since at least 2001 and has done so at three different locations. The evidence also established that Irakli is the father of JLK, who bears Irakli's family name and has been living with his father since his birth, including during the two taxation years under review. At the time the appellant separated from her second husband, she moved into Irakli's house with her three children and later moved again with the children to another house belonging to Irakli .

[16] The evidence is also clear that Irakli uses the same address as the appellant in his income tax returns and in addition he represents himself in those returns as being married to the appellant. The assumptions of fact in subparagraphs s), t) and v) of the Reply must be taken as true, for no evidence was presented by the appellant that would enable me to conclude otherwise. I cannot ignore the fact that Irakli was not called as a witness by the appellant. His testimony would undoubtedly have assisted the Court in resolving this issue and I can only infer that his testimony would not have been favourable to the appellant.

[17] The appellant stressed that Irakli did not provide any financial assistance to her, but the fact is that he provided the appellant and her children, including his son, with a roof and appears to have assumed some responsibilities as a father, as it was he who claimed the GSTC and the CCTB for the years in question.

[18] The appellant's inconsistencies in her testimony as to the actual amount of rent she paid, and as to whether or not the first lease really existed given the fact that it was signed a year after it allegedly came into effect, all tend to discredit her evidence.

In addition, one cannot help but question how she could be the sole provider for herself and her three children in view of the amount of her declared income.

[19] The evidence is insufficient to allow me to conclude that the appellant and Irakli were not common-law partners. The Minister's determinations are therefore correct and the appeals are dismissed.

Signed at Ottawa, Canada, this 21st day of April 2009.

"François Angers"

Angers J.

CITATION: 2009 TCC 207

COURT FILE NO.: 2008-3056(IT)I

STYLE OF CAUSE: Elianor Kvito v. Her Majesty the Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 10, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice François Angers

DATE OF JUDGMENT: April 21, 2009

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Sharon Lee

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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