Docket: 2011-3986(IT)I

BETWEEN:

ROSS J. CUNNINGHAM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 12, 2012, at London, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Paul Klippenstein

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the Appellant's 2009 taxation year is dismissed, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 26th day of July 2012.

"Patrick Boyle"

Boyle J.

Citation: 2012 TCC 279
Date: 20120726
Docket: 2011-3986(IT)I

BETWEEN:

ROSS J. CUNNINGHAM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] Mr. Cunningham has appealed the denial of his claim for a dependent child tax credit under paragraph 118(1)(b.1) of the *Income Tax Act* (the "*Act*") in 2009 in respect of his son, Alex. Mr. Cunningham has instituted an informal appeal. He has put in his case in a very clear manner and he is familiar with the *Act* and the tax system. The facts are not in dispute whatsoever.

Facts

[2] The Appellant and his wife separated in 2007 and divorced in 2010. In 2009, they entered into a Separation Agreement. With respect to their only child Alex, the Separation Agreement provides that they will have shared custody of him. Alex has in fact resided with each of them approximately fifty percent of the time.

[3] The Separation Agreement deals with child support in respect of Alex in the following manner:

(a) The Appellant was required to pay to his wife support on a shared-custody basis in the amount of $261 monthly in 2009. It is clear that this is based precisely upon the Tables of the Federal Child Support Guidelines having regard to each of their respective incomes. That is, the amount the Appellant agreed to pay his wife was the precise difference between (i) the amount of support the applicable Table indicated he should pay her based upon his income for one child in her custody and (ii) the amount of support the applicable Table indicated she should pay him based upon her income for one child in his custody. The agreement specified the amount that was the net amount once child support that would be payable by his wife under the Guideline Tables was set-off or netted against the child support that would be payable to him under the Guideline Tables, each determined as if the other had sole custody.

(b) Additional support of $250 monthly was payable for 24 months beginning in 2009.

(c) Reasonable "special or extraordinary expenses" were to be shared 60% by the Appellant and 40% by his wife. It can be noted that this is not precisely proportional to their respective incomes at the time of the Separation Agreement. It is out by somewhat over 1 % in each direction.

(d) Private school tuition and music lessons were also to be borne 60% by the husband and 40% by the wife.

(e) The Appellant and his wife agreed that they would alternate years for claiming Alex for Canada Child Tax Benefit and eligible dependent purposes. Under the agreement, the wife agreed that the Appellant would be entitled to these claims in 2009.

[4] The Separation Agreement specified that the parties recognized and acknowledged that they were agreeing to child support based upon section 9 of the Federal Child Support Guidelines dealing with shared custody and that they had considered the increased costs of the shared-custody arrangement, including appropriate housing, transportation and the duplication of necessities.

Law

[5] Paragraph 118(1)(b.1) provides a tax credit in respect of a taxpayer's child under 18.

[6] Subsection 118(5) provides that this credit is not available for a child in respect of whom the taxpayer has paid child support to his spouse or former spouse.

[7] Subsection 118(5.1) provides that the restriction in subsection 118(5) will not apply if it would deny the credit to both parents. In such a case, one would have to go on to consider paragraph 118(4)(b.1) which provides that, if both parents are entitled to the child credit, they must agree on who will claim it on an annual basis, failing which the credit will again be denied to both of them.

Position of the Taxpayer

[8] The Appellant does not dispute that he was required to pay his wife child support in 2009 in respect of Alex and for this reason is caught by the words of subsection 118(5).

[9] However, he argues that subsection 118(5.1) also applies to restore his entitlement to the child credit because both he and his wife paid each other child support under the Separation Agreement in respect of their shared custody of Alex. He argues that, but for subsection 118(5.1), neither he nor his wife would therefore be entitled to the child credit in respect of Alex and so, as set out in subsection 118(5.1), the restriction in subsection 118(5) does not apply to either of them.

[10] Finally, he says that the end result of the application of paragraph 118(4)(b.1) is that he is entitled to the credit in 2009 because he and his wife agreed to that in their Separation Agreement.

Analysis

[11] This issue has been considered several times by this Court and it has consistently dismissed taxpayers' appeals in cases of shared custody. See the reasons for judgment of Woods J. in *Perrin v. Her Majesty the Queen*, 2010 TCC 331, those of Webb J. in *Melnyk v. Her Majesty the Queen*, 2007 TCC 733, and those of Lamarre J. in *Ladell v. Her Majesty the Queen*, 2011 TCC 314. In each of these cases, it was decided that in shared custody arrangements governed by the Guidelines, there are not two offsetting support payments payable by the parents and that there is only one parent required to make support payments.

[12] In *Melnyk* and *Ladell*, the Court expressly relied upon the decision of the Supreme Court of Canada in *Contino v. Leonelli-Contino* [2005] 3 SCR 217 to the effect that in cases of shared custody under section 9 of the Guidelines, child support

was not payable on a set-off basis with the parent having the higher income required to make the net payment equal to the difference between the two support amounts. Rather, section 9 starts off from a simple set-off but requires further considerations to be considered and appropriate adjustments made in setting child support. The Supreme Court in *Contino* contrasted these section 9 requirements in cases of shared custody with those applicable to section 8 in cases of split custody (each parent having custody of different children) which do simply provide for a set-off.

[13] It is clear from the child support provisions of the Separation Agreement that the Appellant and his wife entered into, that the child support be paid following the approach mandated by section 9 of the Guidelines and described by the Supreme Court of Canada in *Contino*. That is, the Table amounts for each parent were the starting point and then consideration was given to, and adjustments made for, further special and extraordinary expenses relating to Alex's care and custody.

[14] I see no reason to consider departing from this Court's analysis and approach in these three cases. The Appellant's wife was not required to make child-support payments to the Appellant. For this reason, the appeal must be dismissed.

[15] The Appellant sought to rely on the decision of Lamarre J. in *Rabb v. Her Majesty the Queen*, 2006 TCC 140. However, it is entirely clear that *Rabb* was considering a split-custody agreement covered by section 8 of the Guidelines and not a shared-custody agreement covered by section 9 of the Guidelines. As noted above, the two circumstances – split custody and shared custody - require different approaches to the computation of support under the Guidelines. For that reason, *Rabb* does not assist the Appellant.

[16] I am not unsympathetic to the fact that the Appellant is not receiving the benefit of the child credit in 2009 even though he and his ex-wife agreed he would be the one entitled to claim it during that year of shared custody. Instead, I am told that she claimed the deduction in 2009. However, the agreement of the parties cannot change the requirements of the *Act*. I am also not unsympathetic to the fact that the Appellant, a tax professional, cannot discern a policy basis or other reason for such differing tax results in the cases of shared custody and split custody. Nonetheless, it is clear that the provisions of the Guidelines and of the child tax credit, as they are worded and as they have been interpreted by the Courts, do not allow Mr. Cunningham's appeal to succeed.

Conclusion

[17] The appeal is dismissed.

Signed at Ottawa, Canada, this 26th day of July 2012.

"Patrick Boyle"

Boyle J.

CITATION:	2012 TCC 279
COURT FILE NO.:	2011-3986(IT)I
STYLE OF CAUSE:	ROSS J. CUNNINGHAM v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	London, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Paul Klippenstein

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