Docket: 2011-2453(IT)G

BETWEEN:

PHILIP GERRARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 15, 2012, at Ottawa, Ontario.

Before: The Honourable Justice T.E. Margeson

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Christopher Kitchen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the Appellant's 2005, 2006, 2007 and 2008 taxation years are dismissed, and the Minister's reassessments are confirmed.

Costs are awarded to the Respondent.

Signed at Vancouver, British Columbia, this 16th day of April 2013.

"T.E. Margeson"

Margeson J.

Citation: 2013 TCC 114
Date: 20130416
Docket: 2011-2453(IT)G

BETWEEN:

PHILIP GERRARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Margeson J.

[1] Initially, the Appellant commenced an appeal with respect to the 2005, 2006, 2007, 2008 and 2009 taxation years. At the commencement of the hearing, the Appellant withdrew his appeal with respect to the 2009 taxation year.

[2] For the remaining taxation years under the appeal, the sole question is whether or not the Minister of National Revenue's reassessment was correct in the disallowance of child support payments allegedly made by the Appellant with respect to his three children.

Evidence

[3] The Appellant introduced a separation agreement between himself and Deborah Hossack dated the 2nd day of November 1988, which purported to be the basis for his claim for the allowance of the disallowed payments for support and maintenance. This document is fairly straightforward and was described by the Appellant in his testimony in direct examination. In cross-examination, he said that he was married to Deborah Hossack on September 7, 1979, and had three children

together. They separated in January of 1988 and entered into the separation agreement ("agreement") on November 2, 1988. This agreement provided for payment by the Appellant of $750 each month, being $250 for each child until one or more of the conditions set out in paragraph 9 of the agreement occurred.

[4] All of the children were alive as of the date of this trial. One of the children, Emily, ceased to reside with him on February 7, 1998. She came back on certain occasions after that, but as of February 7, 1998, she ceased to reside with him on a permanent basis. At that time, she was not attending an educational institution on a full-time basis. On January 2, 2001, she reached the age of 21 years and therefore Deborah Hossack was not entitled to receive support payments.

[5] The son, James, ceased to reside with Ms. Hossack on March 30, 1998, and she was no longer entitled to receive maintenance payments for him under the terms of the agreement. A couple of times after that he recommenced living with one or the other but on January 21, 1999, he ceased living with one or the other and was living independently.

[6] On September 5, 2000, he turned 18 years of age.

[7] On February 24, 2000, he was not enrolled in an educational institution on a full-time basis and had not been so since May 27, 1999. On September 5, 2003, he became 21 years of age.

[8] Stephany did not cease to reside with Ms. Hossack even though Ms. Hossack was living in Toronto in the year 2004. Stephany turned 18 on September 1, 2002, and had graduated from high school. She may or may not have been enrolled full-time in an educational institution.

[9] In 2004, Stephany may have been attending an educational institution on a part-time basis.

[10] On September 1, 2005, she turned 21 years of age. By May of 1999, Ms. Hossack was not entitled to maintenance for Emily or James and by May 8, 2005, she was not entitled to support under the agreement.

[11] On November 9, 1993, the Court varied the original agreement to $400 per month for each child.

[12] He referred to the agreement dated December 21, 2000, which provided that he would continue to pay maintenance of $1,200 per month until December of 2003. He would not agree that it provided that the payments would terminate.

[13] By December 2003, James would be 21 years and 3 months and Emily would be 24 years of age and Ms. Hossack had no right to receive payments pursuant to the 1988 agreement.

[14] In 2005 and 2006, James might possibly have attended, on a full-time basis, an educational institution.

[15] The Respondent called no evidence.

Argument on behalf of the Respondent

[16] Counsel argued that the sole issue before the Court was the deductibility of the maintenance payments by the Appellant during the taxation years 2005, 2006, 2007 and 2008. His position was that the payments could not be deducted because a "commencement day" had been triggered under subsection 56.1(4) of the *Income Tax Act* (the "*Act*") prior to the year 2005.

[17] Under the terms of the original agreement dated November 2, 1988, the requirement to make maintenance payments ceased under the terms of paragraph 9 thereof.

[18] The parties signed an agreement on December 21, 2000, that the Appellant would continue to pay maintenance in the amount of $1,200 until December 2003. In effect, the parties decided to look the other way with respect to the original agreement, because at that time there was no right for Ms. Hossack to receive payments for Emily and James.

[19] The document at Tab 26 of Exhibit A-1 shows the intention of the parties to disregard the original agreement when they signed the agreement of December 21, 2000. At that time, the only amount payable was $400 per month for Stephany. After the agreement was signed, he was required to pay $1,200 per month.

[20] This was an entirely new undertaking. The support payments were changed to allow support of $400 for each child. This triggered a new "commencement date".

[21] In the alternative, there was no obligation to make the maintenance payments by the Appellant during the years in question with respect to Emily and James before January 1, 2005, as this obligation had ceased earlier. This is evidenced by the Affidavit of the Applicant, Philip Edgar Gerrard, which was sworn to on May 27, 1999, as can be seen in Exhibit A-1 at Tab 24.

[22] With respect to Stephany, the obligation to pay support for her by the Appellant ceased before May of 2005. It has already been acknowledged that she was over 18 years of age and she was no longer in full-time attendance at an educational institution.

[23] The appeal should be dismissed with costs to the Respondent.

Argument on behalf of the Appellant

[24] In argument, the Appellant said that the question in this case is whether or not a "commencement date" was triggered. He referred to two documents in this respect: (1) the 1988 Separation Agreement; and (2) the agreement between himself and Ms. Hossack dated December 21, 2000. The question he asks is, did the December 21, 2000 agreement vary the amount of maintenance or change it so as to create a "commencement day" under the provisions of subsection 56.1(4).

[25] He argued that the *Act* and the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (the "*Divorce Act*"), approach this question from two different directions, the social and the financial. We must keep these two concepts separate and not cross over from one statute to the other. A valid interpretation of the *Income Tax Act*, subsection 56.1(4) should restrict itself to the financial parameters and not stray over to family law.

[26] He referred to the case of *Newman v. Thompson* (1997), 149 D.L.R. (4th) 605, as describing the proper interpretation under the *Divorce Act*. Here the discussion was with respect to the term "child of the marriage" and that there is no arbitrary age at which a child ceases to be "a child of the marriage" under the *Divorce Act* and that such a determination must be made in each instance.

[27] The question to be asked is, was he required to support the children under the *Divorce Act*?

[28] He referred to the case of *Mossman v. Canada*, [2002] 4 C.T.C. 2101, as a case which focuses on the definition of "child of the marriage" where the child is over the age of majority. The *Divorce Act* recognizes that in these cases the child

may still fit within the definition. This case also found that there was no variation in the amount of support payable under the 1994 or 1998 agreement and that the amount payable under the 1998 agreement was intended to be a continuation of the amount payable under the 1994 agreement.

[29] The Appellant also referred to the case of *Katsoras v. Canada*, [2003] 4 C.T.C. 2247, where Bell J. said that it was clearly in the minds of both counsel that the obligation to pay the $1,300 and to have it claimed by one and deducted by the other was intended to be continued under the subsequent agreement.

[30] In *Whelan v. Canada*, 2004 TCC 680, 2004 DTC 3581, the Court held that the monthly payments for the child may vary, but if at the end of the year the total is the same for each child, there is no change.

[31] The Appellant referred to the case of *Kennedy v. Canada*, 2004 FCA 437, 2005 DTC 5039, where the Court held that orders or agreements made after April 1997 which actually create new obligations will be subject to the new regime. Obligations created under the old regime will be subject to the old regime.

[32] The Court further said that subparagraph 56.1(4)(*b*)(ii) of the *Act* which specifies that agreements or orders which are varied after April 1997 so as to change child support amounts payable, will qualify as creating a commencement day. In such a case, a new obligation will have been created by the variance after April 1997. The same can be said of subparagraph 56.1(4)(*b*)(iii) which provides that a subsequent agreement or order made after April 1997 which changes the total amounts of child support payments creates a commencement day.

[33] The Appellant opined that a substantive change in amounts triggers a commencement date, presumably concluding that a minor change would not.

[34] Both of the agreements were contracts. In interpreting them as contracts they must be read together. What was the intention of the parties? Here the intention was clear that the payments would continue in force.

[35] There is no set determination date. The date set was the earliest date that a party could make an application to vary. It is a trigger date.

[36] No application has been made yet to terminate the payments and so the provisions of the 2000 agreement remain in effect.

[37] The total amount of payments remains the same, at $1,200. The children are still children of the marriage under the *Divorce Act*, so it applies to this case, not the *Income Tax Act*. The amount per child remains the same.

[38] The subsequent agreement had no effect on the original agreement. It continued.

[39] No agreement was made to change the total amount payable.

[40] The Appellant conceded that the children at times passed in and out of entitlement. These are matters under the *Act* and not under the *Divorce Act*, as to whether they are still children of the marriage.

Analysis and Decision

[41] After a fair consideration of all of the evidence and giving due weight and attention to the able arguments of the Respondent and the Appellant, the Court must conclude that this appeal must be dismissed. That conclusion must be reached with regard to both arguments raised.

[42] The Court is satisfied that the governing agreements are those of 1988 and 2000.

[43] The 1988 agreement was not complicated and it clearly sets out the parameters of the Appellant's responsibility with respect to the required maintenance payments and just as clearly indicated the terms under which the payments would be required to be made and when they would be discontinued. The Court is satisfied that the effect of the 2000 agreement was to change the total child support amounts payable as Emily and James were no longer residing with Ms. Hossack. Emily had attained the age of 21 years as of the date of the agreement and James was over 18 years of age and no longer in full-time attendance at an educational institution.

[44] The 2000 agreement purported to make all payments payable until December of 2003. This was clearly a variation of the total amount payable under the 1988 agreement and was unquestionably a variation in accordance with the provisions of subsections 56.1(4), 60.1(4) and subsection 60(b) of the *Act*.

[45] This result is precisely that which was contemplated in the case of *Kennedy* above as referred to by the Appellant in his argument.

[46] The effect of the agreement here was to create new obligations of the Appellant and consequently created a "commencement day".

[47] On the second issue, the Court is satisfied that the Appellant had no obligation to pay amounts in respect of support and maintenance for the children under the order which included by reference the 1988 agreement. The conditions requisite for the discontinuation of the payments had been met as indicated above.

[48] The Court rejects the able arguments of the Appellant that there need be a substantial variation in the amounts payable to trigger a commencement date.

[49] Likewise, the Appellant's contention that the *Divorce Act* and the *Income Tax Act* should be read together does not offer him any relief.

[50] Further, the Appellant's contention that there was no variation in the total amount payable is not accepted. The amount payable was greater than the payments payable under the terms of the original agreement and was not a continuation of the original amount payable even though the total amount payable was the same. Under the terms of the original agreement, he need not pay any amount.

[51] The appeal is dismissed, with costs, and the assessments are confirmed.

Signed at Vancouver, British Columbia, this 16th day of April 2013.

"T.E. Margeson"

Margeson J.

CITATION:	2013 TCC 114
COURT FILE NO.:	2011-2453(IT)G
STYLE OF CAUSE:	PHILIP GERRARD and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 15, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice T.E. Margeson
DATE OF JUDGMENT:	April 16, 2013

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Christopher Kitchen

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada