Docket: 2013-4399(IT)I

BETWEEN:

KRISTIN WARNOCK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 16, 2014 at Edmonton, Alberta

Before: The Honourable Justice Woods

Appearances:

Agent for the Appellant:	Margaret Gavigan
Counsel for the Respondent:	Paige MacPherson

JUDGMENT

It is ordered that the appeal with respect to an assessment made under the *Income Tax Act* for the 2011 taxation year is dismissed.

Signed at Ottawa, Ontario this 24th day of July 2014.

"J.M. Woods"

Woods J.

Citation: 2014 TCC 240
Date: 20140724
Docket: 2013-4399(IT)I

BETWEEN:

KRISTIN WARNOCK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] This appeal by Kirstin Warnock concerns a medical expense tax credit claimed for expenses incurred with respect to a surrogacy arrangement to enable the appellant and her spouse to have a child. The Minister of National Revenue reassessed the 2011 taxation year to allow some of the expenses and to disallow others.

[2] The appellant claimed the credit with respect to three types of services: (1) medical services provided directly to the appellant, (2) medical services provided directly to the surrogate, Penny Warnock, who is the appellant's sister-in-law, and (3) legal expenses related to a mandatory surrogacy contract.

[3] The appellant appeals in respect of the disallowed amounts, which are $2,861.88 for legal services, $696.00 for ultrasound tests for the surrogate, and $318.88 for prescription drugs for the surrogate.

[4] The appellant was represented at the hearing by her mother, Margaret Gavigan, who works for the Canada Revenue Agency (CRA). Ms. Gavigan informed the Court that through her work she became aware of a similar case in which the tax credit was allowed (*Zieber v The Queen*, 2008 TCC 328). Not

surprisingly, the appellant expected that the CRA would follow this decision and allow her the same tax credit. This did not happen.

[5] The Crown referred me to another case which disagreed with *Zieber* (*Carlson v The Queen*, 2012-3063(IT)I). The reasons in *Carlson* were not published, and accordingly were not available to the appellant. The Crown obtained a transcript of the *Carlson* decision for purposes of this hearing.

I. Legislative scheme

[6] The medical expense tax credit is provided for in subsection 118.2(1) of the *Income Tax Act*. In general, the credit gives modest tax relief for "medical expenses," as defined, incurred by a taxpayer in respect of the taxpayer, the taxpayer's spouse or the taxpayer's child under the age of 18.

[7] The provision reads in part:

> **118.2(1)** For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted the amount determined by the formula
>
> A x [(B - C) + D]
>
> where
>
> A is the appropriate percentage for the taxation year;
>
> B is the total of the individual's medical expenses in respect of the individual, the individual's spouse, the individual's common-law partner or a child of the individual who has not attained the age of 18 years before the end of the taxation year
>
> […]
>
> (Emphasis added)

[8] The type of services that qualify for the credit are generally set out in s. 118.2(2) of the *Act*. Paragraphs 118.2(2)(*a*), (*l*.1), (*n*) and (*o*) are relevant to this appeal and are reproduced below.

> **118.2(2)** For the purposes of subsection 118.2(1), a medical expense of an individual is an amount paid
>
> (*a*) to a medical practitioner, dentist or nurse or a public or licensed private hospital in respect of medical or dental services provided to a person (in this subsection referred to as the "patient") who is the individual, the

> individual's spouse or common-law partner or a dependant of the individual (within the meaning assigned by subsection 118(6)) in the taxation year in which the expense was incurred;
>
> […]
>
> **118.2(2)(*l*.1)** on behalf of the patient who requires a bone marrow or organ transplant,
>
> (i) for reasonable expenses (other than expenses described in subparagraph 118.2(2)(*l*.1)(ii)), including legal fees and insurance premiums, to locate a compatible donor and to arrange for the transplant, and
>
> (ii) for reasonable travel, board and lodging expenses (other than expenses described in paragraphs 118.2(2)(*g*) and 118.2(2)(*h*)) of the donor (and one other person who accompanies the donor) and the patient (and one other person who accompanies the patient) incurred in respect of the transplant;
>
> […]
>
> **118.2(2)(*n*)** for
>
> (i) drugs, medicaments or other preparations or substances (other than those described in paragraph (*k*))
>
> (A) that are manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder or abnormal physical state, or its symptoms, or in restoring, correcting or modifying an organic function,
>
> (B) that can lawfully be acquired for use by the patient only if prescribed by a medical practitioner or dentist, and
>
> (C) the purchase of which is recorded by a pharmacist, or
>
> (ii) drugs, medicaments or other preparations or substances that are prescribed by regulation;
>
> **118.2(2)(*o*)** for laboratory, radiological or other diagnostic procedures or services together with necessary interpretations, for maintaining health, preventing disease or assisting in the diagnosis or treatment of any injury, illness or disability, for the patient as prescribed by a medical practitioner or dentist;

II. Discussion

[9] I will first consider the legal expense incurred by the appellant in connection with the mandatory surrogacy contract. This is the largest item in dispute.

[10] This expense will qualify for the credit pursuant to s. 118.2(2)(*l*.1) if it is incurred on behalf of a "patient," as defined, the patient requires an organ transplant, and the expense is reasonably incurred to arrange for the transplant.

[11] In *Zieber*, this Court concluded that expenses related to a surrogacy arrangement qualify for the tax credit because an embryo transplant is an "organ transplant" for purposes of s. 118.2(2)(*l*.1). The problem that I have in following this decision is that the decision does not discuss all relevant aspects of s. 118.2(2)(*l*.1).

[12] I would also note that *Zieber* was heard under the informal procedure and has no precedential value. Decisions under the informal procedure are rarely appealed by the Crown, and caution should be exercised in relying on them.

[13] The conclusion that I have reached is that if s. 118.2(2)(*l*.1) is considered as a whole, it does not apply to surrogacy arrangements.

[14] It is not necessary for purposes of this appeal to decide whether an embryo is an "organ." The problem is that the person receiving the transplant is not the appellant but the surrogate. The surrogate is not a patient, as defined.

[15] Subsection 118.2(2)(*l*.1) requires that a "patient" need a transplant. The term "patient" is defined in s. 118.2(2)(*a*), above, to mean the individual who is claiming the tax credit, or a spouse or a dependant. In this case, it is the surrogate who received the transplant and she is not a "patient," as required by s. 118.2(2)(*l*.1).

[16] In the unreported *Carlson* decision, Justice Archambault decided that this provision was not intended to apply to surrogacy arrangements. I agree with this conclusion.

[17] Turning to the appellant's expenses for ultrasound tests and prescription drugs for the surrogate, I have a similar problem with these expenses. The relevant provisions, s. 118.2(2)(*n*) and (*o*), above, both refer to a "patient." Parliament's intent, in my view, is that these types of services must be prescribed for the "patient," as defined. In this case, the surrogate is not a patient.

[18] For these reasons, I have concluded that the relevant provisions do not apply to the expenses that are at issue. Although the circumstances of this case are sympathetic, the appeal should be dismissed.

Signed at Ottawa, Ontario this 24th day of July 2014.

"J.M. Woods"

Woods J.

CITATION:	2014 TCC 240
COURT FILE NO.:	2013-4399(IT)I
STYLE OF CAUSE:	KRISTIN WARNOCK AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
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REASONS FOR JUDGMENT BY:	The Honourable Justice Woods
DATE OF JUDGMENT:	July 24, 2014

APPEARANCES:

Agent for the Appellant:	Margaret Gavigan
Counsel for the Respondent:	Paige MacPherson

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	

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