

Docket: 2005-3605(IT)I

BETWEEN:

KEITH WHEATLEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 25, 2007, at Saskatoon, Saskatchewan

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: Raymond Wiebe

Counsel for the Respondent: Melissa Danish, Articling Student and
Ainslie Schroeder

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2003 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Calgary, Alberta, this 13th day of June 2007.

"L.M. Little"

Little J.

Citation: 2007TCC330
Date: 20070613
Docket: 2005-3605(IT)I

BETWEEN:

KEITH WHEATLEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] The Appellant was married to Lore Marie Wheatley on February 16, 1973 (the "Former Spouse").

[2] The Appellant and the Former Spouse had two children:

1. Daughter – born March 12, 1978;
2. Son – born December 20, 1988.

[3] The Appellant and the Former Spouse separated. By Order dated August 8, 1995 Madam Justice M.Y. Carter of the Court of Queen's Bench for Saskatchewan ordered that the Appellant shall pay to the Former Spouse the amount of \$400.00 per month per child commencing July 1, 1995 and continuing on the first day of each month so long as the child remains a child within the meaning of the *Divorce Act*.

[4] The Appellant and the Former Spouse entered into Minutes of Settlement dated February 10, 1999 (the "Minutes of Settlement"). Paragraph 6 of the Minutes of Settlement provides as follows:

The existing Order for payment of child maintenance made by Madam Justice M.Y. Carter on August 8, 1995 shall continue in effect in respect of the said Son, and the said sum payable thereunder shall be \$500.00 per month for the Son to continue as long as he remains a child within the meaning of the Divorce Act. As the Daughter has ceased her full time attendance at an educational institution there shall be no sums payable in respect of her maintenance unless there is a material change in her circumstances or upon further order of the court. (Note: The names of the Son and the Daughter were removed by the Court for privacy reasons)

[5] It will be noted that the Minutes of Settlement and the Divorce Judgment increased the amount of child support payable, in respect of the Son, by the first Order from \$400.00 per month to \$500.00 per month.

[6] The Appellant paid the amount of \$500.00 per month to his Former Spouse in respect of the Son in the 2003 taxation year.

[7] When the Appellant filed his income tax return for the 2003 taxation year he deducted the child support payments.

[8] The Minister of National Revenue (the "Minister") disallowed the deduction.

B. ISSUE TO BE DECIDED

[9] The issue is whether the amount of \$500.00 in child support paid by the Appellant in respect of his Son is deductible in computing the Appellant's income in the 2003 taxation year.

C. ANALYSIS AND DECISION

[10] Subsection 56.1(4) of the *Income Tax Act* (the "Act") defines "child support amount", "commencement day" and "support amount". Subsection 56.1(4) reads as follows:

"child support amount" means any support amount that is not identified in the agreement or order under which it is receivable as being solely for the support of a recipient who is a spouse or common-law partner or former spouse or common-law partner of the payer or who is a parent of a child of whom the payer is a natural parent.

"commencement day" at any time of an agreement or order means

- (a) where the agreement or order is made after April 1997, the day it is made; and
- (b) where the agreement or order is made before May 1997, the day, if any, that is after April 1997 and is the earliest of
 - (i) the day specified as the commencement day of the agreement or order by the payer and recipient under the agreement or order in a joint election filed with the Minister in prescribed form and manner,
 - (ii) where the agreement or order is varied after April 1997 to change the child support amounts payable to the recipient, the day on which the first payment of the varied amount is required to be made,
 - (iii) where a subsequent agreement or order is made after April 1997, the effect of which is to change the total child support amounts payable to the recipient by the payer, the commencement day of the first such subsequent agreement or order, and
 - (iv) the day specified in the agreement or order, or any variation thereof, as the commencement day of the agreement or order for the purposes of this Act.

"support amount" means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and

- (a) the recipient is the spouse or common-law partner or former spouse or common-law partner of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage or common-law partnership and the amount is receivable under an order of a competent tribunal or under a written agreement; or
- (b) the payer is a natural parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

[11] "Support" in paragraph 60(b) of the *Act* reads as follows:

- (b) Support -- the total of all amounts each of which is an amount determined by the formula

$$A - (B + C)$$

where

A is the total of all amounts each of which is a support amount received after 1996 and before the end of the year by the taxpayer from a particular person where the taxpayer and the particular person were living separate and apart at the time the amount was received,

B is the total of all amounts each of which is a child support amount that became receivable by the taxpayer from the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and

C is the total of all amounts each of which is a support amount received after 1996 by the taxpayer from the particular person and included in the taxpayer's income for a preceding taxation year;

[12] Under the former rules in the *Act* (pre-May 1997) a spouse making support payments to the ex-spouse or for the support of children could deduct those payments and the recipient was required to include the payments as income. Following the decision of the Supreme Court of Canada in *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, the legislation was amended. So long as a pre-May 1997 agreement remained unchanged the deduction/inclusion system under the former legislation applied.

[13] If a new agreement were entered into or an old agreement was changed in a particular way, the deduction/inclusion regime ceased and only payments made up to the "commencement day" as defined, were deductible by the payer and included in the income of the payee.

[14] The Appellant contends that the definition of "commencement day" in subsection 56.1(4) of the *Act* does not apply in this situation and that the limitation contained in paragraph 60(b) of the *Act* does not apply.

[15] It will be noted that the definition of "commencement day" quoted above is very broad and it would apply to "new agreements" or variations of existing agreements where the child support amount payable to the recipient is changed. In this situation the Minutes of Settlement dated February 10, 1999 clearly changed

the child support amount payable to the Son by increasing the monthly payment from \$400.00 per month to \$500.00 per month.

[16] I have concluded that the definition of "commencement day" is broad enough to apply to this situation.

[17] In my opinion the Appellant is caught by the amended legislation contained in section 56.1 of the *Act* and he is not allowed to deduct the child support payments made to his Son in determining his income for the 2003 taxation year.

[18] In support of my conclusion, I have read and I adopt the Reasons for Judgment of Associate Chief Justice Bowman (now Chief Justice Bowman) in *Kovarik v. The Queen*, 2001 DTC 3716.

[19] I regret that I cannot provide any tax relief to the Appellant because he is obviously a responsible and supportive parent. However, my position is to interpret the provisions of the *Act*. I do not have the authority to amend the *Act*.

[20] The appeal is dismissed without costs.

Signed at Calgary, Alberta, this 13th day of June 2007.

"L.M. Little"

Little J.

CITATION: 2007TCC330

COURT FILE NO.: 2005-3605(IT)I

STYLE OF CAUSE: Keith Wheatley and
Her Majesty the Queen

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: April 25, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: June 13, 2007

APPEARANCES:

Counsel for the Appellant: Raymond Wiebe

Counsel for the Respondent: Melissa Danish, Articling Student and
Ainslie Schroeder

COUNSEL OF RECORD:

For the Appellant:

Name: Raymond Wiebe

Firm: McDougall Gauley
Saskatoon, Saskatchewan

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