

Docket: 2006-2889(IT)I

BETWEEN:

DARLENE HENDRICKEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on December 5, 2007,  
at Charlottetown, Prince Edward Island.  
Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant: Matthew Bradley

Counsel for the Respondent: Devon Peavoy

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**JUDGMENT**

The appeals from the assessments related to:

- (a) the adjustments made to the Appellant's income tax liability for the 2000, 2001 and 2002 taxation years;
- (b) the overpayment of the Goods and Services Tax Credit paid during the period from July 2001 to January 2004, inclusive; and

- (c) the overpayment of the Child Tax Benefit paid during the period from July 2001 to March 2004, inclusive;

are dismissed without costs.

Signed at Halifax, Nova Scotia, this 24<sup>th</sup> day of January 2008.

“Wyman W. Webb”

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Webb J.

Citation: 2008TCC48  
Date: 20080124  
Docket: 2006-2889(IT)I

BETWEEN:

DARLENE HENDRICKEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Webb J.

[1] The Appellant was reassessed for the recovery of an overpayment of the Goods and Services Tax Credit (“GSTC”) paid during the period from July 2001 to January 2004, inclusive and for the recovery of an overpayment of the Child Tax Benefit (“CTB”) paid during the period from July 2001 to March 2004, inclusive. The applicable taxation years related to the overpayment of the GSTC and the applicable base taxation years related to the overpayment of the CTB are 2000, 2001 and 2002. The assessments were issued on the basis that the Appellant was in a common-law relationship during these years and therefore the income of her common-law partner should have been taken into account in determining her entitlement to these credits. As well, other amounts claimed by the Appellant for child care expenses and as a tax credit for a wholly dependent person pursuant to paragraph 118(1)(b) of the *Income Tax Act* (“Act”) were disallowed for the taxation years 2000, 2001 and 2002. The issue in relation to each of these amounts is whether the Appellant and Harold Curran were common-law partners during the 2000, 2001 and 2002 taxation years.

[2] Common-law partner is defined in subsection 248(1) of the *Act* as follows:

“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),

and, for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;

[3] There is a proposed amendment to paragraph (a) of the above definition that, as proposed, will be effective for 2001 *et seq.* As Harold Curran is the father of the Appellant’s four children, this proposed amendment will not affect the determination of this matter as the condition as set out in paragraph (b) above has been satisfied. The Appellant disputes that she was in a conjugal relationship with Harold Curran during these years.

[4] The Appellant and Harold Curran have been living in the same house under the same living arrangement for approximately the past 20 years. The Appellant and Harold Curran have four children together. The children were born in 1988, 1991, 1995, and 1998. Both the Appellant and Harold Curran testified during the hearing and both confirmed that during the periods in question and continuing to today, they have had sexual relations with each other and were not involved in any sexual relationship with any other person.

[5] The Appellant and Harold Curran own three parcels of land as joint tenants and not as tenants in common. The house that is occupied by them (and has been occupied by them for the past 20 years) is not held jointly. This property is registered in Harold Curran’s name. The 49 acre parcel of land adjacent to the house is one of the three parcels of land that are held by the Appellant and Harold Curran as joint tenants. A building within which the Appellant operated a day care was built on this 49 acre parcel of land in 1998 or 1999 and an addition to the building was constructed in 2000.

[6] There was conflicting testimony between the Appellant and Harold Curran with respect to the conversations that they had. She indicated that any conversations they had were restricted to business, but he very clearly indicated that they would also talk about other matters as well. I accept his testimony and find that they would have general discussions about many matters, which would include business matters.

[7] The Appellant and Harold Curran operate a golf course and restaurant business. The Appellant stated that their relationship was mainly business. With respect to the household expenditures, Harold Curran would look after the house and the maintenance around the house, as well as paying the electricity and heating bills. The Appellant would purchase the groceries and clothing for the children. Harold Curran would generally eat at the restaurant and not with the Appellant. Harold Curran slept alone in his own bedroom in the house on most nights with the door to his room usually locked. The Appellant did not sleep with Harold Curran on most nights.

[8] The Appellant and Harold Curran maintained their own bank accounts and their own vehicles.

[9] With respect to social events, the Appellant and Harold Curran would attend wakes together. However, for most other events they would arrive separately. The Appellant indicated that this is largely due to her work. She works as a forest technician and cooks at the restaurant. She indicated that they would usually each drive their own vehicle to social events.

[10] One of their children has Down's syndrome as well as hearing problems and a heart condition. As a result this child requires regular medical attention. The Appellant indicated she would be the one who would take the child to her medical appointments and if she was not available, the Appellant would have her mother take the child. Only if no one else was available, then Harold Curran would take the child to her appointment. This same arrangement – the Appellant, then her mother and finally, if no one else was available, Harold Curran, would apply to the other children as well.

[11] The Appellant and Harold Curran had separate listings in the telephone book. As well, the Appellant and Harold Curran did not at any time exchange any gifts.

[12] In *Milot v. Her Majesty the Queen*, [1996] 1 C.T.C. 2247 Lamarre Proulx J. outlined the criteria to be examined in determining whether a conjugal relationship exists. She noted that:

12 This definition leads us to consider the notion of conjugal relationship. When can two persons be considered as living in a conjugal relationship? This notion has often been studied for the purposes of various statutes. In Quebec, for example, this notion was studied in particular for the application of the Automobile Insurance Act, R.S.Q., c. A-25, section 2, paragraph 2, and the Act respecting the Québec Pension Plan, R.S.Q., c. R-9, section 91. See *Les personnes et les familles*, Knoppers, Bernard et Shelton, Tome 2, Les éditions Adage, the first chapter of which is entitled “Les familles de fait”. It states that cohabitation is fundamental in a conjugal relationship and in conjugal conduct. That conduct may be determined through sexual relations, emotional and intellectual exchange, financial support and common knowledge.

13 In their book, *Introduction to Canadian Family Law*, Carswell, 1994, the Ontario authors Payne and Payne refer to the judgment by Kurisko J. in *Molodowich and Penttinen*, 17 R.F.L. (3d) 376. I cite these authors at pages 38 and 39 because it seems to me they provide an excellent synthesis of the elements that must apply in order to determine whether two persons are living in a conjugal relationship:

14 Not all arrangements whereby a man and a woman live together and engage in sexual activity will suffice to trigger statutory support rights and obligations. As was observed by Morrison J.A., of the Nova Scotia Court of Appeal:

I think it would be fair to say that to establish a common law relationship there must be some sort of stable relationship which involves not only sexual activity but a commitment between the parties. It would normally necessitate living under the same roof with shared household duties and responsibilities as well as financial support.

15 More specific judicial guidance as to what constitutes cohabitation or a conjugal or marriage-like relationship is found in a judgment of the Ontario District Court, wherein Kurisko D.C.J. identified the following issues as relevant:

### **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?

16 As Kurisko D.C.J. further observed, the extent to which each of the aforementioned seven different components will be taken into account must vary with the circumstances of each particular case.

[13] In *Rangwala v. Her Majesty the Queen*, [2000] 4 C.T.C. 2430, (2000) 54 DTC 3652, Campbell J. stated that:

25 In reviewing the relevant case law it is clear that each of the criteria must be given its proper weight in the context of each particular case in determining whether a conjugal relationship exists or not. Each case by its nature will present its own unique set of facts to which the seven criteria established in *Molodowich* are to be applied. This approach is meant to provide a certain amount of flexibility in deciding each case.

[14] In *Roby v. Her Majesty The Queen*, [2002] 1 C.T.C. 2579, Bowman A.C.J. (as he then was) stated that:

7 In *Kelner v. R.* (1995), [1996] 1 C.T.C. 2687 (T.C.C.), 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 (T.C.C. [Informal Procedure]), and *Raghavan v. R.*, [2001] 3 C.T.C. 2218 (T.C.C. [Informal Procedure]), 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), 10 R.F.L. (5<sup>th</sup>) 352 (Ont. S.C.J.)] 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.

[15] In this case the application of some of the criteria as set out in *Milot* to the facts suggests a conjugal relationship and application of others suggest that it was not a conjugal relationship.

[16] With respect to the shelter, the Appellant and Harold Curran did live under the same roof and although in general Harold Curran would sleep alone in his bedroom, occasionally the Appellant would sleep with him and this pattern continued through the period. No one else occupied the house except the Appellant, Harold Curran, and their children.

[17] The parties had sexual relations throughout the period in question and still continue to have sexual relations, although both admitted that this was only occasionally. They maintained an attitude of fidelity to each other. Their feelings toward each other were characterized as feelings of respect and friendship.

[18] I find that the Appellant and Harold Curran communicated on a personal level about matters other than just business. There is no indication that either one of them had any problems with illness during the period. The one child required regular medical attention and this was the responsibility of the Appellant. They did not buy gifts for each other on special occasions.

[19] The Appellant prepared meals for herself and the children and Harold Curran would eat at the restaurant. The laundry would be pooled and all done together. The Appellant would do the shopping for the household. Harold Curran would look after the household maintenance. The Appellant and Harold Curran would attend wakes together, but for other social events they would arrive separately. The Appellant would spend Christmas with her family and Harold Curran would spend Christmas with his sister. There did not appear to be any interaction between Harold Curran and the Appellant's family and between the Appellant and Harold Curran's family.

[20] They both indicated that when the members of the community would suggest or imply that they were living together as a couple, they would correct them.

[21] The financial arrangements are that Harold Curran would provide the shelter, and that the Appellant would be responsible for the groceries, the clothing for the children and their recreational needs. With respect to the property, while the house property is owned by Herald Curran, they did have three other parcels of land that were held by them as joint tenants. With respect to the children, all the children acknowledged Harold Curran as their father and he did care for the children. There is little evidence that he participated in any of the activities of the children. The Appellant was the person who attended school meetings and attended to the other needs of the children.

[22] Counsel for the Appellant also referred to an earlier case under the *Unemployment Insurance Act* that dealt with the relationship between the Appellant and Harold Curran in 1994. The finding in that case was that they were, at that time, dealing with each other at arm's length. However, that is not the issue in this case. In this case the issue is whether they were in a conjugal relationship not whether they were dealing with each other at arm's length.

[23] In this case, in my opinion, the Appellant has failed to satisfy the onus that was on her to establish that she was not living in a conjugal relationship with Harold Curran. The Appellant and Harold Curran have four children together. They have been living in the same household under the same arrangement for 20 years. They continue to have sexual relations with each other and with no one else. They have three properties together as joint tenants. Each participates in household chores as the Appellant does the laundry and Harold Curran does the maintenance work around the house. They each bear some of the financial responsibility for the household as Harold Curran provides the shelter and pays for the electricity and heat and the Appellant pays for the groceries and the clothing for the children.

[24] As a result, the appeals are dismissed without costs.

Signed at Halifax, Nova Scotia, this 24<sup>th</sup> day of January 2008.

“Wyman W. Webb”

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Webb J.

CITATION: 2008TCC48

COURT FILE NO.: 2006-2889(IT)I

STYLE OF CAUSE: DARLENE HENDRICKEN AND HER  
MAJESTY THE QUEEN

PLACE OF HEARING: Charlottetown, Prince Edward Island

DATE OF HEARING: December 5, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb

DATE OF JUDGMENT: January 24, 2008

APPEARANCES:

Counsel for the Appellant: Matthew Bradley  
Counsel for the Respondent: Devon Peavoy

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