Docket: 2008-2419(IT)I

BETWEEN:

LAURIE LYNN GARDIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 21, 2009 at Calgary, Alberta

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Robert Neilson

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of May, 2009.

"G. A. Sheridan"

Sheridan J.

Citation: 2009TCC262
Date: 20090521
Docket: 2008-2419(IT)I

BETWEEN:

LAURIE LYNN GARDIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Laurie Lynn Gardin, is appealing the inclusion by the Minister of National Revenue of child support in her 2004 income. The Appellant was the only witness to testify. Except for the underlined portion of subparagraph 11(d), the Appellant does not dispute the assumed facts set out in the Reply to the Notice of Appeal:

> 11. In so reassessing the Appellant for the 2004 taxation year, and in confirming the reassessments, the Minister assumed the following facts:
>
> (a) the Appellant and her former spouse Kenneth Creig ("Kenneth") lived separate and apart because of a breakdown of their marriage;
>
> (b) the Appellant and Kenneth have one child, [A.] born July 14, 1984;
>
> (c) by a Court Order ("Order") dated November 16, 1994:
>
> (i) Kenneth was required to pay the Appellant $400.00 monthly as maintenance for the support of his child [A.] commencing on the 1st day of December, 1994, until [A.] attained 18 years of age, or sooner if he became completely self-supporting for a period of 3 months, whichever event occurred first;

(ii) if [A.] attended school or university past the age of 18 years, and was living with the Appellant, then maintenance was to continue to the age of 21 years; and

(iii) the monthly maintenance payments were to be increased by 5% yearly commencing on the 1st day of December, 1995 and each year thereafter until Kenneth was no longer obligated to pay.

(d) Kenneth paid monthly support payments to the Appellant as follows:

Date of Cheque	Amount of Cheque
January 1, 2004	$ 620.51
February 1, 2004	$ 620.51
March 1, 2004	$ 620.51
April 1, 2004	$ 620.51
May 1, 2004	$ 620.51
June 1, 2004	$ 620.51
August 1, 2004	$ 1241.11
September 1, 2004	$ 620.52
October 1, 2004	$ 620.52
November 1, 2004	$ 620.52
December 1, 2004	$ 651.54
Total	$ 7,477.27

[2] It is common ground that the Order was made under the so-called "Old Regime" which permitted the deduction of child support by the payor and required its inclusion in the income of the recipient. It is also agreed that from the time her former spouse's obligations began under the Order, he paid the amounts directly to the Director of Maintenance Enforcement (Alberta) in accordance with paragraph 4 of the Order which reads:

> 4. **IT IS ORDERED** that the amounts owing under this Order be paid to the Director of Maintenance Enforcement, and shall be enforced by the Director unless the creditor files with the Court and the Director a notice in writing that she does not wish the Order to be enforced by the Director, pursuant to Section 7 of the Maintenance Enforcement Act.[1]

[3] The Appellant challenges the Minister's inclusion of child support in her 2004 income on the following grounds:

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[1] Exhibit A-2.

1. that the annual increases to the amount of child support provided for under paragraph 2 of the Order constituted a change in the amount of child support thereby triggering a “commencement day” and ending her obligation to include the amounts paid in her 2004 income; and

2. alternatively, that the amounts paid to Maintenance Enforcement do not fall within the definition of “support amount” because they were deposited directly into her son’s solely held bank account. The Appellant contends, therefore, that she did not “receive” them and had no discretion over their use.

[4] The Appellant’s first argument may be quickly disposed of in that the Federal Court of Appeal has held that changes such as cost-of-living increases created by a pre-1997 order or agreement do not amount to a change in the amount of the child support within the meaning of paragraph 56.1(4)(*ii*): *Kennedy v. Her Majesty the Queen*, 2004 FCA 437 at paragraph 13; *Callwood v. Her Majesty the Queen*, 2006 FCA 188 at paragraph 41.

[5] As for the alternative argument, I accept the Appellant’s evidence that in 2003, when her son was 19 years old, she and her former spouse agreed that the amounts he was required by the Order to pay to Maintenance Enforcement would be deposited directly into their son’s bank account. The Appellant’s reasons for agreeing to this change were as follows: in that year, her son was over 18 and could no longer be claimed as a dependent under the *Income Tax Act*; further, receipt of child support on her son’s behalf after he was 18 would have ended the Appellant’s entitlement to certain provincial disability payments upon which she relied on for a portion of her income; and she hoped this would make relations with her former spouse less difficult. He had always been opposed, in principle, to the idea of having to pay amounts in respect of his son’s support to the Appellant and this had contributed to his chronic failure to pay the full amounts due under the Order in a timely fashion.

[6] The Respondent’s position is that, notwithstanding that the amounts were paid directly to her son in 2004, the Appellant continued to have discretion over them. They were receivable by her under the Order; they were paid to her son only as a result of her direction to Maintenance Enforcement to deposit the amounts received from the Appellant’s former spouse in her son’s bank account rather than her own.

Counsel for the Respondent cited the following passage from a decision of the Federal Court of Appeal, *Veilleux v. Canada*[2]:

> 36 It is apparent from subsections 56.1(4) and 60.1(4) that as long as the recipient has discretion as to the use of amounts paid and received as an allowance on a periodic basis, these amounts constitute support amounts that the recipient must include in his or her income under section 56 and that the payer may deduct under section 60. …

[7] I regret to say that I am persuaded by the Respondent's argument. I say "regret" because I accept the Appellant's evidence that she believed by making the changes with Maintenance Enforcement, her obligation to include the amounts paid by her former spouse in her income would cease. I also believe her testimony that for the reasons set out above, she would not have reversed (and, in fact, did not reverse) her direction to Maintenance Enforcement. However, the fact remains that there was no legal impediment to her changing that direction had she wished to do so.

[8] The Appellant represented herself at the hearing. She carefully analyzed the complicated legislative provisions and made an impressively thorough review of the case law[3]. Many of the cases she cited concerned payors seeking a deduction for support paid directly to the child but unfortunately, none provides a basis for avoiding the conclusion that in 2004, all of the statutory criteria for the inclusion of the amounts paid by her former spouse were satisfied: the amounts constituted an allowance receivable by the Appellant on a periodic basis under the Order. At no time was the Order varied to change the recipient and it continued to be enforced by the Director of Maintenance Enforcement in accordance with its terms. Accordingly, the Appellant remained the person entitled to receive the payments under the Order and retained her discretion over their use. She exercised that discretion by directing Maintenance Enforcement to deposit the amounts received from her former spouse in her son's bank account.

[9] For the reasons set out above, the appeal of the 2004 taxation year must be dismissed.

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[2] 2002 FCA 201.

[3] *Clermont v. Canada,* [2003] T.C.J. No. 603; *Robichaud v. Canada,* [1999] 4 C.T.C. 2654 (T.C.C.); *Marcil v. Canada,* [2000] T.C.J. No. 916; *Joncas v. Canada,* [2004] 2 C.T.C. 2253 (T.C.C.); *Robinson v. Canada,* [2000] 4 C.T.C. 2174 (T.C.C.); *Demey v. Canada,* [2000] 2 C.T.C. 2026 (T.C.C.); *Miguelez v. Canada,* [1999] 1 C.T.C. 2665 (T.C.C.); *Chabot v. Canada,* [2007] T.C.J. No. 14; *Northcott v. Canada,* [2001] 3 C.T.C. 2639 (T.C.C.).

Signed at Ottawa, Canada, this 21st day of May, 2009.

"G. A. Sheridan"

Sheridan J.

CITATION:	2009TCC262
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REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
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APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Robert Neilson

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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