

Citation: 2009 TCC 36

Docket: 2008-496(IT)I

BETWEEN:

KENNETH SCOTT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

CERTIFICATION OF TRANSCRIPT OF
REASONS FOR JUDGMENT

Let the attached certified transcript of my Reasons for Judgment delivered orally from the Bench at Vancouver, British Columbia, on November 28, 2008, be filed.

“Diane Campbell”

Campbell J.

Signed in Ottawa, Canada, this 2nd day of February 2009.

1 IN THE TAX COURT

2 2008-496 (IT) I

3 BETWEEN:

4 KENNETH SCOTT,

5 Appellant;

6 - and -

7 HER MAJESTY THE QUEEN,

8 Respondent.

9 -----
10 Held before Madam Justice Campbell in Courtroom No. 602, 6th
11 Floor, 701 West Georgia Street, Vancouver, B.C., on Friday,
12 November 28, 2008.

13 -----
14 APPEARANCES:

15 Mr. K. Scott,

Appearing On His Own Behalf;

16 Ms. C. Akey,

Appearing for the Respondent.

17 -----
18 THE REGISTRAR: J. Platt

19 -----
20 Allwest Reporting Ltd.
21 #1200 - 1125 Howe Street
22 Vancouver, B.C.
23 V6Z 2K8

24 Per: K. Bemister
25

REASONS FOR JUDGMENT

1
2 (Delivered Orally in Vancouver, B.C. on November 28, 2008)

3 JUSTICE: Let the record show that I am
4 delivering oral reasons in the appeals of Kenneth Scott
5 which I heard earlier this week.

6 These appeals are in respect to the
7 Appellant's 2005 and 2006 taxation years. There are a
8 number of issues in each of these taxation years, one of
9 which is the Appellant's claim for the Canada Child Tax
10 Benefits.

11 It was agreed by the Appellant at the
12 outset of the hearing and during the submissions that his
13 claim for the Child Tax Benefit for the 2005 base taxation
14 year was *res judicata*. A notice of determination
15 respecting this Child Tax Benefit had been issued on
16 March 20, 1997. When the Appellant objected, the Minister
17 confirmed the notice of determination for the 2005 base
18 taxation year.

19 On September 7, 2007 the Appellant
20 appealed, among other things, Child Tax Benefits for the
21 2000 to 2005 base taxation years. This matter proceeded
22 to this Court and on March 12, 2008 Justice Miller
23 dismissed the Appellant's appeal for the Child Tax
24 Benefits in respect to the 2001 through to the 2005 base
25 taxation years. Since the issue of Child Tax Benefits for

1 the 2005 base taxation year has previously been
2 adjudicated upon by her decision that issue by consent is
3 quashed as *res judicata*.

4 With respect to the Child Tax Benefit for
5 the following year, the 2006 base taxation year, the
6 Appellant agreed to have this issue quashed because it was
7 not properly before the Court as the Minister has not
8 issued a notice of determination pursuant to
9 subsections 152(3.2) and (3.3) respecting the base
10 taxation year from which the Appellant may object or
11 appeal. However, it is open to the Appellant to properly
12 file for notice of determination in respect to potential
13 future claims for this Child Tax Benefit.

14 The issues remaining in these appeals
15 include the following:

16 1. The Appellant's claim for additional
17 child care expenses in excess of the amounts allowed in
18 respect to both the 2005 and 2006 taxation years for
19 specialized schooling expenses for his son Emory.

20 2. The Appellant's claim for an eligible
21 dependent deduction for his son Eliot in both the 2005 and
22 2006 taxation years.

23 3. The Appellant's claim for disability
24 tax credit for his son Emory in both the 2005 and 2006
25 taxation years.

1 4. The Appellant's claim for a deduction
2 in respect to legal expenses incurred.

3 5. The Appellant's claim for medical
4 expenses in respect to his son Emory's attendance at
5 Kenneth Gordon School.

6 6. CRA's mistake in calculating support
7 arrears payable by the Appellant and the resulting
8 hardship upon him. And finally,

9 7. The imposition of penalties and
10 interest.

11 By way of background information the
12 Appellant and Tonette Ross were married on August 4, 1991.
13 They are the parents of three sons. They separated in 2001
14 and since that date they have been involved in a number of
15 lengthy court proceedings over the years in an attempt to
16 reach a satisfactory resolution to custody, access and
17 support issues together with a division of and
18 equalization of the assets. According to some of the
19 Appellant's documents, there have been some 17 Orders
20 issued by the Supreme Court of British Columbia. The
21 first Order of the Supreme Court of British Columbia by
22 Master Donaldson dated October 24, 2002 provided, among
23 other things, that both parents would share joint
24 guardianship of the children with the mother,
25 Tonette Ross, having the primary day-to-day responsibility

1 of the children.

2 The Appellant was ordered to pay \$1,174
3 monthly commencing November 1, 2002 together with
4 66 percent of childcare costs. A subsequent order dated
5 November 28, 2003 varied the 2002 order slightly. On
6 September 1, 2004 another order issued which provided that
7 the parents were to share joint custody and guardianship
8 of the children and that accumulated child support arrears
9 would be satisfied from the father's share of the family
10 assets.

11 By Order dated January 11, 2005 the
12 Appellant's monthly child support amount was reduced and
13 set at \$850 together with 55 percent of child care
14 expenses relating to daycare and schooling. On October 27,
15 2005 the Court reduced the father's monthly child support
16 payment from \$850 to \$425 effective October 1, 2005.

17 In 2005 one of the children was assessed by
18 Doctor Joan Pinkus and diagnosed with a learning
19 disability. In 2005 and 2006 this son attended a
20 specialized school, the Kenneth Gordon School, at an
21 approximate cost of \$12,000 yearly. An application was
22 brought by Tonette Ross respecting existing support and
23 access arrangements. By Order dated July 21, 2006
24 Justice Gill specified several access provisions
25 concerning the children and in dealing with the additional

1 expense of having one of the children attending at
2 Kenneth Gordon School, Justice Gill at paragraph 5, of
3 that order stated in part:

4 "For greater certainty it is declared that the
5 Defendant has an obligation to contribute to
6 the expense of Emory's attendance at
7 Kenneth Gordon School for a maximum of two
8 years and that the Defendant's obligation in
9 this regard is subsumed within the current
10 monthly child support payment."

11 The Appellant's position is that he contributed to his
12 son's schooling pursuant to paragraph 5 of that Order that
13 increased his support payment and referenced that it was
14 to assist with schooling expenses. The Appellant argued
15 that he should be entitled to claim a percentage of this
16 school expense as either a medical expense or as a
17 childcare expense.

18 In 2005 the Appellant deducted childcare
19 expenses of \$3,475 and in 2006 childcare expenses of
20 \$4,402. The Minister allowed both of these amounts and
21 they were in respect to his son Ethan. The Appellant also
22 claimed 55 percent of the total paid by Tonette Ross in
23 respect to Emory's specialized schooling expenses.
24 According to the Appellant's evidence, these amounts would
25 be approximately \$2,100 in 2005 as his share and

1 approximately \$2,876 in 2006. According to the evidence
2 Ms. Ross paid these expenses in full as documented by two
3 receipts received by her from the school.

4 In reading paragraph 5 it is clear that the
5 Appellant was to be responsible for some amount of the
6 schooling expenses but there is no evidence that assists
7 me in extracting that amount from the wording. This is
8 the first problem. The ideal wording for tax purposes
9 would have been to state the exact amount that the
10 Appellant was responsible for and to have it paid directly
11 by the Appellant to the school.

12 But I also have a second problem. In a
13 shared parenting arrangement such as existed here, I
14 believe each parent can deduct childcare expenses that
15 each incurs for those periods when the child resides with
16 them. It was clear from the evidence that the Appellant
17 is actively involved in the parenting of his three sons.
18 However, I do not have sufficient evidence before me to,
19 firstly, extricate the amount or percentage that the order
20 addresses but does not specifically identify, and
21 secondly, the evidence to identify the specific times that
22 this child resided with the Appellant during these school
23 years.

24 The amounts cannot be claimed as a medical
25 expense either because of subsection (c) of 118.1 which

1 references receipt by another taxpayer of this amount, the
2 Appellant's former spouse here, and consequently this
3 precludes him from claiming under that section as well.

4 In respect to the next issue, the Appellant
5 is precluded by the relevant legislation from claiming any
6 of his children as an eligible dependant for the purpose
7 of computing his non-refundable tax credits for both
8 taxation years. Unfortunately for the Appellant it is the
9 wording of subsection 118(5) which prevents him from
10 claiming an amount under 118(1) because he is the
11 individual required to pay a support amount within the
12 meaning of 56.1(4). This created an inherently unfair
13 result for this Appellant but it is simply the result
14 dictated by a strict interpretation of this legislation.

15 This same reasoning also applies to the
16 Appellant's claim for a disability tax credit in respect
17 to his son Emory in both taxation years. A disability tax
18 credit may be claimed under subsection 118.3(2) of the
19 Act. Since this provision refers back to 118(1), it
20 brings us full circle again to 118(5), resulting in
21 disqualifying the Appellant from claiming this credit
22 because he is the individual that pays the child support.

23 The Appellant's evidence respecting his
24 claim for legal expenses is somewhat confusing. He is
25 stating that some of his claim is in reference to his

1 access, custody and support applications while the
2 remainder involves legal expenses relating to eight
3 commercial and five residential properties contained
4 within a co-operative to which he and his wife owned a
5 percentage interest.

6 The matrimonial home, which Ms. Ross
7 retained, was one of the units inside this co-operative
8 housing building. The Appellant testified that as an
9 owner of one of the units in this type of housing project
10 you are also a percentage owner in all of the other units
11 within the complex. The Appellant took legal action to
12 resolve existing problems within this project and to
13 ensure the units could be sold. The amount that was
14 realized on the sale and the Appellant's portion of the
15 proceeds was not insignificant. If I recall properly it
16 was approximately \$47,000 or \$48,000.

17 The Appellant claimed the legal expense
18 amount of \$6,153 in 2005. It is unclear but, as far as I
19 can ascertain from the evidence and the documentation, the
20 Appellant made no claim for legal expenses in respect to
21 his family issues in 2006 although the Appellant at times
22 attributed part of the legal expense amount to his ongoing
23 family court applications, while at other points in his
24 testimony he seems to attribute it wholly to the pursuit
25 of the resolution of the sale of the units in this co-

1 operative project.

2 I am of the opinion that the entire amount
3 had to have been paid in respect to the legal action
4 regarding the co-op project because throughout the years
5 after 2002 he testified that he was always self
6 represented in the family matters. Although he did seek
7 legal advice after the separation he stated he could not
8 afford a solicitor to continue to represent him. In
9 addition all of the orders and court applications, which I
10 have before me, indicate that he was always self-
11 represented in court throughout the years in these
12 appeals, as well as for the proceeding years.

13 Respondent counsel argued that the housing
14 project was not an investment property and he is precluded
15 from claiming legal expenses pursuant to
16 subsection 60(0.1). This subsection precludes a claim for
17 such expenses where they relate to a division or
18 settlement of property arising out of the marriage.
19 However, the 2004 order speaks of equalization of assets
20 in a general way but there is no specific reference to the
21 sale of these co-operative units. In addition there is no
22 listing of reference of this percentage interest within
23 the list of assets provided in that order.

24 The Appellant's evidence led me to believe
25 that without his initiative in respect to a resolution to

1 some of the recurring problems in the project, it would
2 have been difficult to sell them and certainly the
3 percentage proceeds may not have been as great as they
4 were. I believe this was an investment property in which
5 they happened to have a unit, the matrimonial home. I am
6 therefore allowing the Appellant's claim for the legal
7 expenses in 2005.

8 In respect to the final two issues raised
9 by the Appellant, although it is regrettable that CRA did
10 not thoroughly read the Appellant's court documentation
11 and incorrectly assumed that there existed child support
12 arrears, the arrears payable by the Appellant were removed
13 from their records in May of 2004. Consequently, I can do
14 nothing more in this respect, although I understand from
15 the Appellant that this error lasted over a period of time
16 and caused him a great deal of personal financial
17 hardship.

18 Finally with respect to the Appellant's
19 request that I reduce or cancel the penalties and interest
20 that have accrued to his assessment, I have no authority
21 within the statute to grant any type of relief in this
22 regard.

23 The appeal for the 2005 taxation year is
24 therefore allowed without costs to enable the Appellant to
25 claim the legal expenses of \$6,153. The appeal for the

1 2006 taxation year is dismissed without costs.

2

3 I HEREBY CERTIFY THAT THE FOREGOING
4 is a true and accurate transcript
5 of the proceedings herein to the
6 best of my skill and ability.

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7 K. Bemister, COURT REPORTER

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CITATION: 2009 TCC 36

COURT FILE NO.: 2008-496(IT)I

STYLE OF CAUSE: Kenneth Scott and
Her Majesty the Queen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: November 25, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Diane Campbell

DATE OF ORAL JUDGMENT: November 28, 2008

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Christa Akey

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
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