

Citation: 2009 TCC 32

Docket: 2008-161(IT)I

BETWEEN:

JAMES BROAD,

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 26, 2008, be filed.

“Diane Campbell”

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Campbell J.

Signed in Ottawa, Canada, this 27th day of January 2009.

IN THE TAX COURT

2008-161 (IT) I

BETWEEN:

JAMES BROAD,

Appellant;

- and -

HER MAJESTY THE QUEEN,

Respondent.

Held before Mme. Justice Campbell in Courtroom No. 602, 6th Floor, 701 West Georgia Street, Vancouver, B.C., on Wednesday, November 26, 2008.

APPEARANCES:

Mr. J. Broad,

On his own behalf;

Ms. C. Akey,

Counsel for the Respondent.

THE REGISTRAR: J. Platt

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Per: S. Leeburn

**REASONS FOR JUDGMENT**

(Delivered Orally from the Bench  
in Vancouver, B.C. on November 26, 2008)

JUSTICE: All right, let the record show, please, that I am delivering oral reasons in the matter of James Broad, which I heard earlier this week.

This appeal is in respect to the Appellant's 2005 taxation year. In computing his income for this taxation year the Appellant deducted support payments totalling \$9,000. The Minister disallowed the entire amount. The issue is whether the Appellant can deduct the support payments in respect to this 2005 taxation year.

In addition to the Appellant, I heard evidence from the Appellant's former common-law spouse, Laurie Randall, and from Greer Gibson, a solicitor who represented Laurie Randall for a period of time in the 1990's. The Appellant co-habited with Laurie Randall from April 1, 1989, until July 1, 1990. Their son Matthew was born on October 1, 1989. Subsequent to the separation, they executed an agreement which was dated July 1, 1990, although the evidence suggested it was actually signed sometime later in 1991.

The evidence of the Appellant and that of Laurie Randall provided two different versions of the

1 circumstances of Laurie's execution of this agreement.  
2 She acknowledged signing the agreement, but indicated she  
3 had no opportunity to review it. Although the Appellant  
4 is a lawyer, he had a friend draw up the agreement, as he  
5 did not practice in the area of family law. The relevant  
6 provisions in this agreement provided for the custody of  
7 Matthew, and addressed access to the Appellant. At  
8 paragraph 3 of the agreement, the Appellant was to pay the  
9 sum of \$750 monthly for the maintenance of Matthew.  
10 Although the agreement was signed some time in 1991, the  
11 Appellant had been paying this monthly amount for child  
12 support since July 1, 1990, the date of the separation.  
13 On August 1, 1993, the parties resumed co-habitation and  
14 lived together until February 1995, at which time they  
15 separated for good.

16 During this second period of co-habitation,  
17 the Appellant stopped paying monthly child support  
18 payments. When they separated for the second time, the  
19 Appellant recommenced the same monthly payments of \$750  
20 for Matthew. According to the evidence of the Appellant,  
21 he believed that the 1990 separation agreement was still  
22 valid and in effect and enforceable. In early 1995, he  
23 requested a friend, a Mr. Fred Banning, who practiced in  
24 the area of family law, to write to Laurie's lawyer,  
25 Greer Gibson. The first letter to Ms. Gibson is dated

1 February 15, 1995. That letter reads as follows:

2 "Enclosed is a cheque in the amount of \$750.00.  
3 For tax purposes, this must be made pursuant to  
4 a written agreement. I would propose the  
5 agreement simply provide that Mr. Broad pay  
6 \$750 on the 15<sup>th</sup> of each month, without  
7 prejudice to either parties rights, and that  
8 the agreement can be cancelled by either party  
9 on 15 days notice. I would also ask that you  
10 sign this letter as your client's agent  
11 indicating your approval of this arrangement  
12 and that this letter so endorsed will  
13 constitute the written agreement. You advised  
14 me that there may need to be some adjustment of  
15 the payment dates in the first 30 days due to  
16 moving expenses and the like. If so, please  
17 provide the details and I will obtain  
18 instructions."

19 On March 6, 1995, Ms. Gibson responded as  
20 follows:

21 "Please find enclosed herein the letter of  
22 February 15<sup>th</sup>, 1995, duly endorsed, and we  
23 agreed that this endorsement covers the extra  
24 sum of \$375.00 for the moving expenses."

25 The final correspondence in this exhibit is

1 the same February 15, 1995 letter apparently executed by  
2 Ms. Gibson.

3 In June, 1999, Laurie decided to move to  
4 Victoria. She testified that she received a copy of the  
5 Appellant's 1998 return, together with the Federal support  
6 guidelines with "post-it" notes attached to each, which  
7 advised her that the Appellant's income did not warrant  
8 the \$750 monthly support amount that he had been paying,  
9 and that the guidelines suggested a \$343 monthly payment.  
10 Because the Appellant requested a return of his post-dated  
11 monthly cheques for \$750 each, and because she was tired  
12 of dealing with these issues, she returned his cheques to  
13 him, and the Appellant now commenced payments of  
14 \$343 monthly. These payments continued until she received  
15 a cheque for \$2,442 under a letter dated November 18,  
16 1999, from the Appellant's solicitor, Richard Rhodes. The  
17 letter to the Appellant is short, and simply encloses a  
18 trust cheque for the amount, advising that it represented  
19 a catch-up of the arrears of maintenance.

20 This letter was a follow-up to a letter  
21 dated November 9, 1999, from Mr. Rhodes to Laurie,  
22 suggesting certain access arrangements for the Appellant,  
23 to accommodate the removal of Matthew to Victoria, as well  
24 as his confirmation that he held this cheque for \$2,442 in  
25 respect of arrears of maintenance pursuant to their

1 maintenance agreement.

2           At this time, Laurie hired Trudy Brown to  
3 represent her in this matter. Eventually in early 2000,  
4 the Appellant commenced an action by way of Statement of  
5 Claim to obtain and resolve access issues respecting  
6 Matthew. The only reference to maintenance was at  
7 paragraph 26, where the Appellant states that he has been  
8 paying child support in the amount of \$750 per month  
9 pursuant to the separation agreement.

10           The Appellant's evidence was that he  
11 reduced the monthly payments to \$343 because he was  
12 personally experiencing severe financial problems in both  
13 his law practice and his private business endeavors, and  
14 that when he hired Mr. Rhodes to represent him, he was  
15 advised to recommence the \$750 monthly payments. In 2006,  
16 this Court issued a judgment wherein Laurie Randall was  
17 not required to include in income those child support  
18 payments made by Mr. Broad, the Appellant in this appeal,  
19 in respect to the 2003 taxation year. Justice Beaubier  
20 made certain findings respecting the 1990 separation  
21 agreement in that decision. However, I am not bound by  
22 those findings of fact.

23           The issue to be decided depends on whether  
24 the main payments the Appellant made in 2005 were paid  
25 pursuant to a written agreement under subsection 60(b).

1 The Respondent contends that the 1990 separation agreement  
2 terminated upon reconciliation of the parties in 1993, and  
3 therefore it did not govern payments made by the Appellant  
4 after 1995. In addition, there was no subsequent written  
5 agreement, as the 1995 exchange of letters do not equate  
6 to a continuation of the 1990 agreement or to a new  
7 agreement. The Appellant's position is that he has an  
8 enforceable and valid separation agreement, the  
9 1990 separation agreement, which specifies regular support  
10 payments. This was his main focus, although he also  
11 argued that the 1995 letters could be considered a  
12 re-statement of the original 1990 agreement, or they could  
13 actually be viewed as standing on their own as an  
14 agreement. He alluded to the fact that those letters  
15 might be considered as a recommencement of the  
16 1990 agreement.

17 There is no question here that the parties  
18 reconciled between August 1993 and February 1995, or  
19 approximately for a 19-month period. So what will be the  
20 effect then of this reconciliation period upon the  
21 1990 separation agreement? That agreement contained a  
22 clause referencing the effect of reconciliation. It  
23 stated at paragraph 1, and I quote:

24 "If James and Laurie hereafter by mutual  
25 consent cohabit as man and wife, this Agreement



1           and all the covenants herein contained shall  
2           remain in force unless and until James and  
3           Laurie mutually agree in writing to terminate  
4           or amend this agreement."

5                   The general common law rule is that a  
6           reconciliation, such as occurred in these facts, will  
7           terminate a prior separation agreement between the  
8           parties.

9                   Quite apart from the issues raised by  
10          Laurie's evidence of whether she signed the agreement  
11          voluntarily, read it prior to signing or was given the  
12          opportunity to obtain a legal opinion or whether duress  
13          was exerted in having her sign, I do not believe that this  
14          clause is sufficient to save the 1990 agreement. I do not  
15          believe nor was I provided any evidence that the parties  
16          turned their minds specifically to the effect of a  
17          potential reconciliation. The parties moved in together,  
18          with their son, and the Appellant ceased making the  
19          \$750 monthly support amount for approximately 19-months.  
20          There is just no logic in the position that this agreement  
21          was intended by both parties to survive a reconciliation,  
22          when all of their actions reverted again to their prior  
23          co-habitation arrangement.

24                   The evidence in no way suggests that both  
25          parties had a clear and specific intent that this

1 agreement was a continuing and binding agreement upon them  
2 in respect to access and support payments. If I concluded  
3 that it survived the reconciliation, which I do not, then  
4 I would have to find some rationalization for the  
5 Appellant's actions subsequent to the second break up in  
6 1995. And those are, 1) Why did both parties engage  
7 lawyers in 1995 and seek legal advice if they considered  
8 that the terms of the 1990 agreement survived and could be  
9 relied upon; 2) why did neither lawyer in 1995 refer to  
10 the terms of the 1990 agreement if everyone still  
11 considered it effective; and 3) why would the Appellant, a  
12 lawyer himself, risk the legal consequences of  
13 unilaterally reducing his support payment of \$750 to \$343,  
14 again if this 1990 agreement was valid?

15 All of these actions suggest quite the  
16 contrary. They suggest that, and are consistent with my  
17 conclusions that, the Appellant no longer considered that  
18 this 1990 agreement governed his circumstances as they  
19 existed subsequent to 1995. In addition, the solicitors  
20 do not appear to treat this 1990 agreement as current,  
21 valid and enforceable. The 1995 correspondence makes no  
22 reference to this agreement. In fact, this 1995 exchange  
23 refers only to a figure of \$750 without referencing it as  
24 a support amount. Although there is case law which states  
25 that such an exchange of letters maybe considered an

1 agreement under the right circumstances, this is only so  
2 where the terms are sufficiently specific to support such  
3 a conclusion. That is simply not the case here.

4 The letters of 1995 are very general and  
5 vague in nature, and lacking the specifics in respect to  
6 detail, terms and provisions. There is nothing in them to  
7 indicate a meeting of minds with respect to what that \$750  
8 payment is for. Without that I cannot infer the existence  
9 of an agreement from this exchange of letters in 1995.  
10 Although the correspondence of Mr. Rhodes references a  
11 maintenance agreement when he deals with the catch-up  
12 arrears amount, that mere reference does not make it a  
13 fact. I have concluded otherwise based on the evidence  
14 before me. There was no written agreement pursuant to  
15 which the Appellant made the support payments in 2005.

16 On a final note, and in respect to the  
17 Appellant's estoppel argument, although this was not  
18 addressed in the pleadings, it does not apply here where  
19 we are dealing with an assessment of tax, and I have been  
20 given no evidence to suggest that the Minister is estopped  
21 in any way from assessing the Appellant.

22 For these reasons, the appeal is dismissed,  
23 without costs.  
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I HEREBY CERTIFY THAT THE FOREGOING  
is a true and accurate transcript  
of the proceedings herein to the  
best of my skill and ability.

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S. Leeburn, COURT REPORTER

CITATION: 2009 TCC 32

COURT FILE NO.: 2008-161(IT)I

STYLE OF CAUSE: James Broad and  
Her Majesty the Queen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: November 24, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Diane Campbell

DATE OF ORAL JUDGMENT: November 26, 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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