Citation: 2010 TCC 46
Date: 20100126
Docket: 2007-4093(IT)I

BETWEEN:

BRENDAN J. JORDAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

For the Appellant: The Appellant himself
Counsel for the Respondent: Jill Chisholm

REASONS FOR JUDGMENT

**(Delivered orally from the bench on
November 24, 2009, at St. John's, Newfoundland)**

Margeson J.

[1] The matter before the Court at this time for decision is that of Brendan J. Jordan and Her Majesty the Queen. The sole issue before the Court is whether or not the Appellant, Brendan Jordan, during the year 2005 is entitled to a $5,000 deduction or credit in respect of his son Neil Jordan, or Neil.

[2] The only evidence before the Court today of any infirmity or dependence of the son, Neil, was by the Appellant and the best that can be said about his own evidence is that he said "I have to support Neil." The son lives at home with the Appellant, does not pay any bills such as rent and food, even though the evidence was clear that he could have paid some of those expenses if he wanted to.

[3] The Appellant and his wife, who are very kind persons obviously, decided that they were not going to seek any payment from him even though the evidence was that Neil did, in the year 2005, have taxable income of $12,123.

[4] The evidence offered by the Appellant himself and by Dr. Barry Gaulton was that the Appellant was employed at the "dig" so to speak, and he was earning somewhere in the nature of $10 to $12 per hour. He normally worked a 40 hour week and he normally worked from May until September or October.

[5] The Appellant told the Court today (and this is the only evidence we have on this subject, which I might say is contradictory to the evidence given by the doctor) that his son suffers from a social disorder in that he has difficulty being around people. He suffered from this for his entire life. He is 39 years of age. He said that the son had a social anxiety problem and it is a source of great concern to the Appellant and his family. He was always a loner. He kept to himself.

[6] He finished high school and registered for university. He stayed at the university in his own room and did not room with anybody else or in an apartment. He had no close friends. He did seek medical advice. He suffered from temper tantrums.

[7] However, it was quite clear that Neil himself did not want to receive any treatment. He did not believe that he had a mental problem or disorder. The Appellant spoke to a psychiatrist and a psychologist about Neil and his son refused to go see them although he was observed by a psychiatrist and she apparently told the Appellant that he was suffering from social anxiety but it could be cured.

[8] No such evidence was given before the court here today. Mr. Jordan said that he brought material home to the son to be reviewed about this disorder and left it available for him to review.

[9] Neil received a Bachelor of Arts from Memorial University in the 90’s. He works in the summer months at minimum wage. Neil owed about $20,000 after coming out of university for student loans. He said he and his wife have deep concerns about their son. He pays no bills except for the T.V. dish. He still works, he puts his money in the bank account for himself. The Appellant feels that because he and his wife are not going to be here forever that this is the best course of action that this money go into the bank account for him. When something happens to them, the son will have some money to rely upon. His son still attends some courses at the university. In 2005 when the Appellant filed his Income Tax Return, he claimed a $5,000 deduction. It was disallowed. He objected to that and he said that he was treated like dirt by the Canada Revenue Agency (“CRA”). He had nothing good to say about them. He found them to be ignorant, stubborn and contrary. They would not listen to anything that he had to say and they would not look at any documents

that he gave them. The interviewer sent the documents back. The Appellant went to the appeals division about it and spoke to the appeals officer. She was the same. He walked out in disgust. He then instigated an investigation and he said that the two agents were exonerated.

[10] On cross-examination, he said that the son accumulated the loans before 2005. Dr. Kelly LeDrew viewed him. She was not Neil's doctor but she observed him at the Delta Hotel during a lunch, when the parties were there for lunch.

[11] In the 2005 return, he filed for and claimed the $5,000 deduction. It was accepted but later on he was reassessed and it was disallowed. He said that he asked for the deduction due to the fact that he had low income and that is why he was asking for the deduction. Tab 1 of the Exhibit R-1, shows Neil's return which the Appellant completed. He had a gross income of $13,423 and the Appellant also claimed $750 for drugs which were expended on Neil during that year.

[12] With respect to the $5,000 claim that is before the Court today, the Appellant said, "I just felt it was a fair amount, not based on anything in particular. It was based on the fact that he had low income." He did not refer to any particular sections of the *Income Tax Act* (the "*Act*"). The deduction was allowed and then it was disallowed.

[13] There was a letter at Tab 4 of the Respondent's Book of Documents which the Appellant says he does not remember seeing at all, but it was a letter in which the Minister was explaining why the $5,000 credit was not available to him.

[14] The Appellant said in this own evidence, "I knew my income was too great and I was not entitled to the credit." He was aware of that provision in the statute. He said, "I don't know when I made the request for a $5,000 settlement", that is $5,000 which is not the $5,000 which he is seeking to deduct as a credit. It was a request he made of the Minister for a settlement. There was no indication as to what that was based on, but it had nothing to do with his present claim.

[15] He said Neil was living at home in 2005 and worked and collected Employment Insurance. He cannot find another job, he lacks confidence in himself. The son Neil was not before the Court and there was no medical evidence by way of certificates or oral testimony. They only live about 80 kilometres from St. John's. The Appellant agreed that the son could come to St. John's and get a job, but he had no self-confidence. His son was not aware of the matter presently before the Court and he does not believe that he has an infirmity. There was no written diagnosis and there was no letter in support of it, nor was there any letter from the psychologist and

psychiatrist who the Appellant says viewed him. His son has not agreed to be diagnosed.

[16] The Respondent called Dr. Barry Gaulton. He was an assistant professor of archaeology at Memorial University and possesses a Ph.D degree. He said that he was hired in 2005. He has field experience and has publications to his credit. He had been involved in the dig where Neil works. Earlier he was involved just in the dig, but then he became supervisor and then he became co-director of the enterprise.

[17] He hires employees, that is part of his job. He knew Neil Jordan since 1992. He worked at the site. He is a good worker, he needs little supervision. "I know the Appellant from being a resident of Ferryland," he said. "With respect to the dig itself, we start late in May or early June and go to late September or early October." In 2005, they had ten to twelve workers, most of them are from Ferryland but they also have some students working there.

[18] In 2005, the Appellant was an employee. He excavated and recorded the certificates with respect to the excavations. He also helped train other employees. The dig is public and private. There were about 20,000 visitors a year. They may ask some of the crew questions about the dig and about what they had found and what is going on there. This would include Neil Jordan. Neil has interacted with the visitors and he has answered their questions.

[19] The witness said that Neil would answer questions from the public, "he is intelligent, hard working." He is the best employee that they have, as far as he was concerned.

[20] He was not aware of any medical infirmities or psychological disorders that Neil had. He would have hired him full-time if work was available. He has a Bachelor of Arts in Archaeology and he has 18 years experience in the dig or in the archaeological field. At the dig only seasonable work is available, but Neil is free to seek other work if he can find it. Most of the other workers claim employment insurance during the winter, as Neil does, and some do go out and find other jobs, whether under the table or whether they are above the table, he did not know. Neil asked him for a reference and he was prepared to give him one and obviously from what he said, he would have given him a very high recommendation, but no one has called him about Neil.

[21] Neil went to one of his classes a couple of weeks ago and asked to sit in on the class. He did not refer to any medical or psychological infirmities that he may have

had. He makes $10 to $12 an hour, $400 to $450 a week, 40 hours. "He is quiet, very friendly and I consider him to be a friend."

[22] In Cross-examination, Mr. Jordan was permitted to go beyond what he should have asked the witness but had to be curtailed as he was becoming confrontational with the witness and was asking questions which are not relevant here.

[23] The witness said that occasionally he saw Neil in a social setting. Sometimes the staff would cook meals and Neil would be there. He was not aware that Neil was harassed at work by employees, although he said that there was a person who came down to the dig site and he harassed almost everybody there and he could not kick him out or tell him to stay away. He believed that he had some right to be there. He did not believe that it was particularly Neil that he was harassing and did not know it had any great effect on him. He said that Neil was angry one day at Gerard and may even have threatened to knock his head off or something to that effect. That was his evidence.

[24] In re-direct, he said that in social settings Neil acted like other persons there. He was quiet but he assumed that he was fine in social settings.

[25] In argument the Respondent said that the issue is whether or not the Appellant is entitled to make a deduction of $5,000 for his son. First of all, the Appellant did not seek to advise the Minister under what section of the *Act* he was seeking to make a deduction, so that the Minister's agent went through the various sections to try and determine whether or not there was a section under which he might fall. The Appellant’s idea was just a global figure which he believed that he should be entitled to claim.

[26] The burden is on the Appellant to rebut the presumptions in the Reply according to the Minister. According to the documents that have been filed in the Income Tax Return, he requested the deduction due to the low income and there was no provision for that deduction.

[27] The evidence of Appellant was that Neil had a social anxiety disorder. Counsel referred to the provisions of subsection 118(1), to see if that applied.

[28] Counsel's position was that this section required an infirmity and a dependency as a result of the infirmity. However, the Appellant’s claim was just “a figure out of the air”. It may very well just be coincidental, but it is the same amount that he sought to obtain by way of settlement from the Minister. He did not get it one way, so he is seeking to get it another way.

[29] Counsel referred to paragraph 118(1)*(d)* which is another section which the Minister considered in determining whether or not this credit was available. The requirement is the same, mental or physical infirmity and dependency. The Appellant has not shown that Neil was dependant on him because of a mental or physical infirmity during the year in question.

[30] She referred to the evidence given by the witness called on behalf of the Respondent which she says is indicative of the fact that he was indeed not dependant. Being a loner or being shy, as the Appellant suggests Neil was, does not make a person infirm.

[31] She also referred to subsection 118(6). This is the definition of dependant. It says for the purpose of paragraphs *(d)* and *(e)* of the description of *(b)* in subsection (1) at 4(e), "dependant" of an individual for a taxation year means a person who at any time in the year is dependent on the individual for support. … So again, there is the requirement of dependence on the individual for support at any time of the year. Neil was not dependent upon the Appellant for support in the year and therefore, he is not entitled to claim under subsection 118(6). The Appellant has not set that forward as being the basis for his claim.

[32] With respect to the law, she referred to *Calek v. R.*,[1] and she referred to paragraph 28. This is a decision of Hershfield J. At paragraph 28 of that decision, Hershfield J. said:

> 28 So to be dependent, we are talking about levels of subsistence not levels of maintenance of lifestyle. A person who does not fully have the means to subsist but has some means and is not wholly dependent (that is, has some means but also requires some assistance) could still qualify as dependent.

[33] The Court agrees with that. Here the Appellant spends money on the son by providing the home and not demanding rent. As Hershfield J. found in that case, it is possible that a person can be receiving only some assistance during a year and still be capable of being a dependant. However, in this case that was not so. Living at home is not an infirmity and again, you have to have the infirmity and you have to be dependent, but the son had no infirmity.

[34] Counsel also referred to *Fleury v. R.*,[2] which is a decision by the now Rip C.J. as being of some assistance. In that case, he said that "… it is settled law that to be a

---

[1] [2002] 2 C.T.C. 2857.

personne à charge" or “dependent upon somebody else” "one must financially support the impaired person. …" In that case, he dismissed the appeal. But counsel argued that Neil must also be “infirm” and he must be dependent, which he was not.

[35] At tab 9 of the Respondent’s Book of Authorities, she referred to *Mahoney v. R.*[3] which was a decision of Hershfield J. where he considered subsection 118(1) and in paragraph 38 of that decision, he said:

> 38 This is the contextual background to give meaning to the word “infirmity” as used in paragraph 118(1)*(b)*. In this context, it seems the meaning ascribed in *Diaz* is totally acceptable and appropriate. “Infirmity” is a state of poor health or deteriorated vitality. To this I would add, as elaborated on below, the word “abnormally”. The dependent person credit is available in respect of an adult child living at home and dependent for support by virtue of abnormally poor health or deteriorated vitality. …

[36] That is not the case here. There is no such evidence in the present case that would make the facts applicable to the case of *Mahoney*.

[37] At Tab 10 of the Respondent’s Book of Authorities, she referred to *Borden v. R.*[4] which dealt with paragraph 118(1)*(d)*. At paragraph 15, C. Miller J. said:

> 15 … was Glen dependent …

This is the question he asked himself, was Glen, in that case:

> … dependent because of the infirmity? If not because of the infirmity, why else? Was he simply a ne’er-do-well heading down the wrong track? On balance, I find there is more evidence to support a finding he was dependent because of his mental infirmity. There is no evidence of Glen's backgrounds or comments in his steady stream of calls to suggest a normal offspring simply playing his parents. Though Mr. Borden indicated he considered cutting Glen off, he never wavered from his position that Glen's position was the root of this most unfortunate situation in which the family found itself."

[38] The Court found that it was a borderline case. He went on to say:

> 16 This is a difficult case since it is a borderline case and because of lack of evidence. I do, however, slip over the border, but just, in your favour …

---

2 2005 TCC 379.
3 2002 D.T.C. 2203.
4 2003 TCC 297.

[39] C. Miller J. allowed the appeal. That was in a case where the judge was obviously satisfied that there was more evidence to support a finding of mental infirmity than not.

[40] In the case at bar, counsel says there is no such infirmity. This case does not follow within the parameters of those cases decided by Hershfield J. and C. Miller J. The case should be dismissed here.

[41] The Appellant chose not to argue or make any submission whatsoever in this particular case, although the Court gave him the opportunity to do so.

Analysis and Decision

[42] First of all, the Court agrees with the argument of counsel for the Respondent that the Appellant has not set out any particular section or sections of the Statute which he intended to rely upon. Indeed, the Court is satisfied that after a review of all of the evidence available and all of the documents, the Appellant was really saying that he should be entitled to the $5,000 because of the low income of his son, Neil. That is obviously why he made the application in the first place. Secondly, he is telling the Court that he should be entitled to the figure of $5,000 which was just a rounded figure. It was something that he based upon what he thought that he and his wife were entitled to. He gave no reasons as to why it was $5,000. It was the same amount that he asked for by way of settlement with the Minister, but the Appellant himself said that was not the basis for the figure. So he just picked it out of the air as being a reasonable figure, as far as he was concerned.

[43] The Court finds that the Appellant has not set out any particular section of the *Act* under which he is entitled to receive the credit. Secondly, the Court is satisfied that he has not produced any evidence whatsoever that the figure of $5,000 would be reasonable, except that he picked it out of the air and he figures that is what they should be entitled to.

[44] The sole issue before the Court is whether or not he is entitled to the $5,000 for his son during the year 2005. The Court agrees that his request was vague. It did not set out any particular section. The burden is on the Appellant to rebut the presumptions contained by the Minister in the Reply to the Notice of Appeal and the Minister in his Reply said that the Appellant was not entitled to the $5,000 deduction claim with respect to his son.

[45] In the Reply, the Minister said that Neil did not have a mental or physical impairment and Neil was not mentally or physically infirm. Consequently the Appellant was not eligible for the disability amount transferred from a dependent pursuant to subsections 118.3(1) and 118.2(2) of the *Act* and he was not eligible for the caregiver credit pursuant to paragraph 118(1)*(c)*.1. He was also not eligible for the amount for infirm dependants pursuant to paragraph 118(1)*(d)* of the *Act*.

[46] Those are all of the sections which the Minister considered and the sections which the Court went over just a few moments ago. The Court is satisfied that the Appellant has not met the burden imposed upon him of showing that he was entitled to the $5,000 credit on the basis of any of these sections on the basis of the evidence given before the Court.

[47] The Court believes that it is of considerable importance that there was no medical evidence given nor psychiatric evidence given to support this argument that Neil was infirm and he was dependent. The Appellant himself was not a psychiatrist, nor was he a doctor, yet he is seeking to obtain a credit for a person who allegedly was infirm and dependent without producing any evidence which would support those contentions. Nor has he even produced the Appellant himself. The evidence given by the Appellant himself would suggest that the son denies that he is infirm. He denies that he is dependent. He would not come before the Court. He was not even aware of the fact that his father was making the request for the $5,000 and the Appellant himself said that if he heard about it, he would be angry with him.

[48] The Court is satisfied with counsel's argument that in order for the Appellant to be entitled to the credit, Neil must have been infirm and he must have been dependent on the Appellant for support. As a result, the Court finds that that has not been made out. The evidence of the archaeologist who testified was very straightforward, very direct, very honest and very complete. That evidence suggested that the Appellant's son did not have such an infirmity as the Appellant suggested.

[49] He was able to interact with people in society and his workplace. He was able to attend social functions, such as a meal with the rest of the people. He was able to interact with people who came to the site to view the dig and there was no evidence whatsoever that he had any problem doing so.

[50] The witness said that Neil appeared to be fine, as far as he was concerned, and he found him to be one of the best workers. He would have recommended him highly. He hardly would have done so if he believed that he was infirm. If he was infirm, he certainly would not be able to do the work that he did.

[51] During the winter when he was not working, he was on unemployment insurance, which is his right, but the Court is also satisfied from the evidence and from any reasonable conclusions it is entitled to draw from the evidence, that if he had wanted to get a job in the off-season and if one had been available, he would have been able to take that job, would have been able to do it. He has a Bachelor of Arts Degree, very recently attended the doctor's classes in archaeology and there would seem to be no problem at all going out into a classroom in the university where he would have to associate in some respect with the other people in the class.

[52] The Court is not satisfied that the Appellant has met the burden that is required of him to show that he was entitled to this tax credit. Therefore, the appeal is dismissed and the Minister's assessment is confirmed.

Signed at Winnipeg, Manitoba, this 26th day of January 2010.

"T.E. Margeson"

Margeson J.

CITATION:	2010 TCC 46
COURT FILE NO.:	2007-4093(IT)I
STYLE OF CAUSE:	BRENDAN J. JORDAN and HER MAJESTY THE QUEEN
PLACE OF HEARING:	St. John's, Newfoundland
DATE OF HEARING:	November 24, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice T.E. Margeson
DATE OF JUDGMENT:	January 26, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jill Chisholm

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	N/A
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada