

Docket: 2018-4502(IT)I

BETWEEN:

SHANNON SOOKOCHOFF,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 20, 2020, at Edmonton, Alberta

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Andrew Lawrence

JUDGMENT

The Appeals are dismissed, without costs.

Signed at Ottawa, Canada, this 30th day of November 2020.

“Don R. Sommerfeldt”

Sommerfeldt J.

Citation: 2020 TCC 131

Date: 20201210

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SHANNON SOOKOCHOFF,

Appellant,

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AMENDED REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeals by Shannon Sookochoff in respect of Notices of Redetermination, dated June 20, 2018, concerning Ms. Sookochoff's entitlement to the Canada Child Benefit (the "CCB") in respect of the 2015 and 2016 base taxation years. In determining Ms. Sookochoff's entitlement to the CCB for the 2015 and 2016 base taxation years, the Minister of National Revenue (the "Minister"), as represented by the Canada Revenue Agency (the "CRA"), assumed that Ms. Sookochoff had married Nikki Gauthier (also known as Nik Gauthier) on July 30, 2016. Consequently, the Minister determined that Ms. Sookochoff did not qualify for the CCB, as her adjusted income for the 2015 and 2016 base taxation years included both her income and Mr. Gauthier's income for those years, with the result that the adjusted income of Ms. Sookochoff exceeded the applicable limit contemplated by subsection 122.61(1) of the *Income Tax Act* (the "ITA").¹

II. FACTS

[2] Ms. Sookochoff and her former spouse are the parents of two children, who were under the age of majority during the relevant taxation years. Mr. Gauthier and his former spouse are the parents of two children, who were also under the age of majority during the relevant taxation years.

¹ *Income Tax Act*, RSC 1985, c. 1 (5th supplement), as amended.

[3] Ms. Sookochoff and Mr. Gauthier met in 2012, began dating, and formed a committed relationship. Contemplating marriage, they looked forward to the day when they could combine their two households, to form a blended family.

[4] In 2013, Ms. Sookochoff sold her condominium and purchased a four-bedroom house, with a view to possibly combining the two families in that house.

[5] By reason of confidential circumstances that are best excluded from these Reasons (although they were explained adequately in the evidence), Ms. Sookochoff and Mr. Gauthier anticipated that it would be difficult and problematic to combine their respective families at that time. Nevertheless, they embarked on several trial runs. In 2014 they planned a few one-night sleepovers at Ms. Sookochoff's house, some of which were successful, but more often the sleepovers resulted in conflict, generally between the two sets of children or between Ms. Sookochoff and the children of Mr. Gauthier. In 2015, Ms. Sookochoff, Mr. Gauthier and their respective children took a holiday trip to a cabin in or near Wakaw, Saskatchewan, but that too resulted in conflict and an unhappy conclusion.

[6] In 2015, Ms. Sookochoff's father was hospitalized in Saskatoon. Ms. Sookochoff and Mr. Gauthier drove together from Edmonton to Saskatoon several times that year to visit her father. During those trips they had uninterrupted time together, without having any of the children with them. Those trips and their continued dating in Edmonton led them to consider marriage as a feasible possibility. In April, while on a trip together, Ms. Sookochoff and Mr. Gauthier decided to marry, notwithstanding the objections that had been voiced by their children. They set July 30, 2016 as their proposed wedding date.

[7] In anticipation of their marriage, Ms. Sookochoff and Mr. Gauthier took a marriage preparation class. However, as various family issues arose, it appeared as though their wedding plans might be impeded. They scaled back their plans and were married in the backyard of Mr. Gauthier's parents, on July 30, 2016. Conflicts relating to their children erupted on their wedding day, resulting in various unpleasanties that marred the occasion.

[8] In the lead-up to their wedding day, Ms. Sookochoff and Mr. Gauthier had already determined that it would not be feasible to bring their two families together soon after the wedding. Accordingly, even before they were married, Ms. Sookochoff and Mr. Gauthier had decided that it would be necessary for them to continue to maintain their two separate households. Therefore, they planned that

only one night, their wedding night, would be spent together at Ms. Sookochoff's house, with their children also present. Unfortunately, as anticipated, that experience, like the previous sleepovers and trip with all four children, did not go well. Hence, the next day, July 31, 2016, as Ms. Sookochoff and Mr. Gauthier had also anticipated might be the case, Mr. Gauthier and his children returned to their home.

[9] Sometime later, Ms. Sookochoff and Mr. Gauthier sent a letter to the CRA, advising that they had begun to live separate and apart as of July 31, 2016. As Ms. Sookochoff put it during her testimony, "We did declare a formal separation as of - - well, I think we said July 31st, 2016."²

[10] From 2016 through 2018, the conflicts involving the children were not resolved, although Ms. Sookochoff and Mr. Gauthier went to great lengths to improve the situation. In particular, they sought counselling from internationally recognized family therapy consultants.

[11] Ms. Sookochoff and Mr. Gauthier also planned another joint trip together, this time to Canmore, in August 2017, to attend a family wedding. Although they had planned to spend a week in Canmore, the interpersonal conflicts continued, to the point where Mr. Gauthier and his children left Canmore earlier than expected.

[12] Notwithstanding the difficulties that they had encountered, Ms. Sookochoff and Mr. Gauthier remained committed to each other. The respective custody arrangements that Ms. Sookochoff had with her former spouse in respect of their children and that Mr. Gauthier had with his former spouse in respect of their children were such that every other Friday each of the two sets of children went to visit the other parent, and then returned the next day. Therefore, Ms. Sookochoff and Mr. Gauthier had every other Friday evening and night to themselves. On those alternating Fridays, they spent that time together. They typically went to dinner and a movie, played music, or Ms. Sookochoff went to watch Mr. Gauthier and his band play, and then they often spent the night together.³

[13] From July 31, 2016 to late 2018, the conflicts involving the children sometimes spilled over to affect the relationship between Ms. Sookochoff and Mr. Gauthier. This occasionally carried over to their alternating Friday evening time together, with the result that sometimes their "time together was spent in glum

² Transcript, p. 42, lines 24-25.

³ Transcript, p. 67, lines 2-21.

conversation.”⁴ Nevertheless, the pattern of spending every other Friday evening (and often the night) together appeared to be quite regular from mid-2016 through 2018.

[14] In November 2018, Mr. Gauthier’s children went to live with their mother. On January 8, 2019, once it had become clear that Mr. Gauthier’s children would not be returning to live with him, Mr. Gauthier moved in with Ms. Sookochoff in her house.⁵ At the time of the hearing, Mr. Gauthier was preparing to sell his house, as he intended to continue to reside with Ms. Sookochoff.

III. ISSUES

[15] The issues in these Appeals are:

- a) In computing Ms. Sookochoff’s adjusted income for the 2015 base taxation year, should Mr. Gauthier’s income for the 2015 taxation year be included, given that he was not actually her spouse at the end of 2015?⁶
- b) From July 31, 2016 to June 30, 2018, for the purposes of the definition of “cohabiting spouse or common-law partner” in section 122.6 of the ITA, was Mr. Gauthier living separate and apart from Ms. Sookochoff, because of a breakdown of their marriage, for a period of at least 90 days?

IV. ANALYSIS

A. 2015 Adjusted Income

[16] The relevant portion of the definition of “adjusted income” in section 122.6 of the ITA is as follows:

“Adjusted income”, of an individual for a taxation year, means the total of all amounts each of which would be the income for the year of the individual or the

⁴ Transcript, p. 67, line 28 to p. 68, line 1.

⁵ Transcript, p. 81, line 24.

⁶ This issue arises merely by reason of the facts. It was not raised by either party in the pleadings or at trial.

person who was the individual's cohabiting spouse ... at the end of the year if in computing that income no amount were....

Thus, a cohabiting spouse's income for a taxation year is not to be included in an individual's adjusted income for that year unless the cohabiting spouse had that status (i.e., was, or was deemed to be, the cohabiting spouse of the individual) at the end of that year.

[17] Paragraph 122.62(7)(b) of the ITA contains a deeming provision that is applicable here. To fully understand the deeming provision, it is best to read subsection 122.62(7) in its entirety:

122.62(7) If a taxpayer becomes the cohabiting spouse or common-law partner of an eligible individual,

(a) the eligible individual shall notify the Minister in prescribed form of that event before the end of the first calendar month that begins after that event; and

(b) subject to subsection (8) [which is not applicable here], for the purpose of determining the amount deemed under subsection 122.61(1) to be an overpayment arising in that first month and any subsequent month on account of the eligible individual's liability under this Part for the base taxation year in relation to that first month, the taxpayer is deemed to have been the eligible individual's cohabiting spouse or common-law partner at the end of the base taxation year in relation to that month.⁷

[18] As Mr. Gauthier became the cohabiting spouse of Ms. Sookochoff on July 30, 2016, the first calendar month that began after that event was August 2016. For the purposes of determining the amount of Ms. Sookochoff's CCB for August 2016 and any subsequent month in 2016, Mr. Gauthier was deemed to have been the cohabiting spouse of Ms. Sookochoff at the end of the 2015 base taxation year. Therefore, his income for the 2015 taxation year was properly included in computing her adjusted income for the 2015 base taxation year.

B. Living Separate and Apart

⁷ It is my understanding that the words "that first month" in paragraph 122.62(7)(b) refer to "the first calendar month that begins after that event" that is referenced in paragraph 122.62(7)(a), and that the words "that event" in paragraph 122.62(7)(a) refer to the event whereby a taxpayer became the cohabiting spouse of an eligible individual, as mentioned in the opening lines of subsection 122.62(7). See *MacIntosh v. The Queen*, 2019 TCC 155, ¶33.

(1) Meaning of “Living Separate and Apart”

[19] Although two individuals may be married to each other, if they are living separate and apart, depending on all the circumstances, it is possible that they might not be cohabiting spouses for the purposes of the ITA. The term “cohabiting spouse or common-law partner” is defined in section 122.6 of the ITA. As Ms. Sookochoff and Mr. Gauthier were married, I will focus on the parts of that definition which pertain to a spouse, as follows:

“Cohabiting spouse ...” of an individual at any time means the person who at that time is the individual’s spouse ... and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage ..., for a period of at least 90 days that includes that time....

Thus, for the purposes of these Appeals, which relate to the 2015 and 2016 base taxation years, it becomes necessary to determine whether Ms. Sookochoff and Mr. Gauthier were living separate and apart from July 31, 2016 to June 30, 2018, whether they were living separate and apart because of a breakdown of their marriage, and whether the period of living separate and apart had a duration of at least 90 days.

[20] The applicable criteria to be applied in determining whether spouses are living separate and apart have been identified by the courts, as follows:

As good a starting point as any [to determine whether spouses are living separate and apart] 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 were living and separate and apart?... 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.⁸

[21] During her evidence and submissions, Ms. Sookochoff referred to the generally accepted characteristics of a conjugal relationship, as enunciated in *Molodowich v. Penttinen*.⁹ In that case, Judge Kurisko was required, by reason of the statutory definitions in question, to determine whether two individuals were spouses, which entailed a consideration of whether they had cohabited, which necessitated a determination of whether they had lived together in a conjugal relationship. After considering and quoting a number of authorities, Judge Kurisko formulated a series of questions to guide him in considering the facts and circumstances of the case before him. He stated:

I propose to consolidate the statements just quoted by considering the facts and circumstances of this case with the guidance of a series of questions listed under the seven descriptive components involved, to varying degrees and combinations, in the complex group of human inter-relationships broadly described by the words “cohabitation” and “consortium”:

(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,
- (e) Any other domestic services?

⁸ *Roby v. The Queen*, [2001] TCJ No. 801, ¶8; as quoted in *Kara v. The Queen*, 2009 TCC 82, ¶8. I will refer to the six criteria listed above as the “Cooper/Roby/Kara factors.”

⁹ *Molodowich v. Penttinen*, [1980] OJ No. 1904, (1980) 17 RFL (2d) 376 (Ont. DC).

- (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 towards members of their respective families and how did such families behave toward the parties?

- (5) Societal:

What was the attitude and conduct of the community towards 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 towards 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 children?

To the foregoing must be applied the following caveat of Mr. Justice Blair in the [*sic*] *Warwick v. Ontario Minister of Community and Social Services*, [(1978) OR (2d) 528, 91 DLR (3d) 131, 5 RFL (2d) 325 (Ont. CA)]:

The extent to which the different elements of the marriage relationship will be taken into account must vary with the circumstances of each case.¹⁰

[22] Regarding the above guidelines, the Supreme Court of Canada stated the following in *M. v. H.*:

Molodowich v. Penttinen ... sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal.... In order to come within the definition, neither opposite-

¹⁰ *Ibid*, ¶16.

sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is “conjugal”.¹¹

[23] In commenting on the role of the *Molodowich* characteristics in determining the existence of a conjugal relationship, Justice Boyle stated:

The weight to be given the *Molodowich* factors will vary widely and almost infinitely. The approaches of the courts must be flexible and reflect the reality that the relationships of all couples, whether married or common-law, will vary widely.¹²

[24] As noted above, in *Molodowich*, the court was considering whether two individuals had lived together in a conjugal relationship, such that it could be said that they had been cohabiting, which would be a factor in determining whether they were spouses for the purposes of the particular legislative provision in question. That is not the issue that is under consideration in these Appeals. Here, it is necessary to determine whether Ms. Sookochoff and Mr. Gauthier were living separate and apart, and, if so, whether they were living separate and apart because of a breakdown of their marriage. Consequently, the criteria or factors enunciated in *Cooper*, *Roby* and *Kara* are more pertinent than those considered in *Molodowich*. However, there are similarities between the two sets of factors. As well, Ms. Sookochoff was familiar with, and used, the *Molodowich* factors as a guide while giving her evidence.

(2) Meaning of “Breakdown of Their Marriage”

[25] I have reviewed five cases that have considered the issue of whether a married couple were living separate and apart because of a breakdown of their marriage.¹³ None of those cases provided a definition of the term “breakdown of their marriage,” nor did any of the cases enumerate the criteria or factors to be considered in determining whether there had been a marital breakdown. None of those five cases dealt with circumstances comparable to the present Appeals. However, the *Roby* case suggested that having sexual relations while supposedly

¹¹ *M. v. H.*, [1999] 2 SCR 3 at 50-51, ¶59.

¹² *Harrison v. The Queen*, 2008 TCC 314, ¶6.

¹³ *Roby*, *supra* note 8; *Corroll v. The Queen*, 2002 FCA 388; *Lawin v. The Queen*, 2006 TCC 198; *Kara*, *supra* note 8; and *Astley v. The Queen*, 2012 TCC 155.

living separate and apart may cast doubt on whether there is a separation and whether there is a breakdown of the marriage.¹⁴

[26] Three of the five cases dealt with situations where an able-bodied spouse and a disabled, impaired or seriously ill spouse lived in separate premises, but the able-bodied spouse regularly and consistently spent time with the disabled, impaired or ill spouse to provide care. In two of those three cases the court found that the couples were not living separate and apart because of a breakdown of their marriage.¹⁵ In the third case, where the able-bodied spouse was living with another woman (who was not his wife) while continuing to care for his wife, the court found that there had been a breakdown of the marriage.¹⁶ In the last case, it was found that the spouses were living separate and apart because one spouse was in Canada and the other was in the United Kingdom, waiting for immigration approval to move to Canada.¹⁷ To summarize, although the above five cases do not define “breakdown of their marriage,” the *Lawin*, *Kara* and *Astley* cases illustrate that a couple may be living separate and apart for reasons other than a breakdown of their marriage.

(3) Meaning of “a Period of at Least 90 Days”

[27] The definition of “cohabiting spouse or common-law partner” contains the phrase “for a period of at least 90 days that includes that time.” As the concluding words of that phrase indicate, the particular time is to be included within the period of at least 90 days. It follows that there must be a consecutive period of at least 90 days, and not cumulative periods aggregating at least 90 days.¹⁸

(4) Application – Living Separate and Apart

[28] During her testimony, Ms. Sookochoff stated that she and Mr. Gauthier satisfied three of the seven *Molodowich* criteria or factors. More particularly, she acknowledged that the factors described by her as “sexual and personal behaviour,” “social activities” and “societal perception of the two as a couple” supported the proposition that she and Mr. Gauthier had a conjugal spousal relationship.¹⁹ She said that the other four factors, which she described as “shared

¹⁴ *Roby*, *supra* note 8, ¶10.2.

¹⁵ *Lawin*, *supra* note 13, ¶13; and *Kara*, *supra* note 8, ¶9-11.

¹⁶ *Corroll*, *supra* note 13, ¶3 & 5.

¹⁷ *Astley*, *supra* note 13, ¶10.

¹⁸ See *Kara*, *supra* note 8, ¶11.

¹⁹ Transcript, p. 70, line 1 to p. 71, line 6.

shelter,” “services ... household chores,” “economic support,” and “children,” were not satisfied by her and Mr. Gauthier.²⁰

[29] From July 31, 2016 to November 2018 (when Mr. Gauthier’s children went to live with their mother), the interactions between Ms. Sookochoff and Mr. Gauthier may be analyzed in the context of two time frames, as follows:

- a) the alternating weekends (presumably from sometime Friday afternoon to sometime late Friday evening, or often sometime on Saturday), when Ms. Sookochoff and Mr. Gauthier were together, without their respective children being present (which I will call the “Time Together”); and
- b) the periods between the alternating weekends, each period consisting of approximately 13 days, from sometime late Friday evening, or often from sometime on Saturday, when their respective children returned from visiting their other parent, and continuing for approximately 13 days until the Friday when the children went back to the other parent (which I will call the “Time Apart”).

[30] The evidence at the hearing did not go into sufficient detail to enable me to consider thoroughly and with precision each of the six *Cooper/Roby/Kara* factors in respect of the Time Together and the Time Apart. However, my understanding of the evidence, as it related to those six factors, is as follows:

- a) *Separate bedrooms*: During the Time Apart, not only did Ms. Sookochoff and Mr. Gauthier occupy separate bedrooms, but they also occupied separate houses. However, during the Time Together, they often stayed together for the alternating Friday nights. While there was no specific evidence on this point, on the alternating Friday nights that they spent together, they were presumably in the same bedroom.
- b) *Sexual relations*: Ms. Sookochoff has acknowledged that the *Molodowich* factor that she described as “sexual and personal behaviour” pointed to a conjugal spousal relationship. Therefore, during the Time Together, it seems that there was not an absence of sexual relations. There was no specific evidence concerning sexual relations during the Time Apart.
- c) *Spousal communication*: On alternating weekends, during the Time Together, there was regular communication between Ms. Sookochoff and

²⁰ Transcript, p. 71, lines 8-13.

Mr. Gauthier. However, Ms. Sookochoff did indicate that, if things had not gone well in the days preceding a particular Friday together, depending “on what kind of echo [they] were dealing with ... if something had happened, ... there were times when [their] time together was spent in glum conversation.”²¹ There was no evidence as to the nature or extent, if any, of the communication (such as telephone calls, texts, emails or the like) that Ms. Sookochoff and Mr. Gauthier used to stay in touch with one another during the Time Apart.

- d) *Domestic services*: This factor is best considered by reference to the following statement by Ms. Sookochoff:

So aside from the kind of thing a guest would do when they're over and help load the dishwasher, we didn't do each other's household chores. We didn't do each other's laundry. We didn't share meals. We didn't do each other's shopping or house cleaning or yard work.²²

I presume that the above statement applied to both the Time Together and the Time Apart.

- e) *Meals*: Ms. Sookochoff stated that, during the Time Together, she and Mr. Gauthier generally went for dinner every other Friday evening. While there was no evidence on this point, they may have shared breakfast the following Saturday morning, and perhaps lunch. Based on the statement quoted in subparagraph d) above, it appears that, during the Time Apart, they did not share meals.
- f) *Social activities*: In discussing the *Molodowich* factors, Ms. Sookochoff acknowledged that the “social activities” factor pointed to a conjugal spousal relationship. In addition, as indicated above, on their alternating Friday evenings together, Ms. Sookochoff and Mr. Gauthier regularly went to dinner and a movie, played music, or Ms. Sookochoff accompanied Mr. Gauthier to a gig at which his band was playing. They also went together to graduation ceremonies at the school at which Mr. Gauthier taught, and they attended staff Christmas parties together. In August 2017, Ms. Sookochoff and Mr. Gauthier attended, and sang at, the wedding of Mr. Gauthier's sister in Canmore. As well, Mr. Gauthier accompanied Ms. Sookochoff to her father's funeral.²³ However, due to the blended-family dynamics involving

²¹ Transcript, p. 67, line 25 to p. 68, p. line 1.

²² Transcript, p. 72, lines 14-19.

²³ Transcript, p. 50, lines 4-6; p. 56, lines 12-23; and p. 73, lines 4-6.

their respective children, Ms. Sookochoff and Mr. Gauthier were not together on Christmas, Thanksgiving or other major holidays.²⁴

[31] Considering only the duration of the two groups of time periods, it is obvious that the Time Apart (each period consisting of approximately 13 days) was substantially greater than the Time Together (each period being approximately 8 to 24 hours long). Furthermore, it is significant that, from July 31, 2016 to November 2018, Ms. Sookochoff and Mr. Gauthier did not spend Christmas, Thanksgiving or other major holidays together. Those circumstances might suggest that Ms. Sookochoff and Mr. Gauthier were living separate and apart. However, the fact that they spent every other Friday evening, and often that night and part of the next day, together suggests otherwise. To borrow the words of Justice Bowman from the *Roby* case, the biweekly Time Together “casts some doubt on both the separation of [Ms. Sookochoff and Mr. Gauthier] and the breakdown of the marriage.”²⁵

[32] The fact that Ms. Sookochoff and Mr. Gauthier spent Time Together every other Friday (and often Saturday) suggests to me that they were perhaps not living separate and apart. However, given that the evidence points in both directions, and given Ms. Sookochoff’s adamant assertion that she and Mr. Gauthier were living separate and apart from July 31, 2016 to January 8, 2019, I am prepared to decide these Appeals without making a definitive finding as to whether Ms. Sookochoff and Mr. Gauthier were living separate and apart during that period.

(5) Reason for Time Apart

[33] It is the position of Ms. Sookochoff that there was sufficient tension and stress in her relationship with Mr. Gauthier, after they married, that it could be said that they were living separate and apart because of a breakdown of their marriage.

[34] I accept Ms. Sookochoff’s testimony that there were difficult times for her and Mr. Gauthier after they were married, but, as explained below, it is my understanding of the evidence that those difficulties arose from conflicts involving the children. The evidence does not indicate that the difficulties were caused by a breakdown of the marriage, nor did the difficulties impede the commitment of Ms. Sookochoff and Mr. Gauthier to remain together.

²⁴ Transcript, p. 52, lines 13-20; p. 72, lines 23-24; and p. 73, lines 3-4.

²⁵ *Roby*, *supra* note 8, ¶10.2.

(a) Documentary Evidence

[35] At the hearing (which was in Edmonton), Ms. Sookochoff tendered to the Court two letters that she had received from individuals who reside and work outside Alberta, such that it would have been difficult for them to have attended the hearing. As these Appeals were heard pursuant to the Informal Procedure, such that “the Court is not bound by any legal or technical rules of evidence,”²⁶ notwithstanding that the letters were hearsay, counsel for the Crown did not object to the admission of the letters into evidence, but merely suggested that I consider the weight to be given to the letters. As the writers of the two letters:

- a) reside and work in locations that are at a significant distance from the place of the hearing, such that their attendance at the hearing would have been costly and impractical (particularly during the Covid-19 pandemic), and
- b) are subject to ethical and professional or ecclesiastical duties and obligations that disincline them to be less than truthful in their professional or ecclesiastical communications,

I decided to admit both letters into evidence and to place moderate weight on them, as both letters appear to be objective and balanced. In fact, in my view, the letters support the Crown’s position perhaps more than they assist Ms. Sookochoff.

[36] The first letter produced by Ms. Sookochoff was dated March 28, 2019, and was written by one of her family therapy consultants, Dr. Peter Jakob.²⁷ The letter stated, in part:

The couple became married in July of 2016, wishing to form a loving household that will sustain the needs of all of their children. They also took active steps towards forming that household. However, as often happens in blended families and *in spite of the couple’s firm commitment*, achieving this goal proved extremely difficult. Difficulties occurred when the two families tried sleepovers, combined family holidays, and even brief visits, and conflict arose between Nik’s [children] and Shannon, *eventually putting considerable stress on Nik and Shannon’s relationship....*

²⁶ See subsection 18.15(3) of the *Tax Court of Canada Act*, RSC 1985, c. T-2, as amended. See also *Suchon v. The Queen*, 2002 FCA 282, ¶31-32. My analysis of the questions of necessity and reliability is summarized in subparagraphs 35a) and b) of these Reasons.

²⁷ Exhibit A-1.

It was in our professional opinion completely appropriate for Nik and Shannon to decide to delay full cohabitation until the various conflicts and tensions could be understood and worked out. We wholeheartedly supported this decision and did our best to help them in this task.

Their decision to go on living separately was not easy nor at all times accepted by everyone in their environment. It tested their newly formed marital bond with discomfort, uncertainty and constant tension. Yet, based on our experience and knowledge as family therapists, it was the right step to take. As therapists, we often witness the premature formation of blended, post-divorce households, where expectations exceed emotional capabilities, and not enough thought or time are given to adjustment. Usually children are the first to bear the price of premature co-habitation, and the adverse effects on the couple's sustainability eventually appear.

In short, it has been clear to us that Nik and Shannon *acted in the best interests of their children and themselves* when they elected to live separate and apart for these first years of their marriage. Given the obstacles, living together would have put the psychological well-being of the family members at risk.

We were happy to learn in a recent letter that Nik and Shannon moved in together in January of 2019. Nik's [children] decided to live with their mother in November of 2018 *which allowed for the couple to move forward in their plans for a future together.*²⁸ [Emphasis added.]

The letter from Dr. Jakob acknowledges the stress experienced by Ms. Sookochoff and Mr. Gauthier in their relationship, but also confirms the firm commitment of Ms. Sookochoff and Mr. Gauthier to each other and to their future together.

[37] Ms. Sookochoff also entered into evidence a letter dated January 2, 2019 from Reverend Jonathan K. Gonyou, the minister who (when he lived and worked in or near Edmonton) officiated at the wedding of Ms. Sookochoff and Mr. Gauthier.²⁹ Reverend Gonyou's letter included the following comments:

There were many conversations had regarding the unique challenges of this second marriage for both. The [circumstances referenced above in these Reasons] of [some] of the ... children made the idea of these two households blending under one roof unwise....

²⁸ Exhibit A-1, p. 1-2.

²⁹ Exhibit A-2. Reverend Gonyou and Mr. Gauthier were next-door neighbours for many years.

I can confirm that while Nik and Shannon have tried to blend households by attempting sleepovers, different school placements, ... therapy, and parent coaching, they have remained two distinct households....

Nik and Shannon have made this marriage covenant “work” and honored their children in the process, doing what I believe is truly best for them.³⁰

The letter from Reverend Gonyou, while acknowledging the “two distinct households,” does not suggest that there was a breakdown of the marriage of Ms. Sookochoff and Mr. Gauthier. To the contrary, Reverend Gonyou stated that Ms. Sookochoff and Mr. Gauthier “made [their] marriage covenant ‘work’....”

(b) Conflict and Concerns Related to the Children

[38] The above-quoted excerpts from the two letters indicate that circumstances and challenges relating to the respective children of Ms. Sookochoff and Mr. Gauthier created stress and tension, which Ms. Sookochoff and Mr. Gauthier endeavored to alleviate by continuing to maintain two separate households, until Mr. Gauthier’s children went to live with their mother. Based on those two letters, as well as Ms. Sookochoff’s testimony, it is my view that the decision by Ms. Sookochoff and Mr. Gauthier to maintain two households was made to avoid conflict related to the children, to foster the well-being and best interests of the children, and to preserve the physical, mental and emotional health of all family members, including Ms. Sookochoff and Mr. Gauthier. In my view, the decision by Ms. Sookochoff and Mr. Gauthier to maintain separate households was made to preserve their relationship and to make it work, and not because their relationship had broken down.

[39] The focus by Ms. Sookochoff and Mr. Gauthier on the needs of the children, in deciding their living arrangements, is illustrated by the following statements made by Ms. Sookochoff during her oral submissions at the hearing:

We could not live together and still remain healthy people. I argue that this was a breakdown in our relationship, a breakdown in the elements of a relationship that contribute to the well-being of children and of the partners....³¹

A healthy marriage and blended family does not need psychologists and -- and parenting coaches. A healthy relationship does not need to delay combining homes until two of the children have moved out. This was a breakdown.

³⁰ *Ibid.*

³¹ Transcript, p. 86, lines 2-6.

Now, perhaps it is not a breakdown in the linear sense to which you are accustomed where a happy couple moves in together only to find things are unbearable and then separates. No. We understood in advance that our blended family would not work as an emotional and economic unit.

Instead, we made a promise that we hoped would help the children see our commitment and would set in motion some actions that would one day result in a more traditionally realized -- a more traditional realization of our marriage. That came to be in January '19 when Nik's [children] moved in with their mom.³²

I am telling you that in every way that is important to the operational aspects of managing children and a family, my relationship with Nik Gauthier had broken down. We could not share expenses in a single blended family house without harm to the members of our families.³³

[40] To the extent that there was a breakdown, it was a blended-family breakdown, caused by conflict between the two sets of children or between Ms. Sookochoff and the children of Mr. Gauthier. In my view, there was not a breakdown of the marriage of Ms. Sookochoff and Mr. Gauthier. Rather, Ms. Sookochoff and Mr. Gauthier chose "to live separate and apart" as they faced "the struggle that it is to do what is best for kids in difficult circumstances."³⁴

(c) Alternating Fridays

[41] The most significant factor in my analysis was the routine of biweekly Time Together, i.e., the alternating Friday evenings, and often nights, that Ms. Sookochoff and Mr. Gauthier spent together throughout the time that they were married and living in separate households. This was not consistent with there having been a breakdown of their marriage.³⁵ Accordingly, I have concluded that, if Ms. Sookochoff and Mr. Gauthier lived separate and apart from July 31, 2016 to January 8, 2019, the reason for so doing was likely because of issues relating to their children, and not because of a breakdown of their marriage.

(6) 90-Day Requirement

³² Transcript, p. 86, line 16 to p. 87, line 4.

³³ Transcript, p. 93, lines 10-15.

³⁴ Transcript, p. 91, lines 6 & 8-9.

³⁵ *Roby, supra* note 8, ¶10.2. The fact that Ms. Sookochoff and Mr. Gauthier planned to spend, and embarked on, a week together, with their respective children, in Canmore in August 2017, also suggests that there had not been a marital breakdown. The premature ending of the holiday was due to a conflict involving one or more of the children.

[42] If my conclusion above is incorrect, in other words, if there was a marital breakdown, or multiple breakdowns, each breakdown lasted, at most, for only 13 days, and not for the 90 days stipulated in the definition of “cohabiting spouse or common-law partner.”³⁶

V. CONCLUSION

[43] Throughout the period of time that is relevant for the purposes of these Appeals, the evidence clearly established that Ms. Sookochoff and Mr. Gauthier were committed to each other and to their marriage, that they overcame immense obstacles to maintain their relationship and to make their marriage work, that they were concerned for their children, and that they had the welfare and best interests of their children at heart (all of which is to be commended and applauded). During the time that Ms. Sookochoff and Mr. Gauthier maintained their respective households, from the date of their marriage until January 2019, the evidence was inconclusive as to whether they were living separate and apart. While their Time Together on alternating weekends suggests that they were not living separate and apart, other circumstances pointed to the opposite conclusion. Notwithstanding the uncertainty as to whether they were living separate and apart, the evidence was abundantly clear that there was not a breakdown of their marriage. Accordingly, if Ms. Sookochoff and Mr. Gauthier were living separate and apart from July 31, 2016 to January 8, 2019, the reason therefor was not because of a breakdown of their marriage. Rather, it seems that the reason was most likely the need to address issues pertaining to their respective children and the difficulties inherent in blending two post-divorce families together. Furthermore, even if there was a breakdown of the marriage, the requisite 90-day duration of the separation was not satisfied.

[44] For the reasons set out above, these Appeals are dismissed, without costs.³⁷

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated November 30th 2020.

³⁶ During her cross-examination, Ms. Sookochoff acknowledged that between July 30, 2016 and August 2018 there was not ever a period longer than 90 days wherein she and Mr. Gauthier intended to end their marriage; Transcript, p. 62, lines 20-25; and p. 68, lines 10-17. I am aware that having an intention to end a marriage is not the same as a separation or a breakdown of a marriage; however, Ms. Sookochoff’s comment about not intending to end the marriage indicates that the marriage had an element of commitment.

³⁷ See subsection 10(2) of the *Tax Court of Canada Rules (Informal Procedure)*, SOR/90-688, as amended.

Signed at Ottawa, Canada, this 10th day of December 2020.

“Don R. Sommerfeldt”

Sommerfeldt J.

CITATION: 2020 TCC 131

COURT FILE NO.: 2018-4502(IT)I

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MAJESTY THE QUEEN

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