Docket: 2014-641(IT)I

BETWEEN:

DOUGLAS P. OCHITWA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 16, 2014, at Calgary, Alberta

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Mary Softley

JUDGMENT

The Appeal from the reassessment made under the *Income Tax Act* for the 2011 taxation year is dismissed

Signed at Toronto, Ontario, this 2nd day of September 2014.

"Campbell J. Miller"

C. Miller J.

Citation: 2014 TCC 263
Date: 20140902
Docket: 2014-641(IT)I

BETWEEN:

DOUGLAS P. OCHITWA,

Appellant,

and

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REASONS FOR JUDGMENT

C. Miller J.

[1] Mr. Ochitwa appeals, by way of the informal procedure, the Minister of National Revenue's (the "Minister") assessment of his 2011 taxation year. The Minister denied Mr. Ochitwa the Wholly Dependent Amount (paragraph 118(1)(*b*) of the *Income Tax Act* (the "*Act*")) and the Child Amount (paragraph 118(1)(*b.1*) of the *Act*) on the basis that, because Mr. Ochitwa was required to pay a support amount, he is precluded from claiming such deductions pursuant to the application of subsection 118(5) of the *Act*.

[2] The facts can be briefly stated. Mr. Ochitwa and his wife separated in 2003. They had two children, both minors. They entered a shared custody arrangement and also obtained an order from the Alberta Court of Queen's Bench, pronounced January 11, 2011 that stipulated:

> AND WHEREAS the plaintiff's guideline income for 2010 is estimated to be $80,000 and the defendant's guideline income for 2010 is estimated to be $120,000…IT IS HEREBY ORDERED;
>
> 1. that the defendant shall pay child support to the plaintiff in the amount of $549 per month commencing January 1, 2011 and on the first day of each month thereafter until further Order of the Court or until such time as the child ceases to be a child as defined by the *Divorce Act*.

[3] As Mr. Ochitwa explained, and as confirmed in correspondence from his solicitor, the support amount was based on an offset of the two incomes following the Simplified Federal Child Support Tables for the Province of Alberta, based on support for two children (the difference of $40,000 being the amount by which Mr. Ochitwa's income exceeded that of his former spouse). Mr. Ochitwa suggested that the support amount to be paid would fluctuate depending on incomes, such that if his ex-wife's exceeded his, it would be her responsibility to make the support payment. As is clear from the wording of the order this could only be upon issuance of a subsequent order.

[4] The pertinent provisions of the *Act* are the following:

> 118(1)(*b*) in the case of an individual who does not claim a deduction for the year because of paragraph 118(1)(*a*) and who, at any time in the year,
>
> (i) is
>
> (A) a person who is unmarried and who does not live in a common-law partnership, or
>
> (B) a person who is married or in a common-law partnership, who neither supported nor lived with their spouse or common law-partner and who is not supported by that spouse or common-law partner, and
>
> (ii) whether alone or jointly with one or more other persons, maintains a self-contained domestic establishment (in which the individual lives) and actually supports in that establishment a person who, at that time, is
>
> (A) except in the case of a child of the individual, resident in Canada,
>
> (B) wholly dependent for support on the individual, or the individual and the other person or persons, as the case may be,
>
> (C) related to the individual, and
>
> (D) except in the case of a parent or grandparent of the individual, either under 18 years of age or so dependent by reason of mental or physical infirmity,

an amount equal to the total of …

…

(5) No amount may be deducted under subsection (1) in computing an individual's tax payable under this Part for a taxation year in respect of a person where the individual is required to pay a support amount (within the meaning assigned by subsection 56.1(4)) to the individual's spouse or common-law partner or former spouse or common-law partner in respect of the person and the individual

(a) lives separate and apart from the spouse or common-law partner or former spouse or common-law partner throughout the year because of the breakdown of their marriage or common-law partnership; or

(b) claims a deduction for the year because of section 60 in respect of a support amount paid to the spouse or common-law partner or former spouse or common-law partner.

(5.1) Where, if this Act were read without reference to this subsection, solely because of the application of subsection (5), no individual is entitled to a deduction under paragraph (b) or (b.1) of the description of B in subsection (1) for a taxation year in respect of a child, subsection (5) shall not apply in respect of that child for that taxation year.

[5] Mr. Ochitwa, while recognizing the effect of subsection 118(5) of the *Act* was to preclude someone from obtaining the subsection 118(1) of the *Act* deductions if he or she was obligated to make support amounts, he questions the appropriate application of this provision in shared custody arrangements where there is more than one child, and where payments are determined on an offset basis. Had Mr. Ochitwa's support payment been for only one child, I might accept his argument. In the circumstances, however, I cannot.

[6] Mr. Ochitwa brought to my attention an excerpt from the Canada Revenue Agency (the "CRA") website, entitled "Shared custody and the amount for an eligible dependent", specifically examples 2 and 3. They read as follows:

> Example 2
>
> Nicholas and Christine share the custody of their children Sam and Amy. Sam and Amy spend 50% of their time with Nicholas and 50% of their time with Christine. The written agreement states that Nicholas has to pay Christine $300 a month and that Christine has to pay Nicholas $400 a month. For convenience, Christine agrees that Nicholas does not have to write her a monthly cheque and that she will simply pay him $100 a month, which will fulfill both their support obligations.
>
> Nicholas will claim the amount for an eligible dependent on line 305 of his income tax and benefit return for Sam. Christine will claim the amount for an eligible dependant on line 305 of her income tax and benefit return for Amy.
>
> Example 3
>
> William and Julie share custody of their children, Emily and Eric. Emily and Eric spend 50% of their time with William and 50% of their time with Julie. Based on William's and Julie's incomes, the court order states that William has to pay Julie $250 a month according to *The Federal Child Support Guidelines*. The amount William pays is considered a support payment. Therefore, William is not entitled to a claim on line 305 for either Emily or Eric. However, Julie can claim an amount for an eligible dependant on line 305 of her income tax and benefit return for Emily and Eric.

[7] Mr. Ochitwa questioned why in one shared custody arrangement both parents appear able to obtain the paragraph 118(1)(*b*) of the *Act* deduction, yet not able to do so in the other shared custody arrangement. The Respondent, in answer to my query in this regard, wrote as follows:

> The Minister of National Revenue confirms that in her view both parents are permitted to make a paragraph 118(1)(*b*) deduction in example 2, while on Julie is permitted to a paragraph 118(1)(*b*) deduction in example 3.
>
> In example 2, both parents have a legal obligation to pay child support for their two children under the terms of the written agreement. They may therefore come to an agreement that allows each of them to claim the paragraph 118(1)(*b*) credit for one of their children, as provided for by subsection 118(5.1).
>
> In example 3, only William has a legal obligation to pay child support for his children under the terms of the court order. Subsection 118(5) prevents him from claiming the paragraph 118(1)(*b*) credit for either child.

[8] While I cannot disagree with the Respondent's conclusions, I am perturbed by the implications that in the same circumstances of a shared custody arrangement, that simply due to the crafting of an order or agreement a parent will or will not get the eligible dependant amount. For example, where there is a shared custody arrangement with two children it strikes me there are three possible ways to craft the child support, where each parent earns some income:

1. Each parent agrees to or is ordered to pay support for one child ($400 for one for example and $300 for the other – net $100.00): both could claim the eligible dependant amount.

2. As in example 2 above, both parents agree or are ordered to pay support for both children (one pays $300 for example and one pays $400 – net $100.00: both can rely on subsection 118(5.1) of the *Act* kicking out the effect of subsection 118(5) of the *Act*).

3. As Mr. Ochitwa did, the higher earning parent is obligated to pay support for both children (net $100.00: no eligible dependant amount would be allowed).

[9] So, same shared custody arrangement, same fiscal effect, but different result. This is unfortunate. Why should each parent (where both parents earn income), in a two or more child shared custody arrangement of at least two children, not be able to claim the eligible dependant amount – one child each? I suggest these provisions could be clarified to more clearly ensure the policy objectives are being met, presumably for the benefit of the children.

[10] Ms. Softley, Respondent's counsel, suggested the case of *Marc Verones v Her Majesty the Queen*,[1] recently issued by the Federal Court of Appeal, is a complete answer to this case. It too involved a shared custody arrangement and an order representing a setoff of the amount the appellant in that case was required to contribute to the childrens' needs versus the amount the former spouse was required to contribute in accordance with the *Federal Child Support Guidelines*. The court found that:

> The whole discussion about the concept of setoff is a mere distraction from the real issue, ie. whether or not the appellant is the only parent making the "child

[1] 2013 FCA 69.

> support payment" in virtue of "an order of a competent tribunal or an agreement", as defined under the Act.
>
> …
>
> … the setoff concept does not translate the parents' respective obligation to contribute to child rearing into a "support payment" as defined in the Act.

[11] I agree that the offset is just a means of determining who is required to make the payment: it is not an obligation of two support payments going both ways, but as I illustrated earlier, it could readily have been drafted to be otherwise.

[12] The result I feel bound to reach is that subsection 118(5) of the *Act* precludes someone such as Mr. Ochitwa from the eligible dependant amount. Regrettably this appears to defeat the purpose of the eligible dependant amount to benefit the children, where in fact there is more than one child. In such a shared custody arrangement, what rationale precludes two paragraph 118(1)(*b*) of the *Act* deductions, thus leaving more money available for the benefit of the children. It appears two children do not get the same benefit as one.

[13] It is not difficult to sense Mr. Ochitwa's frustration with the legislative scheme and perhaps how it might be manipulated. Unfortunately for Mr. Ochitwa he may well have some legitimate questions regarding the legislative policy underlying these provisions, but that is a matter for the legislators. Under the law, as written, to qualify for the Wholly Dependent Amount pursuant to paragraph 118(1)(*b*) of the *Act* the following criteria must be met:

1. At any time in the year the child must be wholly dependent on Mr. Ochitwa (clause 118(1)(*b*)(ii)(B) of the *Act*).

2. Mr. Ochitwa is not required to pay support in respect of that child.

[14] When either or both of the children stayed with Mr. Ochitwa, I am satisfied they were at that time wholly dependent on him. He meets the first criteria. With respect to the second criteria, the evidence was that Mr. Ochitwa's support was based on support for both children. As he was required to pay support in respect of both of the children he fails to meet the second condition. He is not saved by the application of subsection 118(5.1) of the *Act* as the Court order does not impose a legal obligation on his former spouse to make any support payments.

[15] I must dismiss Mr. Ochitwa's Appeal.

Signed at Toronto, Ontario, this 2nd day of September 2014.

"Campbell J. Miller"

C. Miller J.

CITATION:	2014 TCC 263
COURT FILE NO.:	2014-641(IT)I
STYLE OF CAUSE:	DOUGLAS P. OCHITWA AND HER MAJESTY THE QUEEN
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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Mary Softley

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada