

Citation: 2004TCC97
Date: **02092004**
Docket: 2002-2058(IT)G

BETWEEN:

JOANNE DUCHARME,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED ORDER AND REASONS FOR ORDER

[1] This is a motion by the Respondent's Counsel in Vancouver pursuant to General subrule 116(4) for an Order:

(a) Dismissing the appeal on the basis that the Appellant has failed or refused to answer proper questions on a written examination for discovery, and;

(b) Compelling the Appellant to attend an oral examination at her own expense.

[2] The motion was filed at the end of November 2002. Through no fault of the parties, it was not heard by the Court until January 9, 2004, at which time it was adjourned for hearing until January 26, 2004, when it was heard by telephone.

[3] There were two reasons for the adjournment by the Court. The first was that the hearing date for the motion was finally set by the Court at such a late date that the Appellant's Counsel in Prince George, B.C., had no time to obtain a proper affidavit from his client in Fort St. John, B.C., a distance of about 450 km across the mountains. The second was that the Court converted the motion to one pursuant to subrule 116(2) to answer a question.

[4] The appeal is from an assessment of the Appellant under section 160 of the *Income Tax Act* that mortgage payments allegedly made by her common law spouse, Donald Edward Vienneau, the father of their two children, on her home in Fort St. John constituted a transfer of property within the meaning of Section 160 of the *Income Tax Act*. The period of the transfers alleged is January 2, 1992 to September 2, 1997 (the "Period") during which time he allegedly paid a total of \$61,878.94, including a payment of \$25,452.94 on September 2, 1997.

[5] The Respondent's assumptions 9(i) to 9(n) inclusive in the Reply allege that:

- i) The Appellant received no income from employment during the period from January 2, 1992 to September 2, 1997;
- j) The fair market value of the consideration given by the Appellant for the Payments made on her behalf was nil;
- k) Vienneau failed to file tax returns until 1996, at which point he filed returns for 10 taxation years at one time;
- l) Vienneau declared personal bankruptcy on November 27, 1998;
- m) Vienneau's liability for federal amounts of tax, penalties and interest under the Act as of January 2, 1992 was no less than \$86,047.28 as follows:

federal tax	\$54,842.79
interest	\$23,129.04
penalties	\$8,075.45
- n) The aggregate of all amounts that Vienneau was liable to pay under the *Act*, in respect of the taxation years in which the Payments were made, or any preceding taxation year, was \$564,628.08 as of September 2, 1997.

[6] Paragraphs 9 to 16 inclusive of the Notice of Appeal outline part of the Appellant's response to the assessment under Section 160. They read:

- 9. The Appellant and her Spouse had an express or implied agreement that the Spouse would pay certain expenses, including mortgage payments, in partial compensation for the aforesaid domestic and business services (the "Services") provided by the Appellant.

10. Sections 88 and 89 of the *Family Relations Act*, RSBC 1996 as amended impose a statutory obligation on the Spouse to provide support and maintenance for his family.
11. By virtue of the said agreement and the *Family Relations Act*, RSBC 1996 as amended, the Spouse had a legal obligation to provide support and maintenance to the family and had a juristic reason to do so.
12. The Spouse made payments on account of his obligations by contributing towards the mortgage payments on the Appellant's Home (the "Mortgage Payments").
13. The Mortgage Payments by the Spouse were made for valuable consideration (the Services).
14. The fair market value of the Services exceeded the fair market value of the Mortgage Payments.
15. The Appellant is not liable as claimed in the notice of assessment.
16. The Appellant relies on Section 160(1) of the *Income Tax Act*, RSC 1985 as amended and Sections 88 and 89 of the *Family Relations Act*, RSBC 1996, as amended.

[7] The Appellant did not intend to and did not conduct Examinations for Discovery.

[8] The Court's Status Hearing Order in this matter, dated March 20, 2003, ordered that Examinations for Discovery be completed no later than June 15, 2003. Without any further Court Order, Respondent's Counsel faxed the questions in Written Examination for Discovery to Appellant's Counsel on June 16, 2003, since, she stated in argument, June 15 was a Sunday, which gave her a further day to fax the questions!

[9] Appellant's Counsel was more than courteous to Respondent's Counsel. His client answered the questions and he did not object in argument on the basis that the Respondent's questions were made for discovery after the time limit set in the Status Hearing Order. Based on the affidavit of Maureen James, dated January 20,

2004, this Court finds this is because of the Appellant's Counsel's continuous efforts to get this matter on for hearing despite Respondent's Counsel's turtillian (many words, a few slow acts) efforts throughout this Appeal. Nor has the Respondent's Counsel asked for any extension of time from anyone!

[10] Respondent's Counsel's questions in dispute on January 26, 2004 are numbers 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, and 26. They will be dealt with in the following paragraphs.

[11] Question #4: At any time since you commenced your relationship with Donald Vienneau, were you aware that he had failed to file income tax returns for the 1986 – 1996 taxation years? If so, to the best of your knowledge, what were the circumstances surrounding his failure to file returns for those years?

Question #5: At any time since you commenced your relationship with Donald Vienneau, were you aware that he owed taxes, which had remained unpaid, for the 1986 – 1996 taxation years? If so, to the best of your knowledge, what were the circumstances surrounding his failure to pay taxes for those years?

Respondent's Counsel stated that these questions were satisfied when Appellant's Counsel undertook and advised that the Appellant is not disputing Mr. Vienneau's tax liability during the course of the Motion hearing. However, Questions 4 and 5 have nothing to do with the Appellant's assessment and are improper.

[12] Question #6: To the best of your knowledge, what were the sources of income received by Donald Vienneau during the 1985 – 1997 taxation years?

Because the Appellant has raised the *Family Relations Act*, the assessment is only for the Period, and the question is limited to the Appellant's knowledge, it is ordered that the Appellant answer the following "rephrased" question:

Question #6: "To the best of your knowledge, what amounts of net business income and of employment income were received by Donald Vienneau in each year during the Period?"

[13] Question #7: To the best of your knowledge, what expenses were paid by Donald Vienneau during the 1985 – 1997 taxation years?

Respondent's Counsel stated that this referred to household expenses. For the reasons described in paragraph [12], it is ordered that the Appellant answer the following "rephrased" question:

Question #7: "To the best of your knowledge, what amounts of support and maintenance were paid by Donald Vienneau in each year during the Period pursuant to the *Family Relations Act*?"

[14] Question #8: During the 1985 to the present date, what were your personal sources of income?

Because of the Appellant's *Family Relations Act* pleading, this question is rephrased and the Appellant is ordered to answer the following question:

Question #8: "What were the amounts of your income in each year during the Period?"

[15] Question #9: From 1985 to the present date, have you been employed? If so, where were you employed and by whom? For what periods of time were you employed? What was your salary during any periods of employment?

Because of the Appellant's *Family Relations Act* pleading, the question is to be answered only "for the Period," and not "from 1985 to the present date." That is so ordered.

[16] Question #10: From 1986 to the present date, which family expenses did you pay for personally? What was the average monthly amount of such payments?

Question #11: From 1986 to the present date, what bank accounts have you maintained, either solely or jointly with Donald Vienneau? Where are such accounts located?

Because the Appellant's *Family Relations Act* pleading, these questions are to be answered only "for the Period," and not "from 1986 to the present date." That is so ordered.

[17] Question 12 was answered by the Appellant in the Notice of Appeal (as admitted by the Respondent). The Appellant also answered the question itself.

[18] Question #13: What was the reason for the transfer of the Property to you? What consideration did you give for the transfer of the Property?

Because of the Appellant's *Family Relations Act* pleading and because a gift is often made by a father to a daughter (as occurred respecting this home) on the condition that the donee provide for another family member in some way, this is a proper question and the Appellant is ordered to answer it.

[19] Question #15: Other than title to this Property, are there any other properties registered in your name? If so, what is the legal description of these properties? When were they acquired and what was the consideration given for their acquisition?

In argument, Respondent's counsel suggested that this question was asked respecting possible expenses that the Appellant might have. It is not as phrased or even implied. It is not relevant to the issues in dispute and it is an improper question. The Appellant need not answer it.

[20] Question #16: As of the Transfer Date, was there an existing mortgage on the Property? If so, which financial institution held the mortgage? What was the amount remaining on the mortgage as of the Transfer Date?

This question does not appear to be relevant for the Period in the transfer of property from Mr. Vienneau to the Appellant during the Period. It need not be answered by the Appellant.

[21] Question #26: At any time since you commenced your relationship with Donald Vienneau were you aware that he had filed for bankruptcy? If so, to the best of your knowledge, what were the circumstances necessitating the bankruptcy application? Did Donald Vienneau make a bankruptcy application on more than one occasion?

This question does not appear to be relevant respecting the transfer of property from Mr. Vienneau to the Appellant during the Period. It need not be answered by the Appellant.

[22] At the conclusion of argument, in consultation with Counsel, the Court made the following orders:

1. The Appellant shall complete the answers to these questions and return them to Respondent's Counsel on or before February 28, 2004.
2. Any undertakings arising from these questions shall be satisfied on or before March 15, 2004.
3. The Hearing of this appeal, which is estimated to take two days shall occur commencing at 9:30 a.m. on May 5, 2004 at the **Tax Court of Canada c/o the Coast Inn of the North, 770 Brunswick Street, Prince George, British Columbia.**

[23] In view of the date at which these questions were submitted to Appellant's Counsel, the courtesy extended by the Appellant and her Counsel to Respondent's Counsel, the fact that some questions were improper or required "rephrasing," and the motion's phrasing to dismiss, when what was wanted was answers, the Respondent shall pay costs of this motion and costs for the Examination for Discovery by the questions, to the Appellant in any event of the cause. These costs are fixed in the sum of \$1000 by this special order according to Tariff B, Class C. They are to be paid forthwith.

This Order and Reasons for Order is issued in substitution for the Order and Reasons for Order dated January 29, 2004.

Signed at **Kelowna, British Columbia**, this **9th** day of **February** 2004.

"D.W. Beaubier"

Beaubier, J.

CITATION: 2004TCC97

COURT FILE NO.: 2002-2058(IT)G

STYLE OF CAUSE: Joanne Ducharme v. The Queen

PLACE OF HEARING: Ottawa Motions Room

DATE OF HEARING: January 26, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice D.W. Beaubier

DATE OF JUDGMENT:

APPEARANCES:

Counsel for the Appellant: Glen R. Nicholson

Counsel for the Respondent: Karen Truscott

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