

Docket: 2012-1697(IT)I

BETWEEN:

DARLENE A. KARN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeals heard on February 8, 2013, at Calgary, Alberta

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant: Patrick Lindsay  
Counsel for the Respondent: Adam Gotfried

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**JUDGMENT**

The appeals from the assessments made under the *Income Tax Act* with respect to the 2009 and 2010 taxation years are allowed, without costs and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 7th day of March 2013.

“Diane Campbell”

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Campbell J.

Citation: 2013 TCC 78  
Date: 20130307  
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BETWEEN:

DARLENE A. KARN,

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and

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Respondent.

### **REASONS FOR JUDGMENT**

Campbell J.

[1] In the 2009 and 2010 taxation years, the Appellant's son (also referred to as "L") was enrolled as a student at Calgary Academy (the "Academy"), a special education private school, designated and accredited by the Province of Alberta. The Appellant claimed a medical expense tax credit in each of these taxation years for the tuition that was paid to the Academy. The Minister of National Revenue (the "Minister") disallowed the claim because the amounts paid to the Academy for tuition were not medical expenses pursuant to paragraph 118.2(2)(e) of the *Income Tax Act* (the "Act").

[2] Paragraph 118.2(2)(e) of the *Act* provides:

**(2) Medical expenses.** For the purposes of subsection (1), a medical expense of an individual is an amount paid

[...]

(e) for the care, or the care and training, at a school, institution or other place of the patient, who has been certified by an appropriately qualified person to be a person who, by reason of a physical or mental handicap, requires the equipment, facilities or personnel specially provided by that school, institution or other place for the care, or the care and training, of individuals suffering from the handicap suffered by the patient;

[3] In order to claim expenses under paragraph 118.2(2)(e), a taxpayer must meet certain requirements. Those requirements were set out at paragraph 20 of the decision in *Collins v. The Queen*, [1998] 3 C.T.C. 2981, and have been relied upon in other decisions of this Court as well as the Federal Court of Appeal. Paragraph 20 states:

**20** A reading of the above provision makes it clear there are several criteria to be satisfied which are as follows:

1. The taxpayer must pay an amount for the care or care and training at a school, institution or other place.
2. The patient must suffer from a mental handicap.
3. The school, institution or other place must specially provide to the patient suffering from the handicap, equipment, facilities or personnel for the care or the care and training of other persons suffering from the same handicap.
4. An appropriately qualified person must certify the mental or physical handicap is the reason the patient requires that the school specially provide the equipment, facilities or personnel for the care or the care and training of individuals suffering from the same handicap.

[4] Although Justice Campbell Miller purported to ‘tweak’ those requirements in his decision in *Lang v. The Queen*, 2009 TCC 182, 2009 D.T.C. 1127, it was generally a re-statement of the *Collins* requirements. I would also note that Justice Miller’s re-statement calls for the taxpayer to provide “a certificate” which, I believe, improperly implies that a document, report or some other written format must be produced. The provision itself, however, uses the phrase “...who has been certified...” implying that any format may suffice, including the preferable method of oral testimony of a properly qualified individual in court.

[5] The Appellant has paid the tuition to the school for these two taxation years and that is not in issue. In addition, the Respondent conceded that the Academy is a specialized institution with programs designed to meet the needs of students with

disabilities. This requirement is, therefore, not in issue. To decide whether the Appellant is entitled to claim the tuition expenses, I must decide whether the certificates, or any one of them, that were entered as exhibits, are sufficient and whether the Appellant's son was actually certified as having a mental handicap. The validity of these certificates was the central focus of the hearing.

[6] I heard evidence from two witnesses: Glen McGinitie, the Appellant's spouse, and Kim Anne McLean, the Principal of the Academy. Mr. McGinitie testified that his son attended St. Catharine's Elementary School from Grade 1 through 3 but, when the school became a "feeder school" (Transcript, page 6, line 13) for surrounding neighbourhoods and the student population expanded significantly, the parents moved their son to Prince of Wales School when "...it was evident that he was not doing well in that environment." (Transcript, page 6, lines 21-22). He remained at this school until the completion of Grade 6. However, their son became anxious, stressed and depressed during his school year in Grade 6 so "...we realized there was something significant that we had to look into." (Transcript, page 7, lines 22-23). At this time, they took their son to a registered psychologist, Dr. Marlis Krueger, who provided the first of three medical certificates that were entered into evidence. Following meetings, assessments and interviews spanning six different days over several months, Dr. Krueger produced an extensive and detailed report dated June 5, 2007 (the "Krueger Report").

[7] The Krueger Report identified a number of concerns and weaknesses in the categories of reading, written language, math and listening comprehension. In some areas within each of these categories, his score was in the average range for his grade level but, in other areas within each category, he scored or was assessed below average. For example, his "[r]eading speed required to attain appropriate comprehension was below average (12<sup>th</sup> percentile) and would be more typical of a grade three student." (The Krueger Report, page 4.) Dr. Krueger also noted that he had significant weaknesses in the math category, including "...in speed, fluency, and memorization for single-digit addition, subtraction, and multiplication facts ... more typical of a late grade two student." (The Krueger Report, page 4.) Again, in his listening comprehension, the "[a]mount of detail recalled was inconsistent and information was recalled in a disorganized manner." (The Krueger Report, page 4.)

[8] At the conclusion of the assessment, Dr. Krueger's diagnosis of the Appellant's son was that he "...has a history of anxious tendencies and descriptions indicate development of Obsessive Compulsive Disorder. ..." (The Krueger Report, page 7.) Based on his history of anxious tendencies in the earlier school years and their escalation in Grade 6, she made four recommendations at the end of the report,

including a suggested further re-assessment in approximately two years. However, based on her evaluation of the possibility for the existence of an attention disorder, she concluded that “[a] diagnosis of any subtype of AD/HD would not be appropriate at this time given minimal symptoms...”. (The Krueger Report, page 6. Emphasis added.) The Report notes that he had the ability to be successful with a regular school curriculum provided accommodations were made to his school programs, including:

- providing copies of lecture notes to reduce note-taking,
- putting important information in writing for [L] instead of only providing it orally,
- allowing extra time for class work, tests, and exams,
- providing access to computer for written work to allow for easier editing, and
- testing in a quieter area.

(The Krueger Report, page 7.)

[9] Following Dr. Krueger’s recommendation to have their son medically assessed by the family physician, the parents were then referred by that family doctor to Dr. J.E. Besant, a consulting psychiatrist. She produced the second report (the “Besant Report”) dated September 27, 2007. Although Mr. McGinitie testified that she conducted several interviews with the McGinities and their son, her report references only one appointment and she noted that, since it was impossible to carry out an extensive assessment of their son during the limited consultation time, her report encompassed her own review and observations together with a review of the Krueger Report of June, 2007. She concludes that he presents with a variety of anxiety symptoms and some obsessional symptoms but, contrary to Dr. Krueger’s diagnosis, she concluded that he did not meet the criteria for Obsessive Compulsive Disorder. At page 2 of her report, she made the following observation in respect to Dr. Krueger’s diagnosis of Obsessive Compulsive Disorder:

Overall these possibly obsessional and compulsive symptoms do not currently last more than one hour per day or cause significant impairment and dysfunction.

She noted his suicidal ideations and, among other items, she diagnosed the Appellant’s son with:

- I. Anxiety Disorder NOS (mostly generalized, and some obsessional features).  
Possible Adjustment Disorder with Anxiety.  
Learning Disorder NOS (Weaknesses in Working Memory, Processing Speed, Reading Speed, Speed and Quality of Written Output, Math Speed).

[...]

(The Besant Report, pages 3-4.)

[10] In the Suggestions/Discussion section of the Besant Report, she states that, based on the Krueger Report, a diagnosis of AD/HD was much less likely. However, she encouraged a more detailed assessment of Working Memory skills and Processing Speed skills with a psychologist to assist in further direction with the school and learning difficulties. At the time of this Report, the Appellant's son had commenced Grade 7 and had shifted to Willow Park Fine Arts School, where the parents hoped the environment would assist their son with his anxiety and be a better fit for his learning problems. The Besant Report notes that, if his new placement at this school did not work out, they should seek further psychological assessment.

[11] In addition to this Report, Dr. Besant wrote a brief one-page diagnostic letter to the child's then school, Willowpark, for school coding purposes.

[12] The third and final certificate (the "MacPherson Report") was completed two years later, on September 21, 2009, by Jennifer MacPherson, a pediatric consultant specializing in learning difficulties. Because this letter is short and is crucial to my finding, I am reproducing it in its entirety:

L has been a patient of mine since April 2008. He is a 14 year old with a diagnosis of Attention Deficit Disorder-Inattentive Type ("ADD"). L is being treated with the medication Strattera. ADD quite often has other learning disabilities that are co-morbid (exist together) with ADD and this is the case with L as he also has an Anxiety Learning Disorder Not otherwise specified which involves an extreme weakness in working memory as well as weakness in processing speed, speed and quality of written output, and math speed (as all assessed by Dr. J.E. Besant, Psychiatrist – October 9, 2007 letter). An additional component of L's treatment for these learning disabilities is the need for placement in a specialized school which provides specialized teacher training and very specific individual program plans, optimizes the teacher to student ratio and provides a high level of individualized support. L is currently attending Calgary Academy, a school which I strongly recommend as it provides the facilities and personnel as described above.

[13] Dr. MacPherson notes that the Appellant's son has been her patient since April, 2008. According to Mr. McGinitie's evidence, their son performed poorly in Grade 7 at Willowpark and, again, the decision was made to relocate him to the Academy to commence his Grade 8 at that school in the fall of 2008. Mr. McGinitie stated that Dr. MacPherson completed her assessment during the period April to

September, 2008. According to the report, her diagnosis was Attention Deficit Disorder-Inattentive Type (“ADD”), versus the hyperactive sub-type, along with other learning disabilities, which co-existed with the ADD. Mr. McGinitie, on cross-examination, stated that Dr. MacPherson used her laptop extensively and that she kept other records and reports on her laptop. However, none of these were produced in evidence. Because her letter is short and appears to be almost a summary of her findings, it would have assisted the Court had these supporting records of her interviews, testing and assessment been provided as backup material to the Report.

[14] The principal of the Academy, Kim Anne McLean, testified that, based on her thesis topic, Metacognitive Lesson Planning for Learning Disabled Students, she developed a lesson plan that all teachers at the Academy use with each student’s individual requirements. She stated that the students who enter the Academy must be assessed by an independent third party as learning disabled. She described a ‘learning disability’ as

...a student who has ... or anybody who has a discrepancy between their potential and their actual performance so much so that it impairs them and it’s neurologically based. ... The accepted definition was written in 2002 by the Learning Disabilities Association of Canada and it’s the one that Alberta Education currently uses.

(Transcript, page 48, line 27 to page 49, line 2.)

She went on to state:

... [t]hat learning disabilities can affect their reading, their written language, their math, their oral language, how they speak. It results from an impairment in perceiving, thinking, remembering, or learning. It is also – can involve difficulty with organization, with social skills, perspective taking, and that it’s lifelong. That it’s due to a genetic and/or neurobiological factor that alters the brain functioning. ...

(Transcript, page 51, lines 7 to 14.)

She goes on to describe a learning disability, in perhaps more layman’s terms, when she stated that most students at the Academy were of at least average intelligence and,

When the students bring an independent assessment, it shows you they are of average intelligence. So if they are of average intelligence in an average school, they should be doing averagely well. However, these students come in with average intelligence, and from what their academic history says is that they are performing well below what they are capable of.

(Transcript, page 60, lines 13 to 19.)

[15] Between the submissions of Counsel for the Appellant and the Respondent, I believe I have been provided with most of the jurisprudence in this area from both this Court and the Federal Court of Appeal. As I have previously indicated in my reasons, the decision in *Collins* sets out the requirements a taxpayer must meet in order to claim the expense under paragraph 118.2(2)(e). While a certification need not be in any particular format, it must be a “true certification” (*Scott v. The Queen*, 2008 FCA 286, 2008 D.T.C. 6682 at para. 23). That decision relied on the reasoning of Sharlow, J.A. in *Title Estate v. The Queen*, 2001 FCA 106, 2001 D.T.C. 5236, at paragraph 5, where the Court stated:

[5] In our view, a certificate under paragraph 118.2(2)(e) must at least specify the mental or physical handicap from which the patient suffers, and the equipment, facilities or personnel that the patient requires in order to obtain the care or training needed to deal with that handicap. The certificates in this case are simply too vague to meet that requirement.

[16] To determine the validity of the proposed certification in these appeals, I must first address whether any one of the three medical reports, or a combination of any of them, identify a mental handicap in respect to the Appellant’s son and second whether their son requires the support facilities of a specialized school, like the Academy. There could be a basis for accepting all three or any two of the certifications provided they present a transparent and evolving diagnosis. The decision in *Lucarelli v. The Queen*, 2012 TCC 301, 2012 D.T.C. 1250, considered that a combination of an initial doctor’s report and a follow up assessment by a Dyslexic Resource Centre would satisfy the certification requirement. At paragraph 22 of her reasons, Woods J. states:

[22] It seems to me that the legislative requirements are satisfied in circumstances where Dr. Johnston's report specifies the nature of the disability and the type of training that is required, and the evidence establishes that the TALC Academy specializes in providing this type of training for children with this disability.

[17] However, in the appeals before me and contrary to the Appellant’s submissions, I do not believe there is anything akin to an evolving diagnosis within these reports. It is always preferable that the author of such a report be present to give evidence and be cross-examined. When that is lacking, I am required to determine on a review of the wording in those reports whether the requirements of paragraph



118.2(2)(e) have been met. That being said, they must, on their face, contain clear and straightforward wording and leave no doubt in my mind as to what is being stated. Dr. Krueger's Report reached a diagnosis of anxiety plus obsessive compulsive symptoms but stated that the Appellant's son should continue in a regular school program. That report does not meet the certification requirements imposed under paragraph 118.2(2)(e). The Besant Report continued the diagnosis of an anxiety disorder but rejected the obsessive compulsive diagnosis of Dr. Krueger and, instead, concluded that there was a learning disorder with accompanying weaknesses in areas such as working memory, processing and reading speed, math speed and speed and quality of written output. This was a substantially different diagnosis from that of Dr. Krueger and certainly not an evolving one, as the Appellant suggested. The Besant Report does not meet the certification requirement. It continues to recommend that the Appellant's son stay at Willowpark school, subject to increased assistance and supervision with those school programs. She was not recommending a private specialized school such as the Academy. However, her report recognizes that Willowpark may not prove adequate for L's needs, when she states, at paragraph 5 of the suggestions, that if this occurs, the parents are strongly encouraged to further pursue the school and learning issues.

[18] The two common elements, that I see in the Krueger and Besant Reports, are first, the recognition by both doctors of the escalating learning difficulties in the same areas and the necessity for accommodations by the schools to assist and support him with his difficulties with learning and second, both recognize the potential for L's symptoms to worsen.

[19] Neither the Krueger nor the Besant Report, taken alone or in combination, can support the certification requirement of this provision.

[20] I turn then to the third Report completed two years subsequent to the Besant Report. The jurisprudence makes it clear that the medical report itself must satisfy the Court that the person has a mental handicap. As the decision in *Lang* points out, it is not up to the Court to determine whether, in fact, a mental handicap exists because that is for the medical doctor or other qualified individual to assess, determine and then include in his or her certification to this Court. I must simply determine whether the certificate, placed before me, certifies that the individual is suffering from a physical or (as in these appeals) a mental handicap. It is not my duty to go behind such a certification to question a diagnosis. Although, as stated in the decision in *Lang*, the certification need not contain the phrase 'physical or mental handicap', there must, however, be no doubt that a reasonable person, looking at that certification, would reasonably conclude that the qualified professional has declared

or positively identified the physical or mental handicap from which the individual suffers.

[21] In the second sentence of the MacPherson Report, it states that L "...is a 14 year old with a diagnosis of Attention Deficit Disorder – Inattentive Type ("ADD")." This diagnosis is clear and straightforward. She goes on to state that "ADD" often exists with "other learning disabilities" and that this, in fact, is L's diagnosis. So, in effect, he has ADD, one learning disability, along with other learning disabilities. She then goes on to specify how these learning disabilities affect him: "... an extreme weakness in working memory as well as weakness in processing speed, speed and quality of written output, and math speed...". The Report references her reliance on Dr. Besant's assessment of September, 2007, which identified weaknesses in these same areas of learning. Again, all of these three Reports recognize the weaknesses in the same areas of learning even though they all reached different conclusions in the medical terminology they would apply to it. From the evidence, L's symptoms between 2007 and 2009 were escalating and the two-year period between the Besant and MacPherson Reports may account for the differing diagnosis. Whatever the reason, I am confining my conclusions to the MacPherson Report. Since the diagnosis is contained within the Report, does it amount to certification of a mental handicap? The term 'mental handicap' has been defined in the jurisprudence using the ordinary meaning from the *Oxford English Dictionary*, 2d ed, definition:

A condition in which the intellectual capacity of a person is permanently lowered or underdeveloped to a degree that prevents normal function in society.

[22] The Appellant suggested that the term 'mental handicap' was outdated and that it is no longer used because of the stigma attached to this term. The principal of the Academy confirmed that the term was antiquated within education circles. Although that may be so, the wording of this provision contains that phrase and Parliament has not seen fit to amend the provision in this respect. It is clear from the evidence that not every learning disability will qualify as a mental handicap. However, L's diagnosis by Dr. MacPherson includes a treatment proposal for his learning disabilities. She clearly states, as a component of his treatment, the "...need for placement in a specialized school which provides specialized teacher training and very specific individual program plans, optimizes the teacher to student ratio and provides a high level of individualized support." (Emphasis added)

[23] *Webster's Ninth New Collegiate Dictionary*, (Merriam-Webster Inc., 1985) defines the word 'need' as:

1. necessary duty: obligation
  2. (a) a lack of something requisite, desirable or useful  
(b) a physiological or psychological requirement for the well-being of an organism
  3. a condition requiring supply or relief
- [...]

*The Canadian Oxford Dictionary*, (Oxford University Press Canada, 1998) defines the word ‘need’ as:

1. (a) a want or requirement  
(b) a thing wanted
  2. circumstances requiring some course of action; necessity
  3. (a) a condition of lacking or requiring some necessary thing, either physically or psychologically
- [...]

[24] From these definitions, it is clear that the use of the word ‘need’ is equivalent to the word ‘require’ and both words are, for all practical purposes, interchangeable. This requirement or need for placement in a specialized school, where his learning disabilities could be addressed, together with the evidence of Mr. McGinitie and the principal of the Academy in respect to how that school could successfully deal with those disabilities which prevented him from functioning normally in society, support my conclusion that the certification by Dr. Krueger meets the definition of mental handicap. As the principal testified and the MacPherson Report suggests, L was performing academically well below what he was capable of until he was enrolled at the Academy, where he is presently completing Grade 12.

[25] Two remaining issues need to be addressed. First, although the MacPherson Report did not require the Appellant to enrol her son at the Academy, it does specify the need, as part of the treatment, for enrolment in a specialized school. At the time she wrote this Report, L had just started at the Academy and it is the school she “strongly recommends”. According to the evidence, there are three such schools in the Calgary area and I believe the certification is met where the enrolment in a specialized school that meets the accreditation requirements of the province will suffice without dictating the specific specialized school that L is required to attend.

[26] Second, there was some issue over the timing of the MacPherson Report, in respect to the 2009 tuition costs, in that the Respondent submitted that the Report, being dated September 21, 2009, was not obtained prior to the money being spent in the 2009 taxation year and that, if I was prepared to accept the certification in the

MacPherson Report, only the appeal for the 2010 expenses could be allowed. There are several cases which appear to conclude that certification must be made before the expense is incurred (*Vita-Finzi v. The Queen*, 2008 TCC 565) or that *ex post facto* certificates would not be acceptable (*Lang*). However, the Federal Court of Appeal in *Scott* makes it abundantly clear, at paragraph 28, that certification must be obtained

...at any time before her filing of the income tax return for the given year in which she claimed the tuition fees as a medical expense deduction. ...

[Emphasis added]

and not prior to the money being spent as suggested by the Respondent. On cross-examination, Mr. McGinitie stated that he made two tuition payments in 2009, one on February 19 and one on September 15 (Transcript, page 24). The MacPherson Report is dated September 21, 2009 and the Appellant filed her return on April 17, 2010 (Respondent's Reply to the Notice of Appeal, at paragraph 4). Consequently, the certification was obtained before filing her returns and is valid in this respect.

[27] For these reasons, the appeals for both the 2009 and 2010 taxation years are allowed to permit the Appellant to claim as medical expenses the tuition costs paid to the Calgary Academy in each of these years.

Signed at Ottawa, Canada, this 7th day of March 2013.

“Diane Campbell”

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Campbell J.

CITATION: 2013 TCC 78

COURT FILE NO.: 2012-1697(IT)I

STYLE OF CAUSE: DARLENE A. KARN AND HER  
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