Docket: 2004-2970(IT)I

BETWEEN:

CHERYL ANN PRIEST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 6, 2004, at Saint John, New Brunswick

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Martin Hickey

JUDGMENT

The appeal from the determination made under the *Income Tax Act* for the period from October 2000 to June 2002 is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 17th day of January 2005.

« François Angers »

Angers, J.

Citation: 2005CCI30
Date: 20050117
Docket: 2004-2970(IT)I

BETWEEN:

CHERYL ANN PRIEST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

[1] This is an appeal from a determination made by the Minister of National Revenue on March 31, 2004, that the appellant was not the eligible individual under section 122.6 of the *Income Tax Act* (the "Act") in respect of her two children E. L. and J. L. for the period from October 2000 to June 2002 as regards the 2000 base year. The children are qualified dependants and the only matter here concerns the condition set forth in paragraphs *(b)* and *(h)* of the definition of "eligible individual", namely, that the parent of the qualified dependants must be the one who "primarily fulfils the responsibility for the care and upbringing of the qualified dependants". Since both parents are claiming the child tax credit benefit for the period in issue, no presumptions are applicable and the factors set forth in section 6302 of the Regulations must be considered.

[2] The definition of "eligible individual" in section 122.6 of the Act reads:

> "eligible individual" in respect of a qualified dependant at any time means a person who at that time
>
> *(a)* resides with the qualified dependant,
> *(b)* is the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of the qualified dependant,
> *(c)* is resident in Canada or, where the person is the cohabiting spouse or common-law partner of a person who is deemed under subsection 250(1) to be resident in Canada throughout the taxation

> year that includes that time, was resident in Canada in any preceding taxation year,
> *(d)* is not described in paragraph 149(1)(*a*) or (*b*), and
> *(e)* is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who
>
> (i) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,
>
> (ii) is a temporary resident within the meaning of the *Immigration and Refugee Protection Act*, who was resident in Canada throughout the 18 month period preceding that time, or
>
> (iii) is a protected person within the meaning of the *Immigration and Refugee Protection Act*,
>
> (iv) was determined before that time to be a member of a class defined in the *Humanitarian Designated Classes Regulations* made under the *Immigration Act*,
>
> and for the purposes of this definition,
> *(f)* where a qualified dependant resides with the dependant's female parent, the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent,
> *(g)* the presumption referred to in paragraph *(f)* does not apply in prescribed circumstances, and
> *(h)* prescribed factors shall be considered in determining what constitutes care and upbringing;

[3] The factors found in section 6302 of the Regulations read:

> 6302. For the purposes of paragraph *(h)* of the definition "eligible individual" in section 122.6 of the Act, the following factors are to be considered in determining what constitutes care and upbringing of a qualified dependant:
> *(a)* the supervision of the daily activities and needs of the qualified dependant;
> *(b)* the maintenance of a secure environment in which the qualified dependant resides;
> *(c)* the arrangement of, and transportation to, medical care at regular intervals and as required for the qualified dependant;
> *(d)* the arrangement of, participation in, and transportation to, educational, recreational, athletic or similar activities in respect of the qualified dependant;
> *(e)* the attendance to the needs of the qualified dependant when the qualified dependant is ill or otherwise in need of the attendance of another person;
> *(f)* the attendance to the hygenic needs of the qualified dependant on a regular basis;

> *(g)* the provision, generally, of guidance and companionship to the qualified dependant; and
> *(h)* the existence of a court order in respect of the qualified dependant that is valid in the jurisdiction in which the qualified dependant resides.

[4] In confirming the assessment, the Minister relied on the following assumptions of fact, which were either admitted or denied by the appellant as indicated:

a) the facts admitted above;
b) the Appellant and her former spouse, Michel LaPlante ("former spouse"), separated prior to December 31, 1994; **(denied)**
c) the qualified dependants in question are E. L., born July 19, 1992, and J. L., born November 27, 1993; **(admitted)**
d) the Appellant and her former spouse, are parents of the dependants; **(admitted)**
e) during the period in question, the Appellant had scheduled access to the children Monday to Thursday after school until 4:00 pm or 5:00 pm, except for Wednesdays when they were with the Appellant until 8:00 pm, and alternate Thursdays, when they stayed over night; **(denied)**
f) the Appellant and her former spouse alternated weekends from Friday after school until Monday morning; **(denied)**
g) during the period holidays including summer, the children resided with the appellant 50% of the time; and **(denied)**
h) the appellant was not the primary caregiver of E. L. and J. L. for the period in question. **(denied)**

[5] The evidence did not disclose any custody order. For the period in question, the children, shared both their parents' home at different intervals and times according to an understanding that they would spend as much time as possible with each parent.

[6] Although the Reply to the Notice of Appeal states that the appellant and her former spouse separated prior to December 31, 1994, it appears from the evidence that they continued living under the same roof until the appellant started dating in October 2000 - one George Priest whom she married in March 2001. After the marriage, the Appellant's eldest daughter testified that the children had two homes and each child had his or her own room at both places. The eldest daughter would occasionally drive the children to and from their various activities.

[7] As for the appellant, the evidence revealed that for part of 2000, she had a place of her own but still considered the family residence as home. After she met George Priest in the fall of that year, her priority to raise her children properly did not change. She kept in touch with the children's father in order to arrange things to facilitate this transition in her life. Custody became the key issue and both parents consulted a mediator to resolve their differences. The appellant's main concern was to make sure that the children had access to both parents.

[8] The appellant testified that no agreement was reached through mediation and that the issue was to be dealt with by their respective lawyers. Notwithstanding, a letter dated March 13, 2001, from the mediator indicates that a mutual agreement had been reached to facilitate access to the children. The relevant paragraphs read as follows:

> It was mutually agreed that both children will continue going to their Mother's home after school. J.L. gets out at 2:15, and E. L. at 4:15. This will allow Cheryl daily contact with the children. The pick-up time for the children depends on the day of the week and their extracurricular activities. The children are only at Cheryl's on alternate Fridays
>
> - Monday – Michel picks up at 4:30
> - Tuesday – Michel picks up at 5:00
> - Wednesday – Children have supper with Mom – drop off to Michel by 8 PM
> - Thursday – alternate weeks stay overnight. On Cheryl's weekend – Michel pick up at 5:00
> - Friday – alternate weeks go directly to Michel's after school.
>
> As Cheryl works each Friday evening and Sat evening and usually Sunday from 4 to 8 PM, it was agreed that she will have the children alternate weekends, and on her weekend they will stay overnight on Sunday so Cheryl may spend time with them on her return from work. She will be responsible for getting them to school on Monday morning. Cheryl will have the children overnight on Thursday preceding Michel's weekend with the kids. The children will **not** go to their Mother's after school on the Friday following an overnight Thursday.
>
> It was agreed that March Break time will be divided and discussion will take place by early February. For 2001, Cheryl will have the children Monday through Thursday as she is off work. Michel will have them over the weekend.

> Summertime will be divided 50/50. Mothers Day/Fathers Day each parent will have the children on their day. Celebrate children's birthdays together.

[9] The appellant once again consulted the mediator since she did not agree with the contents of the letter. Some of her objections dealt with the time school finished for one of the children and with the fact that she did not want the father to hire a babysitter since she was available. According to the appellant, the father had a very busy schedule and she wanted to care for her children when he was not around. That issue was eventually left in the hands of lawyers to settle. The appellant kept a record of the time she spent with her children on a day to day basis but the records were destroyed by a fire at her home.

[10] Her testimony revealed that the children went to her home daily after school except Wednesdays when the father would pick them up. She helped them with their homework and she or her husband would drive them to and from the location of the various activities or would drop them off at their father's home. The children would have dinner with her but would sleep at their father's home because of their homework. She is unable to indicate the approximate number of nights they sleep at their father's.

[11] The appellant made the children's medical and dental appointments but left her former spouse the task of making their orthodontic appointments since he paid for their treatments. She participated actively in the children's extra-curricular activities but admits that her ex-spouse was the one who handled their enrollment in most of these. She paid for piano lessons for her daughter and made sure the children had a set of everything at both homes. When the children were sick, she took care of them since she was at home.

[12] The father had a different version concerning access during the period in issue. On Mondays, the children would go to the appellant's home and he would pick them up at around 4:30 p.m. They had dinner and spent the night at his place. On Tuesdays, they would go to the appellant's home after school and have dinner with her. They would spend the night at their father's home. The children spent Wednesdays at their father's home. On Thursdays, they went to their mother's home after school and had dinner there. After attending their activities on Thursday nights, the children would alternate between returning to their mother's or their father's home where they would spend the night. On Fridays and until Monday morning, the children would alternate spending their week-ends with each parent.

The father testified that in an average month, the children would stay at his home 22 nights. In the summer, the time children resided with each parent was divided evenly. Although there are three different versions concerning access, it is somewhat close to the actual agreement.

[13] The father had a very busy schedule but he reduced it significantly by resigning from various associations in the spring and fall of 2000. This allowed him to be more available to his children. He gets them ready for school in the morning and helps them with their homework. Since the end of 1999, he has made their medical and dental appointments, has arranged for their transportation thereto and has provided the children with psychological care. All related fees were covered by their father's insurance. He made sure that the children were enrolled in extra-curricular activities and paid most of the related costs. He would also accompany the children during these appointments.

[14] The father testified that he made arrangements to care for the children in case they were sick. He also made sure they had a well-balanced diet and exercised regularly. The children do very well in school. They are given all the educational material needed and receive help with their homework.

[15] In this case, both parents have defended their position and provided this court with their best evidence to establish their entitlement to the child tax benefit. The evidence presented by both parents on the access issue and on the overall picture on how they are involved in their children's care and upbringing is contradictory. Notwithstanding their respective positions, both parents in the case appear to have been doing their best in their role as parents and in their children's upbringing during the period at issue and during this difficult time. Unfortunately, only one person may be an "eligible individual" as defined in section 122.6 of the Act (see *Canada v.* M*arshall*, [1996] 2 C.T.C. 92).

[16] In considering the factors established in section 6302 of the Regulations, I find that on some factors both parents qualify equally, while on others, there may be a slight advantage in favour of the father particularly regarding paragraphs *(a)*, *(b)*, *(d)* and *(g)*. The appellant has to establish, on a balance of probabilities, that she is the "eligible individual" as defined in section 122.6 of the Act. In light of the evidence and the factors to be considered, I find that the Minister's determination in favour of the father was reasonable and that the appellant's evidence is insufficient to demonstrate that, during the period at issue, she was the parent who primarily fulfilled the responsibility for the care and upbringing of the two children. The appeal is dismissed.

Signed at Ottawa, Canada, this 17th day of January 2005.

« François Angers »

Angers, J.

CITATION:	2005CCI30
COURT FILE NO.:	2004-2970(IT)I
STYLE OF CAUSE:	Cheryl Ann Priest and the Queen
PLACE OF HEARING:	Saint John, New Brunswick
DATE OF HEARING:	December 6, 2004
REASONS FOR JUDGEMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	January 17, 2005

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Martin Hickey

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario