

BETWEEN:

LOUISE POULIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on June 29, 2006, at Montréal, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant:

The Appellant herself

Counsel for the Respondent:

Anne Poirier
Chantal Roberge, articling student

JUDGMENT

The appeals under the informal procedure in respect of the assessments made under the *Income Tax Act* for the 2003 and 2004 taxation years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of October 2006.

"Paul Bédard"

Bédard J.

Translation certified true
on this 13th day of July 2007.

Brian McCordick, Translator

Citation: 2006TCC495
Date: 20061023
Docket: 2005-4446(IT)I

BETWEEN:

LOUISE POULIN,

Appellant,

and

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Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] The Minister of National Revenue ("the Minister") determined, in a Notice of Redetermination of Canada Child Tax Benefit dated May 20, 2005 in respect of the 2003 base year, and a Notice of Determination of Canada Child Tax Benefit dated July 20, 2005 in respect of the 2004 base year, that the Appellant was no longer the eligible individual in respect of the children of her common-law partner Pavlo Stelmazuk ("the father") for the period commencing in July 2004. The Appellant is appealing from these determinations under the informal procedure.

[2] After issuing his redetermination of Canada Child Tax Benefit dated May 20, 2005 against the Appellant in respect of the 2003 base year, the Minister determined that there were no overpayments in respect of the period from July 2004 to April 2005.

[3] On July 15, 2005 and September 19, 2005, the Appellant served upon the Minister a Notice of Objection to the redetermination of May 20, 2005 and the determination of July 20, 2005, in respect of the base years 2003 and 2004, respectively.

[4] On September 23, 2005, the Minister confirmed the redetermination dated May 20, 2005 and the determination dated July 20, 2005 based on the same facts, that is to say, the facts set out in paragraph 6 of the Reply to the Notice of Appeal:

[TRANSLATION]

- (a) The Appellant is Pavlo Stelmazuk's common-law spouse; (admitted)
- (b) Pavlo Stelmazuk is the father of two children:
 - i) Kevin, born May 4, 1994, and
 - ii) Kamélie, born January 4, 1996; (admitted)
- (c) From the date of the children's births to March 2003, Julie Lavigne, the biological mother, was considered to be the parent who primarily fulfilled the responsibility for the children Kevin and Kamélie's care and upbringing; (denied)
- (d) Pavlo Stelmazuk and Julie Lavigne lived together until August 2000; (admitted)
- (e) Since Pavlo Stelmazuk and Julie Lavigne agreed to joint custody of the children Kevin and Kamélie, six months' worth of the child tax benefits were allocated to each spouse for the period from April 2003 to June 2004; (denied)
- (f) The Appellant, by virtue of the female presumption, was the tax benefit beneficiary in respect of Kevin and Kamélie for the period from March to August each year, but Julie Lavigne cashed the said benefits for the period from September to February each year; (admitted)
- (g) In July 2004, Julie Lavigne notified the Minister that Kevin and Kamélie lived with her from June 18, 2004 to August 20, 2004, and she claimed the tax benefits for the months of July and August 2004; (admitted)
- (h) On July 28, 2004, the Minister notified Julie Lavigne that the children were under a joint custody arrangement and refused to accede to her request; (no knowledge)
- (i) Julie Lavigne served a Notice of Objection on the Minister in February 2005, complaining that the Minister failed to revise her tax benefits for the months of July and August 2004; (no knowledge)
- (j) On February 22, 2005, following the service of a Notice of Objection by Julie Lavigne in respect of the 2003 base year, the Minister sent the Appellant and the biological mother Julie Lavigne a questionnaire to fill out, and a request for documents, for the period commencing in June 2004, in order to determine

which of the two was the parent eligible to receive the child tax benefits in respect of Kevin and Kamélie; (admitted)

- (k) The Appellant provided no documents in response to the letter dated February 22, 2005, such as notes from dentists, doctors, school authorities or sports associations, in support of her application to be considered the eligible parent of Kevin and Kamélie; (admitted) and
- (l) The Minister determined that he did not consider the Appellant the eligible individual in respect of the children Kevin and Kamélie for the 2003 and 2004 base years. (admitted)

Preliminary remarks

[5] Although several years had elapsed since the separation, acrimony continued to reign between the Appellant and the father on the one hand, and Julie Lavigne ("the biological mother") on the other, so I have not taken everything that these people said in support of their positions on their eligibility for the child tax benefit at face value. I would add that I read with some circumspection the laudatory letters that the parties tendered in evidence to support their positions, especially the letters from relatives and friends.

[6] The Appellant and the father testified for the Appellant. Only the biological mother and Canada Revenue Agency appeals officer Serge Grenier testified for the Respondent.

The law

[7] The definition of "eligible individual" in section 122.6 of the *Income Tax Act* was worded as follows at the time:

"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 paragraphs 149(1)(a) or 149(1)(b);

(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,

(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 purpose of this definition,

(f) where the 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 122.6 eligible individual (f) does not apply in prescribed circumstances; and

(h) prescribed factors shall be considered in determining what constitutes care and upbringing.

[8] For the purposes of paragraphs (g) and (h) of the definition of "eligible individual" in section 122.6 of the Act, sections 6301 and 6302 of Part LXIII of the Income Tax Regulations ("the Regulations") provide as follows:

NON-APPLICATION OF PRESUMPTION

6301. (1) For the purposes of paragraph (g) of the definition "eligible individual" in section 122.6 of the Act, the presumption referred to in paragraph (f) of that definition does not apply in the circumstances where

(a) the female parent of the qualified dependant declares in writing to the Minister that the male parent, with whom she resides, is the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of each of the qualified dependants who reside with both parents;

(b) the female parent is a qualified dependant of an eligible individual and each of them files a notice with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependant;

(c) there is more than one female parent of the qualified dependant who resides with the qualified dependant and each female parent files a notice with the Minister under subsection 122.62(1) of the Act in respect of the qualified dependant; or

(d) more than one notice is filed with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependant who resides with each of the persons filing the notices if such persons live at different locations.

(2) For greater certainty, a person who files a notice referred to in paragraph (1)(b), (c) or (d) includes a person who is not required under subsection 122.62(3) of the Act to file such a notice.

FACTORS

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 hygienic 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.

[9] The only thing that interests us relates to the condition set out in paragraph (b) of the definition of "eligible individual", namely that the parent of the qualified dependant must be the one who "primarily fulfils the responsibility for the care and upbringing of the qualified dependant" having regard to the factors in section 6302 of the Regulations.

[10] Thus, we will consider the evidence in light of the factors in section 6302 of the Regulations.

The factors in paragraphs 6302(a), (b) and (g) of the Regulations

[11] The evidence discloses that both of the parents supervised the daily activities of their children in essentially the same way and attended to their daily needs when they had custody of them. Both parents also showed that they maintained a secure environment; each of them resided in a single-family residence in which each of the children had their own room. This settles the matter of paragraphs 6302(a), (b) and (g) of the Regulations.

Educational activities

[12] Both parents were involved in their children's school activities in essentially the same way: they went to the school regularly to meet with their children's teachers and participate in parents' meetings. They both received their children's report cards and helped them with their school work. The evidence¹ discloses that only the biological mother paid for the children's school supplies and items because the father could not afford to do so. It should also be noted that the biological mother invested in an education savings plan that was opened in order to pay for her children's post-secondary studies.

The children's health

[13] The Appellant's main complaint about the biological mother is the children's poor dental health. The Appellant also holds the biological mother responsible for numerous cancelled, missed or postponed dental appointments. Lastly, she complains that the biological mother concealed from the father the many illnesses contracted by the children. In summary, the Appellant tried to show that the biological mother was irresponsible without actually proving what she (and the father) had done with respect to the children's health. At most, the Appellant's evidence in this regard discloses that the father went with his children a few times to the dentist's office, and that she occasionally paid for the children's medicine. The biological mother, for her part, tendered a large amount of documentation² which clearly showed that from the children's birth to the end of the period in question, she was the person who primarily obtained medical care for her children both periodically and whenever needed, and who brought them to the places where such care was provided. The biological mother also clearly showed that she was the person who primarily defrayed these medical expenses.

¹ Exhibit I-2, documents 4, 5 and 6.

² Exhibit I-1, documents 4,5,6,7 and 8; Exhibit I-2 at pages 11, 12, 13 and 18; and Exhibits I-3, I-4, I-5 and I-6.

Recreational, athletic or similar activities

[14] The evidence discloses that all the parents took part in the educational, recreational and athletic activities of their children in the sense that they arranged and participated in them. Specifically, the biological mother enrolled her children in dance, gymnastics and hockey classes. She went with her children to these classes most of the time. She also explained that she went to the movies with her children and went on bicycle rides with them. She added that she played board games with them. The Appellant testified that she and the father preferred to do activities with their children rather than enrol them in all sorts of classes. She explained that they played hockey and many board games as a family. Lastly, the Appellant added that they went on many outings with the children (Granby Zoo, Biodome, fishing trips, and trips to Niagara Falls). This evidence shows that all the parties were involved in the educational, recreational and cultural activities of their children, but in different ways, in that each focussed on activities that corresponded to their values, interests and means.

Conclusion

[15] The two parties before me, that is to say, the children's biological mother on one side, and the Appellant (and the father of the children) on the other, clearly did their best, under generally difficult circumstances, to give as much attention as possible to the children whose custody they shared, and to bring them up and care for them. Each of them looked after the children in their own way, based on their personal values and means. Each person was involved in the children's activities. Each of them played a role that their means permitted.

[16] Where the evidence on the whole does not tip the scales clearly in favour of either party, one would wish to find a solution that accords with the parties' general intent to share the custody of their children equally, an intent that they generally agreed upon and that they honoured in the case at bar.

[17] Unfortunately, except where the parties agree to share the child tax benefit on a half-yearly basis (in which case Revenue Canada has an administrative practice that accepts this) it is not possible to divide the benefit, as the court held in *Her Majesty the Queen v. Marshall*, [1996] F.C.J. No. 431 (T.D.).

[18] Given the factors that are to be taken into consideration and are based on care, attention and participation, and given the evidence adduced in the case at bar, I must find that the Appellant has not met her burden of proving, on a balance of

probabilities, that she met the condition set out in paragraph (b) of the definition of "eligible individual" in section 122.6 of the Act, namely, that she was the person who, during the period in issue, primarily fulfilled the responsibility for the care and upbringing of the students.

[19] The Appellant should understand that in rendering this decision, I am not finding that she (and the father) were bad people or did not ably meet their responsibilities with respect to the care and upbringing of the children during the period in question.

[20] The appeals are therefore dismissed.

Signed at Ottawa, Canada, this 23rd day of October 2006.

"Paul Bédard"

Bédard J.

Translation certified true
on this 13th day of July 2007.

Brian McCordick, Translator

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THE QUEEN
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REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard
DATE OF JUDGMENT: October 23, 2006

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Anne Poirier Chantal Roberge, articling student

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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