

Docket: 2006-3504(IT)I

BETWEEN:

TINA L. WALSH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 27 and 28, 2007,
at Corner Brook, Newfoundland and Labrador.

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Lindsay Holland

JUDGMENT

The Appellant's appeal in relation to the assessment against her for the recovery of overpayment of the Child Tax Benefit is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 2nd day of May 2007.

"Wyman W. Webb"

Webb J.

Citation: 2007TCC263
Date: 20070502
Docket: 2006-3504(IT)I

BETWEEN:

TINA L. WALSH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] This appeal relates to the assessment of the Appellant on the basis that she received payments for the Child Tax Benefit for the period from September 2005 to January 2006 inclusive when she ought not to have received these payments.

[2] Under the *Income Tax Act* ("Act") the Child Tax Benefit amount is treated as an overpayment of the person's liability under the *Act* and hence, if the individual is eligible, such amount is paid to the eligible individual as a refund of this overpayment. Under subsection 122.61(1) of the *Act* the overpayment amount is calculated on a monthly basis. This subsection provides, in part, as follows:

Where a person ... [has] filed a return of income for the year, an overpayment on account of the person's liability under this Part for the year is deemed to have arisen during a month in relation to which the year is the base taxation year, equal to the amount determined by the formula

$$1/12 [(A - B) + C + M]$$

where

A is the total of

(a) the product obtained by multiplying \$1,090 by the number of qualified dependants in respect of whom the person was an eligible individual at the beginning of the month, ...

[3] Because the overpayment is deemed to have arisen during a month in respect of a person who was an eligible individual in respect of a qualified dependent at the beginning of the month, this requires a determination of whether any particular person was an eligible individual at the beginning of each month in respect of that qualified dependent. As a result, it does not necessarily follow that because one particular person was the eligible individual in respect of a qualified dependent at the beginning of a particular month, that the same person would then be the eligible individual at the beginning of the following month in respect of that qualified dependent. The definition of "eligible individual" in section 122.6 provides that:

"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,

...

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;

[4] In this particular case there is no dispute that the Appellant is the female parent of the child in question. The main issue in this case is whether or not the Appellant was the parent who primarily fulfilled, at the beginning of each month during the period in question, the responsibility for the care and upbringing of the child in question.

[5] In the Reply to the Notice of Appeal filed by the Respondent one of the assumptions that was made was that the child in question spent the same amount of time with both the Appellant and the child's father, Daniel Park. Another

assumption that was made was that the Appellant and Daniel Park had joint custody of the child.

[6] In light of these assumptions, the first issue that had to be determined was whether or not the presumption in paragraph (f) of the definition of "eligible individual" was applicable in this case. The prescribed circumstances in which the presumption would not be applicable are set out in section 6301 of the *Income Tax Regulations* ("*Regulations*") and include, as one of these circumstances, the situation where "more than one notice is filed with the Minister under subsection 122.62(1) of the *Act* in respect of the same qualified dependent who resides with each of the persons filing the notices if such persons live at different locations".

[7] The determination of whether the presumption is applicable is, in my opinion, directly related to the question of who will have the onus of proof in this particular case. If the Appellant is presumed to be the parent who primarily fulfills the responsibility for the care and upbringing of the qualified dependant, then the Appellant should not have the onus of proving what she is already presumed to be. In other words, if the presumption is applicable, then the onus of proof would shift to the Respondent who would then be challenging the validity of the presumption. It should be noted that paragraph (f) of the definition of eligible individual provides that "the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is **presumed** to be the female parent" and does not provide that this parent is **deemed** to be the female parent (emphasis added). This is a presumption and not a deeming rule. If the presumption is applicable then it would be open for the Respondent to lead evidence to rebut the presumption but the onus of proof would then be on the Respondent.

[8] In this particular case the Respondent led evidence to establish that more than one notice had been filed with the Minister under subsection 122.62 of the *Act* for the period in question and therefore the circumstance described in paragraph (d) of section 6301 of the *Regulations* was applicable. As a result the presumption in paragraph (f) was not applicable and since the Appellant was challenging the assessment against her in relation to the overpayment of a Child Tax Benefit, the onus of proof then rested with the Appellant to establish, on the balance of probabilities, that during the period in question she was the parent who primarily fulfilled the responsibility for the care and upbringing of the qualified dependant.

[9] The Appellant testified that for the two years immediately prior to August 2005 she did not have any contact with the qualified dependant in this case.

The Order of the Supreme Court of Newfoundland and Labrador, Trial Division, dated July 20, 2004 was introduced as an Exhibit. Paragraph 1 of this Order provided that Daniel Park would "have custody and care of" the qualified dependant in this case and that access to the Appellant would be "on a supervised basis with the intervention of Family Justice Services Western". The Order also provided that "the commencement of the supervised access [was] to be determined by the [Family Justice Services Western]".

[10] The Order also provided that the mother would not initiate contact with the qualified dependant in this case however the qualified dependant could initiate contact with the Appellant and "at least the initial contact was to be supervised by a person designated by the Court".

[11] As a result the Appellant in this case had the difficult task of establishing that she went from not having any contact with her daughter for two years to being the parent primarily responsible for her care and upbringing as soon as contact was re-established. In my opinion the Appellant has failed to establish on the balance of probabilities that during the period in question she was at the beginning of any of these months the parent who was primarily responsible for the care and upbringing of the qualified dependant in this case. This determination is only made for the period in question. This does not mean that the Appellant may not be the person who is primarily responsible for the care and upbringing of the child today, but for the period in question she was unable to establish on the balance of probabilities that she was the parent who was primarily responsible for the care and upbringing of the qualified dependant.

[12] Both the Appellant and Daniel Park testified in this matter. Both parties were consistent in testifying that at the beginning of the period in question (during August and September 2005) the Appellant was re-establishing contact with the qualified dependant in this case. It was also confirmed, that during the period in question, the qualified dependant was spending more time with the Appellant than she had in the two years preceding the period in question. The qualified dependant had started to alternate weeks, one week with one parent and the other week with the other parent and the Appellant testified that she was even spending more time with her than the qualified dependant was spending with Daniel Park. Each parent testified that they supervised the daily activities and needs of the qualified dependant, they maintained a secure environment in which the qualified dependant resided, they arranged for and transported the qualified dependant to medical care at regular intervals and as required, they arranged for and transported the qualified dependant to educational, recreational, athletic or similar activities of the qualified

dependant, they attended to the needs of the qualified dependant when the qualified dependant was ill, or otherwise in need, they attended to hygienic needs of the qualified dependant and they provided, generally, guidance and companionship to the qualified dependant. Daniel Park also testified that his common-law spouse, Lisa Miles, would go shopping with the qualified dependant. The qualified dependant was 14 years of age in September 2005.

[13] One of the factors that is listed in section 6302 of the *Regulations* is the existence of a Court Order in respect of the qualified dependant that is valid in the jurisdiction in which the qualified dependant resides.

[14] In this particular case, the Order of the Supreme Court of Newfoundland and Labrador, Trial Division dated July 20, 2004 was introduced as an Exhibit and, as noted above, provided that Daniel Park had custody and care of the qualified dependant. The Appellant testified that she felt that there was another Order that had changed the custody rights from that as set out in the 2004 Order. However the only other Order that was introduced into evidence was an Order dated July 11, 2006 (after the period in question). This Order did grant joint custody of the qualified dependant to both parents.

[15] The Appellant did not call the qualified dependant as a witness. As the qualified dependant would now be 15 years of age, the qualified dependant could have helped in the determination of which one of her two parents was primarily responsible for her care and upbringing during the period in question. The Appellant, however, did not wish to bring her into the middle of this matter. At one point, the Appellant had indicated that she would rather lose the case than bring her daughter into what is essentially a dispute between the Appellant and her ex-husband. Without the testimony of the qualified dependant the Appellant has unfortunately failed to establish on the balance of probabilities that she was the parent who was primarily responsible for the care and upbringing of the qualified dependant during the period in question.

[16] There is one further matter that should be addressed.

[17] In the Order of the Supreme Court of Newfoundland and Labrador, Trial Division dated July 11, 2006, it was ordered that the father would assign all rights to the "Child Tax Credit" to the mother. Under the *Act*, the person who is entitled to the Child Tax Benefit amount is the person who is the eligible individual in respect of the qualified dependant at the beginning of the month. The definition of eligible individual does not provide for the assignment of the deemed

overpayment of tax from one person to another. The definition of eligible individual is not based on any agreement between the parties but rather on which of the two parties satisfies the tests as set out in that section, one of which is the determination of the parent who primarily fulfills the responsibility for the care and upbringing of the qualified dependant based on the prescribed factors as set out in section 6302 of the *Regulations*. The reference to the existence of a Court Order as one of the prescribed factors is in relation to the existence of a Court Order in respect of the qualified dependant not a Court Order in respect of the Child Tax Benefit.

[18] As well, section 67 of the *Financial Administration Act* provides that a Crown debt is not assignable. As a Child Tax Benefit is, for purposes of the *Act*, an overpayment of tax and hence a liability of the Crown to the eligible individual, it would be a Crown debt and would not be assignable. The question of which person is entitled to the Child Tax Benefit amount is to be determined under the *Act* not by agreement between the parties.

[19] In the *Tax Rebate Discounting Act*, subsection 2(2) provides for the acquisition by a person of a tax refund from another person. This subsection provides as follows:

(2) **For the purposes of this Act**, a person acquires a right to a refund of tax where that person, as between himself and another person, acquires a right to a refund of tax or to an amount equal to the amount of a refund of tax, notwithstanding that, by virtue of section 67 of the *Financial Administration Act* or any provision of any other Act of Parliament or of the legislature of a province, the refund of tax is not assignable.

(emphasis added)

[20] Since, however, this right is only recognized for the purposes of the *Tax Rebate Discounting Act*, it does not assist a person who is claiming a right to a Child Tax Benefit amount under the *Act*.

[21] The Appellant's appeal in this matter is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 2nd day of May 2007.

"Wyman W. Webb"

Webb J.

CITATION: 2007TCC263
COURT FILE NO.: 2006-3504(IT)I
STYLE OF CAUSE: TINA L. WALSH AND HER MAJESTY
THE QUEEN
PLACE OF HEARING: Corner Brook, Newfoundland and Labrador
DATE OF HEARING: March 27 and 28, 2007
REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT: May 2, 2007
APPEARANCES:

For the Appellant: The Appellant herself
Counsel for the Respondent: Lindsay Holland

COUNSEL OF RECORD:

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