

Docket: 2008-4213(IT)I

BETWEEN:

CD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on August 13, 2009, at Edmonton, Alberta.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Agent for the Appellant: GD  
Counsel for the Respondent: Valerie Meier

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**JUDGMENT**

The appeal from the Re-determination of the Minister of National Revenue ("Minister") made under the *Income Tax Act*, notice of which is dated February 28, 2008, in respect of the 2006 base taxation year, relating to the National Child Benefit Supplement ("NCBS") and the Canada Child Tax Benefit ("CCTB") for the months of August 2007 to January 2008, is allowed and the determination is referred back to the Minister for reconsideration and re-determination on the basis that the appellant is entitled to the NCBS and CCTB for the months of August and September 2007.

Signed at Ottawa, Canada, this 9th day of November 2009.

“G.J. Rip”

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Rip C.J.

Citation: 2009 TCC 578  
Date: 20091109  
Docket: 2008-4213(IT)I

BETWEEN:

CD,

Appellant,

and

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Respondent.

### **REASONS FOR JUDGMENT**

Rip, C.J.

[1] The issue in this appeal from an income tax assessment for the 2006 base taxation year is whether the appellant, CD, is entitled to the Canada Child Tax Benefit ("CCTB") and the National Child Benefit Supplement ("NCBS"), described in subdivision a.1 of the *Income Tax Act* ("Act"), for the months of August 2007 to January 2008, inclusive.

[2] The Minister of National Revenue ("Minister") determined that the appellant was not the "eligible individual" as defined in section 122.6 of the *Act* and, therefore, was not entitled to the CCTB and NCBS in respect of her daughter KD for the period July 21, 2007 to January 31, 2008 since:

- a) KD did not reside with the appellant during this period, and
- b) the appellant was not the parent who primarily fulfilled the responsibility for the care and upbringing for KD during the period.

[3] Section 122.6 defines the term "eligible individual". For the purposes of this appeal, "eligible individual":

... in respect of a qualified dependant at [...] S'agissant, à un moment donné, du

any time means a person who at that time

particulier admissible à l'égard d'une personne à charge admissible, personne qui répond aux conditions suivantes à ce moment :

(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,

a) elle réside avec la personne à charge;  
b) elle est la personne — père ou mère de la personne à charge — qui assume principalement la responsabilité pour le soin et l'éducation de cette dernière;

...

[...]

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

h) les critères prévus par règlement serviront à déterminer en quoi consistent le soin et l'éducation d'une personne.

[4] The "prescribed factors" are found in section 6302 of the *Income Tax Regulations* ("*Regulations*") to the *Act*:

(a) the supervision of the daily activities and needs of the qualified dependant;

a) le fait de surveiller les activités quotidiennes de la personne à charge admissible et de voir à ses besoins quotidiens;

(b) the maintenance of a secure environment in which the qualified dependant resides;

b) le maintien d'un milieu sécuritaire là où elle réside;

(c) the arrangement of, and transportation to, medical care at regular intervals and as required for the qualified dependant;

c) l'obtention de soins médicaux pour elle à intervalles réguliers et en cas de besoin, ainsi que son transport aux endroits où ces soins sont offerts;

(d) the arrangement of, participation in, and transportation to, educational, recreational, athletic or similar activities in respect of the qualified dependant;

d) l'organisation pour elle d'activités éducatives, récréatives, athlétiques ou semblables, sa participation à de telles activités et son transport à cette fin;

(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;

e) le fait de subvenir à ses besoins lorsqu'elle est malade ou a besoin de l'assistance d'une autre personne;

(f) the attendance to the hygienic needs of the qualified dependant on

f) le fait de veiller à son hygiène corporelle de façon régulière;

- a regular basis;
- |  |   |
|--|---|
| <p>(g) the provision, generally, of guidance and companionship to the qualified dependant; and</p> <p>(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.</p> | <p>g) de façon générale, le fait d'être présent auprès d'elle et de la guider;</p> <p>h) l'existence d'une ordonnance rendue à son égard par un tribunal qui est valide dans la juridiction où elle réside.</p> |
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[5] That KD was a "qualified dependent" for purposes of subdivision *a.1* is not in issue.

[6] The facts leading up to this appeal are not pleasant and their complete description in these reasons would serve no worthwhile purpose. I have therefore ordered that the persons involved in this sad situation be referred to by initials and not by names and I have attempted to include in these reasons only the necessary facts which led me to allow this appeal in part.

[7] CD testified that on March 5, 2007 she "commenced a relationship" with DS when "we moved in together and resided on and off until August 17, 2007". At the time, CD was near the end of her pregnancy with KD who was born on March 19, 2007. DS is the father of KD. The appellant frequently described the relationship as "bizarre".

[8] Up until June 22, 2007, CD said, she and DS lived "normally" when he "threw me out" of their home. At the time, CD, a schizophrenic patient under medical care, was in the process of applying for a supplement under the Alberta Income for the Severely Handicapped ("AISH") program and had to inform AISH of any changes to her financial and family circumstances. DS, according to CD, had taken the position with her AISH case worker that he and CD had no relationship. In the meantime, on June 23, DS changed the lock to their apartment; CD says she never had a key to the apartment after June 22, even though she spent nights there later on.

[9] On June 28, CD again tried to move into the apartment but DS, CD stated, placed her clothing at the landing and "kicked me out". On August 17, DS served CD with a statement of claim in the Provincial Court of Alberta asking that the Court grant him guardianship of KD. CD says that DS was "drunk" at the time he served the statement of claim.

[10] CD considered herself responsible for, and the sole guardian of, KD up to August 17. A letter dated September 12, 2007, from CD's medical doctor, filed with the Court, stated that it was his opinion that CD was capable of looking after her child; he also stated that she would continue with her medication. CD said she spent nights with DS "when he was pleasant" until August 17. The actual dates are not in evidence. She recalled she would "get up when he got up" at about 7:00 to 7:30 a.m., and then he would ask her to leave. During the day, CD would take KD to her parent's home or to the home of DS's sister. Between August 1 and August 17, CD asserted, she had KD "most of the time". During the evening, after DS returned home at about 6:00 p.m., the appellant would be at the house she shared with DS. CD complained that DS "would get mad" at the child and "didn't want to pick KD up". DS, on the other hand, said he bathed and dressed KD and, with his sister, took her to the doctor. In DS's view, he had custody of KD until August 17.

[11] For the period August 17 to August 19, KD was at CD's parents' home with CD. On August 19, CD said she was advised to apply for legal aid and to keep KD at her parents' home in her care. CD declared that until August 31, KD resided with her at her parents' home. From September 1 to "about October", CD said, she was taking care of KD at her parents' home. On September 28 to September 30, she said she "resumed [her] relationship with [DS]"; they were living together with KD. For about two weeks in October, CD lived with DS and their child. On October 19, CD recalled, DS "grabbed my throat and pushed me down the stairs"; she left the house and filed a police report. CD could not remember where KD spent the night of October 19. Apparently DS had custody of KD from October 19 to October 22. From October 22 to October 26, CD said she and her child were at her parents' residence. On October 26 she "returned the child to DS at his home". He "grabbed the child from me and threw me down the stairs". From that day on, KD was with DS.

[12] DS had also applied for a Canada Child Tax Benefit with respect to KD. He testified that he was personally responsible for KD since July 21, 2007 when the appellant left him and their child. KD was in his care, he said, when he served the guardianship papers on CD on August 17. During the day when he worked, he said his sister would care for KD at her home.

[13] DS testified that because of CD's schizophrenia episodes in June and post partum depression, both he and his sister looked after KD. On Mondays, during the day, CD's parents would take care of KD until the evenings when the baby would return to DS's home. DS confirmed that CD lived with him until July 21 when she left KD in his care and moved out of the home. He said KD was living with him when he served the custody papers on CD on August 17. DS also testified that he

never assaulted CD, "she was the instigator". CD was at the home "only for visits". They again lived together briefly in September, he agreed.

[14] The appellant spent the night of August 16 at his home, DS recalled, but on his return home the next day he found the house vandalized. He asked the appellant to leave and take care of their daughter. From August 17 until September 28 "or so", he did not see the child, he acknowledged. DS and CD had agreed that he could visit the child at CD's parents' home and he did so. However, he stated that CD was rarely at her parents' home when he came to visit.

[15] On September 26, CD brought the baby to DS's home for a couple of hours, DS testified. On September 28, CD returned the child to DS on a permanent basis since CD was under medication, according to DS. CD, said DS, told him she did not want to be at her parents' home; she stayed at DS's home for two hours and then left without the child. DS agreed that from the beginning of September to September 26, KD was at CD's parents' home.

[16] The evidence in this appeal leaves a lot to be desired. I do not fault CD, she tried to recollect events and tried to be honest. I do find DS to have been glib at times in giving evidence. No doubt the history between the two tainted their evidence.

[17] The question before me is whether CD was the "eligible individual" as defined by section 122.6 for the months of August, September and October 2007. I am satisfied that she was not the "eligible individual" after October 2007.

[18] Crown counsel suggested that at the time KD was at CD's parents' home, CD's mother took care of KD, thus removing KD as an "eligible individual". On the facts of this appeal I cannot agree. While CD was at her parent's home with KD, she was in charge of KD and, bearing in mind the age of KD, supervised her needs and daily activities and had her residing in a secure environment. It was CD's decision for KD and her to live at her parents' home. That her mother may have helped, even to a very large extent, ought not prejudice the possibility of CD being "eligible individual". It is not uncommon for grandparents to contribute to the well-being of a grandchild.

[19] There is no doubt that CD was not the "eligible individual" after September 2007. The parties acknowledge that after September 2007, KD was in the custody of DS. Custody of KD during August 2007 was shared by both parents, or at least, the child was with both parents at the times CD was at DS's home until August 17. After August 17 until the end of September KD was with CD at CD's parents' home. This was acknowledged by both CD and DS.

[20] On this basis, I find that CD was the "eligible individual" of KD for the months of August and September 2007. The appeal will be allowed and the matter referred back to the Minister for reconsideration and re-determination on that basis.

Signed at Ottawa, Canada, this 9th day of November 2009.

“G.J. Rip”

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Rip C.J.

CITATION: 2009 TCC 578  
COURT FILE NO.: 2008-4213(IT)I  
STYLE OF CAUSE: CD v.  
HER MAJESTY THE QUEEN  
PLACE OF HEARING: Edmonton, Alberta  
DATE OF HEARING: August 13, 2009  
REASONS FOR JUDGMENT BY: The Honourable Gerald J. Rip, Chief Justice  
DATE OF JUDGMENT: November 9, 2009

APPEARANCES:

Agent for the Appellant: GD  
Counsel for the Respondent: Valerie Meier

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