

Citation: 2010TCC265
Date: 20100608
Docket: 2009-3761(IT)I

BETWEEN:

ROBERT WEIDENFELD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the bench on April 14, 2010, in Toronto, Ontario.)

V.A. Miller, J.

[1] The Appellant has brought this appeal from a Notice of Redetermination which informed him that he was not entitled to the Canada Child Tax Benefit (“CCTB”) for the period from August 2007 to April 2008. The Appellant has stated that the only period which he is disputing is the period from September 2007 to April 2008.

[2] In making the redetermination, the Minister of National Revenue (the “Minister”) concluded that J was not a “qualified dependant” of the Appellant and that the Appellant was not the “eligible individual” with respect to J.

[3] The Minister sought to recover the amount of \$2,357.24 from the Appellant as an overpayment of CCTB.

[4] It was the Appellant’s evidence that he and his former spouse were having discipline problems with his son J. In July 2007, they entered into an agreement with the Jewish Family and Children’s Services (“JF&CS”) and J was taken into temporary care.

[5] The JF&CS applied to receive the CCTB for J.

[6] In July and August, J was placed in different foster homes. On September 10, 2007, J was placed in The Boys' House of The George Hull Centre ("GHC"). This is a residential treatment facility which offers programs to boys ages 12 to 16 who are experiencing emotional and behavioural difficulties. When he lived at GHC, J attended a school which was close to GHC's premises. The school is also a treatment centre and is operated by the Toronto District School Board. J was discharged from the GHC on April 18, 2008.

[7] It was the Appellant's position that JF&CS did not maintain his son while he lived at GHC. GHC is a non-profit organization which receives its funding from the Ministry of Children and Youth Services for the Province of Ontario. The Appellant stated that JF&CS did not pay GHC to maintain his son and, as a result, no special allowance was payable with respect to his son.

Qualified Dependant

[8] The term "qualified dependent" is defined in section 122.6 of the *Income Tax Act* (the "Act"). The only part of this definition which was relied on by the Minister is (c) which reads:

"qualified dependant" at any time means a person who at that time

(c) is not a person in respect of whom a special allowance under the *Children's Special Allowances Act* is payable for the month that includes that time;

[9] In the Reply to Notice of Appeal, the Minister assumed that J was not a qualified dependant as (a) the costs for his care at the GHC was covered by JF&CS and (b) JF&CS applied for and received funding under the *Children's Special Allowances Act* for J's care while he resided at the GHC.

[10] The facts within these assumptions are not within the knowledge of the Appellant. They are within the knowledge of the JF&CS and the Minister who administers the *Children's Special Allowances Act*¹. The onus of demolishing these statements cannot lie with the Appellant. The Respondent must have the onus of proving these assumptions.

[11] In fairness to counsel for the Respondent, he did attempt to submit into evidence an affidavit to support that JF&CS applied for and received funding under the *Children's Special Allowances Act*. However, I did not allow the affidavit to be admitted into evidence as it did not comply with subsection 244(9) of the Act. As a

result, the Respondent has not established that a special allowance was paid in respect of J.

[12] However, the requirement of the Act is not that a special allowance is paid but that it is payable in respect of a child. A special allowance is payable in respect of a child if the conditions in section 3 of the *Children's Special Allowance Act* are met. It reads:

3. (1) Subject to this Act, there shall be paid out of the Consolidated Revenue Fund, for each month, a special allowance in the amount determined for that month by or pursuant to section 8 in respect of each child who

(a) is maintained

(i) by a department or agency of the government of Canada or a province, or

(ii) by an agency appointed by a province, including an authority established under the laws of a province, or by an agency appointed by such an authority, for the purpose of administering any law of the province for the protection and care of children,

and who resides in the private home of foster parents, a group foster home or an institution; or

(b) is maintained by an institution licensed or otherwise authorized under the law of the province to have the custody or care of children.

Use of special allowance

(2) A special allowance shall be applied exclusively toward the care, maintenance, education, training or advancement of the child in respect of whom it is paid.

[13] There was no evidence submitted by the Respondent to show that the costs for J's care at the GHC were covered by JF&CS. I have concluded that this knowledge is peculiar to the Respondent and JF&CS.

[14] The term "maintained" is defined in section 9 of the *Children's Special Allowance Regulations*. It reads:

9. For the purposes of the Act, a child is considered to be maintained by an applicant in a month if the child, at the end of the month, is dependent on the applicant for the child's care, maintenance, education, training and advancement to a greater extent than on any other department, agency or institution or on any person.

[15] In accordance with section 3 of the *Children's Special Allowance Act* a special allowance is payable when the child is maintained by a department or agency and the child resides in the private home of foster parents, a group foster home or an institution. The application for a special allowance must be made to and approved by the Minister². It is approved when it is made in the prescribed manner by the department, agency or institution that maintains the child³. I conclude from these sections that the JF&CS must have been able to establish to the Minister's satisfaction that it maintained J⁴. However, there was no evidence given at the hearing to show that JF&CS maintained J.

[16] The only evidence which was presented at the hearing with respect to this issue was presented by the Appellant. He endeavoured to show that his son was not maintained by JF&CS. As previously stated, I do not believe that this was his burden. However, to the extent that he has established his case, the Respondent was obliged to bring evidence to answer. This it did not do.

[17] I conclude that the evidence before me did not establish that J was a person in respect of whom a special allowance under the *Children's Special Allowance Act* was payable.

Eligible Individual

[18] The definition of eligible individual is in section 122.6 of the Act. The relevant portion reads as follows:

“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,

[19] It was the Appellant's position that he was the eligible individual with respect to his son. He acknowledged that his son was placed in GHC from September 10, 2007 to April 18, 2008. It was his evidence that GHC was similar to a boarding school and treatment centre. Each weekend the Appellant drove to GHC to take J home with him. In February 2008, J was charged and convicted of an offence. The

Appellant took J away for two weeks. J stayed with the Appellant when he was suspended from school.

[20] The Appellant stated that he attended meetings at GHC to discuss his son's well-being and treatment. He gave temporary guardianship of his son to the JF&CS but he was still involved in his son's life to a great degree.

[21] The Appellant relied on the decision of Woods, J. in *Bouchard v. R.*⁵ to state that an expansive definition of the term reside should be used. He stated that the present situation is identical to the decision in *Penner v. R.*⁶

[22] The circumstances in *Bouchard* are very different from the present case.

[23] *Bouchard* involved a situation where the father was unable to stay with his child because the father was incarcerated. The father continued to take care of the child and to provide for the child. The child did not acquire another habitual abode during her father's incarceration.

[24] Likewise, *Penner* is distinguishable from the present case. In *Penner*, the child did not reside with the parent as the child had to attend boarding school. It was found that the parent primarily fulfilled the responsibility for care and upbringing of the child. The parent paid for the child's room and board and was the only person who had legal responsibility for care and upbringing of the child.

[25] In the present appeal, J was placed in the temporary care of the JF&CS. During the period under appeal, JF&CS placed J in the GHC. The Appellant did not have to pay for J's room and board. J's education and treatment were provided by GHC. A copy of the agreement between the Appellant and JF&CS was not presented into evidence and I am left to wonder as to the terms of this agreement.

[26] I do not agree that J resided with the Appellant during the period under appeal. The word "reside" usually means "to live in the same house as": *Burton v. R.*, [2000] 1 C.T.C. 2727 (TCC). In the context of section 122.6, the word "resides" has been interpreted to connote "a settled and usual abode".⁷ During the period September 10, 2007 to April 18, 2008, J resided at the GHC.

[27] The appeal is dismissed,

Signed at Ottawa, Canada, this 8th day of June 2010.

“V.A. Miller”

V.A. Miller, J.

¹ Marilyn Jahnke, 2008 TCC 544 at paragraph 8

² *Children's Special Allowance Regulations*, SQR/93-12, s.3

³ *Children's Special Allowance*, S.C. 1992, c.48, s.4 and 5.

⁴ *Supra*, footnote 2 at s.4

⁵ 2009 TCC 38

⁶ 2006 TCC 413

⁷ *R. (S.) v. R.*, 2003 CarswellNat 2710

CITATION: 2010TCC265
COURT FILE NO.: 2009-3761(IT)I
STYLE OF CAUSE: ROBERT WEIDENFELD AND
THE QUEEN
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: April 12 & 14, 2010
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller
DATE OF JUDGMENT: April 21, 2010
DATE OF ORAL REASONS: April 14, 2010
DATE OF WRITTEN REASONS: June 8, 2010

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Khashayar Haghgouyan

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada