Docket: 2009-3943(IT)I

BETWEEN:

JOHANNE COUILLARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 26, 2010, at Sherbrooke, Quebec
Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant:	Mélanie Vogt
Counsel for the respondent:	Philippe Dupuis

JUDGMENT

The appeal from a redetermination dated April 20, 2009, in which the Minister of National Revenue revised the appellant's Canada Child Tax Benefit and National Child Benefit Supplement for the period from October 24, 2008, to June 30, 2009, in respect of the 2007 base taxation year, is allowed, and the matter is referred back to the Minister for redetermination, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of September 2010.

"Réal Favreau"

Favreau J.

Translation certified true
on this 29th day of October 2010
Margarita Gorbounova, Translator

Citation: 2010 TCC 470
Date: 20100914
Docket: 2009-3943(IT)I

BETWEEN:

JOHANNE COUILLARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a redetermination concerning the Canada Child Tax Benefit (CCTB) and the National Child Benefit Supplement (NCBS) for the 2007 base taxation year. The only issue is whether the Minister of National Revenue (the Minister) correctly concluded that the appellant was not the parent who primarily fulfilled the responsibility for the care and upbringing of her child T., in respect of the 2007 base taxation year for the period from October 24, 2008, to June 30, 2009 (the relevant period).

[2] The appellant is the mother of T. and J., who were born in 1993 and 1997, respectively. Mario Lemay is the father of T. and J. The couple separated. An agreement between the parties was sanctioned by a judgment dated January 27, 1998, which granted the appellant custody of her two children.

[3] On October 24, 2008, Mr. Lemay presented an application for a change of custody and a motion to vary support.

[4] On April 15, 2009, a judgment of the Superior Court of Quebec confirmed that the appellant could continue to have sole custody of J. and shared custody of T., with 166 days per year attributed to the appellant and 199 days attributed to her former spouse (as it had been since October 24, 2008). The judgment also stated that the appellant would have sole custody of T. starting on June 24, 2009, thus regaining sole custody of both children.

[5] In the above-mentioned judgment, shared custody was established in the following manner:

a. The father will have T. from Monday morning until after school on Friday.

b. The mother will have T.

(i) every week, from Friday after school until Monday morning;

i. during all statutory holidays and PD days: if the holiday is a Friday, the mother takes the child on Thursday after school instead of Friday, and, if it is a Monday, she keeps him until Tuesday;

ii. during Spring Break;

iii. for seven (7) days during the Holiday Season, including either the week of Christmas or New Year's Day, switching between the parties every year; and

iv. during the entire summer vacation, starting on June 24, 2009, except for two (2) weeks of vacation that the father could take with the two (2) children, giving the mother a month's notice of the dates he chooses.

[6] The above judgment also provides that T.'s expenses, listed below, had to be split 50/50 between the mother and father. These expenses include

a. clothes;

b. school expenses (registration, school supplies, school activities);

c. expenses related to sports activities (registration and equipment); and

d. medical expenses, such as eye-care, dentist, consultations with healthcare professionals and doctors.

[7] Concerning support, the judgment provides that the father had to pay the appellant $42.55 per week for T. and J. during the period between October 24, 2008, and June 23, 2009, and $68.04 per week starting on June 24, 2009.

[8] The appellant testified at the hearing and explained why her son had gone back to live with his father in Louiseville starting on September 5, 2008 (aggressive behaviour toward her). T. was 15 years old at the time and attended the Plessisville secondary school (secondary II). On September 11, 2008, T.'s father enrolled him in secondary III at the Louiseville secondary school. In September 2009, the appellant enrolled T. in secondary IV at the Plessisville secondary school.

[9] On school days, T. stayed with his father, but he continued to stay with his mother on holidays, weekends and during school breaks. In her testimony, the appellant maintained that T. had never stopped residing with her even though he stayed with his father during the school week. According to her, T. kept his clothes, backpack, hockey equipment and trophies at her house.

[10] The appellant also testified that she attended to T.'s medical care needs (doctors, dentist, optometrist), took care of him when he was sick, bought him clothes, shoes, winter boots, and the sports equipment he needed. She also cut his hair, attended to his personal hygiene and did his laundry. She also stated that she was the person responsible for school and took care of T.'s numerous sports activities, in addition to driving him between Plessisville and Louiseville after school on Friday and on Sunday night or Monday morning for the start of the school week.

[11] Mario Lemay also testified at the hearing. He explained that, after T. had moved in, he had set up a basement bedroom for him and bought a bedroom set. He enrolled him in school and signed him up for rugby, soccer, floor hockey and ice hockey at the Louiseville arena. If T. had practice during the week, he took care of his transportation. Sports activities that took place on weekends were the appellant's responsibility. The witness confirmed that the appellant took care of T.'s medical care needs and that she had bought his clothes and sports equipment because she hurried to buy everything.

[12] Marie-Pier Hamelin, Mr. Lemay's spouse, testified that she washed T.'s clothes and bedding, that her spouse was the contact person for school and that she helped T. with his homework.

Applicable law

[13] The definition of "eligible individual" in section 122.6 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the Act), read as follows during the relevant period:

> "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 149(1)(*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 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.

[14] 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) make the following provisions:

6301. Non-Application of Presumption

(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.

[15] To determine whether the appellant was the "eligible individual" with respect to T., the conditions in paragraphs (*a*) and (*b*) of the definition of "eligible individual" in section 122.6 of the Act must first be considered, that is,

a. whether the appellant resided with T. during the relevant period, and

b. whether the appellant was the parent who primarily fulfilled the responsibility for T.'s care and upbringing during that period.

[16] The appellant presented evidence to the effect that T. never stopped residing with her during the time when he went to school in Louiseville and was staying with his father during the school week.

[17] As Justice Bédard of this Court wrote in *Brigitte Roy v. The Queen*, 2007 TCC 496, the phrase "resides with" used by Parliament in paragraph 122.6(*a*) of the Act denotes "a certain constancy or permanence of a person's usual living habits in relation to a given place, and differs from what one might characterize as a visit or a sporadic stay" (paragraph 7).

[18] In this case, T. was like a boarder at his father's house during the 2008-09 school year. Thus, it was not a visit or sporadic stay but his stay was still temporary in nature, and therefore, limited in time. The appellant had sole custody of T. until October 24, 2008, and, in accordance with the judgment dated April 15, 2009, she regained sole custody of T. starting on June 24, 2009, which coincides with the end of the 2008-09 school year.

[19] Based on the Reply to the Notice of Appeal, the respondent based herself solely on the judgment dated April 15, 2009, which acknowledged that the custody of T. was shared starting on October 24, 2008, with 166 days per year attributed to the appellant and 199 days per year attributed to her former spouse. The number of days per year that was attributed to the appellant and to her former spouse was random and inexact since the shared custody period lasted only from October 24, 2008, to June 24, 2009, that is, 244 days in total. In addition, it is odd that that same judgment obligates T.'s parents to share his expenses 50/50, even though, in theory, T. should be spending more days with his father during the shared custody period. It should also be noted that, even during the shared custody period, the appellant's former spouse had to pay her $42.55 per week in child support for T. and J.'s needs.

[20] In my opinion, the respondent simply could not rely solely on the above judgment to conclude that it created the presumption that the father primarily fulfilled the responsibility for T.’s care and upbringing.

[21] Since it was concluded that T. resided with his mother during the relevant period, paragraph 122.6(*f*) of the Act establishes the presumption that the appellant is the person who primarily fulfilled the responsibility for T.'s care and upbringing.

[22] However, paragraph 122.6(*g*) stipulates that the presumption in paragraph 122.6(*f*) does not apply in the circumstances set out in the Regulations including when 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, set out in paragraph 6301(*d*).

[23] Since in this case, the former spouse filed a CCTB application on September 9, 2008, and the appellant submitted one on June 9 and February 9, 2008, the presumption in paragraph 122.6(*f*) of the Act does not apply.

[24] In the circumstances, the factors set out in section 6302 of the Regulations for determining what constitutes care and upbringing of a qualified dependant should be considered. Based on the evidence, the requirements of supervision and of maintaining a secure environment for T. set out in paragraphs (*a*) and (*b*) are equally fulfilled by both parents. The factors set out in paragraphs (*c*) through (*g*), namely

> c. arrangement of and transportation to medical care;
>
> d. arrangement of and transportation to educational, recreational and athletic activities;
>
> e. attendance to T.'s needs when he is ill;
>
> f. attendance to T.'s hygienic needs on a regular basis; and
>
> g. provision of guidance and companionship to T.

are primarily the responsibility of the appellant although the judgment dated April 15, 2009, favours the former spouse because of the number of days attributed to the appellant and her former spouse.

[25] Applying the factors set out in section 6302 of the Regulations clearly establishes that the appellant primarily fulfilled the responsibility for the care and upbringing of T. during the relevant period. The appellant's testimony was credible and more detailed than that of T.'s father and his spouse.

[26] Although T.'s father's spouse can be considered, for the purposes of the Act, to be T.'s female parent, the evidence submitted does not make it possible to conclude that she primarily fulfilled the responsibility for T.'s care and upbringing during the relevant period.

[27] For these reasons, the appeal is allowed.

Signed at Ottawa, Canada, this 14th day of September 2010.

"Réal Favreau"

Favreau J.

Translation certified true
on this 29th day of October 2010
Margarita Gorbounova, Translator

CITATION:	2010 TCC 470
COURT FILE NO.:	2009-3943(IT)I
STYLE OF CAUSE:	JOHANNE COUILLARD v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Sherbrooke, Quebec
DATE OF HEARING:	April 26, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	September 14, 2010

APPEARANCES:

Counsel for the appellant:	Mélanie Vogt
Counsel for the respondent:	Philippe Dupuis

COUNSEL OF RECORD:

For the appellant:

Name:	Mélanie Vogt
Firm:	Landry, Boisvert, Pinard, Vogt Victoriaville, Quebec
For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada