Docket: 2010-1708(IT)I

BETWEEN:

JULIA PANTELIDIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 10, 2010, at Vancouver, British Columbia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	R.S. Whittaker

JUDGMENT

The appeal from the redeterminations dated January 20, 2010 and January 5, 2010 made under the *Income Tax Act* with respect to the Canada Child Tax Benefit and Goods and Services Tax Credit for the 2008 base taxation year is dismissed, without costs.

Signed at Ottawa, Canada, this 15th day of December 2010.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2010 TCC 639
Date: 20101215
Docket: 2010-1708(IT)I

BETWEEN:

JULIA PANTELIDIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] The only issue to be decided in this appeal is whether the Appellant is the eligible individual entitled to receive the Canada Child Tax Benefit ("CCTB") and Goods and Services Tax Credit ("GSTC") for the period from January 1, 2010 to June 30, 2010 (the "Period") in respect of her two daughters. More specifically, whether the Appellant is the parent who primarily fulfills the responsibility for the care and upbringing of the children during the Period.

[2] By Notices dated January 20, 2010 and January 5, 2010 respectively, as confirmed on April 8, 2010, the Minister of National Revenue (the "Minister") notified the Appellant that her entitlement to the above CCTB and GSTC benefits had been redetermined so that the Appellant's former spouse was the eligible individual entitled to receive the CCTB and GSTC benefits for the Period while the Appellant would be the eligible individual entitled to receive the benefits for the period from July 1 to December 31 of this year, and that she and her former spouse would continue to share eligibility on a six-month alternating basis; all on the basis that both the Appellant and her former spouse are both equally responsible for the children's care and upbringing and hence are in effect entitled to share the benefits equally in accordance with the Minister's policy of shared allocation of benefits.

[3] By way of background, the Appellant and her former spouse, E.C.,[1] have two daughters, Ga. now 11 and Ge. now 7, who are indisputably qualified dependants for both the CCTB and GSTC under the *Income Tax Act* (the "*Act*"). The Appellant and her former spouse separated in 2005. Since such separation, the Appellant received both benefits. On October 5, 2009, E.C. applied for the benefits in respect of the 2008 base taxation year and of course was granted the benefits for the period January 1, 2010 to June 30, 2010 as stated above.

[4] By Consent Order of the Provincial Court of British Columbia dated September 16, 2008, in paragraph 1 both parents were granted joint custody of their two daughters. The two other important paragraphs to note are paragraphs 2 and 3 of the Order which read as follows:

> 2. the Applicant, Julia Pantelidis shall have the primary residence of the Children;
>
> 3. The Respondent, E.C. shall have access to the Children on week one from Sunday at 8:30 a.m. to Wednesday at 7:00 p.m. and on week two from Saturday at 8:30 a.m. to Wednesday at 7:00 p.m. with week two to commence September 20, 2008.

[5] It is evident that pursuant to such Order, both parents have been given shared and equal custody of their two children who are to spend an equal amount of time with each parent.

[6] A second Consent Order of the Provincial Court of British Columbia was issued May 26, 2010, wherein paragraph 8 effectively provides that the parents are to share the CCTC benefit in the same manner as determined by the Minister, which reads as follows:

> 8. The father shall receive the Child Tax Benefit for January through June, and the mother shall receive said benefit from July through December, for both Children.

[7] The Appellant advised the Court she never signed and did not agree with the above second Order which is specifically stated to be on consent.

[8] The position of the Appellant is that she should be entitled to the benefits during the Period and full-time afterwards for that matter for two reasons: Firstly,

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[1] Initials or abbreviations rather than names have been used for the former spouse and the minor children.

that she is not employed and relies upon the benefits to support her children, and secondly, that notwithstanding the joint custody order and the fact the children live with both parents an equal amount of time as per that order, which she does not dispute, it is she that in effect provides much more of her time towards raising the children and attending to their needs than her former spouse, and accordingly, she is the parent who primarily fulfills the responsibility for the care and upbringing of her children and hence is the only eligible individual entitled to the benefits.

[9] The position of the Respondent is that the determination should not be changed as both parents equally fulfil the responsibility for the care and upbringing of their children during the equal times they have custody, and accordingly, since the *Act* does not specifically provide for how to allocate months during the Period in that case, the policy of the Minister in allowing both parents to equally share the benefits is justified and should not be disturbed. The relevant assumptions of the Respondent are found in paragraph 13 of the Reply to the Notice of Appeal which by paragraph c) thereof references the September 16, 2008 Court Order and includes the following other relevant assumptions:

> e) the Children reside an equal amount of time with each parent at their respective residences;
>
> f) the Appellant and E.C. equally provide for the care and upbringing of the Children when the Children are residing with each of them;

[10] Before proceeding to analyse the position of the parties in the context of the evidence before this Court, I would like to summarize the law applicable to the issues in this appeal.

[11] Entitlement to the CCTB and GSTC benefits are set out in sections 122.6 and 122.5 respectively of the *Act*.

[12] For the purposes of the GSTC benefit, subsection 122.5(6) effectively provides that failing agreement between individuals who have the same qualified dependants as to entitlement to the benefit, the individual who is the eligible individual entitled to receive the CCTB under section 122.6 is the individual who will receive the GSTC.

[13] For the purposes of the CCTB, section 122.6 provides that an eligible individual is the person who:

> *(a)* resides with the qualified dependant; and
>
> *(b)* is the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of the qualified dependant.

There are also other requirements in that section which are not applicable here.

[14] As I mentioned, there is no dispute that the two children are qualified dependants and that they are to reside with both parents for equal periods in accordance with the September 16, 2008 Consent Order of the Provincial Court of British Columbia. I note at this time that the Respondent pointed out that paragraph 2 found in the Order of the Provincial Court of British Columbia which states the Appellant's address is the "primary residence" should not be taken to mean that her address is the only residence of the children. In *Carnochan v. R.*, 2006 TCC 13, 2006 DTC 2225, Sheridan J. addressed the identical paragraph found in a custody order and left no doubt that paragraph *(a)* of the definition of "eligible individual" in section 122.6 of the *Act* only required that the eligible individual "resides" with the qualified dependant and does not require such residence to be a "primary residence". In that case, Sheridan J. found that whether the Appellant resides with her children is a question of fact and found that in a situation where the children spent approximately half their time at each of their parent's house in joint parenting circumstances, that would satisfy the requirement of residing with the parent, in effect the same situation we have here. In any event, as I said earlier, the Appellant concedes that the children resides with her former spouse an equal amount of time in accordance with the Court Order. I agree, however, with the Respondent's position that the use of the words "primary residence" in the Order does not mean the Appellant's former spouse does not reside with the children. Obviously, both parents meet the requirement of residing with the qualified dependants under paragraph *(a)* of the definition of "eligible individual" in section 122.6 of the *Act* during the Period.

[15] In determining whether the Appellant met the requirement of the definition of "eligible individual" in paragraph 122.6*(b)* above, it must be noted that while paragraph 122.6*(f)* of the *Act* in the definition creates a presumption that the female parent is the eligible individual where the qualified dependant lives with the female parent, it is clear that pursuant to paragraph 122.6*(g)* of the *Act* in the definition that such presumption does not apply in prescribed circumstances. Paragraph *(d)* of Regulation 6301(1) makes it clear that the presumption in favour of the female parent does not apply where:

> *(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.

[16] Clearly, the Appellant's former spouse made application for the benefits under that subsection as did the Appellant and they both live in different locations, so it is clear they fall within the exception of paragraph 6302*(d)* above, and accordingly, a presumption in favour of the Appellant as the female parent does not exist in this case. There is no need for the Respondent to rebut the presumption because the effect of the exclusionary language in such paragraph 122.6*(g)* and Regulation 6301(1)*(d)* means the presumption does not exist in this situation as also clarified in *Pollak v. R.*, [1999] 2 C.T.C. 2225 by Bowman J. as he was at the time.

[17] In determining then which parent primarily fulfilled the responsibility for the care and upbringing of the two children during the Period pursuant to the aforesaid paragraph 122.6*(b)* of the *Act*, the Court must consider the evidence in light of the factors set out in Regulation 6302 which reads as follows:

> 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.

[18] On the whole, I find that the evidence supports the Minister's position that both parents have demonstrated they are actively and equally involved with the care and upbringing of their children. Both children live in homes provided by each of the parents and there is no evidence such homes are not suitable for any of the children or that they are not secure environments. The evidence shows that both parents provide for food and clothing for the children when in their respective homes or as the need arises while in their respective homes and there is no evidence that the hygienic needs of the children are not provided by both parents. In fact, the evidence shows that both attend to their hair-cutting needs notwithstanding that there may be a dispute between them as to who and how their hair should be cut.

[19] The evidence is also clear that the Appellant plays a greater role in the arrangement of any transportation to medical care at regular intervals. The evidence is that the Appellant made most of the doctor's appointments and picked the children up from school even during days when in the father's custody to attend medical appointments, both with their doctor, dentist, eye doctor and with respect to the eldest daughter, behavioural counsellors while with respect to the youngest daughter, psychiatric and other counselling pertaining to certain suspected disorders. While the father testified he too had taken the children to clinics if they fell ill while under his custody, he worked during the day when the Appellant made most of the appointments and the Appellant did not give him sufficient notice of the appointments in effect making it difficult for him to take them, suggesting the Appellant was intentionally keeping him in the dark or

preventing him from participating; with him often-times only finding out an appointment was made from his children telling him the night before that their mother was picking them up from school the next day to take them to one. There is no doubt there is great acrimony between the two parents here and that it would be difficult to transport children to doctor's appointments on short notice while in employment, but frankly, this does not detract from the fact the Appellant is the one who took the initiative in actually making the appointments and went to great pains to take buses to them before she acquired a car in March of this year, while the evidence showed he already owned a car. He seems content to have allowed the Appellant to take this greater role notwithstanding his complaints. In all fairness, however, it should be mentioned that there is strong disagreement between the parents as to whether their youngest daughter has Attention Deficit Hyperactivity Disorder ("ADHD"), with the school report suggesting she is normal while a psychiatrist report suggests the disorder, while the ADHD Clinic report of September 10, 2010 states it is still impossible to diagnose at this point but diagnosed a Post-Traumatic stress disorder as a reaction to the parents being in constant conflict, all of which the Provincial Court of British Columbia must still consider in follow up. I mention this because it was the Appellant's suggestion that the father refused to participate in the examinations and meetings dealing with the psychiatrist in particular, suggesting he did not care or left the burden of dealing with the issue entirely to her, although his evidence is that he received the psychiatric report only in the mail and was not asked to participate in advance and that when he followed up with the psychiatrist he was convinced he needed another opinion since neither he nor the school thought the daughter had any issues. As I said, the matter is still under consideration and is being dealt with by both parents, each in accordance with their personal views which differ. This cannot be taken to mean that the father is uncaring or unwilling to be involved and in fact he appears actively involved and concerned with the issue with a differing view.

[20] On the other hand, it is clear the father lived on the same street where the children attended a French-speaking school with the Appellant's approval, and as a person who speaks French, while the Appellant does not, he was the parent who predominantly helped the children with their homework, registered the children in the school annually, paid for their school supplies, attended all field trips, attended parent-teacher meetings, although the Appellant's evidence was that she had attended on occasion, was involved in parent-teacher associations and was recognized for his participation by the group. The Appellant lived quite a distance from the school and while the children were with her, the children took long bus rides to attend the school although the Appellant made sure they got to the bus pick-up location. In this regard, the evidence is overwhelming that the father plays

the predominant role in supervising and attending to the educational requirements of the children, with, as I alluded to, the Appellant's tacit approval.

[21] In respect to the children's recreational activities, it is clear both parents actively supported and contributed to arranging and taking the children to various activities. The Appellant applied for and obtained subsidized credits from the Burnaby City Recreation Department allowing her and her children to utilize recreational facilities and the children to attend swim lessons. The father, however, took the children to swim lessons as they fell on Sunday, a day when the children resided with him or if there were no lessons scheduled, to Church with him. On the other hand, the Appellant took her eldest daughter to Tae Kwon Do lessons each Wednesday and Friday as they fell at times while such daughter is in the Appellant's custody while the father paid for the lessons. The father as well takes the youngest daughter to karate lessons on the Saturdays while she is in his custody while the Appellant takes her on Saturdays falling within her time of custody. The father pays for the lessons and uniforms. In my view, both parents equally share in providing and taking their children to sports and recreational activities.

[22] The existence of a Court Order in respect of qualified dependant that is valid in the jurisdiction in which the qualified dependant resides is also a factor to consider. Clearly, the Court Orders above alluded to provide for equal custody arrangements on which as I said there is no dispute. The second Court Order issued pursuant to a hearing held May 26, 2010, issued on its face on consent, clearly sets out that the Appellant and her former spouse are to share the CCTB in the same manner as set out in the determination made by the Minister. The Appellant states that her signature is not on the Order and she did not consent to it. The evidence is that the Appellant was represented at the hearing by counsel and the presiding judge asked whether she was in agreement and she signified she was. I have some difficulty with the Appellant's position that she did not consent to this Order notwithstanding that it lacks her signature. Frankly, the father's signature is not on it either but the Court does not need the Order to be signed as consented to if it is of the view the parties did indeed consent to it during hearing. In any event, I believe the Order was issued and consented to by the Appellant and hence should be given weight as a factor in determining who the eligible individual was for the Period, however, I might add that I would have come to the same conclusion on this matter even in the absence of a Court Order containing that clause.

[23] In the case at hand, I find that neither parent can be said to be the parent primarily responsible for the care and upbringing of the children during the Period as both parents are equally responsible for their care and upbringing.

Unfortunately, as the Federal Court of Appeal confirmed in *R. v. Marshall*, 96 DTC 6292 (F.C.A.) section 122.6 of the *Act*:

> 2. … the *Act* contemplates only one parent being an "eligible individual" for the purpose of allowing the benefits. It makes no provision for prorating between two who claim to be eligible parents. Only Parliament can provide for a prorating of benefits but it has not done so."

[24] Furthermore, as confirmed in *Matte v. R*, 2003 FCA 19, 2003 DTC 5075, by the Federal Court of Appeal, the scheme of the section provides that the determination of who is an eligible individual must be made on no less than a monthly period, having regard to the formula for calculating the amount of benefits found in section 122.61 which effectively requires that a parent reside with the qualified dependant on the first day of the month.. In paragraph 9 of this case, Strayer J.A. stated:

> 9 We understand this to mean that the minimum benefit period is one month and that a month of benefits is to be paid to whomever was the eligible individual at the beginning of the month: …

[25] Put another way, as stated by Hershfield J. in *Connolly v. R.*, 2010 TCC 231, 2010 DTC 3357, in paragraph 19:

> 19 The definition of eligible individual looks to the caregiver at a particular point in time; namely, the first day of the month and the person who is the caregiver at that point in time gets the whole month's benefit. …

[26] The question then becomes what happens if no parent qualifies as the eligible individual at the beginning of any month because the qualified dependant resides with both parents at the beginning of the month and neither one is "primarily" responsible for their care and upbringing at that point in time?

[27] I should add here that I do not consider the fact that the evidence shows that the qualified dependants here were physically in the custody of the Appellant on the first day of the month during three of the months during the Period while in the custody of the father on the first such day during the other three to mean the children "resided" with that particular parent on such first day. I am in agreement with the analysis of the meaning of "residence" by Webb J. in *Campbell v. R.*, 2010 TCC 67, [2010] 3 C.T.C. 2114, who quite simply put it in paragraph 15:

> 15 … It is not simply a question of which house she was at on the first day of any given month. Did she have a settled and usual abode with the Appellant or …

[28] In that case of similar facts, Webb J. concluded in paragraph 17:

> 17 It seems clear to me that this regular cycle of alternating between the Appellant's home and Timothy Campbell's home [the father] continued throughout the period under appeal and that the Child was residing with both parents throughout this period. The Child had a settled and usual abode with both parents. …

[29] I too find in the case at hand that the two children of the Appellant and her former spouse had a settled and usual abode with both parents during the entire Period including at beginning of each month and every day afterwards.

[30] Since I find that both parents are, in the circumstances of this case, the parent who can be said to be primarily responsible for the care and upbringing of the children while in their custody exactly half of each month, then I must conclude that since only one parent can be primarily responsible for their care and upbringing during a minimum of a monthly period as confirmed in the *Marshall* case above, then it follows that neither of them is the parent that is primarily responsible for any entire month during the Period or the entire Period as a whole. They are in fact equally responsible. As in the *Campbell* case above, where the Court found it could not determine which of the parents was "primarily responsible" during a period, I share the conundrum of Webb J. who stated in paragraphs 35 and 36:

> 35 … However, the *Act*, in relation to the CCTB, does not stipulate what will happen if both parents equally fulfill the responsibility for the care and upbringing of the qualified dependent …
> 36 It does not seem to me that the correct result in this situation, where the Appellant and Timothy Campbell share equally in fulfilling their responsibility for the care and upbringing of the Child, is that neither parent should be entitled to the CCTB because neither parent would be able to satisfy the requirement that such parent must be the parent who *primarily* fulfills such responsibility. …

[31] In that case, Webb J. determined that the parents should alternate receiving the benefits on a monthly basis during the period in question. In the case at hand, the Minister decided to alternate between the Appellant and her husband on a six-month period in accordance with its policy of shared allocation. It could have alternated entitlement on a monthly basis and I suspect if the parties wish that result the Minister would likely agree to such request, however it seems the

Minister's decision was to respect the Court Order issued by the Provincial Court of British Columbia where the parties on consent agreed to the six-month allocation, having regard to the fact it is a factor to consider pursuant to Regulation 6302 as above mentioned.

[32] I am aware of this Court's criticism in the past regarding the Minister's shared allocation policy, but am inclined to take the view such criticism was directed more at the manner and circumstances in which the policy was utilized rather than in the underlying policy itself. In *Heubach v. R.*, 2010 TCC 409, 2010 DTC 4072, Boyle J. criticized the Canada Revenue Agency ("CRA") for sending a letter to the Appellant suggesting it had the authority to make an order unilaterally for shared benefits without advising that if one of the parties did not agree in writing it would have to make a determination as to who the eligible individual was, then sought the return of payments when his spouse challenged the allocation, and CRA made a determination she was the eligible individual, after of course, he had relied on the CRA having that unilateral authority. In that case, the Appellant's spouse was specifically named the parent primarily responsible for the children's care and upbringing in the Court Order granting custody and was a factor the CRA seemed to have ignored to the Appellant's detriment in having to repay the funds. In the case at hand, the Court Order, issued on its face as a consent order, was in fact respected by CRA who based their sharing allocation in accordance with it.

[33] As for the CRA's authority for issuing a shared allocation decision, it seems to me that if it is doing so in the context of issuing a determination on the basis that such allocation was agreed to between the parties, whether such agreement be found in a Court Order or by written consent directly contained in a request to do so, then it clearly has such authority. I am also of the view that in circumstances where there is no such direct consent or consent by Court Order, that where one of the parents ceases to be the parent primarily responsible for the care and upbringing of a qualified dependant on the basis that due to shared custody arrangements and equal parenting circumstances it is clear neither parent can fulfill that primary responsibility within the meaning of section 122.6 of the *Act*, then it seems to me that the only reasonable action CRA has is to impose a shared allocation under its policy. To continue to pay benefits to a prior qualifying eligible individual when that person ceases to qualify is equally offensive to the legislation. The fact is the *Act* is silent on what happens in such circumstances and this Court has previously sanctioned the CRA's actions in such circumstances, both in the *Campbell* case above and in this one.

[34] Before concluding this decision, I would like to comment on the Appellant's plea to find in her favour based on her economic situation. I sympathize with the Appellant who diligently seeks whatever assistance she can to help support her children, including applying for housing assistance, income assistance, recreational credits and other government assistance, diligently shopping at discount sources or food banks and so forth and applying for and utilizing a credit card to use for food and other expenses, many of which were not for her own use, in order to replace monies lost from not receiving the benefits in question. I note too that the Appellant's former spouse is only working part-time as a security guard up to 20 hours per week as he testified. However, I agree with the Respondent's counsel that granting relief solely on the basis of unfairness would not be appropriate as the Federal Court of Appeal decided in *Chaya v.Canada*, 2004 FCA 327, 2004 DTC 6676, that this Court is not a court of equity and hence, as Rothstein J.A. stated in paragraph 4 thereof:

> 4 … The Court must take the statute as it finds it. It is not open to the Court to make exceptions to statutory provisions on the grounds of fairness or equity. …

[35] Neither the *Act* nor regulations thereunder provide that the parents' relative economic situation is a direct factor to be considered in determining which parent is primarily responsible for the care and upbringing of the children.

[36] In conclusion, the Appellant has not discharged the onus of rebutting the Minister's assumptions. She has not met the onus of proving she is the parent who is primarily responsible the care and upbringing of the qualified dependants, her two daughters, during the Period and accordingly the redeterminations of the Minister should stand and this appeal is dismissed without costs.

Signed at Ottawa, Canada, this 15th day of December 2010.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2010 TCC 639
COURT FILE NO.:	2010-1708(IT)I
STYLE OF CAUSE:	JULIA PANTELIDIS and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 10, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice F.J. Pizzitelli
DATE OF JUDGMENT:	December 15, 2010

APPEARANCES:

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