Docket: 2011-1798(IT)I

BETWEEN:

JO-ANN NADALIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 16, 2011,
at Prince George, British Columbia

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Shankar Kamath

JUDGMENT

The Appellant's appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 13th day of February 2012.

"Wyman W. Webb"

Webb J.

Citation: 2012TCC48
Date: 20120213
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JO-ANN NADALIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether the Appellant is entitled to the Canada Child Tax Benefit (the "CCTB") for her daughter (the "Child") for the period from February 2010 to August 2010 (the "period under appeal"). Initially CCTB Notices were issued notifying the Appellant that she was entitled to the CCTB for the period under appeal but it was subsequently determined that the Appellant was not entitled to the CCTB for these months. In the Reply it is stated that the Appellant was notified that she was not eligible for the CCTBs because she was no longer the Child's primary caregiver. In the Reply, however, the issue of whether the Child was residing with the Appellant during these months was also raised (and counsel for the Respondent acknowledged that was the main issue). The Appellant, in her notice of objection and at the hearing, did address the issues of whether the Child was residing with the Appellant and whether she was the primary caregiver.

[2] Under the *Income Tax Act* (the "*Act*") the CCTB 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:

> 122.61(1) 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[1] by ***the number of qualified dependants in respect of whom the person was an eligible individual at the beginning of the month***, and

…

C is the amount determined by the formula

$$F – (G \times H)$$

where

F is, ***where the person is, at the beginning of the month, an eligible individual in respect of***

(a) ***only one qualified dependant,*** $1,463[2], and

…

(emphasis added)

[3] Because the overpayment is deemed to have arisen during a month for which a person is an eligible individual in respect of a qualified dependant *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 dependant. As a result, it does not necessarily follow that because one particular person was the eligible individual in respect of a qualified dependant 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 dependant. The definitions of "eligible individual" and “qualified dependant” in section 122.6 provide that:

[1] This amount is adjusted annually as provided in subsection 122.61(5) of the *Act*.
[2] This amount is adjusted annually as provided in subsection 122.61(5) of the *Act*.

"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;

“qualified dependant” at any time means a person who at that time

(a) has not attained the age of 18 years,

(b) is not a person in respect of whom an amount was deducted under paragraph (a) of the description of B in subsection 118(1) in computing the tax payable under this Part by the person's spouse or common-law partner for the base taxation year in relation to the month that includes that time, and

(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;

[4] In this particular case there is no dispute that the Appellant is the female parent of the Child. The Respondent was disputing whether the Child was residing with the Appellant during the period under appeal. If the Child was not residing with the Appellant during the period under appeal, then the Appellant would not be a qualified individual (since she would not be residing with the Child) and hence she would not be entitled to the CCTB. If the Child was residing with the Appellant, the position of the Respondent is that the presumption in paragraph (f)

of the definition of “eligible individual” referred to above was not applicable and, in any event, Colin Foreman was the Child’s parent who primarily fulfilled the responsibility for the care and upbringing of the Child during the period under appeal.

[5] Paragraph (g) of the definition of “eligible individual” referred to above provides that the presumption as set out in paragraph (f) does not apply in prescribed circumstances. 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(l) 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". If the Child resided with both the Appellant and Colin Foreman, since both Colin Foreman and the Appellant filed the notice with the Minister under subsection 122.62(1) of the *Act* and since they were not living at the same location, the presumption in paragraph (f) of the definition of “eligible individual” referred to above is not applicable.

[6] The prescribed factors referred to in paragraph (h) of the definition of “eligible individual” are set out in section 6302 of the *Regulations* and are 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.

[7] If the Child was residing with the Appellant at the beginning of any of the months during the period under appeal the second issue is whether the Appellant was the parent who primarily fulfilled the responsibility for the care and upbringing of the Child at that time.

[8] In this case there are only a few facts that are assumed by the Minister. Paragraph 11 of the Reply provides as follows:

> 11. In determining the Appellant's entitlement to the CCTBs for the 2008 and 2009 base taxation years, the Minister made the following assumptions of fact:
>
> a) the Appellant and Colin Foreman ("Colin") are the parents of [the Child], born …
>
> b) at all material times, the Appellant and Colin were divorced and living separate and apart;
>
> c) [the Child] resided with the Appellant until January 2010;
>
> d) [the Child] commenced residing with her father in January 2010;
>
> e) the Appellant was the "eligible individual" in respect of [the Child] for the months of July 2009 to January 2010 of the 2008 base taxation year for the purpose of computing her entitlement to CCTBs;
>
> f) at all other material times of the 2008 base taxation year, someone other than the Appellant was the "eligible individual" in respect of [the Child] for the purpose of computing his/her entitlement to CCTBs; and
>
> g) the Appellant was not the "eligible individual" in respect of [the Child] for the purpose of computing her entitlement to CCTBs for the 2009 base taxation year.

[9] In *The Queen* v. *Anchor Pointe Energy Ltd.*, 2003 FCA 294, [2004] 5 C.T.C. 98, Justice Rothstein (as he then was) in writing on behalf of the Federal Court of Appeal stated that:

8 In the Reply to the Notice of Appeal, the Minister's assumptions are set forth, including assumptions arising as a result of the Global decision. Specifically, the Reply states at paragraph 10:

In reassessing, the Minister assumed the following facts:

...

(q) API, APII, APIII, APIV and APV did not purchase the seismic data for the purpose of determining the existence, location, extent or quality of an accumulation of oil or gas;

(r) the seismic was not used for exploration purposes;

...

(z) the seismic data purchased by API, APII, APIII, APIV and APV does not qualify as a Canadian Exploration Expense ("CEE") within the meaning of s. 66.1(6)(a) of the Income Tax Act (the "Act").

…

24 Paragraph 10(z) was struck by Rip J. for an additional reason. He considered it to be a conclusion of law "that has no place among the Minister's assumed facts".

25 I agree that legal statements or conclusions have no place in the recitation of the Minister's factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact. The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law.

26 However, the assumption in paragraph 10(z) can be more correctly described as a conclusion of mixed fact and law. A conclusion that seismic data purchased does not qualify as CEE within the meaning of paragraph 66.1(6)(a) involves the application of the law to the facts. Paragraph 66.1(6)(a) sets out the test to be met for a CEE deduction. Whether the purchase of the seismic data in this case meets that test involves determining whether or not the facts meet the test. The Minister may assume the factual components of a conclusion of mixed fact and law. However, if he wishes to do so, he should extricate the factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.

[10] It seems to me that whether the Child was *residing* with the Appellant is a conclusion of mixed fact and law as it will be determined based on the interpretation of “resides” for the purposes of the definition of “eligible individual” in section 122.6 of the *Act* and the application of the law related to the interpretation of “resides” to

the facts of the case. As well, whether the Appellant or someone else is the "eligible individual" is a conclusion of mixed fact and law. The definition of "eligible individual" sets out the conditions that must be met in order for a person to be an "eligible individual" including the condition that the person reside with the qualified dependant (which as noted above is a conclusion of mixed fact and law). There are also other conditions that are set out in this definition of "eligible individual" including the test that the person is the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant based on the factors as set out in section 6302 of the *Regulations*. Whether a person satisfies these conditions can only be determined based on a finding of whether the facts satisfy these conditions and therefore whether a person is an "eligible individual" is a conclusion of mixed fact and law.

[11] It does not seem to me that the assumptions as set out in paragraphs 11 c) to g) of the Reply are proper assumptions of *fact*. The Minister should have clearly delineated the facts that were assumed. Failing to do so results in the Minister having the onus of proof with respect to the facts. In *The Queen* v. *Loewen*, 2004 FCA 146, Justice Sharlow, on behalf of the Federal Court of Appeal, made the following comments:

> 11 The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown**.** This is well explained in *Schultz* v. *R.* (1995), [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (Fed. C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4 (S.C.C.)).

[12] Leave to appeal the decision of the Federal Court of Appeal in *Loewen* to the Supreme Court of Canada was refused (338 N.R. 195 (note)).

[13] The reference to the Child residing with the Appellant until January 2010 and then commencing to reside with Colin Foreman in paragraph 11 of the Reply would, however, provide the Appellant with notice that the issue was whether the Child was residing with the Appellant. As well, the references to the Appellant ceasing to be the primary caregiver in paragraphs 6 and 8 of the Reply would notify the Appellant of this issue. These paragraphs provide as follows:

> 6. By Notice dated September 20, 2010, the Minister notified the Appellant that her entitlement to CCTBs for the 2008 base taxation year had been redetermined on the basis of a change to her eligible children. Consequently, the Minister notified the

> Appellant that she had received deemed overpayments of CCTBs totalling $1,423.33 for the months of February 2010 to June 2010 because the Appellant was no longer [the Child]'s primary caregiver as of February 2010.
>
> …
>
> 8. By Notice dated September 20, 2010, the Minister notified the Appellant that her entitlement to CCTBs for the 2009 base taxation year had been redetermined on the basis of a change to her eligible children. Consequently, the Minister notified the Appellant that she had received deemed overpayments of CCTBs totalling $572.66 for the months of July 2010 to August 2010 because the Appellant was no longer [the Child]'s primary caregiver.

[14] It also seemed clear that the Appellant understood that whether the Child was residing with her and whether she was the primary caregiver were the issues in this appeal. As noted above the main issue in this appeal is whether the Child was residing with the Appellant at the beginning of any of the months during the period under appeal. In this case it is clear that the Child was residing with Colin Foreman throughout the period under appeal.

[15] As a result of the foregoing definitions and requirements for CCTB and since it is clear that the Child was residing with Colin Foreman throughout the period under appeal, for the purposes of this appeal, the issues are as follows:

(a) Was the Child residing with the Appellant at the beginning of any the months from February 2010 to August 2010 for the purposes of the CCTB, and if so, for which months; and

(b) If the Child was residing at the beginning of any particular month or months with the Appellant (and therefore would be residing with both the Appellant and Colin Foreman), which parent, at the beginning of such month or months, was the parent who primarily fulfilled the responsibility for the care and upbringing of the Child at that time?

[16] Justice Rand of the Supreme Court of Canada in *Thomson v. M.N.R.*, 1945 CarswellNat 23, [1946] C.T.C. 51, made the following comments on "residing" and "ordinarily resident":

> 47 The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is

> quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.
>
> 48 The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

[17] Justice Bonner in *S.R.* v. *The Queen*, 2003 TCC 649, [2004] 1 C.T.C. 2386, made the following comments:

> **12** The word "reside" *[sic]* with as used in the section 122.6 definition of the term "eligible individual" must be construed in a manner which reflects the purpose of the legislation. That legislation was intended to implement the child tax benefit. That benefit was introduced in 1993 with a view to providing a single nontaxable monthly payment to the custodial parent of a child. That payment was intended to benefit the child by providing funds to the parent who primarily fulfilled the responsibility for the care and upbringing of the child. The threshold test is whether the child resides with the parent. Physical presence of the child as a visitor in the residence of a parent does not satisfy the statutory requirement. The word "resident" as used in s. 122.6 connotes a settled and usual abode. …

[18] In *Lapierre* v. *The Queen*, 2005 TCC 720, 2008 DTC 4248, Justice Dussault stated that:

> **13** Although residence is the fundamental concept applied to determine if a person is subject to income tax under the *Act*, that term is nonetheless not defined therein and it is the courts that have attempted to establish its scope. Essentially a question of fact, a person's residence in a given place is determined by a certain number of criteria of time, object, intention and continuity that do not necessarily always carry the same weight and which can vary according to the circumstances of each case. (see *Thomson v. M.N.R.*, [1946] S.C.R. 209). All things considered, residence implies a certain constancy, a certain regularity or else a certain permanence according to a person's usual lifestyle in relation to a given place and is to be distinguished from what might be called visits or stays for specific purposes or of a sporadic nature. When the *Act* sets as a condition to reside with another person, I do not consider it appropriate to attribute to the verb "to reside" a meaning which deviates from the concept of residence as it has been developed by the courts. To reside with someone is to live or stay with someone in a given place with a certain constancy, a certain regularity or else in an habitual manner.

[19] Therefore as a result it is necessary to determine whether the Child lived with the Appellant on a settled and usual basis. It is not simply a question of which house the Child was at on the first day of any given month. Did the Child have a settled and usual abode with the Appellant or did the Child live with the Appellant regularly during the period under appeal and if so, at the beginning of which months?

[20] There were two witnesses – the Appellant and Colin Foreman. The Respondent also introduced a copy of the Custody and Access Report prepared following the Order of Judge Morgan rendered on May 17, 2011. This report, however, is of little assistance in determining whether the Child was residing with the Appellant during the period from February to August 2010 as this report was prepared the following year and submitted on August 17, 2011. It does not seem to address in any detail the situation during the period under appeal. However I would note that the recommendations include the following:

- [the Child] shall transition over the next 30 days from day visits with Jo-Ann such as;
    - Sundays 10:00 am until 4:00pm
    - Tuesday and Thursday after school until 7:00 pm to;
- Starting October 1st, 2011 [the Child] shall *[sic]* residing with each of her parents as follows:
    - With Colin from Wednesday after school until Sunday morning at 10:00 am
    - With Jo-Ann from Sunday morning at 10:00 am until drop off at school Wednesday morning

[21] Since the report recommends that the Child "transition" from day visits with the Appellant to residing with the Appellant (and Colin Foreman) commencing October 1, 2011, it is clear that when the report was prepared in 2011 that the Child was not residing with the Appellant. The report does not indicate when the Child ceased to reside with the Appellant but it appears that it was more likely than not in January 2010. The Appellant acknowledged during the hearing that circumstances changed in January 2010. At the beginning of her testimony the Appellant stated that:

> A And what I would like to say that is, as of January 2010, we had quite a tumultuous time in our family, and my daughter has spent very little time starting then at our normal, our usual residence and began to spend more time at her father's.

[22] There was conflicting testimony with respect to whether the Child spent any nights with the Appellant during the period under appeal. The Appellant stated as follows during her direct examination:

> A February, and those are the eye doctor receipts. And we continued to see each other. In February there was an incidence where [the Child] phoned me late at night, to say that she had a fight with her dad and that could she come over, and I agreed. Picked her up, and I asked her what happened and her and her dad had an argument and she stayed over for the next few nights. She came to work with me, as I only work a couple of hours in the evening at a time. And she seen her dad there, and -- because he was working also at the same arena, just as a city worker. She called me off of the ice to tell me that she seen her father and he barely spoke to her and wouldn't hug her, and she was quite distraught over that. She remained with me for a couple more days, until her and her dad --
>
> …
>
> A … Boston Pizza, was an evening that my mother, [the Child] and I spent together for my mom's birthday actually. And I believe [the Child] spent the next couple of nights at home.

[23] The transaction date for Boston Pizza was dated March 2, 2010. During cross-examination of the Appellant, the following exchange of questions and answers took place:

> Q I'm sorry, how many nights --
>
> A Nights.
>
> Q -- a month, would she stay with you from January through August 2010?
>
> A I don't have the exact number, but it was several throughout the month.
>
> Q Okay. So just to reiterate my question, you would say that she maybe stayed with you for seven days, one week per month, from those months of January until August 2010?
>
> A I would say that she stayed with me more than that, including the days, for example, when she went to the coast with me, there was more than a week.

[24] During Colin Foreman's direct examination, the following exchange took place:

> Q So how many days on average and maximum per month did [the Child] spend at

her mother's place from February to August 2010?

A Very little. Very little.

Q So a day or two a month?

A I would say on a daily visit maybe? But no overnight visits. She didn't go over there overnight.

[25] I do not accept the testimony of Colin Foreman that the Child did not spend any nights at the Appellant's residence during the period under appeal. It seems to me that it is more likely than not that the Child did spend some nights at the Appellant's residence during this period. However, the question is whether the Child had a settled and usual abode with the Appellant and lived regularly with the Appellant during this period. It seems to me that the Child's visits with the Appellant became haphazard starting in January 2010 and living with the Appellant was no longer part of her regular routine during the period under appeal. The only time that the Child appears to have spent consecutive days with the Appellant (other than a couple of consecutive days in February and March) are when the Child accompanied the Appellant on a camping trip and on trips to Surrey / Langley in the summer. The trips that the Child took with the Appellant do not establish that the usual and settled abode of the Child was with the Appellant.

[26] The Appellant attempted to support her case by introducing a number of receipts to show the items that the Appellant was buying for the Child. Two recurring items were the tuition amount that the Appellant was paying to the Child's school and the amount that the Appellant was contributing to the RESP for the Child. Neither the payment of tuition nor the contributions to an RESP establish where the Child was residing.

[27] Since the issue for the CCTB is, as noted above, determined on a monthly basis, it is necessary to examine the evidence presented for each month. The only evidence that was submitted for January was a photograph of the Child. For February, the amounts paid by the Appellant consisted of the following[3]:

Date	**Vendor**	**Amount**	**What was Purchased**
February 11	Wal-Mart	$34.99	Clothes

[3] For each month the amounts listed do not include the recurring amounts for tuition and the RESP that are referred to above.

February 18	Quesnel Family Optometric	$315.00	Eye examination and eyeglasses

[28] It is clear that the relationship between the Appellant and the Child changed in December 2009 and January 2010. The Appellant stated that the Child had accompanied her on a trip for Christmas in December 2009 and upon their return the Child asked to see her father. The Appellant took the Child to Colin Foreman on either the 30th or the 31st of December, 2009. It would appear the Appellant did not hear from the Child until January 13, 2010 when she received an e-mail from the Child. The Appellant had received a phone call indicating that the Child was not in school. It would appear that the Child and Colin Foreman had travelled to the coast. It appears that the Child stayed at Colin Foreman's house following their return from the coast.

[29] On or about January 23, 2010 the Appellant was served with an Application to Change the Order of the Provincial Court of British Columbia that had provided that the primary residence of the Child was to be with the Appellant. The request was to change the Order to provide that the primary residence of the Child was to be with Colin Foreman. The Appellant described the first court appearance in relation to this request to change the Order as follows:

> A Since then, that would be the 23rd of January, I believe, I was served with that. We ended up at court, our first time on the coast in Port Coquitlam. I believe it was February 3rd of 2010 where Colin claimed that [the Child] no longer wanted to be at my house, that I abused her, et cetera, and my claim to the judge was that he was keeping her from me, because [the Child] was still coming over, she did not act fearful when she was in my presence. And the judge granted that the court case be moved to Quesnel, because we both lived there. And she also discussed with Colin that his obligation, being one of two parents of this child, to make sure that access was facilitated, to foster a good relationship, in which he agreed, and did not follow through with.

[30] It seems to me that it is more likely than not that the Child was not living with the Appellant at the beginning of February. It seems clear that when the parties were in Court in early February 2010 that the Child was living with Colin Foreman and that the Child was not spending much time, if any, at the Appellant's premises.

[31] The one purchase at Wal-Mart on February 11 and the receipt indicating that the Appellant took the Child to the Optometrist on February 18 are not sufficient to support a finding that the Child was residing with the Appellant as of the beginning of February as it appears that there was a significant change in circumstances as of

the end of December and it appears that the Child did not spend any days or nights with the Appellant in January. Therefore I find that the Child did not reside with the Appellant as of the beginning of February.

[32] The amounts identified by the Appellant for March consisted of the following:

Date	**Vendor**	**Amount**	**What was Purchased**
March 1	Bo Peep Boutique	$35.18	Clothes
March 2	Boston Pizza	$71.24	Food
March 12	Zellers	$29.27	Clothes
March 17	Wal-Mart (Surrey)	$32.47	Clothes

[33] As noted in the Appellant's testimony referred to above, the Boston Pizza amount was for an evening that the Child spent with the Appellant and her mother because it was her mother's birthday. It does not seem to me that spending a couple of nights at the Appellant's house following the Appellant's mother's birthday would mean that the Child had a usual and settled abode at the Appellant's house as of the beginning of March. Nor would the one purchase of clothes at Bo Peep Boutique.

[34] The purchases made at Zellers and Wal-Mart were made while the Appellant was in Surrey, British Columbia. The Child was not with the Appellant and was with Colin Foreman at that time.

[35] As a result I find that the Child was not residing with the Appellant as of the beginning of March, 2010.

[36] The amounts identified by the Appellant for April consisted of the following:

Date	**Vendor**	**Amount**	**What was Purchased**
April 10	Stitches	$10.44	Clothes
April 12	Urban Planet	$31.34	Clothes
April 20	Booster Juice	$9.77	Beverages
April 20	Ardene	$31.50	Clothes

[37] The two purchases on April 10 and 12 do not establish that the Child was living regularly with the Appellant as of the beginning of April. For the purchases on April 20, the Appellant stated that:

> A … [The Child] and I spent the afternoon together and we went to Booster Juice and we also went to the mall, and one of the newer stores in town, in Quesnel, at that time was *[sic]* RD's, was the place to go.

[38] This only establishes that the Appellant and the Child spent an afternoon together. It does not establish that the usual and settled abode of the Child was with the Appellant.

[39] As a result I find that the Child was not residing with the Appellant as of the beginning of April.

[40] The amounts identified by the Appellant for May are as follows:

Date	**Vendor**	**Amount**	**What was Purchased**
May 12	Old Navy	$17.31	Clothes
May 31	Evergreen Fishing Resort / Marigold Resort	$36.96	Camping trip

[41] The one purchase of clothes and the amounts spent on the weekend camping trip at the end of May do not establish that the usual and settled abode of the Child was with the Appellant as of the beginning of May or as of the beginning of June. This was a camping trip to visit the Appellant's mother and does not establish that the Child was living with the Appellant. I find that the Child was not residing with the Appellant as of the beginning of May.

[42] The amounts identified by the Appellant for the month of June are as follows:

Date	**Vendor**	**Amount**	**What was Purchased**
June 28	Ricky's All Day Grill (Surrey)	$49.69	Food
June 29	Ardene (Langley)	$11.20	Clothes
June 29	Zellers (Langley)	$55.85	Unknown

[43] There are no expenditures following the camping trip at the end of May until the expenditures incurred in late June. For the expenditures incurred in late June 2010 in Surrey and Langley, the Child did accompany the Appellant on this trip,

which lasted about a week. Accompanying the Appellant on a camping trip or on another trip to Surrey / Langley does not establish that the Child had a usual and settled abode with the Appellant. I find that the Child was not residing with the Appellant as of the beginning of June.

[44] The amounts identified by the Appellant for July are as follows:

Date	**Vendor**	**Amount**	**What was Purchased**
July 21	Stitches	$22.95	Clothes
July 22	Wal-Mart	$25.72	Clothes
July 30	Ricky's All Day Grill	$19.02	Food
July 31	Wal-Mart (Surrey)	$19.04	Clothes

[45] A couple of purchases of clothes on July 21 and 22 do not establish that the Child was living regularly with the Appellant as of the beginning on July, nor does the trip taken with the Appellant at the end of June (which is referred to above). I find that the Child was not residing with the Appellant as of the beginning of July.

[46] For August, the Appellant identified the following amounts:

Date	**Vendor**	**Amount**	**What was Purchased**
August 3	Claire's Boutique (Surrey)	$22.68	Perfume and sandals
August 4	Cineplex (Surrey)	$40.00	Tickets to the movies
August 7	Ardene (Langley)	$5.60	Unknown
August 7	Old Navy (Langley)	$32.48 + $52.78	
August 8	Famous Players (Langley)	$59.50	Tickets to the movies
August 9	Ricky's All Day Grill	$21.47	Food
August 16	Ardene	$6.72	Unknown

[47] The amounts incurred at the beginning of August were incurred on the trip that began in late July. Simply because the Child was with the Appellant on a trip at the beginning of August does not establish that the usual and settled abode of the Child

was with the Appellant as of the beginning of August. I find that the Child was not residing with the Appellant as of the beginning of August.

[48] Since the Child was not residing with the Appellant at the beginning of any of the months during the period under appeal, it is not necessary to determine which parent at the beginning of any particular month during the period under appeal, was the parent who primarily fulfilled the responsibility for the care and upbringing of the Child at that time.

[49] As a result the Appellant's appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 13th day of February 2012.

"Wyman W. Webb"

Webb J.

CITATION:	2012TCC48
COURT FILE NO.:	2011-1798(IT)I
STYLE OF CAUSE:	JO-ANN NADALIN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Prince George, British Columbia
DATE OF HEARING:	December 16, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	February 13, 2012

APPEARANCES:

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Counsel for the Respondent:	Shankar Kamath

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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