

Docket: 2012-2219(IT)I

BETWEEN:

OLIVE N. BURCHELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 8, 2013, at Toronto, Ontario

Before: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant: Sameer Nurmohamed

Counsel for the Respondent: Christian Cheong

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2007, 2008 and 2009 taxation years are dismissed.

Signed at Ottawa, Canada, this 9th day of April 2013.

"Campbell J. Miller"

C. Miller J.

Docket: 2012-2220(GST)I

BETWEEN:

OLIVE N. BURCHELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 8, 2013, at Toronto, Ontario

Before: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant: Sameer Nurmohamed

Counsel for the Respondent: Christian Cheong

JUDGMENT

The appeal purportedly made under the *Excise Tax Act* for the period July 2008 to July 2011, is quashed, as no assessment was issued pursuant to the *Excise Tax Act*.

Signed at Ottawa, Canada, this 9th day of April 2013.

"Campbell J. Miller"

C. Miller J.

Citation: 2013 TCC 102
Date: 20130409
Docket: 2012-2219(IT)I
2012-2220(GST)I

BETWEEN:

OLIVE N. BURCHELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] This is an unfortunate tale of mother-in-law, the Appellant, Ms. Burchell, pitted against her daughter-in-law, Ms. Marchbank. Both of them claim entitlement to the Canada Child Tax Benefit ("CCTB") pursuant to section 122.61 of the *Income Tax Act* (the "Act") and the Goods and Service Tax Credit ("GSTC") pursuant to subsection 122.5(1) of the *Act*, on the basis that each of them was the eligible individual in relation to the qualified dependent, S, Ms. Marchbank's daughter and Ms. Burchell's granddaughter. Ms. Burchell had also brought an Appeal under the *Excise Tax Act* ("*ETA*"), not appreciating that the GSTC is covered under the *Act*. The Appeal under the *ETA* is therefore quashed.

[2] The benefit period in issue is July 2008 to July 2011 for the 2007, 2008 and 2009 base taxation years. Pursuant to a Temporary Order of the Ontario Court of Justice dated October 18, 2007, S was placed in the temporary care of the Appellant, her grandmother. A further Order, however, was issued by the Ontario Court of Justice on January 23, 2008, restoring custody to the mother, Ms. Marchbank and S's father, with the *proviso* that they permit a worker from Native Child and Family Services of Toronto to conduct announced and unannounced home visits. Ms.

Burchell claims never to have seen this January 23, 2008 Order until the week before trial. I find it not credible that for the last several years she would not have known S has been legally returned to her mother's custody.

[3] The crux of the differing views of Ms. Burchell and Ms. Marchbank for the period from January 2008 to the summer of 2009 is whether the child in fact was returned to reside with her mother in Toronto in January 2008, in accordance with the Order, or remained with her grandmother in Barrie. I heard two diametrically opposed stories in this regard. With respect to the period from the summer of 2009 until the summer of 2011, the crux of the differing views of Ms. Burchell and Ms. Marchbank is that each of them claimed she was the one who had been primarily responsible for the care and upbringing of S, while all under the same roof in Barrie.

[4] Ms. Burchell testified that during the first period, January 2008 to the summer of 2009, S was living with her in Barrie and that she would drive S to Toronto to spend a week at a time, once a month, with her mother and father, being Ms. Burchell's son. Ms. Marchbank testified that her daughter lived with her in Toronto throughout this period. Ms. Burchell said that during this time while S was residing with her in Barrie she simply took care of her granddaughter in every respect, as she felt she was primarily responsible for her. Someone is lying.

[5] Ms. Marchbank claims that her daughter was always within her custody from January 2008 onwards. She provided a copy of a lease dated May 2007 for her accommodation in Toronto, which shows her daughter as one of the tenants. This was, however, before the daughter was removed in the fall and placed in Ms. Burchell's custody. It does not show what happened in January 2008 when Ms. Marchbank legally got custody of her daughter back.

[6] Ms. Marchbank testified that the social worker rarely visited after January 2008. Neither side called the social worker to corroborate their stories, though the Respondent provided a letter from Native Child and Family Services, dated March 1, 2013, indicating their records show the daughter was returned to her mother in January 2008. The Respondent also introduced a letter dated September 23, 2010, from the Children Service Worker, Ms. Lawrence, confirming that the child had been in the care of her mother from January 23, 2008 to the date of the letter. Finally, there were two letters from Dr. Susan M. Shepherd, a Toronto doctor, dated January 26, 2011 and February 11, 2013, confirming that S had been in her mother's care since 2008. While I had concerns with respect to the admissibility of these letters, given my greater concern as to who was telling the truth and with

little else to rely upon, I accept them as some corroborating evidence of Ms. Marchbank's version of the residence of her daughter.

[7] Ms. Marchbank claims that her mother would often look after S during this first period and that she and her daughter lived with her mother in Toronto for a few weeks in the summer of 2009, before they (Ms. Marchbank, S and S's father) moved to Barrie. She also stated that S had the bedroom while she would sleep on a sofa bed in their Toronto home.

[8] Ms. Marchbank's mother testified, though seemed too nervous to be very clear on much, though she did say she saw S Monday to Friday after January 2008 and that she thought they stayed with her for a couple months in 2008. I suspect she meant 2009. I have doubts about the truthfulness of both Ms. Burchell's and Ms. Marchbank's testimony, though on balance I conclude the child resided with her mother, Ms. Marchbank, for the period of January 23, 2008 to the late summer of 2009.

[9] I turn now to the period from the late summer of 2009 to July 2011 (the "Second Period"). In the late summer of 2009, Ms. Marchbank moved in with Ms. Burchell in Barrie to allow Ms. Marchbank to complete her schooling. She rented a room from Ms. Burchell at \$500 a month, though in August 2011 when a tenant of Ms. Burchell's left and a second room became available, Ms. Marchbank paid an additional \$150 a month to Ms. Burchell for that separate room for S.

[10] During the Second Period, Ms. Burchell claims that S slept in her room. Ms. Marchbank went to school so Ms. Burchell looked after S, though she acknowledged that S went to daycare for a while. She claims that Ms. Marchbank never took care of S, though did agree that Ms. Marchbank would take S to appointments. Ms. Burchell said that she bought everything for S and, Ms. Marchbank, apart for some groceries, bought nothing. If S was sick it was Ms. Burchell who claimed she looked after her. According to Ms. Burchell, she did all the cooking.

[11] Ms. Marchbank's version of life in Barrie living with Ms. Burchell is, not surprisingly, somewhat different. It was Ms. Marchbank who bought the groceries and fed S. She did agree that S did sleep in Ms. Burchell's room as she had a toddler bed in her room, but later in 2011 when S got her own room she would sleep there. Ms. Marchbank testified that she kept all of S's "stuff" in her room. She claimed she took S to and from daycare.

[12] There was considerably more evidence regarding Ms. Marchbank's activities during this Second Period, including going to school and attending a young parent program for example. However, I conclude that both mother and grandmother were involved in the care and upbringing of S. How then does the law with respect to the CCTB and GSTC apply to such a finding?

[13] For purposes of the CCTB, the individual claiming the credit must be an eligible individual as defined in section 122.6. It reads:

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 a parent of the qualified dependant who
 - (i) is the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant and who is not a shared-custody parent in respect of the qualified dependant, or
 - (ii) is a shared-custody parent in respect 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] Note that paragraph (f) in that definition is a presumption in favour of Ms. Marchbank, if the child resides with her, which I find she did. This applies unless precluded by Regulation 6301 of the *Income Tax Regulations* which reads:

- (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.

[15] None of the exemptions in Regulation 6301 apply, as Ms. Marchbank was over the age of 18 during the second period. She is therefore presumed to be the eligible individual. Has Ms. Burchell rebutted that presumption? I find that she has not. As I have indicated, there were shared responsibilities, but Ms. Burchell has not convinced me that she primarily fulfilled the care and upbringing of S. She served in many respects as babysitter while Ms. Marchbank attended school during the day. I have not gone into great detail on the facts which might support either Ms. Burchell's or Ms. Marchbank's claim, as frankly I find both of their testimony sketchy, and it is enough for me to simply find the child resided with her mother and nothing Ms. Burchell stated suggested she had any greater care and upbringing of S than Ms. Marchbank.

[16] In summary on the CCTB, I find that during the first period (January 2008 – August 2009) that S resided with Ms. Marchbank and not with Ms. Burchell, and therefore Ms. Burchell was not the eligible individual. For the Second Period, I find nothing has overturned the mother's presumption of being primarily responsible for S's care and upbringing. Ms. Burchell's Appeals of the CCTB issue are therefore dismissed.

[17] With respect to the GSTC, the considerations are similar. To be a qualified dependent of an eligible individual, as the term is defined in subsection 122.5(1) of the *ETA*, requires that S reside with Ms. Burchell. I have concluded that she did not reside with Ms. Burchell for the first period of January 2008 to August 2009. With respect to the Second Period, the facts, as I have concluded, suggest that S could be the qualified dependent of both Ms. Marchbank and Ms. Burchell. In that case, subsection 122.5(6) of the *Act* applies:

If a person would, if this Act were read without reference to this subsection, be the qualified dependant of two or more individuals, in relation to a month specified for a taxation year,

- (a) the person is deemed to be a qualified dependant, in relation to that month, of the one of those individuals on whom those individuals agree;

- (b) in the absence of an agreement referred to in paragraph (a), the person is deemed to be, in relation to that month, a qualified dependant of the individuals, if any, who are, at the beginning of that month, eligible individuals (within the meaning assigned by section 122.6, but with the words “qualified dependant” in that section having the meaning assigned by subsection (1)) in respect of that person; and
- (c) in any other case, the person is deemed to be, in relation to that month, a qualified dependant only of the individual that the Minister designates.

[18] This references the CCTB definition of eligible individual, which brings into play the mother’s presumption. Similar reasoning as applied to the CCTB would therefore apply with respect to the GSTC. Ms. Burchell’s Appeals for the GSTC are also therefore dismissed.

[19] In summary, the Appeal pursuant to the *ETA* is quashed and the Appeals with respect to the *Act* are dismissed.

Signed at Ottawa, Canada, this 9th day of April 2013.

“Campbell J. Miller”

C. Miller J.

CITATION: 2013 TCC 102

COURT FILE NO.: 2012-2219(IT)I and 2012-2220(GST)I

STYLE OF CAUSE: OLIVE N. BURCHELL AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 8, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF JUDGMENT: April 9, 2013

APPEARANCES:

| | |
|-----------------------------|-------------------|
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| Counsel for the Respondent: | Christian Cheong |

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