

Docket: 2012-2155(IT)I

BETWEEN:

C.P.B.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 7, 2013, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant: Aaron SanFilippo
Counsel for the Respondent: Laurent Bartleman

JUDGMENT

The Appeal from the determination of the Minister of National Revenue, with respect to the Canada Child Tax Benefit for the 2010 base taxation year is dismissed. The Court file shall be sealed in accordance with the attached Reasons.

Signed at Ottawa, Canada, this 5th day of April 2013.

"Campbell J. Miller"

C. Miller J.

Citation: 2013 TCC 118
Date: 20130405
Docket: 2012-2155(IT)I

BETWEEN:

C.P.B.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] Ms. B., the Appellant, appeals by way of Informal Procedure the Minister of National Revenue's (the "Minister") denial of the Canada Child Tax Benefit ("CCTB") for her in connection with her daughter for the 2010 base taxation year. This matter had been dealt with by Chief Justice Rip as it pertains to earlier years, prior to the new shared-custody parent rules introduced in 2010. Chief Justice Rip had determined there was shared-custody with respect to the daughter and, therefore, the CCTB was to be shared as assessed by the Minister. Ms. B. maintained that circumstances have changed since then and that she is, for the period in issue, the primary caregiver, and further that the new shared-custody parent rules do not apply. I disagree.

[2] It is agreed that the relevant time period to review for determining who was the primary caregiver of the daughter is June 2011 to July 2012 (the "Period"). I heard considerable testimony relating to earlier time periods, which provided some helpful context, but my determination must focus on the Period itself.

[3] During the Period the daughter was 12 and 13 years old. Based on the separation agreement between Ms. B. and Mr. B. the daughter was to spend alternate weeks with her mother and father. This she did during the Period. While at each of her parents, she had her own room and had a safe and secure environment. Ms. B.,

however, maintains that while the daughter was residing at her father's, Ms. B. still saw her most days and that she would go by her residence after school. I find this was an exaggeration by Ms. B. of the situation, as during the Period she had a boyfriend in Montreal, who she regularly visited during the weeks she did not have custody of her daughter. Ms. B. also testified she would go to some of her daughter's extracurricular activities during the week, though it later came out that the daughter had stopped participating in many such activities during the Period.

[4] Ms. B. claimed she booked all her daughter's medical appointments, though acknowledged that Mr. B. also attended such appointments. Ms. B. described her daughter as starting to make bad choices, sneaking out, inappropriate use of social media, cutting herself, substance abuse. She tried to get her help through Durham Family Services and a child youth and family program but her daughter for the most part refused. Ms. B. described Mr. B.'s attitude as minimizing the problem: as she put it, he had no approach to deal with the problem, though she acknowledged calling Mr. B. on occasion for help when things got out of hand at her residence with her daughter.

[5] Ms. B. produced several receipts indicating that she paid for some of her daughter's clothes and supplies. She also provided copies of emails reminding Mr. B. of the daughter's appointments. Both Mr. B. and Ms. B. were contacts at the school, depending who had the daughter that particular week.

[6] Mr. B. testified that he objected to Ms. B.'s claim of all the CCTB; he believed he was a shared-custody parent. He acknowledged that while the daughter was identified as autistic, he always felt she was 100% normal with some socializing issues. He accepted more readily that his son was autistic.

[7] Mr. B. testified that whatever his daughter needed he bought, but he did not keep receipts. As he put it, what parent keeps receipts after the exchange period has run out? He stated that the daughter needed permission to go out and that he too knew her friends. He never recalled her sneaking out of his home. He disagreed with Ms. B.'s assessment that he was unwilling to go to counselling.

[8] Mr. B. confirmed that the daughter was not involved in much extracurricular activity, though he indicated she appeared to like to go to the cottage with him. He testified he was called on several occasions by Ms. B. to go and get the daughter from Ms. B.'s residence and then return her the next morning.

Analysis

[9] There are some important definitions to be familiar with, all of which are found in section 122.6 of the *Income Tax Act* (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 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;

...

"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;

...

"shared-custody parent" in respect of a qualified dependent at a particular time means, where the presumption referred to in paragraph (f) of the definition "eligible individual" does not apply in respect of the qualified dependant, an individual who is one of the two parents of the qualified dependant who

- (a) are not at that time cohabitating spouses or common-law partners of each other,
- (b) reside with the qualified dependant on an equal or near equal basis, and
- (c) primarily fulfil the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant, as determined in consideration of prescribed factors.

[10] The shared-custody parent definition was only added in 2010, along with the addition of section 122.61(1.1) of the *Act*. Prior to that, the *Act* only permitted one parent to be the eligible individual for purposes of claiming the CCTB. Courts struggled with this limitation and often alternated months between parents sharing custody to effectively split the credit. The new rules now allow for a simple splitting of the credit in the appropriate circumstances.

[11] The new rules do not apply when the presumption in favour of the mother, found in subsection (f) of the definition of the "eligible individual", is in play. Regulation 63.01 of the *Income Tax Regulations* stipulates that the presumption is not applicable in certain circumstances, one of those circumstances being if more than one notice is filed with the Minister under section 122.62(1) of the *Act*, in other words, if both parents have claimed to be the eligible individual. Mr. B. testified that he made such a claim and, therefore, the presumption of subsection (f) is not applicable and the shared-custody parent rules should therefore apply. But, no says the Appellant, I must ignore that critical bit of evidence and decide the case on the basis that the shared-custody parent rules are not in play, because it was not pleaded by the Respondent.

[12] It is not open to the Appellant to have it both ways. The Appellant cannot leave a notice of appeal vague, so that the Respondent is not sure how to plead and then hang the Respondent on its pleadings because the Respondent did not specifically cover what ultimately was in issue. The Appellant argues that the Reply omits any assumptions or allegations of fact to substantiate that Mr. B. filed a claim, and as a consequence the Respondent can lead no evidence to that effect or advance an argument that the shared-custody parent rules should apply. This makes little sense to me on a number of fronts:

- a) The assessment was based on the shared-custody parent rules applying: that is what is at issue in this case and both sides knew it;
- b) The Notice of Appeal was incomplete and gave no indication on what basis the Appeal was launched other than disagreeing with the assessment.
- c) This is an Informal Procedure case and, often, each side hears testimony not previously heard. Am I to turn a blind eye to a witness' evidence, every time he or she may tell me something not specifically mentioned in the Reply? The Appellant relies on the Informal Procedure case of

*Fraser v R*¹ where Justice Woods did not allow the Respondent to raise an alternative argument at trial because it was not pleaded in the reply. Justice Woods did not deal with the option of a request for an amendment to the pleadings. Indeed, the Respondent's counsel before me suggested this, which I found unnecessary. In *Fraser*, the Appellant made it clear in the appeal the issue was who was the primary caregiver, yet the Reply evidently only addressed the issue of residence, and made no assumptions on the caregiver issue. The situation before me is not as blatant, and in the interests of justice, I allow Mr. B.'s evidence that he filed a claim; and

- d) The Reply does specifically raise the issue that the shared-custody parent rules apply, which implies the mother's presumption in the definition of eligible individual does not.

[13] In my view the shared-custody parent rules are designed to cover this very situation, rather than leaving the courts, as we have so often in the past, having to manipulate the provisions to divide eligibility for the credit on a month-by-month basis.

[14] So, as the shared-custody-parent rules apply, how do they apply to Mr. B.'s and Ms. B.'s circumstances? This comes down to a consideration of whether each of them primarily fulfilled the responsibility for the care and upbringing of their daughter when the daughter was residing with each of them. Did Mr. B. primarily fulfill that responsibility when the daughter resided with him; did Ms. B. primarily fulfill that responsibility when the daughter resided with her? The answers are yes and yes. In reviewing the prescribed factors in *Regulation 6302* as to what constitutes care and upbringing, it is clear that Mr. B. provided that while the daughter resided with him, while Ms. B. did so, while the daughter resided with her. I find that each provided:

- a) supervision of daily activities;
- b) maintenance of a secure environment;
- c) arrangement of and transportation to medical care. In this regard, I note Ms. B. sent reminders to Mr. B. of the appointments and may have

¹ 2010 TCC 23.

arranged more appointments. But this pales in comparison to the actual attendance. Also, it is clear Mr. B. held different views in the necessity of all such appointments. This goes to parenting styles as opposed to who primarily fulfills responsibility for care and upbringing;

- d) access to extracurricular activities;
- e) attendance to need when ill;
- f) attendance to hygienic needs; and
- g) guidance and companionship.

[15] Finally, there was a court order ordering the shared-custody arrangement. No, Ms. B. has not satisfied me that, while the daughter resided with Mr. B., she remained primarily responsible for the daughter's care. She did not. The shared-custody parent rules apply and Ms. B.'s case must therefore be dismissed.

[16] At the request of the Parties the Court file is to be sealed with access restricted to the Parties, their designated representatives and judges and registry officers of the Tax Court of Canada.

Signed at Ottawa, Canada, this 5th day of April 2013.

"Campbell J. Miller"

C. Miller J.

CITATION: 2013 TCC 118

COURT FILE NO.: 2012-2155(IT)I

STYLE OF CAUSE: C.P.B. AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 7, 2013

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

DATE OF JUDGMENT: April 5, 2013

APPEARANCES:

Agent for the Appellant:	Aaron SanFilippo
Counsel for the Respondent:	Laurent Bartleman

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

For the Respondent:

William F. Pentney Deputy Attorney General of Canada Ottawa, Canada
