Docket: 2012-1854(IT)I

BETWEEN:

SARA PEIXOTO DAFONSECA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 17, 2014, at Thunder Bay, Ontario

By: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Randall V. Johns
Counsel for the Respondent:	Ryan Gellings

JUDGMENT

The appeal from the redetermination of the Minister made under the *Income Tax Act* pertaining to the 2007, 2008 and 2009 base taxation years is dismissed.

Signed at Toronto, Ontario this 19th day of March 2014.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2014 TCC 88
Date: 20140319
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BETWEEN:

SARA PEIXOTO DAFONSECA,

Appellant,

and

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REASONS FOR JUDGMENT

Pizzitelli J.

[1] This is a sad dispute between mother and daughter for entitlement to the Canada Child Tax Benefit ("CCTB") and National Child Benefit Supplement ("NCBS") in respect of two of the children for the period February, 2009 to June 2011 (the "Period"), as it pertains to the 2007, 2008 and 2009 "base taxation years". Mother and daughter resided together at the mother's home with daughter's three children during the Period. The Appellant, who was the mother in this dispute and the grandmother of the two children, collected the benefits until it was redetermined by the Minister that she was not the "eligible person" during the Period with respect to those children. As a result of such redetermination dated June 20, 2011 and confirmed February 16, 2012, the Appellant was required to pay back the sum of $12,993.45 which is the subject of this appeal. The Appellant's daughter, C, was determined to be the eligible individual during the Period.

[2] The facts not in dispute between the parties or otherwise clear from the evidence is that the daughter C, moved into her mother's house in Thunder Bay, Ontario after becoming pregnant with her third child, D, before the start of the Period, and lived in her mother's house during the Period and afterwards until May of 2012. C also moved into her mother's house after becoming pregnant with her first two children and lived there as well, moving out for periods between her

pregnancies, thus demonstrating a pattern of moving in with her mother during such times in her life. There is also no dispute, as C had admitted in testimony, that she experimented with and had a drug problem, at least prior to the Period, that caused her mother, the Appellant, great concern, both for her daughter and for her grandchildren, and that played a role in the Appellant wanting to have her daughter and grandchildren live in her home. There is, of course, great disagreement between mother and daughter as to the extent of the daughter's drug problem and lifestyle and it is frankly, in the circumstances, far too simplistic to merely state that mother and daughter had serious relationship issues with one another. Unfortunately, a great deal of both of their respective testimony focused on blaming each other for their disagreements.

[3] The Appellant was a personal caregiver and worked shift work at two different retirement or care facilities. She testified she worked either morning shifts from 7:00 a.m. to 3:00 p.m. or afternoon shifts from 3:00 p.m. to 11:00 p.m., usually 3 or 4 shifts per week for either of them depending on when she was needed by them. The evidence is that her employment wages were the main source of her income during the Period in addition to contributions made by her daughter, C.

[4] What is also clear from the evidence is that the daughter, C, was not employed during the Period, nor for a large part of the times she had moved in with her mother on earlier occasions, and that during the Period her only sources of income was assistance she received for rent and transportation from Ontario Works, a $100 per month contribution from the father of her third child, D, and the amounts C received for her third child as CCTB. There is also no question that the daughter contributed the rent portion of her Ontario benefit, amounting to $300-$350 per month, to the Appellant as rent but the Appellant indicates this was only for several months while the daughter testified is was for the whole Period. There is agreement that when the Ontario government increased the rent portion of C's payment by about $300 or so towards the end of the Period, that the increase went to the Appellant for at least some of that time. There were no receipts or any other evidence to establish what total rents were paid by C to the Appellant nor received by the Appellant, and so this Court is left to speculate on the issue, although frankly, what is clear is that having regard to the daughter's limited income sources, any financial contribution she made to the Appellant is clearly minimal compared to the Appellant's cost of maintaining a 4 bedroom house in which the daughter and her three children shared and the costs of their maintenance.

[5] What is also clear from the evidence is that both the Appellant and her daughter take the position they were primarily responsible for the care and

upbringing of the children in question while acknowledging the other contributed in some manner.

[6] The only issue to be determined by this Court is whether the Appellant primarily fulfilled the responsibility for the care and upbringing of the two children to qualify her as being the eligible individual pursuant to section 122.6 of the *Income Tax Act* (the "*Act*") and section 6302 of the *Income Tax Regulations* (the "*Regulations*").

[7] Section 122.6 of the *Act* defines an "eligible individual" in respect of a qualified dependant at any time as the person who resides with the qualified dependants, is a resident of Canada and is the parent who "primarily fulfils the responsibility for the care and upbringing of the qualified dependant". There is no dispute the two children in question are qualified dependants and there is no dispute that both the Appellant, as grandmother to the children, resided in Canada and is a "parent", presumably in accordance with the laws of Ontario which apply to define such term. It was not argued by the Respondent the Appellant was not a parent in any event.

[8] The only dispute in this matter is whether the Appellant satisfied the condition in the definition as being the parent who primarily fulfills the responsibility for the care and upbringing of the two children. Section 6302 of the *Regulations* provides that several factors must be considered in determining what constitutes care and upbringing of a qualified dependant for the purposes of the definition of an "eligible individual" under section 122.6 of the *Act* which are as follows:

(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.

[9] Having considered all of the above factors, I can only find the evidence strongly supports the Appellant's position in factor (c), the maintenance of a secure environment for the children. The evidence is overwhelming that the Appellant owned the home and paid all the bills to maintain it. The contribution made by the Appellant's daughter was minimal at best having regard to the fact the daughter and her three children lived in the Appellant's home and contributed only small rent portions as above described. After such contributions of rent, the daughter had very little income left over as reviewed above. I accept that the Appellant was receiving the CCTB and related NCBS instead of the daughter initially during the Period and so the daughter did not have those funds then available to contribute directly, however the evidence is also clear that even when the daughter obtained a lump sum payment from the Canadian government after a determination she was the eligible individual, that she did not contribute these funds to assisting her mother in the maintenance of the home. In any event, while the Appellant did receive those funds, it is clear she used them to maintain the home and support her daughter and grandchildren.

[10] As for the remaining factors however, I must find that they all support the daughter C's position that C was the parent primarily responsible for the care and upbringing of the children in question.

[11] More specifically, the evidence supports the fact that the daughter supervised the daily activities and the needs of the children in factor (a) above. I accept the evidence of the daughter as being more credible on this matter. The daughter testified she was not working during the Period and so, since her mother was working, it was she who woke the children, prepared breakfast, dressed and sent the older child, S, off to school, who either walked or took the bus a few blocks away, and supervised the preschool daughter, N, as well as the baby D, taking them with her to counselling

lessons for her drug assistance program three times per week in the mornings to the Hope venue which had child daycare facilities. I accept the daughter's evidence that it was she who was back home to receive her son S when he returned from school, help with home work and prepare dinner and deal with their bed time preparations. There is no dispute that it was C who signed up the children for school after she moved in with her mother and C who arranged school bus service for her son S as well.

[12] I accept also that the Appellant, as a loving grandmother, also helped in these activities from time to time, but it is clear that the Appellant, who worked shift work for two different employers, simply could not have been present on any consistent basis to primarily supervise these daily activities. She may well have come home during her breaks to check on them as she testified, but checking on her daughter and grandchildren may suggest a general oversight role, but not a direct supervision of the grandchildren.

[13] I should also add that a former tenant of the Appellant, one L.C., who moved out around the time the Appellant's granddaughter D was born in 2008, testified that even when the Appellant's daughter C was at home, she slept in, due in part to her drinking as he suggested, leaving the supervisory roles to him or the Appellant's other daughter who then lived at home, but frankly, his evidence was vague. He gave no particulars as to what duties or functions he performed for the children, and he admitted he worked night shifts 6 – 7 days per week so I do not find it credible he would never sleep to take on these duties. In any event, it is clear he was not there during the Period in question and cannot speak to that time. Accordingly, I can give no weight to his evidence intended to challenge the credibility of the Appellant's daughter C and her competence to care for her children. What if anything his testimony confirms is that the Appellant herself was not available to perform such duties.

[14] With respect to the factors in paragraphs (c) to (g) above generally, I find that while the Appellant may have sometimes driven the children to their doctors or attended her grandson S's soccer game or her granddaughter N's dance recital or generally helped out with the other activities described in those factors, the evidence is that the daughter C arranged family doctor appointments, appointments with dentists or ophthalmologist and took them to their appointments by bus the majority of times; that C arranged for S to be signed up for soccer and attended his games, arranged for N to take dance lessons and took her to each one, arranged for S to take swimming lessons and took him and arranged for both S and eventually N to be enrolled with Big Brothers Big Sisters for guidance, companionship and exposure to

same sex role models and influences. It is also clear to me that since the Appellant also worked more or less full-time, she could not have taken a larger role in these activities or in dealing with the illness or hygienic requirements of the children which fell to C. I do not doubt she helped where she could but cannot find she was the primary person responsible in these matters. It is clear to me C was the stay at home parent who primarily fulfilled these duties.

[15] I note as well that the Appellant's testimony on these factors was vague and general, giving few details as to the particulars of any of these activities or her role with them, while the daughter testified specifically on the types of activities she arranged for the children or supervised and so I found her testimony to be more reliable on these matters.

[16] With respect to factor (h), the existence of a Court Order in respect of the children, it should be noted none exists. There is no evidence C was not the person with legal authority over or custody of the children,

[17] A great deal of time was spent by the Appellant in suggesting a Service Plan signed with the Children's Aid Society ("CAS") with the date of October 9, 2008 shows that the Appellant was primarily responsible for the care and upbringing of the children, but frankly, such Service Plan does not in my opinion transfer or give the Appellant any such stature or role. The Service Plan clearly addresses the daughter's need to obtain help for her substance abuse and recognizes that the mother's strength was her strong family support and that the Appellant was tasked with ensuring the children's safety. In my view, such task is that of a watchful eye particularly in light of the daughter's substance abuse issues, not an assignment of supervisory roles or custody. I would think such a measure if intended would be clear and more formal.

[18] The only other evidence pertaining to this issue was Case Conference Minutes of January 15, 2009 admitted into evidence being the minutes of a meeting held with the CAS representative and various health program representatives together with C and the Appellant. Such minutes demonstrated C had met her obligations under the Service Plan and the CAS even stated in paragraph 6 thereof:

> Christine Galati of CAS reports child welfare file opened April, 2008 due to drug and alcohol use and resulting impact on C's children. C has followed through on CAS's expectations of her since Christine became the worker in Sept. 2008 and at the present time, CAS would not interfere if C chose to move out of her mother's home and live independently with her children.

[19] It is clear from the above that CAS opened a file to monitor C's conduct and its impact on the children, arranged to have a Service Plan that required C to obtain professional help and counselling for her abuse problems while she and the children lived safely at the Appellant's home and decided clearly that C had honoured her commitment and satisfied CAS she was no longer a threat to her children; all before the Period even started. I might also add that this further discredits the Appellant's claim that her daughter was not competent to exercise that role during the Period. The evidence is that she was.

[20] It is clear from the above that I find that the Appellant was not the person primarily responsible for the care and upbringing of the children in question and accordingly was not the "eligible individual" during the Period.

[21] I have no doubt the love and support of the Appellant, during the Period and during the daughter's earlier pregnancies, have played a crucial role in allowing her daughter to keep and maintain the custody of her children. I have no doubt that even though the daughter testified she often left her mother's house because of the "intolerable" situation, referencing her strained relationship with her mother who she accused of being too controlling, she had no problem tolerating her mother when her mother financially supported her and her children to the degree she did. I also have no doubt the Appellant used those funds received as CCTB and NCBS during the Period before being requested to return it for the benefit of those for whom the funds were intended, namely the children and their mother C. What emerges from the evidence is a tale of a mother who repeatedly opened her home, heart and wallet to her daughter and grandchildren. It is then almost intolerable for me to find for the Respondent in this matter as the funds were used for their intended purposes as should have been the case had the funds been directed to the daughter in the first place. However, based on the analyses of the law and facts I must find the Appellant was not the eligible individual entitled to receive such benefits during the Period as unfortunate, thankless and even insulting as this must seem to the Appellant in the circumstances. It is unfortunate the system allows funds to be paid out to a new eligible individual and a former eligible individual is asked to pay them back in circumstances where the funds are actually used for their intended purposes, but that is a matter for Parliament to address, not this Court.

[22] The Appeal is dismissed.

Signed at Toronto, Ontario this 19th day of March 2014.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2014 TCC 88
COURT FILE NO.:	2012-1854(IT)I
STYLE OF CAUSE:	SARA PEIXOTO DAFONSECA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Thunder Bay, Ontario
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APPEARANCES:

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