

Docket: 2004-2996(IT)I

BETWEEN:

DONNA BARNES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on March 7, 2005, at Fredericton, New Brunswick

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant: Greg G. Byrne

Counsel for the Respondent: Christa MacKinnon

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### **JUDGMENT**

The appeals from the determination of the Canada Child Tax Benefit for the appellant's granddaughter, Teri, for the period from July 2002 to February 2004 for the 2001 and 2002 base years are allowed in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 25<sup>th</sup> day of April 2005.

« François Angers »

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Angers, J.

Citation: 2005TCC252  
Date: 20050425  
Docket: 2004-2996(IT)I

BETWEEN:

DONNA BARNES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Angers, J.**

[1] The Minister of National Revenue (“the Minister”) reviewed the appellant’s entitlement to the Canada Child Tax Benefit for the period from July 2002 to February 2004 inclusive (“the period at issue”). The Minister determined that the appellant was not the eligible individual during the period at issue and assessed an amount of \$1,711.28 for the recovery of the overpayment of benefits the appellant received during the period at issue, throughout the 2001 and 2002 base years. The appellant filed a valid Notice of Objection and the Minister confirmed the assessment on June 1, 2004. The appellant hereby appeals that determination.

[2] Teri Leigh Sharpe is the qualified dependant for the period at issue, which ends on her 18<sup>th</sup> birthday. She was therefore 16 years old at the beginning of the period. The appellant is Teri’s grandmother.

[3] Teri’s parents were separated in 1991 and both have had joint custody. Her father Earl has the day-to-day care and control of her and her mother has access rights. Until February of 2002, Teri resided with her father and stepmother in Charter’s Settlement near Fredericton, New Brunswick. At that time, a dispute arose between Teri, her father, and stepmother, which resulted in Teri’s moving in with her grandparents who live in Cambridge-Narrows, about an hour’s drive from Fredericton. The appellant made the arrangements for Teri to transfer to the Oromocto High School from the Fredericton High School. Her belongings were

sent over to the appellant's house and Teri was given her own room. The appellant attended to all of Teri's needs, and with the help of her husband and another person, provided her with transportation to and from school.

[4] The end of the 2002 school year is the beginning of the period at issue. The only issue to be decided is whether the appellant is the eligible individual in respect of Teri during the period in question. The definition of eligible individual is found in section 122.6 of the *Income Tax Act* (the "Act") and 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 the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing 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 (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 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;

[5] Section 6302 of Part LXIII of the Regulations made under the *Act* 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.

[6] In order to be an eligible individual, the two most determinative factors are whether that person resides with the qualified dependant and whether it is the person who primarily fulfills the responsibility for the care and upbringing of the qualified dependant at any given time. The factors set out in section 6302 of the Regulations are of assistance in determining what constitutes care and upbringing of a qualified dependant.

[7] The case that comes most commonly before this Court involves a determination as to which parent is the eligible individual. This particular case involves a maternal grandmother and the child’s stepmother. In addition, we have a 16-year-old qualified dependant whose level of dependency is somewhat limited. The evidence also reveals that there was a serious communication gap between the maternal grandparents and the father and stepmother throughout the period at issue, a problem that has persisted to this day.

[8] The battle over who is the eligible individual has widened the gap such that it makes it very difficult for this Court to rely on the evidence of the family members, including that of the father. Each witness tends to either exaggerate or colour their version of the facts to favour their role as the primary caregiver. As for Teri, she is unfortunately caught in the middle of all of this and has no real advantage as to the outcome of the appeal.

[9] Teri moved in with her grandmother in February 2002. At the end of the 2002 school year, in mid June, Teri got a job picking strawberries in Jemseg, New Brunswick. She did that for three to four weeks and during that time continued to reside at her grandmother's residence. Her grandfather would provide her with transportation to get to and from work. Teri spent the rest of her summer babysitting her half-sister at her mother's place and returned to live at her grandmother's house at the start of the school year. She continued her schooling at the Oromocto High School and her grandfather and other individuals drove her to and from school each day. Her grandmother provided her with all her needs.

[10] In November 2002, Teri got a part-time job in Fredericton. At first, she worked only on Wednesday nights and stayed over at her father's residence. On week-ends, she would visit with either her mother or father. Just before Christmas, Teri began working weekend shifts but not on a regular basis initially. She would stay at her father's residence when working and depending on where she stayed over, transportation was provided by her father, mother or grandfather. Her clothes were kept at her grandmother's house although she kept some at both her father's and her mother's residences. Her school material and computer were kept at her grandmother's house.

[11] This situation went on until June 2003. Teri got herself another job in Fredericton. At first, she worked two to three shifts per week and mostly on weekends. She stayed at her mother's place since she also babysat her half sister. In September 2003, she went back to school and returned to live with her grandparents.

[12] Teri found out in late September 2003 that she was expecting. She stayed in school and continued her part time job until the middle of December. She gave birth on January 5, 2004. During the Christmas break, she spent a week at her mother's place and the rest of the time at her father's place. She also spent more time with her father and stepmother before giving birth because her grandparents were ill with the flu. After giving birth, Teri went back to her grandparents.

[13] Teri considered her residence to be that of her grandparents during the period at issue and I accept that as a fact. Although she may have spent time with her mother and father, I find that, for all intents and purposes, Teri has resided with the appellant during the entire period. The fact that Teri had to sleep over at different places to allow her to have jobs or that she stayed temporarily at her father's place so that she could work part time is not sufficient to eliminate the fact that the appellant's home was her permanent place of residence.

[14] As mentioned earlier, all testimony has been somewhat tainted or coloured to favour the appellant or the stepmother. Teri has the least to gain in all of this and I accept her testimony to be the most truthful. I have carefully examined Exhibit A-3, which is a letter that Teri signed and forwarded to Revenue Canada to help clarify the issue as to who was to receive the Canada Child Tax Benefit. I find the content of that letter far too precise and detailed to be the work of Teri alone nor do I think that her father wrote it. I believe that her stepmother had a lot more to do with it than she admitted at the hearing since she had a lot to gain from it.

[15] I believe that the appellant and Teri's father and stepmother have all contributed equally in providing Teri with the medical care she needed and in providing her with transportation. At her age, she was quite capable of doing many things on her own, thereby having fewer needs than those in the factors this Court must consider. All those involved seem to share the transportation costs and the medical expenses such that factors (c) and (d) are equally shared by the appellant and the stepmother.

[16] As for the period of time when Teri had to attend prenatal classes and deal with the issue whether to put her child up for adoption, the assistance provided by her stepmother is a valuable consideration in weighing the evidence under factor (g). I must look at the overall picture and not just a short period of time as the factor refers to the provision, generally, of guidance and companionship. One factor stood out during the testimony of the stepmother is when she said that the entire hearing was about money. In fact, one could detect from her evidence that money was a serious concern for her. The money received from the Canada Child Tax Benefits was deposited in a bank account for Teri's education. Teri is enrolled at St. Thomas University and has not yet received that money.

[17] I find that factors (a) and (b) in particular, as well as (d), (e) and (g) favour the appellant. When Teri moved out in February 2002 to reside with the appellant, it was a permanent move. The appellant became her lifeline and provided Teri with a place that she could call home under any circumstances. This gave Teri a secured

environment in which she could reside and receive what could still be provided in care at her age. The appellant provided that care without financial assistance from either Teri's mother or father. Although everyone cared for Teri and provided assistance, I find that the appellant was the primary caregiver throughout the period at issue.

[18] The appeal is allowed and the determination is sent to the Minister for redetermination on the basis that the appellant is entitled to the Canada Child Tax Benefit for the period at issue.

Signed at Edmundston, New Brunswick, this 25<sup>th</sup> day of April 2005.

« François Angers »

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Angers, J.

CITATION: 2005CCI252  
COURT FILE NO.: 2004-2996(IT)I  
STYLE OF CAUSE: Donna Barnes and Her Majesty The Queen  
PLACE OF HEARING: Fredericton, New Brunswick  
DATE OF HEARING: March 7, 2005  
REASONS FOR JUDGMENT BY: The Honourable Justice François Angers  
DATE OF JUDGMENT: April 25, 2005

APPEARANCES:

Agent for the Appellant: Greg G. Byrne  
Christa MacKinnon  
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COUNSEL OF RECORD:

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