

Citation: 2008TCC222
Date: 20080808
Docket: 2007-1559(IT)I

BETWEEN:

GINA CONSTANTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

(Delivered orally at the hearing on February 26, 2008,
at Montréal, Quebec, and amended for greater clarity and precision.)

Archambault J.

[1] This is an appeal by Gina Constantin from the determination by the Minister of National Revenue (**Minister**) that she was not the "eligible individual"¹ for the purpose of the Canada Child Tax Benefit in the 2003 and 2004 base years. I gave my decision from the bench because, unfortunately for Ms. Constantin, at least one of the requirements was not met in this case: she had to be the person who primarily fulfilled the responsibility for the care and upbringing of the children. I believe, as Lamarre Proulx J. said in *Roy v. R.*, 2004 CarswellNat 4908, 2005 TCC 27, [2005] 5 C.T.C. 2194, at paragraph 15, that "[t]he fact that a child lives with one of his or her parents five out of seven days is usually an indicator that, with respect to daily activities, it is that parent who is most responsible for the child's care." Obviously, that is all the more true when the child spends 12 days out of 14 with that parent, as is the case here. There was ample evidence that the father

¹ The definition set out in section 122.6 of the *Income Tax Act* (**Act**) is as follows:
"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,
...

(Mr. Beauvais) and mother both looked after their children during the relevant period. The actual issue is whether Ms. Constantin "primarily" fulfilled that responsibility.

[2] I have no doubt that Ms. Constantin looked after her children, to all appearances considerably more than the average parent who does not live continuously with his or her children. She was in contact with them every day, and this was acknowledged by the father. He confirmed that she called once a day, if not twice. However, the Court cannot find that a father and mother who were not living together both primarily fulfilled the responsibility for the care and upbringing of the children. We must therefore determine which of the two met that requirement. Having regard to the fact that during the relevant period the children spent much more time with their father, it is inevitably easier for the Court to find that it was the father who primarily fulfilled the responsibility for the care and upbringing of the children, under the factors set out in section 6302 of the *Income Tax Regulations (Regulations)*.² Because Ms. Constantin was not present, she could not supervise the daily activities and needs of the children to the extent that Mr. Beauvais could.

[3] Ms. Constantin conceded that the factor set out in paragraph (b) could not apply to her and favoured Mr. Beauvais. It was Mr. Beauvais who maintained a secure environment where the children resided. The evidence is that Ms. Constantin looked after getting them medical care, for example when she went to the doctor when a child had bronchitis. There is no doubt that she played a major role in respect of that factor, but so did Mr. Beauvais. He said that he was there to look after the

² The factors set out in section 6302 are as follows:

6302. Factors – 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.

children's needs when they were sick. There were a lot of educational activities arranged at the school and, as Ms. Constantin acknowledged, the evidence is that the father enrolled the children in those activities, went to parents' meetings and was in a position to attend to the children's daily needs.

[4] The factor set out in paragraph 6302(f) refers to the parent who attends to the hygienic needs of the children on a regular basis, and even though Ms. Constantin did attend to those needs, the children were more often at their father's home than at their mother's, and we can imagine that this activity was more often carried on at the father's home than at the mother's.

[5] The final factor set out in section 6302, providing guidance and companionship generally to the children, also favours Mr. Beauvais. As he said, when the children had difficulties or quarrelled among themselves or had problems with their friends, he was inevitably the one who was able to provide them with companionship and guidance. The Court has a duty to decide this question, and I find that the evidence as a whole favours Mr. Beauvais more than Ms. Constantin.

[6] With regard to the other requirement, that the "eligible individual" had to reside with the dependant,³ I am not able to determine whether the children resided with Ms. Constantin without being able to think about the question more. However, both of the requirements set out in the definition of "eligible individual" must be met; if either of them is not met, the appeal cannot be allowed.

[7] I am very sensitive to the unfairness argument made by Ms. Constantin, making the point that the support paid should be varied to take into account the fact that the father is entitled to the child tax benefit. However, I am obliged to adopt the conclusion stated by Tardif J. in *Laurin v. Canada*, [2006] T.C.J. No. 192 (QL) at paragraph 26: "The Superior Court alone has jurisdiction to establish ... the financial balance between parties"

[8] I would also note, and this is not necessarily an easy thing, that the Act imposes an obligation on the recipient of the child tax benefit to inform the Department where there is a change in the person's situation that could make him or her ineligible. I would hope that the Department provides recipients with enough information that they are able to meet their reporting obligation. However, I do not think it would be appropriate to bring an action in damages against the Department in this Court for failure to provide recipients with information, in order to obtain compensation. In this case, Ms. Constantin acknowledged, at least tacitly if not

³ Paragraph (a) of the definition of "eligible individual", reproduced in note 1 *supra*.

expressly, that the father was the eligible individual. If the Minister had committed any fault in handling the case, the appropriate recourse would be to apply to the Federal Court or another court of competent jurisdiction. The role of the Tax Court of Canada is limited to deciding whether the determination that is the subject of the dispute complies with the provisions of the Act. In other words, the role of this Court is to ensure that the Minister makes his determination in accordance with the Act. The factors set out in the Act and the Regulations do not take into account whether the tax benefits were used to pay support or the amount of the support is reasonable in the circumstances. It is up to the Superior Court to consider those factors.

[9] I have no choice, unfortunately for Ms. Constantin, but to find that the Minister complied with the provisions of the Act. Ms. Constantin has said nothing that could raise any doubt as to the correctness of the Minister's determination. She was not the "eligible individual" for the purposes of section 122.6 of the Act. The Court could not have found otherwise, even if she had established that the Minister had not provided her with sufficient and timely information to enable her to have her support payments adjusted.

[10] I agree with Ms. Constantin that there should be a mechanism that would enable people in situations like hers to remedy the situation, but that might call for an amendment to the legislation or a change in the case law. I am not sufficiently familiar with family law to understand why the Superior Court cannot restore some degree of equilibrium retrospectively. If there is a rule that prevents it from doing so, the proper authorities would have to be asked to amend the legislation.

[11] For these reasons, Ms. Constantin's appeal is dismissed.

Signed at Ottawa, Canada, this 8th day of August 2008.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 11th day of November 2008.

Brian McCordick, Translator

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COURT FILE NO.: 2007-1559(IT)I

STYLE OF CAUSE: GINA CONSTANTIN v.
HER MAJESTY THE QUEEN

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