

Docket: 2008-1680(IT)I

BETWEEN:

LINDA DELAGE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 16, 2009, at Montréal, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Patricia Claude
Counsel for the Respondent: Sylvain Ouimet

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* (the Act) for the 2004 and 2005 taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of March 2009.

"Paul Bédard"

Bédard J.

Translation certified true
On this 6th day of April 2009
Monica Chamberlain, Reviser

Citation: 2009 TCC 119
Date: 20090305
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LINDA DELAGE,

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REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal from a notice of Canada Child Tax Benefit (CTTB) redetermination for the 2004 and 2005 base taxation years.

[2] The issue to be decided is whether the Minister of National Revenue (the Minister) correctly determined that the Appellant was not the parent who primarily fulfilled the responsibility for the care and upbringing of her child Cynthia from May 2006 to July 2006 inclusive (the relevant period) for the purposes of the 2004 and 2005 base years.

[3] In making and confirming the CTTB redetermination notice made on August 20, 2007, for the 2004 and 2005 base years, the Minister relied on the following assumptions of fact:

- (a) The Appellant and Mr. Jeannot Dionne are the parents of, *inter alia*, a girl named Cynthia, born on June 19, 1996. **[admitted]**
- (b) Based on the information obtained by the Minister, the couple separated in 1999, but the divorce occurred in 2002. **[admitted]**

- (c) Prior to the period in issue, the Appellant was always considered the parent who primarily fulfilled the responsibility for the care and upbringing of her child Cynthia. **[admitted]**
- (d) On May 30, 2007, Jeannot Dionne's common-law spouse filed a CCTB application on which she stated that she began caring for Cynthia on April 21, 2006. **[neither admitted nor denied]**
- (e) Before making any adjustments, the Minister had the Appellant confirm that Cynthia had ceased to live with her in April 2006. **[neither admitted nor denied]**
- (f) At the objection stage, the Appellant reasserted that the child Cynthia had ceased to live with her in April 2006. **[neither admitted nor denied]**

[4] The evidence has established as follows:

- (i) Starting in 2003, the Appellant and Jeannot Dionne had joint custody of their daughter Cynthia.
- (ii) Cynthia lived with the Appellant from May 1 to May 5, 2006.
- (iii) From May 5 through July 31, Cynthia lived with Mr. Dionne.
- (iv) In a motion brought on May 11, 2006 (Exhibit A-1), Mr. Dionne asked that the Quebec Superior Court do the following, *inter alia*:
 - (1) grant him exclusive custody of the child Cynthia;
 - (2) declare and recognize that he had custody of Cynthia as of May 5, 2006;
 - (3) declare that the Appellant's access rights would be in accordance with Cynthia's wishes; and
 - (4) order the Appellant to refrain from bothering Cynthia at school, notably by making a scene in front of her friends.

- (v) In a motion (Exhibit A-2) brought on June 6, 2006, the Appellant asked the Superior Court of Quebec to, *inter alia*,
- (1) grant her custody of her daughters Évelyn and Cynthia,
 - (2) grant Mr. Dionne access to his minor children (Évelyn and Cynthia) in accordance with the recommendations of the expert who would carry out the psychosocial assessment, and
 - (3) order Mr. Dionne to pay her, for the exclusive benefit of the minor children Évelyn and Cynthia, child support based on the *Regulation respecting the determination of child support payments*, and payable in accordance with the terms of the *Act to facilitate the payment of support*.
- (vi) On July 12, 2006, Justice Hubert Walters of the Quebec Superior Court rendered the following judgment (Exhibit A-3):

[TRANSLATION]

Until the psychosocial assessment report is filed and the motions are heard:

[47] **GRANTS** custody of the minor children Évelyn and Cynthia to the respondent;

[48] Unless the parties agree otherwise, **GRANTS** the following access rights to the applicant:

- On Saturday July 15 and Saturday July 22, at Maison de la famille de Limoilou from 10 a.m. to noon and from 2 p.m. to 4 p.m.;
- On Saturday July 29 or Sunday July 30, at Maison de la famille de Limoilou, from 10 a.m. to noon and from 2 p.m. to 4 p.m., upon six (6) days' notice of the day chosen to the respondent; and
- On the applicant's choice of either Saturday, August 12 or Sunday, August 13, at Maison de la famille de Limoilou, from 10 a.m. to noon and from 2 p.m. to 4 p.m.

...

- [50] As of the date on which classes resume, **ORDERS** the respondent not to go to the school attended by the children (except for meetings with teachers) in order to meet them or pass messages to them through classmates;
- [51] **ORDERS** the respondent to give the children the correspondence addressed to them by the applicant or by other members of her family;
- [52] **SUSPENDS** the support payable by the respondent for the benefit of the minor children Évelyn and Cynthia until the hearing of the motion.

The Appellant's testimony

[5] The Appellant's testimony can be summarized as follows. From 2003 to May 4, 2006, she and Mr. Dionne had joint custody of Cynthia (alternating weeks). Starting on May 5, 2006, Mr. Dionne held Cynthia hostage, preventing the Appellant from having custody of Cynthia and thereby breaching their agreement, which had been in force since 2003. The Appellant explained that she did not contact the police to take measures to recover her daughter Cynthia because she feared that such action would only trouble Cynthia more. I should immediately note that the Appellant's testimony was otherwise silent with respect to the facts that might have shown that she became primarily responsible for Cynthia's care and upbringing as of May 5, 2006.

Mr. Dionne's testimony

[6] Mr. Dionne's testimony can be summarized as follows. On May 4, 2006, Cynthia told him that she wanted to live with him full-time. He explained that Cynthia did not want to return to her mother's residence, and preferred to live full-time with her sister Évelyn and the children of Mr. Dionne's new partner. In addition, Mr. Dionne explained that he and his partner were the people primarily responsible for Cynthia's care and upbringing during the relevant period.

The law

[7] The definition of "eligible individual" in section 122.6 of the *Income Tax Act* was worded as follows at the relevant time:

"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 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,
 - (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.

[8] For the purposes of paragraphs (g) and (h) of the definition of "eligible individual" in section 122.6 of the Act, sections 6301 and 6302 of Part LXIII of the *Income Tax Regulations* provide as follows:

NON-APPLICATION OF PRESUMPTION

6301. (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.

FACTORS

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.

[9] Paragraph (a) of the definition of "eligible individual" in section 122.6 of the Act requires, among other things, that the eligible individual reside with the qualified dependant. Thus, the residence criterion is an essential element in order to obtain the credit.

[10] The phrase "resides with", as used in the definition of the term "eligible individual" in section 122.6 of the Act, essentially means "lives in the same house" habitually. Consequently, the first issue that I must decide is as follows: Did Cynthia habitually live in the same house as the Appellant in May 2006, June 2006 and July 2006?

[11] I should also note that the fact of having custody of a child under an agreement or judgment does not automatically entitle one to the CCTB. That is simply not a determinant factor. Under no circumstances is such an agreement or judgment binding on the Minister, nor does it confer tax rights on a parent with whom the child is not residing and who does not have custody of the child.

[12] Moreover, in order for the parent of the qualified dependant to be entitled to the CCTB, paragraph (b) of the definition of "eligible individual" in section 122.6 of the Act requires the parent show that he or she is the parent who "primarily fulfils the responsibility for the care and upbringing of the qualified dependant", having regard to the factors set out in section 6302 of the Regulations.

[13] It must also be understood that, under the formula for determining the amount of benefits payable, which is set out in section 122.6 of the Act, the minimum benefit period is one month, and that a month of benefits is to be paid to whomever was the eligible individual at the beginning of the month – that is to say, to the person who was residing with the qualified dependant at the beginning of the month, and who, on that date, was primarily fulfilling the responsibility for the care and upbringing of the qualified dependant.

Analysis and conclusion

[14] In the instant case, the evidence has very clearly disclosed that Cynthia resided with the Appellant from May 1 to May 5, 2006, and that, during that period, the Appellant was primarily responsible for her daughter Cynthia's care and upbringing. Consequently, it is my opinion that the Appellant was entitled to the benefit for May. Indeed, as I have said, it should be understood that, under the formula for determining the amount of benefits payable, which is set out in section 122.6 of the Act, the minimum benefit period is one month, and that a month of benefits is to be paid to whomever was the eligible individual at the beginning of the month — that is to say, to the person who was residing with the qualified dependant at the beginning of the month, and who, on that date, was primarily fulfilling the responsibility for the care and upbringing of the qualified dependant.

[15] With respect to the months of June and July, I am of the opinion that the Appellant was not the eligible individual because the evidence disclosed that the Appellant did not reside with Cynthia during this period, and because the Appellant also did not show, nor did she even attempt to show, that she was, during this period, the person who was primarily responsible for Cynthia's care and upbringing. I should emphasize that the father's non-compliance (during those two months) with the agreement (then in force) concerning the joint custody of Cynthia is not relevant for the purpose of determining whether the Appellant resided with her daughter during those two months. Once again, the fact of having custody of a child under an agreement does not automatically entitle one to the CCTB. In addition, if the Appellant had satisfied me that the father had held Cynthia against her will for those two months, my finding with respect to the residence criterion would probably have been different. With respect to this issue, I have accepted the father's account, which is that, on May 4, 2006, Cynthia told him that she wished to live with him full-time, notably because she no longer wanted to live separate from her sister Évelyn.

[16] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 5th day of March 2009.

"Paul Bédard"

Bédard J.

Translation certified true
On this 6th day of April 2009
Monica Chamberlain, Reviser

CITATION: 2009 TCC 119
COURT FILE NO.: 2008-1680(IT)I
STYLE OF CAUSE: LINDA DELAGE AND HER MAJESTY
THE QUEEN
PLACE OF HEARING: Montréal, Quebec
DATE OF HEARING: January 16, 2009
REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard
DATE OF JUDGMENT: March 5, 2009

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