

Citation: 2010TCC308  
Date: 20100610  
Docket: 2009-2608(IT)I

BETWEEN:

AHMED ATTIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **AMENDED REASONS FOR JUDGMENT**

**These Reasons are issued in substitution for the Reasons dated June 4, 2010.**

Sheridan, J.

[1] The Appellant, Ahmed Attia, is challenging the redetermination of his entitlement to the GST Credit (“GSTC”) for the 2006 taxation year and the Canada Child Tax Benefit (“CCTB”) for the 2006 “base taxation year”. Expressed in calendar years, the period under review is July 2007 to June 2008 (the “Period”).

[2] The hearing of this Informal Procedure appeal began on February 3, 2010; it was adjourned at the direction of the Court to March 12, 2010 to permit counsel for the Respondent to obtain additional information from his client regarding the Minister’s redeterminations<sup>1</sup>. In the interim, the Appellant was awarded sole custody of the two children in respect of whom the CCTB was claimed. The Judgment of Ricchetti, J. of the Ontario Superior Court of Justice was issued March 2, 2010<sup>2</sup> (“Custody Judgment”).

[3] Turning first to the GST Credit, the Appellant presented no evidence to refute the Minister’s assumption in paragraph 9(s) of the Reply to the Notice of Appeal that

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<sup>1</sup> Exhibits R-1, 2, 3, and 4.

<sup>2</sup> Exhibit A-2 at paragraph 253.

his family income in 2006 was too high for him to be eligible for the GST Credit. Accordingly, that aspect of this appeal cannot succeed.

[4] In respect of the CCTB, what makes this case a little out of the ordinary is that the Appellant's children were abducted by the Appellant's spouse during a family holiday to Egypt in August 2006<sup>3</sup>. As well as attempting to locate the children and to work with the relevant authorities in Egypt to have the children returned to Canada, in March 2007, the Appellant commenced custody proceedings in Ontario. Motions and countermotions ensued. In December 2007, his spouse finally complied with a Court order requiring her to return to Canada with the children. However, the Court also granted her custody of children; the Appellant's access was limited to some evenings and weekends. Further details of the steps taken by the Appellant to obtain custody of his children are set out in paragraphs 9(a) to (p) of the assumptions in the Reply to the Notice of Appeal:

- a) the Appellant and Gihan Garanna ("Gihan") were married in 2000 and have been living separate and apart since August 2006 because of a breakdown of their marriage;
- b) the Appellant and Gihan are the parents of D.A., born 2001 and Y.A., born 2004 ("the children");
- c) at all material times before the date of separation the Appellant, Gihan, and the children were living together in the matrimonial home at 6054 Tillsdown Drive, Mississauga, Ontario;
- d) during August 2006 the Appellant and Gihan travelled with the children to Egypt;
- e) during September 2006 the Appellant returned to Canada without Gihan, who remained with the children in Egypt;
- f) pursuant to an Order dated June 8, 2007 of the Ontario Superior Court of Justice [Court File No. FS-07-0867-00] ("the Order") the Appellant was given custody of the children, who remained with Gihan in Egypt;
- g) pursuant to the Order Gihan was required to deliver the children forthwith into the care of the Appellant;
- h) Gihan did not return to Canada, and, did not deliver the children into the care of the Appellant as ordered;

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<sup>3</sup> See also *Callwood v. R.* [2004] 2 C.T.C. 2801 (T.C.C., Informal Procedure); *Bouchard v. R.* [2009] 4 C.T.C. 2006. (T.C.C., Informal Procedure)

- i) Gihan by her solicitor moved before the Ontario Superior Court of Justice in Court File No. FS-07-0867-00 to set aside the Order;
- j) The Ontario Superior Court of Justice adjourned the motion referred to in subparagraph 9(i) above and:
  - ordered Gihan to return to Canada with the children within 30 days;
  - gave the Appellant access to the children, upon their return , for 6 hours each Sunday and 3 hours each Wednesday evening; and,
  - stayed the Order pending a continuance of the motion brought by Gihan.

The Court endorsed the record accordingly on November 15, 2007;

- k) Gihan by her solicitor moved separately before the Ontario Superior Court of Justice in Court File No. FS-07-0867-00 for an order of exclusive possession of the matrimonial home referred to in subparagraph 9(c) above;
- l) neither Gihan nor the children had returned to Canada on or prior to the hearing on December 7, 2007 of the motion referred to in subparagraph 9(k) above;
- m) the motion referred to in subparagraph 9(k) above was dismissed without prejudice to Gihan upon the return of the motion referred to in subparagraph 9(i) above. The Court endorsed the record accordingly on December 7, 2007;
- n) the motion referred to in subparagraph 9(i) above came back on for hearing on April 29, 2008 before the Ontario Superior Court of Justice;
- o) at that time Gihan and the children had returned to Canada;
- p) the Ontario Superior Court of Justice heard the motion and:
  - (i) gave the Appellant care of the children as follows:
    - from May 2, 2008 to May 4, 2008
    - from May 16, 2008 to May 18, 2008
    - from Friday at 5 pm to Sunday at 7 pm for 3 consecutive weekends of every 4 weekends, commencing May 30, 2008, pending further order
    - 2 non-consecutive weeks, each from Friday at 5 pm to Sunday at 7 pm during July 2008 to August 2008 subject to weekends scheduled for Gihan

- each Wednesday between 5 pm and 8 pm

(ii) made no order as to custody

(iii) gave Gihan the right to make educational and medical decisions with respect to the children, subject to an obligation to fully inform the Appellant in writing. The Court endorsed the record accordingly on April 30, 2008;

[5] The relationship between the Appellant and his spouse was an acrimonious one. Paragraph 243 of the Custody Judgment gives an indication of the extent to which their matrimonial problems diminished the concern of either parent for the children's well being:

[243] The most significant [custody] issue is whether either or both of the parties are able to make decisions on his\her own behalf in the best interests of the Children. In this case, it was only in the context of "attacking" the other party or seeking to obtain an advantage in this proceeding, did the parents make decisions not in the best interests of the Children. On this consideration there is little to choose one parent over the other. In other words, both parents appear to be able to make the right decisions for the Children but only if the other parent is not in the picture at all.

[6] The Custody Judgment also dealt with a claim by the Appellant's spouse to be reimbursed for Canada Child Tax Benefits she had received after the abduction in 2006 and which she subsequently had to repay to the Canada Revenue Agency. As part of his challenge to the Minister's redetermination of his entitlement to the CCTB during the Period, the Appellant referred to the following paragraphs in the Custody Judgment in which the Ontario Superior Court ordered the relief sought by his spouse:

[300] While the children were with the Mother in Egypt, the Father continued to receive Child Tax Benefits and Universal Child Care Benefits. As the Children were not in Canada, it is CRA's position that neither party was entitled to these benefits. As a result, CRA had deducted the amount of the benefits the Father received from the Mother's benefits she was entitled to receive since her return in December 2007. The amount had now been fully repaid by the Mother. Whether the Father was entitled to these monies are between him and CRA. On the other hand, clearly the Mother was deprived of the Child Tax Credit while she has had the Children.

[301] The total amount at issue for the Mother was \$5,145.83 for Canada Child Tax Benefit and \$2,200 for Universal Child Care Benefit. There was really no issue as to the quantum or that it has been recovered from the Mother by CRA.

[302] I am satisfied that the Mother has established that the Father should repay to the Mother the full amount of \$7,345.83. It is not one half since the Mother was fully entitled to these benefits since December 2007 and would have received the entire amount but for the Father's claim during 2006 and 2007.

[Emphasis added.]

[7] Notwithstanding its acknowledgement in paragraph 300 that the Appellant's entitlement to the CCTB was not for the Ontario Superior Court of Justice to determine, the Court then went on to decide that the Appellant's spouse had been "deprived" of the CCTB while she had the children. The Appellant was not happy with this outcome: he explained, with some understandable frustration, that if he is unsuccessful in these appeals, he will have to repay to the Canada Revenue Agency the CCTB he received during the Period (July 2007 to June 2008) even though under the Custody Judgment, he has already paid that amount, plus amounts for months not covered by the Minister's redeterminations, to his wife.

[8] While I can understand why he might feel this is unfair, it must be remembered that Ricchetti, J. was dealing with the spouse's claim for an amount in respect of the Canada Child Tax Benefit in the context of the "Equalization of Net Family Property"<sup>4</sup> under the Ontario *Family Law Act*. The payment ordered in respect of what that Court found to be the spouse's entitlement to an amount equivalent to the CCTB is not relevant to the determination of the correctness of the Minister's redetermination of the Appellant's entitlement to the CCTB during the period July 2007 to June 2008. That depends entirely on his being able to satisfy the legislation criteria in section 122.6 of the *Income Tax 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 the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of the qualified dependant,

...

(h) prescribed factors shall be considered in determining what constitutes care and upbringing;

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<sup>4</sup> Exhibit A-1, page 103.

[9] The “prescribed factors” referred to in paragraph (h) are listed in section 6302 of the *Income Tax Regulations*:

**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.

[10] The assumptions upon which the Minister based his decision that the Appellant was not eligible to receive the CCTB are set out at paragraphs 9(q) and (r) of the Reply:

- q) at all material times between August 2006 and June 2008 the children lived with Gihan in their settled and regular way of life;
- r) at all relevant and material times between August 2006 and June 2008: -
  - i) the Appellant did not accompany the children to or from medical appointments, did not arrange their medical appointments or transportation to or from medical appointments;

- ii) the Appellant did not assist the children in preparing for school, did not accompany the children to or from school or arrange their transportation to or from school, did not attend parent-teacher meetings, and did not otherwise arrange or participate in the academic needs of the children;
- iii) the Appellant did not prepare meals for the children;
- iv) the Appellant did not make arrangements for the children to participate in recreational or athletic activities or arrange their transportation to or from recreational or athletic activities;
- v) the appellant did not babysit the children or make arrangement for babysitting services for the children, when required;
- vi) the Appellant did not generally provide guidance and companionship to the children;
- vii) the Appellant did not supervise the daily activities or daily needs of the children;
- viii) the Appellant did not exercise discipline or control over the children;
- ix) the Appellant did not attend to the needs of the children during either periods of illness or other periods requiring intervention in respect of the children;
- x) the Appellant did not attend regularly to the washing or dressing of the children;

[11] The Appellant did not dispute that the children were not living with him during the period but explained that was because of his spouse's abduction of them. For the same reason, he was wrongly prevented from being the parent who primarily fulfilled the responsibility for the care and upbringing of the children. His evidence was that throughout the time the children were with their mother, he continued to maintain the household in the expectation of their return. He paid for Sunday school for at least one of the children, even though as a result of the abduction, she never attended. Similarly, he maintained medical insurance for the children through his work.

[12] The first question is whether during the Period (July 2007 to June 2008), the children resided with the Appellant. I am satisfied that from July 2007 to the date of their court-ordered return to Canada in November 2007, the children's residence continued to be the family home occupied by the Appellant. They left that home for the purpose of a family vacation; it follows that it was intended they would return. They were prevented from doing so only by their mother's wrongful detention of the

children in Egypt. During their absence, the Appellant maintained the family home in which their belongings and furnishings remained. In these circumstances, I am prepared to find that the children “resided” with the Appellant from July to November 2007. However, when the Appellant’s spouse returned to Canada in December 2007, she was awarded custody of the children. They lived with her; the Appellant had only limited access on some evenings and weekends. Thus, even if the period of abduction is disregarded, for the majority of the Period, from December 2007 to June 2008, the children did not reside with the Appellant.

[13] By the same token, the evidence is not there to support the finding that the Appellant primarily fulfilled the responsibility of the children’s care and upbringing after they were returned to Canada. The Appellant’s evidence of paying for Sunday school and medical insurance (giving him the benefit of the doubt that this occurred, at least in part, during the Period) falls far short of rebutting the assumptions set out in paragraphs 9(r) and (s). The point of the CCTB criteria is to ensure that the money follows the children – its purpose is to put funds in the hands of the parent tasked with seeing to their needs. The Appellant has not persuaded me that he was that parent.

[14] For all of these reasons, the appeal must be dismissed.

Signed at Ottawa, Canada, this 10<sup>th</sup> day of June, 2010.

“G.A. Sheridan”

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Sheridan J.



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COURT FILE NO.: 2009-2608(IT)I  
STYLE OF CAUSE: AHMED ATTIA AND  
HER MAJESTY THE QUEEN  
PLACE OF HEARING: Toronto, Ontario  
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