Docket: 2010-945(IT)I

BETWEEN:

PATRICIA BARCELOUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 8, 2011, at Sherbrooke, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the appellant:	Christian Labonté
Counsel for the respondent:	Emmanuel Jilwan

JUDGMENT

The appeal from the redetermination made on November 20, 2009, with respect to the appellant's Canada Child Tax Benefit for the period from July to November 2009, by which the Minister of National Revenue determined that the overpayments received for the 2008 base year totalled $4,317.56, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of June 2011.

"Paul Bédard"

Bédard J.

Translation certified true
on this 17th day of August 2011
Susan Deichert, Reviser

Citation: 2011 TCC 324
Date: 20110627
Docket: 2010-945(IT)I

BETWEEN:

PATRICIA BARCELOUX,

Appellant,

and

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REASONS FOR JUDGMENT

Bédard J.

[1] In a notice of redetermination dated November 20, 2009, with respect to the appellant's Canada Child Tax Benefit (CCTB) for the period from July to November 2009, the Minister of National Revenue (Minister) determined that overpayments in the amount of $4,317.56 were made for the 2008 base year.

[2] On or about December 21, 2009, the appellant served on the Minister a notice of objection to the redetermination.

[3] On March 19, 2010, the Minister confirmed the redetermination.

[4] In making and confirming the redetermination, the Minister relied on the same facts, namely, the facts set out in paragraph 5 of the Reply to the Notice of Appeal:

> [TRANSLATION]
>
> (a) The appellant is, *inter alia*, the mother of four children ("children"), who were born in 1997, 1998, 2003 and 2004.

(b) The appellant and her former spouse, S.B., have been living separate and apart since June 17, 2009.

(c) In a letter dated November 11, 2009, S.B. notified the Minister that the children had been living with him since the date of the separation, but that, since October 1, 2009, he had been sharing custody of the children with the appellant.

(d) On November 20, 2009, the Minister determined that, since June 17, 2009, the appellant was no longer the person who primarily fulfilled the responsibility for the children's care and upbringing.

(e) On December 18, 2009, the Superior Court (Family Division) homologated the agreement between the appellant and her spouse, which stipulates that the parties have shared custody.

(f) The agreement also stipulates that the appellant's former spouse must pay support, solely for the benefit of the children, effective October 1, 2009.

Preliminary remarks

[5] Although a few years have elapsed since the separation, there is still acrimony between the appellant and Mr. Boisvert, the father of the four children, and that is why I did not accept everything they said in support of their position on their eligibility for the CCTB at face value.

The law

[6] The definition of "eligible individual" in section 122.6 of the *Income Tax Act* (Act) read as follows at the 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, 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 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;

[7] 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* (the Regulations) provide the following:

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.

[8] What concerns us here is the condition in paragraph (*a*) of the definition of "eligible individual", namely, that the qualified dependant must reside with the eligible individual; and the condition in paragraph (*b*) of the definition, namely, that the eligible individual must be 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.

Analysis and conclusion

[9] Paragraph (*a*) of the definition of "eligible individual" in section 122.6 of the Act requires that the "eligible individual" reside with the qualified dependant. Therefore, the residence criterion is an essential element in order to obtain the CCTB. In my opinion, the expression "resides with" in the definition of "eligible individual" in section 122.6 of the Act means "lives in the same house" habitually. Thus, the first question that I must answer is as follows: Did the appellant habitually live in the same house as the four children during the period in question? I note that the onus was on the appellant to show me, on a balance of probabilities, that this was the case during the periods in question. The appellant's evidence in this regard relied on her testimony, which was supported by the testimony of Suzanne Roy (a bus driver), André Blais (a bus driver), Denise Abraham (a neighbour of the appellant), Suzanne Ménard (a neighbour of the appellant) and Sonia Barceloux (the appellant's sister). The testimony of the appellant, and of the individuals who testified in support of her position, can be summarized as follows: during the periods in question, the four children habitually lived with the appellant in her apartment. In fact, the appellant explained that she and Mr. Boisvert had shared custody of the four children (custody on alternating weeks, with the exception of August 11 to August 31, 2009, when she was on vacation in Europe). This evidence adduced by the appellant was contradicted by the testimony of Stéphane Boisvert (the father of the four children), Mélissa Boisvert (the adult daughter of the appellant and Mr. Boisvert) and Lyne Moreau (the common-law partner of Mr. Boisvert's brother), who essentially testified as follows:

(i) Mr. Boisvert had sole custody of the children from June 17, 2009, to the end of September 2009. In this regard, it should be noted that Mr. Boisvert specified that the four children stayed with their mother for 12 days at the most during this period, all of which were on weekends.

(ii) Mr. Boisvert and the appellant had shared custody of their four children in October 2009. (Each had custody on alternating weeks.)

[10] The appellant, who bore the burden of proof, has satisfied me that she habitually lived with her four children in her apartment during the period in issue. In the case at bar, I had to choose between two conflicting versions of the facts. I have accepted the appellant's version of the facts rather than Mr. Boisvert's version, because the only independent witnesses, namely André Blais, Suzanne Roy, Denise Abraham and Suzanne Ménard, witnesses whom, I might add, I found very credible, supported the appellant's version of the facts and, to some extent, contradicted Mr. Boisvert's version. Another reason why I accepted the appellant's version of the facts instead of Mr. Boisvert's is that, in a child custody and support agreement (Exhibit A-6, paragraph 20) signed on January 13, 2011, and confirmed by the Superior Court of Quebec, Mr. Boisvert stated that custody during the period in issue was shared. The paragraph reads:

> [TRANSLATION]
>
> The parties acknowledge that custody of their four minor children for consecutive seven-day periods from July 12, 2009, to November 26, 2009, was shared.

[11] Mr. Boisvert testified that the appellant had to some extent forced him to recognize, in writing, a situation that did not reflect reality. He explained that the appellant had threatened not to sign the agreement which, among other things, gave the two parties shared custody of the four children (each party having custody on alternating weeks), and to apply for sole custody of the four children in court. In other words, Mr. Boisvert allegedly recognized, in writing, a situation that he knew not to be consistent with reality because he did not want to run the risk that the court might take shared custody of the four children away from him. His explanations in this regard were simply not persuasive. Accordingly, as to paragraph (*a*) of the definition of "eligible individual" in section 122.6 of the Act, I find that the four children habitually lived in their mother's residence during the period in issue.

[12] We now turn to the condition set out in paragraph (*b*) of the definition of "eligible individual": the parent of the qualified dependant must be the parent who primarily fulfils the responsibility for the care and upbringing of the dependant, and the factors set out in section 6302 of the Regulations must be taken into account in this regard. We will therefore consider the evidence in light of the factors in section 6302 of the Regulations.

The factors in paragraphs (*a*), (*b*) and (*g*) of section 6302 of the Regulations

[13] The evidence discloses that both parents supervised the daily activities of their children in substantially the same way, and saw to the children's daily needs when the children were in their custody. Both parents also showed that they maintained a secure environment; each had an appropriate residence. The fact that Mr. Boisvert's single-family home is larger and more luxurious should not, in my view, be taken into account.

Educational activities

[14] With respect to this factor, the appellant merely explained that she helped the four children with their homework. The appellant also tried to criticize Mr. Boisvert for failing to ensure that the four children did their homework. However, the evidence showed that Mr. Boisvert was the only one who paid the children's school and extracurricular expenses (enrolment fees and cafeteria expenses). It should be noted that only Mr. Boisvert adduced documentary evidence in support of his testimony in this regard (see Exhibits I-4 and I-5).

The children's health

[15] At most, the appellant's evidence in this regard discloses that she had the glasses of one of the children repaired, and purchased medication for the skin problems of one of her daughters. The appellant's focus was on asserting that Mr. Boisvert neglected the four children's hygienic needs when they were in his care. However, Mr. Boisvert is the only person who adduced documentary evidence (see Exhibit I-3) showing that medical care had been obtained for the four children. I should emphasize that the weight given to this factor in relation to the others must not be overstated, since the evidence shows that the four children needed very little medical care during the period in issue.

Recreational, athletic or similar activities

[16] There was little to the appellant's evidence in this regard. She apparently sometimes attended soccer games in which her four children participated. However, Mr. Boisvert explained that he not only attended all the soccer games in which his children participated, but also participated in them as a player. Mr. Boisvert added that he went on many outings with the children (including a trip to Old Orchard from August 23 to August 26, and a five-day trip to Montpellier, Quebec, during the third week of July). In fact, Mr. Boisvert submitted documentary evidence (Exhibits I-1 and I-2) in support of his testimony concerning his outings with his four children.

Conclusion

[17] It is clear that both parties before me — the appellant and Mr. Boisvert — did their best to give the most attention possible to the children whose custody they shared, and to look after the children's care and upbringing in a generally difficult situation. Each looked after the children in their own way based on their own values and on what they could afford financially. Each took part in the children's activities and played their role based on their own means.

[18] Where the evidence as a whole does not clearly tilt the balance in favour of either party, one would wish to allocate the CCTB equally between the parties. Unfortunately, unless the parties agree to share the CCTB on a quarterly basis — a solution that the Canada Revenue Agency accepts under the terms of its administrative practices — the benefit cannot be split: *Canada v. Marshall*, [1996] F.C.J. No. 431 (QL) (F.C.A.).

[19] Given the factors based on care, attention and participation that must be taken into consideration, and given the evidence submitted in the case at bar, I must conclude that the appellant has not met her obligation of showing, on a balance of probabilities, that she met the condition set out in paragraph (*b*) of the definition of "eligible individual" in section 122.6 of the Act, namely, that, during the period in issue, she was the person who primarily fulfilled the responsibility for the children's care and upbringing.

[20] The appellant should understand that in making such a decision, I am not finding that she was a bad person or that she did not fulfil her responsibilities for the children's care and upbringing during the period in issue.

Signed at Ottawa, Canada, this 27th day of June 2011.

"Paul Bédard"

Bédard J.

Translation certified true
on this 17th day of August 2011
Susan Deichert, Reviser

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APPEARANCES:

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Counsel for the respondent:	Emmanuel Jilwan

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