

Docket: 2009-3242(IT)I

BETWEEN:

LAWRENCE DOSTIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 1, 2010, at Montréal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

For the appellant: The appellant himself

Counsel for the respondent: Emmanuel Jilwan

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the determination made on April 20, 2009, under the *Income Tax Act* in respect of the 2007 base taxation year is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that the appellant's children started to reside with him on August 1, 2008.

Signed at Ottawa, Ontario, on this 3rd day of October 2011.

“Gaston Jorré”

Jorré J.

Translation certified true
on this 15th day of November 2011
Margarita Gorbounova, Translator

Citation: 2011 TCC 467
Date: 20111003
Docket: 2009-3242(IT)I

BETWEEN:

LAWRENCE DOSTIE,

Appellant,

and

HER MAJESTY THE QUEEN,

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REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] The issue in this appeal is a question of fact: whether the appellant's two sons started to reside with him on June 23, 2008, and July 1, 2008, respectively, as claimed by the appellant or on September 1, 2008, as claimed by the respondent.

[2] The answer to this question will impact the amounts of the Canada Child Tax Benefit (CCTB) and the National Child Benefit Supplement (NCBS), to which the appellant is entitled.

[3] This is a question of fact.

[4] The appellant; his two sons; the Canada Revenue Agency (CRA) Appeals Officer, Jean-Marc Jacob; and the children's mother, Mélanie Martine Beaudoin, testified.

[5] The only requirement at issue with respect to the CCTB is that found in paragraph (a) of the definition of "eligible individual" in section 122.6 of the *Income Tax Act* (ITA). That provision reads 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,

...

[6] Based on the formula in subsection 122.61(1) of the ITA, the “eligible individual” must reside with the dependant at the beginning of the month. Accordingly, regardless of what I find, the appellant cannot be the eligible individual for June. The discussion is therefore limited to the months of July and August 2008.

[7] On July 27, 2005, and August 2, 2005, the appellant and Ms. Beaudoin signed a consent to judgment, which was confirmed by the Superior Court. Under that consent, Ms. Beaudoin had custody of the two children. The agreement also contained provisions granting access rights to the appellant.

[8] The two sons are twins.

[9] During summer vacation, the children’s time was divided between the two parents.

[10] In 2008, the twins were 14 years old.¹

[11] At the beginning of June 2008, the children resided in Longueuil with their mother.

[12] On August 19, 2008, the parents signed a new consent to judgment giving custody of the children to the appellant starting on September 1, 2008.² That consent was also confirmed by the Superior Court and provided access rights to the mother.

[13] When the parties signed that agreement on August 19, 2008, they were both in a difficult situation: the appellant was receiving employment insurance, and the mother was receiving social assistance.³

¹ Exhibit I-1, second and third pages.

² Exhibit A-3, pages 25 to 29, numbered by hand in the bottom right-hand corner.

³ Exhibit A-3, page 25, numbered by hand.

Appellant's testimony

[14] In June 2008, the appellant lived at his sister's house in Laval.

[15] According to the appellant, on June 23, 2008, after the end of the school year, the children's mother came to his sister's house. She allegedly told the appellant that, if he wanted custody of the two children, she would agree to it.

[16] In cross-examination, when the appellant was asked if it was possible that the twins merely came to spend three weeks of vacation with their father, he answered categorically that the mother wanted him to have custody of the children.

[17] He had wanted custody of his sons for a long time and he said yes right away.

[18] At the same time, the mother apparently asked the appellant not to claim child benefits for a month, and the appellant agreed. The mother allegedly told him that she was having financial difficulties, and he agreed to help her out.

[19] After the first month, the mother apparently asked the appellant to let her receive child benefits for another month. The appellant did not agree.

[20] One of the sons stayed with him starting on June 23. The other son returned to his mother for about a week because he was taking part in a basketball tournament. He moved in with the appellant on July 1, 2008.

[21] The appellant started looking for an apartment and rented one out in Laval starting on August 1, 2008. In August 2008, he moved into his new apartment with his sons.

[22] According to the father, at different times, each of the children spent about a week with their mother during the period from the beginning of July to the end of August 2008.

[23] The appellant testified that he agreed that the consent would indicate September 1, 2008, as the change-of-custody date because he was afraid that the mother would change her mind.

[24] The two parties filed in evidence letters and other written documents from neighbours and relatives stating that the signatories had seen the children during the period in question at one or the other parent's residence.

[25] Since the appeal was heard under the informal procedure and the appellant represented himself, I allowed these letters to be filed by the appellant as well as the respondent.

[26] At the hearing, I indicated that, given that the people who had signed these documents did not testify and thus could not be cross-examined, the written statements could have only a very limited application.

[27] I am attributing very little weight to these written statements, which, contradict each other, in any case, since those obtained by the appellant state that their signatories saw the children with the appellant and those obtained by the mother state that their signatories saw the children with their mother.

[28] As for the statements signed by the sons,⁴ I will not take them into account. The two children testified, and it is that testimony on which I will rely.

[29] I will note also that Exhibit A-3 contains a letter from the Régie des rentes du Québec (RRQ), which was sent to the appellant on July 31, 2009, to inform him that, with respect to child support payments, the RRQ had concluded that the twins lived with the appellant from June 23, 2008, and from July 1, 2008, respectively. I am not bound by that decision, and I do not take into account.

The sons' testimony

[30] The testimony of the two sons was at times confused regarding the year during which they moved.

[31] The first one testified that they had asked their mother if they could go live with their father and that she had given her consent to let them move in with their father.

[32] The first son also testified that, when he left on June 23, he had taken enough clothes to spend about two weeks at his father's residence.

[33] The second son also testified that his mother had agreed to let his bother and him move. He testified that the move went rather quickly.

⁴ Exhibit A-3, pages 6 and 7, numbed by hand.

[34] They both stated that they first went to their aunt's house, where their father was living, and that, after that, they moved into their father's new apartment.

[35] The second son testified that they had moved into their father's apartment in the middle of the summer.⁵

[36] As to the move, the children's testimony was unclear. I believe this may stem from their confusion of the time they went to their aunt's house with the time they moved into their father's apartment. It is even possible that there was confusion with the time that some things were transported from Longueuil to their father's new apartment.

Testimony of Jean-Marc Jacob

[37] Mr. Jacob explained the reasoning used by the Minister of National Revenue (the Minister) in making his determination. The Minister relied, among other things, on the documents of the Longueuil school board, which indicate the children's date of departure as being September 2, 2008 (I note that these documents do not indicate the date when the school board was informed), as well as on a security certificate from Revenu Québec dated February 18, 2009, according to which the two children were registered under their mother's file in July and August 2008.

[38] He also explained that it is the CRA's policy not to take into account documents written by children and to attribute very limited value to neighbours' testimony.

The mother's testimony

[39] The mother testified that the children, the appellant and she wanted the change in custody. Everyone agreed that the change would be good for everyone.

[40] According to the mother, the children moved on August 29, 2008.

⁵ To question 109 of the transcript, the second son replied that they had moved into their aunt's house at the beginning of the summer; to question 110, he replied that it was around the beginning of the school year; and to question 122, he answered that they moved into the father's apartment before school had started. Considering his testimony overall, I conclude that he testified that they were at their aunt's house at first and then later, before school started, they were at the apartment their father was renting.

[41] Also according to her, it was planned that the children would spend half of their summer vacation with their father, but, in reality, they only spent three weeks with their father.

[42] Those three weeks were allegedly a vacation and not a move. Those weeks were when the father lived with his sister, before he got an apartment at the beginning of August 2008.⁶

[43] After that vacation period, the children returned to their mother before moving on August 29.

[44] The mother denied that there had been negotiations with the father about who was going to receive child benefits.

[45] The respondent filed a letter dated February 26, 2009,⁷ written by the dentist, stating that the address that appeared in his records for the twins was that of their mother in Longueuil.

[46] At question 195 of the transcript, the following question and answer appear:

[TRANSLATION]

Q. Ok. So in the summer of 2008, were there any medical appointments or things like that?

A. Of course, we went to the dentist. I took the children to the dentist. As for medical appointments, it was more that. I also sent the evidence to the pharmacy. So you also have it in your possession. I went to get all of the medications that the children could have for August twenty-fifth (25) so that he and the children could have extra because they take puffers for asthma. So I made sure that it was done before the children officially moved in with their father.

Assessment of the evidence

[47] Everyone agrees that the children wanted to move and that the father wanted custody. Everyone also agrees that, in the middle of 2008, the mother agreed to give custody to the father.

[48] There is no doubt that the children spent at least three weeks with the father.

⁶ Transcript, questions 176 -186.

⁷ Exhibit I-4.

[49] The consent to judgment dated August 19, 2008, is a written document signed by both parties. The scope of the consent is very broad.

[50] However, in family issues, especially where custody is concerned, facts often change faster than agreements between parties and court orders can follow; these facts can at times be very imprecise.

[51] The children were 14 years old. When children are 14, regardless of court orders, their wishes with respect to where they want to live have a big impact on parents' decisions.

[52] I accept a great deal – but not all – of the appellant's and the mother's evidence.

[53] The children's testimony was at times vague, but it is clear from the children's evidence that they had moved in the summer. Their testimony is not specific with respect to the exact time when the move took place.

[54] The first son stated very clearly that he had arrived at his father's house with enough clothes for two weeks. This corresponds more to a visit than to a change of residence.

[55] I accept that there had been a discussion between the parents around the end of June in order to agree on a change of residence for the children.

[56] I also accept that there was an unofficial move to the father's residence at the beginning of August. Furthermore, I believe that this is implicit in the mother's response to question 195: [TRANSLATION] "So I made sure that it was done before the children officially moved in with their father".

[57] However, I find that the children's arrival at the end of June and at the beginning of July was only a visit, which was normally supposed to take place during summer vacation in accordance with the 2005 consent to judgment. At the beginning of July, there had still not been a change in residence.

[58] At the beginning of August, the children started to reside with the father. The father was thus the eligible individual in August 2008, but not in July 2008.

Conclusion

[59] Accordingly, the appeal from the determination made by the Minister on April 20, 2009, is allowed, and the matter will be referred back to the Minister for reconsideration and redetermination on the basis that the appellant's children started to reside with the appellant on August 1, 2008.

[60] Without costs.

Signed at Ottawa, Ontario, on this 3rd day of October 2011.

“Gaston Jorré”

Jorré J.

Translation certified true
on this 15th day of November 2011
Margarita Gorbounova, Translator

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STYLE OF CAUSE: LAWRENCE DOSTIE v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: April 1, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré

DATE OF JUDGMENT: October 3, 2011

APPEARANCES:

For the appellant: The appellant himself

Counsel for the respondent: Emmanuel Jilwan

COUNSEL OF RECORD:

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Name:

Firm:

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