

Docket: 2011-2407(IT)I

BETWEEN:

C.P.B.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on March 7, 2012, at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Agents for the Appellant: Shaira Nanji
 Richard Li

Counsel for the Respondent: Laurent Bartleman
 Meaghan Hourigan

JUDGMENT

The appeals from the determinations of the Minister of National Revenue ("Minister"), with respect to the Canada Child Tax Benefit ("CCTB") for the 2007, 2008 and 2009 base taxation years are allowed, without costs, and the determinations are referred back to the Minister for reconsideration and redetermination on the basis that the appellant was the only eligible individual in respect of the CCTB for her son for the base taxation years at issue.

Signed at Ottawa, Canada, this 20th day of April 2012.

“Gerald J. Rip”

Rip C.J.

Citation: 2012 TCC 126
Date: 20120420
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C.P.B.,

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and

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Respondent.

REASONS FOR JUDGMENT

Rip C.J.

[1] The appellant, the children’s mother, says she was the sole primary caregiver of her two children, a daughter and son, and is therefore entitled to the Canada Child Tax Benefit (“CCTB”) for each of the 2007, 2008 and 2009 base taxation year. Her former husband, the children’s father, says that he shared custody of the children with the appellant and each parent was entitled to the CCTB.

[2] The Minister of National Revenue (“Minister”) agreed with the father and allowed the CCTB to both parents for both of the children for the following periods:

| | | |
|---------------|---|---------------------------------|
| The appellant | — | July 2008 to February 2009 |
| Father | — | March 2009 to August 2009 |
| The appellant | — | September 2009 to February 2010 |
| Father | — | March 2010 to August 2010 |
| The appellant | — | September 2010 to February 2011 |
| Father | — | March 2011 to June 2011 |

[3] The Minister determined that the appellant was not the “eligible individual”, described in section 122.6 of the *Income Tax Act* (“Act”), of the children for more than six months of each base taxation year in respect of the CCTB for each relevant base taxation year since the children resided equally throughout the relevant periods

with their mother and father, who were each equally their primary caregiver at the particular periods. The mother, the appellant, does not agree and appealed the determinations made by the Minister.

[4] The parents were separated on May 1, 2006 and entered into a separation agreement dated September 26, 2006 to equally share custody of the children; a temporary court order, dated September 26, 2007 confirmed the custodial terms of the agreement. A final order was made on October 19, 2009. The children lived with each parent on a week-on/week-off basis. There is no issue that the time each parent devoted to the children was equal.

[5] The appellant stated that the needs of the children are “unique, extensive and ongoing”. The respondent admits this. Both children were subject to professional behavioural treatment at the Behaviour Institute in Toronto and the Kinark Child and Family Services (“Kinark”) in Markham, Ontario.

[6] The son, born in 1997, and daughter, born in 1999, each went to a school one block from the appellant’s home. The appellant signed the school registration forms and says she was the person the school was to contact in case of emergency: the school also worked with children and their parents with respect to the issues they were all experiencing. The appellant says she attended all school meetings; the father indicated he attended most meetings.

[7] The son was diagnosed with autism in 2002. The appellant testified that she attended “every single meeting” concerning her son’s condition and researched the condition. The son attended a facility in Oshawa for speech and occupational therapy; he was also diagnosed at the Children’s Hospital in Toronto as well as at the Behaviour Institute and Kinark. The daughter was also treated at the Behaviour Institute and at Kinark. The appellant produced copies of cheques on her bank account payable in 2008 to Behaviour Institute for the services to the children. The Behaviour Institute invoices for 2007 and 2008 were addressed to both parents, occasionally in respect of both children, but more so in respect of a particular child. Most invoices were for the treatment of the son.

[8] The appellant testified that the father for a time did not want the children to attend therapy at Behaviour Institute and she had to proceed to Family Court to prevent him from stopping the treatments.

[9] The appellant also testified that while her former husband requested copies of receipts from Behaviour Institute, he said that he would “absolutely not pay”. The appellant was able to obtain funding from the Ontario Ministry of Family Services.

[10] In 2008 the son was receiving intensive behavioural intervention services with Kinark’s Autism Program. The program had provincial government funding but it appears from the evidence that any amounts paid by the parents were paid by the appellant. Kinark sent invoices to both parents. The contracts with Kinark were signed by the appellant.

[11] The appellant declared that she paid \$54,000 for professional help for the children in 2008 plus “200,000 dollars for all years for (her) son.” She explained she raised funds from golf tournaments, re-mortgaging her home and from loans from her parents.

[12] The appellant appears to have recognized her children’s problems early and wished to do something about it, although I have to conclude from reports from Kinark social workers that the problems, although significant, may not have been as severe as she assumed. The evidence also suggests that the father may not have been as supportive as he ought to have been, in particular with respect to their son.

[13] There is evidence that the son was closer to the appellant than to his father. He looked to his mother, more than his father, for guidance and companionship. When he was at his father’s home he would telephone his mother and visit his mother. She also attended all her son’s hockey games whether or not it was her week to have custody of the children.

[14] The appellant provided an abundant number of invoices, receipts and cancelled cheques to support her claim that she was involved in the son’s recreational activities, paying for hockey, lacrosse and other sports activities and day camp fees as well as sports equipment. She also paid for educational supplies for each child.

[15] The appellant’s view is that notwithstanding any time the children spend with their father she attends to their daily needs: she initiates appointments for the majority of the children’s medical and dental appointments and, she claims she takes them to these appointments even during a week they are with their father.

[16] Both parents claim they pay for the children’s clothing and activities. Notwithstanding that the appellant provided receipts and the father did not, I am

confident that both parents contributed for clothing and the cost of activities, although not equally. The appellant produced evidence that in 2007, 2008 and 2009, she contributed \$1,945.69, \$4,362.68 and \$4,077.63, respectively, towards the costs of the children's activities, for example.¹

[17] The father described a normal day at home when the children are with him. The children awake, wash, make their beds and have breakfast. In earlier years the father's companion drove them to school. He has visited school for meetings and to obtain the children's progress reports. The school calls him in case of emergency during the week he has custody. This is contrary to the appellant's evidence but the school had his name and information on file, I accept his evidence that he also was the person who could be called in an emergency. The father also testified that he paid for some school trips and for special days at school such as "pizza days". He also purchased school supplies, he declared.

[18] The son would have some therapy sessions at his father's home, the father testified. The father would be home during the sessions and sometime participate. The father had a rule that once the children came home, they would have to do their homework; after homework they could play.

[19] In his home the father maintained a bedroom for each child. He purchased Xbox games for the son. He arranged swim lessons for his daughter and hockey activities for his son. He said he paid registration fees for hockey and paid for his son's hockey equipment. He acknowledged the mother also has purchased hockey equipment. Later on in cross-examination he said he paid for all his son's hockey equipment and tournaments. The grandparents paid for some equipment but the mother only once purchased equipment. The appellant's documentary evidence contradicted this. She produced cancelled cheques for payment of numerous activities for the son. More than several were for hockey.

[20] As far as therapy is concerned, the father insists both he and the mother arranged for sessions at Behaviour Institute once the son was diagnosed with autism. This too is contrary to the mother's evidence.

¹ The father produced receipts for payments he made in 2010 for skateboard camp for his son and arts camp for his daughter. There is also a letter from a social worker, dated October 9, 2010 that states that the father "has assumed financial responsibility" for the costs of his son playing hockey and that the appellant has assumed costs for her daughter's horseback riding lessons. The 2010 year is not a taxation year nor a base year that is before me.

[21] The father stated that he, also, took the children to medical and dental appointments on his week having custody. He saw his son on an “off week” if he went to a hockey game or school event.

[22] Section 122.6 of the *Act* codifies eligibility for the CCTB. It is the “eligible individual” who may claim a CCTB in respect of a qualified dependant, in this appeal the son and daughter. An “eligible individual” for purpose of this appeal means a person who at the relevant time

(a) resides with the qualified dependant, a) elle réside avec la personne à charge;

(b) is a parent of the qualified dependant who b) elle est la personne — père ou mère de la personne à charge — qui :

(i) is the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant and who is not a shared-custody parent in respect of the qualified dependant, or (i) assume principalement la responsabilité pour le soin et l'éducation de la personne à charge et qui n'est pas un parent ayant la garde partagée à l'égard de celle-ci,

(ii) is a shared-custody parent in respect of the qualified dependant, (ii) est un parent ayant la garde partagée à l'égard de la personne à charge;

...

...

[23] On the facts before me, custody of each child was shared by the parents. The children resided with each parent equally. To determine in such circumstances which parent is eligible to claim the CCTB in these appeals to the exclusion of the other one must determine which parent primarily fulfills the responsibility for the care and upbringing of the child when residing with the parent, as determined by regulation.

[24] Section 6302 of the *Income Tax Regulations* (“*Regulations*”) states that:

... the following factors are to be considered in determining what constitutes care and upbringing of a qualified dependant: ... les critères suivants servent à déterminer en quoi consistent le soin et l'éducation d'une personne à charge admissible :

(a) the supervision of the daily activities and needs of the qualified dependant; a) le fait de surveiller les activités quotidiennes de la personne à charge admissible et de voir à ses besoins quotidiens;

- | | |
|--|---|
| <p>(b) the maintenance of a secure environment in which the qualified dependant resides;</p> | <p>b) le maintien d'un milieu sécuritaire là où elle réside;</p> |
| <p>(c) the arrangement of, and transportation to, medical care at regular intervals and as required for the qualified dependant;</p> | <p>c) l'obtention de soins médicaux pour elle à intervalles réguliers et en cas de besoin, ainsi que son transport aux endroits où ces soins sont offerts;</p> |
| <p>(d) the arrangement of, participation in, and transportation to, educational, recreational, athletic or similar activities in respect of the qualified dependant;</p> | <p>d) l'organisation pour elle d'activités éducatives, récréatives, athlétiques ou semblables, sa participation à de telles activités et son transport à cette fin;</p> |
| <p>(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;</p> | <p>e) le fait de subvenir à ses besoins lorsqu'elle est malade ou a besoin de l'assistance d'une autre personne;</p> |
| <p>(f) the attendance to the hygienic needs of the qualified dependant on a regular basis;</p> | <p>f) le fait de veiller à son hygiène corporelle de façon régulière;</p> |
| <p>(g) the provision, generally, of guidance and companionship to the qualified dependant; and</p> | <p>g) de façon générale, le fait d'être présent auprès d'elle et de la guider;</p> |
| <p>(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.</p> | <p>h) l'existence d'une ordonnance rendue à son égard par un tribunal qui est valide dans la juridiction où elle réside.</p> |

[25] The evidence of both parents, when it related to only a particular child and not both, in the main, concerned the son. The evidence as to the care and upbringing of the daughter paled beside that of the son. The testimony primarily was focused on the son. From the evidence before me, I could find no difference between the parents as to their care and upbringing of their daughter. The factors listed in section 6302 of the *Regulations* appear to have been shared equally insofar as the daughter is concerned.

[26] However, as far as the son is concerned I find that the appellant's efforts and support, both emotional and financial, to the son eclipsed that of the father. She was the parent whom the son looked to for emotional support, much more than to the

father. It was the mother who initially and continuously attended to the son's needs when he was ill or otherwise in need of his mother's attendance. The appellant also appears to have been more involved in the son's participation in recreational and athletic activities, being present during his participation and paying for his participation during the relevant years. She was also more involved in the provision, generally, of guidance and companionship to the son; she was his emotional crutch. This is not to say that the father was not involved in his son's care and upbringing, only that the appellant's contribution was greater than his.

[27] Therefore I will not disturb the Minister's determination in respect of the daughter of the appellant: each parent shared equally the care of the daughter. However, in my view, the mother was the primary caregiver of the son during the relevant periods. The appeals will be allowed in respect of the Minister's determination with respect to the son only.

Signed at Ottawa, Canada, this 20th day of April 2012.

“Gerald J. Rip”

Rip C.J.

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APPEARANCES:

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