Citation: 2012 TCC 240
Date: 20120709
Docket: 2012-371(IT)I

BETWEEN:

TRINA BRADY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on June 6, 2012 at Vancouver, British Columbia)

Campbell J.

[1] All right, let the record show that I am delivering reasons in the appeal of Trina Brady, which I heard on Monday, June 4, 2012.

[2] This appeal is in respect to the 2010 base taxation year, and involves the calculation of the child tax benefit payments for the period July 2011 through to June 2012. The appellant and her spouse, Sean Brady, have been separated since November 2010.

[3] Initially the Minister determined that the appellant was entitled to the CTB payments for the 2010 base taxation year. In August 2011, the Minister notified the appellant that her previous entitlement to these benefits for the 2010 base taxation year would be adjusted on the basis of an application in July 2011 by Sean Brady for these benefits, in which he claimed that they shared custody of the three children of the marriage. The Minister, on a redetermination of the entitlement to these benefits, and on the basis that the parents shared custody of the children, requested that the appellant repay an overpayment of benefits for this period.

[4] The appellant's argument is that she is not a "shared custody parent" in respect to the three children as the Minister has determined but rather, she is the parent that primarily fulfills the responsibility for the care and upbringing of these qualified dependents. Consequently, she is claiming the full amount of the benefit.

[5] The definition of "shared custody parent" was added to section 122.6 in 2010, in respect to overpayments arising after June 2011. The reduction in the tax benefit where a parent is in a shared custody parent situation is referenced in 122.61(1.1) which was also added to the *Act* at the same time.

[6] The Child Tax Benefit is payable in respect to qualified dependents, and it is payable monthly to an eligible individual, which is most often that parent who resides with the qualified dependent and acts as the dependent's primary caregiver.

[7] Section 122.61 of the *Act* creates a deemed overpayment by an individual who is entitled to the Child Tax Benefit. This legislation creates a notional overpayment. Subsection (1.1) of paragraph 122.61 provides an alternate calculation for these benefits where an eligible individual is a "shared custody parent" in respect to qualified dependents at the beginning of the month.

[8] The introduction of 122.61(1.1) meant that the deemed overpayment that translates to the CTB is reduced in the case of a shared custody parent. Prior to the amendments concerning shared custody parenting, the *Act* contemplated only one parent being the eligible individual for the benefit. In *R. v. Marshal [sic],* 96 D.T.C. 6292, Justice Stone at paragraph 2 made the following comment in respect to section 122.61:

> "This section of the Act contemplates only one parent being an "eligible individual" for the purpose of allowing the benefits. It makes no provision for prorating between two who claim to be eligible parents. Only Parliament can provide for a prorating of benefits but it has not done so."

[9] In the case of joint custody, CRA administrative policy split the benefit into two six-month portions for each parent. This worked as long as the parents were in agreement, or neither parent appealed the assessment. Prior to July 2011, some cases allowed an allocation of the CTB between spouses. Justice Hershfield in the case of *Connolly v. The Queen,* 2010 D.T.C. 1166, allowed a taxpayer to claim a five-month CTB because the taxpayer resided with the child.

[10] In *Campbell v. The Queen,* 2010 D.T.C. 1072, Justice Webb found that each parent was entitled to claim six months in respect to the benefit, because each parent was a primary care giver. Since Parliament made amendments in 2010 to ensure equality in a shared custody parent situation, no cases have, as of yet, considered the new shared custody parent definition. The prior cases which split the benefit are now no longer applicable under the new regime.

[11] Section 122.6 defines the terms "qualified dependents", "eligible individual" and "shared custody parent." Those definitions state:

> "qualified dependant" at any time means a person who at that time
>
> (*a*) has not attained the age of 18 years,
>
> (*b*) is not a person in respect of whom an amount was deducted under paragraph (*a*) of the description of B in subsection 118(1) in computing the tax payable under this Part by the person's spouse or common-law partner for the base taxation year in relation to the month that includes that time, and
>
> (*c*) is not a person in respect of whom a special allowance under the *Children's Special Allowances Act* is payable for the month that includes that 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
>
> (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
>
> (ii) is a shared-custody parent in respect 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 (*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 a 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 (*f*) does not apply in prescribed circumstances, and

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

"shared-custody parent" in respect of a qualified dependent at a particular time means, where the presumption referred to in paragraph (*f*) of the definition "eligible individual" does not apply in respect of the qualified dependant, an individual who is one of the two parents of the qualified dependant who

(*a*) are not at that time cohabitating spouses or common-law partners of each other,

(*b*) reside with the qualified dependant on an equal or near equal basis, and

(*c*) primarily fulfil the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant, as determined in consideration of prescribed factors.

[12] The Minister concedes that the three children are qualified dependents for the purposes of this appeal. Subsection (*f*) of the definition of eligible individual contains a presumption in favour of the qualified dependent's female parent. However, (*g*) of this definition also states that this presumption, in favour of the female parent, will not apply in "prescribed circumstances." Regulation 6301 references both subsections (*g*) and (*f*) contained in the definition of eligible individual in 122.6, and lists the circumstances which are (*a*) through (*d*), where this presumption in favour of the female parent contained in (*f*) will not apply. Regulation 6301 states:

> **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.

[13] Of these four circumstances outlined in Regulation 6301, only (*d*) is applicable to the appeal before me. Provision (*d*) states, and I will read this into the record,

> "…more than one notice is filed with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependent who resides with each of the persons filing the notices if such persons live at different locations."

[14] In this appeal, the father, Sean Brady, filed an application for the CTB as did the appellant, and consequently the presumption in (f) in favour of the mother does not apply in these circumstances. The definition of "shared custody parent" in 122.6 applies where the presumption in favour of the female parent in paragraph (f) of the

definition of eligible individual does not apply. This definition states that a shared custody parent is an individual who is one of two parents of a qualified dependent where (a) the parents are not co-habiting, and (b) reside with the qualified dependent on an equal or near equal basis, and (c) primarily fulfill the responsibility for the care and upbringing of the qualified dependent as determined by reference to the prescribed factors.

[15] These prescribed factors are referenced in (*h*) of 122.6 and that subsection states that,

> "Those factors shall be considered in determining what constitutes care and upbringing of a qualified dependent."

[16] A list of those prescribed factors which are referenced in (*h*) of 122.6 are contained at Regulation 6302. They include:

> **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.

[17] The Court must consider the evidence in light of those prescribed factors set out in Regulation 6302 in order to determine the appellant's entitlement to the CTB for the 2010 base taxation year. The new provision 122.61(1.1) now stipulates what is to occur in circumstances where it is determined that both parents equally fulfill the responsibility for the care and upbringing of the qualified dependents. That is, if they are shared custody parents, then the CTB will be calculated in accordance with 122.61(1.1) so that it is a shared benefit which was not previously provided for in the *Act*.

[18] The onus is on the appellant to establish that she and Sean Brady are not shared custody parents and that she is the sole parent who primarily fulfills the responsibility for the care and upbringing of the three children who are qualified dependents.

[19] After listening to the evidence given by both parents, it is evident that each of them are dedicated, responsible parents who care deeply about the wellbeing of their three children. It is also evident, however, that there continues to be a great deal of acrimony between these individuals.

[20] The appellant maintains meticulous records that track the pick-up and drop-off times of the children with each parent according to a schedule that the appellant established. The father agreed that these records accurately tracked their schedule with the children. According to the appellant's evidence, on average the percentage for which each parent had the responsibility for the care of the three children, based on a 160 hour week, was 55 percent in her favour, and 45 percent in favour of the father. Both parents agreed that those percentages could vary slightly from week to week due to vacations, late pick up, and so forth.

[21] Subparagraph (*b*) of the definition of the term "shared custody parent" contains two parts. The first part is that the individual must reside with the qualified dependent. The second part is that it must be on "an equal or near equal" basis.

[22] Justice Webb in the case of *Timothy Campbell*, in determining where a child resides, or is ordinarily resident, stated that the test is whether the child lived with the parent on a settled and usual basis.

[23] There was a well defined and regular cycle or schedule that was followed by the parents throughout the period in this appeal. The children had a settled and usual abode with both parents according to the evidence.

[24] The interpretive problem that arises now is the meaning of the term "equal or near equal" basis as contained in (b) of the definition of "shared custody parent."

[25] The word "equal" is defined in the *Oxford English Dictionary*, 2nd Edition, as "identical in amount." If each parent resides with the child for the same number of hours in each week, then the parents reside on an equal basis.

[26] "Near equal" is a more difficult concept to define. The dictionary definition is not particularly helpful in this instance, as it defines the word "near" as meaning "with reference to space or portion, close at hand, not distant." Since the words "near equal" are in close proximity to the word "equal" in the legislation, Parliament likely intended only a small difference between the amounts of time spent with each parent. The Latin maxim, *noscitur a sociis*, states that the meaning of a word is revealed by the words with which it is associated. I am referencing here a case called *PCS Investments Ltd. v. Dominion of Canada General Insurance,* 1994.

[27] If Parliament's goal for residency is that it is "equal", then if one applies a strict interpretation, the words "near equal" should be as close to equal as possible, or only slightly less. However, I do not believe that Parliament intended that the line be drawn so strictly at only a 50/50 split, or some very slight variation akin to that. To use such an interpretation would likely frustrate the purpose of the amendment. Rather, the purpose as I view it is to ensure that while disproportionate differences between parents will not be caught by the provisions, parents whose circumstances exhibit only slight differences or close differences, will fall within this amendment.

[28] There have been a number of cases in our court which have considered the meaning of "near". Most have been in respect, however, to tuition costs, and are not helpful in this appeal.

[29] Since the introduction of these amendments, CRA has recently published a revised Child Benefits Guide, T4114(E). Within this guide CRA makes the following statement, and I quote,

> "A child may live with two different individuals in separate residences on a more or less equal basis. For example, 1) the child lives with one parent four days a week

> and the other parent three days a week.; 2) the child lives with one parent one week and the other parent the following week, or…"

And it is this third one that I find troubling,

> "3) …any other regular cycle of alternation."

[30] If such an arrangement is entered into, the CRA considers that the taxpayer is in a shared custody parent arrangement, and therefore will reduce the benefits to 50 percent. My conclusion is that this position is probably too broad. For example, a regular cycle of alternation could consist of one parent residing with the children for three weeks, while the other parent takes custody and resides with the children for only one week out of the month. I do not view such an arrangement as this as being one that is contemplated by this amendment. It does not fall within the equal or near equal basis, since there is a clear difference in the times where the children reside with each parent in the example I have provided.

[31] The evidence was that the appellant spent on average 91 hours per week residing with the three children, while the father spent 77 hours on average. Out of a total 168 hours per week, the appellant spent a total of 54.17 percent with the children. The difference in the number of hours spent residing with the children is 14 hours. Expressing the difference in the hours each parent spends with the children as a percentage may not be particularly helpful here. If the appellant spends 60 percent of the time with the children, she would spend almost 101 hours with them, while the father would spend 67 hours. This difference of 34 hours translates to a day and 10 hours and that would be per week. A difference of 64 hours would mean that the appellant spent 96 hours with the children, which would be a 57.14 percent difference. The question is whether a 14-hour difference based on the 55/45 percentage split, which was the average, should be deemed to be "near equal". In reality, this difference translates to half a day plus two hours.

[32] It is my conclusion that this falls clearly within the term near equal as contemplated by the amendment. The differences between the hours that each parent spends residing with the children, therefore, are "near equal" as contemplated by this provision.

[33] In considering the other factors listed in Regulation 6302 which focus on the child's requirements respecting supervision, guidance, attendance to needs, care, security, and participation, the evidence supports that the father attended to all of these needs when the children were residing with him. He is presently at home on

disability, and is therefore able to spend all day with his 5-year old daughter while the two sons are at school. The evidence supports that he supervises their homework, recreational, and school activities, discipline matters, and hygienic needs. He maintains a secure environment and the appellant testified that it was secure and that the children were in a safe environment there. However, she was not satisfied that it was reasonable that the children not have their own bedrooms as they did at her home. There was nothing in the evidence, however, that would indicate that the children were having resulting problems. The evidence actually supports that the children are happy and well adjusted individuals.

[34] The father coached the oldest son's soccer, and attended school events and field trips. He purchased and rebuilt secondhand scooters that he and the children ride to and from school. It is apparent that he assisted in homework assignments, and executed these when the children were residing with him. He testified that the children spent a lot of time at the pool facilities at his complex. If the children are ill, his parenting style was to try a home remedy before "running off" to the doctor. However, none of the three children suffered from any specific illnesses which required ongoing medical care.

[35] Although he has less disposable income than the appellant, he stated that he purchased second-hand clothing for them and sports equipment. The birthday parties which the father organized were focused more on his family attending as he did not have sufficient funds to organize birthday parties for his childrens' friends, as the mother did. The evidence supports that the father provides for all of their needs when they are with him, without resorting to outside assistance, and according to the appellant's evidence, the children adored him.

[36] The appellant was a hands-on mother who also attended equally to the childrens' needs when they resided with her. Although the children resided with her slightly more hours per week, I have concluded that the slight difference was within the term "near equal basis" as contemplated in the definition of "shared custody parent." The Minister therefore properly determined the appellant's entitlement to the CTB payments for the 2010 base taxation year, on the basis that she was a shared custody parent under subsection 122.61(1.1) of the *Act*. The appeal is therefore dismissed.

Signed at Summerside, Prince Edward Island this 9th day of July 2012.

"Diane Campbell"

Campbell J.

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APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Dawn Francis

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada