Docket: 2012-3792(IT)I

BETWEEN:

JULEE DESMARAIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 1, 2013, at Victoria, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Shankar Kamath

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the Appellant's 2008, 2009 and 2010 base taxation years is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant was the eligible individual to receive the Canada Child Tax Benefit for her daughter for October and November 2009 and the Goods and Services Tax Credit for her daughter for the quarter beginning October 2009.

Signed at Halifax, Nova Scotia, this 15th day of March 2013.

"V.A. Miller"

V.A. Miller J.

Citation: 2013TCC83
Date: 20130315
Docket: 2012-3792(IT)I

BETWEEN:

JULEE DESMARAIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The Appellant has appealed determinations made by the Minister of National Revenue (the "Minister") which determined that she was entitled to claim only a portion of the Canada Child Tax Benefit ("CCTB") and the Goods and Services Tax Credit ("GSTC") for her three children for the 2008, 2009 and 2010 base taxation years.

[2] The Appellant and her former spouse, Ronald Desmarais, separated in March 2009. Following their marriage breakdown, they lived separate and apart and they continue to do so. The Appellant and her former spouse have three children, a daughter and two sons. The sons are twins. Their daughter was born in February 1993 and their sons were born in June 2001.

[3] After the marriage breakdown, the Appellant received the CCTB and the GSTC for her three children until March 20, 2012 and April 5, 2012 respectively, when she was notified by the Minister that her entitlement to the CCTB and GSTC had been redetermined and she was requested to repay the overpayments of CCTB and GSTC.

[4] According to the Appellant, her former spouse contacted the Canada Revenue Agency ("CRA") in December 2011 and the redetermination was made as a consequence of the information he submitted.

[5] The Appellant objected to the redeterminations and the Minister again redetermined her eligibility for the CCTB and GSTC. The latest redeterminations can be summarized as follows:

(a) The Appellant and her former spouse had a shared parenting arrangement for the period May 2010 to March 2011 and each was entitled to receive one-half of the CCTB;
(b) With respect to her daughter, the Appellant was not the eligible individual to receive the CCTB for the period August to November 2009;
(c) With respect to her sons, the Appellant was not the eligible individual to receive the CCTB for the periods July 2009 to April 2010 and April 2011 to June 2012;
(d) With respect to the GSTC, her sons were not her "qualified dependants" for the periods April 2011 to June 2011 and July 2011 to June 2012.

[6] The witnesses at the hearing were the Appellant, her daughter and her former spouse.

[7] It was obvious from the evidence given by all of the witness that the relationship between the Appellant and her former spouse was and continues to be acrimonious. Their evidence was conflicting and a summary of that evidence follows.

[8] According to the Appellant, the real issue in this appeal is not that she had the children full time during the relevant period, but that there was an agreement between her and her former spouse that she would receive the family allowance after the marriage breakdown in place of his paying spousal support. She stated that she had no steady income when she left the marriage because she had been a 'stay at home' mother for 9 years. She would have been eligible to receive spousal support and, in hindsight, she should have requested spousal support instead of making the agreement with her former spouse.

[9] The Appellant used the term "family allowance" when she actually meant the CCTB and the GSTC.

[10] In support of her evidence, the Appellant submitted a letter which had been written by Marie Morrison, the lawyer who represented her in the Provincial Court of British Columbia. The letter was written April 10, 2012 and addressed to the CRA. A portion of the letter read as follows:

> Further, when in attendance at court for the divorce proceedings on June 28, 2011 Mr. Desmarais confirmed to Ms. Desmarais that he was agreeable to my client keeping the Child Tax Benefit for the children due to her low income and his aversion to paying child support.

[11] With respect to the children, the Appellant stated that her daughter did not reside with her former spouse for the entire period August to November 2009. She resided with him for the month of September only. Her daughter was at camp in July and August and she resided with the Appellant in October and November 2009.

[12] The Appellant agreed that she and her former spouse had a shared parenting arrangement for the period May 2010 to March 2011. She also testified that there were periods when court orders gave her former spouse sole custody of the children with supervised access to her. However, these court orders were not respected and the children resided with her former spouse 70% of the time and with her 30% of the time. The only period she did not see her sons was March 18, 2011 to April 30, 2011 when her former spouse denied her access to her sons.

[13] It was her evidence that during the period July 2009 to March 2010 she lived with her mother. She had one of her sons with her most of the time and they lived with her at her mother's home. The Appellant took her sons to school; made their lunches; and, took them for haircuts.

[14] The daughter stated that she agreed with her mother's evidence. She stated that she resided with the Appellant in October and November 2009 at her grandparents' home.

[15] Mr. Desmarais denied that there was an agreement between him and the Appellant with respect to the receipt of the CCTB and the GSTC. It was his evidence that the Appellant had only supervised access to the children during the periods July 2009 to April 2010 and April 2011 to June 2012. He followed the court orders so that his children would not be taken into care by the Ministry of Child, Family and Community Services.

[16] It was Mr. Desmarais' evidence that, at no time during the period that the Appellant had only supervised access to the children, did the twins reside with her. They visited with the Appellant and each son may have stayed overnight but this would have been on only two or three occasions during the period.

[17] In accordance with the court orders, the twins were enrolled in Kids Klub, an organization which provided care and counselling for children. The twins attended Kids Klub before and after school and everyday during the summer. It was Mr.

Desmarais' evidence that he took the twins to the Kids Klub before and after school and during the summer. He also picked them up at the end of their sessions. This aspect of Mr. Desmarais' evidence was confirmed by a document from the Kids Klub.

[18] With respect to his daughter, he stated that she was under his care when she was in camp in July and August 2009. After camp, she resided with him until mid-November 2009 when she decided to reside with the Appellant.

[19] A summary of the several orders tendered at the hearing disclosed the following. In June 2009, the Director of Child, Family and Community Services found that the children were in need of protection from the Appellant. She left the family home and Mr. Desmarais moved in with the children. He resided with them until April 13, 2010. During this period, the orders specified that the Appellant had access to the children at Mr. Desmarais' discretion. By order dated April 13, 2010, both parents were given joint custody of the children. Then, an interim order dated April 5, 2011 ordered that Mr. Desmarais have interim sole custody of the twins with the Appellant to have supervised access to the twins at the discretion of her former spouse. An order dated April 7, 2011 confirmed the interim order and stated that the twins would be placed in the care of the province if any of the terms of the supervision order were not met. Finally, on February 2, 2012, the Appellant was given specific days to have access to the twins and on July 13, 2012 the Appellant and Mr. Desmarais were given joint custody of the twins.

Analysis

[20] To qualify for the CCTB, an individual must be an eligible individual as defined in section 122.6 of the *Income Tax Act* ("*ITA"*). The relevant portions read:

> **"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 a 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

[21] The determination of who "primarily fulfils the responsibility for the care and upbringing" of the children during the relevant period is a question of fact. It requires

an assessment of the prescribed factors given in section 6302 of the *Income Tax Regulations* (the "*Regulations*") and any other factors which may exist. The factors in section 6302 are:

> 6302. **Factors** -- 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.

[22] It is my view that the Appellant provided insufficient evidence to establish that she primarily fulfilled the responsibility for the care and upbringing of the twins either 30% or 50% of the time during the disputed period. I have concluded from a review of the evidence that Mr. Desmarais was the eligible individual to receive the CCTB for the twins during the period July 2009 to April 2010 and April 2011 to June 2012. In reaching my conclusion, I have accepted the Appellant's evidence that her sons visited with her at her home and did sleep over on occasion. However, this does not mean that they no longer resided with Mr. Desmarais and that they resided with her. The word "resides" as used in section 122.6 connotes a settled and usual abode: *S.R. v The Queen*, 2003 TCC 649 at paragraph 12.

[23] I agree with Mr. Desmarais that he was the primary care giver and the "eligible individual" with respect to his daughter when she attended camp in July and August 2009. However, I accept that the daughter started to reside with the Appellant in October and November 2009 and thereafter the Appellant was the eligible individual to receive the CCTB until her daughter turned 18 years old in February 2011.

[24] It is also my view that there was an agreement between the Appellant and Mr. Desmarais that the Appellant would receive the CCTB and GSTC in place of spousal support. Nevertheless, there is no provision in section 122.6 which would allow the parties to make an agreement which would override a finding of who is entitled to receive the CCTB.

[25] When a child resides with more than one parent, subsection 122.5(6) of the *ITA* allows the parties to make an agreement with respect to the receipt of the GSTC: *Fraser v R*, 2010 TCC 23. In the circumstances of this appeal, there was no dual residence situation for the twins during the periods July 2009 to April 2010 and April 2011 to June 2012 and subsection 122.5(6) does not apply.

[26] There is no provision in the *ITA* that would allow the parties to agree to substitute the CCTB and the GSTC for spousal support.

[27] The appeal is allowed on the basis that the Appellant was the eligible individual to receive the CCTB for her daughter for October and November 2009 and the GSTC for her daughter for the quarter beginning October 2009.

Signed at Halifax, Nova Scotia, this 15th day of March 2013.

"V.A. Miller"

V.A. Miller J.

CITATION:	2013TCC83
COURT FILE NO.:	2012-3792(IT)I
STYLE OF CAUSE:	JULEE DESMARAIS AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia
DATE OF HEARING:	March 1, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	March 15, 2013

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Shankar Kamath

COUNSEL OF RECORD:

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Name:

Firm:

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