Docket: 2012-2089(IT)I

BETWEEN:

JOANNE VAN BOEKEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 8 and 10, 2013 at London, Ontario

By: The Honourable Justice J.M. Woods

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Paul Klippenstein

JUDGMENT

It is ordered that:

(a) the appeal with respect to a determination of the child tax benefit under Ontario legislation is quashed;

(b) the appeal with respect to a determination of the child tax benefit under the *Income Tax Act* for the 2010 base taxation year is allowed, and the determination is referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that the appellant is not a "shared-custody parent" within the meaning of section 122.6 of the *Act*; and

(c) the appellant is entitled to her costs, if any.

Signed at Ottawa, Ontario this 30th day of April 2013.

"J. M. Woods"

Woods J.

Citation: 2013 TCC 132
Date: 20130430
Docket: 2012-2089(IT)I

BETWEEN:

JOANNE VAN BOEKEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Joanne Van Boekel, appeals a determination regarding the child tax benefit under section 122.61 of the *Income Tax Act*. The issue is whether the appellant's entitlement is reduced by 50 percent on the basis that she is a "shared-custody parent," as that term is defined. The relevant period is the 2010 base taxation year.

[2] In the 2010 federal budget, a measure was introduced to require the child tax benefit to be shared between separated spouses who reside with their children on an equal or near equal basis. The provision first came into force for the period at issue in this appeal. Prior to this, the entire child tax benefit was provided to the parent who was the primary caregiver, which in this case was the appellant.

[3] Section 122.6 of the *Act* sets out the meaning of "shared-custody parent" for these purposes. It is reproduced below.

> "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.

Preliminary Issue

[4] The appeal relates to child tax benefits under both federal and Ontario legislation. Since this Court has no jurisdiction with respect to Ontario legislation, this part of the appeal will be quashed.

Factual background

[5] Testimony on behalf of the appellant was provided by the appellant herself and her eldest daughter. Testimony on behalf of the respondent was provided by Eric Van Boekel, who is the children's father and former spouse of the appellant.

[6] The appellant and her former spouse have lived in separate residences since June 8, 2009. They divorced in October 2010. It is evident from the evidence that the relationship between the former spouses was, and continues to be, very acrimonious.

[7] The appellant and her former spouse have five children, whose ages currently range from 8 to 16.

[8] When the appellant first moved out of the matrimonial home in 2009, she and her former spouse agreed to a residence arrangement for the children that involved the children spending a substantial amount of time with each parent. The parents prepared a chart ("Schedule") that was based on a template developed for them by a consultant. The Schedule sets out a two-week rotation, with each day broken into four segments – morning (8-12), afternoon (12-4), evening (4-8) and night (8-8). One of the principles behind the agreement was to minimize the time that the children would have to travel between residences.

[9] The Schedule has remained in place since inception. A court order dated September 24, 2010 provided that the parents have joint custody and "share the residential care of the children upon terms as they may, from time to time, agree."

[10] Although the Schedule is still being followed, neither parent produced the original and they had a slight disagreement over the afternoon segments. The

discrepancy is minor. I would also mention that the eldest child no longer follows the Schedule as she chose to live solely with her mother beginning in 2012.

[11] The Schedule as submitted by the appellant is reproduced below. The references to M and F refer to mother and father.

Week 1	**Monday**	**Tuesday**	**Wednesday**	**Thursday**	**Friday**	**Saturday**	**Sunday**
Morning	M	F	F	M	M	M	M
Afternoon	M	F	M	M	M	M	M
Evening	M	F	M	M	M	M	M
Night	F	F	M	M	M	M	M

Week 2	**Monday**	**Tuesday**	**Wednesday**	**Thursday**	**Friday**	**Saturday**	**Sunday**
Morning	M	F	M	M	F	F	F
Afternoon	M	M	M	M	F	F	F
Evening	M	M	M	F	F	F	F
Night	F	M	M	F	F	F	M

[12] As part of the residence agreement, the parents agreed that if one parent is unavailable for a period of time, that parent is responsible for obtaining a replacement caregiver, but the other parent has the right to care for the children in these circumstances in priority to a third party caregiver. This was referred to as a right of first refusal.

<u>Positions of parties</u>

[13] The respondent submits that the Schedule reflects that the children spend approximately 60 percent of the time with their mother and 40 percent with their father. Counsel submits that this is “near equal.”

[14] The respondent refers in support to *Brady v The Queen*, 2012 TCC 240, which appears to be the first reported decision dealing with the term “near equal.” It is useful to reproduce part of Justice Campbell’s reasons in that case.

> [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.

[…]

> [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.

[15] The appellant submits that a 60/40 split is not near equal, and further that the split is closer to 75/25 when the right of first refusal is taken into account.

Discussion

[16] The question in this appeal is whether the appellant was a "shared-custody parent" in 2010. This term contains both residence and caregiving elements.

[17] The caregiving element is in clause (c), which reads:

> (*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.

[18] It is important to note that this element does not require an evaluation of the caregiving roles in general, nor an investigation into the quality of care. The test is quite narrow: Does each parent primarily fulfil the caregiving responsibility during the children's residence with that parent? (See *C.P.B. v The Queen*, 2013 TCC 118.)

[19] The appellant submits that she provided more of the caregiving role than her former spouse. The evidence supports this submission if the caregiving roles are

compared generally. However, I am satisfied that each parent fulfilled the primary caregiving responsibility during the children's residence with that parent. Accordingly, the caregiving element in the definition of "shared-custody parent" is met.

[20] I turn now to the residence requirement. The question is whether the children resided with each parent on a "near equal" basis.

[21] As for the general principles to be applied, in *Brady* Justice Campbell concluded that the term "near equal" was not restricted to only to a very slight variation from 50/50. In my view, the legislation also does not encompass a very wide variation from equal residence. Otherwise, different language would have been used in the legislation.

[22] Further, although the "near equal" element requires a comparison of time spent with each parent, often the circumstances will not lend themselves to a formulaic approach. In this particular case, it is important to look at all the relevant circumstances and not to simply apply an arithmetic approach, such as the 60/40 split suggested by the respondent.

[23] When the facts are viewed as a whole, I am satisfied that the children did not reside with the appellant and her former spouse on a near equal basis in 2010.

[24] In reference to the Schedule, the children are with the parents equally only during the weekends and not during the week. For example, in the weekday after-school/dinner segments the children are with their mother 7 out of 10 days.

[25] In addition, the Schedule does not reflect the time that the children spend with their mother pursuant to the right of first refusal when the father is unavailable. When this is taken into account, the relative time spent is clearly not equal or near equal.

[26] The appellant testified that her former spouse has many interests outside the home which often bring the right of first refusal into play. For example, the former spouse travels extensively to participate in a rodeo event called "cutting horses." He is also involved in sports and activities related to his business.

[27] I accept the testimony of the appellant that some or all of the children often resided with her due to the unavailability of the former spouse and the so-called right of first refusal.

[28] In the testimony of the former spouse, he implied that this was not a significant factor because he took the children when the appellant was not available. I did not find this testimony to be detailed enough to be persuasive.

[29] The respondent submits that the time the children spent with their mother pursuant to the right of first refusal does not have a quality of "residence" in the sense of "usual abode." I do not agree. To the extent that a segment in the Schedule is altered through the right of first refusal, this results in a change of residence. The children are not visiting their other home – they are home.

[30] Before concluding, I would mention that, in a decision of the Ontario Superior Court of Justice dealing with support for the Van Boekel children, the judge mentioned that the children spend relatively equal amounts of time with each parent: *Van Boekel v Van Boekel*, 2010 ONSC 588, para. 7. I accept the submission of the appellant that this was not a central issue before the judge and it was not the focus of the evidence in that case. I have given the statement very little weight in terms of the issue to be decided in this appeal.

[31] I am satisfied by the evidence as a whole that the children were with their mother much more than their father. For this reason, I am satisfied that the appellant was not a "shared-custody parent" for purposes of the child tax benefit.

[32] The appeal will be allowed, and the determination will be referred back to the Minister of National Revenue for redetermination on the basis that the appellant was not a "shared-custody parent" as defined in section 122.6 of the *Act* during the 2010 base taxation year. The appellant is entitled to her costs, if any.

Signed at Ottawa, Ontario this 30th day of April 2013.

"J. M. Woods"

Woods J.

CITATION:	2013 TCC 132
COURT FILE NO.:	2012-2089(IT)I
STYLE OF CAUSE:	JOANNE VAN BOEKEL and HER MAJESTY THE QUEEN
PLACE OF HEARING:	London, Ontario
DATES OF HEARING:	April 8 and 10, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice J.M. Woods
DATE OF JUDGMENT:	April 30, 2013

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Paul Klippenstein

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario