

Docket: 2013-2634(IT)I

BETWEEN:

JASON MITCHELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on February 24, 2014, at Sault Ste. Marie, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:                      The Appellant himself  
Counsel for the Respondent:        Ryan Hall

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**JUDGMENT**

The appeal is allowed and the notices of determination for the 2010 and 2011 base taxation years are referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that:

- (a) The Appellant was the “eligible individual” and the sole custody parent for the Canada Child Tax Benefit (“CCTB”) for his three children for the period January 2012 to April 2012; and,
- (b) The Appellant was the “eligible individual” and the sole custody parent for the CCTB for his two sons, D and N, for the period May 2012 to June 2013.

Signed at Ottawa, Canada, this 3<sup>rd</sup> day of March 2014.

“V.A. Miller”

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V.A. Miller J.

Citation: 2014TCC66  
Date: 20140303  
Docket: 2013-2634(IT)I

BETWEEN:

JASON MITCHELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

V.A. Miller J.

[1] The Appellant appeals the Canada Child Tax Benefit (“CCTB”) determinations made by the Minister of National Revenue (“Minister”) for the 2010 and 2011 base taxation years where the Minister determined that:

- (a) For the period July 2011 to December 2011, the Appellant was not eligible for the CCTB for any of his children because of the presumption in paragraph (f) of the definition of “eligible individual” in section 122.6.
- (b) For the period January 2012 to April 2012, the Appellant was eligible for the CCTB for all three children but he was only entitled to one-half of it because he was a “shared-custody” parent.
- (c) For the period May 2012 to June 2013, the Appellant was not eligible for the CCTB for his daughter, M. He was eligible for the CCTB for his sons, D and N, but he was only entitled to one-half of it because he was a “shared-custody” parent.

[2] At the beginning of the hearing, counsel for the Respondent stated that the Minister now concedes that the Appellant was the sole custody parent of his sons, D and N, for the period February 1, 2013 to June 1, 2013.

[3] The Appellant and Lisa Mitchell (“Former Spouse”) have three children: two sons- D and N who were born in 1995 and 1996; and a daughter M who was born in 2003 (the “Children”).

[4] It is clear that the Appellant and his Former Spouse separated in 2011 even though they disagreed on which month they separated. According to the Appellant, they separated in mid-November whereas the Former Spouse testified that they separated in December 2011. When they separated, the Former Spouse moved to a girlfriend’s house and the Children continued to live in the family home with the Appellant. In January 2012, the Former Spouse purchased her own home and moved into it in February 2012. She stated that her new home had four bedrooms so that each child would have her/his own room.

[5] The Appellant testified that for the first five months after their separation, all three Children lived with him. Thereafter, M went to live with his Former Spouse and he has access to her 13 days a month. His sons, D and N, have always lived with him but they do visit their mother. He stated that since he and his Former Spouse separated, D and N have slept at his Former Spouse’s home very infrequently.

[6] Both D and N testified that they have always lived with their father, the Appellant. They visit with their mother and on occasion they have slept over but they prefer to live in the house where they grew up; that is with their father. They said that their parents are both kind and take care of them.

[7] It was the Former Spouse’s evidence that from February 2012 until May 2012, all three Children spent 3 days a week at her home. Her house is closer to school and she is involved in their school life and their extracurricular activities. During the period June 2012 until September 2012, D and N were between her home, the Appellant’s home and their friends’ homes. From September 2012 until January 2013, N stayed with her more often than D.

[8] The Ontario Court of Justice made two Orders with respect to the Children in this matter. The first was dated May 7, 2012 and it was pursuant to a motion which the Former Spouse had brought on an *ex parte* basis. The Order gave the Former Spouse interim custody of all three Children and the Appellant was given interim access to the children. The Appellant had neither seen nor known of this Order until it was presented to him by counsel for the Respondent at the hearing of this appeal.

[9] The second Order from the Ontario Court of Justice was dated November 25, 2013 and it gave the Appellant custody of D and N retroactively to January 1, 2013. The Former Spouse was given reasonable access to the boys.

[10] The issue in this appeal is whether the Appellant was a “shared-custody parent” for the 2010 and 2011 base taxation years.

[11] For the purposes of the CCTB section 122.6 of the *Income Tax Act* defines:

“cohabiting spouse or common-law partner” of an individual at any time means the person who at that time is the individual's spouse or common-law partner and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or common-law partnership, for a period of at least 90 days 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 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,

...

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,

“shared-custody parent” in respect of a qualified dependent [sic] 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,

**Period July 2011 to December 2011**

[12] According to the definition of “cohabiting spouse”, the Appellant and his Former Spouse were cohabiting for the period July 2011 to December 2011. Whether they separated in mid-November or the end of December 2011 is not really material because they were not living separate and apart for a period of at least 90 days during July to December 2011. Consequently, the presumption in paragraph (f) of the definition of “eligible individual” applies and the Appellant is not entitled to the CCTB for the period July 2011 to December 2011. The Former Spouse is the “eligible individual” for purposes of the CCTB for this period.

### **Periods January 2012 to April 2012 and May 2012 to June 2013**

[13] Each of the Appellant, D, and N stated that the boys, D and N, resided with the Appellant during the period January 2012 to June 2013. Their evidence was supported by letters from the Social Services Department, Ontario Works Division; the principal of the high school where the boys attended; the family doctor; and, the bus company which provided transportation for the boys to and from school.

[14] It is my view that the Appellant has provided sufficient evidence for me to conclude that he was not a “shared-custody parent” for D and N in 2012 and 2013. The boys did not reside with the Former Spouse on an ‘equal or near equal basis’. They resided with the Appellant the majority of the time. I have given no weight to the Order dated May 7, 2012 because it was obtained without notice to the Appellant and it did not reflect the true state of affairs which existed at that time as described by the Appellant, D, N, and the Former Spouse.

[15] The Appellant primarily fulfilled the responsibility for the care and upbringing of his sons. He cooked for them; he did their laundry; and, he attended at their school to support them. It is my opinion that the Former Spouse also cared for her sons but they did not reside with her. They visited with her.

[16] I concluded that the Appellant was the only “eligible individual” for D and N for the period January 2012 to June 2013 and he was not a ‘shared custody parent’ for them during this period.

[17] I have also concluded that the Appellant was not a “shared custody parent” for M for the period from January 2012 to April 2012. All parties agreed that M lived at the family home with the Appellant until May 2012. Thereafter, she lived with the Former Spouse. The Appellant was the only “eligible individual” for M for the period January 2012 to April 2012 inclusive. Thereafter, the Former Spouse was the only “eligible individual” for M.

[18] For all of the above reasons, the appeal is allowed.

Signed at Ottawa, Canada, this 3<sup>rd</sup> day of March 2014.

“V.A. Miller”

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V.A. Miller J.

CITATION: 2014TCC66

COURT FILE NO.: 2013-2634(IT)I

STYLE OF CAUSE: JASON MITCHELL AND  
HER MAJESTY THE QUEEN

PLACE OF HEARING: Sault Ste. Marie, Ontario

DATE OF HEARING: February 24, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: March 3, 2014

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Ryan Hall

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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