Federal Court of Appeal Cour d'appel fédérale

Date: 20101208

Docket: A-229-10

Citation: 2010 FCA 333

CORAM: **SEXTON J.A.**
EVANS J.A.
PELLETIER J.A.

BETWEEN:

ROBERT WEIDENFELD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on December 8, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on December 8, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: PELLETIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20101208

Docket: A-229-10

Citation: 2010 FCA 333

CORAM: **SEXTON J.A.**
EVANS J.A.
PELLETIER J.A.

BETWEEN:

ROBERT WEIDENFELD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on December 8, 2010)

PELLETIER J.A.

[1] The issue in this appeal is whether Mr. Weidenfeld's son was resident with him while he was at the George Hull Centre, a residential treatment centre for adolescents with emotional and behavioural problems. The resolution of that issue will determine whether Mr. Weidenfeld was entitled to the Child Benefit Tax Credit during the period from September 2007 to April 2008.

[2] The material facts are that Mr. Weidenfeld and his former spouse agreed to give the Jewish Family and Children's Services (the Agency) temporary guardianship of their son in order to facilitate getting him the help he needed with his emotional and behavioural problems. Mr. Weidenfeld has chosen not to put this agreement before the Court. The Agency placed the son in foster homes during the months of July and August 2007. From September 2007 to April 2008, the Agency enrolled the son at the George Hull Centre (the Centre). Mr. Weidenfeld continued to incur expenses with respect to his son during this period of time but his living and educational expenses were borne by others.

[3] Mr. Weidenfeld continued to receive the Canada Child Tax Benefit while his son was enrolled at the Centre. In order to be eligible to receive that benefit, Mr. Weidenfeld had to be an "eligible individual" and his son had to be a "qualified dependant", as both those terms are used in section 122.6 of the *Income Tax Act*.

[4] When his son was discharged from the Centre, the Agency made an application for payment of a special allowance pursuant to the *Children's Special Allowances Act* S.C. 1992 c. 48. The Minister took the position that the payment of this allowance meant that the son was no longer a "qualified dependant." The Tax Court Judge found that the Minister had not proved that the special allowances had been paid, so that the son was a "qualified dependant". As a result, the only issue remaining was whether Mr. Weidenfeld was an eligible individual.

[5] The material portions of the definition of an "eligible individual", for the purposes of this case, are that the individual must reside with the qualified dependant and the individual must be the parent of the qualified dependant who primarily fulfills the responsibility for the care and upbringing of the qualified dependant. In this case, the Tax Court Judge found that Mr. Weidenfeld did not reside with his son. She found that during the period in question, Mr. Weidenfeld's son resided at the Centre, not with his father.

[6] Mr. Weidenfeld challenges this conclusion, arguing that the situation is analogous to that in which a child is hospitalized for a period of time. He relies on jurisprudence of the Tax Court of Canada, notably *Fiogbe v R.*, 2007 TCC 454, *Penner v. R.*, 2006 TCC 413, and *Bouchard v. R.*, 2009 TCC 38. As Mr. Weidenfeld points out in his written argument, these cases all turn on their particular facts. The facts in this case are that once Mr. Weidenfeld and his former spouse agreed to give the Agency temporary guardianship of their son, it was the Agency's right to determine his place of residence. The mere fact of the change of legal guardianship did not change the son's place of residence, but the son's removal from his father's home did. When the son was placed at the Centre, it became his place of residence.

[7] That placement was made with a view to a semi-independent placement at its conclusion. When the son left the Centre, the Agency placed him in a group home residence for four months before he returned to his father's home. These elements illustrate the Agency's control over the son's place of residence.

[8] During his stay at the Centre, the son's weekend visits with his father were just that, visits, and were not sufficient to re-establish residence with his father. The same is true of his 2 week stay with his father during his period of suspension from the Centre.

[9] It is to Mr. Weidenfeld's credit that he remained as involved in his son's life as he did during this troubled period in his life, but residence is a separate issue from responsibility for the care and upbringing of the child. The factors to be considered in ascertaining who had the responsibility for the care and upbringing of the child do not affect the issue of the child's place of residence under the statutory scheme.

[10] As the decision under appeal is a decision of a trial court, rendered after a trial, the standard of review is that set out in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. For questions of fact and mixed fact and law, the standard of review is palpable and overriding error. In this case, we are unable to say that the Tax Court Judge's decision on the issue of residence was a palpable and overriding error or that she erred in law in interpreting the word "reside".

[11] As a result, the appeal will be dismissed with costs. We do not need to deal with the other relief which Mr. Weidenfeld sought in his Memorandum of Fact and Law.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-229-10
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MILLER, OF THE TAX COURT DATED APRIL 21, 2010 IN DOCKET NO. 2009-3761 (IT) I)	
STYLE OF CAUSE:	ROBERT WEIDENFELD v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 8, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	(SEXTON, EVANS & PELLETIER JJ.A)
DELIVERED FROM THE BENCH BY:	PELLETIER J.A.

APPEARANCES:

Robert Weidenfeld	FOR THE APPELLANT
Khashayar Haghgouyan Arnold H. Bornstein	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Self-Represented Newmarket, Ontario	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT