

Docket: 2013-3311(IT)I

BETWEEN:

JILLIAN K. REYNOLDS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on October 9, 2014, at Vancouver, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:                   The Appellant herself  
Counsel for the Respondent:       Amandeep Sandhu

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**JUDGMENT**

The appeal from the re-determinations made under the *Income Tax Act* for the Appellant's 2010 and 2011 base taxation years with regard to the Canada Child Tax Benefit and for the Appellant's 2010 base taxation year with regard to the Goods and Services Tax Credit is dismissed, without costs, on the basis that the Appellant was not an "eligible individual" with respect to A and T during the period July 2011 to June 2013.

Signed at Ottawa, Canada, this 1<sup>st</sup> day of May 2015.

"V.A. Miller"

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V.A. Miller J.

Citation: 2015TCC109  
Date: 20150501  
Docket: 2013-3311(IT)I

BETWEEN:

JILLIAN K. REYNOLDS,

Appellant,

and

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Respondent.

### **REASONS FOR JUDGMENT**

V.A. Miller J.

[1] The issue in this appeal is whether the Appellant is entitled to receive the Canada Child Tax Benefit (“CCTB”) and the Goods and Services Tax Credit (“GSTC”) for her two step-sons, A and T (the “Children”) for the period July 2011 to June 2013.

#### Background

[2] The Appellant received the CCTB and the GSTC in respect of her two sons, E and D. The benefits with respect to E and D are not in dispute. However, on August 19, 2011, the Minister of National Revenue (“Minister”) issued redeterminations in respect of E and D due to a change in the Appellant’s marital status and family income. It was determined that the Appellant had received an overpayment of CCTB and GSTC.

[3] On October 6, 2011, the Appellant applied for the CCTB in respect of her step-sons A and T. Her application was denied and the Appellant objected to the determination of her entitlement to the CCTB for the 2010 and 2011 base taxation years and the GSTC for the 2010 base taxation year. It is the Appellant’s position that the Children were with her 6.5 hours each day during the period in issue. She took care of their needs and she should be entitled to receive the CCTB.

[4] William McRae is the natural father of the two Children and Constance Wagner is their natural mother. The Appellant and William McRae are spouses of one another.

[5] Mr. McRae and Ms. Wagner separated in 2007 and Ms. Wagner received the CCTB and the GSTC in respect of the two Children from the time of separation up to and including the period in issue.

### Facts

[6] The witnesses at the hearing were the Appellant and Ms. Wagner. It was apparent from the interaction between the two witnesses that their relationship is extremely acrimonious.

[7] Mr. McRae and Ms. Wagner entered into a Custody Agreement on June 24, 2009 which was amended on February 23, 2010, April 29, 2013, and August 4, 2013. Only the February 2010 and April 2013 versions of this Custody Agreement are relevant to this appeal.

[8] According to the February 2010 Agreement, Mr. McRae and Ms. Wagner shared joint custody of the Children based on an equal shared parenting agreement which they drafted and signed on March 8, 2009. The February 2010 Agreement contained a "Week Schedule" and a Statutory Holiday schedule which detailed the times that each parent had the Children in his/her care.

[9] The "Week Schedule" provided that Mr. McRae would collect the Children from school on Mondays and drop them off to Ms. Wagner at her place of work at 9 p.m. On Tuesdays and Wednesdays, he would pick them up from Ms. Wagner at 4 p.m.; on Thursdays and every second Friday, Mr. McRae would pick the Children up from his mother at 4 p.m. On Tuesday, Wednesday and Thursday, he would drop the Children off to Ms. Wagner at 9 p.m. Mr. McRae and Ms. Wagner had the Children on alternate weekends. On Mr. McRae's weekend, he had the Children from 4 p.m. on Friday until 9 p.m. on Sunday. On Ms. Wagner's weekend, she had the Children after school on Friday until 5 p.m. on Sunday when Mr. McRae picked them up.

[10] Mr. McRae and Ms. Wagner agreed to changes in the "Week Schedule". For instance, during the period, the Children were never in the care of Mr. McRae's mother. From Tuesday to Friday each week, Ms. Wagner met the Children at 3 p.m. at school and walked with them to her place of employment which was three

to four blocks from their schools. Mr. McRae or the Appellant picked up the Children from Ms. Wagner between 3:20 p.m. and 4 p.m. every Tuesday to Thursday and alternate Fridays. The remaining Fridays, the Children remained in Ms. Wagner's care after school. According to the Appellant, on the weekends that Ms. Wagner had the Children, she or Mr. McRae picked them up on Sunday at 10 a.m. instead of 5 p.m. Ms. Wagner disagreed with this statement. It was Ms. Wagner's evidence that on the weekends when the Children were with her, they were picked up at 5 p.m. Regardless, the Children slept at Mr. McRae's home on Sunday evenings and he took them to school Monday morning.

[11] The "Week Schedule" was followed during spring break, summer break and Christmas break. During the school breaks, the Children remained in Ms. Wagner's care throughout the day until they were picked up at the regular time by the Appellant or Mr. McRae. If Ms. Wagner had to work, she arranged for a baby-sitter to care for the Children until Mr. McRae picked them up.

[12] In 2012, there was a period when Mr. McRae was hospitalized and the Children remained in Ms. Wagner's care during the weekdays. The parties did not state the exact number of times that this occurred. In January 2013, there was a change in the "Week Schedule" so that neither Mr. McRae nor the Appellant picked the Children up from Ms. Wagner. Instead, Ms. Wagner used public transportation to take the Children from New Westminster to Surrey where Mr. McRae or the Appellant met them.

[13] According to the Statutory Holiday Schedule, Mr. McRae and Ms. Wagner each had the Children in alternate years for various holidays. However, both the Appellant and Ms. Wagner testified that the only statutory holidays which were consistently alternated were Christmas Eve, Christmas Day, Boxing Day, New Year's Eve and Halloween. Ms. Wagner worked on most statutory holidays and during these occasions the Children were in the care of Mr. McRae. He returned the Children to Ms. Wagner at 9 p.m. on statutory holidays unless the holiday occurred during his weekend with the Children.

[14] The February 2010 Agreement was amended on April 29, 2013 with the result that Mr. McRae had the Children only on alternate weekends. Otherwise, the Children were in Ms. Wagner's care. On Mr. McRae's weekends, Ms. Wagner took the Children to him at 4 p.m. on Friday and they stayed with him until 8:30 p.m. on Sunday.

[15] Both the Appellant and counsel for the Respondent prepared charts which portrayed the rotating “Week Schedule”. These charts were based on the Schedule attached to the Custody Agreement. The chart prepared by the Appellant (Exhibit A-1, tab 10) was inaccurate and self-serving. The Appellant used a 35 day period and estimated that the Children were with her 321 hours, with Ms. Wagner for 56 hours, at school for 150 hours and “not with us” for 369 hours. The number of hours allocated exceeded the total hours in 35 days. On cross examination she conceded that the hours she allocated to the category “not with us” were actually hours the Children were with Ms. Wagner.

[16] I found that the chart prepared by counsel (Exhibit R-6) was more reliable. According to Exhibit R-6, during a two week period, the Children were with Mr. McRae and the Appellant for 110 hours (33%) whereas the Children were with Ms. Wagner for 166 hours (49%) and the Children were in school for 60 hours (18%).

### Issue

[17] For the purposes of the GSTC benefit, subsection 122.5(6) provides that if parties who have the same qualified dependants do not agree who is entitled to the benefit, the individual who is eligible to receive the CCTB under section 122.6 is the individual who will receive the GSTC. Therefore, with respect to both benefits, the issue is whether the Appellant is an eligible individual in respect of the Children for the period July 2011 to June 2013 in accordance with section 122.6 of the *Income Tax Act* (“*ITA*”).

### Legislation

[18] For the purposes of the CCTB section 122.6 of the *Income Tax Act* defines the following terms

“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,

(g) the presumption referred to in paragraph 122.6 eligible individual (f) does not apply in prescribed circumstances, and

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

“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;

“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,

[19] The prescribed factors to consider in determining whether one parent primarily fulfills the care and upbringing of the Children are listed in section 6302 of the *Income Tax Regulations* (the “*Regulations*”) as follows:

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.

### Analysis

[20] The Children were qualified dependants as defined under section 122.6 for the purposes of the CCTB.

[21] The Children are considered to be the children of the Appellant and she is their “parent” as a result of her marriage to Mr. McRae. See paragraphs 252(1)(c) and 252(2)(a) of the *ITA*.

[22] The presumption in respect of the female parent set out in paragraph (f) of the definition of “eligible individual” does not apply, because both the Appellant and Ms. Wagner applied for the CCTB for the Children for the period July 2011 to June 2013.

[23] In order to qualify as an eligible individual in respect of the Children, I must be satisfied that:

- a) the Appellant resided with the Children during the period,
- b) the Appellant is the parent who primarily fulfilled the responsibility for the care and upbringing of the Children and is not a shared-custody parent in respect of the Children; or
- c) the Appellant is a shared custody parent in respect of the Children.

[24] During the period, the Children had a routine where they spent a considerable amount of time with the Appellant and their father Mr. McRae. I have concluded that for purposes of the CCTB and the GSTC, the Children resided with the Appellant. However, after a review of the evidence in terms of the prescribed factors in section 6302 of the *Regulations*, it is my view that the Appellant was not the parent who primarily fulfilled the responsibility for the care and upbringing of the Children.

#### Prescribed Factors

[25] My conclusions from the evidence are as follows:

- a. Both the Appellant and Ms. Wagner contributed to the care and upbringing of the Children during the period at issue. They each cared for the daily needs of the Children on the respective weekends when the Children were with them.
- b. On weekdays, Ms. Wagner was responsible for getting the Children ready for school, transporting them to and from school, managing the majority of their meals and ensuring they were groomed and rested. On weekdays, the Appellant and Mr. McRae cared for the Children from 3:20 p.m. or 4 p.m. until 9 p.m.
- c. Both the Appellant and Ms. Wagner maintained a secure home for the Children. There was evidence that Ms. Wagner had separate bedrooms for each of the Children. The Children primarily slept at Ms. Wagner's home. In a two week period, the Children slept at Ms. Wagner's home 11 evenings.



- d. Both the Appellant and Ms. Wagner made medical appointments for the Children and transported them to the appointments. Ms. Wagner also made arrangements for the Children to attend counselling and she transported them to their counselling sessions.
- e. Both witnesses testified that Mr. McRae took the Children to their sport activities during the week and on the weekends they were with him. Ms. Wagner took the Children to their sport activities on the weekends they were with her. However, the evidence indicated that Mr. McRae was more involved with the Children's recreational activities.
- f. Both Mr. McRae and Ms. Wagner attended parent teacher meetings. Ms. Wagner also attended other school related activities such as book fairs and school concerts. The Appellant attended the Children's Christmas concerts.
- g. Both the Appellant and Ms. Wagner attended to the Children when they were ill or injured.
- h. Both the Appellant and Ms. Wagner cared for the Children's hygienic needs on the respective weekends the Children spent with them. However, I have concluded that Ms. Wagner was primarily responsible for the hygienic needs of the Children as they groomed, brushed their teeth and showered at her home the majority of the time.

[26] The evidence showed that both the Appellant and Ms. Wagner cared for the Children and provided guidance to them. Their parenting styles may have been different but that is not a consideration in deciding who is entitled to the benefits in issue: *Hrushka v R*, 2013 TCC 335 at paragraph 26. However, as stated earlier, the Children spent most of their time with Ms. Wagner and I have concluded that she primarily fulfilled the responsibility for the care and upbringing of the Children during the period at issue.

### Shared-Custody

[27] If parents are shared-custody parents, then the benefits are to be shared between them. The definition of "shared-custody parent" states that a shared custody parent is an individual who is one of two parents of the qualified dependant where (a) the parents are not co-habiting; and (b) reside with the qualified dependant on an equal or near equal basis; and (c) primarily fulfill the

responsibility for the care and upbringing of the qualified dependant when the qualified dependant is residing with them.

[28] It is clear in the present case that the Appellant is not a shared-custody parent as the Children did not reside with her on an equal or near equal basis during the period. During a two week period, excluding the time the Children were in school, they were with Ms. Wagner for 166 hours or 49% of the time and with the Appellant for 110 hours or 33% of the time. When the hours in school are allocated based on who picked the Children up and who dropped them off to school, Ms. Wagner had the Children 65% of the time.

[29] As a result, the Appellant has not shown that during the period she was the parent who was primarily responsible for the care and upbringing of the Children nor has she shown that she was a shared-custody parent. I find that the Appellant was not an “eligible individual” with respect to the Children during the period July 2011 to June 2013. The appeal is dismissed without costs.

Signed at Ottawa, Canada, this 1<sup>st</sup> day of May 2015.

“V.A. Miller”

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V.A. Miller J.

CITATION: 2015TCC109  
COURT FILE NO.: 2013-3311(IT)I  
STYLE OF CAUSE: JILLIAN K. REYNOLDS AND HER  
MAJESTY THE QUEEN  
PLACE OF HEARING: Vancouver, British Columbia  
DATE OF HEARING: October 9, 2014  
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller  
DATE OF JUDGMENT: May 1, 2015

APPEARANCES:

For the Appellant: The Appellant herself  
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