Docket: 2015-1537(IT)I

BETWEEN:

ANGELIC MAGEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 10, 2015, at Ottawa, Ontario.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Mélanie Sauriol

JUDGMENT

The appeals from the determinations made under the *Income Tax Act* for the 2012 and 2013 base years are allowed, and the determinations are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

i) The Appellant and the father were shared-custody parents in respect to A and C during the month of January 2014; and

ii) The Appellant was the eligible individual in respect to C for the month of July 2014.

In all other respects, the Minister's decision, as set out in the notices of determination of October 20, 2014, March 20, 2015 and May 20, 2015, is confirmed.

Signed at Toronto, Ontario, this 2nd day of June 2016.

"Guy Smith"

Smith J.

Citation: 2016 TCC 142
Date: 20160602
Docket: 2015-1537(IT)I

BETWEEN:

ANGELIC MAGEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Smith J.

[1] Angelic Mageau (the "Appellant") appeals under the informal procedure from a notice of determination dated October 20, 2014 whereby the Minister of National Revenue (the "Minister") determined that she was not the eligible individual for purposes of the Canada Child Tax Benefit ("CCTB") in respect of her two children (A and C) for the 2012 base year (December 2013 to June 2014) and 2013 base year (July 2014 to November 2014).

[2] The Minister also issued a notice of determination dated March 20, 2015 for the 2013 base year (December 2014 to March 2015) as well as a further notice of determination dated May 20, 2015, again for the 2013 base year (April 2015 to June 2015).

[3] While it is admitted that the Appellant was the eligible individual in respect of her two children for purposes of the CCTB up to November 2013, the Minister claims that she was not the eligible individual for the ensuing twelve month period (December 2013 to November 2014) and that the father was the eligible individual during that period.

[4] The Minister has also taken the position that the Appellant was the eligible individual with respect to one child (C) from December 2014 to June 2015, that she was a shared-custody parent with respect to the other child (A) for the period from December 2014 to March 2015 and the eligible individual for A for the ensuing period ending June 2015.

[5] In order to establish the notices of determination, the Minister made the following assumptions:

a. That the Appellant and the father are the parents of A, born in 1999 and of C born in 2002;

b. That the Appellant and the father have been living separate and apart since 2005;

c. That starting on or about November 19, 2013;

i. A and C were living with their father on a full time basis;

ii. C attended school in the vicinity of the father's residence;

iii. A took a school bus to attend school from his father's residence;

iv. The residence of A and C, as registered with the schools they attended, was their father's residence.

d. As of December 2014, the Appellant was living with C, on a full-time basis;

e. From December 2014 to February 2015, the Appellant shared custody of A, with the father, and both were living with A on an equal or near-equal basis;

f. As of March 2015, the Appellant was living with A on a full time basis.

[6] The Appellant claims that she was at all times the eligible individual in respect of both children and disputes the evidence put before the Minister by the father that led to the notices of determination.

[7] The issue in this appeal is therefor whether the Minister has made a proper assessment as summarized in the following table:

Base year 2012 (July 2013 to June 2014)

	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May.	Jun.
Child A.	E	E	E	E	E	I	I	I	I	I	I	I
Child C.	E	E	E	E	E	I	I	I	I	I	I	I
	Legend: I = Ineligible E = Eligible											

Base year 2013 (July 2014 to June 2015)

	Jul.	Aug.	Sep.	Oct.	Nov.	Dec	Jan.	Feb.	Mar.	Apr.	May.	Jun.
Child A.	I	I	I	I	I	½	½	½	½	E	E	E
Child C.	I	I	I	I	I	E	E	E	E	E	E	E
	Legend: I = Ineligible E = Eligible ½ = Shared											

[8] The appeal is allowed but only to the extent described below.

I. Factual background

A. Appellant's version of the facts

[9] The Appellant testified at the hearing. She explained that she has had full custody of A and C since the date of separation from their father in 2005.

[10] Prior to the events described herein, she was residing with her two children and second spouse in Montpellier, located approximately one hour from Gatineau, Quebec. Her children also attended school there.

[11] On November 19, 2013, she went on a two week holiday with her second spouse, leaving the children in the care and custody of a girl-friend who lived nearby.

[12] Upon her return, she realized that the children were living with their father and attending school in Gatineau. However, since she had decided to leave her spouse and relocate to Gatineau, she asked the father to continue to care for the two children while she searched for an apartment and made arrangements for the relocation.

[13] Once she had settled into an apartment in Gatineau, she alleges that the children came to live with her. Since she lived about 15 minutes from the school, she maintains that she borrowed her neighbor's vehicle to drive C to the primary

school located near the father's residence and bus stop, also located nearby, so A could take the school bus.

[14] The Appellant produced a number of documents including receipts for medication, an invoice from A's high-school listing her name and address, a receipt for books borrowed from the local library and a receipt for clothing dated November, 2014.

[15] The Appellant maintained that she paid for all the children's activities, food, clothing medication, school fees and that she often provided money to their father when he arranged activities for them.

[16] During cross-examinations, she acknowledged that there was a dispute with C at the end of January 2014 but she maintains that her daughter only went to stay with her father for 3 weeks while A stayed with her.

[17] She also maintained that C had dance classes every Friday night and that A was in Cadets and that she drove them to and from those activities every week.

[18] In December 2014, the Appellant changed C's school and in March 2015, she also changed A's school. The father did not object to this

B. Father's version of the facts

[19] The father acknowledges that he filed an application for the CCTB in June 2014 on the basis that, since November 2013, he had primary care and custody of the two children.

[20] He explained that after the Appellant left for holidays in November 2013, he received a call from C's school with a complaint that she was not appropriately attired for the weather. He purchased a winter jacket for her. He thought this was irresponsible on the part of the Appellant and was not satisfied with the arrangements made for the care of the children. He felt compelled to intervene and did so by assuming full care and custody of A and C and moving them to his residence in Gatineau. As a result of this, he was required to drive from Gatineau to Montpellier and back every day for school. This was not sustainable and he contemplated a change of schools.

[21] Unable to reach the Appellant to discuss the matter, he decided that the best course of action was to enroll the children in schools located in Gatineau. He did

so providing his residential address for the school and transport companies. He alleges that the Appellant accepted the change upon her return from holidays.

[22] He acknowledges that the two children returned to live with their mother in January 2014 but explains that there was conflict, particularly with C, which led to criminal charges being laid against the Appellant. Both children came back to live with him.

[23] The charges against the Appellant were withdrawn in March 2014 and both A and C resumed visits with her. C stayed with the Appellant during July 2014.

[24] According to the father, there was more conflict in late August or early September, and the two children resided mostly with him from September until December 2014 while seeing the Appellant mostly on weekends.

[25] Various documents were filed as evidence including a letter from the school board and bus transportation company confirming that the address of record was the father's. Also produced was a letter signed by a neighbor as well as other letters from the school with the children's reports cards for the period November 2013 to February 2014 and from September to December 2014. All documents bore the father's residential address.

[26] The father acknowledges that C returned to live with the Appellant in December 2014 and that he shared custody of A with the Appellant from December 2014 to the end of March 2015. He acknowledges that effective April 2015, both children returned to live with the Appellant on a full-time basis.

[27] In summary, the father maintains that he bought clothing for the children, paid for some school expenses, purchased bus passes, made their lunches and helped with their homework. He concedes that the time spent by the children varied a great deal during the period in question but maintains that, with few exceptions, he was the primary care giver and that the children spent about 75% of their time with him from November 2013 to December 2014, diminishing thereafter, as described above.

C. The Law

[28] The CCTB regime is set out in section 122.6 of the *Income Tax Act* (the "Act"). The critical issue in this appeal is to determine who, for the purpose of that provision, meets the definition of "eligible individual".

[29] Prior to the disputed period, it is apparent that the Appellant had the benefit of the presumption set out in paragraph 122.6 *eligible individual* (*f*) in that both A and C resided with her and, as the female parent, she was presumed to be the parent who primarily fulfilled the responsibility for their care and upbringing.

[30] However, the presumption noted above is rebuttable in two important instances i) where both parents meet the definition of "shared-custody parents" or where ii) another parent has filed an application claiming to be the primary caregiver (subsection 6301(1)(*d*) of the *Income Tax Regulations* (the "ITR")).

[31] Section 122.6 contains a number of key definitions as follows:

> *"***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;
>
> (*c*) is resident in Canada or, where the person is the cohabiting spouse or common-law partner of a person who is deemed under subsection 250(1) to be resident in Canada throughout the taxation year that includes that time, was resident in Canada in any preceding taxation year;
>
> . . .
>
> and for the purposes of this definition;
>
> (*f*) where the 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;

> "**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.

[32] Where the court is satisfied that two parents meet the definition of "shared-custody parents" including the requirement that the children reside with both "on an equal or near equal basis" and that both parents "primarily fulfil the responsibility for the care and upbringing" of the children when they are residing with them, the CCTB will be shared equally between them, subject to their adjusted income. But when the children or "qualified dependants" do not reside with both parents "on an equal or near equal basis", the Court must look at the prescribed factors set out in section 6302 of the ITR:

> **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.

[33] Since the Court must determine which parent was the "qualified individual", it is clear that this case is based almost entirely on the credibility of the Appellant and the father. At first blush, both versions of the facts presented by them seem to be diametrically opposed.

[34] The issue of credibility was addressed by the Court in the decision of *Daimsis v The Queen*, 2014 TCC 118 (at paragraph 24):

> [24] It is trite law that I can accept all of the evidence of a witness, none of evidence of the witness or I can accept some of the witness' evidence and reject other portions of the witness' evidence. The oft quoted dictum of Justice O'Halloran of the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 344 (B.C.C.A.), at pages 356 and 357 also comes to mind:
>
> > If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
> >
> > The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with

> the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.
>
> It is through this jurisprudential lens that I assess the credibility of the two principal witnesses. In addition, I assess the credibility of the witnesses making use of human experience, the knowledge of the human condition, the knowledge that memories fade with time and the fact that human beings are most imperfect creatures.
>
> [My emphasis.]

[35] Despite the apparent contradictions, there are consistencies in the testimony presented by the Appellant and the father. Notably, the Appellant does not dispute that she asked the father to continue to care for A and C upon her return from holidays, as she looked for an apartment. Both agree that the children returned to live with the Appellant once she had settled into an apartment in January 2014 but that there was conflict with C that led her to return to live with her father. The duration of that period is disputed.

[36] Also, the Appellant does not dispute that the children changed schools from Montpellier to Gatineau and that the bus stop for A and the school for C were located near the father's residence located approximately 15 minutes from the Appellant's apartment in Gatineau.

[37] The Appellant stated that she drove both children every morning and arranged to pick them up at the end of the day. She indicated that she used a neighbour's vehicle but no evidence was adduced to corroborate this statement. While I have no difficulty believing that the Appellant did so on numerous occasions, I find it improbable and unlikely that she did so every school day during the whole time period in question.

[38] While it might seem that the father is simply trying to take advantage of the fact that he took steps to change the children's school, providing the Court with the documentation collected during that process, I find that his position is more nuanced and therefore more credible. He acknowledges that the time spent by the children with either parent was by no means consistent but expressed the view that by and large the children resided about 75% of their time with him. The father also acknowledged that both children returned for a time to live with the Appellant in January 2014 and that C returned to live with the Appellant for the month of July 2014 and on a full time basis from December 2014.

[39] The Appellant's testimony was much less nuanced. She was defensive and categorical, insisting that the father was lying. While she maintained that she absorbed most of the child-related expenses, she appeared to gloss over the events that transpired during the months in question. Although she admitted in cross-examination that there was some conflict with C that led to charges being laid against her, she simply glossed over that event. This suggests that she has been less than truthful and forthright in her version of the facts and that the Court is not getting the full picture.

[40] Even if I was tempted to give the Appellant the benefit of the doubt, the Appellant must still adduce evidence and convince the Court (looking at the factors set out in regulation 6302 of the ITR) that the children resided with her and that she primarily fulfilled the responsibility for their care and upbringing. Merely insisting that she paid for most of the child-related expenses is not enough.

[41] Moreover, the Appellant has the onus of refuting and demolishing the presumptions on which the assessment is based: *Hickman Motors Ltd. v Canada*, (1999) 2 S.C.R. 336. I am of the view that she has failed to do so.

[42] As indicated by Lamarre-Proulx, J, in *Robitaille v The Queen*, [1997] T.C.J. No.6, para 15, (Tax Court of Canada) unless the Appellant is able to convince the court on a balance of probabilities, the Court is bound by the decision of *The*

Queen v Marshall, 96 D.T.C. 6292, to the effect that the Minister's assumptions must be confirmed:

> 15 According to the long-standing rules of evidence in tax litigation, in order to obtain a reversal of this determination, the burden is on the appellant to show that she was the one who primarily fulfilled the responsibility for the care of the qualified dependent children . . . .

[43] In other words, since the Appellant has not convinced the Court that she was the parent who primarily fulfilled the responsibility for the care of the children, the Minister's notices of determination, as described above, must stand unless there is another reason to modify them.

II. Conclusion

[44] In the end, I find that while the Appellant has incurred more than her share of the child related expenses and weekend activities, her claim that the children resided with her on an exclusive basis is simply not supported by the evidence. Having heard the evidence of both parents, I find that the "preponderance of probabilities" (*Daimsis*, *supra*) favours the father's version of the events.

[45] To conclude, I am not prepared to disturb the conclusions reached by the Minister save for the following two exceptions based on the admissions made by the father:

i) The Appellant and the father were shared-custody parents in respect to A and C during the month of January 2014; and

ii) The Appellant was the eligible individual in respect to C for the month of July 2014.

Signed at Toronto, Ontario, this 2nd day of June 2016.

"Guy Smith"

Smith J.

CITATION:	2006 TCC 142
COURT FILE NO.:	2015-1537(IT)I
STYLE OF CAUSE:	ANGELIC MAGEAU v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
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APPEARANCES:

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