Docket: 2015-4010(IT)I

BETWEEN:

SHERRI ANN MORRISSEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 12, 2016, at St. John's, Newfoundland
By: The Honourable Justice Don R. Sommerfeldt

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Amy Kendell

JUDGMENT

The appeal from the redeterminations made under *Income Tax Act*, in the context of the Canada Child Tax Benefit, pertaining to the 24 months in respect of which the 2012 and 2013 taxation years were the base taxation years, is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Edmonton, Alberta, this 27th day of July 2016.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2016 TCC 178
Date: 20160727
Docket: 2015-4010(IT)I

BETWEEN:

SHERRI ANN MORRISSEY,

Appellant,

and

HER MAJESTY THE QUEEN,

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REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to an Appeal brought by Sherri Ann Morrissey in respect of redeterminations (the "Redeterminations") by the Canada Revenue Agency (the "CRA"), on behalf of the Minister of National Revenue (the "Minister"), to the effect that Ms. Morrissey was a shared-custody parent in respect of her son (who will be identified in these Reasons by the initials "LM") during the 24 months in respect of which the 2012 and 2013 taxation years were the base taxation years (as defined in section 122.6 of the *Income Tax Act*[1]). LM's father is Denis Patrick Murphy, who attended, and testified at, the hearing of this Appeal.

II. ISSUE

[2] In general terminology, the issue in this Appeal is whether Ms. Morrissey is entitled to 100% or only 50% of the Canada Child Tax Benefit (the "CCTB") for the period from July 1, 2013 to June 30, 2015 (the "Benefit Period"). In statutory terms, the broad issue is whether Ms. Morrissey may receive all, or only half, of the overpayment that is deemed by subsection 122.61(1) of the *ITA* to have arisen during each month of the Benefit Period. Subsection 122.61(1.1) of the *ITA*

[1] *Income Tax Act*, R.S.C. 1985, c. 1 (5th supplement), as amended (the "*ITA*").

provides that, if an eligible individual (as defined in section 122.6 of the *ITA*) is a shared-custody parent in respect of a qualified dependant (as defined in section 122.6 of the *ITA*) at the beginning of a month, the deemed overpayment for that month is one-half of the amount that would otherwise be calculated pursuant to subsection 122.61(1) of the *ITA*.

[3] The definition of "shared-custody parent" is set out in section 122.6 of the *ITA*. An individual will be a shared-custody parent in respect of a qualified dependant only if certain conditions are met. For the purposes of this Appeal, the relevant conditions may be summarized as follows:

a) the individual must be one of the two parents of the qualified dependant;

b) the two parents must not be cohabiting spouses or common-law partners of each other;

c) the individual and the other parent must reside with the qualified dependant on an equal or near equal basis; and

d) the individual and the other parent must 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.[2]

[4] It appears (but is not certain)[3] that the prescribed factors to be considered in determining whether a particular individual primarily fulfils the responsibility for

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[2] See the definition of "shared-custody parent" in section 122.6 of the *ITA*.

[3] The opening words of section 6302 of the *ITR* (as defined in the next footnote) state, "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." Those words do not make mention of paragraph (c) of the definition "shared-custody parent." Paragraph (h) of the definition "eligible individual" states that "prescribed factors shall be considered in determining what constitutes care and upbringing"; however, an earlier phrase in that definition indicates that paragraph (h) applies for the purposes of that definition only, and thus not for the definition "shared-custody parent." Nevertheless, as I am not aware of any provision in the ITR that specifically prescribes factors for the purposes of paragraph (c) of the definition "shared-custody parent," and as I am of the view that the same factors should be considered in determining what constitutes care and upbringing for the purposes of both definitions (particularly as the definition "shared-custody parent" contains a reference to paragraph (f) of the definition "eligible individual"), for the purposes of this Appeal, I have determined that it is appropriate to construe the reference in paragraph (c) of the definition "shared-custody parent" to prescribed factors as being a reference to the factors that are

the care and upbringing of a qualified dependant are listed in section 6302 of the *Income Tax Regulations*.[4] Those factors are:

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.

[5] As will be discussed below, I have found that both Ms. Morrissey and Mr. Murphy, when residing with LM, primarily fulfilled the responsibility for the care and upbringing of LM. Accordingly, the predominant issue in this Appeal is whether, during the Benefit Period, Ms. Morrissey and Mr. Murphy resided with LM on an equal or near equal basis.

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prescribed for the purposes of paragraph (h) of the definition "eligible individual." Furthermore, I note that the respective Justices in *Brady v The Queen*, 2012 TCC 240 at ¶16 & 33, *B. (C.P.) v The Queen*, 2013 TCC 118 at ¶14, *Fortin v The Queen*, 2014 TCC 209 at ¶18 & 28, and *Reynolds v The Queen*, 2015 TCC 109 at ¶19, similarly referred to the factors listed in section 6302 of the *ITR* when determining whether a purported shared-custody parent primarily fulfilled the responsibility for the care and upbringing of a particular child when residing with that child.

[4] *Income Tax Regulations*, C.R.C., 1977, c. 945 (the "*ITR*").

III. BACKGROUND

A. General

[6] As indicated above, Ms. Morrissey and Mr. Murphy are the parents of LM, who was born in 2004. Accordingly, during the Benefit Period, LM was approximately 8 to 10 years of age,[5] and he was in grades 4 and 5 at school.[6]

[7] During the hearing of this Appeal, very little evidence was provided in respect of the relationship between Ms. Morrissey and Mr. Murphy. However, it was clear that, throughout the Benefit Period, Ms. Morrissey and Mr. Murphy were not cohabiting spouses or common-law partners of each other.

B. Court Order

[8] After Ms. Morrissey and Mr. Murphy separated, three court orders were issued by the Unified Family Court in the Supreme Court of Newfoundland and Labrador. The third of those orders, which was a Consent Order dated May 11, 2010 (the "Order," which was entered as Exhibit A-2), was applicable during the Benefit Period. The first two paragraphs of the Order read as follows:

> 1. … the parties [i.e., Ms. Morrissey and Mr. Murphy] shall have joint custody and shared parenting of the child of the marriage, namely, [LM].
>
> 2. … the parties will share the parenting of the child of the marriage on a week to week rotation wherein the Father shall pick up the child at 2:00 p.m. on Thursdays and drop off the child to daycare on Wednesday mornings. The Mother will have care of the child from Wednesday until the following Thursday when the Father's schedule will resume at 2:00 p.m.

It appears that the general intent of paragraph 2 of the Order was that, during a typical two-week period, LM would live with Ms. Morrissey for approximately eight days and with Mr. Murphy for approximately six days.

[9] Paragraph 3 of the Order provided a schedule and mechanism whereby, over an alternating two-year cycle, each parent would spend a specified portion of Christmas Eve, Christmas Day, New Year's Eve, New Year's Day and Easter Sunday with LM. As well, paragraph 3 of the Order provided that LM was to be with Ms. Morrissey on Mother's Day and on her birthday, and with Mr. Murphy on Father's Day and on his birthday. In addition, paragraph 3 of the Order provided

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5 Testimony of Ms. Morrissey, Transcript, page 29, lines 1-3.

6 Testimony of Ms. Morrissey, Transcript, page 34, lines 9-11.

that both Ms. Morrissey and Mr. Murphy would be able to spend time with LM on his birthday. Finally, paragraph 3 of the Order also provided that there would be a two-week block each summer when LM would be only with Ms. Morrissey and another two-week block each summer when LM would be only with Mr. Murphy.

[10] Paragraph 4 of the Order provided that during the typical schedule when LM was living with Mr. Murphy (i.e., from a particular Thursday to the following Wednesday), Ms. Morrissey would have the right to have one evening's supper with LM. Similarly, when LM was living with Ms. Morrissey (i.e., from a particular Wednesday until the Thursday just over a week later), Mr. Murphy would have the right to one evening's supper with LM.

[11] During the Benefit Period, LM was in school, rather than daycare, with the result that Ms. Morrissey and Mr. Murphy had informally made applicable revisions to the schedule contemplated by paragraph 2 of the Order. Hence, rather than Mr. Murphy dropping off and picking up LM at daycare, Mr. Murphy would instead drop off or pick up LM at school or after-school care.

[12] In the context of paragraph 4 of the Order, during the Benefit Period, Monday evenings had been selected as the time when LM would have supper with the parent at whose home he was not then living.

[13] The annual schedule set out in paragraphs 3 and 4 of the Order was designed in such a manner that LM spent equal amounts of time with Ms. Morrissey and Mr. Murphy on the designated holidays, birthdays, summer vacations and Monday evenings. Accordingly, for the purposes of this Appeal, it is necessary primarily to consider the biweekly schedule contemplated by paragraph 2 of the Order.

C. Biweekly Schedule

(1) According to the Order

[14] An auditor employed by the CRA reviewed the biweekly schedule set out in paragraph 2 of the Order and then calculated the number of hours in a two-week period that LM would be with Mr. Murphy and the number of hours in the same two-week period that LM would be with Ms. Morrissey, assuming that the schedule was followed precisely. Those calculations were set out in a working paper, which was entered as Exhibit R-1. According to the auditor's calculations,

in a typical two-week period, LM spent 139 hours with Mr. Murphy and 197 hours with Ms. Morrissey. Expressed proportionately, LM spent 41% of the time with Mr. Murphy and 59% of the time with Ms. Morrissey. Those percentages were rounded slightly by the auditor. More precisely (but still with some rounding), LM spent 41.37% of the time with Mr. Murphy and 58.63% of the time with Ms. Morrissey.

[15] The auditor prepared the above working paper on the basis that, for any day when LM spent the beginning and the end of that day with a particular parent, all 24 hours in the day (including the hours when LM was in daycare, school or after-school care) would be counted as hours when LM was residing with that parent. For any Thursday when Mr. Murphy picked up LM from school or after-school care, the auditor treated LM as residing with Ms. Morrissey from 12:00 midnight until 2:00 p.m. (i.e., the auditor used the schedule set out in the Order, which had been designed for the period when LM was in daycare, rather than adapting the schedule to the actual situation, with school ending at 3:00 p.m. and after-school care ending at 5:30 p.m.). For any Wednesday when Mr. Murphy dropped off LM at school, the auditor treated LM as residing with Mr. Murphy from 12:00 midnight until 9:00 a.m., a total of nine hours. For that same day, the auditor treated LM as residing with Ms. Morrissey from 9:00 a.m. to 12:00 midnight, a total of 15 hours.

(2) Based on the actual schedule during the Benefit Period

[16] The 2:00 p.m. transition time on every other Thursday, contemplated by paragraph 2 of the Order, was no longer applicable during the Benefit Period, as LM was then in school. As indicated above, school let out at 3:00 p.m. If the auditor were to have used 3:00 p.m. (rather than 2:00 p.m.) on every other Thursday as the transition time, this would have decreased the number of hours spent by LM with Mr. Murphy in each two-week period to 138 hours and would have increased the number of hours spent by LM with Ms. Morrissey during the same two-week period to 198 hours. Based on this calculation, LM spent 41.07% of the time with Mr. Murphy and 58.93% of the time with Ms. Morrissey.

(3) Concerns about the working paper

[17] I have concerns about the calculations set out in the working paper (Exhibit R-1) for the following reasons:

a) the working paper was prepared in accordance with the schedule that was in effect before LM began school, rather than the schedule that was actually in effect during the Benefit Period; and

b) all of the hours during which LM was in school on a transitional day (i.e., a Wednesday when Mr. Murphy dropped off LM at school in the morning or a Thursday when Mr. Murphy picked up LM from school or after-school care in the afternoon) were counted as hours when LM was residing with Ms. Morrissey.

[18] Subject to the comments made below, it seems to me that, if the school hours on one of the transitional days were to be counted as hours when LM was residing with Ms. Morrissey and the school hours on the other transitional day were to be counted as hours when LM was residing with Mr. Murphy, the calculation would be more equitable. As well, this approach is in keeping with the understanding of Ms. Morrissey. During her testimony, she stated that she was supposed to have LM from 4:00 p.m. on a transitional Wednesday until 4:00 p.m. on the following Thursday.[7]

[19] If the six school hours (i.e., from 9:00 a.m. to 3:00 p.m.) on each transitional Wednesday were to be treated as hours when LM was residing with Mr. Murphy and if the six school hours on each transitional Thursday were to be treated as hours when LM was residing with Ms. Morrissey, in a typical two-week period, LM would spend 144 hours with Mr. Murphy and 192 hours with Ms. Morrissey. This would correspond to LM spending 42.86% of the time with Mr. Murphy and 57.14% of the time with Ms. Morrissey.

[20] The calculations in the preceding paragraph were based on the use of 3:00 p.m. on alternating Wednesdays and Thursdays as the transitional times. As indicated above, Ms. Morrissey testified that it was her understanding that 4:00 p.m. on alternating Wednesdays and Thursdays was to be used as the transitional time. This would not alter the outcome of the calculation set out in the preceding paragraph, as the result would still be that, in a two-week period, LM would spend 144 hours with Mr. Murphy and 192 hours with Ms. Morrissey.

D. Ms. Morrissey's Concern

[21] One of the major concerns expressed by Ms. Morrissey was that the biweekly schedule set out in paragraph 2 of the Order was not always followed. In

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[7] Testimony of Ms. Morrissey, Transcript, page 27, lines 13-14.

particular, if there was no school or if LM was sick on a transitional Wednesday, according to Ms. Morrissey, Mr. Murphy took LM to Ms. Morrissey's home at 7:30 a.m., before Mr. Murphy went to work, with the result that, in her view, she had LM for an extra seven and a half hours on that day.[8] As she saw it, when this occurred, it was as though she had LM for nine (rather than eight) days during a two-week period, and Mr. Murphy had LM for five (rather than six) days during that period. Her view was expressed as follows:

> … I feel that I have him definitely more than 50 percent of the time, probably more than 60 percent of the time because of that extra day.[9]

[22] The concern expressed by Ms. Morrissey was, whether knowingly or unknowingly, actually addressed for the most part by the auditor in the calculations set out in the working paper entered as Exhibit R-1. As noted above, the auditor treated the school hours (specifically, the hours between 9:00 a.m. and 2:00 p.m., although this should have been 3:00 p.m.) on each transitional Wednesday as hours when LM was living with Ms. Morrissey. Thus, if Mr. Murphy brought LM to Ms. Morrissey's home at 7:30 a.m. on each transitional Wednesday, using the general premise of the working paper (i.e., that the school hours on transitional Wednesdays had already been allocated to Ms. Morrissey), Ms. Morrissey would have had LM for only an additional hour and a half in each two-week period. Expressed in percentage terms, if the auditor's 2:00 p.m. transitional time every other Thursday and the auditor's allocation to Ms. Morrissey of school hours on transitional Wednesdays were to be used, and if an additional hour and a half on each transitional Wednesday (i.e., from 7:30 a.m. to 9:00 a.m.) were to be allocated to Ms. Morrissey, LM would have spent 40.92% of the time with Mr. Murphy and 59.08% of the time with Ms. Morrissey.

[23] As mentioned in the preceding paragraph, the calculations set out in that paragraph assumed that the transitional time every other Thursday was 2:00 p.m.. If that time were to be changed to 3:00 p.m. (corresponding to the end of the

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[8] Testimony of Ms. Morrissey, Transcript, page 27, lines 15-20. Although Ms. Morrissey stated in her testimony that, on Wednesdays when there was no school or when LM was sick, Mr. Murphy brought LM to her home at 7:30 a.m., during her argument she said that she got LM at 8:00 a.m. on those Wednesdays; see Transcript, page 109, lines 5-6. While there is a discrepancy between those two statements, I do not consider it to be significant. Furthermore, to give Ms. Morrissey the benefit of the doubt, for the purposes of these Reasons, I have used 7:30 a.m., rather than 8:00 a.m., as the time when, according to Ms. Morrissey, Mr. Murphy took LM to Ms. Morrissey's home on transitional Wednesdays when there was no school or when LM was sick.

[9] Testimony of Ms. Morrissey, Transcript, page 28, lines 9-11.

school day), LM would have spent 40.62% of the time with Mr. Murphy and 59.38% of the time with Ms. Morrissey.

E. Tracking and Allocation of Hours

[24] The only documentary evidence concerning the number of hours spent by LM with each of his parents during the Benefit Period was the working paper (Exhibit R-1) prepared by the auditor. Neither Ms. Morrissey nor Mr. Murphy kept a log, diary or other record in which she or he recorded the actual number of hours when LM was with each parent, nor did either parent prepare a table or other calculation similar to the auditor's working paper. Accordingly, the only evidence which I had to consider was the schedule contemplated by the Order (which was outdated, as it related to the period before LM began school), the auditor's working paper and the oral testimony of Ms. Morrissey and Mr. Murphy. While I found both Ms. Morrissey and Mr. Murphy to be sincere and genuine in their respective testimonies, my sense was that they were each speaking in generalities rather than specifics. As well, some of the oral evidence which they provided concerning the biweekly schedule appeared to relate to chronological periods before or after the Benefit Period.

[25] I am sure that there were some transitional Wednesdays when LM was not in school (because of either a school holiday or an illness) and when Ms. Morrissey had LM from 7:30 or 8:00 a.m. for the rest of the day. However, I am not convinced that this happened each and every transitional Wednesday.

F. Summary

[26] In determining the proportionate number of hours spent by LM with each of his parents during a typical two-week period, I have considered several approaches, as summarized below (progressing from the least favourable to the most favourable, insofar as Ms. Morrissey is concerned):

> a) If the schedule set out in the Order is modified to account for LM being at school during the Benefit Period, rather than still being in daycare, and if the six school hours (i.e., from 9:00 a.m. to 3:00 p.m.) on each transitional Wednesday are treated as hours when LM was living with Mr. Murphy and the six school hours on each transitional Thursday are treated as hours when LM was living with Ms. Morrissey, in a typical two-week period

during the school year, LM spent 57.14% of the time with Ms. Morrissey and 42.86% of the time with Mr. Murphy (see paragraph 19 above).

b) If the school hours on each transitional Wednesday are allocated to Ms. Morrissey, and if a 2:00 p.m. end-of-school time on transitional Thursdays is used (as was done by the auditor in the working paper), LM spent 58.63% of the time with Ms. Morrissey and 41.37% of the time with Mr. Murphy (see paragraph 14 above).

c) If the school hours on each transitional Wednesday are allocated to Ms. Morrissey, and if a 3:00 p.m. end-of-school time on transitional Thursdays is used, LM spent 58.93% of the time with Ms. Morrissey and 41.07% of the time with Mr. Murphy (see paragraph 16 above).

d) If I were to accept (which I do not) that Mr. Murphy brought LM to Ms. Morrissey's home at 7:30 a.m. on each and every transitional Wednesday, and if a 2:00 p.m. end-of-school time on transitional Thursdays were to be used, LM would have spent 59.08% of the time with Ms. Morrissey and 40.92% of the time with Mr. Murphy (see paragraph 22 above).

e) If the time after 7:30 a.m. on each and every transitional Wednesday were to be allocated to Ms. Morrissey, and if a 3:00 p.m. end-of-school time on transitional Thursdays were to be used, LM would have spent 59.38% of the time with Ms. Morrissey and 40.62% of the time with Mr. Murphy (see paragraph 23 above).

The approaches summarized above result in percentage allocations that fall within a relatively narrow range, i.e., from 57.14%/42.86% to 59.38%/40.62%. I will comment further in respect of the comparative proportions later in these Reasons.

G. Care and Upbringing

[27] Paragraph (c) of the definition "shared-custody parent" requires that a parent 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, which, as indicated above, appear to be set out in section 6302 of the *ITR*. For the reasons discussed below, I have found that both Ms. Morrissey and Mr. Murphy, when residing with LM, primarily fulfilled the responsibility for the care and upbringing of LM.

(1) Supervision of daily activities and needs

[28] I am satisfied that, when Ms. Morrissey and Mr. Murphy were respectively residing with LM, they each took responsibility for the supervision of his daily activities and needs. For instance, Ms. Morrissey testified that she regularly packed LM's lunch and recess snack,[10] and she purchased LM's clothes, coats and boots.[11] While there may have been some transitional Wednesdays when Mr. Murphy took LM to Ms. Morrissey's home in the morning before school, without having packed a lunch or recess snack for LM, I am satisfied that, overall, Mr. Murphy looked after LM's daily needs.[12] In addition, when LM was staying with Mr. Murphy, Mr. Murphy oversaw LM's homework, studied with LM and generally helped LM with his school learning exercises and projects.[13]

(2) Maintenance of secure environment

[29] There was no evidence to suggest that either Ms. Morrissey or Mr. Murphy failed to maintain a secure environment for LM. During his testimony, Mr. Murphy produced photographs of LM's bedroom. Those photographs depicted a clean, tidy and secure place for LM to live. I am confident that LM's bedroom in Ms. Morrissey's home was also clean, tidy and secure.

(3) Arrangement of, and transportation to, medical care

[30] The evidence clearly indicated that Ms. Morrissey and Mr. Murphy each made arrangements for LM to receive appropriate medical care as needed. When LM was staying with Ms. Morrissey, if he required medical attention, she generally took him to the clinic of Dr. Robert Woodland or to the emergency department of the Janeway Child Health Centre (the "Janeway"). Whenever Ms. Morrissey took LM to the Janeway, she would so advise Mr. Murphy by telephone, whereupon he would usually (but not always) meet them there. When LM was staying with Mr. Murphy, if a medical need arose, Mr. Murphy usually took LM to see Dr. N. Browne at the Cornwall Clinic. It was my sense that, when Mr. Murphy took LM to see Dr. Browne, Mr. Murphy did not always tell Ms. Morrissey, such that there may have been times when LM received medical care without her being aware of it.

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10 Testimony of Ms. Morrissey, Transcript, page 28, lines 14-15.

11 Argument by Ms. Morrissey, Transcript, page 129, line 26 to page 130, line 2. Although this statement was made by Ms. Morrissey during her argument, I accept the veracity of the statement.

12 Testimony of Mr. Murphy, Transcript, page 94, lines 11-13.

13 *Ibid.*, page 94, lines 11-19.

[31] In July 2014, when LM was staying with Mr. Murphy and Ms. Morrissey was out of town, LM seriously cut his knee, such that he required surgery at the Janeway (where he had been taken by Mr. Murphy) and 29 stitches to close the wound. During his testimony, Mr. Murphy suggested that Ms. Morrissey did not make a reasonable effort to come immediately to the hospital.[14] However, I am satisfied that Ms. Morrissey was sufficiently far away and that she had every reason to believe that LM's medical needs were being well managed at the Janeway, such that I do not consider this to be a situation that might suggest that Ms. Morrissey did not attend to LM's medical care.

(4) Educational, recreational and athletic activities

[32] Both Ms. Morrissey and Mr. Murphy were extremely involved in facilitating and attending LM's educational, recreational and athletic activities. Ms. Morrissey looked after most of the annual registrations for the baseball, soccer and hockey programs in which LM enrolled, and Mr. Murphy looked after the registration for one season of rugby.[15] Mr. Murphy was LM's goalie coach and baseball coach. He attended all of LM's practices and almost all of his games, even when LM was staying with Ms. Morrissey. During hockey season, Mr. Murphy consistently assisted LM in putting on his goalie equipment for games and practices. Ms. Morrissey went to all but one of LM's games. If LM was staying with Ms. Morrissey when there was a practice, she generally drove LM to the practice, although she did not stay for it.[16]

[33] One afternoon a week, during the school year, Mr. Murphy ran an after-school athletic program at LM's school. LM and his classmates, as well as other students, participated in the program.[17]

[34] I am satisfied that both Ms. Morrissey and Mr. Murphy were heavily involved in the arrangement of, participation in, and transportation to, LM's educational, recreational and athletic activities.

(5) Attendance to needs when ill

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[14] Testimony of Ms. Morrissey, Transcript, page 43, lines 4-17; and testimony of Mr. Murphy, Transcript, page 91, lines 10-25.

[15] Testimony of Ms. Morrissey, Transcript, page 41, lines 3-21.

[16] Testimony of Ms. Morrissey, Transcript, page 41, line 26 to page 42, line 13; testimony of Mr. Murphy, page 81, line 18 to page 88, line 12.

[17] Testimony of Mr. Murphy, Transcript, page 78, lines 16-19 and page 81, lines 1-6.

[35] Ms. Morrissey diligently attended to LM's needs when he was ill. In fact, she is of the view that she did more than her share, as the school administrators would typically call her, rather than Mr. Murphy, if LM became sick at school. As mentioned above, according to Ms. Morrissey, if LM was sick on a transitional Wednesday, Mr. Murphy generally took LM to Ms. Morrissey's home on his way to work, leaving Ms. Morrissey, before going to her own place of employment, to arrange for LM to be cared for by someone else, usually Donna Collens, who is Ms. Morrissey's sister. As well, if LM needed a prescription medication while staying with Ms. Morrissey, she typically purchased it for him.[18]

[36] After Mr. Murphy began to work for Canada Post, he qualified for health care benefits. He provided a copy of his benefit card to Ms. Morrissey to enable her to defray the cost of prescription medication;[19] however, it appears that Ms. Morrissey generally did not avail herself of Mr. Murphy's health care insurance.[20]

[37] During LM's convalescence, after his knee injury, on the days when LM was staying with Mr. Murphy, he took LM to the home of his (i.e., Mr. Murphy's) mother, who looked after LM while Mr. Murphy was at work. As it was summer and postal duties were light, Mr. Murphy was usually finished his work by 12:30 p.m. or 1:00 p.m., whereupon he would pick up LM and take him back to his (i.e., Mr. Murphy's) home.[21]

[38] I am satisfied that both Ms. Morrissey and Mr. Murphy attended to the needs of LM when he was ill.

(6) Attendance to hygienic needs

[39] Although very little evidence was provided by either Ms. Morrissey or Mr. Murphy concerning the manner in which she or he attended to LM's hygienic needs, it is my impression that they each attended to those needs when LM was living with her or him.

[40] Mr. Murphy stated that he generally tried to schedule LM's dental appointments for a day when LM was staying with him, so that he could take LM

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18 Testimony of Ms. Morrissey, Transcript, page 27, lines 20-28; page 44, lines 13-20.
19 Testimony of Mr. Murphy, Transcript, page 97, lines 8-16.
20 Testimony of Ms. Morrissey, Transcript, page 44, lines 17-24.
21 Testimony of Mr. Murphy, Transcript, page 93, lines 1-9.

to the dentist; however, he also acknowledged that on occasion Ms. Collens took LM to the dentist.[22]

(7) Provision of guidance and companionship

[41] Based on Ms. Morrissey's testimony, I am satisfied that she provided guidance and companionship to LM.

[42] During the hearing, Mr. Murphy stated that before LM was born, his work required him to travel extensively. In order to be involved in his son's life, Mr. Murphy quit that job, eventually obtained employment with Canada Post, and ultimately obtained his own delivery route, whereupon Mr. Murphy was required to be at work each day only so long as it was necessary to complete the day's deliveries on the route. This generally enabled Mr. Murphy to finish work each day in early or mid-afternoon, so as to have more time with his son (although during the Christmas season Mr. Murphy was frequently required to work longer hours, often to about 5:00 p.m., to complete his deliveries).[23] I am satisfied that Mr. Murphy endeavoured to be involved in LM's life[24] and to provide guidance and companionship to LM.

(8) Existence of a court order

[43] The Order has been discussed extensively above. Nothing further needs to be said here.

(9) Summary

[44] For the reasons set out above (together with other oral evidence presented at the hearing), I am satisfied that both Ms. Morrissey and Mr. Murphy primarily fulfilled the responsibility for the care and upbringing of LM when they were respectively residing with him.

[45] Without detracting from the efforts of Ms. Morrissey and Mr. Murphy to care for LM, I would like to acknowledge the invaluable role of Donna Collens (who, as mentioned, is Ms. Morrissey's sister and LM's aunt). Ms. Collens frequently looked after LM after school, occasionally on weekends, and sometimes

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[22] Testimony of Mr. Murphy, Transcript, page 89, lines 9-23.

[23] Testimony of Mr. Murphy, Transcript, page 96, lines 17-28, page 97, lines 1-7 and page 102, lines 14-15.

[24] Testimony of Mr. Murphy, Transcript, page 97, lines 25-26.

on summer-vacation days, as well as when he was ill. Her dedication and service are commendable.

IV. ANALYSIS

A. Jurisprudence

(1) Meaning of "equal or near equal basis"

[46] The definition of "shared-custody parent" (as set out in section 122.6 of the *ITA*), the CCTB-sharing provision in subsection 122.61(1.1) of the *ITA* and other related statutory provisions took effect on July 1, 2011. Since that time, several cases have considered what it means for the parents of a qualified dependant to reside with the qualified dependant on an "equal or near equal basis." A review of those cases suggests that the meaning of the phrase "equal or near equal basis" has been determined more by reference to quantitative factors than to qualitative factors. However, as Woods J noted in *Van Boekel*,[25] while the time spent by each parent with the particular child must be considered, in some situations a strict numerical analysis may not be sufficient:

> … 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.…[26]

[47] It may be useful to begin the analysis with a review of the dictionary meanings of "equal" and "near." The *Canadian Oxford Dictionary* provides a number of meanings for the word "equal," when used as an adjective. The relevant portions of the meanings which appear to be most applicable in the current context are:

> 1 … identical in amount, size, number, value, intensity…. 2 evenly proportioned or balanced…. 3 having the same … status…. 4 uniform in operation, application or effect.[27]

[48] The above definition confirms that the word "equal" has a quantitative element, as indicated by the references to being identical in amount, size, number or value. However, the definition also suggests that, in some contexts, the word

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25 *Van Boekel v The Queen*, 2013 TCC 132.

26 *Ibid.*, ¶22.

27 *Canadian Oxford Dictionary*, 2d ed. (Don Mills: Oxford University Press, 2004), p. 504.

"equal" can have a more qualitative meaning, as evidenced by the references to being evenly proportioned or balanced, having the same status, or being uniform in operation, application or effect. Accordingly, there may be situations where non-numerical or unmeasurable factors should be considered in determining whether parents reside with a child on an equal or near equal basis. However, an analysis of those factors should not preclude a consideration of numerical or measurable factors, in particular the amount of time spent by each parent with the child.

[49] The same dictionary defines the word "near," when used as an adverb (which it is in the phrase "equal or near equal basis"), as meaning "1 … to or at a short distance in space or time.… 2 closely.… 3 … almost, nearly…."[28] Thus, in the statutory definition of the term "shared-custody parent," the phrase "near equal" presumably means a short amount of time from being equal, closely equal, almost equal or nearly equal.

(2) Principles to be applied

[50] Since, as noted in *Van Boekel*, it is necessary to compare the time spent by each parent with the qualified dependant, a numerical comparison is an essential factor to consider (although, as Woods J observed, in some situations other circumstances may also require consideration). In undertaking a numerical analysis, it is important to note that in *Brady* Campbell J indicated that the purpose of the phrase "equal or near equal" is to ensure that, where there are disproportionate differences between parents, they will not be shared-custody parents, but also to provide that parents whose circumstances exhibit only slight differences or close differences will come within the statutory term.[29]

[51] In applying the concept of "near equal," the term should not be restricted to only a very slight variation from a 50%/50% split.[30] However, the statutory provision does not encompass a very wide variation from equal residence.[31]

(3) Review of cases

[52] Each of the cases that have determined whether two parents resided with a child on an equal or near equal basis has, in making that determination, considered

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28 *Ibid.*, p. 1036.

29 *Brady*, *supra* note 3, ¶27.

30 *Ibid*.

31 *Van Boekel*, *supra* note 25, ¶21.

the amount of time that the child spent with each parent. A brief review of those cases, in chronological order, follows.

[53] In *Brady*, the mother's evidence was to the effect that, over the course of a week (which, for reasons unexplained, the mother calculated as having 160 (rather than 168) hours), the children spent 55% of the time with her and 45% of the time with their father. Using a 168-hour week, Campbell J determined that the children were with the mother for 54.17% of the time,[32] meaning that they were with their father for 45.83% of the time. Campbell J held that there was only a slight difference between the amount of time spent by each parent with the children, such that she concluded that the parents resided with the children on a near equal basis.[33]

[54] In *B. (C.P.)*, the separation agreement provided that the child was to spend alternate weeks with each parent.[34] While not expressly stated, it appears as though C. Miller J decided the case on the basis that the parents resided with the child on an equal basis.

[55] In *Van Boekel*, a chart or schedule prepared by the mother set out the blocks of time (morning, afternoon, evening or night) in a typical two-week period during which the children were with the mother and the father respectively. Based on the schedule, it appeared that the children spent approximately 60% of the time with their mother and 40% of the time with their father. Counsel for the Crown submitted that this was "near equal," whereas counsel for the mother submitted that a 60%/40% split was not near equal. The separation agreement between the parents provided that, if a particular parent was not available to care for the children at a particular time, that parent was responsible to obtain a replacement caregiver; however, the other parent had the right (referred to as a right of first refusal) to care for the children at that time in priority to a third-party caregiver. The father was frequently away and the mother generally exercised her right of first refusal, prompting her to argue (it seems without documentary support) that the split was closer to 75%/25%, rather than 60%/40%. In those circumstances, without calculating the actual proportionate split, and without indicating whether a 60%/40% split (if such were to have been proven) would, or would not, have been "near equal," Woods J held that the children did not reside with their parents on a

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32 *Brady*, *supra* note 3, ¶ 20 & 31.

33 *Ibid.*, ¶36.

34 *B. (C.P.)*, *supra* note 3,¶3.

near equal basis. Rather, without using a formulaic or arithmetic approach, she concluded that the children were with the mother much more than with the father.[35]

[56] In *Hrushka*,[36] the child spent alternating weekends with each parent; however, on weekdays the child spent most of her time (other than Wednesday evenings) at her mother's home. Woods J held that this did not satisfy the near equal residence requirement.[37]

[57] In *Mitchell*,[38] two boys resided with their father "the majority of the time." V. A. Miller J held that the boys did not reside with their parents on an equal or near equal basis, such that the parents were not shared-custody parents.[39]

[58] In *Fortin*, an agreement between a father and a mother, in the context of a custody dispute, acknowledged that, approximately six months before the agreement was made, an interlocutory judgment had granted physical custody of the children to the mother and access to the father six days out of fourteen (meaning that the children spent 42% of the time with their father). The agreement also acknowledged that the parents had, in fact, shared custody of the children on a 43%/57% basis. At the hearing of the appeal concerning the father's claim to half of the CCTB, the father testified that he was off work and with the children 43% of the time every month. The mother did not satisfy Lamarre J (as she then was) that the children were with her for more than 57% of the time. Lamarre J stated that it seemed that the parents regularly shared custody of the children on a 43%/57% basis. She held that the parents resided with their children on a near equal basis, such that the parents were shared-custody parents.[40]

[59] In *Reynolds*, during a typical two-week period, the children were with their mother 49% of the time, with their father and stepmother 33% of the time and in school 18% of the time, and the children slept at the mother's home eleven of the fourteen nights. The mother usually took the children to school and picked them up from school, while the father and stepmother had the children during the late afternoon and evening of most days. V.A. Miller J treated most of the school hours as time when the children were with their mother, as she was the person who took them to school and picked them up from school. Based on this allocation, Miller J

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35 *Van Boekel*, *supra* note 25, ¶13, 15, 23 & 31.
36 *Hrushka v The Queen*, 2013 TCC 335.
37 *Ibid.*, ¶10 & 28.
38 *Mitchell v The Queen*, 2014 TCC 66.
39 *Ibid.*, ¶14.
40 *Fortin*, *supra* note 3, ¶14, 21, 23, 26 & 27.

held that the children were with their mother 65% of the time and with their father and stepmother 35% of the time, which was not a near equal basis.[41]

[60] In *Levin*,[42] a consent judgment in matrimonial proceedings provided that, over a two-week period, the children were to reside with their mother for eight days and their father for six days. While this rotation cycle was in place, during a period that was not the subject of litigation, it appears that the father received half of the CCTB. Based on that schedule (with an 8/6 split), the children spent 57% of their time with their mother and 43% of their time with their father. However, as time passed, the children began to spend more and more of their time with their mother. V.A. Miller J, who was considering a period when the 8/6 split was no longer being followed, held that the parents were no longer residing with their children on a near equal basis, such that they were not then shared-custody parents.[43]

[61] Most of the above cases, in determining whether parents resided with their children on a near equal basis, considered the amount of time spent by each parent with the children, as expressed proportionately on a percentage basis. The proportionate splits in those cases may be summarized as follows:

a) *Brady*: A 55%/45% split (which, more precisely, may have been a 54.17%/45.83% split) was a near equal basis.

b) *Fortin*: A 57%/43% split was a near equal basis.

c) *Levin*: An historical 57%/43% split, which related to a period that was not in issue before the Court, was apparently a near equal basis.

e) *Van Boekel*: No decision was made as to whether an alleged 60%/40% split was a near equal basis.

f) *Reynolds*: A 65%/35% split was not a near equal basis.

(4) Documentary evidence of time allocation

[62] In *Brady*,[44] *Van Boekel*,[45] *Fortin*[46] and *Reynolds*,[47] the parties provided charts, tables, schedules or calendars to show the amount of time that the children

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41 *Reynolds, supra* note 3, ¶16, 25 & 28.

42 *Levin v The Queen*, 2015 TCC 117.

43 *Ibid.*, ¶6-9, 13 & 20.

44 *Brady, supra* note 3, ¶20.

in question spent with their respective parents. As mentioned above, no such documentary evidence was provided to me in respect of this Appeal, other than the working paper (Exhibit R-1) prepared by the auditor.

B. Application

[63] Ms. Morrissey submitted that, during the Benefit Period, she resided with LM more than 60% of the time. In endeavouring to confirm whether that was the situation, I have considered a number of approaches, five of which are summarized in paragraph 26 above. However, as there was no specific evidence concerning the actual number of transitional Wednesdays on which Mr. Murphy took LM to the home of Ms. Morrissey before he went to work, I cannot determine precisely the proportionate amount of time that Ms. Morrissey resided with LM. The best that I can do is to find that the proportion of the time that she resided with LM was somewhere between 57.14% and 59.38% (see subparagraphs 26(a) and (e) above).

[64] As noted above, in *Brady* a 55%/45% split was a near equal basis, in *Fortin* a 57%/43% split was a near equal basis, and in *Levin* an apparent 57%/43% split was seemingly a near equal basis. In my view, the split in this case (somewhere between 57.14%/42.86% and 59.38%/40.62%) was sufficiently close to the splits in *Brady*, *Fortin* and *Levin* for me to conclude that Ms. Morrissey and Mr. Murphy resided with LM on a near equal basis.

V. CONCLUSION

[65] It is my impression that both Ms. Morrissey and Mr. Murphy are loving and caring parents, and that they each have LM's best interests at heart. These Reasons should not be construed as a criticism of the manner in which either Ms. Morrissey or Mr. Murphy cared for LM.

[66] In response to Mr. Murphy's application to receive half of the CCTB and Ms. Morrissey's claim to receive the entire CCTB, the Minister issued the Redeterminations, which determined that, during the Benefit Period, Ms. Morrissey and Mr. Murphy were shared-custody parents. Ms. Morrissey has the burden of demolishing the Minister's assumed facts and proving that the Redeterminations are incorrect. Given the general, non-detailed nature of the oral testimony, the lack of documentary evidence and my finding in respect of the

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45 *Van Boekel, supra* note 25, ¶8-11.

46 *Fortin, supra* note 3, ¶6 & 8.

47 *Reynolds, supra* note 3, ¶15-16.

proportionate amount of time spent by Ms. Morrissey and Mr. Murphy respectively with LM, that burden has not been met. Ms. Morrissey has not proven on a balance of probabilities that she and Mr. Murphy were not residing with LM on a near equal basis.

[67] To reiterate I have found that the proportion of the time spent by Ms. Morrissey and Mr. Murphy respectively with LM was somewhere between a 59.38%/40.62% split and a 57.14%/42.86% split. As this range is not significantly different from the 57%/43% split in the *Fortin* and *Levin* cases and is relatively close to the 55%/45% split in the *Brady* case, I have concluded that, during the Benefit Period, Ms. Morrissey and Mr. Murphy resided with LM on a near equal basis and were shared-custody parents. Therefore, Ms. Morrissey's Appeal is dismissed, without costs.

Signed at Edmonton, Alberta, this 27th day of July 2016.

"Don R. Sommerfeldt"

Sommerfeldt J.

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COURT FILE NO.:	2015-4010(IT)I
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