Docket: 2014-4013(IT)I

BETWEEN:

CAROLYN BORGSTADT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on July 16, 2015 and continued on May 9, 2016 at Toronto, Ontario.

Before: The Honourable Justice Réal Favreau

Appearances:

| | |
|---|---|
| For the Appellant: | The Appellant herself |
| Counsel for the Respondent: | Erin Strashin |

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**JUDGMENT**

The appeal from the redetermination of the Minister of National Revenue with respect to the Canada Child Tax Benefit for the 2011 base taxation year is dismissed in accordance with the attached reasons for judgment.

Signed at Montreal, Canada, this 29th day of August 2016.

"Réal Favreau"

Favreau J.

Citation: 2016 TCC 185
Date: 20160829
Docket: 2014-4013(IT)I

BETWEEN:

CAROLYN BORGSTADT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

Favreau J.

[1] Ms. Borgstadt is appealing by way of the informal procedure, the Minister of National Revenue's (the "Minister") partial denial of the Canada Child Tax Benefit ("CCTB" ) for her two children for the 2011 base taxation year.

[2] The appellant's entitlement for the 2011 base taxation year CCTB which included the National Child Benefit Supplement ("NCBS" ) and the Child Disability Benefit ("CDB" ), was redetermined by the Minister by way of a CCTB notice dated May 17, 2013, based on the appellant's "separated" marital status and her sharing custody of her son and daughter with their other parent ("Vern" ). She was the caregiver of both children equally with Vern or Vern's common law spouse.

[3] The appellant filed a notice of objection for the 2011 base taxation year CCTB redetermination on June 1, 2013 for her son only.

[4] In determining the appellant's entitlement to the CCTB for the 2011 base taxation year, the Minister made the following assumptions of fact:

> (a) the Appellant and Vern Borgstadt ("Vern") are the natural parents of two children, a son born in May 1997 and a daughter born in February 1999, respectively;

(b) the Appellant and Vern have lived separate and apart due to a breakdown in their relationship since May 2006;

(c) pursuant to a written Separation Agreement dated September 26, 2006, the Appellant and Vern shared custody of the two children;

(d) Vern applied for the CCTB for each of the children in February 2009;

(e) Vern lived in a common-law relationship with an individual other than the Appellant throughout the relevant times;

(f) at all relevant times, the children lived with each of their parents on a week-on/week-off rotational period;

(g) at all relevant times, the Appellant and Vern, with his common-law spouse, each resided with the children fifty percent of the time;

(h) each parent was the primary caregiver of their son throughout each of their week-on periods;

(i) each parent was the primary caregiver of their daughter throughout each of their week-on periods from July 1, 2012 to February 28, 2013 and from May 1, 2013 to June 30, 2013;

(j) the Appellant and Vern's common-law spouse were each the primary caregiver of the Appellant's daughter throughout each of their week-on periods from March 1, 2013 to April 30, 2013;

(k) both the Appellant and Vern (or Vern's common-law spouse, as applicable) equally shared, but were not limited to, the following responsibilities with respect to each of the two children throughout their applicable week-on periods:

(i) they maintained a safe and secure home
(ii) they supervised their daily needs and activities
(iii) they regularly encouraged good health habits
(iv) they attended doctor/dentist appointments
(v) they cared for the children (made arrangements for care) when the children were sick
(vi) they participated in educational/recreational activities
(vii) they provided guidance/companionship.

[5] The issue is whether the appellant is the only individual who should be entitled to the entire CCTB for her son for the 2011 base taxation year benefit period, that is from June 2012 to July 2013 (the "Period").

[6] This is the third time that the appellant is appealing to this Court from the determinations of the Minister with respect to the CCTB for her two children.

[7] Firstly, this matter had been dealt with by Chief Justice Rip, as he then was, for the 2007, 2008 and 2009 base taxation years. Chief Justice Rip had determined there was shared-custody with respect to the daughter, and, therefore, the CCTB was to be shared as assessed by the Minister. With respect to the son, Chief Justice Rip had determined that the mother was the primary caregiver during the relevant periods and he had allowed the appeal from the determination of the Minister in respect of the son only.

[8] Secondly, this matter had been dealt with by Justice C. Miller for the 2010 base taxation year with respect to the daughter who was 12 and 13 years old during the relevant period. Justice Miller had determined that the shared-custody parent rules applied in this case as the appellant had not satisfied him that, while the daughter resided with her father, she remained primarily responsible for her daughter's care. Ms. Borgstadt's appeal was dismissed.

[9] The son is born on May 24, 1997 and he was diagnosed with autism in 2002. During the Period, the son was 14 and 15 years old.

[10] The parents were separated on May 1, 2006 and entered into a separation agreement dated September 26, 2006 to equally share custody of the children. A Court final order was made on October 19, 2009 to confirm the terms of the joint custody of the children. The children lived with each parent on a week-on/week-off basis. There is no issue that the time each parent devoted to the children was equal.

[11] The appellant's position is that, although her son sleeps approximately equal amounts of time at both places, she is the primary caregiver for her son at all times. A shared-custody on a separation agreement does not mean there is a shared responsibility. The situation here is one of a child with a disability that has endless amounts of challenges and that requires daily interventions, either with the schools, the doctors and specialists of all sorts to meet his sensory needs and to develop his social skills by peer interaction. According to the appellant, it has and will always remain her responsibility to make sure everything gets done.

[12] The appellant testified at the hearing and she claimed that she meets all the prescribed factors set out in section 6302 of the *Income Tax Regulations* since

a) she supervises the daily activities and the needs of her son;

b) she maintains a secure environment for her son by having daily phone calls with him to go over his day and his anxieties and ensuring him that everything will be fine;

c) she initiates all medical and dental appointments and she arranges the transportation to and from the appointments;

d) she makes arrangements to satisfy the educational and recreational needs of her son;

e) she initiates the continuous appointments made at the request of her son to his pediatrician to deal with the issues he has and she attends to all such appointments;

f) she takes care of the hygienic needs of her son, including the purchase of acne medications, soaps and toothbrushes. She pays for all of her son's haircuts;

g) she provides guidance and reassurance to her son on every aspect of his life, such as school, job, friends, girlfriends, his stress and anxiety. Her son continually relies at all times on the appellant whether at her home or at his father's home.

[13] The appellant also provided an abundant number of documents including the following:

- a letter from the Father Donald MacLellan Catholic Secondary School's principal stating that the appellant was responsible for the day-to-day school decisions for her son for the 2011-2015 school years;

- a cellphone invoice for the cellphone used by her son;

- a gym membership application form for her son signed and paid by the appellant;

- correspondence with her son's doctors and dentist;

- school documents with only the appellant's signature on them or only addressed to the appellant such as consent forms, application to

change school, interim reports for classes and student activity fees paid by the appellant;

- provincial report cards for Grades 9-12 with the appellant's address on them;

- school team meeting reports showing only the appellant's attendance and input;

- school emails to and from the appellant showing constant interaction with school staff regarding her son's programming; and

- the yearly individual education plans for her son bearing only the appellant's signature.

[14] The appellant further claimed that her former spouse never attended any dentist appointments for his son and any of the school team meetings and that he had no involvement in the individual education plans of his son.

[15] Mr. Vern Borgstadt testified without providing any receipts, invoices, emails or correspondence with the school concerning his son. He explained that he worked for the City of Whitby and, in such capacity, he had flexible hours of work and a lot of time-off. He said that he never missed any of the doctor appointments, nor any meetings with the school teachers in connection with the individual education plans of his son. Concerning the dentist appointments, he said that they were all pre-scheduled and that he paid the dentist invoices through his family medical plan.

[16] Mr. Borgstadt stated that he paid for his son's hockey and skateboarding equipment and that he attended his son's practices and hockey games during the weeks he had his son with him. He also mentioned that he brings his son to his cottage during the summer for a 6 to 8 week vacation where his son could go swimming, fishing and waterskiing. He described his relationship with his son from good to excellent and his son comes to him when he has a problem.

[17] Counsel for the respondent provided a copy of two letters from the principals of the two schools where the son was enrolled. The first letter is from the St-John the Evangelist Catholic School and is dated September 20, 2010. This letter simply stated that, as per the Family Court document, Vern and the appellant share joint custody of the son who lives one week with his father and one week

with his mother. The second letter is from the St. Leo Catholic School and is dated January 28, 2011. This letter confirms that the son is currently enrolled in a transition class at the St-John the Evangelist Catholic School in Whitby to complete Grade 8. The appellant's daughter also attended that school and she was in Grade 6. The last paragraph of that letter reads as follow:

> When parents need to be contacted for whatever reason, the children notify us as to which parent is in charge of their direct supervision that week. Both parents respond to and attend school meetings and school functions as required. Both parents will also respond in emergency situations at the school as the weeks dictate.

Analysis

[18] The definitions relevant for this appeal are found in section 122.6 of the *Income Tax Act* (the "*Act*" ):

> "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,
> (d) is not described in paragraph 149(1)(a) or 149(1)(b), and
> (e) is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who
>
> (i) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act ,
> (ii) is a temporary resident within the meaning of the Immigration and Refugee Protection Act , who was resident in Canada throughout the 18 month period preceding that time, or

(iii) is a protected person within the meaning of the Immigration and Refugee Protection Act ,
(iv) was determined before that time to be a member of a class defined in the Humanitarian Designated Classes Regulations made under the Immigration Act,

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 (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 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 shared-custody parent definition was only added in 2010. For prior years, the *Act* only permitted one parent to be the eligible individual for purposes of claiming the CCTB. The judgment rendered by the then Chief Justice Rip pertained to years prior to the introduction of the new shared-custody parent rules.

[20] The new rules do not apply where the presumption in favour of the mother, referred to in paragraph (f) of the definition of "eligible individual" is applicable. Paragraph 6301 of the *Income Tax Regulations* specified the circumstances where the presumption referred in paragraph (f) or the definition of "eligible individual" is not applicable. One of those circumstances is where more than one notice is filed with the Minister under subsection 122.62(1) of the *Act* in respect of the same qualified dependant who resides with each of the persons filing the notices if such persons lived at different locations.

[21] As Vern claimed 50% of the CCTB in respect of his son, both parents have claimed to be the eligible individual.

[22] The issue here is to determine which one of the parents was the primary caregiver of their son when they each resided with him. The evidence is clear that the appellant's son resided equally throughout the period for the 2011 base taxation year with both the appellant and Vern and that they were each equally the parent who primarily fulfilled the responsibility for the care and upbringing of their son when he resided with each of them.

[23] In my view, both parents respect the terms of the separation agreement and assume their respective responsibility when their son is residing with each of them. The shared-custody parent rules should apply in this instance which means that the appellant is an "eligible individual" who is a "shared-custody parent" of her son and is entitled to one-half of the CCTB for her son for the Period, as computed under subsection 122.61(1.1) of the *Act*.

[24] This decision should not be interpreted as minimizing the role played by the appellant in the life of her son, in particular for her emotional support, her initiatives in the scheduling of the medical appointments and her participation in the development of the individual education plans. It is difficult for the Court to evaluate the importance of those factors without the son's testimony.

[25] Therefore, I will not disturb the Minister's determination with respect to the son of the appellant. The appeal is dismissed.

Signed at Montreal, Canada, this 29th day of August 2016.

"Réal Favreau"

Favreau J.

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| CITATION: | 2016 TCC 185 |
| COURT FILE NO.: | 2014-4013(IT)I |
| STYLE OF CAUSE: | Carolyn Borgstadt and Her Majesty the Queen |
| PLACE OF HEARING: | Ottawa, Ontario |
| DATES OF HEARING: | July 16, 2015 and May 9, 2016 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Réal Favreau |
| DATE OF JUDGMENT: | August 29, 2016 |

APPEARANCES:

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|---|---|
| For the Appellant: | The Appellant herself |
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Name:

Firm:

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