Docket: 2015-3461(IT)I

BETWEEN:

ELEONORA RUBINOV-LIBERMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 22, 2016, at Toronto, Ontario.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Kaylee Silver

JUDGMENT

The appeal from the redetermination made under the *Income Tax Act* is allowed and the matter is referred back to the Minster of National Revenue for reconsideration and redetermination on the basis that the Appellant and the father have been shared-custody parents of both children since March 1, 2014. In all other respects, I confirm the Minister's decision with respect to the remaining months of the 2012 and 2013 base taxation years.

It is also ordered that the Court file be sealed with access restricted to the Crown, the designated representatives of the Crown, the Appellant, and judges and registry officers of the Tax Court of Canada.

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

"Guy Smith"

Smith J.

Citation: 2016 TCC 188
Date: 20160829
Docket: 2015-3461(IT)I

BETWEEN:

ELEONORA RUBINOV-LIBERMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Smith J.

[1] The issue in this appeal is whether the Appellant was entitled to the Canada Child Tax Credit ("CCTB") and Goods and Services Tax Credit ("GSTC") during the time periods in question on the basis that she was the primary care giver or whether, as a shared-custody parent, she was only entitled to 50% of those benefits.

[2] The Minister of National Revenue (the "Minister") has taken the position that the Appellant has been a shared-custody parent of her son S since January 2013 and of her daughter R since March 2014 and that she was only entitled to 50% of the benefits received after those dates.

[3] This matter involves a Notice of Redetermination for the 2011, 2012 and 2013 base years but, for reasons explained at the hearing, does not include the 2014 base year.

[4] For reasons set out below, I am of the view that the Minister's decision should be revised on the basis that the Appellant and the father have been shared-custody parents of both children since March 2014.

I. Background

[5] The Appellant and Ilan Liberman (the "father") were spouses of one another and the natural parents of two infant children. They separated on May 1, 2012 and have been living separate and apart since that time.

[6] It is not disputed that the Appellant had primary care and custody of both children (S born on June 17, 2010 and R born on April 10, 2012) following the date of separation while the father had limited access that increased over time.

[7] By way of background, it is important to note that shortly after the date of separation, the Appellant commenced proceedings in the Ontario Superior Court of Justice to address various issues including child custody, access and support and this led to the issuance of three court orders.

[8] The first was a temporary Order dated October 3, 2012. It provided that the father "shall have parenting time with both children" followed by an access schedule to include over-night access to the eldest son S on Tuesdays and Wednesdays and every other weekend from Friday evening to Monday morning (or until 6:00 pm on statutory holidays). A similar arrangement was in place for the youngest daughter R except for overnight access on Wednesday.

[9] The second Order was also a temporary Order. It is dated February 7, 2014 and was obtained following a motion by the father for expanded access to S who was now two years old and to arrange for pickup of the children at the daycare instead of the Appellant's residence. The latter measure was intended to reduce conflict.

[10] At paragraph 11 of the Order, Justice Hughes confirms that the "this expansion of access shall not be used as a basis for reducing or terminating the Respondent Father's obligation to pay child support to the Applicant mother."

[11] The last Order is dated September 30, 2014 and contains the notation "Final" in the title of proceedings. The presiding judge also delivered Reasons for Judgement consisting of 33 pages that were filed as an exhibit.

[12] I do not propose to repeat the contents of the written reasons in any detail but include for the record an observation made by the presiding judge on the issue of the father's access schedule. At paragraph 175, he indicates:

> (175) Examination of the terms of the parties' consent regarding the children's care and control schedule reveals that they have agreed to a roughly equal sharing of the children's care.
>
> [Emphasis added.]

[13] Since the parties had agreed to continue the access schedule, the Final Order of September 30, 2014 simply provides that the father shall continue to have access to the children in accordance with an access schedule that does not differ materially from the schedule set out in the temporary Order of February 7, 2014, except that it provides for two weeks during school vacations with alternating March breaks and religious holidays.

[14] While the Appellant had sought full custody of the children, the Reasons for Judgement conclude (at paragraphs 225(a) and (b)) that "the parties shall have joint custody of the children of the marriage" and "shall jointly decide major issues pertaining to the health, education, religion and general welfare for the children".

[15] Also included was a provision for child support payable by the father based on the "Ontario Child Support Guidelines". Special and extraordinary expenses were to be shared between the parties in proportion to their income.

[16] While the Final Order is dated September 30, 2014, it was only issued and signed by the presiding judge on January 22, 2015. According to the Appellant, this was as a result of the father's refusal to approve the draft order as to form and content.

[17] Neither the Reasons for Judgment nor the Final Order refer to the CCTB or GSTC but it is clear that both parties had a continuing obligation to provide income disclosure. It was also clear from the Appellant's testimony that these benefits had been declared and considered in her monthly income.

II. Facts

[18] The Appellant and the father were the only witnesses at the hearing although a Canada Revenue Agency ("CRA") representative testified as to its administrative process and procedures in making in a redetermination.

[19] It was obvious from the testimony that both parties are dedicated and caring parents but that their relationship remains strained and acrimonious.

[20] The Appellant's basic position is that, since the date of separation, she has had primary care and custody of the children. She argues that the temporary Orders were mere access schedules intended to provide the father with "parenting time with both children" (Justice Kaufman, paragraph 2, temporary Order of October 3, 2012). She argues that even if the father's time with the children appears to be equal, she was the parent who primarily fulfilled the parental role.

[21] In particular she argues that the father did not respect the access schedule set out in the temporary Order of October 2, 2012 and that she was obliged to pick-up the children at the daycare, clean, change and feed them, notably on Wednesdays and Fridays, before the father picked them up for over-night or weekend access. This continued until at least February 7, 2014, the date of the second temporary Order.

[22] Notwithstanding the revised access schedule which appeared to give both parties equal access to the children, she maintains that if there were issues at the daycare, she was the one who dealt with the situation since the father was working. She added that on religious holidays or when the children were sick, they stayed at home with her and not the father since he was working.

[23] She testified that she was the parent who brought the children to their doctor's appointments though she conceded that the father attended a few times. She produced letters and details of numerous visits that she had attended.

[24] During cross-examination, she admitted that she had consented to the access schedule set out in the Final Order, that it was a continuation of the access schedule set out in the temporary Order of February 7, 2014 but argued that she did so in order to be able to address all the other issues and that a proceeding to vary the father's access schedule was scheduled for June 2016.

[25] The Appellant expressed the view that the father has only been a joint custody parent since January 22, 2015, the date when the Final Order was taken out.

[26] As indicated above, the Minister called the father as their first witness. He maintained that he had followed all the court orders absolutely and "to a tee".

[27] He indicated that if there were issues at the daycare during his access days, he would deal with the situation. He also indicated that he attended several of the

children's doctors' visits and that he would have attended more often had he known of them. He described weekend activities including sports.

[28] With the assistance of counsel, he provided examples of his parenting activities to address the various criteria set out in section 6302 of the *Income Tax Regulations* (the "Regulations") that I will refer to below.

[29] As far as the father was concerned, he has had shared access of S since at least January 2013 and of his younger daughter R since at least March 1, 2014, following the second temporary Order of February 7, 2014.

[30] During cross-examination by the Appellant, he explained that he had first made enquiries about the CCTB and GSTC in early 2014, that he had collected what he was told were the necessary supporting documents and that he had filed them with CRA in the fall of 2014. When asked why he had waited until after the Superior Court of Justice hearing that led to the Final Order of September 30, 2014, he indicated that he had his own reasons and in particular, that he had done so at the suggestion of the CRA officials with whom he had been dealing.

[31] I will conclude my review of the facts by indicating that the neither party presented a chart, schedule, an agenda or detailed day-to-day summary of their time with the children. Their testimony was of a general nature.

III. The Law

[32] As indicated above, the CCTB regime is set out in section 122.6 of the *Income Tax Act* (the "ITA"). It sets out a number of important 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;

[Emphasis added.]

> "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.

[Emphasis added.]

[33] Following the date of separation and up to the disputed periods (January 2013 for S and March 2014 for R), it is apparent that the Appellant had the benefit of the presumption set out in paragraph 122.6 eligible individual (f) in that both children primarily 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.

[34] However, the presumption in favour of the female parent is rebuttable where both parents meet the definition of "shared-custody parents" or another parent has filed an application claiming to be the primary caregiver as provided by subsection 6301(1)(*d*) of the Regulations.

[35] In this instance, the father filed an application with CRA in the fall of 2014 and the Minister concluded that both the Appellant and the father met the definition of "shared-custody parents" in that both children resided with them "on an equal or near equal basis" and both primarily fulfilled the responsibility for their care and upbringing when they are residing with them, taking into consideration the prescribed factors set out in section 6302 of the Regulations:

> 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.

IV. Analysis

[36] In order to address this matter, the Court needs to consider the definition of "shared-custody parent" and determine, in light of the evidence:

1. Whether the children resided with the Appellant and the father on "an equal or near equal basis"; and

2. Whether each parent primarily fulfilled the responsibility for the care and upbringing of the children when they resided with them, as determined in consideration of the prescribed factors set out in section 6302 of the Regulations.

[37] The definition uses the conjunctive "and" suggesting that a parent must meet both requirements. In this instance, I am satisfied that both parents fulfilled the responsibility for the upbringing of the children when they resided with them.

[38] However, the existence of the three court orders needs to be addressed as they present a particular challenge in the context of determining whether the parties were "shared-custody parents" as that term is defined in the ITA. At first blush, it is difficult to disagree with the Appellant's position that the father was merely entitled to an access schedule from the date of separation until the final Order of September 30, 2014 when the Ontario Superior Court of Justice determined that he would have "joint custody of the children of the marriage" and henceforth would "jointly decide major issues pertaining to the health, education, religion and general welfare of the children".

[39] The Appellant's position basically suggests that the father cannot be a shared-custody parent effective the dates put forward by the Minister since the court order establishing that he was a custodial parent was not made before September 30, 2014 (though she argues it should be January 22, 2015 when the Final Order was taken out).

[40] Also, the second Order dated February 7, 2014 stated that the increase to the father's access schedule for his youngest daughter would not have the effect of reducing his obligation to pay child support to the Appellant.

[41] With the filing of the father's application for the CCTB and GSTC (after the Final Order of September 30, 2014) and retroactive nature of the Minister's

decision, the net effect is that the Appellant's entitlement to child support is in fact reduced, albeit only indirectly as a result of the reduction in her monthly income.

[42] The Appellant argues that the father's application was intended to "cripple her financially" since she was obviously dependant on the receipt of those benefits.

[43] I will make the observation that I do have some difficulty with the notion that the father seeks to obtain what he views as only his fair share of the CCTB and GSTC when it appears that he has been less than candid in the Superior Court of Justice proceedings. In particular, he must have known and understood that his child and spousal supports payments would be established in light of the Appellant's monthly income that included the receipt of the CCTB and GSTC benefits. He nonetheless chose to file his application with CRA after the Final Order.

[44] While I might be tempted to draw a negative inference from the observation noted above, it is not the role of this Court to seek to enforce the Orders of the Ontario Superior Court of Justice, directly or indirectly, but to consider them as one of several factors in determining whether a parent "primarily fulfills the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant" as set out in paragraph (c) of the definition of a "share-custody parent".

[45] Having heard the evidence of both parties and having concluded that both of them fulfilled the responsibility for the care and upbringing of the children when they reside with them, the remaining issue is whether the children resided with each parent on "an equal or near equal basis".

[46] As indicated above, the parties did not submit a detailed chart, agenda or schedule to assist the Court in making any kind of a quantitative analysis although in cross-examination, the Appellant was asked whether she agreed that the father had access to both children 7 out of every 14 days. She did not agree.

[47] The meaning of "equal or near equal basis" and the case law that deal with this issue were reviewed in detail in the recent case of *Morrissey v. The Queen* (2016 TCC 178) where Sommerfeldt J. concluded (at paragraph 64) that the acceptable range is anywhere from 55/45 to 60/40 in percentage terms.

[48] Prior to March 1, 2014, I find that the conflict between the parties was such that the Appellant assumed more than her share of the responsibility for picking-up

the children at the daycare and that, for weekdays, the father's access was really only for an over-night period and not a full 24-hour day.

[49] On balance, I find that the children were in the care of the Appellant for time periods exceeding 60% up to March 2014, but that both parties shared the parenting responsibilities on an equal basis or within an acceptable range thereafter.

[50] I find that this conclusion is consistent with the Final Order of September 30, 2014, where the presiding judge noted (at paragraph 175 of the Reasons for Judgment, referenced above) that the consent of the parties to a revised access schedule revealed that they had agreed "to a roughly equal sharing of the children's care". That revised scheduled referred to the access schedule of February 7, 2014.

V. Conclusion

[51] On the basis of the foregoing, I would allow the appeal and refer the matter back to the Minster for reconsideration and redetermination on the basis that the Appellant and the father have been shared-custody parents of both children since March 1, 2014. In all other respects, I confirm the Minister's decision with respect to the remaining months of the 2012 and 2013 base years.

[52] At the request of the Minister, I would order that the Court file be sealed with access restricted to the Crown, the designated representatives of the Crown, the Appellant, and judges and registry officers of the Tax Court of Canada.

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

"Guy Smith"

Smith J.

CITATION:	2016 TCC 188
COURT FILE NO.:	2015-3461(IT)I
STYLE OF CAUSE:	ELEONORA RUBINOV-LIBERMAN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Guy R. Smith
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APPEARANCES:

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