

Docket: 2007-1555(IT)I

BETWEEN:

SHAWN ROSE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together with the appeal of *Robert Kerr (2007-1669(IT)I*) on
September 17, 2007, at Montreal, Québec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Annick Provencher

JUDGMENT

The appeal from the determination by the Minister of National Revenue, dated November 18, 2005, made pursuant to the *Income Tax Act* respecting the Canada Child Tax Benefit for the 2003 and 2004 base years and from the determination dated November 4, 2005, respecting the Goods and Services Tax Credit for the 2003 and 2004 taxation years, is allowed and the determinations are referred back to the Minister for reconsideration and redetermination, in accordance with the attached Reasons for Judgment

Signed at Ottawa, Canada, this 28th day of September 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Docket: 2007-1669(IT)I

BETWEEN:

ROBERT KERR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together with the appeal of *Shawn Rose (2007-1555(IT)I)* on
September 17, 2007, at Montreal, Québec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Annick Provencher

JUDGMENT

The appeal from the determination of the Minister of National Revenue, dated August 18, 2006, made pursuant to the *Income Tax Act* respecting the Canada Child Tax Benefit for the 2004 and 2005 base years and from the determination dated July 28, 2006 respecting the Goods and Services Tax Credit for the 2004 and 2005 taxation years, is dismissed, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 28th day of September 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Citation: 2007TCC572
Date: 20070928
Docket: 2007-1555(IT)I

BETWEEN:

SHAWN ROSE,
ROBERT KERR,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] These appeals were heard together. The issue is who of the two Appellants was, from November 2004 to August 6, 2005, the principal caregiver of the Appellants' son, James Kerr.

[2] The assumptions of fact made by the Minister of National Revenue (the "Minister"), respecting Mr. Kerr, are described in paragraph 6 of the Reply to the Notice of Appeal (the "Reply") as follows:

- a) The Appellant was married to Shawn Rose;
- b) From the marriage there were two children, a daughter Erin born on November 17, 1986 and a son James born August 11, 1988;
- c) Following a separation the Appellant and Shawn Rose entered into an *Agreement on Provisional Measures* dated September 1, 2004;
- d) In accordance with the terms of the *Agreement on Provisional Measures* the Appellant, from October 15, 2004, was to share the duplex at 61 and 59 Greenfield Street with Rose Shawn (59 Greenfield Street upstairs for the Appellant and downstairs 61 Greenfield Street for Shawn Rose);

- e) In accordance with the terms of the *Agreement on Provisional Measures* the children were to decide the residency of their choice and would have equal access to either 59 or 61 Greenfield Street;
- f) On August 4, 2005 the Minister received an application for the CCTB and the GSTC benefits for the two children from the Appellant for the period starting after October 22, 2004;
- g) Following the receipt of the application from the Appellant, an agent from the Canada Revenue Agency communicated with Shawn Rose to confirm with whom the children were living;
- h) Shawn Rose confirmed that the children were living with the Appellant;
- i) On November 10, 2005 Shawn Rose called the agent at the Canada Revenue Agency and denied that she had told the agent that the children were not living with her from October 22, 2004;
- j) On November 17, 2005, the Minister issued to the Appellant and Shawn Rose a questionnaire in regards to the residence, care and upbringing of Erin and James;
- k) Based upon the submissions with the questionnaires and the submissions received from the Appellant at objections it was concluded that no-one was the eligible individual for the CCTB and the GSTC;
- l) For all relevant periods up to October 2004 the Minister had provided the CCTB and GSTC for the children Erin and James to Shawn Rose as the eligible individual.

[3] At the time of hearing, Mr. Kerr stated that it was only regarding James that he was applying for the Canada Child Tax Benefit ("CCTB") and the Goods and Services Tax Credit ("GSTC").

[4] The assumptions of fact made by the Minister in the appeal of Mrs. Rose, not being that different from those made respecting Mr. Kerr's appeal, need not to be reproduced.

[5] Since there was no debate as to whom was the principal caregiver in respect of the daughter Erin and that the evidence showed that Erin resided with her mother at all the time at issue and that the latter provided her with shelter and food, Mrs. Rose, is therefore the principal caregiver of Erin.

[6] It has to be noted here that 61 Greenfield Street, mentioned at subparagraph d) of the Reply, was the residence of the family before the separation. After the separation, Mrs. Rose stayed there and Mr. Kerr moved upstairs at 59 Greenfield Street.

[7] Mr. Kerr produced, as Exhibit A-1, the Agreement on Provisional Measures. Paragraph 15 of this Agreement is entitled "Residency of the Children": *The children will decide the residency of their choice and will have equal and total access of both residences.* The last paragraph is entitled "Custody": *The parties will have the joint custody of their children.*

[8] In his notice of appeal, Mr. Kerr has stated that his son had lived with him since his separation from his wife. In his letters to the various agents involved in this matter, he mentioned that he had set up a bedroom for his son in his dwelling and that it was where the latter spent most of his time. The computer, video games, awards, pictures, clothing, fold-out bed and personal effects were there in this bedroom. At the hearing, he repeated that his son resided with him the vast majority of the time.

[9] Mr. Kerr stated that he drove his son to school every morning. Asked by the Court where James had his breakfast, he answered that usually James did not have breakfast before going to school.

[10] Mrs. Rose at the hearing, as she had done in her notice of appeal, denied having ever admitted to the Minister's agent as is mentioned in subparagraph h) of the Reply, that her children were not living with her because it was the exact reverse situation.

[11] Mrs. Rose testified that her son came down to sleep every evening, at his mother's place in his own bedroom, although too often, in her view, at too late an hour. James had always kept the bedroom that he had had when the abode was his parents' home. He had his breakfast in the morning at her place and dinner at night there as well. Often, at the beginning, Mr. Kerr would have dinner with them as well. James took his lunch at school.

[12] Mrs. Rose also took care of her son's laundry.

[13] Both parents participated in the Parents/Teachers meetings. Mr. Kerr paid for the school activities.

[14] James never changed his civic address, as shown by his driving permit.

[15] Mrs. Rose evaluates that she provides between 80% or 90% of her son's food and as clothing goes, approximately 60% of the purchases. She makes the medical appointments for both children and accompanies them to their appointments.

Analysis and conclusion

[16] Section 122.5 of the *Income Tax Act* (the "Act") defines "eligible individual" with respect to the GSTC, as follows:

"**eligible individual**", in relation to a month specified for a taxation year, means an individual (other than a trust) who

- (a) has, before the specified month, attained the age of 19 years; or
- (b) was, at any time before the specified month,
 - (i) a parent who resided with their child, or
 - (ii) married or in a common-law partnership.

[17] Section 122.6 of the *Act* defines "eligible individual" for the purposes of the CCTB 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 the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing 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 (b), and
- (e) is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who

[...]

- (f) where a qualified dependant resides with the dependant's female parent, the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent,
- (g) the presumption referred to in paragraph (f) does not apply in prescribed circumstances, and
- (h) prescribed factors shall be considered in determining what constitutes care and upbringing;

[18] These definitions require residence of the qualified dependant with the individual.

[19] It is my view that the son James did not reside with Mr. Kerr but with Mrs. Rose. James' bedroom was not at the father's premises. It had been kept at the mother's premises and it was the only one. It is also at the mother's premises that James took his meals, where he washed and where his clothes were washed.

[20] The evidence showed that the son never slept on the folding couch. It is true that he would stay at his father's place during the evenings to use the computer, but he always came down to sleep at his mother's place, although quite late and later than his mother would have liked him to do.

[21] The person who provides shelter and food, provides residence, and, in this aspect, the mother, had the principal role if not the total role. It is also of importance that James did not change his civic address.

[22] Mr. Kerr cannot be considered as an eligible individual, because he did not reside with the qualified dependent as is requested by the definitions of "eligible individual".

[23] I found that James resided only with Mrs. Rose. For the purpose of the CCTB, she has to be found the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant.

[24] Where a qualified dependant resides with the dependant's female parent, the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent. This presumption will not apply in the circumstances provided by section 6302 of the *Income Tax Regulations*, which reads as follows:

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.

[25] There is no reason to doubt that Mr. Kerr was not attentive to his son's needs and was not participating in his life. The mother did not dispute that there was an affectionate relationship between the son and his father. To the contrary, she was pleased with this.

[26] However, the evidence showed that James took all his meals at his mother's place, his laundry was done by her, she looked after his clothing, she participated as well as the father in his school activities. Taking all these elements into account, I find that Mrs. Rose was the parent who primarily fulfilled the responsibility for the care and upbringing of the qualified dependent for the purpose of the Canadian Child Tax Benefit.

[27] The appeal of Mrs. Rose is allowed. The appeal of Mr. Kerr is dismissed.

Signed at Ottawa, Canada, this 28th day of September 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

CITATION: 2007TCC572

COURT FILES NOS.: 2007-1555(IT)I
2007-1669(IT)I

STYLESOF CAUSE: SHAWN ROSE v. THE QUEEN
ROBERT KERR v. THE QUEEN

PLACE OF HEARING: Montreal, Québec

DATE OF HEARING: September 17, 2007

REASONS FOR JUDGMENT BY: The Hon. Justice Louise Lamarre Proulx

DATE OF JUDGMENT: September 28, 2007

APPEARANCES:

For the Appellants: The Appellant themselves
Counsel for the Respondent: Annick Provencher

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