

Docket: 2007-939(IT)I

BETWEEN:

BRIGITTE ROY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 13, 2007, at Trois-Rivières, Quebec
Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Julie Henri

Counsel for the Respondent: Alain Gareau

JUDGMENT

The appeal against the notice of redetermination dated May 19, 2006, by which the Minister of National Revenue ("the Minister") denied the Appellant the Canada Child Tax Benefit for the period from January to June 2004, in respect of the 2002 base year, is allowed in that the matter shall be referred back to the Minister for redetermination in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 10th day of October 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 1st day of November 2007.

Brian McCordick, Translator

Citation: 2007TCC496

Date: 20071010

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BRIGITTE ROY,

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and

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REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal from a Notice of Canada Child Tax Benefit Redetermination pertaining to the 2002 base year. The only issue is whether the Minister of National Revenue ("the Minister") correctly held that the Appellant was not the parent who primarily fulfilled the responsibility for the care and upbringing of her child Sandrine, in respect of the 2002 base year, for the period from January to June 2004 ("the relevant period").

[2] The Appellant is the mother of Sandrine, born June 26, 1992. Jean-Pierre Hervé is Sandrine's father. The Appellant and Mr. Hervé separated in May 1996. Until December 2003, the Appellant and Mr. Hervé lived in the city of Québec and had shared custody of Sandrine. In December 2003, the Appellant moved from Québec to the municipality of Champlain. Sandrine expressed the wish to move with her mother to Champlain. Mr. Hervé opposed such a move. He wanted to have custody of Sandrine because he felt it was important for her to finish her school year with the Ursulines in Québec. Consequently, Mr. Henri brought an application for the custody of Sandrine. In a judgment dated April 8, 2004, Mr. Justice Raymond W. Pronovost of the Quebec Superior Court awarded custody of Sandrine to her father until June 24, 2004, so that she could

finish her school year with the Ursulines in Québec. However, he granted Sandrine's mother custody effective June 24, 2004. In his judgment dated April 8, 2004, Pronovost J. granted the following access rights to Sandrine's mother until June 24 and the following access rights to her father effective June 24:

[TRANSLATION]

(20) Both parties agree that access rights should be as broad as possible regardless of who has custody. Access rights shall be as agreed between the parties, but if no agreement can be reached, the applicant father shall, as he himself suggested, have the following access rights:

every weekend (with the exception of three weeks per year, during which the respondent mother shall have access to the child Sandrine) from Friday at 5:00 p.m. to Sunday at 7:00 p.m., and weekends shall be extended to encompass any pedagogical days or statutory holidays that immediately precede or follow them;

Easter Sunday in even-numbered years (in odd-numbered years, Sandrine shall be with the respondent mother);

the first part of Spring Break in odd-numbered years;

one week during Christmas break every other year on an alternating basis, and that week shall include Christmas Day and New Year's Day; and

three weeks during the summer, which shall be chosen by the applicant father prior to May 1 each year.

It should be noted that the Appellant testified that she came to an agreement with the father regarding his access rights to Sandrine for the relevant period. The Appellant, whose credibility is not in issue, testified that, in accordance with the agreement with Mr. Hervé, she went to pick up Sandrine at school every Friday during the relevant period, brought her back to school on Monday morning, picked her up from school in the afternoon and brought her to her father's house later in the evening. She added that, during the relevant period, Sandrine stayed with her on all statutory holidays, all pedagogical days, all days that Sandrine was sick, and throughout Spring Break. The Appellant even submitted a table (Exhibit A-2) showing that she spent more hours with Sandrine than Mr. Hervé during the relevant period, even though Mr. Hervé had been awarded custody for that period.

[3] The Appellant also testified that she looked after obtaining dental and medical care for Sandrine, cared for her when she was sick, bought her clothes, ensured that her hair was cut, received her report cards, met with her teachers when the report cards were handed out, attended parent-teacher meetings, and organized numerous recreational and sports activities for her.

The law

[4] The definition of "eligible individual" in section 122.6 of the *Income Tax Act* ("the Act") read as follows during the relevant period:

"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 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 purpose 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;

[5] For the purposes of paragraphs (g) and (h) of the definition of "eligible individual" in section 122.6 of the Act, sections 6301 and 6302 of Part LXIII of the Income Tax Regulations (the Regulations) provide as follows:

NON-APPLICATION OF PRESUMPTION

6301. (1) For the purposes of paragraph (g) of the definition "eligible individual" in section 122.6 of the Act, the presumption referred to in paragraph (f) of that definition does not apply in the circumstances where

(a) the female parent of the qualified dependant declares in writing to the Minister that the male parent, with whom she resides, is the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing of each of the qualified dependants who reside with both parents;

(b) the female parent is a qualified dependant of an eligible individual and each of them files a notice with the Minister under subsection 122.62(1) of the Act in respect of the same qualified dependant;

(c) there is more than one female parent of the qualified dependant who resides with the qualified dependant and each female parent files a notice with the Minister under subsection 122.62(1) of the Act in respect of the qualified dependant; or

(d) 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 live at different locations.

(2) For greater certainty, a person who files a notice referred to in paragraph (1)(b), (c) or (d) includes a person who is not required under subsection 122.62(3) of the Act to file such a notice.

FACTORS

6302. 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.

[6] What concerns us here are the conditions in paragraphs *(a)* and *(b)* of the definition of "eligible individual" in section 122.6 of the Act. Thus, the issue is

- (i)* whether he Appellant resided with her child Sandrine during the relevant period; and
- (ii)* whether the Appellant was the parent who primarily fulfilled the responsibility for the care and upbringing of Sandrine during that period.

[7] The first question that we must consider is whether the Appellant resided with her child Sandrine during the relevant period. In my opinion, the phrase "resides with", used by Parliament in paragraph 122.6(*a*) of the Act, denotes a certain constancy or permanence of a person's usual living habits in relation to a given place, and differs from what one might characterize as a visit or a sporadic stay. In light of

the evidence adduced by her in this regard, I find that the Appellant "resided with" her child Sandrine during the relevant period.

[8] Since I have determined that Sandrine resided with her mother during the relevant period, I should point out that paragraph 122.6(f) of the Act establishes a presumption that the Appellant was the person who primarily fulfilled the responsibility for the care and upbringing of Sandrine. In this regard, I should note that the evidence disclosed nothing capable of rebutting this presumption.

[9] Thus, the onus was on the Respondent to show that the Appellant was not the person who primarily fulfilled the responsibility for the care and upbringing of Sandrine. In my opinion, the Respondent could not discharge this onus simply by arguing that custody of the child during the relevant period was awarded to the father under a judgment and that this gives rise to a presumption that he was the person who primarily fulfilled the responsibility for the care and upbringing of the child. In the case at bar, the Respondent has not satisfactorily shown that the Appellant was not the person who primarily fulfilled the responsibility for Sandrine's care and upbringing.

[10] I would have found that the Appellant was the person who primarily fulfilled the responsibility for Sandrine's care and upbringing, regardless of whether or not I had found that the Respondent failed to rebut the presumption to that effect. Indeed, while the factor set out in section 6302(h) of the Regulations, concerning the existence of a custody order, must certainly be taken into account, it is not determinative. The factor set out in section 6302(g) concerning the provision, generally, of guidance and companionship to the child, must also be taken into account in this Court's decision. In the instant case, I find that the value of the provision of guidance and companionship to Sandrine outweighs the value of section 6302(h), which pertains to the significance of the Quebec Superior Court judgment (Exhibit A-1). In the instant case, the Appellant has satisfied me that she provided more guidance and companionship to Sandrine than did Mr. Hervé during the relevant period.

[11] For these reasons, the appeal is allowed.

Signed at Ottawa, Canada, this 10th day of October 2007.

"Paul Bédard"

Bédard J.

Translation certified true
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COURT FILE NO.: 2007-939(IT)I

STYLE OF CAUSE: BRIGITTE ROY AND HER MAJESTY
THE QUEEN

PLACE OF HEARING: Trois-Rivières, Quebec

DATE OF HEARING: July 13, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: October 10, 2007

APPEARANCES:

Counsel for the Appellant: Julie Henri

Counsel for the Respondent: Alain Gareau

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