

Docket: 2007-979(IT)I

BETWEEN:

MICHELINE CANTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 10, 2007, at Rouyn–Noranda, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Carole Bouffard

Counsel for the respondent: Claude Lamoureux

JUDGMENT

The appeal from reassessments dated December 13, 2006, by which the Minister of National Revenue revised the appellant's child tax benefits for the periods from March to June 2006 and from July to August 2006 with respect to the 2004 and 2005 base taxation years is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, on this 26th day of October 2007.

"Réal Favreau"

Favreau J.

Translation certified true
on this 31st day of January 2008
Michael Palles, Reviser

Citation: 2007TCC633
Date: 20071026
Docket: 2007-979(IT)I

BETWEEN:

MICHELINE CANTIN,

Appellant,

and

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Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from reassessments, notices of which are dated December 13, 2006, concerning the Canada Child Tax Benefit for the base taxation years 2004 and 2005.

[2] The issue involves determining whether the Minister of National Revenue (the "Minister") correctly concluded that the appellant was not an individual entitled to receive benefits because she was not the parent who primarily fulfilled the responsibility for the care and upbringing of her child Miguël, with respect to the base taxation years 2004 and 2005, for the periods from March to June 2006 and from July to August 2006 (the "periods in question").

[3] On or about February 9, 2007, the appellant served a notice of objection on the Minister for the notices of reassessment dated December 13, 2006, with respect to the base taxation years 2004 and 2005.

[4] To establish and confirm the notices of reassessment, the Minister relied on the following assumptions of fact, among others:

- (a) The appellant is the mother of Miguël Bergeron, born on July 9, 1996;
- (b) The appellant and her former spouse, Jacques Bergeron, separated in February 1998;
- (c) During the periods in question, the appellant and her former spouse had joint custody of their son, and he spent more time at his father's home;
- (d) During the periods in question, the Minister determined that Mr. Bergeron was the individual who primarily fulfilled the responsibility for the care and upbringing of Miguël.

[5] Under a Quebec Superior Court judgment dated October 6, 2004¹ (the "judgment"), Mr. Bergeron was granted sole custody of Miguël, and his mother was granted the following access rights effective September 2, 2004:

- every second weekend, from Thursday evening at 5:15 p.m. until Monday morning;
- one week at Christmas or at New Year's, alternately from year to year, from December 22 at 7:00 p.m. to December 29 at 7:00 p.m., and/or from December 29 at 7:00 p.m. to January 5 at 7:00 p.m.;
- one month during the summer, with a maximum of three consecutive weeks of the appellant's choosing;
- one week at spring break every year.²

[6] On January 27, 2006, Miguël's parents agreed on new conditions for the appellant's access rights, namely, in every 14-day period, he would spend 6 days with his mother and 8 days with his father.

[7] In a judgment dated April 24, 2006,³ the Quebec Superior Court dismissed the application for a safeguard order made by the appellant to have the Court recognize the custody conditions for Miguël in accordance with the agreement described in the preceding paragraph.

¹ See Exhibit I-3

² See Exhibit I-3, paragraph 7

³ See Exhibit I-2

[8] Under the terms of an agreement concluded by Miguël's parents on July 10 and 11, 2007, which was homologated by the Quebec Superior Court on July 13, 2007,⁴ custody of Miguël was granted to Mr. Bergeron. As of July 1, 2007, the appellant's access rights for Miguël were every second weekend, one week at Christmas or one week at New Year's, four weeks during the summer, and one week at spring break every year.⁵

Appellant's position

[9] Ms. Cantin alleges that since January 27, 2006, she has been continuously fulfilling the responsibility for the care and upbringing of her child and, more specifically, has been attending meetings with Miguel's teachers and special education teachers, making appointments with doctors, dentists and other health professionals and involving herself in the activities and hobbies that her son wanted to participate in or do. In support of her testimony, Ms. Cantin submitted a copy of a letter from the school, a copy of an invoice from an optometrist's clinic and copies of medical consultations for Miguël.

[10] Ms. Cantin also alleges that since January 27, 2006, she has had custody of Miguël approximately 43% of the time, and if the time during which her mother, Carmen Cantin, babysat him while he was in his father's custody is considered, Ms. Cantin had custody of Miguel for approximately 60% of the time. It is important to note that Ms. Cantin and her mother live in the same duplex: Ms. Cantin lives upstairs, and her mother lives downstairs. In support of her allegations, Ms. Cantin submitted a solemn affirmation from her mother, Carmen Cantin, and one from her friend Serge Desgroseillers, which confirm that Miguël was regularly babysat by his grandmother when he was in his father's custody.

Testimony of Jacques Bergeron

[11] Mr. Bergeron stated that he has had sole legal custody of Miguël since 2004. His former spouse was never granted legal or joint custody of Miguël.

[12] Mr. Bergeron also stated that he is the parent who primarily fulfils the responsibility for the care and upbringing of Miguël. In support of this statement, counsel for the respondent submitted documents in a bundle, including confirmation from a dental clinic, a letter from an optometrist's clinic, a statement

⁴ See exhibit I-1

⁵ See exhibit I-1, paragraph 8

of account from the Arc-en-ciel daycare centre, a registration form for the Élan school, a pharmacy statement, an invoice for school services, invoices for the purchase of clothing and a back pack, confirmation of school transportation and medical reports.

[13] Mr. Bergeron admitted that the child's maternal grandmother would babysit Miguël when he had to take training courses out of town. During the periods in question, this happened twice, for periods of five days each time. He also admitted having a worker at the Fleurs et Miel daycare centre babysit Miguël when he had to work evenings. He also noted that his former spouse would have her mother babysit Miguël when she had to work evenings at the call centre.

[14] Mr. Bergeron also admitted having left his son to play alone near the railway tracks located within approximately 10 minutes' walking distance from where the child's mother lives. Mr. Bergeron stated that this happened at the request of his son, who enjoyed playing at that place, and that the periods during which he was left unsupervised generally ranged between two and three hours.

Analysis

[15] The definition of "eligible individual" for the purposes of the Canada Child Tax Benefit is specified 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 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;

[16] For the application of paragraphs (g) and (h) of the definition of "eligible individual" under 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.

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.

[17] Only the parent with whom the child resides is the "eligible individual" entitled to receive the Canada Child Tax Benefit.

[18] In this case, it has been established that during the periods in question, Miguël stayed with his father for eight days and with his mother for six days per

two-week period, and that under the terms of a judgment, the father had legal custody of Miguël. The appellant had access rights, not joint custody rights.

[19] The testimonies given by the appellant and by Mr. Bergeron, although contradictory on certain aspects about Miguël's main residence, reveal that during the periods in question, he lived mainly with his father. I do not think it is necessarily appropriate in the circumstances to credit to the appellant the number of days during which Miguel was babysat by his maternal grandmother. The solemn affirmation submitted by the maternal grandmother did not contain sufficient information about the number of days and the precise dates when she had custody of Miguël while he was supposed to be with his father.

[20] Because Miguël did not live only with his mother, the presumption of paragraph (f) of the definition of "eligible individual" in section 122.6 of the Act cannot apply in this case, and it must be determined which parent primarily fulfilled the responsibility for the care and upbringing of Miguël during the periods in question. To do so, the factors specified in section 6302 of the Regulations must be considered.

[21] In this case, both parents showed that they fulfilled the responsibility for the care and upbringing of Miguël and submitted documentary evidence to that effect.

[22] The evidence showed that there was some competition between the parents in this regard. The mother would purchase clothes and school material and would make appointments for her son at the medical clinic, with the optometrist, etc., while the father would do the same thing and would try to prevent the mother from making appointments with health professionals, among others.

[23] In light of the factors listed in section 6302 of the Regulations, which are based on care, upbringing and participation, and in light of the evidence submitted in this case, I must conclude that the appellant did not adduce sufficient evidence to show on a balance of probabilities that she had met the conditions specified in paragraph (g) of the definition of "eligible individual" in section 122.6 of the Act, namely, that during the periods in question, she was the parent who primarily fulfilled the responsibility for the care and upbringing of her son Miguël.

[24] Accordingly, the appeal is dismissed.

Signed at Ottawa, Canada, on this 26th day of October 2007.

"Réal Favreau"

Favreau J.

Translation certified true
on this 31st day of January 2008
Michael Palles, Reviser

CITATION: 2007TCC633

COURT FILE NO.: 2007-979(IT)I

STYLE OF CAUSE: Micheline Cantin and Her Majesty the Queen

PLACE OF HEARING: Rouyn-Noranda, Quebec

DATE OF HEARING: August 10, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: October 26, 2007

APPEARANCES:

 Counsel for the appellant : Carole Bouffard

 Counsel for the respondent: Claude Lamoureux

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