Docket: 2007-3518(IT)I

BETWEEN:

VÉRONIQUE GRIMARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 14, 2008 at Sherbrooke, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Marie-Annick Gagnon

Counsel for the Respondent: Johanne M. Boudreau

JUDGMENT

The appeal under the *Income Tax Act* from the notice of redetermination dated December 13, 2006, by which the Minister of National Revenue changed the Appellant's Canada Child Tax Benefit for the period of July and August 2006, in respect of the 2005 base taxation year, is allowed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of March 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 30th day of April 2008.

Brian McCordick, Translator

Citation: 2008TCC98
Date: 20080306
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BETWEEN:

VÉRONIQUE GRIMARD,

Appellant,

and

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a notice of redetermination under the *Income Tax Act* ("the Act") concerning the Canada Child Tax Benefit for the 2005 base taxation year.

[2] The issue is whether the Minister of National Revenue ("the Minister") correctly concluded that the Appellant was not the parent who primarily fulfilled the responsibility for the care and upbringing of her children Daphnée and Alexia during the period of July and August 2006, in respect of the 2005 base taxation year.

[3] In making and confirming the Canada Child Tax Benefit redetermination dated December 13, 2006 for the 2005 base taxation year, the Minister made the following assumptions of fact:

[TRANSLATION]

(a) The Appellant and Pascal Pelletier are the parents of the following children:

(i) Daphnée, born on August 3, 1998;
(ii) Alexia, born on June 29, 2001.

(b) Prior to the period in issue, the Appellant was always considered the parent who primarily fulfilled the responsibility for the care and upbringing of her children.

(c) Pascal Pelletier applied for the Canada Child Tax Benefit in respect of his daughters Daphnée and Alexia, alleging that they had lived with him from June 26 to August 27, 2006 and had then resumed living with the Appellant.

(d) Without checking, the Minister made the adjustment on December 13, 2006, determining that the Appellant was not the eligible individual in respect of her children Daphnée and Alexia for the period of July and August 2006.

(e) At the objection stage, the Minister sent the Appellant and Pascal Pelletier a questionnaire to complete for the period of June 26 to August 27, 2006 to determine which of them was the parent eligible to receive tax benefits in respect of Daphnée and Alexia.

(f) According to the information provided by both parties, the children lived with Pascal Pelletier during the summer for a period equal to 41 out of 61 days.

(g) Pascal Pelletier also demonstrated that he attended to the care and upbringing of his children during the period in issue:

(i) he registered his children in a summer camp for eight (8) weeks;

(ii) he accompanied his children on three outings that were part of the summer camp activities;

(iii) he accompanied his daughter Daphnée to a podiatric clinic.

[4] After discussing the matter, the parties agreed that the proceedings would be limited to the statement of their respective arguments, given that the outcome of the case basically depends on the interpretation to be given to the judgment rendered on February 23, 2006 by the Honourable Suzanne Mireault of the Quebec Superior Court, the relevant part of which reads as follows:

> [TRANSLATION]
>
> [11] GRANTS the defendant access to his children during the summer as follows:
>
> - the entire summer, except the periods granted below to the plaintiff;

[5] To begin with, when parents of minor children are involved in their care, upbringing and custody, it seems to me that it is extremely difficult for the parties to establish on a balance of probabilities that one of them behaves better than the other or is more fit than the other.

[6] This is a very complex debate, and the Superior Court has much better resources for conducting it than this Court; moreover, the participants in the Superior Court's proceedings are generally more qualified to draw conclusions, especially concerning the best interests of minor children.

[7] In this case, the Court must answer the following question: does the fact that the father was granted special access during the summer, specifically 41 out of a total of 61 days, with the Appellant having the other 20 days, mean that the Appellant lost her status as the eligible parent and the father became the eligible parent for that short period?

[8] The parties supported their respective arguments with case law.

- The Respondent relied on the following decisions:

  Matte v. Canada, [2003] F.C.J. No. 43
  Landry v. Canada, [2007] A.C.I. n^{o} 287
  Walsh v. Canada, [2001] T.C.J. No. 11

- The Appellant referred to the following decisions:

  Ginette Lefebvre v. The Queen, 2006 TCC 79
  Michelle Lapierre v. La Reine, 2005 CCI 720
  Diane Bergeron v. The Queen, 2006 TCC 81
  S. R. v. Her Majesty the Queen, 2003-602(IT)I, 2003 TCC 649

[9] Stressing the fact that *Matte v. Canada*, *supra*, was the only one of these decisions rendered by the Federal Court of Appeal, the Respondent basically argued that the residence criterion is determinative; in other words, the Respondent submitted that this is a quantitative issue: if the minor child lives with one parent most of the time in a month, that parent is entitled to the benefits, provided, of course, that the parent in question satisfies the other criterion, namely caring for the child.

[10] The Respondent relied, *inter alia*, on the following passages:

> **5** We are of the view that the *Marshall* case is distinguishable and that there is no legal barrier to a non-custodial parent being considered to be the "eligible individual" for a period as short as one month as requested here.
>
> . . .
>
> **7** It is important to note that this definition clearly contemplates that the "eligible individual" may change from time to time, as long as at the relevant time he or she is primarily fulfilling the responsibility of a caregiver. This is indicated by the words "*at any time* means a person who *at that time*..." in the opening words of the definition.
>
> . . .
>
> **9** We understand this to mean that the minimum benefit period is one month and that a month of benefits is to be paid to whomever was the eligible individual at the beginning of the month: that is, to the person who was primarily fulfilling the responsibility for the care and upbringing of the child or children at that time. It is merely an administrative convenience to pay the whole month's benefit to the person acting as caregiver as of the first of the month. In this way it is not necessary to do *per diem* calculations because of a change of caregiver sometime during the month. Nor is it necessary that changes in caregivers must occur only in strict correspondence with calendar months. Otherwise in a case like this neither parent would have been able to claim for August: the mother's caregiving apparently only covered half of that calendar month so she could not

claim, and the father could not claim as he was not the caregiver on August 1 as required by the terms of subsection 122.61(1).

. . .

11 We also understand the later decision of Bowman T.C.J. in *Armstrong* (*supra*) not to have been inconsistent with *Marshall*. Firstly, he concluded that a family law award of custody to one parent did not preclude the other parent from meeting the requirements of section 122.6 of the *Employment Insurance Act* when the children were actually in that other parent's care. His case involved only one caregiver at a time. Secondly, he found that a determination of who is the caregiver must be made on a minimum of a monthly basis. He was able to conclude on the evidence that as the non-custodial parent had in fact had the primary responsibility for the children's care for the months of July and August, 1996, she was entitled to the benefit for that period.

12 We are therefore of the view that the Tax Court Judge erred here in finding as a matter of law that the applicant mother, the non-custodial parent, could not be eligible for the child tax benefit for the month of August, 1998 as requested, because her former partner was at other times of the year the "eligible individual".

13 Unfortunately as a result of this conclusion of law, the Tax Court Judge made no finding as to whether the applicant was in fact the "eligible individual" as of August 1, 1998. We are of the view that we can make such a determination as a matter of law by relying on a statutory presumption to this effect. It is not in dispute that the children were residing with the applicant on August 1, 1998. Section 122.6, in its definition of "eligible individual", provides as follows:

> (*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...

Although it was suggested by counsel for the respondent that this presumption would not apply because of an exception prescribed in paragraph 6301(1)(d), of the Regulations, there was nothing in the record to establish that the conditions which would trigger that exception actually existed in this case. We are thus at liberty to apply this presumption as a matter of law.

> **14** Therefore we conclude that the Trial Judge erred in law in his interpretation of the definition of "eligible individual" and we will set aside his decision affirming the Minister's assessment. We are applying the presumption that, as the children were (it is admitted) qualified dependants and resided with the applicant on August 1, 1998, she is deemed to have been the "eligible individual" on that date and entitled to the Child Tax Benefit for the month of August, 1998. The matter will be referred back to the Minister for reassessment accordingly.

. . .

[11] In *Walsh v. Canada*, the Honourable Rowe stated the following at paragraph 12:

> **12** In the within appeal, there is no doubt the appellant was extremely concerned about the ongoing welfare of her children and that she expended a great deal of time and energy in maintaining close contact during the period under appeal even though she resided in a community 180 kilometres from where her children were living with their father. She spent a great deal of time with them and they stayed with her at her residence in Dawson Creek three weekends a month - weather permitting - and for longer periods during a long weekend and over the Christmas holiday. She remained involved with their schooling, recreation and other related activities and was still concerned with arranging their counselling and/or communicating with the family physician. She also expended her own funds in connection with activities of the children carried out in Tumbler Ridge and attended events there even though the trip from Dawson Creek and back involved at least a three-hour drive under good road conditions. However, when one examines the criteria set forth in *Regulation* 6302, there is no doubt that the father of the children - Bradley Walsh - provided the primary residence for the children, as designated by the Court Order - Exhibit A-1. In addition, he was primarily responsible for the maintenance of a secure environment in which the children resided and would have been required to carry out the supervision of the daily activities of the children and to attend to their hygienic needs on a regular basis as well as arrange for the transportation to school and athletic and other activities as contemplated by the wording of the *Regulations* taken as a whole. The children spent the majority of their time with their father and the provision of the *Act* relates to a quantitative measurement of time rather than a qualitative assessment of the capabilities of both parents in carrying out certain functions set forth in *Regulation* 6302. Certainly, the appellant was an important part of the ongoing process of caring for the children and they were very fortunate to have had such a dedicated mother despite the difficulties posed by her economic situation and the distance from the site of her employment and residence from Tumbler Ridge. She is to be commended for her efforts in

> obtaining additional education which permitted her to secure employment suitable for caring for her children on a permanent basis. However, on the evidence, I cannot find the Minister was incorrect in determining that Bradley Walsh - the appellant's husband - during the period under appeal was the eligible individual pursuant to section 122.6 of the *Act*. The appellant carried the burden of establishing her entitlement on a balance of probabilities. In recent times, joint or shared custody has become quite common, especially with both parents working - at one or more jobs - and there is a need for both to rely on a variety of instructors, teachers, coaches, trainers and caregivers - apart from the school system - in order to provide care for their children. In the recent case of *Nelson v. A.G. of Canada*, 2000 D.T.C. 6556, the Federal Court of Appeal considered the case of a taxpayer who sought the equivalent to married tax credit even though he had made child support payments for his son and had been allowed the resulting deduction for those amounts. . . .

[12] What emerges from these two cases is that the quantitative aspect is indeed very important. In particular, I note that if the child in respect of whom the tax benefits are paid is not with the recipient parent on the first day of the month, the recipient parent's entitlement to benefits may shift to another recipient.

[13] Such a literal reading could lead to situations that are strange, to say the least. I understand that it is not my role to legislate and that I need not consider the effect of applying the statutory provisions that read as follows:

> 122.5 (1) The following definitions apply in this section.
>
> . . .
>
> "qualified dependant" of an individual, in relation to a month specified for a taxation year, means a person who at the beginning of the specified month
>
> (*a*) is the individual's child or is dependent for support on the individual or on the individual's cohabiting spouse or common-law partner;
>
> (*b*) resides with the individual;
>
> (*c*) is under the age of 19 years;
>
> (*d*) is not an eligible individual in relation to the specified month; and
>
> . . .

122.6. In this subdivision,

"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,

. . .

[14] The residence criterion is of fundamental importance. Despite the importance and especially the impact that this concept may have, it seems that Parliament did not see fit to define it in the legislation.

[15] I therefore rely on what the Honourable Pierre Dussault stated in *Michelle Lapierre*, *supra*, at paragraphs 13 and 14:

[TRANSLATION]

13. Although residence is the basic concept used to establish liability for income tax under the *Act*, that concept is not defined in the *Act*, and it is the courts that have tried to determine its limits. Residence in a particular place is basically a question of fact and is established through a number of criteria relating to time, object, intention and continuity, which do not necessarily always have the same importance and which may vary with the circumstances of each case (see *Thomson v. M.N.R.*, [1946] S.C.R. 209). However, residence implies some constancy, regularity or permanence in a person's customary mode of life in relation to a given place, and it differs from what may be characterized as visiting or staying for a specific purpose or on an occasional basis. Where the *Act* requires residence with another person, I do not think it appropriate to give the verb "reside" a meaning that departs from the concept of residence as developed by the courts. Residing with someone means living with someone in a given place customarily or with some constancy or regularity.

14. Indeed, the condition of "residing with the dependant" has been analysed in this way (see, *inter alia*, *S.R. v. Canada*, [2003] T.C.J. No. 489 (QL), *Bachand v. Canada*, [2004] T.C.J. No. 26 (QL), and *Boutin v. Canada*, [2004] A.C.I. n^{o} 379 (QL)).

[16] Obviously, I agree with Mr. Justice Dussault's analysis. This is a question of fact that must be answered on a case-by-case basis.

[17] Parliament has also imposed another condition for tax benefits, namely that the parent who primarily fulfils the responsibility for the care and upbringing of the child will be the parent who receives the benefits.

[18] Yet the care and upbringing of a child cannot be assessed quantitatively. It is not enough to count days or determine which parent had the child on the first day of the month. This assessment concerns a minimum period of time and implies a certain minimum period.

[19] Children have to go see a pediatrician, dentist and other professionals; these may be routine visits, but often they are more numerous when there is a specific problem, and any follow-up requires some continuity.

[20] Follow-up is also necessary during the school year, preferably through meetings with various professionals. The same is true of extracurricular activities, not to mention friends, the school environment and so on.

[21] The Respondent's position is that, in theory, the eligible parent can change on the first day of every month. I find it difficult to accept this position in relation to the care and upbringing of a child, since stability is, without question, a fundamental part of such care and upbringing.

[22] When custody is shared, the competent court or the parties provide for these kinds of problems; movements are generally organized on the basis of such problems.

[23] In the instant case, custody is not shared, but access is broadened during the short vacation period. When a person leaves on vacation, does the hotel where the person stays become the person's residence?

[24] Here, I conclude that the Appellant was the eligible parent in light of the short period of time involved and the reason the children went to their father's home; the Appellant still has legal custody and, above all, she has always been the parent who primarily fulfils the responsibility for the care and upbringing of the children.

Signed at Ottawa, Canada, this 6th day of March 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 30th day of April 2008.

Brian McCordick, Translator

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