

Docket: 2007-3788(IT)I

BETWEEN:

KENNETH SCOTT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on February 25, 2008 at Vancouver, British Columbia

Before: The Honourable Justice Valerie A. Miller

Appearances:

For the Appellant:                   The Appellant himself  
Counsel for the Respondent:       Pavanjit Mahil

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**JUDGMENT**

The appeal with respect to determinations for the CCTB is dismissed and the appeals with respect to the notices of assessment for the 2001, 2002, 2003, 2004, 2005 and 2006 taxation years are quashed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 12<sup>th</sup> day of March, 2008.

"V.A. Miller"

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V.A. Miller, J.

Citation: 2008TCC150  
Date: 20080312  
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BETWEEN:

KENNETH SCOTT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **V.A. Miller, J.**

[1] The Appellant appeals from the assessments for his 2001, 2002, 2003, 2004, 2005 and 2006 taxation years. He also appeals the determinations for the Canada Child Tax Benefits (“CCTBs”) for the 2000, 2001, 2002 2003, 2004 and 2005 base taxation years.

#### **ASSESSMENTS**

[2] The Appellant did not serve Notices of Objection to the assessments for the 2000, 2001, 2002, 2003 and 2004 taxation years. Section 169 of the *Income Tax Act* (“Act”) requires that a Notice of Objection be served on the Minister of National Revenue (“Minister”) before the Appellant can appeal to the Tax Court of Canada. As a result, the Notice of Appeal for these years is not valid.

[3] The Appellant’s 2005 taxation year was reassessed by Notice dated November 14, 2006. On August 23, 2007, the Appellant requested that the Minister extend the time within which he could object to the 2005 taxation year. The extension of time was granted on September 20, 2007. The Notice of Appeal filed with the Tax Court of Canada on September 7, 2007 was premature as on that date a valid Notice of Objection had not been served on the Minister.

[4] By Notice dated August 23, 2007, the Appellant objected to the assessment of his 2006 taxation year. This Notice was received by the Minister on August 24, 2007. Subsection 169(1) of the *Act* provides that a taxpayer may only appeal to the Tax Court of Canada after either (a) the Minister has confirmed the assessment or reassessed, or (b) 90 days have elapsed after service of the Notice of Objection. The effect of this subsection is that the Notice of Appeal for the 2006 taxation year is also premature as 90 days had not elapsed since the Objection was served and the Notice of Appeal was filed.

### **DETERMINATIONS**

[5] The Appellant applied to the Minister on December 21, 2006 for retroactive payments of CCTB dating back to July 2001 in respect of his three children. The Minister determined that the Appellant was not entitled to the CCTB for the 2005 base taxation year. On May 8, 2007 the Minister also determined that the Appellant was not entitled to the CCTB in respect of his three children for the 2000, 2001, 2002, 2003 and 2004 base taxation years on the basis that he was not the primary caregiver. These determinations were confirmed on June 11, 2007.

[6] I note that if the Appellant is found to be the eligible individual, then the Respondent has plead in the alternative that subsection 122.62(1) of the *Act* limits the Appellant's entitlement to the 2005 base year as the Appellant only made his application on December 21, 2006. Subsection 122.62(1) reads as follows:

For the purposes of this subdivision, a person may be considered to be an eligible individual in respect of a particular qualified dependant at the beginning of a month only if the person has, no later than 11 months after the end of the month, filed with the Minister a notice in prescribed form containing prescribed information.

[7] The issue for determination is therefore, which of the parents, the Appellant or Tonette Ross (Ms. Ross), was the eligible individual in respect of their three children for the CCTB during the relevant base taxation years. Paragraphs 122.6(a) and (b) of the *Act* require that the eligible individual (a) reside with the dependant and (b) primarily fulfil the responsibility for the care and upbringing of the dependant. *Regulation 6302* of the *Income Tax Regulations* lists the following as the some of the factors to be considered in determining what constitutes care and upbringing:

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.

[8] The Appellant and Ms. Ross separated in July 2001 and were divorced in 2006. They have three children from their marriage, Eliot, born January 30, 1994, Emory, born September 10, 1996 and Ethan, born May 22, 2001. The Appellant and Ms. Ross have joint custody of their children. They have each provided a home for their children and there is a complicated schedule whereby the children reside with each of their parents during the week.

[9] The relationship between the Appellant and Ms. Ross is extremely acrimonious; they have been in Court on numerous occasions for various reasons resulting in five Court Orders. For each of the years since 2001, the Appellant has kept elaborate records of when the children were with him and when he was responsible for the children. He included the times that the children were at school and daycare as a time when both parents were equally responsible for the children. These records show that except for July 2006 and July 2005, the children resided with Ms. Ross on more days during the years. In fact, the Appellant himself has stated that he was not primarily responsible for the children's care and upbringing but was equally responsible for the children's care and upbringing during the relevant period. The Appellant seeks an equal division of the CCTB.

[10] The legislation does not permit the Court to divide the CCTB between the parents; it allows for only one of the parents to be the "eligible individual" "at any

time". See *Canada v. Marshall*, [1996] 2 C.T.C. 92 (F.C.A.) and *Perry v. R.*, [2007] 2 C.T.C. 2493 (T.C.C.).

[11] The evidence presented by the Appellant showed that he is very active in the lives of his children. He has taken his children to school, made their meals when they were with him, bathed them, taken them to visit their grandfather, taken them to films at their friend's place, took them camping in 2007, went to meetings with teachers and has taken them to church. The Appellant is to be commended.

[12] However, based on a careful analysis of the testimony of the Appellant and Ms. Ross and the exhibits that were tendered, I have concluded that Ms. Ross primarily fulfilled the responsibility for the care and upbringing of the children for the purposes of receiving the CCTB during the base taxation years at issue. It was she who was responsible for making doctor and dentist appointments for the children and for taking them to the appointments. She was the one who researched various methods of dealing with the children's health, behaviour, emotional and educational needs. She sought out a specialist to diagnose Emory's reading disability and she enrolled him in a special school to assist him; she arranged for Eliot to be assessed and treated when he was exhibiting emotional problems. She was responsible for buying their clothes, doing their laundry, arranging for transportation to school for Emory, and to recreational activities generally for the children.

[13] In conclusion, the Appellant has not shown that the Minister's determination was incorrect. The appeal with respect to the determinations for the CCTB is dismissed. The appeals with respect to the Notices of Assessment for the 2001, 2002, 2003, 2004, 2005 and 2006 taxation years are quashed as they were not validly before the Court.

Signed at Ottawa, Canada this 12<sup>th</sup> day of March, 2008.

"V.A. Miller"

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V.A. Miller, J.

CITATION: 2008TCC150  
COURT FILE NO.: 2007-3788(IT)I  
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PLACE OF HEARING: Vancouver, British Columbia  
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REASONS FOR JUDGMENT BY: The Honourable Justice Valerie A. Miller  
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APPEARANCES:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Pavanjit Mahil

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