Docket: 2008-728(IT)I

BETWEEN:

JUANITA L. MURPHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 29, 2009 at Edmonton, Alberta

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant:	The Appellant herself Kathleen Quinn (Agent)
Counsel for the Respondent:	Robert Neilson

JUDGMENT

The appeal with respect to determinations made by the Minister of National Revenue under the *Income Tax Act* with respect to the child tax benefit and the goods and services tax credit is allowed, and the determinations are referred back to the Minister for reconsideration and redetermination on the basis that the appellant was an eligible individual and the appellant's daughter was a qualified dependant for the period beginning in April of 2006.

There will be no order as to costs.

Signed at Ottawa, Canada this 18th day of February 2009.

"J. Woods"

Woods J.

Citation: 2009 TCC 110
Date: 20090218
Docket: 2008-728(IT)I

BETWEEN:

JUANITA L. MURPHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Juanita Murphy, brings this appeal in respect of determinations that affected her entitlement under the *Income Tax Act* to the child tax benefit and the goods and services tax credit.

[2] The periods at issue are the 2004 and 2005 base taxation years for the child tax benefit, and the 2004 and 2005 taxation years for the goods and services tax credit.

[3] The determinations were made in February and March of 2007 and required Ms. Murphy to pay back the monthly benefits that she had received since April 2006.

[4] In making the determinations, the Minister concluded that Ms. Murphy's daughter was not a "qualified dependant" beginning April 2006 because a special allowance was paid in respect of the daughter under the *Children's Special Allowances Act*. The payments were made because the daughter went into foster care in March 2006.

[5] The relevant statutory provisions of *Income Tax Act* provide that a child is not a qualified dependant if a special allowance is payable in respect of the child for a relevant month pursuant to the *Children's Special Allowances Act*.

Appellant's position

[6] Ms. Murphy acknowledges that her daughter lived in a foster home during the relevant period. However, she asks that the Court consider the entire situation.

[7] Ms. Murphy states that she continued to care for her daughter after she went into foster care, both financially and otherwise. Also, the daughter came home on a regular basis.

[8] Another factor that Ms. Murphy asks to be considered is that she continued to receive the child tax benefit for about 11 months after the daughter went into a foster home. The benefit was used, at least in part, to care for the daughter. According to Ms. Murphy, no one told her that receiving these benefits may have been illegal, or that she had an obligation to report the changed circumstances to the Canada Revenue Agency.

[9] Further, Ms. Murphy notes that the benefits have been paid back in their entirety, and that this has been a significant hardship on her, and on her son whose child tax benefits were used at least in part to repay the benefits in relation to the daughter.

[10] Ms. Murphy suggests that, taking all these circumstances into account, it is not fair for the government to recoup 11 months worth of benefits on a retroactive basis.

Respondent's position

[11] The original position of the respondent, as reflected in the reply, is that Ms. Murphy is not entitled to benefits for periods in which the federal government paid allowances under the *Children's Special Allowances Act.*

[12] This position changed at the hearing, apparently as a result of a recent decision of Bowie J., *Jahnke v. The Queen*, 2008 TCC 544, 2008 DTC 4939.

[13] In *Jahnke*, it is noted that it is not the payment of special allowances that triggers the disentitlement to the child tax benefit. Rather it is whether the special allowances are payable. As Justice Bowie notes, the two are not synonymous.

[14] The relevant statutory provisions are set out in paragraphs 10 and 12 of *Jahnke* as follows.

> [10] […] Subsection 3(1) of the *CSA Act* governs the payment of allowances, and it reads as follows:
>
> > 3(1) Subject to this *Act*, there shall be paid out of the Consolidated Revenue Fund, for each month, a special allowance in the amount determined for that month by or pursuant to section 8 in respect of each child who
> >
> > (*a*) is maintained
> >
> > (i) by a department or agency of the government of Canada or a province, or
> >
> > (ii) by an agency appointed by a province, including an authority established under the laws of a province, or by an agency appointed by such an authority, for the purpose of administering any law of the province for the protection and care of children,
> >
> > and who resides in the private home of foster parents, a group foster home or an institution; or
> >
> > (*b*) is maintained by an institution licensed or otherwise authorized under the law of the province to have the custody or care of children.
>
> [12] The term "maintained" is defined for purposes of the *CSA Act*, by section 9 of the *Children's Special Allowance Regulations*. It reads:
>
> > MAINTENANCE OF CHILD
> >
> > 9. For the purposes of the *Act*, a child is considered to be maintained by an applicant in a month if the child, at the end of the month, is dependant on the applicant for the child's care, maintenance, education, training and advancement to a greater extent than on any other department, agency or institution or on any person.

[15] The respondent submits that the statutory requirements set out above are satisfied in this case.

[16] In addition, counsel for the respondent raised a further new argument. He submits that the appellant did not qualify for benefits after her daughter went into foster care because the daughter did not reside with Ms. Murphy after this time. This

argument was not mentioned in the reply and there were no factual assumptions mentioned in the reply that deal with residence.

Analysis

[17] In this appeal, the respondent's position is markedly different from that stated in the reply. As a result, a serious question of procedural fairness arises.

[18] Counsel for the respondent was very open at the hearing about the deficiency with the reply. He submits, though, that in an appeal under the informal procedure the Court should consider all arguments whether they are in the pleadings or not.

[19] I cannot agree that this is the standard that should apply. In regard to pleadings, procedural fairness should always be considered: *Burton v. The Queen*, 2006 FCA 67, 2006 DTC 6133.

[20] In support of the respondent's position, counsel referred me to the decision of Miller J. in *Stevens v. The Queen*, 2008 TCC 47, 2008 DTC 2565.

[21] The circumstances of the *Stevens* case are quite different from those in the present case.

[22] *Stevens* involved a claim for an interest deduction under s. 20(1)(*c*) of the *Income Tax Act*. At the hearing, the Minister sought to raise a new argument as to why s. 20(1)(*c*) did not apply and Justice C. Miller permitted the new argument to be made.

[23] The *Stevens* decision highlights a particular problem for informal procedure appeals which have no provision for discoveries. In many circumstances, the Minister should be given latitude to respond to the facts presented by the appellant at the hearing.

[24] It does not follow, however, that pleadings are irrelevant in the informal procedure for either party. Each case must depend on its particular facts.

[25] This case involves the disentitlement to the child tax benefit as a result of provisions of the *Children's Special Allowances Act*. It is a very different situation from that in *Stevens*, where the taxpayer claimed a deduction in a return based on information known only to the taxpayer.

[26] In this case, Ms. Murphy was at a significant disadvantage by the failure of the reply to properly deal with the relevant factual and legal issues.

[27] To his credit, counsel for the respondent tried to salvage the situation by sending Ms. Murphy a letter shortly before the trial in which he outlined the respondent's position and included the relevant statutory provisions.

[28] Unfortunately for the respondent, I find that the letter provided too little information and it was sent too late, having been received by Ms. Murphy just one day before the hearing.

[29] I would also make a brief comment about an issue that was not mentioned at the hearing.

[30] It appears that the special allowance in respect of Ms. Murphy's daughter was not actually "payable" during the period at issue because the provincial agency had not properly applied for the allowance. It only became payable in 2007 after the application was made.

[31] There was no argument before me as to whether the lateness of the application would affect Ms. Murphy's entitlement to benefits under the *Act*. It may not affect the outcome. Nevertheless, I mention it because this information, known only to the Minister, was not in the reply. It highlights the importance that a reply has in setting out the relevant facts and issues.

[32] I would also mention that, in an appeal where the appellant is not represented by experienced counsel, a judge often has an added role in terms of ensuring that the proper issues are brought to the fore. This role can be severely compromised if the reply is deficient.

[33] In some cases where the pleadings of either party are deficient, it may be appropriate to adjourn the hearing.

[34] An adjournment would have presented significant problems in this case. It likely would have been difficult for Ms. Murphy who suffers from severe disabilities, it would have been inconvenient for the many witnesses who attended the hearing, and the appeal had already been adjourned once because the court docket was full.

[35] In these circumstances, I conclude that the interests of justice are best served by allowing the appeal.

[36] Although that is the basis for my conclusion, I would also briefly comment on the substance of the case.

[37] All the witnesses at the hearing were forthright and credible. It was clear that care was provided by both the foster mother and Ms. Murphy. Also both women received funding from the government for the 11 months at issue and they both considered that the funding should be used to support the child.

[38] There could have been better documentary evidence regarding custody. The custody agreement that was entered into evidence expired by its terms after three months, and it was only in effect for a short time during the period in question.

[39] If I were to decide on the merits, I would likely conclude that Ms. Murphy was disentitled to the benefits on the basis that the provincial agency maintained the daughter, within the meaning of section 9 of the *Children's Special Allowance Regulations*. This conclusion would be based on the limited evidence that was presented at the hearing.

[40] Finally, I would comment that Ms. Murphy asked the Court to tell her who had the obligation to inform her of the potential loss of the child tax benefit when she agreed to place her child in foster care, as she did.

[41] An official from Children's Services admitted in her testimony that there may have been an administrative error in this case in not properly informing Ms. Murphy of the effects of foster care on the child tax benefit.

[42] This circumstance is unfortunate, but it is not grounds for allowing the appeal. It is a useful reminder, however, of the hardship that can arise when repayment of benefits is required several months after they have been received.

[43] For the reasons stated above, I conclude that the appeal should be allowed and that the determinations should be referred back to the Minister for redetermination on the basis that Ms. Murphy was an eligible individual and her daughter was a qualified dependant.

[44] There will be no order as to costs.

Signed at Ottawa, Canada this 18th day of February 2009.

"J. Woods"

Woods J.

CITATION:	2009 TCC 110
COURT FILE NO.:	2008-728(IT)I
STYLE OF CAUSE:	JUANITA L. MURPHY and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	January 29, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice J. Woods
DATE OF JUDGMENT:	February 18, 2009

APPEARANCES:

For the Appellant:	The Appellant herself Kathleen Quinn (Agent)
Counsel for the Respondent:	Robert Neilson

COUNSEL OF RECORD:

For the Appellant:

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Firm:	

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