

Docket: 2008-4084(IT)I

BETWEEN:

MARIUS PENNEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on October 22, 2009, at Halifax, Nova Scotia

Before: The Honourable Justice G. A. Sheridan

Appearances:

Agent for the Appellant: Karen Stewart  
Counsel for the Respondent: Jan Jensen

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**JUDGMENT**

In accordance with the attached Reasons for Judgment, the appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant was the “eligible individual” for the period July 2007 to June 2008, inclusive.

Signed at Ottawa, Canada, this 20<sup>th</sup> day of November, 2009.

“G. A. Sheridan”

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Sheridan J.

Citation: 2009TCC596  
Date: 20091120  
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BETWEEN:

MARIUS PENNEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Sheridan, J.

[1] The issue in this appeal is whether the Appellant, Marius Penney, was entitled to receive the Child Tax Benefit in respect of her two children for the period July 2007 to June 2008 (the “Period”). At that time, the children were 11 and 15.

[2] During the Period, Ms. Penney and the children’s father, Ted Harnett, had joint custody of the children pursuant to a Court Order dated July 23, 2007<sup>1</sup>. The Order also granted “primary care” to Mr. Harnett and “reasonable access” to Ms. Penney on weekends and school holidays; given their ages, all access was “subject to the reasonable wishes of the children.”

[3] In November 2007, Ms. Penney applied for the Child Tax Benefit. By Notice of Determination dated February 20, 2008, the Minister of National Revenue determined that Ms. Penney was the “eligible individual” and paid her a lump sum amount for the period July 2007 to February 2008 and commenced monthly payments for the period March to June 2008, inclusive.

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<sup>1</sup> Exhibit R-2.

[4] On July 18, 2008, the Minister reversed his decision and notified Ms. Penney that she had not been entitled to the Child Tax Benefit during the Period and assessed her for an overpayment of \$5,522.84.

### Legislation

[5] The term “eligible individual” is defined in section 122.6 of the *Income Tax Act*, the relevant portions of which read:

“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,

...

(h) prescribed factors shall be considered in determining what constitutes care and upbringing;

[6] The “prescribed factors” referred to in paragraph (h) of the definition of “eligible individual” are listed in section 6302 of the *Income Tax Regulations*:

**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.

### The Minister's Position

[7] The Minister's position is that Ms. Penney was not the "eligible individual" because under the terms of the Order, Mr. Harnett had primary care of the children and they were under his care and supervision more than half of the time. According to the Minister's assumptions, it was Mr. Harnett who arranged the children's medical appointments and was listed as the primary contact person at their schools.

[8] The Minister called Mr. Harnett and regrettably, one of the children, their daughter who was then 17. I say regrettably because, in my experience, little good comes from putting a child who has already lived through a series of custody disputes in the position of effectively having to choose between parents in a Child Tax Benefit appeal. In the present case, her testimony was at best, vague and at its worst, simply not credible.

[9] As for Mr. Harnett, to describe him as a man of few words is an understatement. His evidence provided none of the details I would have expected from one who claimed that the children were with him "95%" of the time. While I would not go so far as to say his answers were not credible, they simply did not provide enough information to be persuasive.

### Ms. Penney's Position

[10] Ms. Penney's position is that notwithstanding the terms of the Order, she was the parent who primarily fulfilled the responsibility for the care and upbringing of the children during the Period. It was her evidence that neither Mr. Harnett nor the children complied with the Order. Mr. Harnett dropped the children at her residence whenever it suited him; similarly, the children would arrive unannounced and stay with her as they pleased, especially if, for some reason, they were not in school. While she did not object to the children being with her, she lacked the resources to care for them properly and relied on the Child Tax Benefit to cover such expenses.

[11] She also disputed that Mr. Harnett saw to their medical care; she said that Mr. Harnett failed to keep the children's appointments and it was left to her to make other arrangements for them. Finally, while acknowledging that Mr. Harnett was listed as the schools' contact person, so was she; on at least one occasion during the Period, she had been called to pick up the children because Mr. Harnett had not shown up.

[12] In support of her position, Ms. Penney testified on her own behalf and called three other witnesses, Karen Stewart, Beulah Doucette and Augusta Wickens.

[13] Ms. Penney explained that she has certain cognitive difficulties which impair her ability to read and speak fluently and to remember or to recount the sort of details which others might take for granted. Notwithstanding these obstacles, her testimony provided a more detailed and credible picture of the reality of the family's home life and her involvement with the children during the Period than did Mr. Harnett's.

[14] Ms. Stewart is the Financial Coordinator and a Support Worker at the Tri-County Women's Center. As such, she was responsible for all financial operations at the Women's Centre but also worked directly with the women who relied on the Center's services. Ms. Stewart got to know Ms. Penney when she was assisting her with family court matters. As a result, Ms. Stewart was aware of Ms. Penney's limited means and her concerns that the children were spending more time with her than contemplated by the Order. As Ms. Penney was not able to do so herself, Ms. Stewart sought advice from the Canada Revenue Agency regarding the eligibility requirements for the Child Tax Benefit. She discussed these requirements with Ms. Penney and helped her complete her application. Notwithstanding her role as a sort of ombudsman for Ms. Penney, her professionalism made her testimony persuasive.

[15] Mrs. Wickens was equally credible. Her acquaintance with Ms. Penney dated back some nine years when she was asked by a local social service agency to "be a friend" to Ms. Penney. What this meant from a practical perspective was that she provided Ms. Penney with advice on and assistance with childcare and life skills, in general. They usually spoke on the phone. Though Mrs. Wickens did not often go to Ms. Penney's house, on occasion, she helped Ms. Penney with transportation.

[16] Ms. Doucette said she met Ms. Penney when she was helping out at an event at the Women's Center. Ms. Doucette often spoke to Ms. Penney on the phone and, for a time, was a regular visitor at her home. Because Ms. Penney had no car of her own, Ms. Doucette often drove Ms. Penney and her children to school, medical appointments, the pharmacy and the grocery store. While Ms. Doucette's evidence

was generally credible, the reliability her testimony was somewhat diminished by her obvious sympathy for Ms. Penney's situation.

### Analysis

[17] To succeed in her appeal, Ms. Penney had the onus of proving that during the Period, the children resided with her and that she primarily fulfilled the responsibility for the care and upbringing of the children, having regard to the factors in section 6302 of the *Income Tax Regulations*. For the reasons set out below, I am satisfied that she has done so.

[18] In the summer of 2007, Ms. Penney was working at the local herring plant. Because of her various difficulties, she often made use of the services of the Women's Center and spoke regularly with Ms. Stewart either in person or on the telephone. During the Period, Ms. Stewart (or her fellow support worker) dropped in at Ms. Penney's residence about once a week, to see how things were going.

[19] I have no reason to doubt Ms. Stewart's testimony that, at least during the day, the children were often with Ms. Penney. In forming this view, I disregarded entirely a log<sup>2</sup> kept by Ms. Stewart recording Ms. Penney's reports to her of when the children were with her. Ms. Stewart was candid in explaining that she had maintained the log on an informal basis in anticipation of future family court challenges to Ms. Penney's access to the children. She did not have personal knowledge of whether or how often the children were with Ms. Penney overnight or on weekends.

[20] I also accept Ms. Doucette and Mrs. Wickens' evidence that they had seen the children at Ms. Penney's residence or with her around town and sometimes, when speaking to her on the phone, heard their voices in the background.

[21] Mr. Harnett did not deny Ms. Penney's evidence that the children would go on their own to their mother's; indeed, that can be inferred from his testimony that he would get called to pick them up "to referee", as he put it, because they often argued. Further, although Mr. Harnett estimated the children were with him 95% of the time, he gave no basis for that number. It seems to me that had that really been the case, it would not have been difficult for even a taciturn individual like Mr. Harnett to volunteer details of the time they spent with him. Instead, he provided a barebones description of their routine: he took them to and from school, fed them supper, watched TV and movies with them.

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<sup>2</sup> Exhibit A-3.

[22] Ms. Penney, on the other hand, spoke candidly of all the difficulties she experienced trying to cope with the children's unexpected visits: finding them at her place when she got home from her shift at the herring plant; having to get more groceries, water and extra furniture for the household; having to rely on her friends or taxis to get the children where they needed to be; worrying about the cost of using taxis, and struggling to accommodate the children's needs.

[23] Turning, then, to the requirements of the legislation, I am satisfied that the children were equally resident with both parents. They had accommodations at each residence and, as is typical of joint custody arrangements, moved freely back and forth between them. The children went to and from school from both locations and were free to go to either residence if, for some reason, there was no school.

[24] That leaves only to consider, having regard to the factors in section 6302 of the *Regulations*, which of the parents primarily fulfilled the responsibility for the care and upbringing of the children during the Period.

[25] The Minister assumed that Mr. Harnett was the parent who arranged for the children's medical care. The evidence, however, tells a different story. As far as she was able, Ms. Penney provided relatively detailed evidence of the children's medical and dental needs and trips to the pharmacy to pick up medications. In support of these contentions, Ms. Penney provided copies of certain medical and dental receipts<sup>3</sup> in respect of the children. Although I admitted these documents, I disregarded them as it is not clear Ms. Penney paid for the items mentioned, the addresses shown in them are inconsistent and, the pharmacy receipts for the daughter's medications are for purchases made after the Period.

[26] Nonetheless, I found her oral evidence more convincing than Mr. Harnett's version of events. He said that his son's medical condition was "good" and that neither of the children had had any medical problems during the Period "that [he] knew of"; yet, in the same breath, he insisted he took them to the doctor if they were sick. I found more believable Ms. Penney's evidence that Mr. Harnett failed to take their son to scheduled medical appointments and dismissed their son's counselling sessions as "foolishness".

[27] I also accept Ms. Penney's testimony that she sometimes purchased clothing and games for the children, took them to recreational activities at the YMCA and in

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<sup>3</sup> Exhibit A-2.

the case of their son, arranged for him to go to camp for a week in the summer of 2007. In reaching this conclusion, I gave no weight to copies of receipts from various merchants, most dated February 2008. As the purchases were all paid for with debit cards, there was no way to determine who had actually paid for the items listed.

[28] Finally, Ms. Penney said she had a neighbour check on the children if she was going to be late getting home from work; Mrs. Wickens explained this was necessary because the children sometimes did not get along very well and were better not left on their own.

### Conclusion

[29] While I am left with the feeling that there is much more to this story than was revealed at the hearing, an appeal can only be decided on the evidence presented. I do not doubt that it was a struggle for both parents to provide for their children; fortunately, as I understand the Reply to the Notice of Appeal, the Child Tax Benefit is currently being paid to each of them on a rotational 6-month basis.

[30] As to the question before me, on a balance of probabilities, I am persuaded that during the Period, the children were resident with Ms. Penney and that she was the parent who saw to the children's care and upbringing as contemplated by the factors set out in section 6302 of the *Regulations*. As such, Ms. Penney was the "eligible individual" entitled to the Child Tax Benefit under the *Income Tax Act*.

[31] Accordingly, the appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Ms. Penney was the "eligible individual" for the period July 2007 to June 2008, inclusive.

Signed at Ottawa, Canada, this 20<sup>th</sup> day of November, 2009.

"G. A. Sheridan"

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Sheridan J.



CITATION: 2009TCC596

COURT FILE NO.: 2008-4084(IT)I

STYLE OF CAUSE: MARIUS PENNEY AND  
HER MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: October 22, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: November 20, 2009

APPEARANCES:

Agent for the Appellant:	Karen Stewart
Counsel for the Respondent:	Jan Jensen

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