

Docket: 2012-3429(IT)I

BETWEEN:

GERALD ARMSTRONG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on April 26, 2013, at Toronto, Ontario

Before: The Honourable Justice François Angers

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Thomas J. O'Leary Darren Prevost

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**JUDGMENT**

The appeal from the determination of the Canada Child Tax Benefits made under the *Income Tax Act* in respect of the 2009 base taxation year is allowed, in accordance with the attached Reasons for Judgment.

Signed this 24th day of July 2013.

“François Angers”

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Angers J.

Citation: 2013 TCC 238  
Date: 20130724  
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GERALD ARMSTRONG,

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and

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### **REASONS FOR JUDGMENT**

Angers J.

[1] The appellant's notice of appeal originally referred to an appeal from the Minister of National Revenue (the "Minister") determination of Canada Child Tax Benefits (CCTB) for the 2009, 2010 and 2011 base taxation years. The Minister has made no determinations of the CCTB for the 2010 and 2011 base taxation years and the appellant has informed the Court that he was in agreement with that fact. This appeal, therefore, concerns only the determination of CCTB for the 2009 base taxation year.

[2] The issue in this appeal is whether the Minister has properly determined the appellant's entitlement to the CCTB in respect of J. for the 2009 base taxation year. It is the respondent's position that the appellant is not the "eligible individual" as defined in section 122.6 of the *Income Tax Act* (the "Act") for the period covering July 2010 to June 2011 as J. did not reside with the appellant and he was not the person who primarily fulfilled the care and upbringing of J. at the beginning of that period. Alternatively, and in any event, it is submitted that the appellant is not entitled to the CCTB as he has not filed a "return of income" as defined in section 122.6 of the Act for the 2009 taxation year, as required under subsection 122.61(1) of the Act.

[3] It has emerged from the evidence that, at the time of the trial, the appellant had not filed a "return of income" for his 2009 taxation year. A tax return for 2009 had been prepared but not yet mailed and filed. Indeed, no return of income had been filed by the appellant for his 2010 and 2011 taxation years as well. The appellant was arbitrarily assessed under subsection 152(7) of the Act for his 2009 taxation year.

[4] The definition of "eligible individual" applicable for the period in issue namely for the 2009 base taxation year reads as follows:

“**eligible individual**” – “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 (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 purposes of this definition,

- (f) where a 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 (f) does not apply in prescribed circumstances, and
- (h) prescribed factors shall be considered in determining what constitutes care and upbringing;

[5] An eligible individual must be a resident of Canada, must reside with the qualified dependant and must be the parent who primarily fulfills the responsibility for the care and upbringing of the qualified dependant. It is not disputed in this case that J. is a qualified dependant.

[6] Regulation 6302 sets out the factors to be considered to determine what constitutes care and upbringing of a qualified dependant.

**6302. Factors** -- 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:

1. the supervision of the daily activities and needs of the qualified dependant;
2. the maintenance of a secure environment in which the qualified dependant resides;
3. the arrangement of, and transportation to, medical care at regular intervals and as required for the qualified dependant;
4. the arrangement of, participation in, and transportation to, educational, recreational, athletic or similar activities in respect of the qualified dependant;
5. 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;
6. the attendance to the hygienic needs of the qualified dependant on a regular basis;
7. the provision, generally, of guidance and companionship to the qualified dependant; and
8. the existence of a court order in respect of the qualified dependant that is valid in the jurisdiction in which the qualified dependant resides.

[7] The operation of the CCTB has been well summarized by Justice Webb formerly of this Court in *D'Elia v. Q.*, 2012 TCC 180, in paragraphs 3 and 4 which read as follows:

3 Under the *Income Tax Act* (the "Act") the CCTB is treated as an overpayment of the person's liability under the *Act* and hence, if the individual is eligible, such amount is paid to the eligible individual as a refund of this overpayment. Under subsection 122.61(1) of the *Act* the overpayment amount is calculated on a monthly basis. This subsection provides, in part, as follows:

122.61(1) Where a person ... [has] filed a return of income for the year, an overpayment on account of the person's liability under this Part for the year is deemed to have arisen during a month in relation to which the year is the base taxation year, equal to the amount determined by the formula

$$1/12 [(A - B) + C + M]$$

where

A is the total of

(a) the product obtained by multiplying \$1,0901 by the number of qualified dependants in respect of whom the person was an eligible individual at the beginning of the month, and

...

C is the amount determined by the formula

$$F - (G \times H)$$

where

F is, where the person is, at the beginning of the month, an eligible individual in respect of

(a) only one qualified dependant, \$1,4632, and

...

4 Because the overpayment is deemed to have arisen during a month for which a person is an eligible individual in respect of a qualified dependant *at the beginning of the month*, this requires a determination of whether any particular person was an eligible individual at the beginning of each month in respect of that qualified dependant. As a result, it does not necessarily follow that because one particular person was the eligible individual in respect of a qualified dependant at the beginning of a particular month, that the same person would then be the eligible individual at the beginning of the following month in respect of that qualified dependant. [...]

### Facts

[8] The appellant and Amy Westbrook are the parents of J. and they have been living separate and apart since 1998. At the time of their separation, J. stayed and resided with her mother who had applied for, and was receiving, the CCTB.

[9] The appellant applied for the CCTB for J. commencing June 5, 2010. On that day, the appellant received a call from J.'s grandfather on her mother's side to come over to J.'s mother. A quarrel between J. and her mother had occurred and the appellant took J. to live with him.

[10] The appellant, J., another daughter, and the appellant's common law wife testified. Although, there may have been some uncertainties as to the year when J. moved in with her father, I am satisfied that J. has, in fact, moved in and resided at

her father's place after June 2010. There are sufficient other aspects of their testimony to assist me in reaching this conclusion. J. testified that she had not lived with her mother since that incident on June 2010 and that when she graduated in June 2011, she was living with the appellant.

[11] During the year 2010, while living with her father, J., at her request, continued to attend her school. The appellant lives in another area of town and if the school had been informed of that fact, J. would have had to change school. She was given a ride every day to attend that school either by the appellant or his common law wife.

[12] J. has always been permitted to visit her mother and grand parents. J.'s mother has continued to be involved in J.'s life even after she moved in with the appellant. Each parent adduced the documents, photographs and certificates, in support of their respective submission that they are the parent who primarily fulfilled the responsibility for the care and upbringing of J. This involvement of both parents in the life of J. is commendable considering the troubled relationship of her parents.

[13] As to the factors set out in section 6302 of the Regulations, I find those provided for in paragraphs (a), (b), (d) and (g) confirm the submission of the appellant. The appellant has shown, on a balance of probabilities, that he is the



“eligible individual” as defined in the Act, and was for all intents and purposes the parent who primarily fulfilled the responsibility for the care and upbringing of J. in respect of CCTB benefits payments covering July 2010 to June 2011.

[14] Whether or not the appellant is entitled to a CCTB will be determined once he has filed a return of income as defined in section 122.6 of the Act for his 2009 taxation and as required under subsection 122.61(1) of the Act. The specific wording of subsection 122.61(1) requires the taxpayer to have filed a return of income as a precondition to applying the formula calculating entitlement to the CCTB or a deemed overpayment. The situation is the same with the GST/HST credit, the Refundable Medical Expense Supplement and the Working Income Tax benefit provided for in the Act. They are all income — tested credits, to which applies the same requirement that a return be filed.

[15] The appeal is allowed.

Signed this 24th day of July 2013.

“François Angers”

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Angers J.

CITATION: 2013 TCC 238

COURT FILE NO.: 2012-3429(IT)I

STYLE OF CAUSE: GERALD ARMSTRONG v. HER  
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 26, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice François Angers

DATE OF JUDGMENT: July 24, 2013

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Thomas J. O'Leary  
Darren Prevost

COUNSEL OF RECORD:

For the Appellant:

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Firm:

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