

Docket: 2019-3661(IT)I

BETWEEN:

PATRICIA LÉVESQUE ST-CYR,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 18, 2024, at Trois-Rivières, Quebec

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant: Stéphane Roof

Counsel for the respondent: Samantha Jackmino

JUDGMENT

The appeal from the notice of redetermination under section 122.6 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “Act”), for the 2015, 2016 and 2017 benefit years is allowed, without costs, and the notices of redetermination are referred back to the Minister of National Revenue for reconsideration and reassessment.

Signed at Ottawa, Canada, this 18th day of April 2024.

“Patrick Boyle”

Boyle J.

Citation: 2024 TCC 46
Date: 20240418
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REASONS FOR JUDGMENT

Boyle J.

Summary

[1] The appellant is the mother of two children for whom she received the Canada child benefit (CCB) during the years following her separation from their father, Pascal Bellemarre, in 2012, including the years 2015 to 2018.

[2] The parents had signed an interim agreement under which the mother would have custody of the children and the father would have extensive access rights. That arrangement was incorporated into their divorce judgment in 2013. The father subsequently claimed to be a shared-custody parent and in 2019 the Canada Revenue Agency determined that the parents were shared-custody parents for the 2015 to 2017 benefit years. The result was an overpayment that was recovered from the mother. This is her appeal from that determination.

[3] For the reasons that follow, I conclude, based on the evidence presented to the Court, that the father is not a shared-custody parent and the mother is entitled to the full amount of the CCB.

I. The Law

[4] Section 122.6 of the Act defines the term “shared-custody parent” as follows:

shared-custody parent in respect of a qualified dependant at a particular time means, where the presumption referred to in paragraph (f) of the definition *eligible individual* does not apply in respect of the qualified dependant, an individual who is one of the two parents of the qualified dependant who

(a) are not at that time cohabitating spouses or common-law partners of each other,

(b) reside with the qualified dependant either

(i) at least 40% of the time in the month in which the particular time occurs, or

(ii) on an approximately equal basis, and

(c) primarily fulfil the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant, as determined in consideration of prescribed factors. (*parent ayant la garde partagée*)

parent ayant la garde partagée

S’entend, à l’égard d’une personne à charge admissible à un moment donné, dans le cas où la présomption énoncée à l’alinéa f) de la définition de *particulier admissible* ne s’applique pas à celle-ci, du particulier qui est l’un des deux parents de la personne à charge qui, à la fois :

a) ne sont pas, à ce moment, des époux ou conjoints de fait visés l’un par rapport à l’autre;

b) résident avec la personne à charge :

(i) soit au moins 40 % du temps au cours du mois qui comprend le moment donné,

(ii) soit sur une base d’égalité approximative;

c) lorsqu’ils résident avec la personne à charge, assument principalement la responsabilité pour le soin et l’éducation de celle-ci, ainsi qu’il est déterminé d’après des critères prévus par règlement. (*shared-custody parent*)

[5] Section 6302 of the *Income Tax Regulations*, C.R.C. c. 945 (the “Regulations”) provides the following factors concerning care and upbringing:

For the purposes of paragraph (h) of the definition *eligible individual* in section 122.6 of the Act, the following factors are to be

Pour l’application de l’alinéa h) de la définition de *particulier admissible* à l’article 122.6 de la Loi, les critères suivants servent à

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.

déterminer en quoi consistent le soin et l'éducation d'une personne à charge admissible :

a) le fait de surveiller les activités quotidiennes de la personne à charge admissible et de voir à ses besoins quotidiens;

b) le maintien d'un milieu sécuritaire là où elle réside;

c) l'obtention de soins médicaux pour elle à intervalles réguliers et en cas de besoin, ainsi que son transport aux endroits où ces soins sont offerts;

d) l'organisation pour elle d'activités éducatives, récréatives, athlétiques ou semblables, sa participation à de telles activités et son transport à cette fin;

e) le fait de subvenir à ses besoins lorsqu'elle est malade ou a besoin de l'assistance d'une autre personne;

f) le fait de veiller à son hygiène corporelle de façon régulière;

g) de façon générale, le fait d'être présent auprès d'elle et de la guider;

h) l'existence d'une ordonnance rendue à son égard par un tribunal qui est valide dans la juridiction où elle réside.

[6] The father did not claim that custody was shared more or less equally; moreover, the evidence would not support such a claim. The legal issue that arises in this case is therefore whether the children resided at least 40% of the time with

their father and whether, during that time, the father primarily fulfilled the responsibility for their care and upbringing as provided in section 6302 of the Regulations.

[7] There is no precise method for apportioning the time the children spend in school in order to determine the 40% minimum custodial time or determine which parent primarily fulfilled the responsibility for the care and upbringing of the children during their days at school. Neither the Federal Court of Appeal nor the Tax Court of Canada has specified the precise calculation method that applies to school days. The calculation depends on the circumstances and the particular facts.

II. The Facts

1. Did the children reside with their father at least 40% of the time?

[8] Both parents testified. The children spent every other weekend with their father and resided with him two nights a week, on weekdays. Their mother clearly stated that no change had been made to those periods, during which the father had access to the children, from the time they separated until 2018. In 2018, the father applied to the Superior Court of Quebec to have the 2013 divorce judgment varied, and he amended that application in 2019. No variation has been ordered to date. In his application, the father confirmed this arrangement and the fact that it had been in effect since the outset and continued until July 2018.

[9] The mother stated that the children were with their father every second weekend from 9:00 a.m. Saturday until he dropped them off at school or her home on Monday morning before 9:00 a.m. The father stated that as he recalled, the children spent one day per weekend with him, not a full weekend every other week. However, his testimony was far from clear and coherent, and he was unable to recall a number of things. Given the unreliability of the father's testimony, I accept the mother's testimony where there is a discrepancy between the two (unless it is contrary to other credible evidence in the father's favour). In any event, the text that the father sent the mother on August 26, 2018, expressly confirmed that the arrangement provided for every other weekend, from 9:00 a.m. on Saturday to 9:00 a.m. on Monday. In that text, the father also confirmed that the two overnights a week would start at 5:15 p.m. and end at 9:00 the next morning. That also fits with the invitation and entries in his 2018 Outlook daily calendar, which was introduced in evidence, that show that the weekday overnights when he had the children started at 5:00 in the evening and ended at 8:30 a.m. the next day. There was other evidence that also supported this fact.

[10] The appellant clearly stated in her testimony that the terms of the father's access to the children stayed the same during the children's summer holidays. In other words, the children continue to return to their mother's home at 9:00 Monday morning, every second weekend, and at 9:00 a.m. following the two weekday overnights while they were with their father.

[11] According to the parents' calendar, every second week, one of the weekday overnights started on Monday between 5:00 and 5:30 p.m. and ended on Tuesday morning. When the access from Monday evening to the next day started, the father did not pick the children up at school during the school year. The children first went to their mother's home after school.

[12] The father's reliability was questioned because he was repeatedly unable to remember facts, including whether the children had spent every other weekend with him each year or had spent only one day per weekend with him; whether he had written the letter to his cousin stating the apparently incorrect number of days a week when, he said, she had seen him with the children; whether he was the author of the letter from his employer stating that it was not possible for him to work two days a week but without specifying whether he was not available only in the evening or for the entire day. As well, he was not able to recall whether he had worked on those days, and he stated that we was not able to recall the time of day when he picked the children up and dropped them off on weekdays in the summer.

[13] The father made an incorrect statement to the Canada Revenue Agency in his application to be recognized as a shared-custody parent when he stated that his children resided with him for three full days out of seven per week. That raises doubts as to the credibility of what he told the Court.

[14] I see no reason to consider the time the children spent in school every second Monday during the school year as time the children spent with their father. His access ended at 9:00 a.m. His Monday overnight did not start until 5:00 p.m. or even later, when the children, who had gone back to their mother's for a while, returned. During the summer holidays, the children did not spend time with their father during the day on Monday. I also see no reason to consider the weeknights the children spent with their father to be 24-hour days.

[15] I find that the preponderance of the evidence is not sufficient to establish that the children resided with their father at least 40% of the time.

2. Care and upbringing

[16] The father cared for his children when they were with him. During the weekday overnights, he had supper with them and prepared their school lunches for the next day. He made sure they had done their homework in the evening. The father attended some of the children's activities and he recalls accompanying the mother to a few medical appointments.

[17] The mother coordinated all of the children's activities and appointments with the family doctor, optometrist and dentist. She was the primary parent with whom the school communicated concerning the children. When one of the children had to leave school early because of behavioural problems, the school communicated primarily with the mother, who then went to pick the child up or asked her mother to do it. After school, the children returned to their mother's, where their father picked them up between 5:00 and 5:30 p.m. for his overnight, even on Mondays. When the children were at home after school, the mother made them snacks and made sure they did their homework before leaving for their father's.

[18] In light of these facts, even if it were admitted that every second Monday during school hours counted as time spent with the father, and the school may have been authorized to call either of the parents to let them know about concerns regarding the children, I conclude that the mother was primarily responsible for the care and upbringing of the children during each school day.

[19] For these reasons, the appeal is allowed with costs.

Signed at Ottawa, Canada, this 18th day of April 2024.

“Patrick Boyle”

Boyle J.

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APPEARANCES:

Counsel for the appellant: Stéphane Roof
Counsel for the respondent: Samantha Jackmino

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