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Docket: 2005-363(1T)1

BETWEEN:

CHANTAL BOUCHER,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on December 2, 2005 and judgment rendered orally on
December 6, 2005 at Ottawa, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant: Gary Stein

Counsel for the Respondent: April Tate

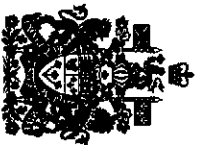
JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2000, 2001 and 2002 base taxation years are dismissed.

Signed at Ottawa, Canada, this 7th day of December 2005.

"Diane Campbell"
Campbell J.

Tax Court of Canada



Cour canadienne de l'impôt

Citation: 2006TCC62

Docket: 2005-363(TT)1

BETWEEN:

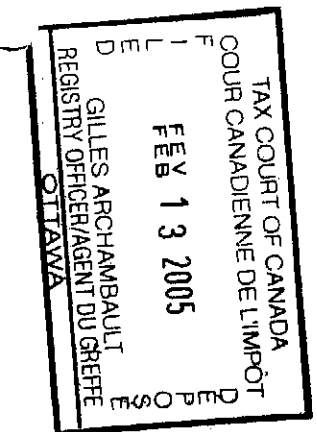
CHANTAL BOUCHER

Appellant,

And

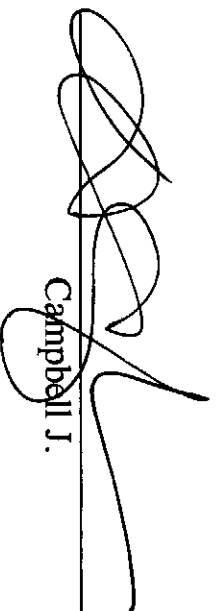
HER MAJESTY THE QUEEN,

Respondent.



CERTIFICATION OF TRANSCRIPT OF
REASONS FOR JUDGMENT

Let the attached certified transcript of my Reasons for Judgment delivered orally from the Bench at Ottawa, Ontario, on December 6, 2005, be filed.


Campbell J.

Signed in Ottawa, Canada, this 9th day of February 2006.

THE TAX COURT OF CANADA

IN THE MATTER OF The Income Tax Act

BETWEEN:

CHANTAL BOUCHER

Appellant

- and -

HER MAJESTY THE QUEEN,

Respondent

Transcript of the Decision, with Oral Reasons, of The Honourable Justice Campbell, delivered from the Bench on 6 December 2005 at Ottawa, Ontario

SITTING
(Decision, with Oral Reasons)

APPEARANCES:

G. Stein

for the Appellant

A. Tate

for the Respondent

HELD AT:

The Tax Court of Canada
Court Room
200 Kent Street, 3rd floor
Ottawa, Ontario

Tuesday, December 6, 2005

1 Appellant and from Alain Giguere.

2 For the rest of the Judgment, I will
3 refer to Mr. Giguere as "the father of the children".

4 There is no dispute in this Appeal
5 that the two children in question are in all respects
6 "qualified dependents" within the meaning of
7 Section 122.6 of the Act.

8 When the parents separated in 2000, an
9 Order, dated December 14, 2001, of the Ontario Superior
10 Court issued which provided that the parents would
11 share joint custody of the children. The Order went on
12 to state that the children's primary residence would be
13 with the father. At Paragraph 2, it is stipulated that
14 if the parents were unable to jointly make major
15 decisions affecting the children, the father would be
16 entitled to make the final decision.

17 The Order set out very specific and
18 detailed access arrangements between the parents. The
19 Appellant was to have the children every second
20 weekend, together with two weekdays preceding her
21 access weekend, and three weekdays preceding the
22 father's access weekend, from 8 o'clock in the morning
23 until 7:30 in the evening. All other holiday and
24 special occasion periods seem to be equally divided
25 between the parents.

26 The Appellant described the three
27 different residences where she resided for the relevant

1 period, with the sleeping accommodations she provided
2 for her children. Although in all of these residences
3 the children shared the bedroom with the Appellant, it
4 appears that adequate provisions were made for them,
5 including their own beds, dressers, TV and computer.
6 She moved to a third residence, where she currently
7 resides, to be closer to the children's school, so that
8 they could walk to school when she had them, instead of
9 taking the bus.

10 The Appellant described in detail the
11 various activities she participated in with the
12 children. She gave evidence of meal and luncheon
13 preparation, of keeping her home safe for small
14 children, of attending to dental and medical
15 appointments, of walking to the school and spending
16 fifteen minutes in the schoolyard with the children in
17 the mornings when they slept at the father's residence,
18 of completing homework assignments, and of purchasing
19 clothes.

20 The Affidavit of the Appellant,
21 Exhibit A-2, outlined in great detail the arrangements
22 she made with respect to her responsibilities toward
23 her children, including educational, recreational,
24 athletic and the daily involvement in the supervision
25 and maintenance of the home environment, arrangements
26 for medical and dental needs, and general guidance for
27 the children.

1 This Exhibit also contained a calendar
2 record for the relevant period, showing the days that
3 she cared for the children and the days on which they
4 were ill and she took them to a doctor. A record of
5 medical appointments was also attached to her
6 Affidavit, as well as copies of prescription
7 medication.

8 The School Registration Forms,
9 attached to the Appellant's Affidavit, listed the
10 father as the number 1 contact, the Appellant as number
11 2, and a babysitter as number 3. The Appellant, on
12 cross-examination, stated that the father was listed as
13 number 1 because he had registered the children at
14 school. She also went on to state that she informed the
15 school that she should be the number 1 contact on those
16 days that were the Access Days for her under the Order
17 but it does not appear the school acted on this.

18 The father of the children provided
19 his evidence respecting the living arrangements with
20 his children. He initially lived in a three-bedroom
21 townhouse, and now he is back in a duplex, where the
22 children have their own bedroom and their own
23 workspace. In addition, he owns a cottage, where the
24 children enjoy activities such as swimming in the
25 summer and skating in the winter.

26 Mr. Giguere reviewed his involvement
27 with the children's activities, including: coaching his

1 son's hockey and soccer teams, biking with both
2 children, preparing meals and lunches, helping with
3 homework, and attending school activities including
4 school field trips.

5 Mr. Giguere allowed the Appellant to
6 take the children to dental appointments, at her
7 suggestion, because as he observed she was receiving
8 Assistance and Social Services that paid for this type
9 of care. Although he took the children to a doctor if
10 it was required, it was clear that it was not as often
11 as the Appellant and that he felt that many of these
12 Doctor Appointments were unnecessary.

13 Although the Court Order gave him the
14 final decision-making role in the event of a
15 disagreement over the children, he testified that there
16 had been no disputes that they had not been able to
17 resolve.

18 Attached to the Appellant's Affidavit,
19 as Schedule "H", the original being filed as
20 Exhibit A-3, was a note, handwritten by the Appellant
21 and signed by the children's father, in which he agreed
22 to the mother continuing to receive the Child Tax
23 Benefit. Both Parties agreed that the Appellant
24 produced this note outside the school on a rainy day.
25 The Appellant admitted that the father was not happy
26 about signing it, and Mr. Giguere stated he was coerced
27 into signing it.

1

2 Analysis:

3
4 Unfortunately, in these cases, the Act
5 contemplates only one parent being the eligible
6 individual to receive these benefits.

7 I have a father and a mother before
8 me, both of whom have demonstrated that they are
9 excellent caregivers and both of whom are extensively
10 involved in the daily care and upbringing of their two
11 children. However, the Act contains no provision which
12 would allow me to pro-rate the benefits, as I would
13 like to do in this case, between these two individuals,
14 both of whom claim to be the eligible individual in
15 respect of the children.

16 This is one of those cases where there
17 is not much to choose between the evidence of the
18 mother and the father.

19 The applicable statutory definition of
20 the term "eligible individual" is found in
21 Section 122.6, which states, in part:

22 "... 'eligible individual' in respect of a
23 qualified dependant at any time means a
24 person who at that time
25 (a) resides with the qualified dependant,
26 and

1
2 **(b) is the parent of the qualified dependant**
3 **who primarily fulfils the responsibility for**
4 **the care and upbringing of the qualified**
5 **dependant, ----"**

6 And for the purposes of this definition:

7 **(h) prescribed factors shall be considered in**
8 **determining what constitutes care and**
9 **upbringing; ----"**

10 Section 6302 of the Income Tax
11 Regulations sets out the prescribed factors referred to
12 in Paragraph (h) of Section 122.6, and it is those
13 factors that I must consider.

14 When I look at each month, the
15 children were with the mother overnight on two nights,
16 Friday and Saturday, every second weekend in a month.
17 There were no other overnights spent with the
18 Appellant, except for special occasion and holiday
19 periods. The children slept the majority of the nights
20 in a month at the father's residence. In addition to
21 this weekend access, the Appellant had the children
22 from 8 a.m. to 7:30 p.m. on two days of one week and
23 three days of the next week. However, if I understand
24 the evidence correctly, the father still got the
25 children out of bed, would get them their breakfast,
26 prepare their lunches, and then the Appellant would go
27 to the schoolyard, as she did most days, to spend some
 time with them before they attended class. She then

1 had the children after school, from 2:45 p.m. until
2 7:30 in the evening, when they were returned to the
3 father.

4 The evidence was that the Parties
5 followed the Court Order to the letter of the law, and
6 there was no deviation from these terms.

7 It is also clear, despite the
8 Appellant's evidence to the contrary, that even on
9 those days when the Appellant had weekday access, the
10 father was still listed on the school's records as the
11 first contact person in the event of an emergency.

12 I cannot agree with the Appellant's
13 contention, notwithstanding a very able argument put
14 forward by her Solicitor, Mr. Stein, that the children
15 resided with her 50 percent of the time. They followed
16 the Order, and that Order specified that the primary
17 residence of the children would be with the father and
18 that, ultimately, he had the "final call" on all major
19 decisions on which they could not agree.

20 The Order placed the primary residence
21 with the father, and I believe, based on the evidence
22 that I heard, he fulfills the residency requirement.

23 Even if I found in favour of the
24 Appellant in respect of this requirement, I would have
25 difficulty when I consider the factors in Section 6302
26 of the Regulations, in light of the Order and the
27 facts.

1 Again, there is little to choose
2 between these two parents in respect of their parenting
3 skills.

4 The Appellant is clearly a concerned
5 and loving mother, who takes every opportunity to
6 devote quality time to the children.

7 There was some contention over the
8 number of times the Appellant took the children to
9 Doctor's Appointments for asthmatic-related problems.
10 There was no evidence that they were not necessarily
11 essential visits; but on other hand, there was no
12 evidence that the father was neglectful in his
13 responsibilities because he did not take them as often
14 as she did.

15 I also have the note signed by the
16 father in which he purportedly forgoes his claim to the
17 benefits after a certain time. He says he was coerced -
18 - although I doubt, given his size compared to that of
19 the Appellant, he felt in any way threatened by her.
20 However, this note was silent respecting the actual
21 periods for which he did sign off his entitlement. In
22 addition, he did not have the benefit of independent
23 advice before signing it and indicated he signed it
24 after much persistence on the Appellant's part.
25 Therefore, I consider it to have a neutral value in
26 assessing these factors.

1 More importantly, the method to change
2 Paragraph 14 of the Court Order was to seek a Variation
3 to the Order, not via a handwritten signed note.

4 Again, in the end, since there is
5 little between these parents, I must return to the
6 Court Order, which states, at Paragraph 14, that the
7 Appellant would receive the benefit for the 2001
8 Taxation Year, up to February 2002, and thereafter the
9 father would start to claim it.

10 I have nothing in the facts of this
11 case that indicate that the parents were doing anything
12 other than following, to the letter, the terms of the
13 Order, and that Order places the primary residence of
14 the children with the father where from the facts they
15 reside more than 50% of their time. It gives him the
16 ultimate decision-making powers, and also gives him the
17 right to claim the Child Tax Benefits after February
18 2002.

19 I must conclude that the Minister's
20 position is correct and, accordingly, I dismiss the
21 Appeal.

22 **THE REGISTRAR:** Court is now closed.

23 Certified Correct:

24
25
26

S.A. Tyler Keeley, V.C.R.

1 CITATION:

20065TCC62

2 COURT FILE NO.:

2005-363(IT)1

3 STYLE OF CAUSE:

Chantal Boucher and
Her Majesty the Queen

4 PLACE OF HEARING:

Ottawa, Ontario

5 DATE OF HEARING:

December 2, 2005

6 REASONS FOR JUDGMENT
BY:

The Honourable Justice Diane
Campbell

7 DATE OF ORAL JUDGMENT:

December 6, 2005

8 APPEARANCES:

9 Counsel for the Appellant:

Gary Stein

10 Counsel for the Respondent:

April Tate

11 COUNSEL OF RECORD:

12 Counsel for the Appellant:

13 Name:

Gary Stein

14 Firm:

Ottawa, Ontario

15 For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada

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