

BETWEEN:

BONNIE FRASER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 30, 2009 at Ottawa, Canada

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Sara Chaudhary

JUDGMENT

The appeal from determinations made by the Minister of National Revenue under the *Income Tax Act* that the appellant had been overpaid child tax benefits (CCTB) and the goods and services tax credit (GSTC) for the period from April 1, 2006 to June 30, 2008 is allowed, and the determinations are referred back to the Minister for reconsideration and redetermination on the basis that the appellant is entitled to the CCTB and GSTC for the period from April 1 to December 31, 2006 only.

Each party shall bear their own costs.

Signed at Toronto, Ontario this 12th day of January 2010.

“J. M. Woods”

Woods J.

Citation: 2010 TCC 23
Date: 20100112
Docket: 2009-1037(IT)I

BETWEEN:

BONNIE FRASER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The issue in this case is whether the appellant, Bonnie Fraser, is entitled to the Canada child tax benefit (CCTB) and the goods and services tax credit (GSTC) in respect of her daughter. The relevant provisions are sections 122.5 and 122.6 of the *Income Tax Act*.

Period at issue

[2] At the commencement of the hearing, there was some confusion as to the period at issue.

[3] Attached to the notice of appeal was a confirmation letter dated December 15, 2008. It notified the appellant that she was denied benefits for the period from April 1, 2006 to June, 2008. The appellant had assumed that this was the period at issue.

[4] Counsel for the respondent, on the other hand, stated that the period at issue is reflected in notices of redetermination that were subsequently issued (i.e., on January 20, 2009). According to the respondent, these redeterminations denied the CCTB for the period from May 2006 to June 2008 and denied the GSTC in respect of the period from July 2006 to April 2007. These notices were not available at the hearing.

[5] Since the only evidence before me as to the period at issue is the letter dated December 15, 2008 that was attached to the notice of appeal, I will rely on it to establish the period at issue. Accordingly, the relevant period for both the CCTB and the GSTC is from April 1, 2006 to June 30, 2008.

[6] I would also note that each of the parties made certain concessions for portions of the period at issue. In this regard, the appellant informed the Court that she would not contest the determinations for any period after 2006. As for the respondent, counsel informed the Court that the benefits for the month of April, 2006 were conceded.

[7] The period that remains to be decided, then, is from May 1, 2006 to December 31, 2006.

Positions of parties

[8] The position of Ms. Fraser, as stated in her notice of appeal, is that she qualifies for the CCTB and the GSTC in respect of her daughter for the relevant period for the reason below.

I always have been and still am the caregiver of my daughter [name]. I incur all expenses except for ½ of her sports programs, [her] father does not!

[9] The position of the respondent is that the CCTB and the GSTC should be denied because the daughter resided with her father and not Ms. Fraser during the relevant period.

[10] In the alternative, the respondent submits that Ms. Fraser is ineligible for benefits because she was not the primary caregiver for her daughter during this period.

[11] I would mention at the outset that the respondent's position is contrary to an agreement reached between Ms. Fraser and the father of the child. By way of a written agreement, they agreed that Ms. Fraser would be entitled to the benefits for 2006 and 2009, and that the father would be entitled to the benefits for 2008 (Ex. A-1).

Entitlement to CCTB

[12] The legislative requirements for the CCTB and the GSTC differ and therefore each of these benefits will be discussed separately. I begin with the CCTB.

[13] The CCTB is a monthly benefit generally provided to a parent in respect of a dependant child. It is provided for in section 122.6 of the *Act*.

[14] In order to qualify, it must be established that the appellant is an “eligible individual” at the beginning of the month to which the benefit relates. The relevant provision reads:

"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,

[...]

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;

[15] The first question to be decided is whether the appellant resided with her daughter throughout the relevant period as required by clause (a) above.

[16] For purposes of the CCTB, the term “resides with” means “to live or stay with someone in a given place with a certain constancy, a certain regularity or else in an habitual manner:” *Hall v. The Queen*, 2008 TCC 636, [2009] 2 CTC 2034.

[17] At the hearing, Ms. Fraser testified on her own behalf and the daughter’s father, Anik Cardin, was subpoenaed to testify for the respondent.

[18] Ms. Fraser and Mr. Cardin were in a common-law relationship from June 1992 until May 2002. Their daughter was born in 1995.

[19] When the relationship ended in 2002, Ms. Fraser left the family home in Pierrefonds, Quebec and moved with her daughter to a new residence in the same location (Ex. R-1). A few months later, a consent judgment was entered into which provided that Ms. Fraser would have sole custody of her daughter and she would receive child support from the father. Mr. Cardin was given access every second weekend and holidays.

[20] In April 2006, Ms. Fraser moved from the new residence to Lancaster, Ontario, which was closer to her employment.

[21] Shortly after moving, Ms. Fraser concluded that it would be in her daughter's interest to stay with her father during weekdays for the remainder of the school term so that she would not have to change schools mid-year. After a short period of time, Mr. Cardin agreed to this arrangement and it continued until the end of the school year.

[22] During July and August, the daughter stayed with both parents on a regular basis each week. The daughter was involved with soccer near her father's home and it made sense for the daughter to spend a considerable amount of time there. It also enabled her to spend time with her father.

[23] The testimony was contradictory as to where the daughter spent the majority of her time during the summer. I am satisfied based on the evidence that the daughter lived with each parent for a considerable time during the summer.

[24] Ms. Fraser testified that she had planned that her daughter would start school in Lancaster in September. However, this did not happen because the daughter preferred to go to school in Quebec where she qualified for high school. Accordingly, when school started in September the daughter stayed with her father during the week and she spent weekends with her mother. It is likely that the daughter spent on average four nights a week with her father and three nights a week with her mother from September to December.

[25] The pattern throughout the period from May to December 2006, then, was fairly consistent in that the daughter lived with each parent for a considerable period of time. I conclude that the daughter had dual residence throughout the period. Her settled routine was split between the two parents.

[26] Counsel for the respondent submits that the daughter only visited Ms. Fraser during this period. She suggests that the daughter never moved to Lancaster.

[27] I disagree with this submission. According to exhibit R-1, the daughter lived with her mother after the separation and the mother had sole custody. It was not a situation where the daughter continued to reside in the matrimonial home with the father after the separation. The daughter was not visiting her mother during the relevant period.

[28] I now turn to the respondent's alternative argument that Ms. Fraser was not the primary caregiver as required by clause (b) of the definition of "eligible individual."

[29] The main problem that I have with this argument is that it is not mentioned in the reply. The relevant statutory provision is mentioned, but the only ground stated is the residency requirement.

[30] A similar issue was recently discussed by Justice Bowie in *Bibby v. The Queen*, 2009 TCC 588. In that case, the respondent was not permitted to raise a new argument at the hearing because it had not been mentioned in the reply. Justice Bowie noted that the respondent would have been entitled to raise the issue if the pleadings were amended. However, the respondent did not seek to do so.

[31] At paragraph 23 of the *Bibby* decision, Bowie J. notes the importance of the reply:

Subsection 49(1) of the *General Procedure Rules* requires that every Reply shall state:

- (a) the statutory provisions relied on; [and]
- (b) the reasons the respondent intends to rely on

The purpose of these requirements is to ensure that the issues are properly defined for the purposes of discovery and trial, and so that the appellant will know what arguments he must meet, and so that he will be able to marshal and lead his evidence accordingly. This is not a mere formality that may be overlooked when it has not been complied with; it is a core component of the trial process, and to ignore non-compliance would undermine the integrity of that process: see *Glisic v. The Queen*.

[32] While the above passage refers to the Rules under the General Procedure, a similar requirement for an appeal heard under the Informal Procedure is contained in section 6 of the Informal Procedure Rules.

[33] The respondent's alternative argument should be rejected for this reason.

[34] Counsel for the respondent submits that this principle should not be applied here because the appellant was not taken by surprise by the alternative argument. I was invited to ask Ms. Fraser whether she was taken by surprise.

[35] In my view, this is not a satisfactory response in this case. Even if the appellant had agreed that she was aware of the caregiver requirement, I would have no confidence that it was fully understood. The bottom line is that Ms. Fraser, and the Court, should be entitled to rely on the pleadings for an understanding of the issues in the appeal.

[36] I would also note that the reply does not provide any assumptions of fact relating to the caregiver requirement. Even if Ms. Fraser was generally aware of a caregiver requirement, the failure of the respondent to state assumptions of fact supporting its position likely resulted in prejudice to Ms. Fraser. It became clear during Ms. Fraser's argument that she had not introduced many relevant facts during her evidence.

[37] Although it is not necessary for my decision, I would also mention that I would have decided the issue in favour of the appellant on the merits as well.

[38] The following are the prescribed factors that are to be considered in determining the primary caregiver:

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.

[39] In this case, it is clear that both parents took an active role in the care and upbringing of their daughter during the relevant period. They both spent considerable time with their daughter although during the school year the daughter spent more evenings at her father's residence than at her mother's. For certain activities, the father seemed to take a lead role (i.e., participation in sports) while for other activities the mother seemed to take a lead role (i.e., educational and medical needs).

[40] In my view, the fact that the daughter spent more evenings with her father is counterbalanced by the fact that the mother had sole custody and took responsibility for making the central decisions in respect of her daughter's upbringing.

[41] In a situation such as this, it makes sense in my view to follow the agreement that Ms. Fraser and Mr. Cardin reached, which was for Ms. Fraser to receive the CCTB benefit for 2006.

Entitlement to GSTC

[42] The GSTC is a benefit that is designed to assist Canadians with modest incomes. The benefit is enhanced if an individual has a qualified dependant, as defined. The relevant provision is section 122.5 of the *Act*.

[43] Counsel for the respondent made identical arguments with respect to the GSTC that were made with respect to the CCTB.

[44] For purposes of the GSTC, the term "qualified dependant" is defined as follows:

“qualified dependant” of an individual, in relation to a month specified for a taxation year, means a person who at the beginning of the specified month

(a) is the individual’s child or is dependent for support on the individual or on the individual’s cohabiting spouse or common-law partner;

(b) resides with the individual;

(c) is under the age of 19 years;

(d) is not an eligible individual in relation to the specified month; and

(e) is not a qualified relation of any individual in relation to the specified month. (Emphasis added.)

[45] According to this definition, the daughter would be a qualified dependant of Ms. Fraser if she resided with the appellant and was under 19 years of age. The age requirement is clearly satisfied. It is the residency requirement that the respondent takes issue with.

[46] For the reasons described above, I have concluded that the daughter did reside with Ms. Fraser during the period from May to December, 2006. Accordingly, the daughter was a qualified dependant for purposes of the GSTC during this period.

[47] I now turn to the respondent’s alternative argument that the appellant was not the primary caregiver.

[48] As with the CCTB, the caregiver requirement was not mentioned in the reply. This procedural defect is sufficient to dispose of this issue but I would also mention another problem with the respondent’s position.

[49] The caregiver test is imported into the GSTC provisions as part of a series of rules that are designed to prevent the payment of multiple benefits in respect of a child. The relevant provision is subsection 122.5(6), which provides:

(6) If a person would, if this Act were read without reference to this subsection, be the qualified dependant of two or more individuals, in relation to a month specified for a taxation year,

(a) the person is deemed to be a qualified dependant, in relation to that month, of the one of those individuals on whom those individuals agree;

(b) in the absence of an agreement referred to in paragraph (a), the person is deemed to be, in relation to that month, a qualified dependant of the individual, if any, who is, at the beginning of that month, an eligible individual within the meaning assigned by section 122.6 in respect of the person; and

(c) in any other case, the person is deemed to be, in relation to that month, a qualified dependant only of the individual that the Minister designates.

[50] The legislative scheme that is contemplated by clause (a) of s. 122.5(6) enables a dual residence situation to be resolved by the agreement of the parties. It is only where there is no agreement that the caregiver test applies by virtue of clause (b).

[51] In this case, the caregiver test has no application because Ms. Fraser and Mr. Cardin have agreed that Ms. Fraser should receive the benefit for the relevant period (Ex. A-1).

[52] For this reason, I conclude that the daughter is a qualified dependant of the appellant for purposes of the GSTC during the period from May to December, 2006.

Conclusion

[53] In light of these conclusions, the appeal will be allowed and the determinations will be referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that Ms. Fraser is entitled to the CCTB and GSTC for the period from April 1 to December 31, 2006.

[54] Each party shall bear their own costs.

Signed at Toronto, Ontario this 12th day of January 2010.

“J. M. Woods”

Woods J.

CITATION: 2010 TCC 23

COURT FILE NO.: 2009-1037(IT)I

STYLE OF CAUSE: BONNIE FRASER and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Canada

DATE OF HEARING: November 30, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice J. M. Woods

DATE OF JUDGMENT: January 12, 2010

APPEARANCES:

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