

Docket: 2009-2595(IT)I

BETWEEN:

AXEL HEUBACH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on July 13, 2010, at Yarmouth, Nova Scotia.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the appellant: The appellant himself

Counsel for the respondent: Melanie Petrunia

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**JUDGMENT**

The appeal from the determinations made under the *Income Tax Act*, notices of which are dated January 9 and 20, 2009, for the periods from October 2008 to January 2009 and from August 2008 to December 2008 respectively, is dismissed without costs in accordance with the Reasons for Judgment attached hereto.

Signed at Ottawa, Canada, this 23<sup>rd</sup> day of August 2010.

"Patrick Boyle"

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Boyle J.

Citation: 2010 TCC 409  
Date: 20100823  
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### **REASONS FOR JUDGMENT**

#### **Boyle J.**

[1] The appellant Axel Heubach has appealed the respondent's determination that he is not entitled to all or a portion of the Canada Child Tax Benefit ("CCTB") in respect of his three children for any period since his divorce from their mother.

[2] Mr. Heubach and his ex-wife have a form of a shared custody of their children. They stay with him three days a week and they stay with their mother four days a week throughout each month. The applicable CCTB legislation did not provide for the sharing of monthly CCTB amounts between parents in such circumstances. Mr. Heubach appeals to this Court on the basis that:

- (i) the CCTB provisions are unconstitutional to the extent they discriminate against parents with less than 50% parenting time;
- (ii) he is entitled to the CCTB in full or on a prorated basis because he is the children's primary caregiver when they are staying with him which is more than 40% of the time; and
- (iii) the Canada Revenue Agency ("CRA") was wrong to advise him after its investigation that he and his ex-wife were each entitled to one-half of the CCTB because their children reside with each and both parents are

equally involved in the children's care and upbringing. His position is that the CRA should therefore not be allowed to seek to recover five months of CCTB payments made to him on that basis.

### I. The Constitutional Question

[3] The discrimination or inequality complained of by Mr. Heubach with respect to the CCTB entitlements of parents sharing custody of their children does not rise to the level of constitutionally prohibited or restricted discrimination protected by the Canadian Charter of Rights and Freedoms. This very issue was considered and rejected by C. Miller J. in *Barnett v. The Queen*, 2005 TCC 719, 2005 DTC 1692. I concur with the analysis, reasons and decision of C. Miller J. and find them applicable in this case.

### II. Entitlement to the CCTB

[4] The CCTB legislation as it applied in the period in question and to date does not provide for the sharing or prorating of the CCTB amongst parents who have shared custody of their children: see the Federal Court of Appeal's decision in *The Queen v. Marshall et al.*, 96 DTC 6292. The CCTB can only be paid to one parent each month. In order to be the parent entitled to receive the CCTB for a particular month in respect of the child, that parent must, in accordance with section 122.6 of the *Income Tax Act* (the "Act"):

- (i) reside with the child; and
- (ii) be the parent who primarily fulfilled the responsibility for the care and upbringing of the child.

[5] In addition Regulation 6302 of the *Act* lists a number of factors which are to be looked at in considering a child's care and upbringing. These are reproduced in Appendix A hereto.

[6] There is no basis in this case for considering that one parent is the primary caregiver for the children some months and the other parent is primary caregiver for the remaining months of the year. Nothing in the relationship between the parents and children changes from month to month. Nor is there any basis in this case to consider one parent as the primary caregiver of some of the children and the other

parent as the primary caregiver of the other children. The parents' legal and living relationships with each child are essentially the same.

[7] In this case, the children reside with each parent at different times of the week each month. Each parent is generally responsible for day-to-day parenting of the children for the days and nights each week that they are at that parent's home. The parents each fulfill that parental caring, supervision and responsibility quite independently of the other.

[8] Mr. Heubach is undoubtedly responsible for looking after the children's headaches, tummy aches, earaches, cuts, bruises, sprains and bumps while they are staying with him, including getting them medical or emergency hospital attention if needed. Similarly, while they are with him, it is Mr. Heubach who generally supervises their daily activities and needs, keeps them safe and secure through the day and night, ensures they get to school and scheduled activities, ensures they wash up, get ready for and go to bed, and then get up in time to get ready for school, etc. Of course, the children's mother is responsible for all of these same things when the children are with her, which is somewhat more than half of the time.

[9] In the circumstances of joint or shared custody or parenting, many of the primary caregiver considerations listed in Regulation 6302 may not be of much assistance.

[10] However, one of the enumerated factors to be considered in determining which parent primarily fulfills the responsibility for the child's care and upbringing is "the existence of a court order in respect of the [child] that is valid in the jurisdiction in which the [child] resides". The Supreme Court of Nova Scotia issued an order under the *Divorce Act* in March 2008. The order was made by the Court after hearing evidence and after the parties reached an agreement and consented to the order. Under the terms of the consent order:

- (i) Mr. Heubach and his ex-wife were granted "joint custody" of the children;
- (ii) the children's mother was to "continue to be the primary care giver of the children"; and
- (iii) the "parenting time with the children" was to be shared in accordance with the detailed annual schedule which generally provided the children

would live three days each week with their father and four days each week with their mother.

[11] A variation order was obtained from the Supreme Court of Nova Scotia on consent in December 2008 to provide the terms upon which Mr. Heubach was to be allowed to take two of the children on a trip to Germany. The variation order provided Mr. Heubach would provide proof of scheduled travel and medical coverage to his ex-wife, whereupon she would give Mr. Heubach the children's passports. The order went on "Mr. Heubach shall return the passports to [his ex-wife] upon their return from Germany, as she is the primary care giver of the children."

[12] I find it very significant that the Supreme Court of Nova Scotia makes it clear that notwithstanding joint custody and shared parenting time, the children's mother is to be the primary caregiver of the children and that the parents agreed with and consented to that order. It was intended by the Court and by the parents that the children's mother would, to that extent at least, have greater responsibility for, and rights to the children's care. Mr. Heubach is not alleging that order has been breached nor has he sought to have it varied.

[13] While it is difficult in cases involving shared custody and joint parenting by two parents much involved with all aspects of their children's daily lives, I am satisfied that the children's mother, not Mr. Heubach, was primarily responsible for their care and upbringing for CCTB entitlement purposes. Her greater responsibility was evidenced not only by the terms of the court orders and the fact that the children lived with her more than half of the time, but also by the fact that she was more responsible for monitoring and scheduling the children's regular medical and dental appointments, more involved in, and responsible for getting the children registered and out to activities, mostly responsible for the children's clothing wardrobes (with the exception of back-to-school clothes) especially such things as coats and boots and other seasonal clothing, and it was she who gave the children a monthly allowance and guided them in its spending.

### III. The CRA's Determination that the Parents would share the CCTB

[14] In response to Mr. Heubach's application for the CCTB following his divorce from his ex-wife, the CRA sent him a detailed questionnaire regarding his relationship with the children. His ex-wife received a similar questionnaire. In July 2008 the CRA wrote to Mr. Heubach as follows:

We have carefully reviewed the information that you and another person provided about the care and upbringing of [your children].

As a result, we have determined that they reside with each of you, and you are both equally involved in the children's care and upbringing. Consequently, we intend to alternate eligibility for the CCTB . . . between you, every six months, starting August 1, 2008.

[15] The letter from the CRA goes on to set out the six-month rotating entitlement schedule. The CRA paid Mr. Heubach in accordance with this letter and now seeks to recover the money. Mr. Heubach's ex-wife received an identical letter which prompted her to object to losing one-half of the CCTB. Her objection led to the CRA determining that she was the sole parent entitled to the CCTB which in turn led to Mr. Heubach's appeal.

[16] The CRA's letter to Mr. Heubach is shocking. It is clear from the laws governing the CCTB as passed by Parliament that only one parent can be entitled to the CCTB each month and that, if parental responsibilities do not change from month to month, CCTB entitlement cannot alternate between parents. The Federal Court of Appeal has confirmed that this is the only permissible reading of the legislation in *Marshall*. Just as this Court has no power to share the CCTB in joint custody and shared parenting cases, the CRA cannot have the power to do so in administering the legislation. While it is entirely possible that the CRA has the power to administer the CCTB to permit the sharing of CCTB by joint custodial parents if those parents both agree, the CRA can have no power to order it unilaterally. The CRA should not have told Mr. Heubach that it did. The CRA must have known that, if either parent objected, it would be required to determine that only one of them qualified. In circumstances such as these, Mr. Heubach is reacting as any reasonable Canadian could be expected to in thinking that the CRA should not now be allowed to collect back the amounts it gave him.

[17] Unfortunately for Mr. Heubach, this Court has no power to order the CRA not to collect amounts legally owing, nor to find the CRA responsible for its apparent maladministration of the *Act*. There are other venues for such grievances including the CRA Fairness Program, the *Financial Administration Act* and the Federal Court. In the circumstances, I would hope the CRA will seriously consider exercising some discretion regarding the collection of past amounts paid to Mr. Heubach on grounds of basic and simple fairness.

[18] The appeal is dismissed.

Signed at Ottawa, Canada, this 23<sup>rd</sup> day of August 2010.

"Patrick Boyle"

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Boyle J.

## APPENDIX A

**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:

- (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.



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DATE OF JUDGMENT: August 23, 2010

APPEARANCES:

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