Dockets: 2017-854(IT)I
2017-1310(IT)I

BETWEEN:

DJIMY THÉODORE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence
on December 14, 2017, at Montréal, Quebec, and decision rendered
orally from the bench
on January 16, 2018, at Montréal, Quebec.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Nancy Dagenais

JUDGMENT

For the attached reasons delivered orally, the appeals from the determinations made under the *Income Tax Act* for the 2012, 2013, 2014 and 2015 base years (period from July to September 2016) are dismissed, without costs.

Signed at Montréal, Quebec, this 18th day of January 2018.

"Guy Smith"

Smith J.

Citation: 2018 TCC 23
Date: 20180118
Dockets: 2017-854(IT)I
2017-1310(IT)I

BETWEEN:

DJIMY THÉODORE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT
Decision rendered orally from the bench
on January 16, 2018, at Montréal, Québec.

Smith J.

[1] These are appeals under the informal procedure from a determination by the Minister of National Revenue (the Minister) that the Appellant, Djimy Théodore, was not an eligible individual with shared custody of the three minor children born of his relationship with Marie Lousiane Paul (the mother), on the grounds that he was not residing with the children on an equal or near equal basis during the period at issue, in accordance with section 122.6 of the *Income tax* (the Act).

[2] These two appeals were heard on common evidence. The first concerns the 2012, 2013 and 2014 base years and, more specifically, the period from January 2014 to June 2016. The second concerns the 2015 base year, but only for the period from July to September 2016.

[3] The only issue in this case is whether the Appellant was an eligible individual with shared custody of his three children during the relevant period, that is, from January 2014 to September 2016.

[4] It is not disputed 1) that the Appellant and the mother are the parents of the three children, born in 2001, 2004 and 2007; 2) that they have been living separate and apart since 2007; or 3) that the Superior Court of Québec rendered a judgment granting them shared custody of the three children.

[5] A copy of this judgment was entered into evidence. I note in the preamble that the mother made a claim for sole custody of the children, and it was dismissed. At paragraph 20, Mr. Justice Déziel stated that [TRANSLATION] "the parties shall consult with each other on all decisions concerning the children's education, health, religion, educational institutions, and sports activities."

[6] While this appeal concerns the period beginning in January 2014, the Appellant refers to events that occurred in previous years.

[7] According to his testimony, he and the mother had a fight around June 20, 2012. Police and the office of the Director of Youth Protection intervened, it was decided that he had to remove himself from the situation. As a result, he did not see his children again for some time. Since no police report was entered into evidence, the Court has little information about the circumstances surrounding this incident. However, it does not seem to be disputed that police took no further action.

[8] The Appellant then made several attempts to exercise his shared custody rights, to no avail. After many attempts, he instituted proceedings before the Superior Court of Québec, and on November 7, 2013, an interlocutory judgment was rendered indicating that the judgment dated December 16, 2009, was still binding and that the mother had to comply with it. A copy of this decision was not entered into evidence, but the Respondent did not dispute it.

[9] According to the Appellant's testimony, the mother nevertheless refused to comply with the custody order. As a result, the legal proceedings were postponed until January 24, 2014. In the transcript of the hearing held that day (Exhibit A-2), Madam Justice Devito noted a written agreement between the parties. She then ratified the consent signed on January 23, 2014, and ordered the parties to comply with it.

[10] Paragraph 1 of the consent in question (Exhibit A-3) sets out the following terms for shared custody: a) [TRANSLATION] "the children will reside primarily with their mother" and b) [TRANSLATION] "the father will have access to the children from Thursday after school until Monday at school, twice a month, beginning on

January 31, 2014." It goes on to state that the parties will share the Christmas break, spring break, school holidays, and the summer holidays, and ends with the following general statement: [TRANSLATION] "at any other time by mutual agreement between the parties."

[11] At paragraph 2 of the written consent, the parties agree that [TRANSLATION] "[the mother] exercised sole custody from July 2012 to December 2013," thus confirming the Appellant's testimony in this regard. No explanation was offered for this.

[12] At paragraph 10, the parties agree to contribute to certain expenses in proportion to their incomes in accordance with the Child Support Determination Form (Exhibit A-4), that is, 40% for the father and 60% for the mother. The form's cover page indicates that it was "produced jointly," and it was signed by both parties. In addition, it is an affidavit.

[13] In Part 5 of the form, entitled "Calculation of annual support according to custody time," the parties chose Division 3, entitled "Shared custody." The form states that the parties must "[f]ill out this division if each parent has at least 40% of custody time in respect of all the children." Under "Distribution factor (%) of custody," the parties entered 147 days of custody or 40.27% of custody time for the father and 218 days of custody or 59.73% of custody time for the mother. Lastly, I note that it is indicated that the document is [TRANSLATION] "Accepted by the Court" and that the docket number matches that on the transcript of the hearing on January 24, 2014.

[14] As for the other evidence, the Appellant adduced, among other things, a schedule showing his custody time, that is, 135 days of custody (36.98%) for 2015 and 143 days of custody (39.18%) for 2016. An incomplete schedule was filed for 2014.

[15] The mother also filed summaries, prepared for the purposes of this case, for 2014, 2015, and 2016. According to her, these handwritten notes were prepared based on a schedule at home, and the Appellant's annual share of custody time is 30%, compared to 70% for her. She says that the appellant does not always adhere to the custody schedule, especially during school holidays, and that, sometimes, instead of dropping off the children at school Monday morning, he returns the children to her on Sunday afternoon.

[16] The two parents filed a series of receipts for expenses incurred in caring for the children, that is, for daycare, lunches and school or sports activities. The mother claims that the Appellant does not reimburse expenses and that she is the one who takes the children to doctor's and dentist appointments. She also maintains that she is the primary contact for the children's school.

[17] On cross-examination, the mother admitted that, even though she was the primary contact, the school also had the father's contact information and sent him the school newsletter. She also admitted that she worked nights and that, when she got home around 9 a.m., the kids had already left for school, as they took the bus around 7:30 a.m. This arrangement is possible since her elderly parents also live with them.

[18] The Appellant maintains that he has the children more often than not and that he occasionally has to pick them up on Sunday mornings when they refuse to go to religious ceremonies with their mother. According to him, he is very involved with them, especially with their schooling, and, notwithstanding the schedules in evidence, from a quantitative and qualitative perspective, he has the children more than 40% of the time, which is akin to shared custody. He added that he did not reimburse certain expenses incurred by the mother because she did not give him the receipts, and that, in any event, he had incurred expenses as well.

The Law

[19] I now turn to the questions of law before me. As mentioned, the issue here is whether the Appellant was an eligible individual with shared custody of his children during the period at issue.

[20] Based on the definition in the Act, two conditions must be met. The Appellant must establish 1) that he resided with the children on an equal or near equal basis and 2) that, when the children were residing with him, he primarily fulfilled the responsibility for their care and upbringing according to prescribed factors.

[21] I would point out that the second condition must be analyzed separately from the first, and that there is not necessarily a relationship between the two. The condition is fairly narrow, and it is not for the Court to assess, verify or compare the quality of the care provided by either parent.

[22] However, after reviewing the factors set out in section 6302 of the *Income Tax Regulations*, and after noting that neither the mother nor the Respondent disputed the evidence on this issue, the Court finds that the Appellant meets the second condition in that, when the children were residing with him, he fulfilled his duty to look after their care and upbringing.

[23] I return, then, to the first condition, which states that the Appellant must have resided with the children on an equal or near equal basis, an expression that is not defined in the Act.

[24] In *Van Boekel v. The Queen*, 2013 TCC 132, Madam Justice Woods examined this question and noted that a strict numerical analysis may not be sufficient. At paragraph 22, she stated that although the "near equal" element applies to time spent with each parent, often the circumstances will not lend themselves to a formulaic approach, and that, in this particular case, it is important to look at all the relevant circumstances and not to simply apply an arithmetic approach.

[25] This view was adopted, in part, by Mr. Justice Boyle in *Zara v. The Queen*, 2017 TCC 45, a decision that was cited by the Appellant. At paragraph 17, the judge stated: "When Parliament tells me to decide if it is near equal, I am not certain one need always spend hours in Court debating each hour of each day of each month." He added, at paragraph 20: "I think what is most important is that it is clear that the mother and the father agreed as part of their divorce to share parental responsibility and to have shared custody on a 60:40 basis, full stop."

[26] In that decision, the parties had negotiated an agreement that was ratified by the Superior Court of Québec. After reviewing the evidence, Boyle J. found that custody had indeed been shared on a 60:40 basis, which meant that the near equal requirement in the Act was met.

[27] Yet even though a qualitative approach is permissible, most often, the Court has found it necessary to adopt a quantitative approach to the time spent with each parent. In fact, this was the conclusion of Mr. Justice Sommerfeldt in *Morrissey v. The Queen*, 2016 TCC 178, after an exhaustive review of this Court's jurisprudence. He concluded that the Court must, first and foremost, undertake a quantitative analysis, and that a 60%/40% split was a near equal basis, but not less than 40% for either parent.

[28] In this case, the Appellant stated that the judgment dated December 16, 2009, granted him shared custody and that he had exercised his custody rights until the June 2012 incident. Afterwards, he was not able to exercise them again until late January 2014. Of course, the Court could attribute this to an arbitrary decision by the mother, which could lead the Court to draw a negative inference. Perhaps this was the Appellant's intention when he pointed this out. However, he did not attempt to explain the incident; he simply said that police had taken no further action. Consequently, the facts remain uncertain, if not murky, and the Court cannot draw from them a negative inference regarding the mother. Ultimately, this incident is not relevant to the case at bar.

[29] After looking at the judgment dated January 24, 2014, the Court is satisfied that the parties entered into a written agreement that was ratified by the Superior Court of Québec. Under this agreement, even though the children must reside primarily with their mother, the parents also agree to sharing custody on a 40.27%/59.74% basis in favour of the mother.

[30] This is similar to the situation in *Zara*, above. On its face, the division of custody time is, according to the case law, sufficient for the Court to find that the parties are sharing custody on a "near equal" basis.

[31] That being said, the Court must also review all the evidence to determine whether the Appellant complied with the judgment or at least attempted to comply with it.

[32] While the Court is satisfied, from a qualitative perspective, that the Appellant is very involved with his children, his evidence is insufficient to satisfy the Court that the parties are sharing custody on an equal or near equal basis.

[33] The Appellant adduced a schedule for 2015 and another for 2016. The Respondent disputes its accuracy, since the Appellant included Mondays, even though the children are dropped off either at school or at daycare on Monday mornings. There is no need to make a finding on this issue. While the Court accepts the accuracy of the schedules in question, it is undeniable that the Appellant did not have the children more then 37% of the time in 2015 and 39% of the time in 2016. The qualitative factors cannot trump this quantitative analysis. Therefore, for the above reasons, the appeals are dismissed.

Signed at Montréal, Quebec, this 18th day of January 2018.

"Guy Smith"

Smith J.

CITATION:	2018 TCC 23
COURT FILE NOS.:	2017-854(IT)I 2017-1310(IT)I
STYLE OF CAUSE:	DJIMY THÉODORE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 14, 2017
REASONS FOR JUDGMENT DELIVERED ORALLY FROM THE BENCH BY:	The Honourable Justice Guy R. Smith
DECISION RENDERED ORALLY FROM THE BENCH ON:	January 16, 2018

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Nancy Dagenais

COUNSEL OF RECORD:

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