Docket: 2010-3844(IT)I

BETWEEN:

DAWN DESJARDINS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 4, 2011, at Edmonton, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Adam Gotfried

JUDGMENT

The appeal from the determinations made under the *Income Tax Act* for the 2005, 2006 and 2007 base taxation years is allowed in part, and the matter is referred back to the Minister of National Revenue for reconsideration and redetermination in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 6th day of December 2011.

"Robert J. Hogan"

Hogan J.

Citation: 2011 TCC 556
Date: 20111206
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BETWEEN:

DAWN DESJARDINS,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. INTRODUCTION

[1] This is an appeal from the confirmation of the notices of determination issued by the Minister of National Revenue (the "Minister") in respect of the Canada Child Tax Benefit ("CCTB") and the Goods and Services Tax Credit ("GSTC") for the base taxation years 2005, 2006 and 2007.

II. BACKGROUND FACTS

[2] Dawn Desjardins (the "Appellant") and Alain Simonot separated in the early fall of 2004. They have three children. At the time of the separation, the eldest child was entering full-time schooling (grade 1), the middle child was entering part-time kindergarten, and the youngest child was not yet in school. The youngest began full-time schooling in September 2007.

[3] The Canada Revenue Agency (the "CRA") originally determined that the Appellant was eligible to receive the CCTB and GSTC for the base taxation years 2005, 2006 and 2007 in respect of her three children and, from July 2006 to October 2008, she did receive them.

[4] In October 2008, Mr. Simonot applied to receive the CCTB and the GSTC for the base taxation years 2005, 2006, and 2007. His application stated that from December 1, 2004 the children lived primarily with him and that Dawn Desjardins had them in her care an average of five nights a month. The CRA accepted the application.

[5] The following table sets out the amounts the CRA determined to have been overpaid to the Appellant in respect of each of the years in question.

Year	CCTB	GSTC
2005	$8,987.00	$476.00
2006	$9,189.00	$581.04
2007	$1,173.93	$124.00

[6] It should be noted that for the base taxation year 2007, it was initially determined that the Appellant was entitled to receive a CCTB of $4,715.98 and a GSTC of $668.12. However, the Appellant was only paid $1,173.93 and $124.00 of those amounts before payments were stopped or reduced in October 2008.

III. ISSUE

[7] The issue in this case is whether the Appellant is entitled to receive the CCTB and the GSTC for the 2005, 2006 and 2007 base taxation years. This question turns on which of the two parents the children resided with during the years 2005 through 2007 and which parent primarily fulfilled the responsibility for the care and upbringing of the children during that period. In order for a parent to be eligible for the CCTB, the child must reside with that parent and that parent must be the one, primarily responsible for the care and upbringing of the child. Eligibility for the GSTC in respect a child is conditional on the child residing with the parent.

IV. THE PARTIES' POSITIONS

Appellant's Position

[8] The Appellant's position is that for 2005 and 2006 she was the person primarily responsible for the care of the children and that they lived with her for the majority of the time. After the appellant began full-time employment partway through 2007, care of the children was split between the two parents on a roughly fifty-fifty basis.

Respondent's Position

[9] The Respondent's position is that Mr. Simonot is rightfully entitled to the GSTC and CCTB for the entire period because throughout that period the children lived with him roughly 80 percent of the time.

V. ANALYSIS

[10] The Appellant testified on her own behalf. Her position is that in 2005 and 2006 the children resided with her. For part of 2007, residence was split between the two parents on a roughly fifty-fifty basis. This appears to be consistent with the CRA's original determination of eligibility for CCTB and GSTC payments.

[11] The Appellant explained that, when she separated from Mr. Simonot in August or September of 2004, the children came to live with her. She testified that in 2005 she was working part-time at a night club and taking university courses by correspondence. Two of the three children were not in school full-time, and they would spend their days with the Appellant. The Appellant testified that in 2005 the children would spend weekdays at her residence, and from Friday to Sunday they would be with Mr. Simonot.

[12] She testified that this pattern continued in 2006, except that partway through the year she took on extra evening shifts during the week. On those nights, the children would sleep at Mr. Simonot's residence. However, she maintained that the children would have stayed with her the majority of the time in 2006. She changed her type of employment when the youngest child entered kindergarten in September 2006, but it was still part-time employment.

[13] When the youngest child began full-time schooling in September 2007, the Appellant took on full-time employment with a local outreach organization. The

Appellant alleges that it was from then on that the children split their residence between the two parents roughly equally. The full-time position required her being on call on alternate weekends, but when this was necessary she would be given time off during the week to compensate. The Appellant testified that when the children slept at Mr. Simonot's during the week because of her being on call, they would be dropped off at her place the next morning for school.

[14] The Appellant explained that in all three years she was involved in the school life of the children, attending parent-teacher meetings, for example. She also presented a letter from Ms. Kaley Thompson, the teacher of two of the children during the period in question. The letter states that the Appellant attended parent-teacher meetings, involved herself in other school activities and communicated with the teacher about the children's education. The Appellant alleges that Mr. Simonot very rarely attended parent-teacher meetings.

[15] The Appellant presented letters from an employer, a landlord, a former co-worker and a friend that generally supported her position.

[16] The Appellant presented insurance documents relating to costs for eyeglasses for the children. The documents suggest that the Appellant was reimbursed for such expenses incurred in November 2007. She stated that Mr. Simonot had paid the upfront cost of the eyeglasses and that she had repaid him upon reimbursment by the insurance company. The Appellant also entered a receipt dated September 5, 2007 for a $150 bus pass payment for the eldest daughter, as well as copies of eight receipts for monthly payments for the youngest child's preschool. The preschool receipts are dated from September 2005 to April 2006.

[17] I found the Appellant to be a credible witness.

[18] Mr. Simonot testified that from December 2004 the children resided mostly at his residence. When asked to provide a percentage breakdown he replied that "[o]n a best case scenario" the children were with him 80 percent of the time, and frequently spent even more time with him than that. This was reflected in Mr. Simonot's October 2008 application for the CCTB and GSTC, in which he stated that the Appellant only had care of the children an average of five nights per month.

[19] For much of the time period in question, Mr. Simonot was self-employed as a part owner of a Great Canadian Dollar Store franchise. He stated that he would often bring the children to his store after school so that he could complete any tasks that were required of him there. Owning his own business made it easier to work his

schedule around the children's requirements, such as picking them up from school. This explained why the children spent so much time in his care as opposed to the Appellant. Mr. Simonot did not convince me that such was in fact the case. If anything, the start-up of the new business and the financial difficulties that he had to contend with more likely than not left him with less time for the children than his spouse had, who was then working part-time.

[20] The Crown introduced a photocopy of a school workbook belonging to the middle child. The workbook is a calendar for the 2007-2008 school year. Parents were expected to initial it for each day. The Crown had Mr. Simonot examine a few sample pages from the workbook; he confirmed that the majority of the initials on the pages presented were his own. The probative weight of this document is questionable, as it does not include weekends and in any event only covers one four-month period (September 2007 through December 2007) out of the entire three years at issue. The Appellant testified that during this four-month period the care and residence of the children was split between the two parents roughly evenly.

[21] The Crown entered into evidence letters that generally supported Mr. Simonot's position, one from a couple who are his neighbours and one from a former employee. The Crown also introduced an interim consent order dated September 2, 2008 reflecting an agreement entered into by the two parents. Paragraph 5 of the order states that Mr. Simonot is to have the children on weekdays and on the second weekend of every month. Mr. Simonot stated that these terms reflected the status quo from the years at issue in the present appeal. However, it should be noted that the order was entered into around the time the Appellant moved away from Camrose, in September 2008. It seems just as likely that the order was entered into to avoid disruption in the children's lives on account of their mother's move.

[22] Mr. Simonot's testimony revealed several contradictions. When initially questioned on the subject, Mr. Simonot claimed that when the Appellant moved to within a few houses from his, the children did not spend a significant amount of time with the Appellant. When cross-examined by the Appellant, Mr. Simonot contradicted this testimony by agreeing that, when the two youngest children were not yet in school full-time, they spent their days at the Appellant's residence. The youngest child did not begin full-time schooling until September 2007.

[23] The Appellant entered into evidence a letter drafted by Mr. Simonot dated August 16, 2007 and sent to the CRA. The letter states that he and his ex-wife had

joint custody of Leah Simonot (the middle child) and that she resided with both of them.

[24] When I showed Mr. Simonot this letter and questioned him on it, he indicated that joint custody merely referred to shared parental decision-making authority regarding the child. However, the letter clearly states that the child *resides* with both parents, a point which was not addressed by Mr. Simonot. In fact, during his examination in chief, Mr. Simonot contradicted the statement made in the letter by stating that the children rarely stayed with their mother.

[25] Finally, Mr. Simonot stated that the appellant lived on the same street as he for “a brief period of time”. Questioned on this point, Mr. Simonot stated it lasted from December 2004 until roughly a year before the Appellant moved away from Camrose. This represents a period from December 2004 to roughly September 2007, or approximately two years and nine months. In fact, from the letter the Appellant introduced from a housing manager for The Bethany Group, it appears this period lasted until January 2007, or just over two years. Even so, given that the period under review is three years, it seems surprising that two years could be viewed as “a brief period”. The answer suggests to me that Mr. Simonot was deliberately being evasive, trying to colour the evidence in his favour.

[26] This case boils down to a question of credibility. The parents’ stories are mutually exclusive. The Court must decide which of the two parents is more credible. The evasiveness on the part of Mr. Simonot and the inconsistencies in his evidence tend to weaken the credibility of his version of the facts. Therefore, on a balance of probabilities, it appears to me that the Appellant’s version is correct: the children resided with her for the majority of the time throughout 2005 and 2006, and then, when she began full-time employment in mid-2007, the parents split the housing and care obligations on a roughly equal basis.

V. CONCLUSION

[27] In light of these conclusions, the appeal will be allowed and the determinations will be referred back to the Minister for reconsideration and redetermination on the basis that the Appellant is entitled to the CCTB for the period from July 2006 to February 2008 in respect of her three children and to the GSTC for the same period.

Signed at Ottawa, Canada, this 6th day of December 2011.

"Robert J. Hogan"

Hogan J.

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COURT FILE NO.:	2010-3844(IT)I
STYLE OF CAUSE:	DAWN DESJARDINS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
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REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
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APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Adam Gotfried

COUNSEL OF RECORD:

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Firm:

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