

**Citation: *G. T. v. Minister of Employment and Social Development*, 2015 SSTGDIS 106**

**Date: September 17, 2015**

**File number: GT-123620**

**GENERAL DIVISION - Income Security Section**

**Between:**

**G. T.**

**Appellant**

**and**

**Minister of Employment and Social Development  
(formerly Minister of Human Resources and Skills Development)**

**Respondent**

**and**

**K. B.**

**Added Party**

**Decision by: Susan Smith, Member, General Division - Income Security Section**

**Heard In person on June 30, 2015, Kelowna, British Columbia**

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

Appellant: G. T.

Appellant's husband and representative: D. T.

Appellant's friend as support: M. M.

The Added Party, K. B., did not attend the hearing.

### **INTRODUCTION**

[1] The Appellant's application for a *Canada Pension Plan* (CPP) Disabled Contributor's Child Benefit (DCCB) was date stamped by the Respondent on August 22, 2007, and the application was granted and approved with an effective date of September 2006. In July 2012, the Appellant notified Human Resources and Skills Development Canada (HRSDC) that the biological mother of her two step children ("the twins") with whom she and her husband share custody, was also making an application for the DCCB benefit. The Appellant was notified in August 2012 that she was not entitled to receive benefits for the full period of September 2006 to August 2012; therefore, she has been overpaid. The Appellant requested reconsideration and the Respondent maintained their decision upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

[2] The hearing of this appeal was by In person for the following reasons:

- a) more than one party will attend the hearing;
- b) the form of hearing is most appropriate to allow for multiple participants;
- c) the form of hearing provides for the accommodations required by the parties or participants;
- d) the issues under appeal are complex;

- e) there are gaps in the information in the file and/or a need for clarification;
- f) the form of hearing is the most appropriate to address inconsistencies in the evidence;  
and
- g) the form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

## **THE LAW**

[3] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Tribunal.

[4] Section 42 of the *Canada Pension Plan* provides definitions of the following terms:

“child” of a contributor means a child of the contributor, whether born before or after the contributor’s death, and includes

- (a) an individual adopted legally or in fact by the contributor while the individual was under twenty-one years of age, and
- (b) an individual of whom, either legally or in fact, the contributor had, or immediately before the individual reached twenty-one years of age did have, the custody and control, but does not include a child of the contributor who is adopted legally or in fact by someone other than the contributor or the contributor’s spouse or common-law partner prior to the death or disability of the contributor, unless the contributor was maintaining the child, as defined by regulation;

“dependent child”

“dependent child” of a contributor means a child of the contributor who

- (a) is less than eighteen years of age,
- (b) is eighteen or more years of age but less than twenty-five years of age and is in full-time attendance at a school or university as defined by regulation, or
- (c) is a child other than a child described in paragraph (b), is eighteen or more years of age and is disabled, having been disabled without interruption since the time he reached eighteen years of age or the contributor died, whichever occurred later;

“disabled contributor’s child”

“disabled contributor’s child” or any form of that expression of like import means a dependent child of a contributor who is disabled, but does not include a dependent child described in paragraph (c) of the definition “dependent child” in this section;

[5] Paragraph 44(1)(e) of the *Canada Pension Plan* states:

(e) a disabled contributor’s child’s benefit shall be paid to each child of a disabled contributor who

- (i) has made contributions for not less than the minimum qualifying period,
- (ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor’s application for a disability pension was actually received, or
- (iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of

unadjusted pensionable earnings that was made under section 55 or 55.1, had not been made;

[6] Subsection 74(3) states:

Where a disabled contributor's child's benefit has become payable to a child under this Act or under a provincial pension plan in respect of any contributor thereunder or an orphan's benefit has become payable to an orphan under this Act or under a provincial pension plan in respect of any contributor thereunder, no disabled contributor's child's benefit or orphan's benefit is payable to that person under this Act in respect of any other such contributor except another parent of that person, and in no case shall such a benefit be paid to that person in respect of more than two contributors.

[7] Subsection 74(3.1) states:

In subsection (3), "parent" has the reciprocal meaning to that of "child".

[8] Section 75 states:

Where a disabled contributor's child's benefit is payable to a child of a disabled contributor or an orphan's benefit is payable to an orphan of a contributor, payment thereof shall, if the child or orphan has not reached eighteen years of age, be made to the person or agency having custody and control of the child or orphan, or, where there is no person or agency having custody and control of the child or orphan, to such person or agency as the Minister may direct, and for the purposes of this Part,

(a) the contributor, in relation to a disabled contributor's child, except where the child is living apart from the contributor, and

(b) the survivor, if any, of the contributor, in relation to an orphan, except where the orphan is living apart from the survivor,

shall be presumed, in the absence of any evidence to the contrary, to be the person having custody and control of the child or orphan.

[9] Subsection 76(1) states:

A disabled contributor's child's benefit ceases to be payable with the payment for the month in which

(a) the child ceases to be a dependent child;

(b) the child dies;

(c) the contributor's disability benefit ceases to be payable;

(d) the child is adopted legally or in fact by someone other than the disabled contributor or the disabled contributor's spouse or common-law partner, unless the disabled contributor is maintaining the child, as defined by regulation; or

(e) the disabled contributor ceases to have custody and control of the child, where the child is a child as defined in subsection 42(1) by reason of the disabled contributor having had such custody and control.

[10] Section 52(i) of the CPP Regulations sets out the information an applicant is required to provide:

[52] For the purposes of determining the eligibility of an applicant for a benefit, the amount that an applicant or beneficiary is entitled to receive as a benefit or the eligibility of a beneficiary to continue to receive a benefit, the applicant, the person applying on his behalf, or the beneficiary, as the case may be, shall, in the application, or thereafter in writing when requested to do so by the Minister, set out or furnish the Minister with the following applicable information or evidence:

(i) whether a dependent child of the disabled or deceased contributor,

(i) is his child,

- (ii) is his legally adopted child or was adopted in fact by him or is a legally adopted child of another person,
- (iii) was legally or in fact in his custody and control,
- (iv) is in the custody and control of the disabled contributor, the survivor of the contributor or another person or agency,
- (v) is living apart from the disabled contributor or the survivor, or
- (vi) is or was maintained by the disabled contributor;

[11] Section 65 of the CPP Regulations states:

For the purposes of subsection 42(1) of the Act, "wholly or substantially" with reference to the maintenance of one or more dependent children of a deceased contributor means that the survivor, of that contributor provides more than 50% of the maintenance provided for such children by all persons other than such children or any other dependent child of that contributor.

[12] Section 65.1(b) of the CPP Regulations states:

For the purposes of subsection 42(1) and paragraph 76(1)(d) of the Act, "maintaining the child",

(b) with reference to the child of a disabled contributor, means making periodically, for the child, financial provision amounting to not less than the disabled contributor's child's benefit payable under the Act.

## **ISSUE**

[13] The issues in this appeal are complex and require that a series of questions be considered.

[14] In this case, the Tribunal must decide:

- a) Has the Appellant had custody and control of the twins from September 2006 and onward;
- b) Does the legislation require that custody and control include residency with the contributor at least 50% of the time for a benefit to be payable;
- c) Does the Appellant meet the criteria of a “parent” as that term is defined under the CPP;
- d) Does the CPP allow the Respondent to cease payment of the DCCB for reasons other than under the criteria set out in section 76(1).

## **EVIDENCE**

[15] The Appellant began to live together with her husband in June 2005 following his separation and subsequent divorce from the natural mother of the twins in May 2004. The Appellant and her husband married in September 2005. From the outset of their cohabitation the Appellant’s husband had shared custody of the twins with their natural mother on the basis of alternating weeks and amounting to 50/50 shared custody.

[16] In June of 2005 the Appellant was the natural mother of two older children in her custody and in September 2005 she gave birth to the youngest son of her and her husband. She was in receipt of a CPP disability pension at the time the cohabitation began and the DCCB for her oldest two children. In August 2007 the Appellant made application for the DCCB for the twins and for her youngest natural child. She was granted the benefit with the maximum allowable retroactivity and payments commenced in September 2006.

[17] In July 2012, following a car accident which left her disabled, the natural mother of the twins made an application for a CPP disability pension and the DCCB for the twins. The above application and enquiries made by the Appellant and her husband to the office of the Respondent triggered the sequence of events that lead to a partial cessation of DCCB payable to the Appellant with respect to the twins, an assessment of overpayment, and, ultimately, to this appeal.

[18] The Appellant and her husband both attended the hearing of this appeal and both gave testimony under oath. The added party to this appeal, being the natural mother of the twins, did not appear despite having received a Notice of Appeal by express post. The hearing was held in her absence.

[19] The Appellant stated that from the beginning of their cohabitation she and her husband regarded all the children as both of their children and they proceeded to live their lives as a blended family sharing all of the responsibilities of child rearing together as any family would. The appellant said she has always regarded the twins as her children exactly as she has her natural children and that despite the fact the twins have a natural mother and a second family together with their natural mother they have always regarded her as their mother too. She said that she has always been involved in the twins care unfettered by any obligation to consult with either of the twins natural parents before making determinations affecting their care. She has, in every respect, acted as a parent toward the twins.

[20] The Appellant stated that one of the twins has some health issues that require careful management and that she has always carried an equal responsibility to ensure that he has the care he requires to that of his natural parents. She said that if issues arise at school she is the one to get a call from the school to come and attend to his needs. She said that typically she and the twins natural mother would attend parent teacher meetings together and would work together in consulting with the necessary health care providers. She said that she has taken him to the emergency department for treatment and she has authority to consent to treatment.

[21] The Appellant stated that she does not and has never felt the need to consult with either of the twin's natural parents before granting permission for any activity or choice, give advice, or to a discipline, reprimand or reward the twin's behavior. She said the twins show no preference in which parent they turn to and that parental status is in all respects a non-issue within their blended family. She could grant permission for example, to shave their head, dye their hair purple, pierce their eyebrows, tattoo their left arm or any other request they might make if they convinced her they had thought it through and had valid reasons. Of course she

would hope they do not make such decisions but in theory she would have the authority to give them permission and not be required to justify herself to anyone else.

[22] The Appellant stated that she has referred to the twins as her children and they to her as their mother since they were preschoolers and she and their father began living under the same roof in June 2005. The twins refer to the Appellant's natural children as brothers and sister and they, likewise, refer to the twins as their brother and sister. The twins are also very close to the Appellant's parents who live close by and provide a great deal of support to accommodate the Appellant's limitations resulting from her disabling medical condition.

[23] The Appellant stated that she is the one to take the children to their appointments and their extracurricular activities; she gets their prescriptions filled; she takes them to doctors and dentists. She says that she must be very vigilant at all times to manage her energy levels and meter out her activity levels so that she is available to cater to all of the children's needs. She gets lots of help from friends and family to help with housework so she can rest when the children are at school and she can have energy for things like appointments and helping with homework and driving them places.

[24] The Appellant stated that she and her husband have combined their finances in all respects. All of their accounts are joint accounts and they view all of their obligations as joint obligations. She said that all of the needs of all of their children are handled in the same manor and that she and her husband are equally financially responsible for all of their children, including the twins. She said that the twins have every need provided for within each of their two separate homes. They each have their own bedroom and their wardrobe as well as all of the incidentals requires for everyday life in both of their homes. The Appellant and her husband fully provide for every need of the twins.

[25] The Appellant was asked who she would consider the one having custody and control of the twins if it were determined the law could not be interpreted to allow for a determination that both she and her husband meet the criteria of custody and control. Her answer was that it would be her. She is the one there and available to handle the needs and concerns of all five children immediately as they arise and she definitely sees herself as the primary care giver within their household.

[26] The Appellant's husband also gave oral testimony and he concurred that the Appellant is the primary care giver in their household. He stated that from the outset he and the Appellant as well as the children have always regarded the Appellant as their mother. They also regard their natural mother as their mother and it has never presented any kind of issue for the children to have multiple parents. The children appear to regard the situation as completely natural. He said that this appeal has actually presented the first and only situation to be problematic in the management of harmonious and conflict free co-parenting with all the parties involved.

[27] The Appellant's husband also testified that the Appellant and he have completely combined their finances in every respect since the beginning of their cohabitation and that all of the needs of all of their children are regarded and treated as a joint responsibility.

#### **SUBMISSIONS:**

[28] The Appellant submitted that:

- a) She has had custody and control of her two step children from September 2006 and onward and that, as such, she is a "parent" as that term is used under the CPP;
- b) The CPP allows for more than one DCCB to be payable in regards to her two step children;
- c) The CPP does not allow for the administrators to prorate the benefit based on percentage of time sharing residency with the Appellant;
- d) The CPP does not allow for the cessation of the DCCB except in accordance with Subsection 76(1) which does not include ceasing the DCCB retroactively; determining an overpayment of more than \$15,000.00; and paying that overpayment to a person with whom the contributor shares custody and control.

[29] The Respondent submitted that:

- a) In the case of shared custody the Appellant must prove she had custody and control of the two step children at least 50% of the time and that they reside with her for at least 50% of the time;
- b) The Appellant is only entitled to receive 50% of the DCCB where the dependent children live 50% of the time with another parent;
- c) The Department cannot allocate a percentage of a pension to multiple recipients of a monthly benefit and, as a result, it becomes necessary to create a legal fiction and pay a full month pension to competing interests for a portion of the full months in a year, in this case six months to the Appellant and six months to the children's biological mother.

## **ANALYSIS**

[30] The first question to be determined is the meaning of "custody and control" as the term is used in the CPP to determine the meaning of "child" under the act, in relation to the "contributor" and the reciprocal meaning of "parent" under the act.

[31] Black's law dictionary defines:

- "care", among other things, as "Watchful attention; concern; custody; diligence; discretion; caution; opposite of negligence or carelessness; prudence; regard; preservation; security; support; vigilance. To be concerned with, and to attend to, the needs of oneself or another".

- "control"- the verb- "To exercise restraining or directing influence over"; the noun- "Power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee".

- "custody"- "The care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation, security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody".

[32] The above definition of custody lends insight to the ordinary meaning of the term and of particular note is that custody carries with it the idea of immediate personal care and control of the person to whose custody it is subjected, implying responsibility and preservation of the thing in custody. Parallels can be drawn in comparison to the situation of a minor child having multiple adults under whose care they fall at various times. It only makes sense that at any given point in time an adult may be required to exercise custody and control of a child at the drop of a hat without hesitation that they have authority to do so as required. In other words, those adults who have custody and control of a child must be found to have that custody and control 100% of the time regardless of where the child may be residing at the moment. This being so, it is unlikely that the definition of custody and control carries with it some requirement attached to residency. In reviewing the above definitions to ascertain the meaning of “custody and control” in CPP Section 42 definition of “child” and its reciprocal definition of “parent” it is helpful to also review CPP Regulations 52(i) and the list of information required to qualify for a DCCB. The list separately itemizes custody and control; living with; and, maintaining of a “child” (Section 65.1(b) of the CPP Regulations defines “maintaining” as making periodically, for the child, financial provision amounting to not less than the disabled contributor’s child benefit payable under the CPP). It is only logical to conclude that the notion of custody and control does not necessarily include residency with the contributor or the contributor having the financial responsibility to maintain the child as defined in CPP Regulation 65.1(b). If this reasoning were applied to the facts of this case, it would be reasonable to conclude that the Appellant and her husband both have custody and control of the children all of the time, as does the children’s natural mother and, potentially, also her husband, the children’s stepfather, although no evidence was presented in respect of the stepfather. The need for certainty is obvious and attempting to limit the reality of custody and control to those days or even hours of a month that a child actually resides with a parent leads to the potential that at certain times no adult clearly has the custody and control of a child. The Tribunal finds that it is possible to establish, on the basis of the particular facts, that multiple adults, including biological parents and step parents, have custody and control of minor children. If the facts presented establish custody and control the Tribunal finds that the custody and control exists at all times regardless of where the child may reside at a given time.

[33] In reviewing subsection 74(3) of the CPP with respect to the payment of the DCCB; or an orphan's benefit; or a combination of the DCCB and an orphan's benefit, the CPP limits payment of the benefit, with respect to a particular person/child, to a maximum of two qualifying contributors and if one such benefit is in pay then the second can only become payable to another "parent" of that person/child. If the idea that more than two people could have custody and control of a child was not clearly contemplated when drafting the CPP, the restriction in Subsection 74(3) of the CPP to limit the number of qualified contributors to whom the benefit in respect of a particular person/child is payable would have no purpose. The idea that more than two people could have custody and control of a child certainly leads to the conclusion that the term "custody and control" has a broad and fluid meaning that is in keeping with the reality of modern day family. The conclusion the Respondent reached in determining that residency was a determinative factor in establishing custody and control, and that a contributor would have to prove the child lived with them at least 50% of the time is simply not supported by the legislation. The only time any reference is specifically made to "50%" is in relation to the meaning of "whole or substantial maintenance" and found at section 65 of the CPP Regulations. The reference pertains only to the survivor of a deceased contributor in relation to the deceased contributor's dependent children. No such reference can be found with respect to a DCCB and the reference that is made pertains to percentage of maintenance and not to residency. The Tribunal finds that residency is not a requirement to prove custody and control and it is not a requirement to receive a DCCB with respect to children over whom you have proven custody and control.

[34] The Tribunal finds that the meaning of "custody and control" in determining the "parent/child" relationship with respect to DCCB allows for multiple contributors to fall within the definition of parent, although payment of the DCCB is limited to only two. The particular facts of this case show that the Appellant, her husband and his ex-wife all have custody and control of the twins (in addition, there is a possibility that the facts could establish the twin's natural mother's new husband may also have custody and control over the twins) but there can only ever be a maximum of two DCCB with respect to the twins or two orphan's benefits with respect to the twins, or a combination of two DCCB and orphan's benefits with respect to the twins. The Tribunal finds that the notion of residency is not relevant to the determination of custody and control. The factors outlined in regulation 52 support the finding.

Reference to Black's law dictionary provides insight to the broad scope of the ordinary meaning of the words and supports the logical conclusion that in modern day families there may be multiple adults that exercise custody and control over minor children, as evidenced in the facts of this case. The limitation found in subsection 74(3) of the CPP further supports this conclusion as no such limitation would be needed if it were only possible to establish custody and control over a minor by two people.

[35] The Tribunal has considered the Section 75 of the CPP regarding to whom the benefit shall be payable and the presumption that the contributor shall be presumed to have custody and control, except where the child is living separate and apart from the contributor. It is the Tribunal's interpretation that living separate and apart merely rebuts the presumption of custody and control but does not preclude proving custody and control over a child by a person with whom the child does not reside and that each case would turn on the facts and evidence presented.

[36] The Appellant must prove on a balance of probabilities that she had custody and control of her step children by September 2006 and onward.

[37] The Appellant gave clear and uncontroverted evidence of the custody and control she exercises over her two step children. She exercises all of the elements of custody and control that any parent would exercise to make sure their child is properly cared for and nurtured. She performs literally every task required of any parent and is not obligated to consult with others in making rules and decisions on behalf of her step children. In addition, the Appellant provides financially for her step children in exactly the same manor she provides financially for her natural children. Indeed, when asked who he would say has custody and control of his two children if he had to choose between himself and the Appellant, the Appellant's husband said it would be the Appellant because she is a stay at home mom and he has a fulltime job.

[38] The Tribunal finds that the Appellant has met the burden of proof in showing that she had custody and control of her two step children September 2006 and onward.

[39] The Tribunal has studied the relevant legislation thoroughly and has failed to identify any authority for the Respondent to have determined the Appellant had been overpaid. The

legislation does not disclose any authority to decide the contributor, having proven custody and control, is not entitled to the benefit for which she has qualified because she shares custody. The financial arrangements between ex-spouses with respect to child support rests solely with the ex-spouses to resolve, whether by court order, consent order or separation agreement. The financial arrangements whether agreed to or court ordered are not relevant to an application for DCCB. The DCCB is paid for the benefit of the child and where a parent is disabled that benefit ought to be paid to the parent whose ability to earn a livelihood is affected by that disability so that the funds are in the hands of the parent whose ability to provide is likely also diminished. There is no authority under the legislation to place half the funds in the hands of a parent who is not disabled simply because the child has more than one residence.

[40] Where there is evidence of custody and control and a disability pension has been granted the DCCB is payable to the contributor parent. Nothing in the legislation indicates the DCCB payable to the contributor parent can be altered; diminished; or ceased due to shared custody. The Appellant has established that she is eligible for the DCCB for her two step children by September 2006 and onward. The full amount of the DCCB should be payable to the Appellant and can only be ceased at such time as one of the factors set out in subsection 76(1) of the CPP occurs.

## **CONCLUSION**

[41] The appeal is allowed.

Susan Smith  
Member, General Division - Income Security