



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. W. v. Minister of Employment and Social Development*, 2016 SSTGDIS 91

Tribunal File Number: GP-13-1928

BETWEEN:

K. W.

Appellant

and

Minister of Employment and Social Development

Respondent

and

B. H.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Shane Parker

HEARD ON: November 4, 2016

DATE OF DECISION: November 8, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, Ms. K. W.

The Added Party, Mr. B. H.

E. H. (Mrs. H. /E.), witness for the Added Party

INTRODUCTION

[1] The Appellant was awarded a *Canada Pension Plan* (CPP) disability benefit with payments effective July 2008 (GD3-68 to 71). She and the Added Party are the biological parents of H. H. (H.), who was born on February 24, 2010 (GD3-54). The Appellant applied for a CPP disabled contributor's child's benefit (DCCB) on August 31, 2010. That application was granted and the Appellant received the DCCB from July 2008 until September 2012. Further to information received from the Appellant in September 2012, the Respondent suspended payment of the DCCB to her at the end of September 2012.

[2] On October 11, 2012 the Respondent received an application for the DCCB from the Added Party, Mr. B. H., H. H.'s father. Based on the documents filed with that application, the Respondent determined that he had care and custody of H. H. beginning November 2011, and awarded payment of the DCCB to him retroactively to December 2011. In so doing, the Respondent determined that the Appellant was overpaid the DCCB from December 2011 to September 2012, on the basis that she did not have physical custody and control of H. H. during that time. On March 26, 2013 the Appellant requested the Respondent to reconsider this decision. On April 29, 2013 the Respondent issued its reconsideration which upheld its earlier decision (GD2-10). By follow-up letter dated May 9, 2013, the Respondent informed the Appellant of her appeal rights (GD2-9). The Appellant appealed the reconsideration to the Social Security Tribunal of Canada (the Tribunal) in June, 2013.

[3] The appeal was heard by teleconference for the following reasons expressed in the Notice of Hearing:

- There are gaps in the information in the file and/or a need for clarification; and
- This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] It is undisputed that H. H. is the Appellant (the contributor)'s biological child and that H. H. qualifies for the DCCB. What the Tribunal must decide is whether the Appellant was entitled to receive the DCCB for H. H. from December 2011 to September 2012. The answer to this question turns on who had custody and control of H. H. during this period, and is therefore eligible to receive the DCCB on her behalf.

THE LAW

[5] Subsection 42(1) of the CPP contains the following relevant definitions:

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 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 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;

[6] Paragraph 44(1)(e) of the CPP states that 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;

[7] Section 75 of the CPP explains who is to receive payment of the DCCB:

Payment of benefit

75 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.

[8] Section 76 of the CPP explains when the DCCB ceases being payable:

76 (1) 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.

[emphasis added]

[9] Section 66 of the CPP and section 42 of the CPP Regulations discuss the return of a benefit to which the recipient is not entitled, and how the Respondent can recover the excess amount. The relevant provisions are cited here:

Return of benefit where recipient not entitled

66 (1) A person or estate that has received or obtained by cheque or otherwise a benefit payment to which the person or estate is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person or estate is entitled, shall forthwith return the cheque or the amount of the benefit payment, or the excess amount, as the case may be.

Recovery of amount of payment

(2) If a person has received or obtained a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, the amount of the benefit payment or the excess amount, as the case may be, constitutes a debt due to Her Majesty and is recoverable at any time in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

[...]

Set-off

(2.1) Where any amount is or becomes payable to the person or the person's estate or succession under this Act or any other Act or program administered by the Minister, that indebtedness may, in the prescribed manner, be deducted and retained out of the amount payable.

Recovery by Deductions of Amounts to Which Recipient not Entitled

42 For the purpose of subsection 66(2.1) of the Act, an amount of indebtedness that is owing may be deducted and retained out of the whole or any portion of a benefit that is payable to the person or the person's estate or succession, under this Act or any other Act or program administered by the Minister, that will recover the overpayment in a single payment or in instalments, in any amount that does not cause undue hardship to the person or the person's estate or succession.

[10] Paragraphs 66(3)(c) and (d) of the CPP pertain to hardship caused by collecting the excess payment from the debtor, and erroneous advice or administrative error causing the excess payment:

(3) Notwithstanding paragraph 61(2)(b) and subsections (1) and (2) of this section, where a person has received or obtained a benefit payment to which he is not entitled, or a benefit payment in excess of the amount of the benefit payment to which he is entitled, and the Minister is satisfied that

(c) repayment of the amount or excess of the benefit payment would cause undue hardship to the debtor, or

(d) the amount or excess of the benefit payment is the result of erroneous advice or administrative error on the part of the Minister or an official of the Department of Employment and Social Development acting in an official capacity in the administration of this Act,

the Minister may, unless that person has been convicted of an offence under any provision of this Act or of the *Criminal Code* in connection with the obtaining of the benefit payment, remit all or any portion of the amount or excess of the benefit payment.

EVIDENCE

[11] The following is a summary of the most relevant evidence.

[12] The hearing file contains H. H.'s birth certificate issued June 28, 2010 confirming her birthdate of February 24, 2010 and that the Appellant and Added Party are her biological parents (GD3-54).

[13] The Appellant applied for a CPP DCCB by application received August 31, 2010. The Appellant was paid a monthly DCCB up to and including September 2012. An application for the DCCB was received from the Added Party on October 11, 2012 (GD3-52 to 53).

[14] The DCCB was awarded to the Added Party in November 2012, effective back to December 2011, which was the month following the date of the court documents giving Mr. B. H. sole custody of H. H. (discussed next).

[15] A Court Order dated November 4, 2011 gave the Added Party sole custody of H. H., with access to be decided for the Appellant; that H. H. be returned to Newfoundland and Labrador from Alberta for this purpose; and that the police shall enforce the Order if required. The Court Order was to expire on May 4, 2012 (GD3-48).

[16] A Final Variation Order dated November 9, 2011 states that H. H.'s present guardians are both the Added Party and the Appellant. The Court ordered that the November 4, 2011 order be replaced by the current one and that :

The child shall reside with the father.

The father is hereby given permission to fly back to Newfoundland with the child effective immediately and the consent of the mother is hereby dispensed with.

The father shall have parenting time and responsibility for the child at all times except for when the mother has parenting time.

The mother shall have no parenting time with the child without first obtaining a subsequent Court Order.

The father shall have sole decision making authority regarding the child, including those decisions relating to educational, medical, dental and religious upbringing.

(GD3-49)

[17] The Appellant's note of March 26, 2013 states that she alternated residences between a women's shelter in X, Newfoundland and the X home, during the disputed time period. Her residence periods in the shelter were described as follows:

January 31, 2012 to February 22, 2012 (back to X home on February 23, 2012);

April 27, 2012 to April 28, 2012 (returned to X home on April 29, 2012).

(GD3-39 to 40)

[18] The Appellant filed credit card statements. Most were for time periods falling outside the disputed time period of December 2011 to September 2012 (GD7-10 to 43). The ones for June through September 2012 listed the Appellant's mailing address to be in X, Newfoundland (GD7-14 to 16, 43).

[19] The Appellant filed a prescription printout indicating purchases she made at a pharmacy in X, Newfoundland (GD3-30).

[20] An undated letter from Ms. A. B. of the Single Parent Association of Newfoundland (SPAN) stated the Appellant resided in the Added Party's home:

[The Appellant] lived in X Newfoundland and Labrador, with her child's father and his mother. I believe the time was in December 2011 and extended into the summer possibly August 2012.

(GD7-2)

Testimony

Appellant

[21] The Appellant was asked why she thought she had custody and control of H. H. from December 2011 to September 2012. Despite informing a Service Canada agent that the Added Party had full legal custody and control of H. H., she said she still qualified to receive the DCCB because she resided with H. H., the Added Party, and the Added Party's mother (Mrs. E. H.). Mrs. E. H. owned the home (the mortgage was paid off after the death of her husband). She lived under the same roof continuously. Asked to describe what she meant by having a "measure of control and care" over H. H., the Appellant mentioned the following: She took H. H. for walks, bathed her, and prepared her for the day. A typical day regarding care for H. H. involved: preparing breakfast, walking, visits to the pond or park or some other daily activity,

and preparing her for bed. The Appellant changed H. H.'s diapers. She arranged and attended medical appointments. H. H. was not in daycare. The Appellant said she was more religious than the Added Party, and would attend church with H. H. She shared meal preparation for H. H. with the Added Party and Mrs. E. H. The Appellant suggested she had a greater measure of control and care of H. H. because she would most often awaken with H. H. and begin the day's routine with her. The Added Party's involvement with H. H. began in the evenings, and from that time onward parenting responsibilities were shared until H. H.'s bed time. During the night, H. H. was sleeping in Mrs. E. H.'s bed, so if H. H. awoke during the night, Mrs. E. H. would have the initial care and control. The Appellant regularly purchased groceries, shoes and clothes for H. H., as needed. The Appellant regularly gave funds to Mrs. E. H. or the Added Party for household expenses. Mrs. E. H. and the Added Party each had a vehicle, but the Appellant contributed funds for gasoline. The Appellant and H. H. would travel as passengers while either the Added Party or Mrs. E. H. drove the vehicle.

Added Party

[22] The Added Party has had sole legal custody of H. H. for the disputed time period. H. H.'s rights and care remain in his sole discretion, including the Appellant's visitation. He disputes that the Appellant resided with him and his mother, Mrs. E. H., in December 2011. Mrs. E. H.'s husband passed away in November 2011 and there was no way they would have allowed the Appellant to move in with them.

[23] The Added Party agrees with the Appellant's testimony regarding her involvement in H. H.'s life, but disputes the time period for such involvement. He claims that happened prior to when he was ordered to be H. H.'s sole custodian in November 2011. He reminded the Tribunal that the Appellant left the province with H. H. without his consent in September 2011. The Added Party went to court for full custody. The Appellant was never permitted thereafter to be alone with H. H. From November 6, 2011 onward and during the disputed time period, the Appellant resided under a different roof than the Added Party, his mother, and H. H.

[24] As far as custody and control of H. H. from November 8, 2011 to October 2, 2012, the Added Party repeated that the Appellant did not reside with him, H. H., or his mother. He permitted H. H. to communicate with the Appellant on Skype during this time, because the

Appellant resided in Alberta. The Added Party's specific involvement as far as custody and control of H. H. during the disputed time period included: feeding, shelter, bathing, sole responsibility for making medical appointments and transporting H. H. to and from these appointments, playing with H. H. (puzzles for example), and reading bedtime stories.

Appellant

[25] In reply testimony, the Appellant stated that while the Added Party had sole legal custody of H. H., she lived with him, H. H. and Mrs. E. H. for nine months. During this time, she cared for H. H. and provided financial support. The Appellant maintained that A. B.'s letter confirms this testimony. The Appellant added that Ms. A. B. phoned her at the house, but never came to the property. The Appellant also clarified that Ms. A. B.'s information and belief that the Appellant shared a residence with the Added Party and Mrs. E. H. are based on what the Appellant told her.

E. H.

[26] Mrs. E. H. denied that the Appellant lived in her home during the disputed time period.

[27] The Appellant was permitted to ask Mrs. E. H. questions. She asked her if she remembered driving her and H. H. to the pool, Wal-Mart, the grocery store, and the pond. The Appellant could not give specific dates of these occurrences. Mrs. E. H. recalled the events, but also could not recall specific dates.

SUBMISSIONS

[28] The Appellant submitted that:

- a) While she was in receipt of the DCCB, H. H. was in her partial custody (GD7-45) and she provided a "very real measure of care and control" over her daughter despite the Added Party being appointed H. H.'s sole legal custodian (GD7-5 to 6). For example it was she who provided full financial maintenance of H. H.: she paid all the rent and bills and the Added Party was unemployed (GD3-42);

- b) Repaying the overpayment claimed would leave her in a financially dire situation. At the hearing, the Appellant submitted that she repaid the overpayment to the Respondent in full through deductions from her CPP disability benefit;
- c) The evidence supports that she resided with H. H., the Added Party and Mrs. E. H. for 9 months (entire disputed period in 2012). Ms. A. B. with her credentials is credible. Credit cards confirm gas and grocery purchases also confirm the Appellant's version of events. Mrs. E. H. and the Added Party drove both she and H. H. to Wal-Mart and other locations while she cared for H. H.; and,
- d) The Added Party and Mrs. E. H. are not being truthful in denying that she resided with them and H. H. during the disputed time period.

[29] The Respondent submitted that:

- a) The Appellant applied for and received the DCCB from July 2008 to September 2012. Information received from the Appellant in September 2012 indicated that she would no longer be living with the child;
- b) Court documents attached to the Added Party's DCCB application indicated that he had sole custody for the child, effective November 2011. No court documents have been filed since to change that custody arrangement; and,
- c) As a result, the Appellant was paid the DCCB from December 2011 to September 2012, erroneously, which resulted in an overpayment to the Appellant.

[30] The Added Party made these submissions at the close of the hearing:

- a) The Appellant did not live with them during the disputed time period. In fact, the Appellant had to be removed from their home after a 3-day visit in October 2012;
- b) It is not credible that his mother would allow the Appellant in her home in the timeframe following the Appellant's unilateral removal of H. H. from the province in September 2011 and the passing of her husband in November 2011; and,

- c) Credit card statements do not prove someone's actual residence. In any event, the Appellant's statements fall outside the disputed time period. A. B.'s letter is not an actual verification that the Appellant resided with the Added Party, H. H. and his mother. It is based on the Appellant's inaccurate information.

ANALYSIS

[31] In order to succeed in this appeal, the Appellant must prove on a balance of probabilities that she had custody and control of H. H. from December 2011 to September 2012.

[32] The DCCB cannot be split between people. Section 75 of the CPP makes it clear that it is payable to one "person" (singular) at a time.

[33] The dispute is whether the Appellant, or the Added Party, is the rightful person during the disputed time. In other words, was it the Appellant or the Added Party who had custody and control of H. H.? This is a fact-driven analysis.

[34] In the present case, the Tribunal is confronted with a he-said/she-said dispute between the Appellant and the Added Party with regard to whether the Appellant resided under the same roof as H. H. during the time period in issue.

[35] The Appellant was adamant under oath that she did in fact reside with H. H., the Added Party and Mrs. E. H. in the X home for nine continuous months beginning late-January or early-February 2012 until September 2012. She argued that her credit card statements supported her testimony. However, a credit card mailing address does not actually establish someone resides at said address. A person can move and not update their contact information.

[36] The Appellant also argued that Ms. A. B. is a credible and upstanding member of the community, and therefore her letter should carry significant weight. Moreover, Ms. A. B. phoned the Appellant at the X home. The Tribunal considered these arguments, but neither actually establish the Appellant resided in the X home. The letter is based on hearsay from the Appellant, who admitted that Ms. A. B. never in fact witnessed her set foot inside or near the property. As to the phone conversations, these do not establish one's residence either. A person can be visiting anywhere, and take a phone call. In any event, there are no phone records filed to verify these conversations in fact took place.

[37] The Tribunal notes that the prescription printout for the X pharmacy not only lists a mailing address for the Appellant in X; but that it contains significant time gaps: there are no purchases indicated between September 26, 2011 and February 11, 2012. And there are only two purchases indicated in 2012: February 11th and December 21st (which falls outside the disputed time period). This evidence clearly does not establish residence at the X home during the disputed time period, and casts some doubt on whether the Appellant resided in Newfoundland at all during this period.

[38] Finally, the Appellant's evidence was internally inconsistent. She testified that she resided with H. H., the Added Party, and Mrs. E. H. *continuously* during the disputed time period. This is contradicted by her written evidence that she resided in a women's shelter in X at times during the same period (GD3-39 to 40).

[39] Given the above, the Tribunal found the Appellant's case to be weak as far as establishing that she resided with H. H., the Added Party, and Mrs. E. H. from December 2011 to September 2012, let alone have custody and control of H. H. during that time.

[40] The most persuasive testimony, and that deserving most weight, was that of Mrs. E. H. She was polite and respectful to the Tribunal Member and the Appellant throughout her participation before the Tribunal. She vividly recalled the time period in dispute and was asked point-blank whether the Appellant resided in her home with the Added Party and H. H. during that period. Mrs. E. H. answered in the negative. The Appellant was given the opportunity to question Mrs. E. H., but all that came out of that exchange was a common recollection of driving the Appellant and H. H. to some locations. Neither Mrs. E. H. nor the Appellant recalled the dates of these outings. And in any event, these confirm the Appellant had a lack of control over H. H. because the Appellant was not permitted to drive the vehicle. Also of note was that the Appellant did not challenge Mrs. E. H.'s testimony contradicting her account that she resided with Mrs. E. H., the Added Party and H. H. during the disputed time period (instead, the Appellant focused her questions on transportation to certain locations).

[41] Finally, the most persuasive documentary evidence was the Final Variation Order (GD3-49). This established legal authority granting the Added Party sole custody and control over H.

H. throughout the disputed time period. Any involvement the Appellant would have in H. H.'s care was at his discretion.

[42] In summary, the Tribunal finds that the Appellant did not have care and custody of her child, H. H., for whom the DCCB was being paid for the time period of December 2011 to September 2012 and as such an overpayment was made to her by the Respondent. This overpayment is a debt recoverable by the Respondent pursuant to section 66 of the CPP and section 42 of the CPP Regulations. With respect to the Appellant's declarations of financial hardship and erroneous advice or administrative error by the Respondent's agents, these matters fall outside the Tribunal's jurisdiction pursuant to subsection 66(3) of the CPP. Rather, the remission of all or any portion of the overpayment is up to the Respondent's discretion.

CONCLUSION

[43] The appeal is dismissed.

Shane Parker
Member, General Division - Income Security