



Citation: *K. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 245

Tribunal File Number: AD-16-440

BETWEEN:

K. B.

Applicant

and

Minister of Employment and Social Development

Respondent

and

S. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: May 29, 2017

REASONS AND DECISION

INTRODUCTION

[1] On December 22, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal seeking entitlement to the Canada Pension Plan (CPP) Disabled Contributor's Child's Benefit (DCCB). The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on March 14, 2016.

[2] The Applicant and his ex-wife, who was added as a party to the appeal before the General Division, have one child for whom the Applicant is seeking entitlement to the DCCB. The Applicant has argued that, although he does not have legal custody of the child, the child's primary residence is with him, and because the child's primary residence is considered to be with the Applicant, he should be entitled to receive the DCCB on behalf of his son.

ISSUE

[3] The member must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal." Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] According to subsection 58(1) of the DESD Act, the only grounds of appeal are the following:

- (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[6] Sections 74, 75 and 76 of the CPP state:

74(1) An application for a disabled contributor's child's benefit or orphan's benefit may be made on behalf of a disabled contributor's child or orphan by the child or orphan or by any other person or agency to whom the benefit would, if the application were approved, be payable under this Part.

(2) Subject to section 62, where payment of a disabled contributor's child's benefit or orphan's benefit in respect of a contributor is approved, the benefit is payable for each month commencing with,

(a) in the case of a disabled contributor's child's benefit, the later of

(i) the month commencing with which a disability pension is payable to the contributor under this Act or under a provincial pension plan, and

(ii) the month next following the month in which the child was born or otherwise became a child of the contributor, and

(b) in the case of an orphan's benefit, the later of

(i) the month following the month in which the contributor died,
and

(ii) the month next following the month in which the child was
born,

but in no case earlier than the twelfth month preceding the month following the month in which the application was received.

(3) 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.

[...]

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.

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.

SUBMISSIONS

[7] The Applicant submitted that the General Division based its decision on an error of law. The Applicant argued that the General Division considered only the legal custody of the child and failed to consider that the Applicant in fact had custody and control of the child. Although custody was awarded in a final order of the Superior Court of Justice – Family Court dated August 7, 2014, the Applicant argued that the General Division ought to have considered other factors such as:

- i. The final order of the Superior Court contains an order that the child's primary residence is with the Applicant;
- ii. The child actually lives with the Applicant most of the time;

- iii. The school lists the child's home as being at the same address as the Applicant's, despite the fact that the child's mother is the primary contact listed with the school;
- iv. The Applicant pays child support, which entitles him to apply for the DCCB; and
- v. The Canada Revenue Agency (CRA) recognizes that the child resides with the Applicant, and Universal Child Care Benefit payments are sent to the Applicant on behalf of the child by the CRA.

ANALYSIS

[8] Section 74 of the CPP sets out the eligibility requirements for the DCCB benefit. Section 75 further specifies that payments shall be made only to the person or agency recognized as having custody and control of a child under the age of 18 years. Paragraph 76(1)(e) of the CPP states that DCCB payments cease when the disabled contributor ceases to have custody and control of the child.

[9] Section 75 of the CPP provides for payment of the DCCB to the "person or agency having custody and control of the child." Paragraph 75(a) specifies that the disabled contributor is presumed to be the person having "custody and control" of the child. This presumption can be rebutted with evidence to the contrary and does not apply where the child is living apart from the contributor.

[10] The CPP does not define the term "custody and control." However, the term "child" of a contributor, as defined under subsection 42(1) of the CPP, includes "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 or control." Subparagraph 52(i)(iii) of the *Canada Pension Plan Regulations* (CPP Regulations), which sets out information that an applicant or beneficiary has to provide to the Minister, requires information on whether a dependent child of a disabled contributor "was legally or in fact in his custody and control." Therefore, based on the references to "legally or in fact" in the CPP and CPP Regulations, it appears that "custody and control" can be legal or factual.

[11] There can be only one beneficiary of a DCCB benefit. The CPP sets out that the person entitled to receive the DCCB must be an individual who has “custody” and “control” over the child. In the matter at hand, a final order of the Ontario Court of Justice – Family Division dated August 7, 2014, awarded custody of the child to his mother, the Added Party in this application. I note that the DCCB payments were originally paid to the Added Party, but were ceased by the Respondent once the Superior Court issued an interim order in which the child’s primary residence was the Applicant’s home. The Added Party’s custody of the child was subsequently reconfirmed by final order of the Court, and this is a significant factor because, in the final order, the Added Party retained legal custody of the child but his primary residence changed to be with the Applicant. The General Division found that the custody and control of the child was determined by these court orders. The General Division did not consider any other factors in determining whether the Applicant had “custody and control” of the child.

[12] There is a presumption in section 75 that the contributor should be the recipient of the DCCB payment, however, this presumption does not apply where the child resides with the other parent. The Applicant has submitted that the child’s residence should have been considered by the Respondent in determining the Applicant’s entitlement to receive the DCCB, just as it was the determinative factor in deciding to cease payments to the Added Party.

[13] In addition to considering entitlement to the DCCB on the issue of the child’s primary residence, there is jurisprudence regarding the interpretation of the term “custody and control.” Citing *Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357 (C.C.B.C.), in *Abbott v. Abbott* 2001 BCSC 232 (CanLII), Justice Pitfield stated:

In the narrow sense of the word, "custody" means physical care and control or day to day care and control of a child. In the broad sense of the word, "custody" means all of the rights and obligations associated with physical, day to day care and control of a child as well as the right and obligation to nurture the child by ensuring, providing for, and making decisions in relation to, a child's physical and emotional health, education, religious or spiritual development, and all other matters that affect the welfare of the child.

[14] The above interpretation of “custody” is broad. Custody of a child encompasses the care, control, guardianship, and maintenance of a child. A person with custody has the "full bundle" of parenting responsibilities with respect to the raising and care of the child, day-to-day

decisions and provision of physical and emotional health, personal care, place of residence, and discipline. It includes responsibilities for providing and caring for a child. The Applicant has argued that, although the Added Party retains “custody” in terms of legally recognized decision-making for the respective child in this case, including being a contact for the school, the Applicant’s home is the child’s primary residence. As a result, he argues, he retains day-to-day responsibility for the child’s care, financial and physical maintenance.

[15] I note as well that section 75 refers not only to “custody” but also to “control.” In *Minister of Human Resources Development v. Warren* (December 10, 2001) CP 14995 (PAB), the Pension Appeals Board (PAB) considered that the parent who took responsibility for the child’s maintenance, schooling, participation in sports, and who was financially responsible for the child’s welfare retained “control” of the child. Although not binding on the Tribunal, the PAB’s approach to determining which party retains “control” is persuasive. This approach supports the argument that, in determining “control” of a child for the purposes of determining entitlement to benefits under section 75 of the CPP, a broader approach is warranted. For example, legal custody is not the only consideration in determining eligibility under section 75. A party asserting that they have *de facto* control of a child should also be recognized as eligible to receive the DCCB.

[16] The Applicant has argued that the General Division erred in law as it failed to consider “custody and control” beyond the Superior Court’s determination of legal custody as awarded to the Added Party. According to the Applicant, the General Division should have taken a broader approach in determining “custody and control” pursuant to section 75 of the CPP and considered such factors as those contained in jurisprudence on the issue.

[17] I find that the Applicant’s argument has merit. He has raised a ground of appeal that has a reasonable chance of success. Although he has framed the General Division’s error as an error of law, I find that the possible error is actually one of mixed fact and law. Leave to appeal is granted.

CONCLUSION

[18] The Application is granted.

[19] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Meredith Porter
Member, Appeal Division