Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *M. C. v. Minister of Employment and Social Development*, 2017 SSTGDIS 175

Tribunal File Number: GP-15-3171

BETWEEN:

M. C.

Appellant

and

Minister of Employment and Social Development

Respondent

and

The Estate of M. R.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: John F. L. Rose

HEARD ON: October 31, 2017

DATE OF DECISION: November 20, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for Benefits For Under Age 18 Children Of Disabled Contributor (DCCB) on March 22, 2010. The Appellant's spouse (Added Party) was disabled and he was applying on behalf of the children. The Respondent allowed the application and began paying those benefits to the Appellant.

[2] The Respondent cancelled those benefits, retroactively, commencing July 2013 alleging that the children were no longer in his care and custody. The Appellant requested a reconsideration of that decision which was denied by the Respondent on July 14, 2015. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[3] To qualify for DCCB, the Appellant must meet the requirements that are set out in the CPP. More specifically, if the child has not reached the age of 18, the Appellant must be found to have custody and control of the child.

[4] This appeal was heard by Teleconference for the following reasons:

a) More than one party will attend the hearing,

b) The method of proceeding is most appropriate to allow for multiple participants,

c) Videoconferencing is not available within a reasonable distance of the area where the Appellant lives,

d) The issues under appeal are complex,

e) There are gaps in the information in the file and/or a need for clarification, and

f) 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.

[5] The following people attended the hearing: The Respondent and the Added Party's brother who is the representative of her estate.

[6] The Tribunal has decided that the Appellant was not entitled to receive the DCCB effective July 2013 for the reasons set out below.

EVIDENCE

Documentary Evidence

[7] The record shows that the Added Party began receiving a CPP disability benefit in August 2009, which was also the effective date of DCCB payable to the Appellant on behalf of two children who were under eighteen.

[8] A statutory declaration dated August 12, 2012 by the Appellant stated that he was going to be travelling with the children for work relocation purposes and that he was their sole custodian because the Added Party was not capable of doing so.

[9] A letter dated May 26, 2015 from the Appellant stated that he had moved to Florida with the children in August 2012 and they had attended school there for the 2012/2013 school year. The Added Party had been living in Columbia since February 2012 but came to visit with them in the summer of 2013. They all went back to Columbia for the holidays and he left the children with the Added Party for the summer while he returned to work in Florida. In August 2013 he was advised by the children's grandmother in Columbia that the children would not be returning to Florida which he stated was against his consent. He began an application under the Hague Convention for the return of the children to his care. A copy of that application was filed.

[10] On September 23, 2013, a Conciliation Hearing for Fixing Custody was held in the Columbian Family Court. The parties, with their lawyers, attended. The report states that the parties could not come to an agreement on custody and awarded "...custody, personal care and provisional custody of the children…" to the Added Party. The provisional award also provided for visits by the Appellant with the children while he was in Columbia and dealt with some support issues.

[11] On July 14, 2014 a final agreement was made between the parties whereby custody and personal care of the children would be exercised jointly by the parents. The children would reside with the Added Party during the school periods and part of their vacations and it provided for visits by the Appellant when he was in Columbia.

[12] On February 6, 2015 the Appellant called the Service Canada office to advise that the children had been with the Added Party since June 2013 and that the DCCB payments should be sent to her instead. A letter dated the same day from the Added Party to Service Canada stated that she and the Appellant had separated in May 2013 and requested DCCB payments be made to her retroactively from June 2013.

[13] On April 7, 2015 the Added Party was notified that she was entitled to the DCCB effective July 2013 and on April 8, 2015 the Appellant was notified of the cancellation of the DCCB payments to him and that an overpayment was established for the period July 2013 until March 2015.

Oral Testimony

The Appellant

[14] The Appellant told the Tribunal that the children had been living with him in the United States (US) since 2012. In May 2013 the Added Party came for a visit and he and the children when back to Columbia for a holiday. He stated that the children were to stay in Columbia for the summer and that he had already purchased return tickets for them and they had been enrolled in school in Florida for September 2013. In August 2013 he was told that the children were not going to be returning to Florida.

[15] He stated that the Added Party had no legal grounds to keep the children in Columbia, although they were Columbian and Canadian citizens and that they were taken from his legal custody. In September 2013 they went to family court in Columbia and at that time the Added Party was not able to look after the children on her own but needed the grandparents to help. He attended that hearing with his lawyer but they could not agree on custody and a temporary order in favour of the Added Party was made by a Hearing Officer, and not a judge. It was to be temporary only until they went before a judge.

[16] In January 2014 he was served with divorce papers in Florida and in July 2014 they came to an agreement that the children would continue to reside with the Added party. The Appellant does not dispute that as of July 2014 he was no longer entitled to receive the DCCB. He is disputing the period from July 2013 to July 2014.

[17] When asked when he and the Added Party actually separated the Appellant said there had been no discussion of separation before the hearing in September 2013 and he still wished to talk to her about reconciliation. There was no prior written agreement between them about the children's custody or residency in July 2013. He said they had verbally agreed that she would go to Columbia in 2012 for rehabilitation and that he would live with the children in the US. He stated that he never had power of attorney for her but just acted for her as her spouse.

[18] He started paying child support in September 2013 according to the temporary order. Prior to this he was sending the Added Party about $350 per month for support for her.

[19] The children continued to reside with the Added Party until her death in May 2016 and the children have been back living with him in Florida since 2016.

Estate Representative

[20] The Estate Representative for the Third Party told the Tribunal that Columbia had jurisdiction to make the custody order in September 2013. He noted that the Added Party did have a disability and stated that she was competent to make decisions but needed some help with the children. He had spent time with her in January 2013 and in mid-2013 and said she was competent but she did deteriorate in 2015 when she had another stroke. He said that the relationship with the Appellant broke down in May 2013 and there was not any significant support paid by him until the court imposed it.

SUBMISSIONS

[21] The Appellant submitted that he qualified for the DCCB from July 2013 to July 2014 because:

a) He had legal custody of the children during that time;

b) The Children had been taken from him illegally by the Added Party; and

c) The Added Party was not competent to look after them during that period.

[22] The Added Party submitted that the Appellant did not qualify for the DCCB effective July 2013 because:

d) The parties separated in May 2013 and the children physically resided with the Added Party from July 2013;

e) The Added Party was competent to look after them; and

f) The Columbian authorities awarded custody to Added Party in September 2013.

[23] The Respondent submitted that the Appellant does not qualify for the DCCB from July 2013 because:

a) DCCB is only payable to the person having custody and control of the children; and

b) The children were not in his custody and control after June 2013.

ANALYSIS

Test for a Disabled Contributor's Child Benefit

[24] Paragraph 44(1)(e) of the CPP sets out the eligibility requirements for the DCCB. It is paid to each child of a disabled contributor who has made contributions for not less than the minimum qualifying period.

[25] Section 75 of the CPP stipulates that where a DCCB is payable to a child who has not reached eighteen years of age it be made to the person having "custody and control" of the child. Subsection 75(a) provides that the contributor, except where the child is living apart from the contributor, is presumed, in the absence of any evidence to the contrary, to be the person having custody and control of the child.

[26] In this case, there is no issue that the children were entitled to the DCCB based on the Added Party's disability. It also is not disputed that the children were residing with the

Appellant and that he had care and control of them until June 2013. As well, the Appellant does not dispute that he did not have care and custody of the children effective July 2014 when he and the Added Party entered into a final agreement that children would be in her custody and care.

Custody

[27] The Appellant, however, argues that the children were simply on an intended holiday in the summer of 2013 when the Added Party improperly and illegally withheld them. He maintains that he retained legal custody of them pursuant to their oral agreement. He also submits that the September 2013 family court order was not made by a judge and was temporary until July 2014 when a final agreement and order was made. He states that he maintained legal custody during that period.

[28] I cannot accept these submissions. The parties had no written agreement or court order in July 2013 with respect to the children's residency or custody when they went into the Third Party's care. As a result, the parties would have had an equal entitlement to custody pending an order or agreement. If the children had been returned, as the Appellant had anticipated, in August 2013, there would be no issue here. However, a dispute arose over their custody and the matter was brought before the Family court in Columbia where the children were then residing and where they were citizens. While the provisional order made was not by a judge, I find it was made by a competent authority under the Columbian system. Both parties were represented and there did not appear to be any challenges to the hearing officer's authority to make such an order.

[29] While the Tribunal accepts that legal custody may have been an issue during the summer of 2013, it was determined in September 2013 that the mother would have custody. I don't find that the fact that it was temporary is of importance and it was in effect until either a further order or agreement was made.

Control

[30] The legislation requires both custody and control of the child, one is not sufficient. I take some guidance from *MHRD v. Warren* (December 12, 2001), CP 14999(PAB) in which the Pension Appeals Board set aside a decision where the Tribunal had only addressed the issue of

custody and overlooked the requirement of control. In *Warren* the PAB found that the father had control of the child when he resided with him and he took responsibility for his care and maintenance. In our case, the Added Party mother had sole control of the children when they came into her care in July 2013. It was not possible for the Appellant to exercise that control when he resided in Florida while the children resided in Columbia with the Added party.

Added Parties Disability

[31] I have considered the Appellant's submissions with respect to the mother's capacity to look after the child. The evidence was that while requiring physical assistance in the care of the children, she was sufficiently competent to make decisions about their care and control. She was able to retain and instruct counsel in the family proceedings in September 2013 and an assessment filed from November 2013 found that she was competent to make her own decisions. There is no evidence that she ever required a power of attorney during the period in question. Regardless of her capacity, the issue before the Tribunal is not her entitlement to the DCCB, but whether the Appellant had custody and control of the children during the relevant period.

[32] The Tribunal finds that while custody was an issue between July and September 2013, control was not throughout the entire period between July 2013 and July 2014. As a result the Tribunal finds that the Appellant did not have custody and control of the children and was not entitled to receive the DCCB effective July 2013.

CONCLUSION

[33] The appeal is dismissed.

John F. L. Rose
Member, General Division - Income Security