



Citation: *KM v Minister of Employment and Social Development and MM*, 2021 SST 693

## Social Security Tribunal of Canada General Division – Income Security Section

# Decision

**Appellant:** K. M.

**Respondent:** Minister of Employment and Social Development

**Added Party:** M. M.

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**Decision under appeal:** Minister of Employment and Social Development reconsideration decision dated September 9, 2020 (issued by Service Canada)

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**Tribunal member:** George Tsakalis

**Type of hearing:** Teleconference

**Hearing date:** June 15, 2021 and post-hearing submissions

**Hearing participants:** Appellant  
Respondent

**Decision date:** October 28, 2021

**File number:** GP-20-1428

## Decision

[1] The appeal is allowed.

[2] The Claimant, K. M., is entitled to the disabled contributor's child's benefit (DCCB) on behalf of E. M. Payments start as of July 2019. This decision explains why I am allowing the appeal.

## Overview

[3] The Claimant and the Added Party, M. M. married in 1985. They divorced in 2011. They have four children.

[4] The Added Party receives a Canada Pension Plan (CPP) disability pension. He applied for a DCCB in October 2018 on behalf of E. M., who was born in 2004. The Minister of Employment and Social Development (the Minister) approved his application.

[5] The Claimant applied for a DCCB on behalf of E. M. in June 2020. The Minister denied her application because the DCCB for a child under 18 years of age can only be paid to one parent, who has **some** custody and control of that child. The Minister had already begun paying the DCCB to the Added Party.<sup>1</sup>

[6] The Claimant asked the Minister to reconsider its decision. She argued that the Added Party had no custody or care of E. M.<sup>2</sup>

[7] The Minister reconsidered, and decided to maintain the original decision.<sup>3</sup> The Claimant appealed the Minister's reconsideration to the Social Security Tribunal.

[8] The Claimant says that she should receive the DCCB on behalf of E. M. because she has care and custody of E. M.

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<sup>1</sup> See GD2-31

<sup>2</sup> See GD2-22-23

<sup>3</sup> See GD2-8

[9] The Added Party says that he should receive the DCCB on behalf of E. M. because he has joint custody of E. M. and provides her with a significant amount of care.<sup>4</sup>

[10] The Minister says that the Added Party should receive the DCCB. The Minister implemented a policy in August 2018 about who should receive the DCCB for a child under 18 years of age. The policy says that a DCCB is payable to the disabled contributor when they have applied for the benefit and they inform the Minister that they have **any** custody and control of their child. The Minister was satisfied that the Added Party had some custody and control over E. M., even though she did not reside with him.

### **The DCCB – What it is**

[11] The DCCB is a flat-rate monthly benefit that is paid for each child of a person receiving the CPP disability benefit.<sup>5</sup>

[12] The CPP says that where a DCCB is payable to a child under 18, payment is made to the person having custody and control of the child.<sup>6</sup> The CPP also says that the contributor is presumed to be the person having custody and control of the child except when the child is living apart from them.<sup>7</sup>

### **Matters I have to consider first**

[13] The teleconference hearing proceeded on June 15, 2021. The Claimant had three of her children available to testify, including E. M. The Claimant advised that E. M. had mental health issues related to the COVID-19 pandemic. I was concerned about E. M. giving evidence. The Claimant had already provided the Tribunal with statements

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<sup>4</sup> See GD14

<sup>5</sup> See paragraph 44(1)(e) of the *Canada Pension Plan*

<sup>6</sup> See section 75 of the *Canada Pension Plan*

<sup>7</sup> See section 75(a) of the *Canada Pension Plan*

from her children that outlined their anticipated evidence.<sup>8</sup> The parties agreed to proceed with the hearing without E. M. giving evidence.

[14] This appeal also raised issues of statutory interpretation. There is a division in the Tribunal about the meaning of the term “custody and control” contained in the CPP. There is one recent decision from the Tribunal’s Appeal Division that agrees with the Minister’s policy that the DCCB is payable to a disabled contributor who has **any** custody and control of the child.<sup>9</sup> There is another recent decision from the Tribunal’s Appeal Division that disagrees with the Minister’s policy.<sup>10</sup>

[15] Prior to the hearing, I asked for and received submissions from the Claimant and Added Party on the Appeal Division’s decision that followed the Minister’s policy.

[16] At the conclusion of the hearing, I asked the Minister to make submissions on the legislative history of the DCCB, including any information that could be found in parliamentary debates. I received the Minister’s submissions. I asked the Claimant and Added Party to make submissions. I received submissions from the Claimant. I did not receive further submissions from the Added Party. I am now prepared to make a decision in this appeal.

### **I disagree with the Minister’s policy**

[17] I disagree with the Minister’s policy that the DCCB is payable to the disabled contributor who has any custody and control of a child under 18.

[18] When I interpret the CPP I must apply the “modern principle” of statutory interpretation. This means that the words of a statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”<sup>11</sup>

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<sup>8</sup> See GD2-12, 13, and 16

<sup>9</sup> See *LS v. Minister of Employment and Social Development and DS*, 2021 SST 75

<sup>10</sup> See *RO v. Minister of Employment and Social Development and RM*, 2021 SST 240

<sup>11</sup> See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)

[19] Section 75 of the CPP deals with the payment of the DCCB for a child who is under 18 years of age. It says that the DCCB is payable “to the person or agency having custody and control of the child. . .” It also says that the contributor, who in this case is the Added Party, is presumed to have custody and control of the child if the child lives with the contributor. However, E. M. lives with the Claimant. She does not live with the Added Party. This means that I cannot presume that the Added Party has custody and control of E. M.

[20] In interpreting section 75 of the CPP, I cannot accept the Minister`s interpretation that the DCCB is payable to a disabled contributor who has any custody and control of the child. I am not obligated to follow the Minister`s policy. I am obligated to follow what CPP says. The CPP does not use the phrase “any custody and control of the child” when it says who the DCCB is payable to. It specifically refers to **the** person who has custody and control of the child.

[21] Even when the words of a statute seem to be clear, I still have to consider the total context of the section of the law that I am interpreting.<sup>12</sup> I must seek to interpret section 75 of the CPP in a manner that best meets the overriding purpose of the CPP.<sup>13</sup>

[22] When I look at the purpose of a law, I am entitled to presume that all laws have a purpose. In so far as the language of the law permits, I should adopt an interpretation that is consistent with or promotes the purpose of the law, while avoiding interpretations that defeat or undermine the purpose of the law.<sup>14</sup>

[23] When I consider the purpose the DCCB, I believe that the Minister`s policy undermines the purpose of the DCCB. Courts have looked at the purpose of the DCCB. Courts have ruled that the DCCB belongs to the child. It does not belong to either parent.<sup>15</sup> The CPP is benefits conferring legislation and should given a large and

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<sup>12</sup> See *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4

<sup>13</sup> See *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 and *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1

<sup>14</sup> See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)

<sup>15</sup> See *Williams v. Williams*, 1995 CanLII 17843 (ON SCDC) and *Sipos v. Sipos*, 2007 ONCA 126

generous interpretation.<sup>16</sup> The CPP sets out a program of benefits for those who experience a loss of earnings because of retirement, disability, or death of a wage-earning spouse or parent.<sup>17</sup> The DCCB is a benefit for a child of a disabled contributor, payable to offset the costs associated with caring for a child of a disabled contributor.<sup>18</sup>

[24] The Minister's policy would make it easier to decide who would get the DCCB. It would be easier for disabled contributor's to show that they have any custody and control of a child, as opposed to primary or actual custody and control. However, my focus in interpreting the law is to make sure that it fits in with the purpose of the DCCB, and the courts have ruled that the DCCB belongs to the child.

[25] When I am interpreting the DCCB, my primary focus is on the child and not whether it is administratively easier for the Minister or the Tribunal to award the benefit to a disabled contributor. I believe that the DCCB should go the parent with the child who has primary or actual custody and control of the child. This is because the DCCB provides financial assistance to the children of a disabled contributor that the contributor would otherwise have provided if they were able to work. The wording of the CPP also specifically refers to the DCCB being payable to the parent who has custody and control of the child, which suggests that the parent having such custody and control is in a better position to decide how the benefit is spent.

[26] In addition, when I asked the Minister to make submissions on the legislative history of the DCCB, I did not see anything in its submissions that its policy is consistent with the CPP.<sup>19</sup>

[27] The Minister's policy only came into effect in August 2018. The DCCB has been around since the enactment of the CPP in 1965. Before August 2018, the Minister would consider which parent spent the most time with the child and the residence of the child. It would pay the DCCB to the non-disabled parent if it determined they spent more

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<sup>16</sup> See *Villani v. Canada (AG)*, 2001 FCA 248

<sup>17</sup> See *Granovsky v. Canada (Minister of Employment Insurance)*, 2000 SCC 28

<sup>18</sup> See *L.S. v. Minister of Employment and Social Development and DS*, 2021 SST 75

<sup>19</sup> The Supreme Court of Canada in *Rizzo* said that the use of legislative history is appropriate when interpreting a statute.

time with the child or if the child's primary residence was with them.<sup>20</sup> However, there have been no significant legislative changes dealing with who the DCCB is payable to for children under 18 since it was originally enacted in 1965. I do not see any legislative change which would justify such a drastic change in the Minister's policy in 2018.<sup>21</sup>

[28] The Minister's submissions on the legislative history of the DCCB did not support its position on how I should interpret the DCCB. The Minister is saying that any legal custody and control is enough to receive the DCCB. If a disabled contributor can show that they have any type of custody they would receive the DCCB. However, the legislative debates show that there was a discussion about modifying the language of the DCCB to allow agencies that might have custody and control of a child to receive the benefit.<sup>22</sup> The legislature seemed to recognize that DCCB payments could go to an agency that is taking care of a child, while a parent retains legal guardianship over the child. This suggests that legal custody and control is not enough, but instead factual custody and control is critical in determining who should receive the DCCB. In other words, the critical factor in receiving the DCCB should be who is actually taking care of the child, and not who has legal control over the child.

[29] When I interpret a statute, I have to conduct a consequential analysis. I have to consider whether an interpretation that says the DCCB for children under 18 should go to the person who has primary or actual custody and control of a child, as opposed to any custody and control, would lead to an absurd result. I have to consider questions such as whether such an interpretation would lead to an unreasonable or inequitable result and whether such an interpretation fits harmoniously with the purpose of the Act.<sup>23</sup>

[30] I find that an interpretation that the DCCB should be paid to the parent who has primary or actual custody and control of a child does not lead to an absurd result. Such an interpretation does not lead to an unreasonable or inequitable result. Courts have

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<sup>20</sup> See GD18-4

<sup>21</sup> See GD18-12

<sup>22</sup> See GD18-26

<sup>23</sup> See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)

said the DCCB belongs to the child and not the disabled contributor. I also believe that the person or agency with primary or actual custody and control of the child receiving the DCCB fits harmoniously with the purpose of the law, which is to provide a benefit to a child of a disabled contributor to help offset the costs associated with caring for a child. I believe that the person who has primary or actual custody and control would be in a better position to decide how the DCCB should be spent on the child's behalf to help offset those costs.

[31] I will now turn to the issue of which parent has primary or actual custody and control of E. M.

**The Claimant has primary or actual custody and control of E. M.**

[32] The CPP does not define the term "custody and control". The Tribunal has accepted the definition of custody set out by a British Columbia Court. It says:

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.<sup>24</sup>

[33] In a case called *Warren*, the Pension Appeals Board decided 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.<sup>25</sup>

[34] I agree with the Claimant that she had primary or actual custody of E. M. The Claimant testified that there was a custody order in place. The Added Party visited E. M. one or two times each week in 2017. She said the Added Party was sick in 2018 and he did not see the E. M. for 13 or 14 months. He also stopped paying child support.

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<sup>24</sup> See *Abbott v. Abbott*, 2001 BCSC 232

<sup>25</sup> See *Minister of Human Resources Development v. Warren* (December 10, 2001) CP 14995 (PAB). This decision does not bind me, but I find it persuasive. It has been followed by the Tribunal in other cases.



[35] The Claimant said that the Added Party began contacting E. M. in January or February 2019. But E. M. is not keen on seeing the Added Party. The Claimant says the Added Party has mental health issues. He abuses alcohol and drugs.

[36] The Claimant said that E. M. is in school full-time. The Claimant helps E. M. with her schooling. The Added Party has not helped E. M. with her schooling since 2017. The Claimant takes E. M. to school or E. M. goes to school by bus.

[37] The Claimant said she oversees E. M.'s social life and sets rules for her to comply with. She denied that the Added Party was involved in her social life and extra-curricular activities. The Claimant pays for E. M.'s dental bills. She buys all of E. M.'s clothing and pays her personal expenses. She denies that the Added Party ever assisted E. M. with her social life or extracurricular activities.

[38] The Claimant also submitted documents to support her argument that she had primary or actual custody and control of E. M. She submitted a statutory declaration that said she had full custody and control of the children.<sup>26</sup> She also submitted a written statement that the Added Party had not seen E. M. from December 2017 to March 2019.<sup>27</sup> She also submitted that she cared for E. M. when she was sick.<sup>28</sup>

[39] The Claimant submitted letters from her children and a friend to support her argument that she had full custody and control of E. M. One of the children described the Claimant as their caretaker, provider and sole parent.<sup>29</sup>

[40] The Added Party testified that the Claimant had full custody of E. M. But he described the custody arrangement as being joint custody. He and the Claimant made decisions about E. M.'s life. The Added Party acknowledged that he suffers from major depressive disorder and other health issues, which affected his ability to see E. M. He said he saw E. M. two times a week in 2017. He only saw E. M. on a limited basis in 2018 because of depression. He saw her at least one time a week in 2019. He saw

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<sup>26</sup> See GD1-10

<sup>27</sup> See GD2-10-11

<sup>28</sup> See GD15-1

<sup>29</sup> See GD2-14-15

E. M. one time a week until the summer of 2020, when he had a fallout with the Claimant. He sees a psychologist about not being able to see E. M. and not having the means to communicate with her.

[41] The Added Party said that he bought E. M. both Christmas and birthday gifts every year. He took her on vacations. He participated in her extra-curricular activities when he was healthy enough to do so.

[42] The Added Party acknowledged that the Claimant had primary custody of E. M., but he would discuss E. M.'s life with the Claimant.

[43] The Added Party submitted documents that showed he was no longer in arrears for child support.<sup>30</sup> He provided a statement saying that he was not an absentee father and had provided a significant amount of custody and care for the children.

[44] The Added Party submitted a statement from his parents that the Claimant refused him access to E. M. The Added Party's parents submitted that the Added Party had supported his family, and that he only fell behind in his child support because of his health issues. The Added Party's parents said the Claimant recently purchased a home with a swimming pool and that he was excited to provide a swimming pool for the children.<sup>31</sup>

[45] The Added Party submitted a report from his psychologist. His psychologist said that he began seeing the Added Party in November 2017. He said that the Added Party had contact with his children over the years.<sup>32</sup>

[46] The Added Party also submitted a court order dated June 3, 2011. The court order said that the Claimant had custody of the children of the marriage. The Added Party had access to two overnight visits each week.<sup>33</sup>

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<sup>30</sup> See GD14-5

<sup>31</sup> See GD14-8-10

<sup>32</sup> See GD14-20

<sup>33</sup> See GD2-27

[47] I find that the evidence showed that the Claimant had primary or actual custody and control of E. M. There is no dispute that E. M. lives with the Claimant.

[48] The 2011 court order awarded the Claimant custody of E. M. I am satisfied that she is responsible for the day to day care of E. M. I find the Claimant is responsible for ensuring that E. M. has the essentials for day-to-day living, including food, clothing, and a place to live. I am satisfied that the Claimant is responsible, from one day to the next, for providing for E. M.'s safety, guidance, and instruction.

[49] I acknowledge that the Added Party has had access to E. M. He made submissions that his attempts to contact her have been frustrated by the Claimant. But that is a matter for a family court to consider. I am more interested in who has primary or actual responsibility for the day to day activities of E. M., and I am satisfied that it is the Claimant who has such responsibility. I do not mean to suggest that the Added Party has not fulfilled his parental responsibilities. I accept the Added Party's evidence that he has made efforts to see and maintain contact with E. M. When I compare his every-day responsibilities to those carried out by the Claimant, I cannot find, on these facts, that the Added Party had primary or actual custody and control of E. M.

### **When payments start**

[50] Payment of the DCCB can start no earlier than 11 months before the Minister received the DCCB application.<sup>34</sup>

[51] The Minister received the Claimant's DCCB application in June 2020. Payment of the DCCB to the Claimant starts in July 2019.

### **Conclusion**

[52] I find that the Claimant is eligible for the DCCB because she had primary or actual custody and control of E. M.

[53] This means the appeal is allowed.

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<sup>34</sup> See subsection 74(2) *Canada Pension Plan*

George Tsakalis  
Member, General Division – Income Security Section