

CHILD TAX BENEFIT

Update on Objections and Appeals

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Objections: Process

- Objections are internal appeals of Canada Revenue Agency (CRA) assessments or determinations. An objection may be filed where there is a disagreement with the way the CRA has allocated the Child Tax Benefit (CTB).
- Objections are handled by the CRA Appeals Branch – objections relating to both the CCTB and OCTB are handled by CRA.
- There are 3 ways to file an Objection:
 - Online using the “My Account” feature
 - Writing to the Chief Appeals Officer at the appropriate Appeals Intake Centre – for residents with postal codes starting with A to P, it is the Eastern Intake Centre in Sudbury
 - Complete Form T400A – Objection – Income Tax Act
- A person filing an objection can authorize another person to act as their representative by filing a T1013 form. The representative need not be a lawyer.
- The CRA Appeals Branch will review the objection and will either reassess the benefit, confirm the original decision or make a determination.
- An objection must be filed within 90 days of the date the notice of determination was mailed to the taxpayer. If the objection is not filed in time, the claimant can apply for an extension of time. It must be shown that:
 - They could not object or have someone else object for them;
 - They intended to object;
 - It would be fair to grant the extension;
 - They applied as soon as they could.
- If the extension is granted, the objection is considered to have been filed on the day that the decision notice was mailed. The CRA will not grant an extension longer than one year. A refusal to grant an extension of time to file an objection can be appealed to the Tax Court.

Appeals to the Tax Court: Process

- The Notice of Appeal must be filed within 90 days of the date that the CRA mailed the objection decision. An appellant can also appeal to the Tax Court if the CRA does not make a decision on an objection within 90 days of the date the objection was filed.
- If this deadline is missed, the appellant has one year and 90 days from the date of the reassessment or from the date of the confirmation of the original assessment to file an application to extend the time to appeal.
- There are two streams of appeals at the Tax Court: 1) Informal Procedure; 2) General Procedure. Most CTB appeals follow the informal procedure.
- The Informal Procedure is intended to minimize and simplify the legal steps involved in the appeal process. The Informal Procedure is limited to cases in which the amount of federal tax and penalties in dispute for each taxation year, excluding interest, is \$12,000 or less.
- When the amount in dispute in an income tax case is greater than \$12,000, a taxpayer who chooses the Informal Procedure must decide to limit the amount under appeal to \$12,000; otherwise the General Procedure will apply.
- An original and two (2) copies of the notice of appeal must be submitted to any Tax Court office. This can be done in person or mail. Facsimiles and electronic documents are also accepted, and do not require the filing of the original and two (2) copies.
- The Tax Court forwards the Notice of Appeal to the CRA. The CRA must file a “reply” within 60 days that sets out: (a) the facts that are admitted; (b) the facts that are denied; (c) the facts of which the respondent has no knowledge and puts in issue; (d) the findings or assumptions of fact made by the Minister when making the assessment; (e) any other material facts; (f) the issues to be decided; (g) the statutory provisions relied on; (h) the reasons the respondent intends to rely on, and; (i) the relief sought.
- Note that the Tax Court has in at least two recent cases taken a strict approach in respect of the CRA’s obligation to be complete in identifying the issues in its Reply (particularly in cases involving unrepresented litigants). In *Fraser* 2010 TCC 23 and *Murphy* 2009 TCC 110, the Tax Court refused to consider a legal argument made by the CRA that was not contained in their reply as it was unfair to the appellant. The Reply must be complete.
- Costs against the appellant are generally only available where they have acted in a way that unduly delayed the prompt and effective resolution of the appeal. Even so, the permitted costs are in the range of \$900.
- The General Procedure: The General procedure entails a much more formal process that mirrors the civil litigation process.

- An appeal is initiated by submitting the original and two (2) copies of the notice of appeal, together with the appropriate *filing fee*, to the Registry at a TCC office. This may be done in person, by mail, by fax or electronically. The filing fee depends on the amount in issue.
- The CRA has 60 days to file their Reply. A response by the appellant to the Reply, if any, must be filed within 30 days.
- The parties are then required to exchange lists of the documents they will be relying on at the hearing. Examinations for discovery usually follow. An application to schedule a hearing date may be made jointly by the parties to the appeal, or by one of the parties, after these procedural steps are completed or the parties have agreed that they are unnecessary. Other procedural steps can also occur in preparation for the hearing, such as motions, the filing of experts' reports, and pre-hearing conferences. The risk of costs is greater.
- Appeals to the Federal Court of Appeal: Appeals from the Tax Court of Canada are to the Federal Court of Appeal.
- In general, the timeline for appealing to the Federal Court of Appeal is 30 days from the date of the decision (not counting July or August). There are some exceptions (particularly for appeals from a decision that followed the General Procedure) so the legislation should always be reviewed. Note that there is a 180 day appeal period in the Informal Procedure where the appeal is dismissed because the appellant did not appear.

RECENT JURISPRUDENCE

The challenge of joint custody arrangements

- The primary area of CTB Tax Court litigation remains joint custody arrangements; primarily because the legislation is based on an assumption that only one person is primarily responsible for the care and custody of children. Legislative change that will take effect in July 2011 will allow for the sharing of the benefit between parents with joint custody arrangements.
- In the meantime, the Revenue Canada has a policy of splitting the benefit on a six-month rotation as between parents. Only one parent can be eligible for the CTB in a one-month period.
- Unfortunately, the Tax Court has concluded it does not have the jurisdiction to follow such a policy absent legislative change. Until the change to the legislation takes effect in July 2011, the Tax Court adjudicates on the basis that one parent must be found to be the primary caregiver in any particular month, although the identity of the eligible person can change from month to month (*Matte v. Canada*, [2003] F.C.J. No. 43 (F.C.A.)).
- Given the discord between the reality of the lives of joint custody families and the legislation, the Tax Court often ties itself up in knots in order to make determinations. It is difficult to predict what the Court will do with any particular fact situation.
- Parents cannot decide the allocation of the CTB between them in a separation agreement. Nor does a Family Court have jurisdiction to do so. A court order or separation agreement identifying

which parent should receive the benefit is only one factor to be considered and the ITA tests are ultimately determinative (*Laurin v. R*, 2007 FCA 44).

- There are two aspects of the definition of “eligible individual” that are of central importance to the Court in determining which parent gets the benefit (see s. 122.6 ITA):
 - a) the parent resides with the child, and;
 - b) the parent primarily fulfils the responsibility for the care and upbringing of the child.
- In practice, these two factors are often merged in the Court’s analysis. But in general, if the child resides with both parents at different times, the question of which parent is primarily responsible for the care and upbringing of the child takes on more significance. If both parents are claiming the benefit, than the presumption that the female parent has primary responsibility is no longer made.

i. Residence

- In the leading case interpreting the residence requirement, the Tax Court concluded that “to reside with someone is to live or stay with someone in a given place with a certain constancy, a certain regularity or else in an habitual manner” (*Lapierre v. Canada* 2005 TCC 720).
- In practice, it is not as easy a question to answer as *Lapierre* suggests. There are many arrangements in which there is a regular schedule and children split their time evenly as between their parents.
- Although, as noted, the legislation does not permit the Court to adopt Revenue Canada’s policy of splitting the benefit as between the parents on a six-month basis, at least three recent cases have evaluated what percentage of time a child spends with each parent, and divided up the months in the calendar year accordingly.
- In *Campbell v. Canada* 2010 TCC 67 the Court was faced with a shared custody situation, with no one parent primarily responsible for the care and upbringing of the children.
- The Court noted that in calculating the Child Tax Benefit, the calculation is based on eligibility “at the beginning of the month” (s. 122.61(1) ITA). So the Court looked at which household the children were living in at the beginning of each respective month and granted the benefit accordingly. This worked out to six months for one parent and six months for the other. See also *Matte v. Canada* (supra) for a similar approach.
- In *Connolly* 2010 TCC 231, the child lived with the father during the school week and the rest of the time with the mother. This arrangement allowed the child to attend a better school. The mother maintained that she was still the primary caregiver although the child spent more time at his father’s home. The Court concluded that unlike in *Campbell*, physical residence at any particular time in the month is not always determinative. For example, if the child resides with the mother for most of the month but not on the first day there may be cases where consideration of the roof under which the child lives on the first day is not determinative.

- “Clearly the general rule would be to find that the roof under which the child lives is determinative but there must be room for exceptions where the facts and common sense dictate otherwise. I also note that this expansive approach as to where a person “resides” clearly contemplates that a person can reside in more than one place at one time. Admitting to the possibility of exceptions to this general rule in my view facilitates the administration of the CCTB provisions on a sensible basis considering their purpose and considering the administrative problems associated with applying them on a strict literal basis where there is a good case for finding two eligible individuals in respect of the same child.” (para. 27-28)
- Nonetheless, the Tax Court in *Connolly* adopted a process of examining where the child was at the beginning of a month. The Tax Court calculated that the child resided with the mother approximately 40% of the time, roughly the equivalent of five months a year. The child resided with the mother at the beginning of each of the summer months, as well as in September and January (four months). The Court was satisfied (without checking) that “as a matter of probability at least one of the 8 months in question would have commenced on a [day when the mother had the child]” and thus granted the benefit to the mother for five months out of the year.

ii. Primary Responsibility for Care and Upbringing

- However, even a clear cut place of residence is not determinative, as there are situations in which another parent can remain the “primary caregiver”.
 - *Murphy* 2010 TCC 411: The child lived primarily with the mother but started spending more time at her father’s home when her boyfriend moved in. While she may have resided with both her parents, “the CCTB provisions provide that ... the CCTB is payable only to the parent who is the child’s primary caregiver. It is clear that only one parent can be the “primary” caregiver....The evidence satisfies me that Melanie’s mother continued to be primarily responsible for Melanie’s overall care and upbringing notwithstanding the change in Melanie’s living arrangements.”
 - *Fraser* 2010 TCC 23: “In my view, the fact that the daughter spent more evenings with her father is counterbalanced by the fact that the mother had sole custody and took responsibility for making the central decisions in respect of her daughter’s upbringing.”
- In practice, the two factors (residence and primary caregiver) tend to become intermingled or conflated, with the Tax Court looking to evidence of which parent is the “primary caregiver” in order to determine where the child “resides”:
 - *Penner v. Canada*, 2006 TCC 413: while the child lived apart from her grandmother to attend school, at all times the grandmother primarily fulfilled the responsibility for her care and upbringing. The grandmother paid for the child’s room and board, and made all decisions concerning the child’s medical care or education. The child also lived with the grandmother when she was not attending school: “As a result, Brittany resided with the Appellant at all times in question.”
 - *Bouchard v. Canada*, 2009 TCC 38: In this case, the father was unable to stay with his child because he was incarcerated. However, he continued to take care of the child and to provide for the child during his incarceration. The child did not acquire another habitual

abode during her father's incarceration. The Tax Court stated: "the child tax benefit provisions should be interpreted in a compassionate way in these types of circumstances so as not to frustrate the obvious intention of Parliament to assist low income families. Where there is one parent who has custody of the child and takes care of the child, generally that parent should be entitled to the child tax benefit even though the parent may not be physically under the same roof as the child for a period of time.... this is a proper case in which to give an expansive meaning of the phrase "resides with." The daughter did not acquire another habitual abode during her father's incarceration and her father maintained responsibility for her care. I find that the daughter did not give up her ordinary residence with her father, even though it was interrupted for a significant period."

- Section 6302 of the Regulation sets out the following factors to be considered in determining which parent is primarily responsible for the "care and upbringing" of a child:
 - (a) the supervision of the daily activities and needs of the child;
 - (b) the maintenance of a secure environment in which the child resides;
 - (c) the arrangement of, and transportation to, medical care at regular intervals and as required;
 - (d) the arrangement of, participation in, and transportation to, educational, recreational, athletic or similar activities;
 - (e) the attendance to the needs of the child when the child is ill or otherwise in need of the attendance of another person;
 - (f) the attendance to the hygienic needs on a regular basis;
 - (g) the provision, generally, of guidance and companionship; and
 - (h) the existence of a court order.
- While the legislative change allowing parents to split the benefit between them each month may assist in reducing litigation over the benefit, it remains open to either parents to seek to keep the benefit entirely to themselves by asserting that they are primarily responsible for the care and upbringing of their child.

Where the child lives with someone other than a parent

- Section 252(1) of the ITA provides that if a child is in the custody and control of a non-parent taxpayer, and they are "wholly dependent" upon them, that person will be considered a "parent" for the purposes of eligibility for the Child Tax Benefit. This can result in conflict as between parents and other types of caregivers.
- *Grenier 2010 TCC 234/Couture 2010 TCC 233*: In these cases, a conflict arose in a situation where the person with whom a child was staying during the school year (not a family member) applied for the benefit. Although the clear majority of time was spent living with the caregiver,

the Court granted the benefit to the mother rather than the caregiver. The Court concluded that the child continued to reside with the mother because she kept a room ready for him, he kept clothes and personal effects in her house and they took vacations together. Because the mother continued to provide support for clothes, school supplies and food, it could not be said that the child was “wholly dependent” on the caregiver with whom he resided during the school year.

- *Mesamour* 2010 TCC 131: A woman partnered with an NGO providing services to minor refugee claimants without family in Canada. She took children into her home and looked after them. She initially received the CCTB. Later, Revenue Canada assessed an overpayment on the basis that the children were not “wholly dependent” upon her because the NGO provided for their financial needs. In ruling against the caregiver, notably the Court considered her receipt of social assistance as a key factor in finding that the children could not have been “wholly dependent” upon her: “I do not see how a person who already resides with a dependent, has a part-time job and receives social assistance can be considered to have other children (three or four at a time) who are wholly dependent on her. The contributions from PRAIDA for each child taken in are clearly insufficient to enable the Appellant to look after their care and upbringing.”
- Parents of children in foster care are disqualified from receiving the Child Tax Benefit by virtue of the fact that the child protection agency is eligible for a “Children’s Special Allowance” (see s. 3(1) of the CSA Act), even if the agency does not apply for the allowance (*Murphy* 2009 TCC 110).
- The test is whether the allowance is “payable” not whether it is paid (*Weidenfeld* 2010 TCC 265; upheld by the Federal Court of Appeal in 2010 FCA 333). In accordance with section 3 of the *Children’s Special Allowance Act* a special allowance is payable when the child is maintained by a department or agency and the child resides in the private home of foster parents, a group foster home or an institution. In *Weidenfeld*, the Tax Court held that it was Revenue Canada’s burden to establish that the special allowance was payable. Since they did not meet this burden on the facts of this case, the benefit could not be denied on the basis that a special allowance was payable. However, since the child was placed in temporary care, the father did not pay for room and board and made no decisions about the child’s education, treatment or residence, he could not be said to be responsible for the care of his child and he was disqualified on this alternative basis.
- The *Murphy* 2009 TCC 110 case demonstrates the hardship that can arise where a parent continues to financially support their child in care. In that case, the child benefit continued to be paid to the mother and she accrued a significant overpayment when Revenue Canada learned that her child was in care. The mother was not aware that she was no longer eligible for the benefit, and in fact, continued to use it to support and provide for her daughter. (Note the appeal was actually granted in the mother’s favour, but for other reasons)

Living in spousal relationship

- CTB beneficiaries can accrue large overpayments in circumstances in which Revenue Canada determines retroactively that they are living in common law spousal relationships. In such circumstances, the income of both spouses is considered and can result in a substantial decrease in the parent’s entitlement.

- Many factors may be taken into consideration in determining whether a person is cohabiting with another in a conjugal relationship. These factors, which can be found in many decisions (see *Milot v. R.*, [1996] 1 C.T.C. 2247, *Kelner v. Canada*, [1995] T.C.J. No. 1130 (QL), *Roby v. Canada*, [2001] T.C.J. No. 801 (QL), are as follows:

1. Shelter:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

2. Sexual and Personal Behaviour:

- (a) Did the parties have sexual relations? If not, why not?
- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings toward each other?
- (d) Did they communicate on a personal level?
- (e) Did they eat their meals together?
- (f) What, if anything, did they do to assist each other with problems or during illness?
- (g) Did they buy gifts for each other on special occasions?

3. Services:

What was the conduct and habit of the parties in relation to:

- (a) preparation of meals;
- (b) washing and mending clothes;
- (c) shopping;
- (d) household maintenance; and
- (e) any other domestic services?

4. Social:

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community toward each of them and as a couple?

6. Support (economic):

- (a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation, etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning the children?

- There is no predominant model of marriage, and no single factor should predominate.
- Problems can particularly arise for spouses who separate, but continue to reside together for financial and childcare reasons. While the Tax Court has recognized that is possible for spouses to live “separate and apart” even where they are living under the same roof, in practice the evidence “should be convincing” (*Kelner v. R*, [1996] 1 C.T.C. 2687). The following circumstances are generally needed:
 - (i) Spouses occupying separate bedrooms.
 - (ii) Absence of sexual relations.
 - (iii) Little, if any, communication between spouses.
 - (iv) Wife performing no domestic services for husband.
 - (v) Eating meals separately.
 - (vi) No social activities together.
- *Kvito* 2009 TCC 207: The Tax Court concluded that parents who lived together but claimed to be separated were, in fact, common law spouses. The evidence strongly suggested that they were financially interdependent.
- *Perron* 2010 TCC 547: Former spouses living in the same house were found to be living separate and apart. They each had their own bedroom and had no sexual relationship. Social contact was minimal and they did not share social activities. They shared household maintenance and expenses equally, but the mother was financially responsible for her daughter.

The impact of child support payments

- If one parent is paying child support, that parent is automatically disqualified from receiving the benefit, even if they share custody for the child.
- Note that if both parents are paying child support, then one parent can still claim the credit.
- While the Tax Court has concluded that this legislative policy can result in unfairness, it has ruled that it has no equitable jurisdiction to overrule the statutory provisions, even where circumstances changed such that the payor had sole custody of the child and stopped paying child support. A retroactive court order acknowledging this arrangement and removing the child support obligation for the period in question was not sufficient to address the problem. See *Dubis* 2010 TCC 121; *Pineau* 2009 TCC 559; *Beaudoin* 2010 TCC 600.