

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D140/01

Salaries tax – single parent allowance – sole or predominant care of the child – ‘care’ is not necessarily the same as ‘custody’ – section 32(1), (2) and (3) of the Inland Revenue Ordinance (‘IRO’) – section 19 of the Matrimonial Proceedings and Property Ordinance.

Panel: Anthony Ho Yiu Wah (chairman), Barry J Buttifant and Gregory Robert Scott Crichton.

Date of hearing: 14 September 2001.

Date of decision: 21 January 2002.

The taxpayer claimed single parent allowance which was disallowed by the assessor. The taxpayer’s wife, Madam B, had not claimed single parent allowance in respect of the child for the year of assessment.

By a deed of separation, the taxpayer and Madam B agreed that the latter should have custody of their child. The taxpayer should have access to the child every Wednesday and one Sunday morning in each month as well as staying access to the child three times in each month, from 3:00 p.m. Saturday to 12:00 noon Sunday. The taxpayer should pay monthly maintenance of Madam B and the child.

It was the taxpayer’s evidence that the deed of separation was merely a document setting out the consensus between the taxpayer and Madam B. Insofar as custody of the child was concerned, the deed merely set out what the taxpayer and Madam B thought at the material time to be the best arrangement which was more flexible than one resulting from contentious proceedings followed by a custodial order granted to the mother. The taxpayer had been the sole provider of the child’s maintenance and education and had shown great care and concern over the child’s living, education and development. The taxpayer relied on a letter signed by Madam B confirming that ‘the actual day-to-day care, supervision, well being and control’ of the child was shared equally between Madam B and the taxpayer. The taxpayer also produced a letter written by the child which stated that the taxpayer would talk to her everyday on telephone and cared for her well being and overall development.

Held:

1. Making contributions to the maintenance and education of one’s child per se is not sufficient to make the contributor qualify for single parent allowance. In this case, the taxpayer did much more than making financial contributions. The taxpayer had

INLAND REVENUE BOARD OF REVIEW DECISIONS

cared greatly for the child, had control over the child's education and had personally helped the child to achieve success in her education.

2. It is true that a sole custody order is the most common form of order made in divorce and related proceedings. It should be noted that section 19 of the Matrimonial Proceedings and Property Ordinance states that the court may make such order as it thinks fit for the custody and education of any child of the family and the court's power is not limited to making sole custody orders. Although a joint custody order or a share-residence order is still comparatively rare because it may create competing homes or cause confusion and stress on the child, there are reasons justifying the issue of such an order in appropriate circumstances as such an order symbolises divorced or separated parents playing a joint role in the upbringing of the child and neither parent would be excluded. In the present case, the taxpayer and Madam B appeared to have cooperated very sensibly and each of the taxpayer and Madam B had given affection and wise guidance to the child in their respective ways without competition or jealousy and therefore without causing confusion and stress on the child. The Board was of the view that in effect both the taxpayer and Madam B had custody, care and control over the child.
3. Being a good father and having effective (shared) custody, care and control over the child is not sufficient for the taxpayer to obtain single parent allowance. He must also satisfy section 32(1) of the IRO which provides that at any time during the year of assessment he had the predominant care of the child. Whether a parent can be regarded as having predominant care of his or her child is a question of fact to be decided on the facts and merits of each case and that 'care' is not necessarily the same as 'custody'. Even if the above proposition is wrong, the Board is of the view that the 'custody' granted to Madam B by the deed of separation would not bar the taxpayer from claiming that he had predominant care of the child because the evidence before the Board clearly showed that in this case both the taxpayer and Madam B had joint custody, care and control over the child. In a case like this where both parents had great affection for the child and had joint custody, care and control over the child, the only way to do justice to both of them when the Board is forced to make a determination which parent had predominant care is to rule that the parent in question had predominant care over the child during the period the child stayed with him or her. Using this yardstick, the Board is of the view that the taxpayer had predominant care of the child for an aggregate period of approximately 30% of the year.

Appeal allowed in part.

Cases referred to:

INLAND REVENUE BOARD OF REVIEW DECISIONS

Dipper v Dipper [1980] 2 All ER 722

Jussa v Jussa [1972] 2 All ER 600

Cheung Lai Chun for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The appeal

1. This is an appeal by Mr A ('the Taxpayer') against the determination by the Commissioner of Inland Revenue dated 22 May 2001. For the year of assessment 1999/2000, the Taxpayer claimed single parent allowance which was disallowed by the assessor. The Taxpayer objected against the assessment. The Taxpayer's objection was overruled by the Commissioner who confirmed the salaries tax assessment for the year of assessment 1999/2000.

The facts

2. The following facts are not in dispute and we find them proved.
3. (a) By a deed of separation dated 11 September 1998, the Taxpayer and his wife, Madam B agreed, among other things, that:
 - (i) Madam B should have the custody of their child ('the Child'), who was born on 17 May 1987. The Taxpayer should have access to the Child every Wednesday and one Sunday morning in each month as well as staying access to the Child three times in each month, from 3:00 p.m. Saturday to 12:00 noon Sunday.
 - (ii) The Taxpayer should pay \$20,100 per month for the maintenance of Madam B and the Child with effect from 1 April 1997. The amount of the monthly payment was subject to annual adjustment.
 - (iii) The Taxpayer undertook to transfer half of his interest in a flat in District C ('the Property') to Madam B as a consideration for Madam B to waive any further claims on the Taxpayer's property in future dissolution of the marriage. Madam B and the Child were to have the exclusive possession of the Property.
- (b) During the year of assessment, Madam B and the Child were living at the Property whereas the Taxpayer was living in District D.

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (c) Madam B had not claimed single parent allowance in respect of the Child for the year of assessment.

Sworn testimony of the Taxpayer

4. At the hearing before the Board, the Taxpayer gave sworn testimony and was cross-examined by the Commissioner's representative.

5. The Taxpayer's evidence may be summarized as follows:

- (a) The deed of separation is merely a document setting out the consensus between the Taxpayer and his wife, Madam B. Insofar as custody of the Child is concerned, the deed merely sets out what the Taxpayer and Madam B thought at the material time to be the best arrangement. The Child had to attend school in District C and the Taxpayer had to move to District D, so the best arrangement would be for the Child to live with the mother at the original place, that is, the matrimonial home. The arrangement was more flexible than an arrangement resulting from contentious proceedings followed by a custodial order granted to the mother.
- (b) Essentially, the terms of the deed of separation had been complied with by the parties. In the case of access to the Child, the Child normally came to stay with him for the weekend and sometimes on Wednesdays. When asked what was meant by 'weekend', the Taxpayer said that it meant Saturday plus Sunday and depending on whether the Child had to attend school on Saturday, the Child would come to his place on Friday night, Saturday morning or Saturday afternoon and would return to the mother on Sunday afternoon. So, the Taxpayer in fact had more access to the Child than that provided in the deed of separation.
- (c) The Taxpayer had been the sole provider of the Child's maintenance and education. The Taxpayer had shown great care and concern over the Child's living, education and development.
- (d) When asked by the Commissioner's representative whether the custody arrangement of the Child meant that Madam B was charged with the responsibility of taking the daily care and control of the Child on an ongoing basis, the Taxpayer disagreed and asserted that both Madam B and himself had been taking care of the Child on an ongoing basis. The Taxpayer also relied on a typewritten letter dated 20 June 2001 signed by Madam B confirming that apart from finance (which was provided solely by the Taxpayer), 'the actual day-to-day care, supervision, well being and control' of the Child was shared equally between Madam B and the Taxpayer.

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (e) The Taxpayer admitted that the said letter signed by Madam B was drafted by him but it was drafted after full discussion and Madam B agreed to all the facts therein stated and signed the letter out of her own free will.
- (f) The Taxpayer also produced a handwritten letter dated 26 August 2001 written by the Child confirming that although she was not living with her father, he really cared for her daily lives. The following passages extracted verbatim from the said handwritten letter were particularly touching:
 - (i) 'He [my father] talks to me everyday on telephone and cares for my well being and overall development.'
 - (ii) 'My father brings me to his house every weekends and teach me schoolwork. Sometimes we go out and do some other activities like swimming or dancing.'
 - (iii) 'At that time my English is not good at all. So in the summer, I took two English summer courses in School E and beside that my father talked to me in English everyday on telephone.'
 - (iv) 'My father also employed an English private tutor for me. At first she came to my home twice a week, then when I come to apply this School F, she came four times a week and every lesson costs \$500. Under my father and private tutor's help, my English improves a lot. Therefore I had much more confident to apply this school. I passed the exam and joined the school.'
 - (v) 'I am very happy that I can be part of this school [School F].'
- (g) Comments were at first made by the Commissioner's representative that neither Madam B nor the Child attended to give evidence at the hearing and that the probative value of the two letters, that is, the letter from Madam B and the letter from the Child, was questionable. But by a letter dated 26 August 2001 the Taxpayer already notified the Revenue that for family and practical reasons, he did not intend to call either Madam B or the Child to give evidence but they could be contacted by telephone at home if necessary. When asked by a Board member whether the Revenue is contesting the authenticity of the two letters, the Commissioner's representative replied that while not contesting on authenticity, she would question the kind of circumstances under which the two letters were written and that there was room for doubt.
- (h) We have the benefit of observing the Taxpayer in the course of the hearing before us. We have no reason to doubt that he had been a caring father and had shown

INLAND REVENUE BOARD OF REVIEW DECISIONS

great concern for the Child at all relevant times. We also have no reason to doubt that the two letters in question were authentic and were written and/or signed by Madam B or the Child (as the case may be) out of their own free will without any coercion on the part of the Taxpayer.

The law

6. Section 32(1) of the IRO provides that:

‘An allowance (“single parent allowance”) of the prescribed amount shall be granted if at any time during the year of assessment the person had the sole or predominant care of a child in respect of whom the person was entitled during the year of assessment to be granted a child allowance.’

7. Section 32(2) of the IRO provides that a person shall not be entitled to claim single parent allowance:

- (a) if at any time during the year of assessment the person was married and not living apart from his or her spouse;
- (b) by reason only that the person made contributions to the maintenance and education of the child during the year of assessment; or
- (c) in respect of any second or subsequent child.

8. Section 32(3) of the IRO provides that where two or more persons are entitled to claim single parent allowance in respect of the same child for the same year of assessment, the allowance due shall be apportioned on such basis as the Commissioner may decide –

- (a) having regard to the respective periods for which each person had the sole or predominant care of the child during the year of assessment; or
- (b) if, in the opinion of the Commissioner, those periods are uncertain, on such basis as the Commissioner may decide as being just.

Analysis of the case

9. There is no doubt in this case that the Taxpayer was entitled to be granted and he was indeed granted a child allowance in respect of the Child for the year of assessment 1999/2000. What is left to be considered is whether he had either the sole care or the predominant care of the Child at any time during that year.

INLAND REVENUE BOARD OF REVIEW DECISIONS

10. It was submitted by the Revenue that 'sole or predominant care' in the context of single parent allowance relates to the custodial responsibility for the Child. This means that to qualify for the allowance, the parent must be responsible, on an ongoing basis, for the actual provision of daily parental care, guidance, protection, guardianship, supervision and control of the Child for the physical and mental well-being of the Child. According to the Commissioner's representative, this kind of responsibility is attached to the parent's right of custody over the Child because the possession of such right enables or puts the parent in a proper position to take care of the Child.

11. Concerning the meaning of the words 'sole' and 'predominant' in section 32(1) of the IRO, it was submitted by the Revenue that the words should bear their plain and ordinary English meanings. There should be no dispute that 'sole' means 'one and only'. On the facts and evidence of this appeal, the Taxpayer obviously did not have 'sole' care of the Child in the year of assessment 1999/2000. As regards 'predominant', the word is defined in the New Shorter Oxford English Dictionary as follows:

- (a) 'having supremacy or ascendancy over others; predominating'; or
- (b) 'constituting the main or strongest element; prevailing'.

12. We are of the view that whether a parent can be regarded as having the sole or predominant care of his or her child is a question of fact to be decided on the facts and merits of each case and that 'care' is not necessarily the same as 'custody'.

13. In the present case, the Taxpayer and Madam B by the deed of separation dated 11 September 1998 had made arrangements between themselves on various matters affecting their rights and liabilities to each other, including the custody of the Child. The purpose of the custody arrangement was clear. They, as responsible parents, had to make appropriate arrangements to ensure that the provision of care and supervision to the Child would continue despite their separation.

14. The evidence before us clearly showed that the Taxpayer had been the sole provider of the Child's maintenance and education and had shown great concern over her living, education and development. The Commissioner's representative argued that this is not sufficient to show that the Taxpayer had the sole or predominant care of the Child because section 32(2)(b) expressly provides that a person shall not be entitled to single parent allowance by reason only that he made contributions to the maintenance and education of the Child.

15. We agree that making contributions to the maintenance and education of one's child per se is not sufficient to make the contributor qualify for single parent allowance. In this case, however, the Taxpayer did much more than making financial contributions. According to the handwritten letter of the Child, the Taxpayer talked to her in English everyday on telephone and under her father's and private tutor's help, she passed the examination and got admitted into School F and she was very happy to be part of that school. Whether such a change in her educational

INLAND REVENUE BOARD OF REVIEW DECISIONS

development may turn out to be beneficial to the Child ten years from now is not possible for us to foretell, but it clearly showed that the Taxpayer had cared greatly for the Child, had control over the Child's education and had personally helped the Child to achieve success in her education.

16. The Commissioner's representative further argued that whatever the contributions made and notwithstanding the level of care and concern he had shown for the Child, the Taxpayer would not qualify to claim single parent allowance because Madam B was the parent with custodial responsibility and was the only parent having the right of providing daily parental care, guidance and protection to the Child. As to the Taxpayer, since he did not have custody, it would not be possible for him to exercise control over the Child and he would not therefore satisfy the 'predominant care' test. When making the aforesaid propositions, the Commissioner's representative was no doubt influenced by the misconception that only one of the parents can have custody over a child at any given time. It is true that a sole custody order is the most common form of order made in divorce and related proceedings. The effect of the order is to transfer most, if not all, parental rights and authority to the custodial parent exclusively whereas access is granted to the non-custodial parent.

17. It should be noted, however, that section 19 of the Matrimonial Proceedings and Property Ordinance states that the court may make such order as it thinks fit for the custody and education of any child of the family and the court's power is not limited to making sole custody orders. In Dipper v Dipper [1980] 2 All ER 722, a split order was originally made giving the wife the daily care and control of the child (or custody in its narrow sense) whereas giving the husband the custody (without day-to-day care and control). On appeal, this was changed by consent to a joint custody order.

18. Although a joint custody order or a share-residence order is still comparatively rare because it may create competing homes or cause confusion and stress on the child, there are reasons justifying the issue of such an order in appropriate circumstances as such an order symbolises divorced or separated parents playing a joint role in the upbringing of the child and neither parent would be excluded. In Jussa v Jussa [1972] 2 All ER 600 at 603, Wrangham J said:

'The joint order for custody with care and control to one of the two parents is, perhaps, of rather more recent origin ... For my part, I recognise that a joint order for custody with care and control to one parent only is an order which should only be made where there is a reasonable prospect that the parties will cooperate. Where you have a case such as the present case, in which the father and the mother are both well qualified to give affection and wise guidance to the children for whom they are responsible, and where they appear to be of such caliber that they are likely to cooperate sensibly over the child for whom both of them feel such affection ... it seems to me that there can be no real objection to an order for joint custody.'

19. In the present case, although the deed of separation between the Taxpayer and Madam B did provide that Madam B should have custody of the Child, the evidence before us clearly

INLAND REVENUE BOARD OF REVIEW DECISIONS

showed that the Taxpayer had made significant contributions and had great influence on the care and upbringing of the Child. Insofar as parental care and control over the Child is concerned, the Taxpayer and Madam B appeared to have cooperated very sensibly and each of the Taxpayer and Madam B had given affection and wise guidance to the Child in their respective ways without competition or jealousy and therefore without causing confusion and stress on the Child. We are of the view that in effect both the Taxpayer and Madam B had custody, care and control over the Child.

20. We remind ourselves that being a good father and having effective (shared) custody, care and control over the Child is not sufficient for the Taxpayer to obtain single parent allowance. He must also satisfy section 32(1) of the IRO which provides that at any time during the year of assessment he had the predominant care of the Child.

21. The representative of the Revenue argued that although the Child did stay with the Taxpayer for a day or two each week during the year of assessment, since Madam B was the parent having the custody and care over the Child in fact and in law, Madam B would continue to have the predominant care of the Child even during those periods in which the Child temporarily stayed with the Taxpayer.

22. We have mentioned earlier that whether a parent can be regarded as having predominant care of his or her child is a question of fact and 'care' is not necessarily the same as 'custody'. Even if our above proposition is wrong, we are of the view that the 'custody' granted to Madam B by the deed of separation would not bar the Taxpayer from claiming that he had predominant care of the Child because the evidence before us clearly showed that in this case both the Taxpayer and Madam B had joint custody, care and control over the Child.

23. In a case like this where both parents had great affection for the Child and had joint custody, care and control over the Child, the only way to do justice to both of them when we are forced to make a determination which parent had predominant care is to rule that the parent in question had predominant care over the Child during the period the Child stayed with him or her. Using this yardstick, we are of the view that the Taxpayer had predominant care of Child for an aggregate period of approximately 30% of the year during the year of assessment.

Conclusion

24. Having considered all the evidence and the facts before us we have reached the following conclusions:

- (a) The Taxpayer has established that at some time during the relevant year of assessment he did have predominant care of his daughter in respect of whom he was entitled and was granted a child allowance.

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (b) The Taxpayer's entitlement to claim single parent allowance in respect of his daughter for the relevant year of assessment was shared with his wife, Madam B, and this is a case where apportionment should be made by the Commissioner pursuant to section 32(3) of the IRO.
- (c) We are of the view that the Taxpayer had predominant care of his daughter for an aggregate period of approximately 30% of the year during the year of assessment.

25. We therefore remit the case to the Commissioner to make appropriate adjustments to the assessment.