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Marmar Penner Inc. Newsletter

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Who Receives the Canada Child Benefits in Shared Custody Situations?

The Canada Child Benefit (“CCB”) is a tax-free monthly payment for children under the age of 18 intended to help families with the cost of raising their children. As a result of the March 22, 2016 federal budget, the CCB replaced the Canada Child Tax Benefit. The CCB is calculated for the twelve month period beginning in July of one year and ending in the June of the following year. It is based on the recipient’s income from an earlier taxation year. For example, the amount of the CCB payments from July 2019 to December 2019 is based on the recipient’s 2017 “adjusted income” and payments from January 2020 to June 2020 will be based on the 2018 “adjusted income”. Currently, the CCB pays parents up to \$6,639¹ per child under age 6 and \$5,602¹ per child aged 6 through 17. The Child Disability Benefit will pay an additional \$2,832¹ per eligible child. All of these amounts will start to erode when family (or single parent) income exceeds \$31,120¹. These payments are paid to the parent who resides with the child and primarily fulfills the responsibility for the caring and upbringing of the child.

When parents separate, the CCB may be an important consideration during custody and child support negotiations. Provided certain other criteria are satisfied, CRA pays the parent who resides with the child and who primarily fulfills the responsibility for the caring and upbringing of the child. Generally, when the female parent resides with the child, she is presumed to be the person who fulfills this responsibility. As a result, when the father and mother reside together, it is the mother who is normally paid the CCB.

¹ These amounts are applicable to the July 2019 to June 2020 period. Amounts are now indexed to inflation according to the 2018 federal budget.

Where the parents have separated and each spends considerable periods of time with the child(ren) and each of the parents had applied for the CCB, the CRA will conduct a review to determine which parent qualifies for the CCB. The review will attempt to determine whether the child(ren) actually reside with one parent and simply visit the other or whether the child(ren) indeed resides with both parents. If it is determined that the child(ren) reside with both parents, then a determination is made to establish who is primarily responsible for the care and upbringing of the child(ren). The existence of a court order is only one of several factors considered by CRA. Usually, the review confirms that the parent who has custody of the child(ren) the majority of the time is the primary caregiver and therefore is eligible to receive the CCB. Where custody is shared on an "equal or near equal basis" and both parents satisfy the "resides with" and "primary care" requirements, the parents are viewed as "shared-custody parents." When the parents are viewed as shared-custody parents, each parent will receive 50% of the payments they would be eligible for if they were not viewed as shared-custody parents.

There is no definitive criterion to determine whether parents are considered "shared-custody parents". In two recent cases, one in Ontario and the other in Newfoundland, where the fathers had 40% and 42% of the time with the child, the Tax Court and Federal Court of Appeals viewed these percentages as insufficient for the fathers to qualify as shared-custody parents. As a result, the mothers were entitled to 100% of the CCB payments.

The Department of Finance has recently introduced draft legislation to change the definition of shared-custody to be more consistent with the definition found in the *Federal Child Support Guidelines*. The draft legislation would change the definition of a shared-custody parent to a parent that resides with the child at least 40% of the time.

Should either of the parents be dissatisfied with the results of a CRA determination of primary or shared custody, the normal appeal rights which exist for other income tax matters apply.

In lieu of the rotational payments, the parents may mutually agree to and request one of the following alternate arrangements:

- (1) Where there is more than one child, payment of the CCB to one parent for one or more of the children and payment of the CCB to the other parent for the remaining child(ren); or
- (2) Payment of the CCB to one parent only and the agreement that the other parent will then be able to claim the equivalent to spouse amount as a non-refundable credit.

This latter alternate arrangement applies only where the parent claiming the equivalent to spouse amount is not paying child support with respect to the same child.

However, the CCB is means-tested benefit meaning that it is worth more to the lower-income parent. Accordingly, it makes economic sense to agree that the lower-income parent claims it solely and then determine how to equitably share it.

Don't forget that provisions of *The Income Tax Act* alone dictate to whom the CCB is paid. Payment is not based on the rules of family law or/and other legal arrangements. Much like a family law court or a written agreement cannot order or specify that periodic spousal support be non-taxable, the same family law court or agreement cannot order or specify who receives the CCB if it contravenes the provisions of *The Income Tax Act*. Knowledge of the legislative requirements, by both parents and their representatives, will avoid frustrations arising out of orders or agreements to allocate or share the CCB contrary to the law.

This newsletter is not intended to substitute for proper professional planning. It is intended to highlight areas where professional assistance may be required or enough to discuss at the next hoedown. The professionals at Marmer Penner Inc. will be pleased to assist you with any matters that arise. Please feel free to visit our website at www.marmerpenner.com.