

Citation: *B. G. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 229

Appeal No: CP28928

BETWEEN:

B. G.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Shu-Tai Cheng

HEARING DATE: June 25, 2014

TYPE OF HEARING In person

DATE OF DECISION: September 16, 2014

PERSONS IN ATTENDANCE

| | |
|------------------------|--------------|
| Appellant | B. G. |
| Witness for Appellant | S. M. |
| Counsel for Respondent | Hasan Junaid |

DECISION

[1] The Tribunal dismisses the Appeal.

INTRODUCTION

[2] The Appellant applied for a *Canada Pension Plan* (“CPP”) survivor benefit on May 27, 2008, as the common-law partner of Mr. L. R. (LR or “the deceased”) who died on January 27, 2008. This application was approved for payment effective February 2008. The survivor benefit was cancelled in July 2010, effective February 2008, after the Respondent determined that the Appellant and LR had not been living in a common-law union for the 12 months that immediately preceded his death.

[3] The Appellant requested reconsideration, by letter dated September 2010 and received by the Respondent on October 19, 2010. The appeal was denied by letter dated December 13, 2010.

[4] The Appellant appealed to the Office of the Commissioner of Review Tribunals on March 11, 2011.

[5] On June 27, 2012, a Review Tribunal (“RT”) determined that a survivor benefit was not payable to the Appellant.

[6] The Appellant filed an Application for Leave to Appeal that RT decision with the Pension Appeal Board (PAB) on September 17, 2012.

[7] The PAB granted leave to appeal on November 7, 2012. Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Tribunal is deemed to have granted leave to appeal on April 1, 2013.

[8] The hearing of this appeal was held in person for the reasons given in the Notice of Hearing dated May 1, 2014.

THE LAW

[9] To ensure fairness, the Appeal will be examined based on the Appellant's legitimate expectations at the time of the original filing of the Application for Leave to Appeal with the PAB. For this reason, the Appeal determination will be made on the basis of an appeal *de novo* in accordance with subsection 84(1) of the *Canada Pension Plan* (CPP) as it read immediately before April 1, 2013.

[10] Subsection 44(1)(d) of the CPP sets out the eligibility requirements for the CPP survivor's pension. It states:

Subject to subsection (1.1), a survivor's pension shall be paid to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period, if the survivor

- (i) Has reached sixty-five years of age, or (...)
- (ii) In the case of a survivor who has not reached sixty-five years of age;
 - (A) had at the time of the death of the contributor reached thirty-five years of age;
 - (B) was at the time of death of the contributor a surviving spouse with dependent children, or
 - (C) is disabled.

[11] Subsection 42(1) of the CPP states:

“survivor” in relation to a deceased contributor, means

- (a) If there is no person described in paragraph (b), a person who was married to the contributor at the time of the contributor's death, or
- (b) A person who was the common-law partner of the contributor at the time of the contributor's death.

[12] Subsection 2(1) of the CPP states:

- a) “common-law partner”, in relation to a contributor, means a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor’s death, the “relevant time” means the time of the contributor’s death.

ISSUE

[13] There is only one issue in this appeal: whether the Appellant was the common-law partner of the deceased, L. R., at the time of his death on January 27, 2008.

[14] In this case, the Tribunal must decide if it is more likely than not that the Appellant was the deceased’s common-law partner on January 27, 2008.

EVIDENCE

[15] The Appellant testified and Ms. S. M., who attended the hearing initially for moral support, also testified. Counsel for the Respondent requested that Ms. S. M. be excluded from the hearing room as soon as it was decided that Ms. S. M. would testify on the Appellant’s behalf. Ms. S. M. was excluded until after the Appellant’s testimony had been completed. The Respondent did not have any witnesses.

Appellant’s Testimony

[16] The Appellant met LR a long time ago and described him as “an ex-brother-in-law”. He was previously married to the Appellant’s half-sister. In May 2006, the two had a brief affair; LR was divorced and the Appellant was married at the time.

[17] The Appellant separated from her husband in September 2006 and moved into an apartment in Woodstock, New Brunswick. Between May and September 2006, the Appellant and LR were not in contact with one another.

[18] LR heard from a third party that the Appellant had left her marriage, and he contacted the Appellant in the hopes of rekindling their relationship. They dated from September to December 2006. The Appellant stated that because they had started off as an

extra-marital affair, she felt guilty and although they did not hide their relationship during these months, she “did not flaunt it”.

[19] Around the holiday season in December 2006, the Appellant decided to stay at LR’s home through the holidays. He had medical appointments and they had plans together; he wanted her to stay with him and she agreed. Around Christmas, they had a discussion about their future and decided to live together. The Appellant stated that from then on and until his death, they were always together. Physically, they were either at her place in Woodstock or his place in Grand Falls, New Brunswick.

[20] The Appellant had a lease on the apartment in Woodstock and kept the apartment until September or October 2007. LR’s family stayed at the apartment while they were having house renovations done in 2007, and the Appellant and LR used it as one of their two residences. Neither of them was working at the time. They had a routine together that included many medical appointments, visits with family in and out of town, and having people over “at the house”.

[21] LR’s father was in hospital in Edmonston in the early part of 2007, so they were often there until his passing in February. In March and April 2007, LR’s daughter bought a home in Woodstock and was having renovations done to it; her family and some family friends went to Woodstock and stayed in the Appellant’s apartment.

[22] In the spring of 2007, the Appellant’s car broke down and LR gave the Appellant one of his cars to drive and put her on his car insurance policy. Other than that, the Appellant did not fill out any “official” documents. She was still working on settling her separation and divorce issues and formal address change was not a priority. The only name on the Woodstock apartment lease was hers, and the only name on the ownership of the Grand Falls house was his.

[23] In 2007, LR was in his mid-fifties and had pre-existing medical conditions including a failing heart. In July 2007, he and the Appellant went to Halifax for LR to be tested to see if he qualified for a heart transplant.

[24] In September and October 2007, LR needed to be at the hospital in Halifax and a transplant was planned in January 2008. The couple decided to go to Halifax and to stay there until after the transplant. The Appellant closed the apartment in Woodstock in October 2007, as they planned to live only out of LR's Grand Falls house upon return from Halifax after the transplant.

[25] In Halifax, the Appellant stayed at her cousin's home. When he was not in hospital, LR stayed there also. He was hospitalized sometime in October 2007 and the Appellant spent weeks in the hospital room. Eventually, he was moved into a "hospital apartment" where he was connected to a Ventricular Assist Device (VAD). The Appellant learned how to help with the VAD and often stayed in the apartment.

[26] In 2007, the Appellant's sister was diagnosed with a brain tumour. They thought that Christmas 2007 would be her last, and the Appellant went to see her sister for about two weeks in December 2007. Otherwise, the Appellant was "always with L. R."

[27] LR underwent heart transplant surgery on January 2nd or 3rd, 2008. He passed away on January 27, 2008.

[28] The Appellant maintains that she was living with LR since at least the beginning of January 2007 until his death on January 27, 2008.

[29] In cross-examination, the Appellant was asked about LR's will. She stated that she and LR had discussed his will when he was sick and she told him to leave the will as it was; they talked about her "not being put out until I got on my feet" in the event of his death. The will left everything to his sister, and she paid for his funeral. The Appellant agreed that she and LR did not own any property jointly or have a joint bank account. Her mail went to the apartment in Woodstock or to her former matrimonial home. She explained that they "never got around" to those things, since they spent most of their time trying to "have a normal life" in a situation where he was getting sicker and sicker and they were focused on him getting better after the transplant surgery. She stated that they had made plans for after the surgery; that she would buy half his property with her divorce

settlement; they would change the house into both names; and they would renovate it and put in a pool.

[30] When asked for examples of being a couple, the Appellant noted that she and LR gave one another gifts, at Christmas, on Valentine's Day and for birthdays. They did some grocery shopping together. They had repainted and papered the house in Grand Falls together. They had family and friends over at his house. They introduced each other as "partner" or "spouse". However, next-of-kin on medical documents named his sister because she had followed his life for a long time and she was a big part of his life before the Appellant came into it.

[31] The Appellant's 2007 tax return stated her marital status as "living common-law". LR's 2007 tax return, prepared after his death by a consultant, stated "common-law" but it was later amended to "divorced" due to discrepancies related to a GST quarterly payment application; in 2004 to 2006, his returns declared his marital status as "divorced"; and in 2008, his return, prepared by the executor of his estate, his sister, stated "divorced".

Testimony of Ms. S. M

[32] Ms. S. M. has been friends with the Appellant for decades; they are also extended family to one another by marriage. She had also known LR since the 1970s because he was an ex-brother-in-law. In May 2006, she was living in Grand Falls. At that time, she heard that LR was "going out with a blonde". It was only later on, in the summer, that LR and she bumped into one another, decided to have a cup of tea together, and he told her that "the blonde" was the Appellant.

[33] Ms. S. M. testified that the families, on both sides, did not approve of the relationship, but she thought they were very happy. In the fall of 2006, he had a house in Grand Falls (one street away from her house) and the Appellant had an apartment in Woodstock. Her recollection was that in October 2006, the couple was in Woodstock together.

[34] Ms. S. M. went to Alberta in October 2006, to visit her daughter, and stayed there until early spring 2007. During this time, she and the Appellant talked on the phone; she could not say how many telephone conversations they had. Each time they talked, Ms. S. M. knew that LR “was there”, i.e. that he was physically near the Appellant.

[35] Ms. S. M. could not recall exactly when in 2007 she returned to Grand Falls. There was still snow on the ground, but it was spring. She remembers seeing the Appellant and LR sitting on the porch at his house. She had not seen or spoken with LR since their discussion the summer before.

SUBMISSIONS

[36] The Appellant submitted that she qualifies for a survivor benefit because:

- a) She had been living with LR for more than one year prior to his death on January 27, 2008;
- b) They made a joint decision during the holiday season 2006 to live together and that is what they did, in Woodstock, in Grand Falls and in Halifax, until his death; and
- c) She had been given the survivor benefit until LR’s sister contacted the Respondent and made trouble.

[37] The Respondent submitted that the Appellant does not qualify for a survivor benefit because:

- a) The Appellant was neither legally married nor the common-law partner of LR at the time of his death;
- b) The relevant time for co-habitation is one year before death and during that time the indicia of “cohabitation in a conjugal relationship” were not present;
- c) In particular, there were none of the following: joint bank account, joint property, joint home address or joint life insurance policy; and

- d) The only documents showing them as common-law partners were tax returns with self-declarations and filed after LR's death.

ANALYSIS

[38] The Appellant must prove on a balance of probabilities that she was the common-law partner of the deceased as that term is defined in the CPP. I have considered all of the written and oral evidence in reaching my decision.

[39] "Common-law partner" means a person who is cohabiting with the deceased in a conjugal relationship for a continuous period of at least one year at the time of the deceased's death.

[40] The test for "cohabitation in a conjugal relationship" has been developed and refined in many cases: *Hodge v. Canada (Minister of Human Resources Development)* [2004] S.C.R. 357 at p.375.

[41] The Pension Appeals Board decision in *Betts v. Shannon* (September 17, 2001, CP11654) is often cited as an authority on this issue. While the decision is not binding on me, it properly set out what factors to consider in determining whether a claimant is a common-law partner under the CPP. They are listed below with my findings in this case:

- a) Financial interdependence – I find that the Appellant and LR were not financially interdependent. She also testified that they kept their finances separate. They had no joint accounts.
- b) Sexual relationship – The Appellant and LR had a sexual relationship. This is not in dispute.
- c) Common residence –The Appellant's oral evidence is that they lived together in Woodstock, in Grand Falls and in Halifax and that they agreed to live together during the holidays encompassing Christmas 2006 and the New Year in 2007. They went to Halifax together in September 2007 and stayed there until LR's death in January 2008. The Appellant had an apartment in Woodstock until September or

October 2007. The Appellant's mail went to her apartment in Woodstock or her former matrimonial home. I am not persuaded on a balance of probabilities that the Appellant and LR had a common residence for one year prior to his death.

- d) Purchasing gifts on special occasions – the Appellant testified that she and LR exchanged gifts on special occasions. This is not in dispute.
- e) Sharing of household responsibilities – there was very little evidence in this regard. The Appellant testified that she helped LR to repaint and paper his home and they sometimes did groceries together.
- f) Shared use of assets – the Appellant testified she drove one of LR's cars when hers broke in the spring of 2007. The documents show that she was added to his car insurance policy in April 2007. The Appellant and LR did not have any assets registered in both of their names or purchased with joint funds.
- g) Shared responsibility for children – The Appellant and LR did not have children together. They each had children from previous unions. The Appellant testified that LR's daughter and her family stayed in her Woodstock apartment while their house was being renovated. Otherwise, there was no testimony to indicate the Appellant had any relationship with LR's children or that LR had any relationship with the Appellant's children.
- h) Shared vacations – there was no evidence that any party took any vacations.
- i) Expectation of mutual dependency – the Appellant testified that she expected her relationship with LR to continue. Going to Halifax with him in September 2007 to support him through his transplant surgery is consistent with this testimony.
- j) Beneficiary of will – the Appellant was not a beneficiary of LR's will; his sister was. The Appellant testified that she suggested that he leave his will as it was before they were together and that he told her she would “not be put out until I got on my feet”.
- k) Beneficiary of insurance policy – the Appellant was not a beneficiary of LR's life insurance policy.

- l) Where clothing was kept – the Appellant testified that she had moved many of her things to LR’s house. I do not place a lot of weight on this factor. It is not uncommon for someone to leave their personal items in different places when they spend a significant amount of time in each place.
- m) Care for one another when ill, and knowledge of medical needs – the Appellant was with LR in Halifax for the time leading up to and including his heart transplant surgery, from September 2007 to January 2008. She learned how to help with use of the VAD.
- n) Communication between the parties – there is no evidence of written communication between the Appellant and LR. Ms. S. M.’s oral evidence was that in the period October 2006 to spring 2007, when she spoke with the Appellant on the phone, LR was close by. Ms. S. M. could not say how many phone calls she and the Appellant had had during this period. Ms. S. M. saw them together once on the porch of LR’s home in the spring of 2007.
- o) Public recognition – the Appellant testified that she and LR introduced one another as “partner” or “spouse” and that they had people over to the house. There is no other evidence on this issue.
- p) Attitude and conduct of the community – Ms. S. M. testified that both the Appellant and LR’s family disapproved of their relationship.
- q) Marital status on various documents – the only documents showing common law status were 2007 income tax returns. They were filed after LR’s death. The Appellant declared that she was “living in common law”. LR’s return first stated “common law” and was later amended to “divorced”.
- r) Funeral arrangements – LR’s sister paid for the funeral.

[42] For a common-law relationship to exist, the parties to the relationship must have a mutual intention of being in and continuing the relationship: *Betts v. Shannon* *ibid.* at paragraph 7.

[43] Upon review of all of the evidence, I do not find that the Appellant and LR had such a common intention for the continuous period of one year prior to his death. It is possible for me to find that common intention as of September 2007, when they went to Halifax in preparation for LR's transplant surgery. However, the Appellant has not shown on a balance of probabilities that the common intention existed for a continuous period of one year prior to January 28, 2008.

[44] For these reasons, I find that the Appellant was not LR's common-law partner under the CPP.

CONCLUSION

[45] The appeal is dismissed.

Shu-Tai Cheng

Member, Appeal Division