

Citation: *B. D. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 39

Appeal No: GT-115124

BETWEEN:

**B. D.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

and

**I. B.**

Added Party

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security**

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SOCIAL SECURITY TRIBUNAL MEMBER: Glen Johnson

HEARING DATE: October 30, 2014

TYPE OF HEARING: In person

DATE OF DECISION: December 11, 2014

## **PERSONS IN ATTENDANCE**

**Appellant:** B. D. (“Appellant”), and her Representative, Daniel Shea

**Added Party:** I. B. (“Added Party”), her Representative, Mark Matthews, and witness L. B.

## **DECISION**

[1] The Tribunal finds that a Canada Pension Plan (CPP) survivor’s benefit is not payable to the Appellant.

## **INTRODUCTION**

[2] C. B. died on August 23, 2004 (“the deceased”). He was born X X X and had contributed to the Canada Pension Plan sufficiently to enable payment of a Survivor’s benefit to one qualifying applicant.

[3] The Added Party was born on X X X and legally married the deceased on May 29, 1976 and continued to be married to the deceased until the time of his death. She claims to be entitled to the Survivor’s benefit.

[4] The Appellant was born on X X X and claims she was the deceased’s common law spouse within the meaning of the CPP legislation at the time of his death. She also claims to be entitled to the Survivor’s benefit.

[5] The Added Party’s application for the benefit was date stamped by the Respondent on October 8, 2004, and was initially accepted by the Respondent, with an effective date for payments from September 2004.

[6] The Appellant’s application for a CPP Survivor’s benefit was date stamped by the Respondent on November 13, 2007, and was initially accepted by the Respondent, who then reversed the Added Party’s entitlement to the benefit. The Appellant became entitled to the benefit in January 2009, with an effective date for payments from December 2006.

[7] On February 2, 2009, the Added Party applied for reconsideration of the decision to reverse her entitlement to the benefit. The Respondent decided to reinstate the benefit to the Added Party, and then reversed the Appellant's entitlement to the benefit.

[8] The Respondent received a letter from the Appellant requesting reconsideration on October 13, 2009. The Respondent maintained the denial in a letter to the Appellant on December 15, 2009. The Appellant's appeal to the Office of the Commissioner of Review Tribunals (OCRT) was received May 13, 2011.

[9] The Appellant was scheduled to appear at an in-person Hearing on August 28, 2012, but it was adjourned at the joint request of the Appellant and Added Party, in order for each of them to submit further information. The current Appeal proceeded as an in-person Hearing for the Appellant, and videoconferencing for the Added Party for the reasons given in the Notice of Hearing dated July 17, 2014. The Appellant's application for an adjournment of the present Hearing was denied in reasons dated October 27, 2014. Immediately prior to the current Hearing, the Appellant had asked for a reconsideration of the adjournment refusal, but at the commencement of the Hearing she advised that she was prepared to proceed.

## **THE LAW**

[10] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal ("the Tribunal").

[11] A benefit may be paid to "the" qualifying survivor of a deceased contributor pursuant to Section 44(1) (d) of the CPP, provided the contributor has made payments for not less than the minimum qualifying period ("MQP"). Section 44(1)(d) of the CPP requires that the survivor be at least 35 years of age at the time of death.

[12] "Survivor" is defined in subsection 42(1) of the CPP as one who was married to the deceased contributor at the time of death, unless there was a common-law partner at the time of death, in which case the common-law partner's entitlement shall prevail.

[13] Subsection 2(1) of the CPP defines a “common-law partner” as one who, at the time of death, was cohabitating with the deceased in a conjugal relationship, having so cohabitated for a continuous period of at least one year.

## **ISSUE**

[14] Since the parties agree, and the Tribunal finds, that the contributor made payments for not less than the MQP, the Tribunal must decide whether the Appellant is entitled to the survivor’s benefit as the common-law partner of the deceased at the time of his death.

[15] The parties agree that the Appellant and the deceased were not residing together at the time of his death. However, the Tribunal must decide, despite their physical separation, whether they had continued to live in a conjugal relationship to the time of the contributor’s death.

## **EVIDENCE**

[16] The Added Party testified that she had been separated from the deceased continuously since 1985, but had never divorced. The Appellant testified that she began living with the deceased from September 1989, continuously until November 26, 2002.

[17] The Appellant last resided with the deceased in a house at X X , X Ontario. The Appellant gave evidence that she and the deceased mutually decided to sell the house, so that the Appellant could move to Westbank, British Columbia (BC) to be with, and assist her elderly parents, who were each experiencing significant health problems. The deceased would stay in Ontario until he could find work in his occupation as a long-haul trucker, in BC. The X house sold near the end of 2002, and the Appellant and deceased split the proceeds equally.

[18] The Appellant maintains that while she and the deceased lived in separate provinces, it was mutually agreed that it would be a temporary and involuntary separation.

[19] The Appellant purchased a mobile home in BC for \$17,000, with the Ontario house sale proceeds. Although the Appellant acknowledges that the mobile home was purchased in her sole name, she testified that she and the deceased had both intended to be registered

owners, but he was unavailable to sign documents, since he was on a long distance trucking haul. Bassett and Company were the lawyers for the mobile home purchase. There is no indication in the lawyer's documents that the deceased was in any way involved in the purchase. The Appellant testified that she took possession of all of the couple's furniture and household effects, except for a television, and the deceased's personal clothing and effects.

[20] While the Appellant commenced living alone in BC at the start of 2003, the deceased moved in with a friend, and paid rent for a room in a home at X X, X, Ontario and continued working as a long haul trucker. He resided at the X home until his untimely death.

[21] In a Statutory Declaration – Separation of Legal Spouses or Common-law Partners dated October 8, 2009, the Appellant states that she and the deceased lived separate and apart from November 27, 2002 to August 23, 2004 due to “work related, family illness related” reasons.

[22] As to the work related reason for the alleged involuntary separation, she writes, in a letter dated March 11, 2011, that the deceased and the Appellant intended for the deceased to work in BC as a trucker, but, despite applying for work, companies were not hiring due a recession in 2002 and 2003.

[23] In the same letter the Appellant states that: “We were together every month in 2003 and 2004.” However, at the Hearing the Appellant admitted that this statement was inaccurate, and she meant that she and the deceased spent this time video-chatting online at a Yahoo website, similar to Skype.

[24] The Appellant testified that during the period of separation, she would seldom communicate with the deceased by telephone, despite the fact that they both had cell phones at the time. She says that they did not communicate via email because the deceased was not computer savvy.

[25] The Appellant testified to a visit with the deceased in Ontario during the summer of 2003 and the spring of 2004. This is supported by an email dated July 14, 2009, from the Appellant's friend, B. K. to the Appellant.

[26] At the Hearing, the Appellant claimed that the deceased planned to move to Penticton, BC, to start a trucking job on September 1, 2004. Dennis Smith of Dennis Smith Trucking Ltd., alleges in a letter dated February 29, 2008, that he knew the deceased for 5 years, and was made aware of the deceased's plan to relocate to BC, and that he was of the view that they were still a couple at the time of death. He writes that the Appellant and deceased had planned to live in Penticton, BC.

[27] The Added Party testified that she took on the responsibility as the legal representative of the deceased's estate, and arranged for, and paid for a funeral. The Appellant says she couldn't attend the funeral due to her parent's health problems. As part of the estate administration, the Added Party attended the X residence that the deceased had rented. She found that the deceased's clothes had not been packed, and were still hanging in a closet. The accommodation was messy, and there were no signs that the deceased had planned to move out of the province to start a job in a week's time.

[28] The Appellant states that she and the deceased did not share bank accounts, investments, or own any assets jointly, during the separation period. She says that this was the same during their entire relationship, because they each had been taken advantage of in the past, and were not about to let that happen again.

[29] In reciprocal life insurance applications dated January 26, 2002, the Appellant and deceased named each other as beneficiaries, and upon death, the Appellant was paid a \$50,931.37 benefit. However, by letter dated November 9, 2004, the Eastern Canada Carriers Pension Plan states that the deceased became a member of the plan in July 2003, and named his daughter, L. B., as beneficiary.

[30] The deceased signed his 2002 income tax return on April 30, 2003. On the first page of the return, where he was asked his marital status, he checked off the box "Separated".

[31] The Appellant has submitted numerous letters and emails from friends and relatives which are dated 2009 or later. She claims that the correspondence supports her contention that she and the deceased were close, despite the geographical separation, and that she and the deceased had planned to recommence living together in BC.

[32] In correspondence from July 2012, G. R. (mother of the Appellant), S. R. (brother), F. F., K. B. and A. R. (friends) all state that to their knowledge the Appellant was not dating while separated from the deceased and living in BC.

[33] B. K. writes in an email dated July 14, 2009, that she has been a friend of the Appellant and deceased since 1998. She confirms 2 visits that the Appellant made to Ontario in the summer of 2003, then the spring of 2004. She states that the Appellant is like a sister to her. Mrs. B. K. also speaks generally of the closeness of the Appellant and deceased during those visits, and generally about the deceased's intention to move to BC. M. P. states, in an email of September 24, 2009, that she has been a close friend to the Appellant for over a dozen years. She reiterates in general terms, the intention of the deceased to relocate to BC.

[34] K. A., sister of the Appellant, emailed the Appellant on July 24, 2009. She writes to provide details of the "involuntary separation" of the Appellant and deceased, and states that the deceased told her that he had accepted a job offer to work in BC.

[35] In an email dated July 24, 2009, friend, M. M., says that she spoke with the deceased "a number of times" when the deceased called the Appellant on the Appellant's cell phone, and the deceased "always" referred to himself as the Appellant's common-law husband.

[36] T. M., friend of 25 years, wrote an email to the Appellant on October 7, 2009. She states that the Appellant and the deceased told her that he was making plans to be with the Appellant at the beginning of September 2004, and they lived apart due to an "involuntary separation".

[37] A cousin of the deceased, S. F., states in a letter dated June 6, 2011, that the Appellant and deceased "managed to keep their relationship alive" during their "involuntary separation". She says that she spoke with the deceased in the new year of 2004 about his intention to move to BC to be with the Appellant.

[38] Another cousin of the deceased, J. C., wrote a letter dated June 24, 2012. She states that she knew the Appellant and deceased as a couple from 1989 to 2002. They were a

loving and supportive couple during that time. She also says that the deceased was planning “to go back and reunite” with the Appellant.

[39] In a letter dated August 23, 2012, J. M., friend of the deceased from 1994 or 1995, writes that he saw the deceased in mid-July 2004, and that the deceased told him that he had a position with a BC trucking company and would soon be moving west to continue his relationship with the Appellant.

[40] The Added Party submitted correspondence in support of her contention that the deceased and Appellant had ceased living as common-law partners for almost 2 years prior to his death.

[41] The deceased’s sister, K. C., writes, on May 27, 2009, that she was very close to her brother, and about one week prior to his passing, he was dating and seemed to be very happy.

[42] The deceased’s son, P. B., also writes on May 14, 2009, that on P. B.’s 21<sup>st</sup> birthday, in May 2002, he had a visit with the deceased who told him that the Appellant had decided to move to BC, and that if the deceased refused to go with her then they would end their relationship. He said that he had not seen the Appellant since December 2001.

[43] At the Hearing, L. B., daughter of the deceased, testified. She also wrote a letter dated May 14, 2009. She states that she lived with the deceased at the X address from November 2003 to June 2004. She says that during this time, the deceased had very little contact with the Appellant, and had discontinued their relationship in November 2002. She helped the deceased move his personal effects after the X house sold. She testified that while living with the deceased, he was seeing other women, and he had no intention of resuming his relationship with the Appellant.

[44] The Added Party testified at the Hearing. She also submitted an Affidavit sworn May 15, 2009. The Affidavit states that despite her long standing separation from the deceased, they remained on good terms. Cell phone records confirm regular contact between them. She testified to visits with the deceased every 1 to 2 months, including spending Christmas 2002 together. The deceased told her that the sale of the X house was due to the intentional



and permanent separation of the deceased from the Appellant, and he never stated to the Added Party that the reason was for convenience, financial reasons or that it was in any way involuntary. The deceased told her that he was dating other women.

## **SUBMISSIONS**

[45] The Appellant submitted that she is entitled to the CPP Survivor's benefit because:

- a) Despite living separate and apart from the deceased from November 2002 to the time of death in August 2004, they mutually intended to resume cohabitating in BC;
- b) The separation was involuntary, and her move to BC was required due to her need to care for her parents, and due to the deceased's continued employment in Ontario on account of his difficulty finding work in BC.
- c) By mutual intention, the Appellant and deceased continued a common-law partnership during their time apart. The couple regularly communicated with one another during the separation.

[46] The Respondent submitted that the Appellant is not entitled to the CPP Survivor's benefit because:

- a) The Appellant met the definition of common-law partner up to the separation in November 2002, but she and the deceased had not lived together for a continuous period of at least one year at the time of death;
- b) Submitted documents do not support an involuntary separation of the Appellant and deceased from December 2002 to the time of death;
- c) The fact that the deceased may have found employment in BC, almost 2 years after their separation may indicate a possibility of reconciliation, but does not substantiate involuntary separation.

## ANALYSIS

[47] Since the parties agree, and the Tribunal finds, that the Added Party was legally married to the deceased at the time of death, the Added party shall be entitled to the CPP survivor's benefits pursuant to section 44(1)(d), unless the Appellant can establish, on a balance of probabilities, that she was "*the* survivor" ( italics added) of the estate of the deceased contributor.

[48] According to section 42(1) of the CPP, the Appellant would be the "survivor" if she was the "common-law partner" of the deceased at the time of his death.

[49] To be the "common-law partner", as defined in section 2, the Appellant must produce evidence of a conjugal relationship with the deceased at the time of death, for a continuous period of at least one year. The parties agree and the Tribunal finds that the Appellant and deceased had cohabitated for many years, but not at the time of death. Given that the Appellant and deceased were not residing together at the time of death, the Appellant must establish that they continued a conjugal relationship while apart from August 2003, up to the time of death in August 2004. Cohabitation is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof. The question is whether the Appellant and the deceased shared a mutual intention to continue the conjugal relationship (*Canada (MHRD) v. Hodge*, 2004 SCC 65).

[50] To establish a conjugal relationship, the Appellant must show that the couple continued, while apart, by their acts and conduct, to have shown a mutual intention to be in a marriage-like relationship of some permanence. The question is not whether an Appellant is a good person or whether she behaved in an appropriate way. Nor is the question whether the legally married spouse is more deserving of the survivor's benefit than the common-law partner. The question is whether there was a common-law partnership during the separation up to the time of death (*Farrell v. Canada (A.G.)*, 2010 FC 34).

[51] The Tribunal finds that the evidence does not support a mutual intention to continue in a conjugal relationship during the separation of the Appellant and deceased.

[52] The Tribunal finds that communication between the Appellant and the deceased was infrequent and irregular. Cell phone records confirm the Appellant's testimony that they rarely communicated by cell phone. In almost 2 years apart the two had visited each other only 2 times. There is no evidence of the exchange of emails or letters. The Tribunal is skeptical of the Appellant's claim that she and the deceased regularly communicated via the Yahoo chatting site. There were no documents submitted to support such a claim. It is ironic for the Appellant to claim that she and the deceased would communicate regularly by computer, yet she also alleges that the deceased was not computer savvy to account for the lack of email exchanges. The deceased spent Christmas in 2002 with the Added Party, rather than the Appellant. Those who appear to have been closest to the deceased, and who each had visited with the deceased shortly before his passing, namely, his daughter L. B. and sister K. C., confirm the deceased's intention to remain apart from the Appellant. This evidence is consistent with the deceased's intention to end their conjugal relationship.

[53] The evidence is more consistent with the intention of the deceased, in November 2002, to permanently separate from the Appellant. The X house sale proceeds were divided equally, and the Appellant purchased a home in her name only. There is no evidence to support the intention of the deceased to become involved in the purchase. She kept most all of the couple's household possessions. They did not share any bank accounts, debt, or assets during the separation.

[54] The Tribunal does not accept the correspondence of those who write with assertions that are not personal observations, and instead seem to be general recantations of a story that the Appellant has asked them to prepare for her, in most cases 5 to 8 years after the time of death. For example, T. M. and K. A. both use the term "involuntary separation" in their statements, which is a term frequently used by the Appellant in her submissions and in testimony. Others write to say that, to their knowledge, the Appellant did not date during her residence in BC apart from the deceased. This does not support a mutual commitment in that respect. J. G.'s statement indicates that she knew the Appellant up to 2002, which is prior to the separation, and of little relevance.

[55] Other evidence supports the lack of a continuing mutual commitment to a conjugal relationship. The deceased indicated in his 2002 income tax return that he was separated. The Appellant did not attend his funeral, or in any way assist with the funeral or estate representation. The reciprocal Sunlife life insurance policies between the Appellant and deceased were obtained prior to their separation, and keeping each other as beneficiaries is consistent with what may happen in a spousal separation agreement.

[56] The Appellant alleges that the deceased had planned to move to BC to take on a job with Dennis Smith Trucking commencing September 1, 2004, yet few details are forthcoming from Mr. Smith, or the Appellant, as to the nature of the trucking job, or where the deceased was to reside in BC. Even the deceased's friend of 10 years, J. M., was not specific as to the date of the move, residence plans or even the name of the prospective employer.

[57] If the deceased had, one week prior to his death, an intention to move to a different province, one would expect that he would have his clothes and other possessions packed, yet that is not the evidence of the Added Party. Although the deceased may have discussed moving to BC for work, the Tribunal is skeptical of the alleged start date of employment, or whether he had a genuine intent to move in with the Appellant, in any event. The evidence is consistent with a possible intent to reconcile, but does not persuade the Tribunal that the deceased had a continued intent, during separation, to maintain a conjugal relationship with the Appellant.

## **CONCLUSION**

[58] The Tribunal finds that the Appellant has not established, on a balance of probabilities, that she was the common-law partner of the deceased, and therefore is not the survivor of the estate of the deceased contributor and is not entitled to the CPP Survivor's benefit.

*Glen J. Johnson*  
Member, General Division