Citation: ***M. D. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 122**

Date: November 3, 2015

File number: GT-120696

GENERAL DIVISION - Income Security Section

Between:

M. D.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Raymond Raphael, Member, General Division - Income Security Section

Heard by International Teleconference on September 14, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. D.: Appellant

Frank Laveaux: Appellant's counsel

Noris Vizcaino: Spanish Interpreter

M. V.: Appellant's mother

R. M.: Witness

A. U.: Witness

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* (CPP) survivor's pension in relation to the deceased contributor M. Q. (contributor) who passed away on November 30, 2010. The Appellant and the contributor were married on December 21, 2007; she was 29 years old on the date of the contributor's death. The Appellant has two children from prior relationships who were nine and fourteen on the date of the contributor's death.

[2] The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Social Security Tribunal (Tribunal) in April 2013.

[3] The hearing of this appeal was initially scheduled to be heard by Videoconference for the following reasons:

a) The form of hearing is most appropriate to allow for multiple participants;

b) The issues under appeal are complex; and

c) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] Due to the Appellant's inability to obtain the required visa to travel from Cuba to Canada for the videoconference, the form of hearing was changed to International Teleconference.

THE LAW

[5] 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 Tribunal.

[6] Section 44(1)(d) of the CPP provides that in the case of survivor who has not reached the age of 65 a survivor's pension shall be paid to the survivor of a deceased contributor who had at the time of the contributor's death reached 35 years of age, was at the time of the contributor's death a surviving spouse with dependent children, or is disabled.

[7] Section 42(1) defines "surviving spouse with dependent children" to mean a surviving spouse of a contributor who maintains wholly or substantially one or more dependent children of the contributor.

[8] Section 42 (1) also provides relevant definitions as follows:

> *child.* - *'child'* - of a contributor means a child of the contributor, whether born before or after the contributor's death, and includes
>
> (a) an individual *adopted legally or in fact (emphasis added)* by the contributor while the individual was under twenty one years of age, and
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> (b) an individual of whom, *either legally or in fact (emphasis added),* the contributor had, or immediately before the individual reached twenty-one years of age did have, the custody and control…

> *dependent child.* - 'dependent child' of a contributor means a child of the contributor who
>
> a) is less than eighteen years of age,
>
> b) is eighteen or more years of age but less than twenty-five years of age and is in full-time attendance at a school or university as defined by regulation, or
>
> c) is a child other than a child described in paragraph (b), is eighteen or more years of age and is disabled, having been disabled without interruption since the time he reached eighteen years of age or the contributor died, whichever occurred later;

ISSUE

[9] The Tribunal must decide whether the Appellant is eligible for the CPP survivor's pension.

LATE SUBMISSIONS

[10] The Appellant filed additional submissions including numerous case authorities (GT8 & GT9) on September 10, 2015 which was after the extended date for filing additional submissions. In view of the importance of the legal issues raised the Tribunal Member determined that the additional submissions should be accepted.

[11] On September 14, 2015 after the oral evidence and the Appellant's submissions were completed the Tribunal adjourned the hearing on the following terms:

> 1. The Respondent shall have until Thursday, October 15, 2015 to file submissions in response the Appellant's late submissions.
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> 2. Once the Respondent's submissions are received the Tribunal will determine if a further hearing is required.
>
> 3. If no further hearing is required, the Tribunal will deliver its reasons for decision.

[12] The Respondent delivered it's responding submissions on September 29, 2015.

Oral Evidence

The Appellant's Evidence

[13] The Appellant met M. Q. (M. Q.) in February 2005. At that time she had custody of her two children R. R. (born September 1996) and A. B. (born July 2001). The biological fathers were not providing any financial support and saw the children on a very infrequent basis. The only contact with the paternal families was occasional visits by their paternal grandmothers. The Appellant was not working at that time because of a medical condition (trigeminal neurologia); she and her children lived with and were financially supported by her mother. She described her present health condition as being "okay" and stated that she is taking medication for her condition. Mr. Laveaux confirmed that the Appellant was not claiming to be disabled for the purposes of the survivorship claim.

[14] M. Q. was on vacation and they met at the beach. M. Q. was 55 years old at that time. The Appellant described him as a "very good person…very pleasant…very honest and ethical…he had many positive qualities." She introduced him to her family (including her children) about 3-4 days after they met. She saw M. Q. again in June 2005 when he came back to Cuba to see her and her children; at that time he asked her to marry her. In June 2005 he stayed at her house and travelled with a family visa.

[15] The children were four and nine at that time, and his relationship with the children was "good from the beginning." He would advise the children, discipline them when they did something wrong, and took over the role of a father. This started in June 2005 when M. Q. was able to spend more time with the children.

[16] The Appellant testified that their relationship started to be "stable" in June 2005. When M. Q. was not in Cuba they would communicate by telephone 3-4 times a week. Initially they used a neighbour's phone, and after a month M. Q. sent her money to buy a cell phone. Once she had the cell phone he would contact her every time he had time available (4-5 times a week) and they would also exchange text messages.

[17] M. Q.'s next visit wasn't until May 2006; M. Q. worked as a gas station attendant in X and it was very expensive for him to visit Cuba. M. Q.'s other visits to Cuba were in December

2006 (15 days); April 2007 (15 days); May 2007 (15 days); December 2007 (21 days); August 2008 (15 days); March 2009 (7 days); October 2009 (15 days); and May 2010 (21 days). They married during M. Q.'s visit in December 2007.

[18] In April 2008 she applied at the Canadian Embassy for a visa to visit Canada. She was going to travel to Canada to see what the country was like, and the plan was that M. Q. would then sponsor her and her children to move to Canada. The visa was refused (they told her this was for financial reasons) and she was never able to visit M. Q. in Canada. In 2008 M. Q. sent her $2,400 and she was able to purchase her own apartment; she and the children moved from her mother's home when the apartment was purchased, and they still live there. M. Q. lived with them when he came to Cuba. M. Q.'s last visit was in May 2010, and he looked fine at that time.

[19] She stated that they had a "stable" relationship up until M. Q.'s death in November 2010. M. Q. had many friends in Cuba; their friends visited them frequently and saw how well he treated the children. He would be with the children all the time; he walked them to school, helped them with homework and math problems, and showed them affection. She stated, "He was like a father to them when he was in Cuba." He also helped financially; from 2005 onwards he sent $100 or $200 a month depending on how much he was earning. He would also send the children money and buy them presents for their birthdays and other special occasions. After her visa was refused in 2008, M. Q. always spoke about his trying to make arrangements for them to come to Canada. He considered her children to be his children.

[20] She stated that he had already started immigration procedures and that he received a letter stating that the visa was going to be granted. When questioned by the Tribunal Member, the Appellant acknowledged that she never saw this letter and that there was no copy of the letter or any documentation relating to these immigration procedures in the hearing file. The Appellant also acknowledged that M. Q. never took any steps to adopt the children, that their school records were never changed to indicate him as their father, and that no steps were taken to change their last name to his. She believes that on one of his trips to Cuba he spoke to a notary about changing the children's name, and he told her that this was a very expensive

process. When questioned by the Tribunal Member, she couldn't remember when this occurred and couldn't remember the notary's name.

[21] She doesn't know if M. Q. has a will, and stated that she saw a letter from a bank indicating that she was to receive a share of his bank account. She didn't receive any money from this account. Mr. Laveaux advised the Tribunal that his information was that M. Q. had a Scotia Account with approximately $24,000 and that the only beneficiaries were M. Q.'s two children from his previous marriage. She stated that M. Q. told her that she and the children were beneficiaries of his life insurance policy, but she never received any money from such a policy. Mr. Laveaux advised that the Tribunal that he has not been able to locate such a policy. He stated that he has a letter dated December 28, 2010 from the bank indicating that there is a life insurance policy, but the names of the beneficiaries is private information and that he would need a court order to get this information. Mr. Laveaux acknowledged that he has not been able to find any evidence to establish that the Appellant and/or her children were beneficiaries of a life insurance policy.

M. V.'s Evidence

[22] She is the Appellant's mother and M. Q. was her son-in-law. When describing M. Q.'s relationship with the children she stated that he acted like their father – he gave them support and did so until he passed away. He bought the apartment for the Appellant and helped her out financially. She stated, "Everyone was happy…they made friends with everyone…he was good for the children…he said that he was going to take the Appellant to see Canada and then arrange for her and her children to move to Canada." She stated that the biological fathers didn't look after the children, made no financial support, and only saw them "once in a blue moon." Sometimes the paternal grandmothers would come and spend an hour with the children. She concluded that it was like the Appellant was their biological father – he worried about them and it was as if he were their father.

R. M.'s Evidence

[23] He is R. R.'s biological father. R. R. was born in X X and he and the Appellant separated before he was born. His son has always lived with the Appellant and her mother. He

never paid any support because he makes very little money. He sees his son sporadically – they live in the same city and sometimes they run into each other. He stated that there is no emotional bond between him and his son.

A. U.'s Evidence

[24] He is A. B.'s father. A. B. was born in X X, and he was only one year old when he and the Appellant divorced. He stated that he has no contact, no bond, and no link with his son. He doesn't see his son and has made no financial contribution for his support.

SUBMISSIONS

[25] Mr. Laveaux submitted that the Appellant qualifies for the CPP survivor's pension because:

a) The contributor stood in the place of a father for the children and the definition "adopted legally or in fact" (see paragraph 8, supra) should be understood and interpreted in the same way as the expression "stands in the place of a parent" is used to define child of a marriage under the Divorce Act;

b) Mr. Laveaux's legal argument together with his supporting case law is set out in detail in his supplementary submissions (GT8 & GT9) and was thoroughly reviewed during his closing submissions;

c) The evidence establishes the contributor's intention to provide financially for the children; he purchased an apartment for them and regularly sent financial support;

d) The contributor played the role of a father in their life and gave them advice and emotional support; the biological fathers played no role;

e) Although there is no evidence of steps towards a formal adoption, this doesn't detract from the fact that M. Q. wished to bring them to Canada as part of his family. At a minimum, he acted as a step-parent from 2005 onwards;

f) The case law establishes that M. Q. fit the shoes of "adopted in fact."

[26] The Respondent submitted that the Appellant does not qualify for the CPP survivor's pension because:

a) In her initial application the Appellant indicated that she and the contributor were married and that there were no children under the ages of eighteen and no children between eighteen and twenty five years attending school. The address provided for the Appellant was not the same address provided for the contributor;

b) Although the contributor visited Cuba for short periods of time from 2007 to 2010 they did not live together;

c) There is no compelling evidence to indicate that the Appellant's children were supported by the contributor or that he exercised parental control over her children;

d) Although the contributor visited Cuba there is not sufficient evidence to prove a child-contributor relationship existed with the children as defined by the CPP;

e) Although the Appellant is the survivor of the contributor no survivorship pension is payable because she was 29 years old at the time of his death, she is not disabled, and she had no dependent children as defined by the CPP.

ANALYSIS

[27] The Appellant must prove on a balance of probabilities that she has "dependent children" in accordance with s. 44(1)(d) of the CPP in order to qualify for the CPP survivor's pension. There is no issue that the Appellant and contributor were legally married, that she was under the age of 35 years on the date of death, and that she is not disabled.

The Primary Issue

[28] The primary issue that must be determined is whether the Appellant maintains wholly or substantially one or more dependent children of the contributor. There is no dispute that she maintains the two children from her former relationships; however, the Tribunal has determined that she has not established, on the balance of probabilities, that her children were children of the contributor as defined by the CPP.

[29] As set out in Section 42(1) of the CPP (see paragraph 8, supra) in order for the Appellant's children to be considered children of the contributor they must at the time of his death either be "adopted legally or in fact" or be individuals of whom the contributor "either legally or in fact…had custody and control."

[30] Mr. Laveaux in his submissions did not rely on the contributor having had custody and control of the Appellant's children; he based his position on his submission that her children had been "adopted… in fact" by the contributor.

The Appellant's Legal Submissions

[31] Mr. Laveaux submitted that the expression "adopted…in fact" as stated in the definition of "child" in the CPP should be understood in the same way as the interpretation given to the expression "stands in the place of a parent" of clause (b) of the definition of "child of the marriage" in subsection 2(1) of the Divorce Act, RSC, 1985.

[32] Mr. Laveaux referred to decisions which have interpreted the expression *in loco parentis* including *Chartier* v. *Chartier* [1999] 1 SCR 242 and *Re O'Neil and Rideout* (1975), 7 O.R. (2d) 117.

[33] He submitted that the Ontario family law case in *Re O'Neil and Rideout* sets out what was considered at one time the classic expression of the law of *in loco parentis* as follows:

> Whether a person stands in loco parentis to a child depends upon:
>
> (1) Whether he provides a substantial part of the financial support of the child;
>
> (2) whether he intends to permanently "step into the father's shoes";
>
> (3) whether the relationship between the person and the child was a permanent one;
>
> (4) whether the inference that the child's own father with whom he is living and who supports him, has not been replaced has been rebutted;

(5) whether the person has terminated his position of being *in loco parentis* in respect of the child;

[34] He also referred to the Supreme Court of Canada case in *Chartier v. Chartier* as setting out the principles as to when a person "stands in the place of a parent" as follows:

> To look at intention as a factor. Whether the child participates in the extended family in the same way as would a biological child. Whether the person provides financially for the child. Whether the person disciplines the child as a parent. Whether the person represents to the child, the family, the world, either explicitly or implicitly that he is responsible as parent to the child. Look at the nature or existence of a relationship with the absent biological parent.

[35] Mr. Leveaux further submitted that the expression "adopted…in fact" in the CPP should be understood in the context of legislation designed specifically to provide benefits in respect of an extended class of beneficiaries and that this is a change to the common law that allows courts and the Tribunal to recognize circumstances of informal adoption. He further submitted that because the CPP is remedial legislation it should be interpreted liberally and not restrictively. He referred to a cases dealing with the definition of adoption (mostly in the context of estate cases) and referred to *McNeil v MacDougal* 1999 ABQP 945 which sets out a statement from the Alberta Law Reform Commission that "step-children…are probably as close to the de facto adoptees that one sees in law."

The Contributor did not "adopt in fact" the Appellant's children

[36] The Tribunal does not agree that "adopted legally or in fact" should be interpreted in the same way as "stands in the place of." If this was the legislative intention then the term "stands in the place of" could easily have been used. The legislature obviously intended a stricter and more restrictive test. Mr. Justice Iacobucci in the Supreme Court of Canada majority decision in *Verdun v. Toronto-Dominion Bank* [1996] 3 S.C.R. 550 at paragraph stated:

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

[37] There are no cases that interpret this specific provision of the CPP. The Tribunal, however, has found guidance from the decision of the *Pension Appeals Board* (PAB) in *Bajwa v. MHRD* (April 4, 2002), CP 14184 which interpreted the expression "either legally or in fact…had…the custody and control" when defining "child" of a contributor under Section 42(1)(b) of the CPP (see paragraph 8, above).

[38] The *Bajwa* case dealt with the issue as to whether the Appellants who were the natural children of a disabled contributor's second wife and deceased brother were entitled to the disabled contributor's child benefit. The case turned on whether the disabled contributor either legally or in fact had custody and control of the Appellants before they reached the age of twenty one. The *PAB* after referring to the definition of "child" of a contributor as set out in the Section 42 (1) of the CPP stated as follows:

> To greater concentrate the key question in this appeal, I refer to the key words, "or in fact, the contributor had, or immediately before the individual reached twenty-one years of age did have, the custody and control ..." The appeal succeeds or fails on these words in the context of this appeal and the words used and their meaning.
>
> In Black's Law Dictionary, the words "in fact" are defined as "actual, real; as distinguished from implied or inferred" and "resulting from the acts of the parties, instead of from the act or intendment of law." Another way of looking at the matter is that if something is "in fact," it is an actual occurrence - that which has taken place, not what might or might not have taken place. I fully agree. Indeed, my thoughts go further. "In fact"? It may have an ordinary and everyday English meaning of "in fact." It does not mean "in theory," "in contemplation," "in intention," or "in the mind of an individual." It means in fact and not in the minds or beliefs of those involved or others.
>
> I wish to say something of "custody" and "control" in the present appeal. It is difficult, even if it be theoretically possible in certain circumstances, to think of "custody" and "control" at a great distance, for example the distance between Canada and Pakistan, to the extent that existed, from time to time in the circumstances of this appeal. It is difficult to think of them as established by short and on and off periods, to the extent that exists in the circumstances of this appeal. It is difficult to think of "custody" and "control" existing and being maintained and evidenced by long distance phone calls. It is quite difficult to consider the concept of "custody" and "control" of people who are no longer young or the likelihood of the two being established by a mother and young children.
>
> While custody is not altogether a physical matter, it is difficult to consider it without the age aspect coming to mind.

[39] There is no suggestion that the contributor legally adopted the Appellant's children and, accordingly, in interpreting the expression "adopted legally or in fact" the key words are "in fact." As the *Bajwa* decision indicates "in fact" means what is "actual and real" as opposed to what is "implied or inferred" and must be an "actual occurrence" as opposed to "in contemplation or intention."

[40] The Appellant's evidence relies mostly on what the Appellant perceived to be the contributor's intentions as opposed to his actual actions. In this regard the Tribunal noted the following:

- During the close to 5 ½ years that the contributor knew the Appellant's children he spent approximately 161 days with the Appellant and her children (see GT4-3). This amounts to approximately only one month per year.

- It is difficult to envision an "adoption" relationship having occurred given the relative short period of time that the contributor was with the children and the distance and other barriers between the Appellant's residence in Canada and the children's residence in Cuba.

- Although the *Bajwa* case discussed a distanced and infrequent relationship in the context of "custody" and "control" it is also an important factor in considering "adopted...in fact."

- Although the contributor provided some financial assistance to the Appellant by sending her money on a monthly basis ($100 to $200) and sending her $2,400 to purchase an apartment, this is the normal assistance that a husband would send to his wife; there is no suggestion that the contributor assumed financial responsibility for supporting the Appellant's children. Purchasing birthday presents and gifts is not equivalent to assuming financial responsibility.

- Although the Appellant testified that she attempted to obtain a visa to visit Canada and see what the country was like, this speaks at most to her contemplation and intention - the visit never actually occurred.

- The Appellant testified that the contributor spent time with the children while he was in Cuba and was to a certain extent involved in their care, education and discipline; however, this was only for one month a year. Further having involvement in their care is a far cry from "adopting in fact" which involves actually treating the children as if they were his own natural children.

- Although the Appellant testified that the contributor told her that he had started immigration procedures, there is no credible evidence that he actually did so. The Appellant acknowledged that she never saw a copy of the letter that the contributor allegedly received from the immigration department and there is no documentation relating to these alleged immigration procedures in the hearing file.

- The contributor never took any steps to adopt the children, their school records were never changed to indicate him as their father, and no steps were taken to change their last name to his.

- The Appellant doesn't know if the contributor had a will and there is no evidence of either her or her children being beneficiaries under a will. If the contributor had "adopted in fact" the Appellant's children it is reasonable to expect him to have provided some protection for them in the event of his death.

- The Appellant stated that she saw a letter from a bank indicating that she was to receive a share of the contributor's bank account. However, she acknowledged that she did not receive any money from this account and Mr. Laveaux advised the Tribunal that his information was that the contributor had a Scotia Account with $24,000 and that the only beneficiaries were the contributor's two children from his previous marriage. This suggests that the contributor did not treat the Appellant's children as if they were adopted children who one would reasonably expect to be treated in the same fashion as his natural children.

- The Appellant also stated that the contributor told her that she and her children were beneficiaries of his life insurance policy; however, neither she nor her children ever received any money from the contributor's life insurance policy and Mr. Laveaux

acknowledged to the Tribunal that he has not been able to find any evidence to establish that the Appellant and/or her children were beneficiaries of a life insurance policy.

CONCLUSION

[41] Although the Appellant is the survivor of the deceased contributor no survivorship pension is payable because she was 29 years old at the time of his death, she is not disabled, and she has no dependent children of the contributor as defined by the CPP.

[42] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security