

Citation: *J. L. v. Minister of Employment and Social Development*, 2015 SSTGDIS 132

Date: November 23, 2015

File number: GP-13-1526

GENERAL DIVISION - Income Security Section

Between:

J. L.

Appellant

and

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

Respondent

Decision by: Jeffrey Steinberg, Member, General Division - Income Security Section

Heard by Teleconference on November 3, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. L., the Appellant

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on January 10, 2013. The Appellant states she married the deceased contributor, F. L. (the deceased contributor) on February 2, 1995 in Michigan, USA. She and the deceased contributor divorced on July 14, 1997. The deceased contributor died on December 22, 2012. According to the Appellant, she and the deceased contributor were living in a common-law relationship at the time of his death.

[2] On February 19, 2013, the Respondent denied the Appellant's application because she was divorced from the deceased contributor since July 14, 1997 and therefore was not his spouse as defined under the Canada Pension Plan (the CPP) at the time of his death. The Appellant requested reconsideration of the refusal. On June 10, 2013, the Respondent denied the Appellant's request for reconsideration, stating that the deceased contributor maintained a separate residence from her for the period of time up to and including his date of his death. On July 12, 2013, the Appellant filed an appeal with the Tribunal.

[3] The hearing of this appeal was by Teleconference for the following reasons:

- a) There are gaps in the information in the file and/or a need for clarification.
- b) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

Applicable CPP provisions

[4] Section 44(1)(d) of the CPP provides that a survivor's pension shall be payable to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period provided the survivor meet certain conditions.

[5] Subsection 42(1) of the CPP defines a survivor in relation to a deceased contributor as either a person who was the common-law partner at the time of the contributor's death, or, if there was no such common-law partner, a person who was married to the contributor at the time of death.

[6] Subsection 2(1) of the CPP defines a common-law partner in relation to a contributor as a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited for a continuous period of at least one year. In the case of a contributor's death the "relevant time" means the time of the contributor's death.

ISSUE

[7] The Tribunal must determine whether the Appellant is a survivor in accordance with the CPP criteria.

Documentary Evidence

[8] In correspondence dated February 24, 2013 sent to the Respondent, the Appellant stated she submitted a copy of the deceased contributor's will in which the deceased contributor declared that although she was his "x-wife", they had been living as common law partners ever since they divorced in 1997. The Appellant explained that she and the deceased contributor lived in Canada and the United States and had been in a common law relationship for the past 15 years until his death (December 22, 2012) and would still be today had he not died. She stated "we have been with each other constantly for 18 years". She further stated: "I miss him so much. He's all I had and I was all he had. When we got married he was getting a divorce and his kids never accepted that he wanted to marry me. His kids to this day still hate him and me

because I married him. They never visited with him for 18 years except on the phone which always turned into an argument especially if he even as much mentioned my name”.

[9] In her Notice of Appeal to the Tribunal, the Appellant wrote that she married the deceased contributor in February 1995. The marriage was dissolved in 1997 as he was bi-polar. After the divorce, he mainly lived with her in the USA where they lived common law. In Canada, he resided at X X Apt X. She explains the Canadian government would not give him his Social Security unless he had an address. He used his daughter’s address for about one year however she stated “no more”. He mainly lived with her in the USA because they were living common-law. Because he had to have a Canadian address, he went through Social Services in Canada and they placed him at X X Apt X. She has a house and he wanted to be with her. When he returned to Canada to pay his rent and bills, she went with him. She also lived with him in Canada. He paid his own bills and helped her with her bills because she is disabled and was receiving social security and disability. He received social security in Canada and the USA (he worked in the USA when he was 35). When they met, he was age 62 and she was age 47. He received a pension but she did not, so he supported her so she would not lose her home. They resided together until the time of his death. He helped her with her bills, her car, her property tax, her “custom measured socks” and her lawn. She still wears the wedding band and engagement ring he bought her. They were “Church going” people. He would show her off to strangers as his “USA wife” and she would show him off as her “Canadian spouse”. They loved each other so much. She misses him and she has no plans of meeting anyone else. He stated in his will that she was his common law wife. He had nothing in his apartment but a sofa that turned into a bed. That is where she slept when she accompanied him when he went to pay his rent and bills. Sometimes they would go to different motels and stay for a week and then return to the USA. She was the only one he ever did that with. His final six months were “rough”. His driver’s license was taken away as he was getting dizzy spells and had fallen. Although she stayed with him, his landlord told him that he could not have anyone stay at his apartment because they were not married and that she had to leave. He spent most of his 18 years with her because they could live together without a landlord telling him to leave. He hated being away from her. Because he was with her most of the time in the USA, he didn’t buy any food because it would spoil. The year before he died when he was age 79, he spent approximately \$4,000.00 landscaping her front yard. He wanted to surprise her and make her happy. He took her

everywhere and was proud to be with her. They travelled everywhere, especially in Canada. The Appellant writes: “What’s the difference which country we were in? We were married, got a divorce and went back together and lived together for the remainder of 16 years”. She explains they did not see each other for about one month before he died. He was not feeling well for about a month and he thought he should stay in Canada to get better before he returned to the USA. She wanted to see him but he did not want her to see him sick. When he did not call her, she contacted the hospital and then the police who found him dead. Otherwise, she would have been there with him. He gave up his 4 kids, his wife, and his house in X because he loved her that much and she him.

[10] The Appellant signed a Statutory Declaration of Common Law date stamped received by the Respondent on January 10, 2013. She declared that she and the deceased contributor lived together for 17 years continuously from February 2, 1995 to December 22, 2012. She stated she was relying on a will, pictures, marriage papers, neighbors, friends and relatives in support of her position that she and the deceased contributor were common law partners.

[11] The Appellant provided a copy of the Certificate of Marriage (February 2, 1995) between her and the deceased contributor and Divorce Judgment dated July 14, 1997. She also filed copies of an excerpt from a petition filed February 11, 1997 in the County of Wayne, Probate Court, Mental Division, State of Michigan, in the matter of “F. L., in which she was the Petitioner.

[12] She also provided a copy of a letter signed by the deceased contributor dated November 13, 2007 in which he referred to the Appellant as the “love of his life”, stating he would not know what he would do if she were to pass away before him.

[13] The Appellant also relied on a drawing of a guitar with the words “Crystal Lounge” written over it and faint illegible writing.

[14] She further relied on a photograph at GD2-37.

[15] The Appellant submitted a handwritten letter dated January 14, 1997 signed by the deceased contributor addressed to her stating he promised to pay all existing loans, utilities, and

telephone charges from the above location (X X Place, Michigan) from the date of December 24, 1996 forward.

[16] The Appellant filed a handwritten note dated February 1999 from the deceased contributor addressed to the Appellant stating he certified he would pay the approximate sum of \$14,600.00 US funds as soon as possible by means of a home equity loan. [17] The Appellant also filed copies of receipts from Wal-Mart.

[18] The Appellant filed a copy of a document entitled Foreign Exchange Services.

[19] The Appellant submitted a letter dated January 16, 2013 stating she was submitting the original will that the deceased contributor gave her. She explained she did not submit it along with her original application for CPP Survivor's Benefits because it was stolen from her by the deceased contributor's daughter, D. C. However, Ms. D. C. returned it to her. To verify it was stolen, she provided a copy of the X Police case number: X and provided the name of PC F., badge number X. She notes that on page one of the will, the deceased contributor refers to her as his common law partner.

[20] The Appellant submitted a letter dated January 10, 2013 from C. P., X X, Michigan. Ms. C. P. stated she knew the Appellant and deceased contributor since 2003 and was the Appellant's next door neighbor. She witnessed the deceased contributor coming over from Canada to stay with the Appellant for weeks at a time. In 2007, they both attended her wedding. They lived as common law partners until the day he died. In 2010, he did a lot of landscape work at the X X residence. She stated: "It's like they had two addresses, one in the States and one in Canada, because (the Appellant) would go to Canada and stay with F. L. They love each other very much. In 2012, F. L. bought (the Appellant) a wedding ring for Christmas."

[21] The Appellant provided a copy of a handwritten will signed by the deceased contributor on February 2, 2004. According to its terms, he appointed his daughter as sole executrix and trustee of the will. At Paragraph VII: the Will directs the deceased contributor's executrix, D. C. as follows:

J L. ...because she is my x wife but still living common law (even though not housed in Canada anymore) to be given first right of acceptance or refusal. "Because J. L. has been

very, very poor and in very, very bad health most of her life and for approx. 11 years has given, given, given to me even to the point of going without food just to help and please me and placing me ahead of her own family from day one boggles my mind. If that's not true love I don't know what true love is.

....

I give, D. C. and bequeath all my worldly provisions (to J. L.) wherever situation. If J. L. does not survive me, this will become null and void. Dated February 2, 2004.

[22] The Appellant submitted a letter (undated) from H. J Jr, which stated: F. L. and (the Appellant) have been together for over 17 years. F. L. would visit (the Appellant) at least once a month in X X, Michigan (United States), and stay for about 2 weeks. I live a few houses away and have been their friend during this period. They were a great couple and had a lot of love for one another. Also during this time I learned a lot about Canada from F. L. and could tell he was very proud to be Canadian. F. L. was very social as well as (the Appellant) and a lot of neighbors know them well”.

[23] The Appellant submitted a letter dated March 6, 2013 signed by B. W. She stated she knew the Appellant for the last 25 years. The Appellant lived behind her at X X Place, X X and was her neighbor. Ms. B. W. could see the property from her back porch and states the deceased contributor was over at the Appellant's house most of the time. When the Appellant divorced the deceased contributor, it was because he did not take his medication for bipolar. However, he still wanted to be with just her. When she was gone, she was with him in Canada in X. They had a bond together as loving common law partners in the USA and Canada. This went on for about 15 years that she knew them. They went everywhere together. They came into the store together for ice, cigarettes, etc.

[24] The Appellant submitted a letter signed by L. R. dated March 5, 2013 stating the Appellant and deceased contributor were together for almost 18 years and knew them because they came into the Gas and Convenience Store for about the last 5-6 years. Ms. L. R. stated the Appellant had no choice but to divorce the deceased contributor because he was not taking his medication. She took him back and they lived as common law partners ever since. He died

December 22, 2012. He was bi-polar. He bought her another engagement ring and wedding band. He loved her and didn't want to give her up. They were always together. If they were not at her house, they were staying in Canada at their apartment in X.

[25] In a letter dated July 14, 2015, the Appellant stated that she and the deceased contributor divorced in July 1997 because of his bipolar state. However, they continued to live common law for 16 years in the United States at X X Place, X X, Michigan. The only reason for the Appellant's apartment in X was because he could not receive his pension in Canada or Canadian health plan without a Canadian address. His "real" home was in X, Ontario. He wasn't about to drive 250 miles to X and leave her 250 miles away. That is why he got the apartment in X. He just had to drive across the bridge to get his pension and health plan and not be too far from her. At the time of his death, he travelled by himself to Canada to see his doctor. He stated he would come right back. When he did not return, he called her about 10:00 pm and stated he could not breathe. She called the hospital to have them send someone from 911 to his apartment. By the time they got there, he had died. She was on the phone with him at the time of his death. He did not call anyone else for help. They called her back to notify her. If she could access his passport held by his daughters, it would show 16 years of travel between the United States and X. Her neighbors have sent letters stating they knew the deceased contributor and her as married and common law. He worked in the yard and did landscaping, brick and stone work because it was his house too. For 18 years, they had the same address at X X Place in X X, Michigan. He was never as happy as when he was with her. He even got her another wedding ring.

Oral Evidence

[26] She married the Appellant on February 2, 1995 in Michigan, USA.

[27] They met approximately two years earlier in a store in the USA. They have been together even since then.

[28] At the time they met, he had been divorced for about one year. He had four adult children from his first marriage. His ex-wife and kids hated him. He did not get along with them.

[29] At the time of marriage, she was age 46 and he was age 62.

[30] They married in Michigan. She had a house in the USA whereas he did not. His ex-wife got their house after his divorce from her. The plan was that he would move into her home and live with her in the USA. He would return to Canada to keep his Canadian health coverage and pension. He had to convert the monies to US funds before he returned to the USA.

[31] He worked in the USA. He used to buy golf merchandise which he would resell in Canada. He stopped this after they married and he started doing landscaping and worked in some other jobs.

[32] During their marriage, he would go to Canada approximately one week each month to take care of his business in Canada.

[33] He initially used his daughter's address in Canada as his Canadian residence. However, approximately one year after the divorce, he got an apartment in X in order to have his own Canadian address to remain eligible for health care and his pension. His daughter no longer wanted him to use her Canadian address.

[34] After they divorced in July 1997, he never established a relationship with anyone else. He was very possessive and jealous of her. He felt he "hit the jackpot" when he met her. She was not bad looking and she was younger than him.

[35] The marriage dissolved for several reasons. She had long work hours and he was upset that she was meeting other people and thought he might lose her. Also, his family and children would not leave him alone. She initiated the divorce. At the time, he was going to a psychiatrist and was diagnosed as bi-polar. In February 1997, she issued a petition at which time he was taken to St. John's Holy Cross for tests to determine why he would get jealous and go through extremes – like Dr. Jekyll and Mr. Hide. He was diagnosed as bi-polar. One time, he was really bad and was drinking. He was supposed to take his medication but would not take them. The psychiatrist said she would be better off divorcing him. She told the psychiatrist she was the only one he had and could turn to. She could not give him up or he would get into a lot of trouble. She tried to help him and straighten him out. However, she did tell him that if he did not take his medication, she could not stay with him.

[36] He always resided at her home, before, during and after the divorce. She felt sorry for him. He did not want to get a divorce. She told him maybe they could figure things out but he had to do one thing for her: never go off his pills. He asked her if they could get married again. She told him he would have to prove he would take his medication. Before he died, he wanted to get married again and gave her an engagement ring.

[37] He was very possessive and would not let her go anywhere alone. He accompanied her shopping and went everywhere with her.

[38] Approximately one year after the divorce, he secured an apartment in X. It was at this time he got into trouble with Revenue Canada for not doing his taxes in Canada. She accompanied him to Revenue Canada and explained that he was living with her in and working in the USA. The Appellant was told that he needed an address in Canada in order to get his money, i.e., pension, social security and health care. They found a place in X through Social Services. It was government housing for seniors and was inexpensive. He would return to this address from the USA to take care of his pension and health care matters and pay rent owing on the X apartment. When she accompanied him, one of the property managers stated she could not stay there because the unit was only for one person and that she would have to leave. The other property managers did not seem to care if she was there.

[39] He went to Canada once a month and would stay for approximately one week. Sometimes he would stay longer if he had an appointment with his psychiatrist.

[40] When she accompanied him to Canada, he would take her on trips and show her Canada. They would stay in motels and travel all over Canada.

[41] After the divorce, they combined their incomes. She would pay so much and so would he. If she did not have money, he would come up with it. She owned her house outright. They would each pay one half of the expenses as they shared the house. The year before he died, he spent more than \$4,000.00 in landscaping her entire front yard. He was age 79 at the time. He really loved her. No other man would have done that to make her happy.

[42] They did not have a joint bank account. If he spent his money, she was afraid he would go into hers. He did this to his ex-wife. Therefore, she did not want a joint bank account.

[43] He used to like to go out to eat a lot. The cost of groceries in the home was covered through her food stamps entitlement.

[44] They would go to Church together and alternate between Catholic and Lutheran churches every Sunday.

[45] Although the Appellant did not have a copy of GD2 in front of her, the Tribunal asked her to explain the significance of GD2-36, a document which had the words "Crystal Lounge" written on it. She stated she believed this was a place she and the deceased contributor went on vacation, although she could not recall when they went.

[46] The Appellant stated she believed the photograph at GD2-37 was of her, the deceased contributor and his son, visiting the son at his home in Ontario. She could not recall when it was taken.

[47] She explained that the letter dated January 14, 1997 signed by the deceased contributor addressed to her, stating he promised to pay all existing loans, utilities and telephone charges from her home address, was written by the Appellant at the time they were going through a divorce. It was his way of saying he did not want to lose her. The Appellant's handwritten note dated February 1999 certifying he would repay \$14,600.00 US funds was on account of the monies her father loaned him.

[48] She could not recall why she filed receipts from Walmart.

[49] She filed a document entitled Foreign Exchange Services to inform the Respondent that she travelled to Canada with the deceased contributor and had to exchange US funds to Canadian dollars.

[50] C. P. is her girlfriend. Ms. C. P. stated she knew the Appellant and deceased contributor since 2003. That is when she moved next door to the Appellant.

[51] Although the deceased contributor's children hated him, he appointed his daughter, D. C., as his executrix, because she stated she would help him with his cremation/burial. She is wealthy and could afford to do so. The Appellant did not have the money to do so.

[52] She never received any money under the deceased contributor's will. His adult children went over to the deceased contributor's place and destroyed everything that should have been left to her. When she got there, there was nothing left. They had already removed or destroyed everything to prevent her from getting anything.

[53] H. R. is a friend. Although he stated the deceased contributor would stay for about 2 weeks, the deceased contributor would stay for 3 weeks and go to Canada for one week.

[54] B. W. is a neighbor and works at the Gas and Convenience store where they would buy gas.

[55] L. R. also worked at the Gas and Convenience store.

[56] She went to the funeral home to see the deceased contributor's cremation box. The funeral home first called D. C. (the deceased contributor's daughter/executrix) to grant permission to allow the Appellant to view it. D. C. handled the funeral preparation. The Appellant was not even invited to attend. His children were mad at her as they felt she took the deceased contributor away from their mother.

[57] She and the deceased contributor shared the same bedroom and had marital relations.

[58] He had mail coming to both addresses: the one in Canada and their shared address in the USA. D. C. took all his paperwork. She also took his passport which would show how often he crossed the border. It would show that once a month, he crossed over and would stay three weeks.

[59] She did his laundry and would cook for him

[60] They would buy gifts for each other for Christmases, Easter, birthdays and their anniversary. He would buy her gifts at the duty free.

[61] On their taxes, they each declared they were single after the divorce; otherwise, they would get in trouble. He also would have told his landlord in Canada he was single. They had to watch what they did to stay out of trouble.

[62] She accompanied him to doctor's appointments, hospitals, etc.

[63] They would vacation all through the year as the deceased contributor loved to travel. They could be gone up to two weeks at a time.

[64] A lot of people do not do it the way they did it and do not understand it. She trusted him when he was away from her in Canada and going back and forth.

[65] She once considered selling her house and moving in with him in Canada. The deceased contributor told her that if she did so, she would lose her social security, disability and food stamps. He stated he could do it and figure out how to do it.

SUBMISSIONS

[66] The Appellant submitted that she is entitled to the survivor's pension because she was living in a common law relationship with the deceased contributor for many years at the time of his death.

[67] The Respondent submitted that the Appellant is not entitled to a CPP survivor's pension with respect to the deceased contributor because:

- a) The evidence shows she and the deceased contributor were not living together at the time of death and that the required elements of a common-law relationship were not sufficient to support a determination she was the common-law partner of the deceased contributor.
- b) The Appellant and deceased contributor were married from February 1995 to July 1997. They were legally divorced in July 1997.
- c) In establishing whether the period July 1997 to December 2012 qualifies as a period of common-law cohabitation, the Respondent must defer to precedent set by the Supreme

Court of Canada in *Hodge v. Canada (Minister of Human Resources Development)* (2004 SCC 65). The Court found that co-habitation was a necessary element of a common-law relationship.

- d) The Appellant and deceased contributor, by the Appellant's own admission, maintained separate residences during the period from July 1997 to December 2012, she in the United States and he in Canada.

ANALYSIS

[68] The Tribunal is satisfied by the preponderance of evidence that the Appellant was the deceased contributor's common-law spouse at the time of his death.

[69] In determining whether persons are cohabitating, the Tribunal should consider elements such as continued financial interdependence, a sexual relationship, a common residence, expenses for each other on special occasions, a sharing of responsibilities in running the household, a shared use of assets, shared vacations, continued mutual dependency, the naming of each other as beneficiaries in the will of the other and as a beneficiary under insurance policies, where each kept their clothing, who cared for each person when ill, communication between the parties, public recognition of the relationship, what status was declared by the parties on various applications and other forms, and who took care of the deceased's funeral arrangements: *Betts v Shannon* (September 27, 2001), CP 11654 (PAB).

[70] The Appellant gave credible oral testimony, consistent with her documentary evidence, as to the longstanding common-law relationship between herself and the deceased contributor immediately following their divorce. The evidence canvasses a significant number of the elements of such a relationship and is consistent with and supported by witness statements from other persons.

[71] A significant stumbling block to the Respondent's recognition of a common law relationship between the Appellant and the deceased contributor is the fact that by the

Appellant's own admission, she and the Appellant maintained separate residences during the period from July 1997 to December 2012, she in the United States and he in Canada.

[72] In response, firstly, the Tribunal notes that it is not necessary for a common law relationship that the parties share one residence. In *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, Justice Binnie stated:

The respondent terminated cohabitation and cohabitation is a constituent element of a common law relationship. "Cohabitation" in this context is not synonymous with co-residence.

Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof. Such period of physical separation as the respondent and the deceased experienced in 1993 did not end the common law relationship if there was a mutual intention to continue.

[73] In any event, even though the Appellant and deceased contributor each had their own address, the Appellant in the USA and the deceased contributor in Canada, in order to maintain their respective public entitlements, the Tribunal finds as fact, based on the Appellant's credible and unchallenged evidence, that it is more likely than not that during the period following the divorce and up until the deceased contributor's death, the deceased contributor shared a second residence at the Appellant's home where they maintained a relationship that contained numerous indicia of cohabitation.

[74] For example, each month, for the majority of the month (3 weeks each month according to the Appellant), they lived under the same roof, slept in the same bedroom and maintained sexual relations. The Appellant explained that she allowed the Appellant to continue living with her following the divorce on the condition that he continued to take his medication. This indicates that she attempted to assist him with his illness (bi-polar) even though his illness was a significant factor leading up to the divorce.

[75] They would buy gifts for each other on special occasions. Shortly before his death, the deceased contributor bought the Appellant an engagement ring.

[76] While they resided together, the Appellant prepared meals for the deceased contributor and did his laundry. They went grocery shopping together. They were known as a couple in the community and attended church together.

[77] Financially, they both contributed towards the Appellant's household and prior to his death, the Appellant landscaped the Appellant's front yard at considerable expense. The deceased contributor referred to the Appellant as his common law partner in his February 2004 will in which he left her his worldly provisions. This is a highly significant piece of evidence, as it indicates the deceased contributor also considered the relationship between him and the Appellant to be a common law relationship long after they divorced in 1997.

[78] The Tribunal accepts the Appellant's explanation as to why she was excluded from arranging and participating in the deceased contributor's funeral, given the hostility she described on the part of the deceased contributor's children (one of whom was the named executrix under the will) toward her.

[79] Having regard to the totality of the evidence, the Tribunal is satisfied, on the balance of probabilities, that the Appellant and the deceased contributor continuously cohabitated in a common-law relationship immediately following their divorce in July 1997 until the deceased contributor's death in December 2012.

CONCLUSION

[80] The Appellant is a survivor in accordance with the CPP criteria in relation to the deceased contributor. Accordingly, she is entitled to receive the CPP survivor's pension.

[81] The appeal is allowed.

Jeffrey Steinberg
Member, General Division - Income Security