



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. P. v. Minister of Employment and Social Development*, 2016 SSTGDIS 12

Tribunal File Number: GP-15-2760

BETWEEN:

**A. P.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

and

**P. P.**

Added Party

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

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DECISION BY: Neil Nawaz

HEARD ON: January 19, 2016

DATE OF DECISION: January 25, 2016

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

A. P., the Appellant; P. P., the Added Party;

Sandar Shia, student-at-law in the office of the Added Party's representative;

John Done, the Added Party's representative (observer only).

### INTRODUCTION

[1] On September 20, 2011, the Added Party applied for a *Canada Pension Plan* (CPP) division of unadjusted pensionable earnings (DUPE), claiming that she and the Appellant, her former husband, had last resided together as of April 1, 1996. The Appellant disputed the Added Party's claimed date of separation, and the Respondent accordingly revised the date of separation to May 1, 1995. The Appellant then appealed this determination to the General Division of the Social Security Tribunal (Tribunal) on February 27, 2015.

[2] On August 12, 2015, a member of the Tribunal summarily dismissed the appeal on the grounds that it had no reasonable chance of success. The Appellant applied for leave to appeal this decision to the Appeal Division of the SST on the grounds that he had at least an arguable case that merited a hearing.

[3] The Appeal Division granted leave and heard the appeal. In a decision dated August 12, 2015, it allowed the appeal and referred the matter to the General Division for a hearing *de novo* on the issue of the date of separation between the Appellant and the Added Party. The form of hearing was left to the General Division's discretion.

[4] As explained in the Notice of Hearing dated October 1, 2015, this appeal was heard by teleconference for the following reasons:

- More than one party was to attend the hearing;

- The method of proceeding was most appropriate to allow for multiple participants.
- The method of proceeding provided for the accommodations required by the parties or participants.
- There were gaps in the information in the file and/or a need for clarification;
- The form of hearing was the most appropriate to address inconsistencies in the evidence; and,
- The form of hearing respected the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

## **THE LAW**

[5] Section 55.1 of the CPP governs the circumstances under which a credit split may take place. Following a judgment granting divorce, the Minister shall divide unadjusted pensionable earnings during the period in which the former spouses cohabited.

[6] Subsections 55.1(2) to (4) set out the rules for calculating a period of separation:

2. For the purposes of this section,
  - (a) persons subject to a division of unadjusted pensionable earnings shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other ...
4. In determining the period for which the unadjusted pensionable earnings of the persons subject to a division shall be divided, only those months during which the two persons cohabited shall be considered, and, for the purposes of this subsection, months during which the two persons cohabited shall be determined in the prescribed manner.

[7] Under section 55.2 of the CPP, a written agreement between spouses made after June 1986 is not binding on the Minister for the purposes of a DUPE.

## **ISSUE**

[8] The Tribunal must determine the date the Appellant and the Added Party ceased to cohabitate for the purpose of calculating a DUPE under section 55.1 of the CPP.

## **EVIDENCE**

### *Documents*

[9] The Appellant and his spouse executed a Separation Agreement on October 10, 1996 (p. GT1-29). The terms of the agreement contained the acknowledgement the parties were husband and wife and were married to each other in Sri Lanka on January 17, 1964. The parties indicated that they had been living separate and apart since May 1, 1995. The Appellant and his spouse resided in Ontario when the Separation Agreement was signed.

[10] The Appellant submitted the final page of a declaration that indicated it was signed by the Added Party on May 23, 1996 (p. GT2-18). In it, she stated that she and the Appellant had been living separate and apart under the same roof for at least five years. It was only since April 1, 1996, however, that she had finally made up her mind to end the marriage.

[11] In a letter dated October 15, 1996 (p. GT1-15), Mary-Jo Maur Raycroft, the Added Party's family lawyer at the time, wrote to her client advising her that her divorce could not be finalized until April 1, 1997 because the date of separation was April 1, 1996.

[12] On September 20, 2011, the Added Party applied for a CPP Credit Split (p. GT1-7). She indicated on the application form that she and her former spouse last resided together in April 1996 and were divorced in October 1997.

[13] In a Questionnaire completed at the request of the Respondent on June 1, 2012 (p. GT1-11), the Appellant wrote that he had been separated from the Added Party since May 1, 1995.

[14] In a letter dated June 12, 2012 (p. GT1-16), the Appellant wrote that he had lived separate and apart from the Added Party since May 1, 1995.

[15] In a letter to the Office of the Commissioner of Review Tribunals dated February 10, 2013 (p. GT1-68), the Appellant indicated that, in light of the Added Party's May 1996 Declaration, the date of separation should now be considered May 28, 1991.

[16] In a letter to the Tribunal dated January 17, 2014 (p. GT2-1), the Appellant conceded that a division of pension credits was mandatory but continued to contest the date of separation, relying on the Added Party's declaration of May 23, 1996, in which she acknowledged that she and the Appellant had been living separate and apart under the same roof for at least five years.

### *Testimony*

[17] The Appellant told the Tribunal that he separated from the Added Party no later than April 1991. At the time, he was living with his former wife in their house at X X in X. Actually, the marriage had broken down some time earlier after he discovered evidence of infidelity. However, they continued to live under the same roof for reasons of economy and convenience. He had no intention of moving out because, legally, the house belonged to him as much as it did her. They had no conjugal relations after 1991. They slept in separate bedrooms but continued to maintain a joint bank account. They both had jobs and deposited their wages into the joint account and paid shared living expenses from it.

[18] In May 1995, not long after he retired, his wife went to a lawyer and he was forced out of his own house under a court-ordered interim arrangement. He got his own apartment and set up a separate household.

[19] The Appellant was asked why he changed his position and demanded that April 1991 be recognized as the separation date when he had originally accepted May 1995. He replied that, immediately following the Added Party's application, he had not yet turned up her May 1996 declaration, in which she admitted that they had been living separate a part for at least five years. As he lacked documentary proof of any other date, he argued for May 1995, but he personally always knew that they had been separated much earlier.

[20] On cross-examination, the Appellant was asked whether he recalled bring his wife to work-related Christmas parties during the five-year period leading up to May 1995. He replied that he might have done so, but couldn't remember.

[21] The Added Party testified that between 1991 and 1995, she and her then-husband resided at X X X, X in a four-bedroom single detached home. At that time, their children had grown up and moved out of the house. She slept with her husband in the master bedroom in the same bed, although she doesn't think they were having conjugal relations at that time. They did not sleep apart until May 1995, when her husband moved out. Prior to that, she did all the cooking, laundry and housework. That was her job. They had two vehicles and both drove, although she did the lion's share of it. They would pick up and drop off each other to and from work.

[22] She recalled traveling with her husband to Vancouver to see their daughter in 1993. All three stayed in the same studio apartment. She confirmed that both their wages went into the same joint account, which was opened years previously. It was not closed until 1996. They paid their mortgage and all bills out of it. She was in charge of accounts and bookkeeping.

[23] The Appellant was asked about the May 1996 declaration. She admitted that it was her signature on the page but had no idea why, or under what circumstances, she made that statement. "I signed so many documents around that time."

[24] She conceded that their relationship was poor between 1991 in 1995, but they adhered to long-established customs as husband and wife. She felt like she had to follow a role. "I did what I had to do." They never had a big social life, but they did see people and, as mentioned, attended Christmas parties and other gatherings together.

## **SUBMISSIONS**

[25] In oral arguments and in letters dated October 15, 2012 (p. GT1-41) and November 10, 2015 (p. GT8-1), the Appellant submitted that:

- (a) He and his former wife specifically excluded any division of his pensions in their Separation Agreement of October 10, 1996 (the Appellant later conceded this argument);

- (b) If his pensionable earnings are to be divided, the documentary evidence, specifically his former wife's May 23, 1996 declaration, indicates that they were cohabited no later than April 1, 1991.

[26] In oral submissions and in a letter dated August 1, 2013 (p. GT1-114), the representative for the Added Party made the following points:

- (a) A separation agreement may not deprive a spouse of a division of CPP credits;
- (b) The evidence suggests that the parties stopped cohabiting on May 1, 1995, the date specified in the Separation Agreement, which was rightly accepted by the Respondent;
- (c) The May 1996 declaration was not to be relied upon because it was only one page of a larger document and there was no court file number on it. As far as anyone knew, it might be a draft.

[27] The Respondent did not appear at the hearing, but in a written submission dated November 20, 2015 (p. GDR2-1), it argued that the best evidence for when the parties began living separate and apart was the October 10, 1996 Separation Agreement, which specified the May 1, 1995 date.

## **ANALYSIS**

[28] The Tribunal carefully considered the evidence and submissions from all parties and ultimately decided that, on a balance of probabilities, the most appropriate effective date for the DUPE was May 1, 1995, as was proposed by the Respondent and supported by the Added Party.

[29] It should be noted at the outset that the Appellant's request for consideration and his appeal originally suggested that his former wife had no claim over his CPP pension, as she had waived her rights to it in their separation agreement of October 10, 1996. By application of section 55.2 of the CPP, this position could not be supported, and in January 2014 the Appellant conceded, correctly, that the Respondent was obliged to comply with the Added Party's

application for a credit split. The only issue remaining for this Tribunal was when the Appellant and his former wife began living separate and apart as per subsection 55.1(2) of the CPP.

[30] When a cohabitation ceases depends on many factors, including, but not limited to, whether the parties: (i) intended to live separate and apart; (ii) maintained separate residences and household accounts; (iii) held themselves out as a couple to the outside world and (iv) continued to engage in conjugal relations. Living under the same roof does not necessarily mean that parties are cohabiting; conversely, a couple can be found to cohabit without sharing living quarters.

[31] In this case, several different separation dates were raised as possibilities. There appears to have been a slow estrangement that may or may not have been punctuated by episodes of infidelity. Whatever the cause of marital breakdown, both parties agreed that they continued to live under the same roof until the Added Party eventually hired a lawyer and filed for divorce, which ultimately led to a court order forcing the Appellant out of their matrimonial home in X. The Appellant and the Added Party were in agreement that this event occurred on May 1, 1995, and there was nothing in the documentary record to contradict this as fact. This date was used to mark the parties' formal separation in their Separation Agreement, signed 18 months later.

[32] Nevertheless, despite the Separation Agreement, the Added Party listed April 1, 1996, as the date of separation in her application, a discrepancy whose likely origin was an October 1996 letter written by her family lawyer. It is unclear why Ms. Raycroft cited April 1, 1996 as the date of separation when May 1, 1995 had already been enshrined in the Separation Agreement, but the Added Party subsequently acceded to the latter date following the Appellant's request reconsideration.

[33] At that point, another old document emerged that further muddied the waters. The page from a Declaration, prepared by Ms. Raycroft and signed by the Added Party on May 23, 1996, referred to the parties having lived separate and apart under the same roof for the previous five years. This document prompted the Appellant to shift his position and make an appeal to the Tribunal, claiming April 1, 1991 as the last date of cohabitation.



[34] There is no doubt that the documentary record contains inconsistencies and even contradictions on the issue of the separation date, but in the end the Tribunal must give greatest weight to the Separation Agreement, which was signed by both the Appellant and the Added party following what one assumes were contentious negotiations and submitted to Court for approval. The date of separation is usually a point of dispute in divorce proceedings that carries significant implications, not just in the division of pensions, but also in other issues such as the appropriate valuation of assets in the equalization process. It is typically not a date that is randomly selected but arrived upon by mutual agreement after due consideration of factual circumstances and the parties' interests.

[35] The Appellant submitted that he and his former spouse had effectively ceased to be husband and wife as of April 1, 1991, and he pointed to the Added Party's declaration of May 23, 1996 as evidence of this claim. However, the Tribunal was reluctant to give much weight to a fragmentary document that, as noted by the Added Party's counsel, might well have been a draft. In any case, her statement that she and her husband had been "living separate and part under the same roof for five years" seemed intended not so much to carry legal significance than to be a qualitative description of the (poor) state of her marriage.

[36] In testimony, the Appellant and the Added Party were in agreement that they lived at the same address until May 1, 1995, sharing bank accounts, vehicles and domestic chores. They differed on whether they shared a bed or a social life, but on the latter point the Tribunal was inclined to accept the evidence of the Added Party, who insisted that there were a few social occasions in which they held themselves to the world out as a couple. The last few years of their marriage were likely strained, but it is also clear that they continued to live a semblance of the life they had shared in happier days. A telling detail, highlighted by counsel for the Added Party, was the fact that they continued to pool their wages in the same bank account, each drawing living expenses as needed. This comingling of interests by itself suggested a level of mutual trust that suggested a continuing "cohabitation," consistent with the term as used in section 55.1 of the CPP, that did not end until May 1, 1995.

## CONCLUSION

[37] The Tribunal finds that the Appellant and the Added Party began living separate and apart as of May 1, 1995

[38] The appeal is dismissed.



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Member, General Division