



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *E. H. v. Minister of Employment and Social Development*, 2017 SSTGDIS 9

Tribunal File Number: GP-15-3616

BETWEEN:

E. H.

Appellant

and

Minister of Employment and Social Development

Respondent

and

A. D.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Shane Parker

DATE OF DECISION: January 23, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a Division of Unadjusted Pensionable Earnings (DUPE or Credit Split) was date stamped by the Respondent on July 18, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on October 21, 2015.

[2] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

- a) The issues under appeal are not complex.
- 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.

ISSUE

[3] The Tribunal must determine if the Appellant is entitled to a Credit Split.

THE LAW

[4] Section 55.11 of the *Canada Pension Plan* (CPP) states that section 55.1 of the CPP applies to former spouses who divorced after January 1, 1987.

[5] Section 55.1 pertains to the DUPE/Credit Split. A part of this provision reads:

When mandatory division to take place

55.1 (1) **Subject to this section and sections 55.2** and 55.3, a division of unadjusted pensionable earnings shall take place in the following circumstances:

- (a) in the case of spouses, following a judgment granting a divorce or a judgment of nullity of the marriage, on the Minister's being informed of the judgment and receiving the prescribed information;

(b) in the case of spouses, following the approval by the Minister of an application made by or on behalf of either spouse, by the estate or succession of either spouse or by any person that may be prescribed [...]

[emphasis added here]

[6] Subsection 55.2(3) of the CPP is of particular relevance. It reads:

Agreement binding on Minister

(3) Where

(a) a written agreement between persons subject to a division under section 55 or 55.1 entered into on or after June 4, 1986 contains a provision that expressly mentions this Act and indicates the intention of the persons that there be no division of unadjusted pensionable earnings under section 55 or 55.1,

(b) that provision of the agreement is expressly permitted under the provincial law that governs such agreements,

(c) the agreement was entered into

(i) in the case of a division under section 55 or paragraph 55.1(1)(b) or (c), before the day of the application for the division, or

(ii) in the case of a division under paragraph 55.1(1)(a), before the rendering of the judgment granting a divorce or the judgment of nullity of the marriage, as the case may be, and

(d) that provision of the agreement has not been invalidated by a court order,

that provision of the agreement is binding on the Minister and, consequently, the Minister shall not make a division under section 55 or 55.1.

[7] Subsection 38(5) of *The Family Property Act* of Saskatchewan permits spouses to contractually waive their rights to a CPP Credit Split:

(5) Without limiting the generality of subsection (4), an interspousal contract entered into on or after June 4, 1986 may provide that, notwithstanding the Canada Pension Plan, there may be no division between the parties of unadjusted pensionable earnings pursuant to that Act.

EVIDENCE

[8] The Tribunal considered all the material filed. The following evidence was most significant.

[9] The Appellant and Added Party were married on October 10, 1981 and divorced on August 16, 2004 (see: Certificate of Divorce issued by the Saskatchewan Court of Queen's Bench on August 17, 2004 at GD2-18).

[10] The Appellant and Added Party agreed that they cohabited from October 1981 to July 2003 (GD2-21).

[11] The Appellant and Added Party entered into an Interspousal Agreement (or agreement) on December 29, 2003 which states the following at clause 6(c):

[The Appellant] [...] waives any claim or right that she may have to any pension plan of [the Added Party], including any Canada Pension Plan credits [...] Without limiting the generality of the foregoing, [the Appellant] expressly waives any division of adjusted pensionable earnings under Section 55 or 55.1 of the *Canada Pension Plan Act*.

(GD2-30)

[12] Clause 9(a) of the Interspousal Agreement states that the Appellant and Added Party each had independent legal advice; understands their respective rights and obligations under the agreement, and signed the agreement voluntarily (GD2-33).

[13] Clause 9(b) of the Interspousal Agreement states that both the legal and practical effects of the agreement in each and every respect were explained to both parties, and both acknowledge that the terms are not the result of any fraud, duress or any undue influence. Clause 9(b) further states that the Appellant and Added Party agree that the Interspousal Agreement contains the entire understanding of the parties (GD2-33).

[14] Clause 16 of the Interspousal Agreement provides that the agreement shall be governed by the laws of the Province of Saskatchewan (GD2-34).

[15] The Appellant signed the Interspousal Agreement before a witness on December 15, 2003. The Added Party did the same on December 29, 2003 (GD2-35). The Affidavit of Execution regarding the Appellant's execution of the agreement in the presence of a Notary Public in the State of Wisconsin is found at GD2-42.

[16] The Appellant (on December 15, 2003) and the Added Party (on December 29, 2003) each declared their awareness of the nature and effect of the Interspousal Agreement; that they executed it freely and voluntarily; and that they each received independent legal advice regarding the agreement (GD2-39).

[17] On December 18, 2003 the Appellant's lawyer certified that he fully advised her of the legal significance of the Interspousal Agreement; that she acknowledged having full understanding of the legal consequences of the agreement; and that she signed the agreement in his presence (GD2-40).

SUBMISSIONS

[18] The Appellant submitted in her Notice of Appeal (GD1) that she qualifies for a CPP Credit Split because:

- a) She was not informed of her legal right to receive a Credit Split (she relies upon personal notes and correspondence which predates the execution of the Interspousal Agreement);
- b) The waiver of entitlement to a CPP Credit Split set out in the Interspousal Agreement does not apply, because she could not waive rights of which she was unaware;
- c) She was not fully advised of her legal rights of "any part" of the Interspousal Agreement and did not sign it in her lawyer's presence, and therefore the agreement is null and void;
- d) She may suffer financial challenges once her disability benefit ends, which underlines the personal significance of the Credit Split.

[19] The Respondent submitted that the Appellant does not qualify for a Credit Split because:

- a) She waived her rights to a Credit Split in accordance with the Interspousal Agreement;
- b) The Interspousal Agreement has not been invalidated by a Court order;
- c) The Interspousal Agreement is binding upon the Respondent;
- d) There is no legal basis to grant a Credit Split on compassionate grounds including the health and financial circumstances of an applicant, such as the Appellant.

ANALYSIS

[20] The Appellant must prove on a balance of probabilities that she is entitled to a CPP Credit Split.

[21] Having considered all the material and submissions filed, the Tribunal finds that the Appellant has not met her onus. The Respondent cannot grant a Credit Split under section 55.1 of the CPP because all of the criteria under subsection 55.2(3) are met in this case.

[22] In accordance with paragraph 55.2(3)(a) of the CPP, the Interspousal Agreement was executed after June 4, 1986 and contains a provision (clause 6(c) of the agreement) that expressly mentions the CPP and indicates the intention of the parties that there be no division of unadjusted pensionable earnings under section 55 or 55.1.

[23] In accordance with paragraph 55.2(3)(b) of the CPP, the Interspousal Agreement was governed by the laws of Saskatchewan, which permits opting out of the CPP Credit Split (see: subsection 38(5) of *The Family Property Act* and clause 16 of the agreement cited above).

[24] In accordance with paragraph 55.2(3)(c) of the CPP, the parties entered into the Interspousal Agreement before they were divorced, and before the Appellant applied for a Credit Split. The parties entered into the Interspousal Agreement on December 29, 2003. They divorced in August 2004. The Appellant applied for a Credit Split in July 2014.

[25] In accordance with paragraph 55.2(3)(d) of the CPP, there is no evidence before the Tribunal that clause 6(c) of the Interspousal Agreement has been invalidated by a Court order.

For this reason, the Appellant's claims to not understanding her rights under the Interspousal Agreement, that she did not waive her rights to the Credit Split, and that the Interspousal Agreement should be null and void, have no merit in this appeal. In other words, for her to invalidate her express waiver of rights to a Credit Split (clause 6(c) of the agreement) on the basis that her rights were not explained to her (despite clear provisions in the agreement to the contrary), only a Court order invalidating clause 6(c) could potentially release the Respondent from adhering to the Interspousal Agreement.

[26] Lastly, as a creature of statute, the Tribunal must apply the law as written. The CPP does not allow a Credit Split on the basis of one's personal health and financial circumstances. The Tribunal empathizes with the Appellant, but cannot ignore the law and grant her a Credit Split because of her health and financial situation.

CONCLUSION

[27] The appeal is dismissed.

Shane Parker
Member, General Division - Income Security