



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. N. v. Minister of Employment and Social Development*, 2017 SSTADIS 209

Tribunal File Number: AD-16-1188

BETWEEN:

**S. N.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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Leave to Appeal Decision by: Neil Nawaz

Date of Decision: May 5, 2017

## **REASONS AND DECISION**

### **INTRODUCTION**

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal dated June 29, 2016. The General Division had earlier conducted an in-person hearing and determined that the Applicant's mother, J. C., was not eligible for a survivor's pension under the *Canada Pension Plan* (CPP), because she was not the deceased contributor's common-law partner at the time of his death. The General Division also found that the Applicant was not eligible for the CPP children's benefit, because the deceased contributor did not have custody and control over him and did not contribute to his financial support.

[2] On October 6, 2016, within the specified time limitation, the Applicant's authorized representative filed an application with the Appeal Division requesting leave to appeal on the grounds that the General Division erred in rendering its decisions. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

### **BACKGROUND**

[3] D. S., the deceased contributor, died on April 29, 2010. On June 23, 2010, the Applicant's mother applied for the CPP survivor's pension, as well as the children's benefit on behalf of her five dependent children, whom she claimed the deceased contributor had effectively adopted. The Respondent approved the application in August 2010.

[4] On April 29, 2013, following an investigation, the Respondent terminated the survivor's pension and children's benefits. The Applicant's mother was advised of an overpayment in the amount of \$48,813.04 for the period of May 2010 to April 2013, and the Applicant was advised of an overpayment of \$4,484.08 for the portion of the children's benefit he received after age 18 while attending a college or university.

[5] The Applicant's mother requested a reconsideration of the Respondent's decision. The Respondent denied that request and maintained its original decision. The Applicant's mother appealed the reconsideration decision to the General Division on October 10, 2013.

[6] On April 21, 2016, the General Division conducted a joint in-person hearing in which both the Applicant and his mother gave testimony. In its decision dated June 29, 2016, the General Division found that the Applicant's mother had separated from the deceased contributor in December 2009 and was not his common-law partner at the time of his death. The General Division also concluded that the evidence did not demonstrate that the deceased contributor was contributing financially to the support of his former partner's children or that he had custody and control of them, as provided in subsection 42(1) and section 65.1 of the *Canada Pension Plan Regulations* (CPP Regulations).

[7] On October 6, 2016, the Applicant's mother filed an application requesting leave to appeal to the Appeal Division.

## **THE LAW**

### ***Department of Employment and Social Development Act***

[8] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal.

[9] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[10] According to subsection 58(1) of the DESDA, the only grounds of appeal are the following:

- (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

(d) Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada*.<sup>1</sup> The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada*.<sup>2</sup>

[11] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the applicant does not have to prove the case.

### ***Canada Pension Plan and Associated Regulations***

[12] Subsection 2(1) defines “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 with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor’s death, the ‘relevant time’ means the time of the contributor’s death.”

[13] Subsection 42(1) of the CPP sets out the following definitions:

“Survivor”, in relation to a deceased contributor, means

- (a) if there is no person described in paragraph (b), a person who was married to the contributor at the time of the contributor’s death, or
- (b) a person who was the common-law partner of the contributor at the time of the contributor’s death...

“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 by the contributor while the individual was under twenty-one years of age, and
- (b) an individual of whom, either legally or in fact, the contributor had, or immediately before the individual reached twenty-one years of age did have, the custody and control,

but does not include a child of the contributor who is adopted legally or in fact by someone other than the contributor or the contributor's spouse or common-law partner prior to the

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<sup>1</sup> *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

<sup>2</sup> *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

death or disability of the contributor, unless the contributor was maintaining the child, as defined by regulation;

“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...

[14] Paragraph 44(1)(d) states in part:

Subject to subsection (1.1), a survivor’s pension shall be paid to the survivor of a deceased contributor, who has made contributions for not less than the minimum qualifying period, if the survivor...

- (ii) in the case of a survivor who has not reached 65 years of age,
  - (A) had at the time of death of the contributor reached 35 years of age,
  - (B) was at the time of death of the contributor a surviving spouse with dependent children, or
  - (C) is disabled.

[15] Section 65.1 of the CPP Regulations states that, for the purposes of subsection 42(1) and paragraph 76(1)(d) of the CPP, “maintaining the child,”

- (a) with reference to the child of a deceased contributor, means making periodically, for the child, until the contributor's death, financial provision amounting to not less than the orphan's benefit payable under the Act...

## **ISSUE**

[16] Does the appeal have a reasonable chance of success?

## **SUBMISSIONS**

[17] The Applicant submitted that the General Division erred in law and based its decision on erroneous findings of fact. Specifically, he alleged that the General Division:

- (a) Erred in concluding that the common-law relationship of his mother and the deceased contributor ended prior to the latter's death;
- (b) Failed to properly consider and apply the test for cohabitation set out in *Hodge v. Canada*<sup>3</sup> to the facts of this case;
- (c) Concluded, without adequate or any evidence, that prior to his death, the deceased contributor regarded his common-law relationship with the Applicant's mother to be at an end and had, by his conduct, demonstrated that his state of mind in that regard was settled;
- (d) Asserted that the Applicant's mother had the onus to prove that the relationship had resumed prior to the deceased contributor's death, even though the evidence supported the conclusion that the common-law relationship had not ended;
- (e) Placed undue value on the question of co-residence, when the case law clearly states that it is only one factor to be considered among many and is not synonymous with cohabitation;
- (f) Failed to properly consider the requisite elements that comprise a conjugal relationship as set out in the case law;
- (g) Failed to properly consider case law recognizing that there can be intervals of separation, for one reason or another, within a common-law relationship that does not disturb its status—the law permits bridging gaps, cooling-off periods and discourages placing an inordinate amount of weight on a particular event;
- (h) Misconstrued the evidence related to the deceased contributor's request for a "Change in Beneficiary Form" in February 2010 and equated that to the deceased contributor having actually requested a change in beneficiaries;
- (i) Failed to attribute proper weight to Dr. Brenda Grey's notes from her April 2010 counselling sessions, which reflected the fact that the Applicant's mother and the

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<sup>3</sup> *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65.

deceased contributor loved each other and intended to continue their relationship;

- (j) Improperly regarded the marital status selected by the Applicant's mother and the deceased contributor on their respective income tax returns as determinative, dismissing the likelihood that they were referring to their prior marriages when they marked "divorced," while ignoring their mutual intention to live in a common-law relationship;
- (k) Failed to give proper weight to the evidence filed on behalf of the Applicant, including the testimony of his mother with respect to the following facts:
  - (i) until his death, the deceased contributor supported the children emotionally and financially;
  - (ii) the deceased contributor's time outside the house was motivated by his and the Applicant's mutual interest in the welfare of the children and did not reflect an intention to end the relationship;
  - (iii) the Applicant's mother and the deceased contributor had a common-law and conjugal relationship until the time of the latter's death, as indicated by their ongoing sexual relationship, continuing exchange of text messages, shared assets and accounts, division of domestic responsibilities and mutual participation in home life, as well as the perception of the relationship within the family and the community at large. The General Division also disregarded the fact that the Applicant's mother planned and paid for the deceased contributor's funeral arrangements.

## **ANALYSIS**

[18] It must be said at the outset that many of the Applicant's submissions mirror evidence and arguments that were already presented to the General Division. They amount to a recapitulation of his claim that J. C. was the common-law partner, and S. N. the dependent

child, of the deceased contributor at the time of his death. However, under the narrow parameters of subsection 58(1) of the DESDA, the Appeal Division has no mandate to reassess evidence or re-hear claims for CPP benefits on their merits. I am only permitted to determine whether any of the reasons cited fall within the enumerated grounds of appeal and whether any of them have a reasonable chance of success.

[19] Similarly, I note that many of the Applicant's allegations criticize the General Division for giving certain items of evidence too little, or alternatively too much, weight than they would have preferred. Generally, the Federal Courts have given administrative tribunals charged with finding fact wide latitude in how they weigh the evidence before them. In *Simpson v. Canada*,<sup>4</sup> the appellant's counsel identified a number of medical reports that she said the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Court of Appeal held:

First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact...

[20] These caveats aside, the Applicant has convinced me that his case has a reasonable chance of success on appeal. The jurisprudence surrounding cohabitation is complex, and the courts have made it clear that a multiplicity of factors must be taken into account when determining whether a common-law partnership existed at a given time. The Applicant has raised *Hodge*, and I look forward to seeing further submissions on how, specifically, the General Division departed from it. The Applicant has also correctly noted that co-residence is not to be equated with cohabitation; I would be interested in reviewing relevant case law with a view to assessing whether the General Division, as suggested, overemphasized the deceased's contributor's time outside the family home, from Christmas 2009 to his death four months later. As well, the question of whether the Applicant was a "child" and/or "dependent child" of the deceased contributor under the terms set out in the CPP is a question that is intimately linked to whether, and when, his mother was his common-law spouse.

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<sup>4</sup> *Simpson v. Canada (Attorney General)*, 2012 FCA 82.



## CONCLUSION

[21] I am granting the Applicant unrestricted leave to appeal. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[22] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.



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Member, Appeal Division