



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. M. v Minister of Employment and Social Development and J. E.*, 2018 SST 1400

Tribunal File Number: GP-16-2738

BETWEEN:

M. M.

Appellant

and

Minister of Employment and Social Development

Respondent

and

J. E.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Raymond Raphael

VIDEOCONFERENCE HEARING ON: November 16, 2017

DATE OF DECISION: March 17, 2018

IN ATTENDANCE: M. M., Appellant
J. F., Appellant's daughter (witness)
D. M., Appellant's mother (witness)
J. E., Added Party
Todd Brayer, Added Party's representative
S. E., Added Party's daughter (witness)
B. G., witness by teleconference
J. G., witness by teleconference

REASONS AND DECISION

DECISION

[1] The Appellant is entitled to survivor's benefits.

OVERVIEW

[2] The Appellant (M. M.) claims that she and the deceased contributor T. E. lived together as common-law partners from March 2005 until his death on February 3, 2007.

[3] The Added Party (J. E.) was married to the deceased contributor on the date of his death. She claims that M. M. and T. E. did not start to live together until September 2006. She also claims that they were not common-law partners because of the chaotic nature of their relationship and T. E.'s mental health issues.

HISTORY OF PROCEEDINGS

[4] The Respondent received M. M.'s application for *Canada Pension Plan* (CPP) survivor's benefits on March 27, 2007. It also received an application from J. E. on April 18, 2007. The Respondent initially denied M. M.'s application and allowed J. E.'s application. It subsequently reversed its position, allowed M. M.'s application, and denied J. E.'s application. J. E. appealed

the denial of her application to the Office of the Commissioner of Review Tribunals (OCRT), and on May 23, 2012 a Review Tribunal determined that the survivor's pension was payable to her.

[5] On January 14, 2013 M. M. was granted leave to appeal the Review Tribunal decision to the Pension Appeals Board. On April 1, 2013 the appeal was transferred to the Appeal Division of the Social Security Tribunal pursuant the *Jobs, Growth and Long-term Prosperity Act*. The Appeal Division heard the appeal on May 6, 2014; however, the appeal was heard in J. E.'s absence because she had apparently been misinformed about her entitlement to attend the hearing.

[6] J. E. applied to the Federal Court of Appeal for judicial review. On May 29, 2015, the Federal Court of Appeal allowed J. E.'s application for judicial review and, by consent of the parties, ordered that the matter be remitted to the Appeal Division for redetermination. On August 13, 2016 the Appeal Division allowed M. M.'s appeal and referred the matter to the General Division for a new hearing.

[7] I am the member of the General Division who has been assigned to conduct the new hearing.

ISSUES

1. Did M. M. and T. E. cohabit as common-law partners at the time of his death?
2. If so, had they so cohabited for a continuous period of at least 12 months?

ANALYSIS

[8] M. M. must establish on the balance of probabilities, or that it is more likely than not, that she was cohabiting with T. E. as his common-law partner at the time of his death and that they had so cohabited for a period of at least one year. If she fails to establish this, J. E. will be entitled to the survivor's pension.

Chronology

[9] A brief chronology of the most significant events is set out below.

- **October 29, 1989:** J. E. and T. E. marry.
- **November, 1992:** J. E. and T. E.'s daughter S. E. was born.
- **April 23, 2003:** J. E. and T. E. separate.¹
- **January, 2005:** M. M. and T. E. meet. M. M. alleges that they immediately started to live together at her home in Edmonton. J. E. disputes this and takes the position that they did not start to live together until the summer of 2006.
- **March 1, 2005:** M. M. alleges in her statutory declaration sworn on February 13, 2007 that her common-law relationship with T. E. began this month.² J. E. disputes this.
- **June, 2005:** M. M. alleges that she and her daughter J. F. moved to a farmhouse rented by T. E. approximately 65 kilometers from Edmonton (the farmhouse). J. E. disputes this.
- **September, 2005:** J. F. starts attending the X school which is near the farmhouse. J. E. alleges that J. F. did not start attending this school until September 2006.
- **May, 2006:** T. E. assaults M. M. and enters into a recognizance that he will not have any contact with her and J. F., and that he will not attend within one kilometer of the farmhouse.
- **Summer, 2006:** S. M. moves to the farmhouse and enrolls in the X school. J. E. alleges that M. M. did not move to the farmhouse until this time.

¹ IS4-134: J. E.'s statutory declaration sworn May 14, 2007 states that she was separated from T. E. from April 23, 2003 until February 3, 2007 because of his volatile temper and unpredictable behaviour and his being verbally and physically abusive.

² IS4-20

- **November, 2006:** T. E. was incarcerated for three weeks for breach of the recognizance. He moved back to the farmhouse after he is released.
- **Christmas, 2006:** M. M. and T. E. are engaged.
- **February 3, 2007:** T. E. dies.
- **March 27, 2007:** M. M. applies for a CPP survivor's pension.
- **April 18, 2007:** J. E. applies for a CPP survivor's pension.

Oral evidence supporting M. M.

[10] M. M. testified she met T. E. in January 2005 and that they immediately started to live together; that in June 2005 she and J. F. moved to T. E.'s rented farmhouse; that in September 2005 J. F. transferred to the X school which was near the farmhouse; that in September 2006 S. M. moved in with them and started to attend school with J. F.; and that she and T. E. resided in a common-law relationship until T. E.'s death in February 2007.

[11] She also testified that from January 2005 to June 2005, they lived in Edmonton during the week and at the farmhouse on weekends. They shared the same bedroom, expenses, and household activities. S. M. would occasionally stay with them during this time. In June 2005 she and J. F. moved to the farmhouse and started to live there with T. E.. She moved her belongings there and in September 2005 J. F. started grade nine at the nearby school. M. M.'s mother D. M. had a summer cabin on X Lake which was 15 minutes away, but this was only a summer cabin and they spent family thanksgivings and birthdays there. She described her altercation with T. E. in May 2006. After being in jail overnight T. E. ignored the recognizance order and came back to farmhouse. In November 2006 T. E. was incarcerated for three weeks for breaching the recognizance. M. M. took J. F. and S. M. to see him while he was incarcerated, and she and T. E. talked every night. T. E. came back to the farmhouse when he was released and they were engaged on Christmas day 2006. They continue to live together until T. E. died in February 2007.

[12] M. M. denied ever living at the X Lake cabin and denied moving any of her belongings there. She denied that T. E. had a girlfriend who lived at the farmhouse during the summer of

2005. She denied that T. E. moved to Kelowna in the summer of 2006, and denied that he had a girlfriend in Kelowna at that time. She denied that she had not started to move her furniture to the farmhouse until the summer of 2006. She denied that she had another boyfriend.

[13] J. F. and D. M. gave similar testimony.

Oral evidence supporting J. E.

[14] J. E. testified that T. E. lived at the farmhouse with his girlfriend K. in the summer of 2005. She saw K.'s phone number on his phone statements, and she spoke to her. She also believes that in 2006 T. E. had another girl-friend in Kelowna. Much of her information came from what T. E. told her: he told her that M. M. didn't live with him; that they each had their own place; that they had "humongous" fights; that they were "extremely dysfunctional"; and that M. M. was trying to "weasel" her way into living at the farmhouse. When T. E. visited J. E. in July 2006, he told her that he had been in Kelowna for two months; that he had to cancel his plans because M. M. and J. F. had come to B.C; and that he and M. M. had a big fight. This was when S. M. went to live with T. E. in Alberta.

[15] S. M. testified that when she moved to the farmhouse in July 2006, M. M. and J. F. were starting to bring their things from Edmonton. She started to attend the nearby school in September. She didn't remember whether J. F. had attended that school the year before. When questioned as to why she couldn't remember this, she stated "That was a long time ago." M. M. and T. E. had their "fights" but not "all the time." There was yelling, screaming, and T. E. punched holes in the wall; there were "split-ups" for a few days during which she went to the X Lake cabin with M. M. and J. F.; and on two occasions T. E. threw M. M.'s possessions out of the house. When asked about the X Lake cabin she stated, "Sometimes the three of us (her, M. M., and J. F.) went out there to get away from him...we would just go for a couple of days ... then they made up and we would go back to the farmhouse ..M. M. never moved any of her things there."

[16] S. M. also testified that T. E. moved back to the farmhouse within a few days of his being released from incarceration. Sometimes he referred to M. M. as his "girlfriend", but he never referred to her as his wife. T. E. proposed on Christmas day. This was "exciting" but it was no

secret that they had a “dysfunctional relationship.” She acknowledged that although the relationship was dysfunctional they were “a family.” Sometimes M. M. took her to dance classes, she and J. F. had their chores, they had pets, and it was as if her father and M. M. were husband and wife.

[17] B. G. testified that he and T. E. were friends for 35 years. “There isn’t too much that we didn’t share.” He lives about 20 minutes from the farmhouse. Until M. M. moved in, he and T. E. would talk every day, and got together 2-3 times a week – they would usually meet at a bar near the farmhouse. T. E. was living at the farmhouse with K. in 2005. He went to the farmhouse in the summer of 2005 and he saw that K. was living there – he saw her items in the bathroom. T. E. and K. broke up in 2006. M. M. moved into the farmhouse in September/October 2006 because T. E. wanted her to help take care of S. M.. T. E. never thought of M. M. as his wife or spouse, and thought her to be “more like a baby-sitter” for S. M.. T. E. referred to her as “his part-time girlfriend.”

[18] B. G. also testified that he stopped talking to T. E. in 2006 because of M. M.. He feels that M. M. ruined T. E. with drugs. When discussing M. M. he said, “If she had horns on her head, I would have shot her during deer season.” He denied that T. E. went back to the farmhouse after he was released in December 2006. T. E. lived at his friend D.’s home, and moved out as many of his belongings as M. M. permitted. He visited T. E. at that time since he was away from M. M.. T. E. never referred to M. M. as his wife, but as a “friend with benefits.” He did not know that T. E. proposed to her. T. E. never told him anything about this. He recalled T. E. going to Kelowna, but he can’t remember when or why.

[19] J. G.’s testimony was similar to her husband’s. She testified that T. E. had “cleaned up” but he went back on cocaine because of M. M.. She described M. M. and T. E.’s relationship as “very chaotic.” They were never together for more than two months at a time. T. E. took his belongings to D.’s after he was released, and told her that he didn’t want to have anything to do with M. M.. She wasn’t aware that T. E. had proposed to M. M.. T. E. had girl-friends everywhere. She last spoke to T. E. two days before he died. He was on the patio at the farmhouse, and M. M. was in Edmonton with her “boy toy”. T. E. told her that he had had enough of M. M.’s spending.

My Findings

[20] I find:

1. that M. M. and T. E. started to co-habit as common-law partners by June 2005 when M. M. and J. F. moved to the farmhouse,
2. that J. F. started to attend a school near the farmhouse in September 2005, and
3. that although there were short periods of physical separation in 2006 when T. E. went to Kelowna and during the three weeks that he was incarcerated, they continuously cohabited as common-law partners until T. E.'s death in February 2007.

[21] I found the evidence from M. M., J. F., and D. M. to be consistent and credible concerning M. M. and J. F. moving to the farmhouse in the summer of 2005. I also found that although they may have understated the chaotic nature of M. M.'s and T. E.'s relationship and their evidence displays a disturbing disregard of the recognizance order by T. E., their evidence was credible regarding the desire by both M. M. and T. E. to jointly establish a family with their daughters, regarding their joint activities, and regarding their continuing to cohabit until T. E.'s death in February 2007.

[22] J. E. did not have direct knowledge concerning these events and to a significant extent relied on what others told her. S. M.'s evidence was in significant respects similar to that of the witnesses who testified on behalf of M. M.. S. M. confirmed that despite the chaos they all continued to co-habit at the farmhouse, and that even though M. M.'s and T. E.'s relationship was dysfunctional they were "a family." She did not deny that J. F. attended the X school in 2005, but stated that she didn't remember whether or not she had done so. Even though she saw M. M. moving belongings into the farmhouse the summer of 2006, this does not necessarily mean that M. M. had not previously moved some of her belongings in. She also confirmed that T. E. moved back to the farmhouse after he was released from incarceration, that he and M. M. were engaged on Christmas day, and that they continued to cohabit until T. E.'s death in February 2007. J. G. testified that she last saw T. E. on the patio at the farmhouse a couple of days before he died, which supports that he continued to reside there.

[23] I do not accept the evidence from B. G. and J. G. that K. lived at the farmhouse during the summer of 2005. My impression is that their evidence was coloured by their obvious hostility towards M. M.. Given that we are dealing with events that occurred over 10 years ago, they could easily have mistaken events that occurred in 2004 as having occurred in 2005. Further, this evidence conflicts with the oral evidence on behalf of M. M. that I found credible and the documentary evidence set out below.

[24] I found the following documents most significant:

- The post-hearing letter dated November 21, 2017 from W. M., the X school principal, stating that J. F. had attended that school in 2005-2006 and 2006-2007 and that she lived at the farmhouse at that time.³ J. E. was given the opportunity to examine W. M. under oath but she declined to do so. This letter is from a disinterested person and I accept it as being reliable and accurate.
- It supports that M. M. and J. F. moved to the farmhouse in the summer of 2005. I find J. E.'s submission⁴ that M. M. and J. F. resided at the X Lake cabin during the 2005-2006 school year to be unsubstantiated speculation. It makes no sense that M. M. would disrupt her daughter by placing her in a new school 65 miles outside of Edmonton to live in what has been described as a summer cabin.
- The declaration of common-law spouse for insurance benefits signed by T. E. on June 9, 2005 declaring that M. M. was his common-law spouse and that they had been co-habiting since January 4, 2005.⁵
- The Boilermaker's National Benefit Funds application card signed by T. E. on June 23, 2005 which stated that M. M. was his common-law spouse and that J. M.(M. M.'s oldest daughter) and J. F. were his step-daughters.⁶

³ IS25-5. This letter was admitted pursuant to my November 17, 2017 (IS25) and January 23, 2018 (IS29) directions.

⁴ IS30-1

⁵ AD8-8

⁶ AD8-9

- A Star Choice entertainment services invoice dated October 28, 2005 addressed to M. M. indicating the farmhouse as the service address.⁷
- The May 2016 recognizance order prohibiting T. E. from contacting M. M. and J. F., and from being within one kilometer of the farmhouse.⁸ This supports that M. M. and J. F. were living there at that time.
- Two undated notes from Dr. Adams, family doctor at the West Edmonton Medical Clinic, addressed To Whom This May Concern. One note stated that T. E.'s most recent visit was on November 20, 2006 for help regarding his severe anger and inability to control his actions and mood swings. Dr. Adams stated that T. E. should be in a psychiatric facility and not at the Edmonton Remand Centre where he was currently being held.⁹ The other note confirms that Dr. Adams had been treating T. E. and M. M. as common-law spouses for the last two years.¹⁰
- A letter dated March 22, 2007 from the Boilermaker's National Pension Fund advising M. M. that although she was not designated as beneficiary for T. E.'s death benefit, she was listed as his common-law spouse at the date of his death.¹¹
- A letter from the Boilermaker's National Pension Fund dated June 26, 2009 stating that according to their records T. E. had been in a common-law relationship with M. M. since January 2005 and that he had three dependants S. M., J. M., and J. F..¹²

[25] I am satisfied that it is more likely than not that M. M. and T. E. started to cohabit in a common-law relationship by June 2005 when M. M. and J. F. moved to farmhouse. I am also

⁷ IS-64

⁸ IS4 -112 to 114

⁹ IS4-95

¹⁰ IS4-94

¹¹ IS4-21

¹² AD8-10

satisfied that J. F. attended the X school during the 2005-2006 school year and that she resided with her mother and T. E. at the farmhouse at that time.

[26] The Supreme Court of Canada has stated that cohabitation in the context of a common-law relationship is not synonymous with co-residence, and that two people can cohabit even though they do not live under the same roof. There may be periods of physical separation if there was a mutual intention to continue.¹³ While cohabitation under the same roof is not determinative of a common-law relationship in order to qualify for a survivor's pension, living under the same roof is still a significant factor to be taken into account in assessing the overall relationship.¹⁴

[27] I am also satisfied that although there were short periods of physical separation in 2006 (when T. E. was in Kelowna and when he was incarcerated) there was a mutual intention to continue the common-law relationship. T. E. and M. M. vacationed together after T. E. was in Kelowna and then returned to the farmhouse together. They were in regular contact while T. E. was incarcerated and after being released he returned to the farmhouse.

[28] The Federal Court has stated that the factors that are indicative of a common-law relationship include the following: 1) shelter, including considerations of whether the parties lived under the same roof, slept together, and whether anyone else occupied or shared the available accommodation; 2) sexual and personal behaviour, including whether the parties have sexual relations, maintain an attitude of fidelity to each other, communicate on a personal level, eat together, assist each other with problems or during illness or buy each other gifts; 3) services, including the roles they played in preparation of meals, doing laundry, shopping, conducting household maintenance and other domestic services; 4) social, including whether they participated together or separately in neighbourhood and community activities and their relationship with respect to each other's family members; 5) societal, including the attitude and conduct of the community towards each of them as a couple; 6) support, including the financial

¹³ *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357

¹⁴ *E.S. v. MHRSD* (July 24, 2012), CP 25586 (PAB). This decision is not binding but I find it persuasive.

arrangements between the parties for provision of necessities and acquisition and ownership of property; and 7) attitude and conduct concerning any children.¹⁵

[29] J. E. argues that T. E. and M. M. had a chaotic relationship. This appears to have been true; however, it is not appropriate for me to evaluate the quality of their relationship to determine whether or not it falls within the definition of a “common-law partnership”.¹⁶ M. M. and T. E. lived under the same roof, slept together, shared expenses, shared household tasks, participated in birthday parties, celebrated holidays such as Christmas together, vacationed in B.C. together, and shared in the responsibilities for raising J. F. and S. M.. They were engaged on Christmas day 2006, and I am satisfied that no matter how overly optimistic this may have been they were both determined to be a family and raise their daughters together.

[30] I find that M. M. has established, on the balance of probabilities, that she and T. E. started to live together as common-law partners by June 2005, and that they continued to so cohabit until T. E. died in February 2007.

CONCLUSION

[31] M. M. is entitled to the survivor’s benefits.

[32] The appeal is allowed

Raymond Raphael
Member, General Division - Income Security

¹⁵ *McLaughlin* 2012 FC 556

¹⁶ *McLaughlin*, above