



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. H. v Minister of Employment and Social Development and M. P.*, 2019 SST 1564

Tribunal File Number: GP-17-2477

BETWEEN:

H. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

and

M. P.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: John Eberhard

Appellant represented by: Farid Arbi

Third Party represented by her son C. P.

In person hearing on: January 4, 2019

Date of decision: January 4, 2019

DECISION

[1] The Appellant is not entitled to the Canada Pension Plan (CPP) survivor's pension.

OVERVIEW

[2] This case deals with the competing applications of two women who have both applied for a survivor's pension under the Canada Pension Plan (CPP)¹. Only one can be granted². The deceased contributor, J. P. (the contributor) passed away on June 26, 2011 without a will and leaving a modest estate³.

[3] M. P. (added party) is now 79 years old. She married the contributor in 1965. They were together for over 35 years before separating. They did not divorce. She has lived with her son since the date of separation.

[4] The Appellant's application for a CPP survivor's pension was received by the Minister on June 30, 2011⁴. Her application indicated the marital status at time of death was "common-law". The Appellant indicated in her application that she and the contributor began living at the same address on September 1, 2001 and remained in the same house until shortly before his death. The application was approved for payment effective July 2011.

[5] At a later date, the Minister reconsidered the history of the application and determined that the Appellant was not the common-law spouse of the contributor and thus not entitled to the benefit. Based on new information, the Minister denied the continuation of the benefit in January 2016.

[6] The Minister had also received a survivor's application from the added party. It was dated July 5, 2011. This applicant, for the same benefit, claimed to be the separated spouse of the contributor. She was. The Minister denied the application on August 25, 2011 based on the earlier finding that the Appellant had been found to be the surviving common-law spouse the contributor. The Minister received a second survivor application from the added party dated

¹ Paragraph 44(1)(d) of the CPP provides for the payment of a pension to the survivor of a contributor to the Plan

² Paragraph 63(6) of the CPP

³ Court File para 1

⁴ GD2-528

September 7, 2011. The Minister denied the application on October 25, 2011 for the same reason. A third survivor application (dated November 10, 2015) was received from the added party. This application is pending a decision of this tribunal.

[7] The Minister asserts that the evidence shows that the required elements of a common-law relationship were not sufficient to support a determination that the Appellant and the contributor resided together in a common-law relationship as required by the Plan⁵. The Appellant appealed the reconsideration decision and the demand for the repayment of benefits paid by the Minister.

[8] I dismiss the appeal and confirm the discretion of the Minister to make the demand for repayment of benefits if it so chooses.

PRELIMINARY MATTERS

[9] The matters before me are not unlike the issues that faced Mr. Justice A.D. Grace of the Superior Court of Justice who released a decision on May 4, 2015 under the Style of Cause of Prelorentzos v. Havaris⁶. The facts, as he found them, are recited⁷ in detail. Those civil proceedings dealt with issues of intestate succession which included the requirement to determine who the spouse of the contributor was and thus who would receive a preferential share of the estate. The Judgment of Grace J. permitted the added party to apply to the Court to be appointed as the Estate Trustee to the Estate of J. P.. The Applicant in that case is the Added Party here and the Respondent is the Appellant here.

[10] That lengthy trial concluded with a finding that the added party was entitled to her preferential share of the estate⁸. The Appellant is entitled to support⁹. The Ontario legislation is relevant here only to the extent that evidence relevant in these proceeding under the CPP can be applied to this case.

⁵ Section 2 of the CPP defines a “common-law partner”. A “common-law partner” in relation to a contributor, means 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.

⁶ Court File No: 4702 Dated: 20150504 (referred to here as the “court file”)

⁷ GD1-11 to 62

⁸ pursuant to s. 45(1) of the Succession Law Reform Act (SLRA) and s.1 of O'Reg. 54/95

⁹ pursuant to Part V of the SLRA in a lump sum

[11] The Court of Appeal heard the appeal of the Grace J. decision and issued a judgement on September 16, 2016. The Court dismissed the appeal by the Appellant.

[12] The matters before me deal with the CPP definition of “survivor” and “Common-law Partner”. The Minister requested an oral hearing be held because the Appellant and the added party have conflicting evidence regarding the relationship between Appellant and the contributor as noted in the court file. In addition, the Appellant has declined to provide relevant information and evidence that may preclude her from being found a common-law spouse¹⁰. The issues before me call for an adoption of evidence as recited in the court file and findings of fact necessary to which I have applied the CPP law.

[13] At the outset of the hearing the parties acknowledged that evidence that is relevant to this proceeding from the findings of Grace J. can be applied to this case. In addition, the Representative of the Appellant made reference to specific findings¹¹ and indicated that these were corroborative of a common-law relationship between her and the contributor. I disagree with that conclusion.

[14] There was no issue as to whether or not the deceased spouse was a contributor to the CPP or that he made contributions for not less than the minimum qualifying period before his death. He was a qualified contributor.

THE LAW

ENTITLEMENT TO A SURVIVOR'S PENSION

[15] Paragraph 44(1)(d) of the CPP states that

“... 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

[16] A “survivor” is defined in subsection 42(1) of the CPP as:

“survivor” in relation to a deceased contributor, means:

¹⁰ Court File Para 56

¹¹ Court File para numbers 67, 69, 99, 175 and 189

(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;

[17] The CPP defines a common-law partner in section 2:

"common-law partner", in relation to a contributor, means 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.

ISSUE(S)

[18] The issue before the Tribunal in this appeal is whether the Appellant is entitled to a survivor's pension. Stated another way: was the Appellant the common-law partner of the contributor at the time of his death?

THE FACTS

[19] I accept the facts as outlined in the court file¹² and findings of fact taken from the materials filed and evidence heard. Based on all of the evidence, I find that the Appellant is not entitled to a survivor's pension.

[20] I have reviewed additional documentation referred to by the Appellant before and during the hearing. Some are relevant. Others of little assistance in focusing on the issues (such as the definition of a common-law spouse) that were not dealt with in the civil proceedings:

- The letter date September 29, 2012 from Mr. and Mrs. H.¹³ and affidavit of H. S¹⁴. Neither is persuasive of all of the elements of a common-law relationship.

¹² Abid: GD1-11 to 62

¹³ GD4-10

¹⁴ GD4-10

- The Domestic Contract dated March 10, 2012 between the contributor and the added party gave rise to a financial settlement upon their formal separation and statement that the home was no longer a matrimonial home to the added party does not assist the Appellant. This is not relevant to the issue of the “common-law” finding I must make.
- Tax returns filed by the Appellant showed her as being single¹⁵ do not assist her

The Additional Evidence

[21] The Appellant testified that the contributor’s family did not care for him and the added party left him on several occasions. She stated that the reason she did not go to the hospital in the month before the contributor died was because the added party did not want her there. There was little evidence of relationships between the Appellant and extended family of the contributor. There is evidence that she did not do expected things like exchanging Christmas gifts or cards. The added party said that the Appellant simply had nothing in common with her husband except a common Greek heritage.

[22] The added party testified that she and the contributor maintained a joint bank account until he passed away. She was authorized by the bank to continue to manage the account after his death. She stated that she left her husband because he had mental health issues and was yelling at her to the point where neighbours were being bothered. By living with her son, her husband was content and he visited her often (up to twice a week and on weekends). They had a continuing respectful relationship. When he returned from a visit with his daughter in San Francisco (after suffering a stroke there) the added party was with him every day in the hospital until he died and often slept there. She stated that the Appellant did not visit him in the hospital (except for the actual day of his death) nor did the Appellant assist with funeral arrangements or burial and related costs.

[23] In cross examination, the added party testified that she and the family had come to know the Appellant when the contributor helped her do repairs on her house. They befriended her. The Appellant was destitute and the family agreed to rent her a room. She did so at the house of son, C.. She was expected to pay rent. She often missed paying for the room. She was treated by the

¹⁵ GD4- 16 to 23

family as an acquaintance who had no money and the family felt sorry for her. When the added party moved from the matrimonial home to her son's residence, the Appellant moved from the son's residence. She was expected to pay rent to the contributor and had her bedroom in the location of that was previously occupied by the son, C. She testified as to the bedroom arrangements, consistent with the findings of Grace J.¹⁶ There was no rental agreement. The added party agreed that she had no problem with the friend living in the same house as her husband because she knew they were just friends and he treated her like a sister and not a spouse: "there was no affection between them". The added party said that she had no concern about them travelling together and was satisfied by reference to his TV, shower and location of his clothes and toiletries in his basement room that he was not sleeping with her.

[24] On balance, I accept the evidence of the added party (as did Grace J.) in preference to that of the Appellant. The judge did not find the Appellant to be a credible or reliable witness¹⁷. I also accept the summary of evidence as compiled by the Minister which is set out in detail in the proceedings file¹⁸.

The Minister carried out a review of the facts leading to its original decision.

[25] The Service Canada staff carried out the review of the survivor's pension entitlement of the two applications of the added party for benefits. There is conflicting information that I am not assisted in the determination of the issues before me. For example: Marital status of "common-law" was not claimed on Canada Pension Plan and Old Age Security applications for benefits: The contributor's Old Age Security benefit application dated August 17, 2004 indicates marital status as "separated", Appellant is not included in the area provided for witnesses that can verify the applicant's residence in Canada. The Appellant's Old Age Security benefit application dated November 4, 2013 - no marital status information was provided. Appellant's CPP Retirement pension application dated January 9, 2010 indicates marital status as "single". Appellant's Disability application received on December 18, 2009 indicates marital status as "single". Appellant indicates on the Questionnaire for Disability Benefits received on December 18, 2009 that friends assist with shopping and other activities. There is no mention of a common-

¹⁶ Court File: para. 50, 57 and 58

¹⁷ Court File: para 123

¹⁸ GD7-6 to 9: para 16-19

law spouse within the Disability Application file. Marital status of “common-law” was not claimed on Tax Returns for 2001-2011 by Appellant or The contributor. The Appellant would be aware of the importance of claiming the correct marital status on tax returns with a background in economics. Funeral expenses were not paid by Appellant. The Appellant did not respond to requests for proof of death even though processing of her survivor pension was dependant on the document. The evidence is not conclusive of establishing a common law relationship with the contributor.

Facts¹⁹ arising in the court file are applicable to the issues in this case

[26] Additional facts accepted include the following:

- The contributor's daughter, N. states that Appellant told her that she did not see the contributor as her husband. N. said Appellant encouraged her to “find the contributor a nice lady”. Appellant identified a woman in South Carolina as someone she had in mind, during a Christmas, 2010 discussion²⁰.
- Appellant and the contributor's joint vacation trips began prior to the contributor's separation from his wife²¹.
- N. states that she was often invited to accompany Appellant and on their vacation trips²².
- Son C. and N. state that Appellant and the contributor had separate sleeping arrangements²³.
- L. A., a former neighbour, whose residence backed onto the X property states that the contributor told him that Appellant slept on a different floor and that the contributor regarded Appellant as a sister²⁴.
- The Appellant did not provide all relevant information to the court. The Appellant did not provide tax returns and bank statements even though financial dependency

¹⁹ Prelortzoz v. Havaris - Court File No: 4702 (Dated: 2015/05/04)

²⁰ Court file para # 36 at page 8

²¹ Court file para # 29 at page 7

²² Court file para # 45 at page 9

²³ Court file para # 50 at page 10

²⁴ Court file para # 52

was at issue²⁵. A print-out dated December 1, 2016 of a document indicates Appellant, as the investor, has named J. P. a beneficiary of an RRSP investment related to National Bank Investments; however, the area for spouse information is blank. The completion of the form in this manner would be equally consistent with naming a friend as a beneficiary.

[27] This evidence is not conclusive of establishing a common law relationship with the contributor.

ANALYSIS

[28] I find that there was not a common-law relationship between the Appellant and the contributor at the time of his death. The Minister acknowledges that Appellant and the contributor resided together for a period from approximately 2002 to June 26, 2011, although Appellant has not clarified that a tenant/landlord relationship with the contributor initially existed and then progressed beyond a friendship a few months later. The Appellant indicates that she moved into the residence at X, but subsequently indicates in responses on a questionnaire, that rent wasn't paid. The nature of this type of relationship is unclear but is more consistent with a caregiver/friendship in lieu of rent arrangement. Economic factors explain the documents showing that expenses were shared²⁶. It seems that the Appellant claimed a common-law spouse relationship when it is convenient to save money on such expenses as automobile transfer of ownership fees and insurance and vacation expenses; but, not when it was a disadvantage for tax purposes or helping the contributor or to pay the mortgage on the home. Her neglect of funeral expenses is more consistent with a relationship without fidelity.

[29] The court had determined that a relationship existed within a thin margin but it also acknowledged that the appellant had not provided information that had been requested regarding how Appellant and the contributor represented themselves to Canada Revenue and that this information was not considered when a decision was rendered by the court²⁷. The Questionnaire²⁸ completed by the Appellant (dated September 14, 2017) is evasive and actually

²⁵ Court file para # 26

²⁶ e.g. automobile insurance, car transfer fees, a claimed joint account and shared hotel rooms

²⁷ Court file para #56 at page 11

²⁸ GD2-520

refers to the Court file for answers to many questions. This does not assist her in proving that she was in a common-law relationship with the contributor.

[30] The Minister relies on a Pension Appeal Board (PAB) decision²⁹ to find that the Appellant did not have such a relationship. The law outlines the elements of a common-law relationship to apply to the facts. There are several elements to consider when determining if a relationship is common-law. These can include:

- a) Financial interdependence - e.g. - shared bank accounts, credit cards with the same number, the acquisition and ownership of property.
- b) A sexual relationship - did the parties have sexual relations? If not, why not?
- c) A common residence - did the parties live under the same roof? Did they eat their meals together? What were their sleeping arrangements?
- d) Did the parties buy gifts for each other on special occasions?
- e) A sharing of responsibilities in the running of the household; who prepared the meals? Who washed the clothes? Who did the shopping? Who looked after the maintenance of the home?
- f) A shared use of assets such as cars, boats, etc.
- g) A shared responsibility in the raising of the children;
- h) Shared vacations;
- i) The expectation each day that there will be continued mutual dependency;
- j) Named as beneficiary in the will of the other;
- k) Named as beneficiary in the insurance policy of the other;
- l) Where each of them kept their clothing;
- m) In cases of illness, who cared for the one who was ill? Which one visited the ill one if in hospital?
- n) Who had knowledge of the medical needs of the other?
- o) Communications between the parties;
- p) Public recognition of the parties;

²⁹ Betts v. Shannon (October 22, 2011), CP11654 (PAB)

- q) The attitude and conduct of the community and the parties' families towards the parties, and, in the particular circumstances, the common-law relationship.
- r) What marital status was declared by the parties on various applications, or other forms, completed by them?
- s) Who took care of the deceased's funeral arrangements? Was there a funeral notice, and, if so, how were the parties described therein?
- t) Who was billed for the funeral costs? Who paid for the funeral? Who attended the funeral? Where did they sit? Was there an obituary that provides any clues?

[31] On balance, in applying these elements to the facts of this case, there is insufficient evidence to establish the existence of a common-law relationship. The CPP requires that the Appellant to be cohabiting with the deceased contributor at the time of his death. In the Supreme Court of Canada³⁰ decision, the Court states that a common-law relationship ends:

"when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one."

[32] I find that there is insufficient evidence to establish such a relation in the first place. Indeed, in applying the PAB elements to the facts of this case, there is evidence that a common-law relationship did not exist. Her credibility was suspect because of the conflicting dates she gave related to when she was resident at the home of the contributor and on important matters such as her answer in the application that she would be paying for the funeral expenses of the contributor. She simply wrote³¹ (as she did with many questions): "please see Court order". That was not helpful. There is nothing in the Court decision concerning this issue. In fact, they (and the interment fees) were paid for by the added party³². I agree with the conclusions on missing information from the Appellant with the words of Justice Grace: "Unanswered questions abound"³³.

³⁰ Hodge v. MHRD, SCC 2004 at page 65

³¹ GD2-523

³² GD2-259 and GD2-532

³³ Court file para #129

[33] I find that Subsection 2(1) of the CPP which defines a common-law partner includes the need to prove a conjugal relationship. Conjugal implies a commitment of both common-law partners to live in a marriage-like state, thereby assuming those marital rights, duties and obligations typically applied to married couples. The question for me is whether the relationship between the Appellant and the contributor in the year before his death was conjugal in nature?

[34] When considering the level of commitment to live as man and wife, one looks at such related evidence as the documents that support the notion of a common-law partnership such as financial contributions or commitment of the two individuals towards each other. I am not satisfied on the basis of the Court record or the testimony of the Appellant there was a continuing commitment by her to the contributor until his death. I am satisfied that the many of the elements referred to in *Betts v. Shannon* have not been demonstrated.

[35] Here the added party seeks a survivor's pension. The spouse had removed of herself and son from the matrimonial home. Her marriage status is determinative of this appeal but I would add that they continued a relationship after separation. She demonstrated care and mutual support of the contributor not unlike that of one where a spouse might be hospitalized or incarcerated or on a work or vacation absence. The reasons for her living with her son at the time of the death of the contributor are now known and understood. If nothing else, her admission of this fact on her processing of the estate papers (and death certificate) illustrates the credibility of the added party and I accept the balance of her evidence and testimony to be believable and reliable.

[36] The Supreme Court of Canada has noted³⁴ that 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* (my emphasis).

[37] There is insufficient evidence concerning both the intentions of the parties and the substance of the relationship that in the 12 months preceding the death of the contributor, to satisfy me that the onus upon the Appellant has been discharged.

[38] The evidence shows that the required elements of a common-law relationship were not sufficient to support a determination that the Appellant and the contributor resided together in a

³⁴ Hodge v. MHRD, SCC 2004 at page 65

common-law relationship. She may have been cohabiting but was not in a conjugal relationship with the contributor.

[39] Under the Canada Pension Plan, a “survivor” is a person who legally married to the deceased at the time of death, if there was no common-law relationship. I find here that there was no common-law relationship between the contributor and the Appellant. I find that the added party is the spouse of the deceased and entitles to the survivor benefit.

CONCLUSION

[40] The appeal is dismissed.

John Eberhard
Member, General Division - Income Security