



Citation: *M. J. v Minister of Employment and Social Development and P. S.*, 2019 SST 48

Tribunal File Number: AD-18-518

BETWEEN:

**M. J.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

and

**P. S.**

Added Party

---

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

---

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: January 23, 2019

## **DECISION AND REASONS**

### **DECISION**

[1] The appeal is allowed, and the decision that the General Division should have given is made. The survivor benefit is payable to the Appellant.

### **OVERVIEW**

[2] The Appellant (M. J.) married the deceased (G. J.) in October 1960. They separated in 1988 but did not divorce. The Added Party (P. S.) lived in a common-law relationship with G. J. starting in 1989. In 2012, the condominium where P. S. and G. J. lived was sold, and G. J. moved to X, a retirement home. He died in 2013. M. J. applied for a Canada Pension Plan survivor's benefit as G. J.'s legal spouse; P. S. applied for this benefit as his common-law partner.

[3] The Minister of Employment and Social Development (Minister), refused M. J.'s application and granted P. S.'s application for this pension. M. J. appealed the Minister's decision to the Tribunal. The Tribunal's General Division dismissed the appeal, finding that P. S. was G. J.'s common-law partner. M. J.'s appeal is allowed because the General Division failed to observe a principle of natural justice when it restricted cross-examination at the hearing. It also made an error in law when it failed to consider G. J.'s diminished capacity when it assessed his intentions, and it based its decision on an erroneous finding of fact regarding whether P. S. and G. J. had separated. The decision that the General Division should have made is given; P. S. was not in a conjugal relationship with G. J. at his death, therefore the survivor benefit is payable to M. J., who was his spouse.

### **PRELIMINARY MATTERS**

[4] At the appeal hearing, I asked the parties to confirm what remedy they were seeking on appeal. Counsel for the Minister requested additional time to provide written submissions regarding the remedy he was seeking, particularly whether the appeal should be reconsidered by a different General Division member if it were to be referred back to the General Division. I granted him additional time to file submissions and time for the other parties to respond to his

submissions. In submissions, the Minister withdrew the request to have the matter reconsidered by a different General Division member.

[5] M. J. filed documents with the Appeal Division that were not part of the General Division record.<sup>1</sup> New evidence is not ordinarily considered on an appeal.<sup>2</sup> These documents do not fall within any of the exceptions to this rule. I did not consider them when making the decision below.

## **ISSUES**

[6] Did the General Division fail to observe a principle of natural justice when it restricted one party's cross-examination of P. S.?

[7] Did the General Division base its decision on an erroneous finding of about whether X was a long-term care facility or a retirement residence?

[8] Did the General Division make an error in law when it based its decision on G. J.'s expressed intentions without considering his diminished mental capacity and the fact that his representative was appointed as his medical health representative?

## **ANALYSIS**

[9] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider. They are that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.<sup>3</sup> M. J.'s grounds of appeal are considered in this context below.

### **Issue 1: Natural Justice**

[10] The principles of natural justice are concerned with ensuring that all parties to a claim have an opportunity to present their full case to the Tribunal, to know and answer the legal case

---

<sup>1</sup> These documents were included in AD6, AD8, and AD9.

<sup>2</sup> *Canada (Attorney General) v O'Keefe*, 2016 FC 503.

<sup>3</sup> DESD Act s 58(1).

against them, and to have a decision made based on the law and the facts by an impartial decision-maker. In this case, the hearing was lengthy. It began by in-person hearing in August 2017, but was not completed, so it continued by videoconference in October 2017. Although all of the evidence was presented by the end of this appearance, the submissions had not been, so the General Division member allowed the parties to file their submissions in writing, which they did.

[11] Toward the end of the October 2017 appearance, P. S. was called as a witness. His counsel and the General Division member were concerned about running out of time at the appearance. P. S.'s counsel stated that she wished to ask P. S. only three or four questions and suggested that cross-examination be limited to matters raised in these questions.<sup>4</sup> M. J.'s representative responded that she did not know how long her cross-examination would take because she did not know what questions P. S.'s counsel would ask.<sup>5</sup> The General Division member stated that the cross-examination must be relevant.<sup>6</sup> During the cross-examination, counsel for P. S. objected to a question from M. J.'s representative because it did not relate to a question that had been asked in her questioning. The General Division member stated that they were "running out of time" and that cross-examination should be limited to questions related to the examination in chief. P. S. did not answer any more questions from M. J.'s representative.<sup>7</sup>

[12] M. J.'s representative now argues that the General Division failed to observe a principle of natural justice because it unduly restricted her cross-examination of P. S., which prevented her from fully presenting her case to the Tribunal. The right to cross-examine other parties in a proceeding is fundamental to a party's ability to present its case. The scope of cross-examination is not limited to matters raised only in a party's examination in chief but extends to the whole case.<sup>8</sup> By restricting M. J.'s ability to cross-examine P. S. only to issues raised in the examination in chief, the General Division unduly limited M. J.'s ability to present her case. This is a breach of natural justice.

---

<sup>4</sup> General Division hearing recording at approx. 2:49:20, although the exact time may be different depending on the device used to listen to the recording.

<sup>5</sup> *Ibid.* at approx. 2:50:00.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* at approx. 3:09:50.

<sup>8</sup> *Jones v Burgess*, (1914) 43 NBR 126.

[13] A party who wishes to rely on a failure to observe a principle of natural justice on appeal must raise this at the earliest practical opportunity. M. J. did so. She followed the General Division member's direction at the hearing regarding her questioning. Despite the fact that M. J.'s representative is a retired police officer, she would not reasonably have known that the General Division member erred when it restricted her cross-examination and that she should have objected to this at the hearing. This ground of appeal was presented in the application to the Appeal Division, which is the first reasonable opportunity to do so.<sup>9</sup>

## **Issue 2: Erroneous finding of fact**

[14] Another ground of appeal under the DESD Act is that 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 that was before it. To succeed on this basis, M. J. must prove three things: that the finding of fact was erroneous, that it was made in a perverse or capricious manner or without regard for the material before the General Division, and that the decision was based on this finding of fact.<sup>10</sup>

[15] M. J. submits that the General Division erred when it found as fact that X was a long-term care facility. She argues that X was an independent seniors' residence and that G. J. would have had a certain level of independent functioning to be able to live there. I have read the General Division decision carefully. It makes no finding of fact regarding what kind of facility X is. Therefore, the decision could not have been based on any erroneous finding of fact in this regard. This ground of appeal fails.

[16] However, the General Division did base its decision on an erroneous finding of fact made without regard for all of the material that was before it: the General Division found as fact that G. J.'s and P. S.'s separation was involuntary and necessitated by G. J.'s declining health. This finding of fact is erroneous. G. J. took active steps to separate his affairs from P. S.'s in 2010 when he met with counsel to change his will and Power of Attorney documents. In addition, at that time, he severed the joint tenancy of the condominium. There is no indication that he was

---

<sup>9</sup> See also *M. G. v Minister of Employment and Social Development*, 2015 SSTAD 413, where the Appeal Division found that raising this issue in the application for leave to appeal was the first reasonable opportunity to do so.

<sup>10</sup> *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319.

influenced by anyone to do this or that it was done against his wishes. He took these steps before any questions arose about G. J.'s mental capacity. In addition, G. J.'s representative sent an email in June 2012 that stated that G. J. had reluctantly agreed to move to X. He was not forced to move there; he agreed to do so in spite of his diminished mental capacity. The General Division did not consider this undisputed evidence. The decision was based on its finding of fact that G. J.'s and P. S.'s separation was involuntary. Therefore the appeal must be allowed on the basis that the General Division based its decision on an erroneous finding of fact under the DESD Act.

### **Issue 3: Error in law**

[17] Another ground of appeal under the DESD Act is that the General Division made an error in law. The Claimant argues that the General Division did so in this case because it failed to consider that G. J. had diminished capacity, to the point that his representative made decisions on his behalf under power of attorney and as his medical health representative. It is not disputed that G. J. had diminished capacity prior to his death. In August 2011, Dr. Cotterell reported that it was in G. J.'s best interest to have his attorney take over full management of his affairs.<sup>11</sup> When the General Division analyzed the evidence, it considered whether the parties had, by their acts, shown a mutual intention to live together in a marriage-like relationship of some permanence.<sup>12</sup> When it did so, the General Division considered and weighed conflicting evidence about G. J.'s intentions after the condominium was sold without taking into consideration that his mental capacity was diminished to the point that his attorney made decisions on his behalf before then. This would impact his capacity to act on or express his intentions. It is an error in law not to consider this when making a decision based on that party's intentions.

[18] The appeal is allowed because the General Division failed to observe a principle of natural justice, based its decision on an erroneous finding of fact under the DESD Act, and made an error in law.

---

<sup>11</sup> GD2-56.

<sup>12</sup> General Division decision at para 133.

## REMEDY

[19] Because the appeal is allowed, I must decide what remedy to give. The DESD Act sets out what remedies the Appeal Division can give on an appeal.<sup>13</sup> This includes making the decision that the General Division should have made or referring the matter back to the General Division for reconsideration. The DESD Act also allows me to decide questions of law or fact necessary to dispose of an appeal.<sup>14</sup> It is appropriate that I make the decision that the General Division should have made in this case. Most of the facts are not in dispute. There is an extensive written record and a recording of the entire General Division hearing. I have reviewed the written record and listened to the hearing recording. In addition, at the appeal hearing, all parties requested that I make the decision that the General Division should have made. M. J. argued that although she was prejudiced when the General Division restricted her cross-examination of P. S., there was still sufficient evidence upon which the decision could be made, and her counsel asked that I do so. Finally, there has been a significant delay in this proceeding. G. J. died almost six years ago. M. J. and P. S. both applied for the survivor benefit in 2013.

[20] The following facts are not in dispute:

- M. J. and G. J. were married in 1960. They separated in 1988 but never divorced.
- G. J. and P. S. began a common-law relationship in 1989.
- They lived together in a home and then a condominium that they owned together.
- The relationship was volatile, and police were called on more than one occasion.<sup>15</sup>
- The police visited the home in January 2010 due to allegations of domestic assault. The police report states that G. J. was adamant that he wanted to end his relationship with P. S.

---

<sup>13</sup> DESD Act s 59(1).

<sup>14</sup> *Ibid.* s 64(1).

<sup>15</sup> See police reports, GD35.

- In 2010, G. J. changed the title to the condominium from joint tenants to tenants in common. He also changed his will and Power of Attorney to remove P. S. and name his children as beneficiaries.
- In June 2011, G. J. closed all joint accounts with P. S. except the one used to pay the mortgage on the condominium.
- In August 2011, Dr. Cotterell reported that G. J. was not capable of managing his affairs. Dr. Cotterell also reported that G. J.'s relationship with P. S. was not monogamous, that there was concern about domestic violence, and that G. J. was afraid to leave the relationship due to his fears of being alone and residual feelings for P. S. It was in G. J.'s best interest for his Power of Attorney to take over management of his affairs.<sup>16</sup>
- After this, G. J.'s representative took over management of his affairs.
- In February 2012, P. S. removed G. J. as a beneficiary from his extended healthcare plan.
- P. S. also listed the condominium for sale without notice to G. J. or his attorney by power of attorney.
- Another police report dated June 2012 states that G. J. and P. S. were separating.
- G. J. and P. S. lived in the condominium until it was sold in July 2012. The net proceeds of sale and contents were divided between G. J. and P. S.
- When the condominium was sold, G. J. moved to X, a retirement residence.
- Before the sale of the condominium, G. J. and P. S. did not have sexual relations. G. J. was impotent.

---

<sup>16</sup> GD21-2.



- G. J. was involved with his church and attended services regularly. He also performed the role of verger at Thursday services. P. S. helped him with this.
- After the condominium was sold, P. S. continued to take G. J. to church services until shortly before G. J.'s death.
- G. J.'s family arranged a celebration of life. P. S. did not attend.
- P. S. participated in a funeral service at G. J.'s church. At this service, G. J.'s immediate family was not mentioned.

[21] In addition, M. J.'s representative presented evidence that supported her position that P. S. was financially, emotionally, and physically abusive to G. J. This evidence included:

- statements from a neighbour that she could hear arguments between P. S. and G. J.;
- Police reports of physical altercations between P. S. and G. J.;
- allegations of P. S.'s infidelity and his failure to care for G. J.'s needs as his health declined;
- P. S.'s use of jointly borrowed funds to buy out a car lease and register the vehicle in his name;
- P. S.'s refusal to equitably divide the contents of the condominium after its sale;
- his failure to pay his share of bill and debts;
- his harassment of G. J. when he lived at X, which prevented G. J. from fully integrating into that community; and
- his refusal to "play by the rules" of X and X (the care facility where G. J. stayed immediately before his death).

M. L. (M. J.'s son in law) also testified that in the last few years before G. J.'s death, P. S. did not join G. J. at their home to celebrate Christmas and that although M. L. visited G. J. daily at X and X, he never saw P. S. there.

[22] In contrast, P. S. presented evidence that he continued to be in a common-law relationship with G. J. until his death. His evidence included:

- G. J. was moved to X against his wishes,
- G. J.'s attorney under the power of attorney worked against G. J.'s wishes and separated them physically and financially,
- he continued to visit G. J. very frequently at X and X and to take him to church services and on other outings, and
- he and G. J. presented themselves to the world as common-law partners despite their physical separation after the condominium was sold.

P. S. presented also an affidavit from L. S. that included statements about G. J.'s participation in church activities and the nature of his relationship with P. S.<sup>17</sup> However, L. S. did not testify and was not available for cross-examination despite the fact that P. S. presented other witnesses.

[23] The *Canada Pension Plan* states that a survivor benefit is payable to the survivor of a deceased contributor.<sup>18</sup> The survivor is the person who was married to the contributor unless there was a person who was the common-law partner of the contributor at the time of their death.<sup>19</sup> A common-law partner is a person who was cohabiting with the contributor in a conjugal relationship at the time of the contributor's death, having so cohabited with the person for at least one year.<sup>20</sup>

[24] It is not disputed that G. J. and P. S. lived in a common-law relationship for many years. The question that must be answered is whether the common-law relationship ended when their condominium sold and G. J. moved to X. The Supreme Court of Canada teaches that when deciding whether two people are in a common-law relationship should include examination of a number of factors, including (i) economic support, (ii) children, (iii) services provided to one another, (iv) social activities, and (v) the societal perception of the couple.

---

<sup>17</sup> GD2-89.

<sup>18</sup> *Canada Pension Plan* s 44(1)(d).

<sup>19</sup> *Ibid.* s 42(1).

<sup>20</sup> *Ibid.* s 2(1).

**(i) Economic Support**

[25] When G. J. and P. S. moved to British Columbia, they purchased a home together. They later sold this and jointly purchased a condominium. They lived together in this home until its sale in July 2012. They shared expenses. M. J.'s witnesses testified that P. S. did not always pay his share of expenses and used joint funds for his own purposes: for example, he took a joint loan to pay off a car lease and registered the car only in his name, and he used money meant for groceries for other purposes. In addition, G. J. closed all of their joint accounts in 2010, except the one that was used to pay the condominium mortgage. He also took active steps to separate his finances from P. S.'s, changing his will and Power of Attorney to remove P. S. as a beneficiary and severing the joint tenancy of the condominium. P. S. did not challenge this evidence. I give great weight to this evidence. It demonstrates that G. J. intended to separate his finances from P. S.'s.

[26] P. S. also stopped providing economic support for G. J. Early in 2012, P. S. removed G. J. as a beneficiary on his extended health care plan. He did this despite the fact that G. J. had a heart condition and dementia, which required treatment. There was also evidence that in 2012, G. J. had eye surgery and required eye drops afterward.

**(ii) Children**

[27] G. J. had adult children from his marriage to M. J. There was no evidence that P. S. had any children. The parties did not have any children together.

[28] M. J.'s witnesses testified that at the beginning, they supported the relationship between G. J. and P. S. G. J.'s representative and her husband even helped them buy their first home in British Columbia together. However, as time passed, G. J.'s children were less supportive of the relationship. Their evidence was that this was because P. S. was financially, emotionally, and physically abusive. They provided some evidence to support this. However, whether P. S. and G. J.'s relationship was abusive is not a relevant consideration. I must decide whether P. S. and G. J. were in a conjugal relationship at the time of G. J.'s death, not whether the relationship was a positive one for either of them. Therefore, not much weight is placed on this evidence.

**(iii) Services, Social Activities, and Societal Perception**

[29] There is no question that G. J. and P. S. provided services for one another through most of their relationship. However, the unchallenged testimony at the General Division hearing was that in the years just before the sale of the condominium, P. S. stopped providing some services to G. J. There were complaints that P. S. did not pay his share of the bills and that he did not cook meals or buy food for G. J. Some witnesses testified that G. J. lost weight before the condominium sale.

[30] P. S. testified that he visited G. J. at X and took him on outings and to his home for some meals. Unfortunately, little detail was given in this evidence.

[31] It is clear the G. J. was involved in his church. He regularly attended services and performed the role of verger for a long time. As his health declined, P. S. assisted him by helping him perform verger duties and taking him to services.

[32] I do not place much weight on L. S.'s evidence. It is not clear that he discussed the move to X with G. J. It is also not clear whether he had any involvement with G. J. and P. S. outside of the church. In addition, his evidence could not be tested in cross-examination because he did not testify.

[33] P. S. and his witnesses testified that G. J. and P. S. presented themselves to the world as a couple after the condominium sold and that their church participation supports this. The comments in the funeral guest book also support this; however, it is not clear whether those writing the comments were churchgoers or whether they knew G. J. in another context. Therefore, not much weight is given to this evidence.

[34] I must also consider that P. S. and G. J. did not celebrate Christmas together for two years before G. J.'s death. There was no evidence that they celebrated any other important holidays or functions together. P. S. also stopped going to G. J.'s daughter's home for Sunday dinners some time before the condominium was sold. This evidence weakens P. S.'s position that he and G. J. presented themselves to the public as a couple until his death.

[35] There was no evidence that G. J. was providing any services to P. S. at or after the time of the condominium sale.

[36] I am therefore satisfied, on balance, that G. J. and P. S. did not provide services to each other after the condominium sold. They attended only church services together, and it is not clear that they presented themselves as a couple in all aspects of their lives.

#### **(iv) Sexual and Personal Behaviour**

[37] G. J. and P. S. had a sexual relationship for many years. There are allegations that P. S. was unfaithful to G. J., but that in itself does not end a relationship. G. J. was impotent in the years before his death. As a result, he and P. S. did not have a sexual relationship. The evidence of their other behaviour paints a picture of a tumultuous relationship marred by physical violence, alcohol abuse, and health issues. P. S. did not challenge the evidence that he called G. J. repeatedly while G. J. was at X. G. J.'s representative sought out advice on how to stop this because it was harassment.

[38] The bulk of the evidence is also that G. J.'s daughter and son-in-law visited G. J. daily—or sometimes twice a day—while he was at X and X. P. S. visited him there, but not as frequently. He did not see G. J.'s family members when he visited.

[39] G. J. and P. S.'s behaviour does not support the argument that they continued to be in a conjugal relationship after the condominium sold.

#### **(v) Shelter**

[40] The parties clearly lived in shared shelter for a long time, until the condominium was sold in July 2012. While parties may continue to remain in a common-law relationship when their physical separation is involuntary,<sup>21</sup> this is not so in every case. In this case, G. J. took active steps to separate his finances from P. S.'s before their physical separation. P. S. listed the condominium for sale without notice to G. J. or his attorney under the power of attorney. P. S. testified that he wished to then rent accommodation for himself and G. J., but he provided no

---

<sup>21</sup> *Hodge v Minister of Human Resources Development*, 2004 SCC 65.

explanation for selling the condominium under these circumstances. I find that it was more likely that P. S. wished to separate from G. J. and listed the condominium for sale for this reason.

After reviewing all of the evidence, I find that it is more likely than not that G. J. and P. S. were not in a conjugal relationship at the time of G. J.'s death. They did not live in the same home. P. S. listed that home for sale without notice to G. J. When their condominium was sold, the proceeds and contents were divided. Before being found incapable, G. J. took significant steps to separate his finances and legal status from P. S.'s by changing his will and Power of Attorney and by severing the joint tenancy of their property. He also closed all joint bank accounts except the one needed to pay the mortgage. P. S. removed G. J. from his extended health care coverage. P. S. used joint funds for his own purposes. There was violence between P. S. and G. J., and G. J. reported to police—on at least two occasions—that he was separating from P. S. G. J. and P. S. did not have a sexual relationship. Although G. J. and P. S. continued to attend church together, and P. S. helped G. J. with his duties there, they did not celebrate Christmas together, and there was little evidence that they socialized together.

## CONCLUSION

[41] The appeal is allowed. P. S. is not entitled to the survivor benefit. M. J.'s appeal is allowed, and because she was G. J.'s legal spouse, the survivor benefit is payable to her.

Valerie Hazlett Parker  
Member, Appeal Division

HEARD ON:	January 8, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. L., Representative for the Appellant  Doug Roberts, Counsel for the Appellant  Matthew Vens, for the Respondent

	<p>P. S., Added Party</p> <p>Victoria Pitt, Counsel for the Added Party</p>
--	---------------------------------------------------------------------------------