



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *A. B. v Minister of Employment and Social Development*, 2019 SST 418

Tribunal File Number: GP-17-2523

BETWEEN:

A. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Antoinette Cardillo

HEARD ON: January 23, 2019

DATE OF DECISION: March 28, 2019

DECISION

I find that the Appellant is the survivor of the contributor in accordance with the *Canada Pension Plan* (CPP). Therefore, she is entitled to receive the CPP survivor's pension.

OVERVIEW

[1] The Respondent received the Appellant's application for a CPP survivor's pension on January 31, 2017.¹ The Appellant stated that she married the contributor on February 16, 1963, and that she was divorced when she applied. The contributor passed away on January 8, 2017. The Respondent denied the application initially and on reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal.

ISSUE

[2] I must decide whether the Appellant was in a common-law relationship with the contributor when he passed away, in accordance with the criteria set out in the CPP.

ANALYSIS

i. Applicable CPP Provisions

[3] The CPP² sets out that a survivor's pension must be paid to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period, subject to the survivor meeting certain conditions.

[4] A survivor,³ in relation to a deceased contributor, means a person who was the common-law partner of the contributor at the time of the contributor's death or, if there is no eligible common-law partner, a person who was married to the contributor at the time of the contributor's death.

¹ GD2-4.

² CPP, s 44(1)(d).

³ CPP, s 42(1).

[5] A common-law partner,⁴ 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. In the case of a contributor's death, the "relevant time" means the time of the contributor's death.

ii. Documentary Evidence

[6] According to the application for survivor's pension, the Appellant and the contributor married on February 16, 1963.

[7] According to the Certificate of Divorce⁵ the Appellant submitted, they divorced on September 25, 1993.

[8] According to the Statutory Declaration of Common-law Union⁶ signed on January 31, 2017, the Appellant stated that she lived with the contributor from August 1, 2013, to August 29, 2015. The contributor had life insurance, and she was the beneficiary. They did not share any property or bank accounts. According to a letter attached to the Declaration, the Appellant specified that they were in a common-law relationship for eight years and that after August 29, 2015, the contributor moved in just a few doors down from her.

[9] A letter from the Appellant's parish priest⁷ dated June 1, 2017, stated that, despite the Appellant and contributor's legal separation, she still took care of him. He needed care because he was seriously ill. The priest added that they had still been in love, and during the last years, she was close to the contributor for his surgeries and other medical needs.

[10] A letter from the daughter of the Appellant and contributor dated June 7, 2017,⁸ indicated that they were separated and lived together again on many occasions. The Appellant (her mother) had no choice but to separate from the contributor (her father) because he was an extremely jealous and possessive man. Nevertheless, they still loved each other, and the Appellant still took

⁴ CPP, s 2(1).

⁵ GD2-30.

⁶ GD2-10.

⁷ GD2-51.

⁸ GD2-48.

care of him out of love. She went with him to his medical examinations. He moved in with her on many occasions so that she could care for him after each of his surgeries because he could not look after himself. Over the years, he underwent, among others, the following surgeries: three complete reconstructive knee surgeries, gallbladder surgery, and heart surgery (in 2008, 2012, and 2016). The Appellant even went with him to Montréal for his last surgery, and she was by his side in New Brunswick before he passed away. The contributor talked as if they were still married. In his eyes and in the eyes of the Appellant, they were still married. Starting in 2004, her parents went through temporary separations, but they always moved back in together because they loved each other. Even though they did not live under the same roof, the contributor constantly visited the Appellant. He had lunch at her home, and they often went to church and out to restaurants together. They would go to the cottage together and had other outings. He would even go to her home on a regular basis for tea in the afternoon. They would go to all family gatherings together. In 2015, the Appellant fell on the ice and was injured. That is why she had stated that she could no longer care for the contributor; it was by no means because of a lack of love. The contributor got mad, and on impulse he changed his will.

[11] A letter from the family doctor for the Appellant and contributor dated June 10, 2017,⁹ indicated that the Appellant and the contributor had a rather unstable relationship during the last years. They were separated for close to 17 years. They regularly spent time together between 2004 and 2008, and they eventually reconciled officially in 2008. They went through several short separations from 2008 to 2015 and ultimately separated again in August 2015. The periods of separation from 2008 to 2015 varied from a few weeks to a few months. Despite all the periods of separation, the Appellant was always there for the contributor. The contributor had many health problems and, anxious as he was, he often asked the Appellant to come with him to his medical appointments and operations and to help him when he was in post-operative recovery or when he was not feeling well. It was always the Appellant who cared for him after his four heart surgeries (in 2004, 2008, 2012, and 2016). For the contributor, the Appellant was always his wife, and he never admitted or accepted that they were separated. In fact, he always denied

⁹ GD2-60.

that they had separated when the doctor asked him about it during visits to the practice, even though the Appellant told the doctor that they had separated.

[12] According to the evidence on file, a design dated September 27, 2016, and a photo¹⁰ after the contributor's death showed the Appellant's name engraved on the contributor's headstone.

[13] According to a letter from the Appellant dated September 27, 2017,¹¹ the contributor passed away on January 8, 2017. She was with him during his surgery in Montréal, and she visited him regularly afterward when he returned to New Brunswick. She made all the funeral arrangements for the contributor. She separated from him because he was a very jealous man and had mental health issues that he did not want to admit or accept. She indicated that they lived together from 2008 to August 29, 2015, with three brief separations during that period. He added the Appellant's name on his headstone before his death, and this gesture was out of love for her.

iii. Oral Evidence

[14] The Appellant stated that after their divorce, she moved back in with the contributor between 2008 and 2015. However, they experienced some short separations during this period.

[15] In December 2015, she became ill, so, even though he wanted to move back in together, she could not because of her health, and she could not care for him. However, he did not live very far away, so he would visit her regularly, they would have dinner together, and he would go to mass and on outings with her. They also spent time in the countryside. They shared the expenses during their trips in the countryside. She always went with him to his medical appointments and surgeries, and she was with him in Montréal for his care before his death.

iv. Common-law Relationship

[16] The Appellant must prove on a balance of probabilities that she was in a common-law relationship with the contributor at the time of his death.

¹⁰ GD2-50 and 61.

¹¹ GD1-13.

[17] The Federal Court¹² 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 arrangements between the parties for provision of necessities and acquisition and ownership of property; and
- 7) Attitude and conduct concerning any children.

[18] The Pension Appeals Board (PAB)¹³ has stated that, in determining whether persons are cohabitating, elements must be considered, such as continued financial interdependence, a sexual relationship, a common residence, expenses for each other on special occasions, a sharing of responsibilities in running the household, a shared use of assets, shared vacations, continued mutual dependency, the naming of each other as beneficiaries in the will of the other and as a beneficiary under insurance policies, where each kept their clothing, who cared for each person when ill, communication between the parties, public recognition of the relationship, what status was declared by the parties on various applications and other forms, and who took care of the deceased's funeral arrangements.

[19] The evidence shows that, after their divorce, the Appellant moved back in with the contributor from 2008 to August 2015. During this period, she took care of his medical and

¹² *McLaughlin*, 2012 FC 556.

¹³ *Betts v Shannon*, (2001), CCH, CE B & PGR No. 8661, pp. 6775–6782.

personal needs; they were beneficiaries of each other's life insurance policies; they shared certain expenses; they participated in community activities together (going to mass); and the community as well as family members, specifically their daughter, considered them a couple.

[20] Therefore, I find that the Appellant and the contributor lived together in a common-law relationship from 2008 to August 2015.

v. Mutual Intention after August 2015

[21] I am also satisfied that the common-law relationship was not interrupted from August 2015, when the Appellant and the contributor stopped physically cohabiting together, until the contributor's death in January 2017.

[22] The Appellant gave a credible oral testimony about the common-law relationship between her and the deceased contributor that was consistent with the documentary evidence. The evidence addresses a large number of constituent elements of a common-law relationship and is coherent and supported by the documentary evidence and statements provided by other people close to the Appellant.

[23] As noted, to be considered a "common-law partner" under the CPP,¹⁴ the Appellant must prove that she cohabited with the contributor in a conjugal relationship for a continuous period of at least one year at the time of the contributor's death. Since the Appellant and the deceased did not reside together at the time of death, the Appellant must prove that they maintained a conjugal relationship during their separation up to the time of death in January 2017.

[24] Cohabitation is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof. The issue is whether the Appellant and the contributor mutually intended to continue their conjugal relationship.¹⁵

[25] To prove that a conjugal relationship existed, the Appellant must establish that, during their physical separation, the couple continued to show through their actions and conduct a

¹⁴ CPP, s 2(1).

¹⁵ *Canada (MHRD) v Hodge*, 2004 SCC 65.

mutual intention to continue in a marriage-like relationship of some permanence. The issue is whether a common-law relationship existed during the separation up to the time of death.¹⁶

[26] I find that the evidence shows a mutual intention on the part of the Appellant and the contributor to continue to be in a common-law relationship during their physical separation.

[27] There is case law to the effect that “where parties are in a conjugal relationship, they can be separated for a period of time without in any way affecting the quality of that relationship.” The key consideration is the intention of the parties. A conjugal relationship “terminates when one of the parties to the relationship intends the termination.”¹⁷

[28] Furthermore, the Federal Court¹⁸ has endorsed a PAB decision and found that, because the CPP¹⁹ does not specifically state that the continuous period of one year must immediately precede the death, it did not have to interpret the CPP in that way.²⁰

[29] Considering all the factors mentioned above and the decision made in *Hodge* that cohabitation for the purposes of the CPP does not require that the parties live together, I find that the Appellant and the contributor meet enough of the criteria to establish that the Appellant and the contributor, even though they did not reside together, maintained a common-law relationship from August 2015 to the time of the contributor’s death.

[30] I have also considered the findings of the Federal Court (in *Beaudoin*) regarding the continuous period of one year of cohabitation. There is no dispute that the Appellant and the contributor were in a common-law relationship for several years before August 2015, therefore satisfying the requirement of section 2(1) of the CPP that the parties have cohabited for a continuous period of at least one year. I find that, even though the Appellant and the contributor did not reside together after August 2015 because of the Appellant’s health, they socialized and continued with their outings; the contributor never claimed that they were actually separated; the

¹⁶ *Farrell v Canada (Attorney General)*, 2010 FC 34.

¹⁷ *AL v DP and Ministry of Human Resources and Skills Development*, (November 16, 2011), CP27238 (PAB) [A.L.], paras 35, 36, and 39.

¹⁸ *Beaudoin v Canada (Minister of National Health and Welfare)*, 1993 CanLII 2961 (FCA).

¹⁹ Section 2.

²⁰ Citation *Minister of National Health and Welfare v Decoux*, (July 3, 1991), CP20146 (PAB).

Appellant still went with him to his medical appointments and surgeries; she was with him in Montréal for his care before he passed away; and she looked after the contributor's funeral arrangements. Also, according to a sketch dating before the contributor's death in 2016 and a photo after the contributor's death, the Appellant's name is engraved on the contributor's headstone as he wished. There is no indication that either of them had a relationship with another person. Even though there may have been an interruption of the common-law relationship, I find that the Appellant and the contributor had been in a common-law relationship for more than a year before the deceased contributor's death and that it was not necessary for a continuous period of actual physical cohabitation to have occurred immediately before the contributor's death.

CONCLUSION

[31] For the reasons mentioned above, I find on a balance of probabilities that the Appellant is the survivor of the contributor in accordance with the CPP criteria. She is entitled to receive the CPP survivor's pension.

[32] The appeal is allowed.

Antoinette Cardillo
Member, General Division – Income Security