



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *EY v Minister of Employment and Social Development and DH*, 2020 SST 1144

Tribunal File Number: GP-19-1309

BETWEEN:

**E. Y.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

and

**D. H.**

Added Party

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Pierre Vanderhout

Teleconference hearing on: December 21, 2020

Date of decision: December 30, 2020

## **DECISION**

[1] The Claimant is not entitled to a Canada Pension Plan (“CPP”) survivor’s pension with respect to T. Y. (the “Contributor”). Although the Claimant was still married to the Contributor when she died in 2017, the Contributor had been in a common-law relationship for at least one year immediately before her death.

## **OVERVIEW**

[2] The Claimant married the Contributor on June 25, 2005. The Contributor’s first husband had passed away. The Claimant acted as a father to the Contributor’s daughters J. Z. and S. R. However, in October 2010, the Contributor moved out of the Claimant’s home to commence a common-law relationship with the Added Party. While she returned to the Claimant for brief periods shortly afterward, she left for the last time in January 2012. The Contributor appears to have lived with the Added Party from that point forward, and they eventually started a business together. In September 2016, the Contributor was diagnosed with cancer. The disease progressed quickly, and by February 2017, she was only receiving palliative care. The Contributor passed away on April 5, 2017. At that time, she was still legally married to the Claimant. The Claimant stayed in contact with the Contributor, and was extensively involved in caring for her at the end of her life.

[3] The Minister initially awarded the CPP survivor’s pension to the Claimant. However, the Added Party then filed his claim for the survivor’s pension. The Minister ultimately decided that the Added Party was entitled to the pension, and upheld that decision on reconsideration. The Claimant appealed the reconsideration decision to the Tribunal. The Claimant maintains that the common-law relationship between the Added Party and the Contributor ended before the Contributor’s death. The Claimant says the Contributor and the Added Party were only business partners by that time. He also suggested that the Added Party was in another relationship when the Contributor died.

## **ISSUE**

[4] Who is entitled to the CPP survivor’s pension with respect to the Contributor?

## ANALYSIS

[5] According to the *Canada Pension Plan*, a survivor's pension is payable to the "survivor" of a deceased contributor.<sup>1</sup> The person married to the deceased contributor at the time of the contributor's death is the "survivor" of the deceased contributor, with one important exception. The exception occurs when the deceased contributor had a common-law partner when the contributor died. In that case, the common-law partner is considered the survivor.<sup>2</sup>

### **Who is entitled to the CPP survivor's pension with respect to the Contributor?**

[6] For the reasons set out below, the Added Party is entitled to the CPP survivor's pension.

[7] Nobody denies that the Claimant was married to the Contributor when she died. The question is whether the Contributor had a common-law partner when she died.

[8] For CPP purposes, a common-law partner is "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 a deceased contributor, the "relevant time" is the time of the contributor's death.<sup>3</sup> Based on the evidence, the Added Party is the only person who could have been the Contributor's common-law partner. This means I must decide whether the Added Party cohabited with the Contributor in a conjugal relationship continuously for at least the last year of her life.

[9] When the Minister was assessing the Claimant's application for the survivor's pension, the Claimant admitted that the Added Party had been the Contributor's common-law partner.<sup>4</sup> While the parties disagree about whether the common-law relationship started in October 2010 or January 2012, it ultimately does not matter.<sup>5</sup> More importantly, the Claimant maintains that the Added Party's relationship with the Contributor was "on and off", and the Added Party had "moved on with another woman" by the time of the Contributor's funeral.<sup>6</sup> The Claimant says

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<sup>1</sup> Paragraph 44(1)(d) of the *Canada Pension Plan*.

<sup>2</sup> Subsection 42(1) of the *Canada Pension Plan*.

<sup>3</sup> Subsection 2(1) of the *Canada Pension Plan*.

<sup>4</sup> GD2-14

<sup>5</sup> The Added Party said it started in 2010, while the Claimant suggests it was in 2012.

<sup>6</sup> GD2-64

any relationship between the Added Party and the Contributor was strictly a business relationship by then. This is where the Claimant and the Added Party disagree. The Added Party says he was still the Contributor's common-law partner when she died. J. Z. and S. R., the Contributor's daughters, both gave oral evidence that supported the Claimant's position. K. S. (the Contributor's best friend) and D. B. (the Added Party's former employer) both gave oral evidence that supported the Added Party's position.

*What does "cohabitation in a conjugal relationship" mean?*

[10] The *Canada Pension Plan* does not define "cohabitation in a conjugal relationship". However, a 2001 decision called *Betts* sets out which factors are usually relevant to that question.<sup>7</sup> I will call these the "Betts Factors". The Betts Factors are:

- (a) Financial interdependence
- (b) Sexual relationship
- (c) Common residence
- (d) Purchasing gifts on special occasions
- (e) Sharing of household responsibilities
- (f) Shared use of assets
- (g) Shared responsibility for children
- (h) Shared vacations
- (i) Expectation of mutual dependency
- (j) Beneficiary of will
- (k) Beneficiary of insurance policy
- (l) Where clothing was kept
- (m) Care for one another when ill, and knowledge of medical needs
- (n) Communications between the parties
- (o) Public recognition
- (p) Attitude and conduct of the community
- (q) Marital status on various documents
- (r) Funeral arrangements

[11] The evidence in this case is not completely for or against a common-law relationship. However, complete certainty is not necessary. The onus is on the Claimant to prove that the Contributor was not cohabiting in a conjugal relationship with the Added Party for at least one year when she died. I find that the Added Party and the Contributor were in such a relationship. I

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<sup>7</sup> The full name is *Betts v. Shannon*, (2001) CP 11654. It is frequently cited in other Tribunal decisions, such as the Appeal Division's decision in *B. G. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 229.

will explain why I came to this conclusion, after setting out the Betts Factors. I will first set out the Betts Factors which support a common-law partnership.

*The Betts Factors which support a common-law partnership*

[12] The Added Party and the Contributor lived together for several years under the same roof, although he seems to have moved out for the last two weeks of her life due to conflict with her daughters. The Added Party said he shared a bed with the Contributor. They ate their meals together. They kept their clothing in the same place: the “acreage” leased in the Contributor’s name. He said they shared household chores. She mainly handled the meals and laundry, while he mainly did the outdoor maintenance. They shared the shopping duties.

[13] The Added Party and the Contributor had some financial interdependence. They had a shared bank account.<sup>8</sup> They also were co-owners of a trucking business, for which they also had a joint account. The Added Party said that account was opened in 2014 or 2015.

[14] The Added Party went to Mexico with the Contributor in February 2017, shortly before her condition worsened and she began palliative care. The Added Party said they took a couple of trips to Mexico together, and sometimes included other friends. He filed evidence that the Contributor bought him gifts: in August 2016, she bought him personalized license plates.<sup>9</sup>

[15] The Contributor signed her Will on March 13, 2017. She left her shares in the trucking company to the Added Party, whom she described as her “spouse”. The rest of her estate went to J. Z. and S. R.<sup>10</sup>

[16] The Added Party said he and the Contributor had life insurance with Co-op on each other, through their work. He said they were named as each other’s spouses. It is unclear if this is the same as the Blue Cross group benefits they started in 2014, for which they were named as each other’s beneficiaries. However, that coverage appeared to end before the Contributor’s death.<sup>11</sup>

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<sup>8</sup> GD2-35 to GD2-37

<sup>9</sup> GD2-61

<sup>10</sup> GD2-32

<sup>11</sup> GD2-38 to GD2-41

[17] The Added Party said they cared for each other during times of illness. He said he spent a lot of time at the hospital when the Contributor was there, although the Contributor seems to have barred him from visiting her for a time. He also spent a lot of time with her at their home, although that access was restricted in the final weeks of her life.

[18] The Claimant considered the Added Party and the Contributor to be in a common-law relationship when the Contributor died. The memorial card handed out at her funeral named the Added Party as her “partner”. The Added Party’s daughter was named as the Contributor’s step-daughter. The Claimant created the memorial card, although he said he included the Added Party because he “felt sorry for him.”

[19] The Added Party and the Contributor declared that they were common-law spouses on multiple applications and forms. Some of these were before the last year of the Contributor’s life, and may no longer have been in force. However, in her January 27, 2017, application for CPP disability benefits, the Contributor said the Added Party was her common-law partner.<sup>12</sup> I will now set out the Betts Factors that do not support a common-law relationship.

*The Betts Factors which do not support a common-law partnership*

[20] The Added Party moved out for the last two weeks of the Contributor’s life, although he continued to visit. He had conflict with her daughters, who were living and providing palliative care in the Contributor’s home. Her daughters told her that it was “us or him.” However, the Added Party still visited and was present when the Contributor died.

[21] The Claimant and the Contributor had life insurance policies on each other. These policies existed before their separation.<sup>13</sup> The Claimant said the premiums came out of a joint account held by them right up to the Contributor’s death. However, it does not appear that the Contributor put money into this account up to the time of her death.

[22] The communications between the Contributor and the Added Party do not appear to have been strong. The Claimant’s witnesses suggested there was a lot of abuse.<sup>14</sup> The Added Party’s

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<sup>12</sup> GD2-57

<sup>13</sup> GD4-5 to GD4-8

<sup>14</sup> GD4-10, for example, and the oral evidence at the hearing.

visits during the Contributor's illness were restricted or barred from time to time.<sup>15</sup> He admitted there were some "rough periods," and K. S. described it as a "love/hate relationship".

[23] The attitude and conduct of the Contributor's family towards the Added Party was negative, especially during the last year of the Contributor's life.<sup>16</sup> J. Z. said the relationship was "off and on" and the Added Party would simply disappear. She said he was doing a lot of "sneaking around" and "sketchy stuff," despite her mother's terminal illness. S. R. said he used cocaine and drained the Contributor's bank account. She said her mother wanted the Claimant to be around at the end of her life. S. R. said the Added Party put a wedge between her mother and her family. At the end of the Contributor's life, her daughters made her choose between "us and him". As a result, the Added Party moved out to K. S.'s house for the last couple of weeks. Both J. Z. and S. R. said their mother was only with the Added Party for business purposes, and at the end he was not allowed to be alone with her. The Claimant's evidence was consistent with the evidence of J. Z. and S. R.<sup>17</sup> At the hearing, he said the rest of the family did not want the Added Party at the funeral. The Contributor's daughters sat with the Claimant at the funeral.

[24] J. Z. and S. R. both described an incident where the Added Party left the Contributor in hospital. The Contributor was apparently concerned about his activities, and used a tracing app to determine his whereabouts. She then sent K. S. to investigate. K. S. then found the Added Party naked in a hot tub with a couple of prostitutes. K. S. and the Claimant gave very similar evidence about the "hot tub incident".<sup>18</sup>

[25] The Added Party did not take care of or pay for the Contributor's funeral arrangements. However, the Claimant did, with help from the Contributor's daughters. The Claimant also took her to the crematorium, and still has her ashes.<sup>19</sup> However, as noted, the memorial card described the Added Party as the Contributor's partner. Both the Added Party and the Claimant sat in the front row at the funeral.

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<sup>15</sup> GD4-12

<sup>16</sup> GD2-38 to GD2-41

<sup>17</sup> See, for example, GD1-2, GD2-64, and GD4-12 to GD4-15.

<sup>18</sup> GD4-12, for example, and the oral evidence at the hearing.

<sup>19</sup> GD1-3 and GD4-11

*The Betts Factors which have little relevance in this case*

[26] The Added Party and the Contributor appeared to share the use of assets such as cars and trucks, but I have considered this in the context of their trucking company. The Added Party said they considered everything (such as vehicles) to be “theirs,” but he admitted that items were usually in the Contributor’s name for insurance purposes. He also said he had some “old bills” that made it difficult to own things in his name. I did not hear any evidence about whether the Added Party had a Will, and whether the Contributor was named in it.

[27] I heard conflicting evidence about whether there was a daily expectation of continued mutual dependency. J. Z., S. R., and the Claimant all suggested that the Contributor only remained with the Added Party for business reasons and other reasons that the Contributor would not discuss. The Added Party, however, said that the Contributor was his “rock”. Both the Added Party and D. B. described the Added Party’s care for the Contributor in the last few months of her life.

[28] I did not hear a lot of persuasive evidence about whether the Contributor and the Added Party knew of each other’s medical needs. However, when the Added Party had to attend rehab (due to addiction issues) in Ontario, the Contributor went to live with D. B.’s mother (who lived near the treatment centre). The Added Party also seemed to have some role in providing the Contributor with CBD oil during her palliative care, although her daughters had primary responsibility for that care. Responsibility for raising of the children is not a relevant factor: their children were no longer living with them.

*Assessing the Betts Factors*

[29] If all the Betts Factors carried equal weight, they would be slightly in favour of a common-law partnership. However, this is not a strict arithmetic exercise. The Betts Factors are not always weighted equally.<sup>20</sup> Context is important.

[30] The Claimant’s responsibility for the funeral arrangements is notable. So is his ongoing possession of the Contributor’s ashes. This suggests that the Contributor viewed her relationship

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<sup>20</sup> See, for example, *M. v. H.*, [1999] 2 SCR 3, at paragraph 60.



with the Claimant more fondly than her relationship with the Added Party. I also note that the Contributor's daughters were particularly negative about the Added Party's conduct in the last year of the Contributor's life. These allegations were not baseless. The Added Party admitted the hot tub incident, although he said the two naked women were "friends" and the hot tub "rules" did not permit clothing. The Added Party also admitted "some bad choices" in his life, including difficulties with debts and substance abuse. In comparison, the Claimant's conduct in the last year of the Contributor's life was commendable. Even the Added Party's evidence suggests that the Claimant played a very important and supportive role.

[31] However, I attach substantial weight to the Betts Factors relating to the Contributor's 2017 actions and intentions. These are vital.<sup>21</sup> In January 2017, when applying for a CPP disability pension, she said she was in a common-law relationship with the Added Party. In February 2017, she went to Mexico with her sister and the Added Party. In March 2017, she signed a Will in which she described the Added Party as her spouse. These three clear acts affirm that she still considered the Added Party to be her common-law partner in the last months of her life. The memorial card prepared by the Claimant, in which the Added Party was named as the Contributor's partner, strongly supports this.

[32] I conclude that the Contributor and the Added Party were likely still common-law partners throughout the last year of her life. Despite making this finding, I am not suggesting that it was a particularly good relationship. The Added Party's conduct may well have been questionable, and the Contributor seems to have received better care from others (including the Claimant) in the last few weeks of her life. The Claimant said that the Contributor wished the Added Party would kill himself, so she would finally be free of the relationship.<sup>22</sup>

[33] However, this evidence speaks more to the quality of the relationship with the Added Party, rather than the essence of the relationship itself. In a binding decision, the Federal Court says I should not evaluate the quality of the relationship, when deciding whether it was actually a common-law partnership. Even if the common-law spouse had committed breaches of trust, or engaged in other wrongful conduct to the detriment of the deceased, it was irrelevant to his status

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<sup>21</sup> *Hodge v. MHRD*, 2004 SCC 65, affirms the importance of the mutual intention to continue the relationship.

<sup>22</sup> GD4-12 and the Claimant's oral evidence.

as a common-law spouse.<sup>23</sup> It follows that even serious allegations of abuse do not necessarily terminate the partnership. The Pension Appeals Board said that separation due to an abusive relationship did not interrupt cohabitation, where there was a mutual intention to continue the relationship.<sup>24</sup> I note that the Added Party continued to visit the Contributor even after he moved out of her home, and was present when she died.

[34] From a legal perspective, the allegations regarding the Added Party's infidelity carry little weight. The Pension Appeals Board said monogamy is not a requirement. Infidelity by one of the partners is not in itself fatal to a finding of a conjugal relationship.<sup>25</sup> The "hot tub" incident took place in 2016, before the Contributor repeatedly affirmed that she was the Added Party's common-law partner. I saw no evidence that the Contributor was involved in an ongoing relationship with the hot tub attendees. While it was suggested that the Added Party entered a relationship with K. S. shortly before the Contributor's death, both the Added Party and K. S. denied it. K. S. was described as the Contributor's best friend.

[35] I will briefly address the last two weeks of the Contributor's life, when the Added Party moved out of her home. As the Contributor had to choose between her daughters and the Added Party, I am not persuaded that this terminated the common-law partnership. Even if there had been a fight between the Contributor and the Added Party, a brief "cooling off" separation does not necessarily bring the relationship to an end. There needs to be a settled state of mind that the relationship is over.<sup>26</sup> Both the Added Party's presence at the Contributor's death and the memorial card prepared by the Claimant rebut that possibility.

[36] The question in this appeal is not whether the Added Party is a good person or behaved appropriately. Nor is the question whether the Claimant is more deserving of the survivor's pension. The question is whether the Contributor had a common-law partner during the relevant time.<sup>27</sup> To this legal question, the answer is yes.

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<sup>23</sup> *McLaughlin v. Canada (Attorney General)*, 2012 FC 556.

<sup>24</sup> This persuasive but non-binding decision is called *MHRSD v. S.S.*, (2011) CP 27386.

<sup>25</sup> This persuasive but non-binding decision is called *Brandon v. MHRD*, (2001) CP 14937.

<sup>26</sup> See *Hodge v. MHRD*, 2004 SCC 65, at para. 42.

<sup>27</sup> See the binding decision in *Farrell v. Canada (Attorney General)*, 2010 FC 34.

**CONCLUSION**

[37] The appeal is dismissed.

Pierre Vanderhout  
Member, General Division - Income Security