



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *LH v Minister of Employment and Social Development and LK*, 2021 SST 58

Tribunal File Number: GP-19-1241

BETWEEN:

L. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

and

L. K.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Teleconference hearing on: January 6, 2021

Date of decision: January 26, 2021

DECISION

[1] The Appellant is not entitled to a Canada Pension Plan (CPP) survivor's pension. This decision explains why I am dismissing the appeal.

Overview

[2] R. K. passed away in September 1994. In November 1994, the Added Party applied for the CPP survivor's pension. In her application, the Added Party reported that she married R. K. in March 1988 and that she was married to R. K. at the time of his death. The Minister approved the Added Party's application, and awarded her the survivor's pension.

[3] In December 2018, the Appellant applied for the CPP survivor's pension. In her application, she reported that she married R. K. in June 1974 and that she was married to him at the time of his death. The Minister denied the Appellant's application. The Minister did not provide much of an explanation for why it was denying the application, except to say that another person had applied for the survivor's pension and, after reviewing both applications, the Minister did not consider the Appellant to be R. K.'s survivor.

[4] The Appellant asked the Minister to reconsider its decision. The Minister reconsidered, and decided to maintain the denial. The Minister explained that another person was married to R. K. at the time of his death, and that the Minister considered that person to be R. K.'s survivor. The Appellant appealed the Minister's reconsideration decision to the Social Security Tribunal.

What the Appellant must prove

[5] To be successful with her appeal, the Appellant must show that she is R. K.'s "survivor".

What the law says about who is eligible for a CPP survivor's pension

[6] A CPP survivor's pension is payable to the survivor of a deceased contributor who made base contributions to the CPP for not less than the minimum qualifying period¹.

[7] A "survivor" is a person who was legally married to the contributor at the time of his death. However, if the contributor was in a common-law relationship at the time of his death, then the "survivor" is the contributor's common-law partner².

[8] The term "common-law partner" means 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 contributor for a continuous period of at least one year³.

[9] The word "cohabitation" is not synonymous with "co-residence". This means that two people can cohabit even though they do not live under the same roof⁴.

[10] The factors that are relevant to determining whether two people were cohabiting in a conjugal relationship include⁵:

- Shelter, including considerations of whether the parties lived under the same roof, slept together, and whether anyone else occupied or shared the available accommodation;
- Sexual and personal behavior, including whether the parties had sexual relations, maintained an attitude of fidelity to each other, communicated on a personal level, ate together, assisted each other with problems or during illness or bought each other gifts;
- Services, including the roles they played in preparation of meals, doing laundry, shopping, conducting household maintenance and other domestic services;

¹ Paragraph 44(1)(d) of the *Canada Pension Plan*

² Subsection 42(1) of the *Canada Pension Plan*

³ Subsection 2(1) of the *Canada Pension Plan*

⁴ *Hodge v. MHRD*, 2004 SCC 65

⁵ *McLaughlin v. Canada (Attorney General)*, 2012 FC 556

- Social, including whether the parties participated together or separately in neighbourhood and community activities and their relationship with each other's family members;
- Societal, including the attitude and conduct of the community towards each of them as a couple;
- Support, including the financial arrangements between the parties for provision of necessities and acquisition and ownership of property; and
- Attitude and conduct concerning any children.

[11] 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 his or her particular state of mind is a settled one⁶.

The Appellant is not eligible for the CPP survivor's pension

[12] I have decided that the Appellant is not eligible for the CPP survivor's pension. She was not married to the contributor at the time that he died. She was also not in a common-law relationship with the contributor at the time of his death. I will now explain each of these reasons in detail.

The Appellant was not married to the contributor at the time of his death

[13] Although the Appellant reported in her application that she was married to the contributor at the time of his death⁷, I cannot find this to be true. I accept that the Appellant and the contributor were married at one time. The evidence includes a marriage certificate showing they were married in June 1973⁸. However, the evidence shows they likely divorced before R. K. died. The Appellant has acknowledged in writing that she and R. K. divorced, though she seems to question the validity of the divorce⁹. The Appellant has also acknowledged in writing that she

⁶ *Hodge v. MHRD*, 2004 SCC 65

⁷ Page GD2-7

⁸ Page GD2-12

⁹ Pages GD28-1 and GD45-1

had relationships, including two marriages after her relationship with R. K., though she seems to question the legal status of those relationships¹⁰. What I find most significant is the fact that R. K. married the Added Party in March 1988¹¹. It is reasonable for me to infer that, to re-marry, R. K. would have had to show proof that his marriage of 1973 had ended.

The Appellant was not in a common-law relationship with the contributor at the time of his death

[14] The Appellant has not shown that she and R. K. were common-law partners at the time of R. K.'s death in 1994. I say this for five main reasons.

(i) The Appellant did not answer questions about when the alleged common-law relationship began

[15] During the hearing, I asked the Appellant to tell me when her common-law relationship began. The Appellant chose not to answer the question. She said the answer was in the documentary evidence, and in particular a bankruptcy document. When I pointed out that the document does not appear to say she was in a common-law relationship with R. K. (let alone when that relationship began), the Appellant still chose not to answer the question.

[16] The Appellant's reluctance to answer a question about the alleged common-law relationship raises credibility concerns. If the Appellant was in fact in a common-law relationship with the contributor at the time of his death, then she should have been able to clearly state her position as to when that relationship began.

(ii) The Appellant reported her marital status as "single" in 2014

[17] The Minister submits that when the Appellant applied for her CPP retirement pension in 2014, she identified her marital status as "single" (rather than married, common-law or a surviving spouse). The Minister has provided a copy of the application in question¹².

¹⁰ Pages GD1-8 and GD11-1 and GD27-1 and GD44-2

¹¹ Page GD8-4

¹² Page GD40-3

[18] I find this evidence relevant. While the evidence might not be determinative of the issue, it deserves some weight in that it shows that about 4 years before the Appellant applied for the CPP survivor's pension she did not represent herself to be a surviving spouse.

(iii)The Appellant's evidence and arguments are not compelling

[19] The Appellant's evidence and arguments about why she is entitled to the survivor's pension are not compelling. I will give several examples.

[20] First, the Appellant has repeatedly referred to a "million dollar family book" that she says depicts her as R. K.'s widow. The Appellant included an excerpt from the book. It says, in part¹³:

L. H., born March X, 1954, married R. K. in June 1973, born July X, 1953. R. K. died September 30, 1994. L. H. and R. K. had one child...H. K., born November X, 1974.

[21] The article may imply that the Appellant was still in a relationship with R. K. at the time that he died, but it does not expressly state that. Moreover, it is not clear who wrote the article. It is possible the Appellant wrote the article herself and in doing so did not want to acknowledge that her marriage had ended.

[22] Second, the Appellant suggests that she was in a common-law relationship with R. K. because she and R. K. share a child¹⁴ and because that child was in contact with R. K. The Appellant adds that "contact" can also be defined as receiving and giving of funds¹⁵. I acknowledge that there does indeed appear to be a child from the marriage. As I understand it, the Appellant's daughter (H. K.) was born in November 1974. However, this does not mean that the Appellant and R. K. established a common-law relationship after they divorced. R. K. married the Added Party about fourteen years after his daughter was born. The fact that H. K. maintained contact with R. K. does not show that the Appellant and R. K. were in a common-law

¹³ Page GD1-9

¹⁴ Page GD10-2

¹⁵ Page GD11-1

relationship. This is true even if the “contact” involved R. K. providing some sort of financial support to H. K.

[23] Third, the Appellant asserts that the Added Party did not adopt the Appellant’s daughter, H. K.¹⁶. The Appellant also says that H. K. never called the Added Party “mom”¹⁷.

[24] The nature of the relationship between the Appellant’s daughter and the Added Party is not at issue here. The issue is whether the Appellant was in a common-law relationship with R. K.

[25] Fourth, the Appellant says that a bankruptcy document shows she is R. K.’s survivor. She points out that the document states her marital status as “married” and “separated” and shows that she is existing on borrowed funds¹⁸.

[26] I cannot agree with the Appellant’s argument. The bankruptcy document of 1993 states the Appellant’s marital status as “married”¹⁹, but it does not say who she was married to. The document also says the Appellant had separated from her spouse, who was also bankrupt. Again, the document does not identify who the spouse is. If the Appellant’s argument is that the separated spouse was R. K. then the separation itself is not supportive of a common-law relationship. If, on the other hand, the Appellant’s argument is that the breakdown of her marriage (with someone other than R. K.) somehow supports the existence of a common-law relationship with R. K. then her argument is problematic. The breakdown of one relationship does not mean another relationship exists. As for the borrowed funds, the document says the Appellant is existing on borrowed funds. However, this does not mean the Appellant was in a common-law relationship with R. K. The document does not mention who the funds were borrowed from. Although the Appellant suggests that she borrowed the money from R. K. she has not provided any other documentation to support this. Moreover, the fact that the Appellant may have borrowed money from R. K. is not a strong indicator that she was in a common-law relationship with him.

¹⁶ Page GD6-1

¹⁷ Page GD46-1

¹⁸ Page GD7-1

¹⁹ Page GD7-5

[27] Fifth, the Appellant suggests that she was R. K.'s common-law partner at the time of his death because R. K. and the Added Party were either separated at the time or they were in the process of separating²⁰. In support of her argument, the Appellant points to the Registration of Death. She says the document shows R. K.'s usual place of residence as X X Avenue in X, Manitoba, but shows the Added Party's address simply as X, Manitoba (with no street address)²¹.

[28] I do not believe that R. K. and the Added Party had separated or were in the process of separating. The Registration of Death shows the marital status between R. K. and the Added Party as married (not separated). However, even if R. K. and the Added Party had separated or were in the process of separating, it would not mean that the Appellant is eligible for the survivor's pension. A separated but legally married spouse is entitled to the survivor's pension as long as there is no common-law partner. The Appellant has not shown she was R. K.'s common-law partner at the time of his death.

[29] Sixth, the Appellant states that R. K. and the Added Party had not been in a conjugal relationship for a very long time. She added that R. K. was gay²². I fail to see how this argument helps the Appellant. Even if it is true, (and I have no corroborating evidence it is), then it does not change the fact that the Added Party was still legally married to R. K. at the time of his death. As the legally married spouse, the Added Party does not need to prove that she had a conjugal relationship with R. K. at the time of his death.

[30] Seventh, the Appellant suggests that she is R. K.'s survivor because he was "blood family"²³ and because he was her cousin²⁴. This argument does not help the Appellant. To be considered a "survivor" for CPP purposes, the Appellant needs to show she was R. K.'s common-law partner at the time of his death. It does not matter whether she was related to R. K. by blood.

²⁰ Pages GD7-1 and GD46-1

²¹ Page GD13-2

²² Page GD38-1

²³ Page GD16-2

²⁴ Page GD1-6

(iv) The Appellant has made written statements that are not consistent with a finding that she was in a common-law relationship with R. K. at the time of his death.

[31] The Appellant has at times provided written statements that are not supportive of a finding that she was in a common-law relationship with R. K. at the time of his death. For example, the Appellant wrote that one year before R. K. died, she and R. K. were “working out the legal turmoil of our too young daughter being able to keep her baby”. The Appellant said that she met R. K. in X a “couple few times” and that R. K. stayed and visited with the Appellant’s sister²⁵. If the Appellant in fact met R. K. in X a few times a year before his death, then presumably she was not cohabiting with him at that time.

(v) The Added Party confirmed she was living with R. K. at the time of his death

[32] In December 2019, the Added Party wrote to the Tribunal and said that she married R. K. in March 1988 and she continued to be married to him at the time of his death in September 1994²⁶.

[33] At the hearing, the Added Party testified that she was married to *and living with* the contributor at the time of his death. The Added Party’s testimony was corroborated by the testimony of her daughter, A. S. A. S. said she was living with her mother (the Added Party) and her step-father (the contributor) at the time of the contributor’s death. I have no reason to question the credibility of either the Added Party or her witness. Given that the contributor was living with the Added Party at the time of his death, it is very unlikely that he was also in a common-law relationship with the Appellant.

CONCLUSION

[34] The appeal is dismissed. The Appellant is not eligible for a CPP survivor’s pension.

Other Matters

²⁵ Page GD1-8

²⁶ Page GD8-1

[35] There were several procedural matters that needed to be resolved before this hearing took place. I will now summarize what happened with each of the procedural issues.

(i) Redacted Documents

[36] On November 25, 2019, I wrote to the Minister and explained that the file the Minister provided to the Tribunal contained a number of redacted documents. I asked the Minister to provide clean copies of the documents in question (i.e. without any removed text).

[37] It took some time to get this matter resolved. However, in November 2020, the Minister provided un-redacted copies of the documents²⁷.

(ii) Form of Hearing

[38] In her Notice of Appeal, the Appellant said that she preferred this matter to be heard by way of written questions and answers. I considered the Appellant's preference, but decided to proceed by way of teleconference. I explained that the issue of whether a person is a "survivor" is difficult to decide through written questions and answers. I also explained that sometimes a written answer requires follow up questions, which can result in a back and forth paper exchange. Finally, I pointed out that there are two other parties in this proceeding and those parties are entitled to ask questions of the Appellant. I said that an oral hearing would be more efficient²⁸.

[39] The Appellant disagreed with my decision to proceed by way of teleconference. In August 2020, she wrote to the Tribunal and asked for the hearing to be done in writing. She said that a teleconference would be problematic for several reasons, including the risk of northern interference, power outages, the possibility of money not being available for telephone devices, the possibility of a medical appointment (presumably on the date of the hearing), and her need to make thoughtful replies²⁹.

²⁷ Pages GD47-1 to GD47-6

²⁸ Page GD0A-2

²⁹ Page GD16-2

[40] On August 27, 2020, I issued a letter explaining that I had decided to maintain my decision to proceed by way of teleconference. I reiterated my initial reasons for choosing a teleconference. I also added that³⁰:

- The Appellant's written documents are such that I am not always able to understand the relevancy of her statements. I said that an oral hearing would allow me to seek clarification when needed.
- I could accommodate the Appellant's desire to make thoughtful replies to questions, by giving the Appellant lots of time during the hearing to reply to questions.
- The file shows that the Appellant had recently been able to call the Tribunal to discuss her appeal, suggesting to me that she has access to a telephone with suitable connectivity.
- The telephone number for the hearing is a toll-free number, so the Appellant would not incur long distance charges for the call.
- The Appellant could ask for an adjournment if she had a medical appointment that conflicted with the date of the hearing.

[41] After receiving my decision letter of August 27, 2020, the Appellant continued to contact the Tribunal, asking for the Tribunal's written questions³¹.

[42] On September 3, 2020, I wrote to the Appellant and I explained that I had not changed my decision to proceed by way of teleconference. However, I provided the Appellant with a few questions that she could review prior to the hearing. I explained that I was not inviting the Appellant to respond to the questions in writing before the hearing, and I also explained that my questions were not exhaustive³².

³⁰ Pages GD17-1 to GD17-2

³¹ See, for example, pages GD21-1 and GD22-1

³² Pages GD23-1 to GD23-5

(iii) Late-Filed Documents / Post-Hearing Documents

[43] On September 21, 2020, I wrote a letter about late-filed documents. I explained that the filing deadline for evidence and submissions was July 27, 2020. I noted that since that time the Appellant had continued to send in several documents that appeared to contain evidence and/or submissions. I explained that I have the discretion to accept documents that are filed late, but I would only do so where I am satisfied that (1) the document(s) is relevant; and (2) there is a good reason why the party could not have filed the document before the filing deadline. I said that if a party wishes to submit further documents, then the party should clearly explain why the document is relevant and why it could not have been submitted sooner. I said that if the explanation is not provided, then the party risks having the document returned to them and not added to the file³³.

[44] In the end, I accepted all of the Appellant's late-filed documents into the record, except for the following:

- Pages GD50-1 to GD50-3 – received January 6, 2021. I told the Appellant during the hearing that I would not be accepting these documents into the record. I decided not to accept these documents for two reasons. First, the Added Party told me during the hearing that she had received the documents, but had not yet had an opportunity to review them. Second, I asked the Appellant to explain why the documents could not have been submitted sooner, and the Appellant was unable to provide a reason. Although I did not accept the documents into the record, I told the Appellant that she could speak to the documents during the hearing if she felt they were important.
- Page GD51 – received January 6, 2021. I did not learn of this document until January 7, 2021. On January 8, 2021, I wrote to the parties and explained I would not be accepting the document into the record because a copy of the document was already on file (at page GD13-2). I also explained that during the hearing the Appellant had spoken about the document at GD13-2 and so her argument about why she considers the document important was already on record.

³³ Pages GD31-1 to GD31-3

- Page GD53-1 – received January 14, 2021. On January 19, 2021 I wrote to the parties and I explained that I would not be accepting this document into the record. First, I had not given the Appellant permission to submit post-hearing evidence or submissions. Second, the Appellant did not provide an explanation for why she was submitting the document late or how the document was relevant to the issue on appeal.
- Page GD55-1 – received January 22, 2021. I have not accepted this document into the record because the Appellant did not provide an explanation for why the information she was providing could not have been submitted sooner and she did not explain how the information was relevant. As I explained earlier in this decision, I sent a letter to the parties in September 2020 explaining that late-filed documents need to be accompanied by an explanation for why they are late and why they are relevant, otherwise the party runs the risk of not having the documents admitted into the record. I also spent time explaining this to the Appellant during a hearing (that was adjourned) in September 2020.

Shannon Russell
Member, General Division - Income Security