



Citation: *TF v Minister of Employment and Social Development (Minister) and DP*, 2021 SST 685

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant/Claimant: Representative:	T. F. Richard Pengelly
Respondent:	Minister of Employment and Social Development (Minister)
Added Party: Representative:	D. P. Tara Vasdani
<hr/> Decision under appeal: <hr/>	Minister of Employment and Social Development reconsideration decision dated March 2, 2018 (issued by Service Canada) <hr/>
Tribunal member:	Anne S. Clark
Type of hearing:	Teleconference
Hearing date:	July 13, 14 and 15, 2021
Hearing participants:	Appellant/Claimant Appellant's/Claimant's Representative Added Party Added Party's Representative Added Party's Witnesses
Decision date:	October 8, 2021
File number:	GP-21-336

Decision

[1] The appeal is dismissed.

[2] The Claimant, T. F., is not eligible for a *Canada Pension Plan* (CPP) survivor's pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Contributor, S. F., died on May 17, 2017. At the time of his death he was married to the Claimant but had been separated since October 2006. The Added Party, D. P., lived with the Claimant.

[4] The Minister decided the Added Party was the Contributor's surviving spouse and awarded her a survivor's pension under the CPP. The Claimant appealed the decision to the General Division (GD) of the Social Security Tribunal (Tribunal) and was successful.

[5] The Added Party appealed the GD decision to the Tribunal's Appeal Division (AD) and was successful. This appeal is the second hearing before the GD. I will provide more detail of the various appeal processes in this decision.

What the Claimant said

[6] The Claimant said she believed the Contributor was not the Added Party's common-law partner. She said he did not behave as if he was in a committed relationship. The Claimant said that even though she was separated from the Contributor they remained in close contact until his death. She said the Contributor always told her about the women he dated. She said he told her the Added Party was his friend. The Claimant said the Contributor stayed at the Added Party's house as her friend or business partner and not as common-law partners.

What the Added Party said

[7] The Added Party said she met the Contributor around 2014 and they became romantically involved. In early 2016 they entered into a lease agreement for property in Florida. They lived there until October 2016 when they purchased and moved into another property in Florida. They lived as common-law partners and, by October 2016

became engaged to be married. The Contributor made business and personal trips back to Canada but his home was with her in Florida for more than one year before his death.

What the Minister said

[8] The Minister participated in the previous appeals before the GD and AD. The Minister said the Added Party was the Contributor's common-law partner when he died and for at least 12 months before his death. The Tribunal sent the Minister notice of all proceedings for the rehearing or second hearing at the GD. The Minister did not participate or file submissions.

What the decision must address

[9] As the Contributor's wife, the Claimant would be his surviving spouse unless he lived with a common-law partner when he died and for at least 12 months before his death. The parties agreed the only outstanding question I must answer on appeal is whether, when the Contributor died, the Added Party was his common-law partner and had been for at least 12 months.

Matters I have to consider first

The history related to this appeal

[10] There were many steps that led to this appeal. They resulted in decisions and agreements. The evidence and submissions from the previous hearings are a part of this appeal. To help avoid confusion I will refer to this appeal as the "rehearing". The file contains letters and decisions setting out the details of each step. I will provide a summary here with reference to each previous step.

- September 21, 2017 – The Claimant applied for a CPP survivor's pension. The Minister denied the application.¹

¹ The application is at GD2-101 and the denial is at GD2-111

- March 2, 2018 – The Minister refused the Claimant’s request to reconsider the denial.²
- June 7, 2018 – The Claimant appealed the reconsideration decision to the GD.³
- The Claimant, Added Party and Minister filed evidence and/or submissions to be considered in the appeal before the GD. The GD held oral hearings and the Claimant and the Added Party presented evidence in addition to the documents they filed.⁴
- In April 2020 the GD allowed the Claimant’s appeal and decided the Added Party was not the Contributor’s common-law partner for the full year before his death. The GD found she was, therefore, not his survivor under the CPP.
- January 29, 2021 – The Added Party’s appeal to the AD was allowed. The AD decided the GD did not follow a fair process because the Added Party did not have adequate time to consider and respond to all of the evidence contained in a package of documents labelled GD12. The AD said the Added Party did not have an opportunity to appropriately challenge the evidence in GD12 and ordered the GD to reconsider the appeal.

The rehearing process

[11] The Claimant and the Added Party participated in all steps of the process. They both had representatives. It was necessary to clarify the issues on appeal and the process for the rehearing. I felt it was important to allow the parties the opportunity to participate in setting the process so I asked them to join a prehearing conference for that purpose.

² The reconsideration decision is at GD2-5

³ The application and supporting documents are at GD1.

⁴ The documentary evidence and recordings of the hearing are in folders labelled GD.

[12] The Claimant and the Added Party agreed on most process questions. When they did not agree they made submissions for me to consider before I decided how to proceed.

[13] In making my decision I considered all evidence and argument that is relevant to the question under appeal. It would be impractical and is not necessary to summarize all of the evidence. I will refer to specific evidence when it is necessary to explain my decision or to provide examples of the type of evidence on file.

The Claimant and the Added Party agreed to the following

[14] The parties agreed that:

- They wanted the rehearing conducted as soon as possible. They agreed it should be by teleconference.
- The only issue on appeal is whether the Added Party was the Contributor's "common-law" partner when he died in May 2017 and for the full year immediately before his death.
- The Claimant was married to the Contributor when he died so there is no need for her to prove that fact.
- They have complete copies of the record from the previous GD appeal including transcripts of the hearings, evidence and submissions. They confirmed they have all documents filed for this rehearing.
- The record from the previous hearing was complete with the exception of additional evidence the parties will present. The parties or witnesses will not have to repeat their evidence or submissions.
- After detailed discussion the parties agreed the Claimant would not have to file an unedited copy of GD12. They agreed the information that was redacted should not be included in the record.

When they did not agree

[15] The parties were not able to reach agreement on some of the questions about evidence and process. In those cases I made a decision after considering the submissions.

[16] The following points required a decision.

The Added Party's text and email messages

[17] The Added Party filed copies of certain text messages and emails she exchanged with the Contributor. The Claimant said the emails appeared to be a selection of messages and not a complete copy of all messages during any particular time period. She requested an order requiring the Added Party to produce a complete copy of all messages and texts the Added Party exchanged with the Contributor during the relevant period.

[18] The Added Party said she did not have a complete copy of text and messages. She also argued that she should not be ordered to produce her personal information. She submitted information she felt was relevant to the appeal and submitted she should not be ordered to find and produce all of her phone and email records.

[19] I refused the Claimant's request. The Tribunal does not have the explicit authority to compel parties to produce evidence. To order a party to produce evidence I would have to be satisfied that I have the authority to make that order **and** that the requested evidence was relevant to the appeal. The Claimant did not specify any relevant evidence the Added Party was withholding. Her request for the documents was **in case** there is relevant information in them. She did not demonstrate how the requested evidence would be relevant to the appeal.

Additional Witnesses

[20] The Added Party submitted a list of 17 witnesses she wanted to examine during the rehearing. This was in addition to the time she needed to finish her examination and cross-examination regarding GD12. She said she needed half a day to complete the examination regarding GD12 and no more than one day for the additional testimony.

[21] The Claimant did not agree to the additional witnesses. She submitted this was an attempt to have a new hearing and the Added Party wanted to “perfect” the earlier case because she was not successful. The Claimant also said she might need half a day to present additional testimony from witnesses she did not have at the earlier hearing.

[22] The AD found the earlier process was not fair particularly because the Added Party did not have adequate opportunity to review and respond to the information in GD12. The Added Party said the witnesses would all speak to their observation of the relationship between the Added Party and the Contributor in the year before his death. The information in GD12 includes information about the Contributor’s relationships with other people, his living arrangements, and his messages about his living arrangements. Since the AD found the Added Party did not have adequate opportunity to respond to the evidence in GD12, I found it was reasonable to allow her the opportunity to present additional evidence.

[23] Given the volume of information on the record it was reasonable to dedicate up to one day for the evidence to allow the Added Party to respond to the issues raised in GD12. Further, the Claimant would be able to present additional evidence to respond to the new witnesses once she had a chance to review the summary of the testimony.

Errors in the Added Party’s post hearing submissions

[24] The Added Party referred to incorrect page numbers in her submissions. For example, she said evidence about the Contributor’s funeral expenses is at GD 7. GD7 is the Minister’s submissions. The Added Party may have meant GD 6 and this may have been a simple typographical error. She also referred to GD28 and incorrectly used “tab” numbers rather than exhibit numbers. However, I am confident I have all of the information and evidence the Added Party referred to in her submissions. I am also confident the Claimant has all of the information and could identify the evidence referred to in the Added Party’s submissions. There is no reason to delay the appeal to correct typographical errors.

Reasons for my decision

What the CPP says about the Survivor Pension

[25] 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 period⁵. There is no issue regarding the Contributor's base contributions.

[26] 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 partner⁶.

[27] 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 year⁷. In other words that they lived in a marriage-like relationship during the whole year before the contributor's death.⁸

[28] The factors that are relevant to determining whether two people were cohabiting in a conjugal relationship include⁹:

- a Shelter, including considerations of whether the parties lived under the same roof, slept together, and whether anyone else occupied or shared the available accommodation;
- b Sexual and personal behavior, including whether the parties had sexual relations, maintained an attitude of fidelity to each other, communicated on a

⁵ Paragraph 44(1)(d) of the *Canada Pension Plan*

⁶ Subsection 42(1) of the *Canada Pension Plan*

⁷ Subsection 2(1) of the *Canada Pension Plan*

⁸ See the recent Social Security Tribunal Appeal Division (AD) decision in *JR v. Minister of Employment and Social Development*, AD-20-851. I will refer to this decision as JR. I am not required to follow AD decisions, however I find the AD provides a very clear description of common-law partner for the purpose of survivor benefits.

⁹ *McLaughlin v. Canada (Attorney General)*, 2012 FC 556

- personal level, ate together, assisted each other with problems or during illness or bought each other gifts;
- c Services, including the roles they played in preparation of meals, doing laundry, shopping, conducting household maintenance and other domestic services;
 - d Social, including whether the parties participated together or separately in neighbourhood and community activities and their relationship with each other's family members;
 - e Societal, including the attitude and conduct of the community towards each of them as a couple;
 - f Support, including the financial arrangements between the parties for provision of necessities and acquisition and ownership of property; and

[29] Attitude and conduct concerning any children.

I find the Added Party and the Contributor were common-law partners at the time of the Contributor's death (May 2017)

[30] The Added Party submitted evidence from individuals who knew her and the Contributor as a couple when they lived in Florida. Beginning in February 2016, the Added Party and the Contributor met their landlord and signed a lease for the rental property they would live in. The landlord thought they were a couple. He said they told him about their plans to buy a house in the same area.

[31] Neighbors and colleagues testified that they knew the Added Party and the Contributor as a couple beginning in February 2016. The Added Party's former employer knew her to be in a marriage-like relationship. The Contributor came to her place of business and was seen as her partner. A member of the board of directors helped them find furniture for their home.

[32] Socially they attended regular events together as a couple and talked about their plans for the future. They hosted events at their home. The Added Party's sister heard the Added Party talk about the Contributor for several years. She visited them in Florida and stayed in their home.

[33] Financial advisers testified about their financial plans including purchasing a home together. The bank manager and mortgage broker saw them as a couple. The bank manager said he knew the Added Party and the Contributor from March/April 2016 until April 2017 when he changed jobs. He helped the Added Party set up her bank account in March 2016. He helped the Contributor open his account in April 2016. They asked him about arranging a mortgage when they purchased their home. He was not able to work with them to set up a mortgage and he referred them to the mortgage broker who said she began working with them in July or August 2016.

[34] One witness said he met the Contributor in Ontario in early 2016 and was adamant he saw both the Added Party and Contributor at the gym in Ontario at least twice a week for the following year. I find this witness' evidence is not plausible. His statement is contrary to all of the other testimony and evidence on file. The Added Party and the Contributor lived in Florida in homes (rental and owned) beginning early February 2016. Even though the Contributor returned to Canada for periods of time he was not in Ontario every week from early 2016 to early 2017. Also, the evidence is that the Added Party remained in Florida for the entire time. There is no explanation for this witness' error. Because of that I find I cannot rely on his statement. I will disregard his testimony.¹⁰

[35] The evidence on file shows the Contributor and the Added Party shared a residence from, at least February 2016 when they signed the lease. There is evidence they engaged in sexual relations and behaved as a couple in a marriage-like relationship. All of the witnesses who visited at their homes knew they shared the homes as a couple. They shared one bedroom, shared household responsibilities and presented themselves as a couple. They attended other events as a couple and

¹⁰ The witness is S. T. and he gave testimony by telephone.

introduced each other as partners. In their community, business and social circle they were seen as being in a marriage-like relationship from February 2016.

The Added party and the Contributor were in a common-law relationship for more than one year even though they did not live in the same residence at all times

[36] 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 roof.¹¹ Instead, 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 one.¹²

[37] There were periods when the Added Party and Contributor were apart temporarily. He travelled to Canada for family and personal reasons. His time away from his home in Florida was more like personal or business travel. There is no evidence to support a conclusion that he intended to end his common-law relationship with the Added Party.

[38] The evidence showed the Contributor used different mailing addresses for different reasons. He used his Florida address for his property and financial business, the Claimant’s address for some insurance and work correspondence and his mother’s for other business.

[39] Very little changed in the Added Party’s relationship with the Contributor when they were apart. The living arrangements were temporary and they did not demonstrate, by their conduct, that they intended to end the relationship. When he was in Canada he continued to write to the Added Party and plan for his return. Their messages to each other demonstrated the intention to continue their relationship upon his return.

¹¹ *Hodge v. MHRD*, 2004 SCC 65. The AD in JR also considered this point and confirmed the clear direction from the Court that parties can live apart and still meet the definition of common-law partner under the CPP.

¹² *Hodge v. MHRD*, 2004 SCC 65

The evidence does not support the Claimant's contentions

[40] The Claimant submits there is enough evidence to show the Contributor did not intend to live in a common-law relationship with the Added Party. She believes when the Contributor was in Canada his actions demonstrated an intention to live as a single person and not as the Added Party's common-law partner. She says a common-law relationship is possible only when both parties demonstrate by their words and actions that they intend to be seen as common-law partners.

[41] The Claimant said the Contributor did not demonstrate in his last year that he intended to be in a common-law relationship with the Added Party. She said the facts prove he was not seriously committed to the Added Party. They are that he:

- lived in his mother's home in March 2016;
- was in a serious committed relationship with another woman until June 2016;
- re-engaged with a former lover and during the last five to six weeks of his life;
- was in a serious long-distance relationship with a third woman; and
- the ring he gave the Added Party as an engagement ring was not valuable.

[42] The Claimant said the Contributor was financially and emotionally dependent on her. He was in constant contact with her and he rarely talked about the Added Party. He did not say they were in a serious relationship. But that is not how he presented his relationship to others.

[43] The Claimant submits that the Contributor's friends and family have known him much longer than the friends and acquaintances in Florida. She seems to suggest I should prefer their opinions about the Contributor's relationship because they knew him longer. I simply do not agree with the Claimant. In fact, his friends and acquaintances in Florida knew him during the period in question. As noted earlier, the question is whether the Contributor was the Added party's common-law partner in May 2017 and for at least

one year before. What is important is how he acted during that time and whether he demonstrated the intention to live in a marriage-like relationship with the Added Party.

[44] There is no question the Contributor's actions during his visits to Canada showed he was less than honest with many people including the Claimant and the Added Party. His fidelity was not clear and, to his friends and family in Canada, he appeared to show himself as a dishonest and disloyal person. The Claimant excused his actions and attributed them to his mental health conditions.

[45] When the Contributor was in Florida he was seen in the community as a very different person. He was described as loyal, honest, devoted to the Added Party, fun, happy and committed to making a life in Florida with the Added Party.

[46] The Contributor had a residence in Florida beginning in February, 2016. One witness said she helped them (the Added party and the Contributor) find the rental property.¹³ They signed a lease in February 2016¹⁴ and a neighbor helped them find furniture. The neighbors, colleagues and businesses saw them as a couple. Close, loving and supportive of each other.

[47] The Claimant says the Added Party lacks credibility because she lied and submitted forged documents to access the Contributor's estate and potential death benefits. I have no authority to investigate these allegations. Moreover, there is no proof from an agency authorized to investigate, that the allegations are true. If the Claimant proved the Added Party was not honest in her dealings about the Contributor's estate that would have some weight regarding her reliability as a witness. That could affect whether I accept her as a credible witness. However, that does not affect the credibility of the many witnesses who testified about their personal observations and contact with the Added Party and the Contributor as a couple.

¹³ GD6-180

¹⁴ GD36-56

Does the Contributor's lack of fidelity show he did not intend to be the Added Party's common-law partner?

[48] The Claimant presented considerable evidence of the Contributor's lack of fidelity and his dishonesty. She claims that proves he did not intend to live in a common-law relationship with the Added Party. The question before me is not whether the Contributor was a good or honest person. The only question to be answered is whether the Contributor and the Added Party lived in a common-law relationship for at least one year before his death.¹⁵

[49] The Claimant points to what witnesses said about the Claimant's other relationships. One witness said she was in a relationship with the Contributor for "many months" between March and July 2016. She said they were together day and night unless he was with the Claimant.¹⁶ The Contributor's brother said the Contributor was unhappy in Florida.¹⁷ His mother said he had one girlfriend visit him at her home in June 2016 and he was dating another woman in the winter of 2016. She said he "went back" to Florida at the end of June 2016. She later said the Contributor lived with her from the spring of 2016 to March 2017.¹⁸

[50] According to the Claimant, the Contributor's mother, the Contributor's brother, and several other women, the Contributor had close intimate contact with several women from around March to June 2016. Also during this time he supposedly entered into a long distance, internet relationship with another woman. According to that woman, he intended to move to Oregon and marry her.

[51] In February 2016 the Contributor and Added Party entered into a rental agreement in Florida for a house. At some point in the spring of 2016 he travelled to Canada and stayed at his mother's. It is not clear how many trips he made between Canada and Florida during these months. He is said to have met or reconnected with former lovers and reached out to a third "girlfriend" to try to establish a relationship. The

¹⁵ The court said this in *Farrell v. Canada (A.G.)*, 2010, FC

¹⁶ This witness' letter is at GD20

¹⁷ This letter is at GD21-49

¹⁸ SF's mother's evidence is at GD12-20

Claimant claims he was unstable and could not maintain a lasting relationship with anyone.

[52] The Claimant also said there is another woman who said she had a relationship with the Contributor during the time he lived in Florida. She felt she and the Contributor had a close relationship and intended to be together as soon as he could make the trip to her home. After the Contributor's death she published photos and letters about him and said they planned to get married.

[53] It is true that an attitude of fidelity toward another person can show an intention to live in a committed relationship. However, there are many factors that can demonstrate a person's intention to live in a common-law relationship. The Contributor lived with the Added Party, rented a house and then purchased a house with her. He treated her as his partner in public and in social gatherings in their home. All of these facts lead me to accept that he intended to live in a common-law relationship for at least one year before his death.

[54] The allegations that the Contributor did not maintain an attitude of fidelity toward to the Added Party may have eventually affected their relationship but from at least May 2016 to his death in May 2017 he and the Added Party were common-law partners and she is his surviving spouse as defined by the CPP.

Conclusion

[55] I find that the Claimant isn't the Contributor's surviving spouse and isn't eligible for a survivor's pension under the CPP.

[56] This means the appeal is dismissed.

Anne S. Clark
Member, General Division – Income Security Section