



Citation: *EM v Minister of Employment and Social Development*, 2024 SST 291

**Social Security Tribunal of Canada  
General Division – Income Security Section**

## Decision

**Appellant:** E. M.

**Respondent:** Cathy Isenor for the Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development reconsideration decision dated June 7, 2023 (issued by Service Canada)

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**Tribunal member:** Jackie Laidlaw

**Type of hearing:** Teleconference

**Hearing date:** February 6, 2024

**Hearing participants:** Appellant  
Respondent

**Decision date:** February 13, 2024

**File number:** GP-23-1112

## **Decision**

[1] The appeal is allowed.

[2] The Appellant, E. M., is eligible for a Canada Pension Plan (CPP) Survivor's pension. This decision explains why I am allowing the appeal.

## **Overview**

[3] The Appellant was 75-years old when she married T. B. (the Deceased) on October 12, 2022. The Deceased died on October 20, 2022. The Appellant was R. S.'s common-law spouse from 1999 until he died on September 27, 2022. The Appellant lived with the Deceased from October 2020 until he died.

[4] The Appellant applied for a CPP Survivor's pension on June 22, 2023. The Minister of Employment and Social Development (Minister) refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

## **The Minister's Reasons for Denial**

[5] The Minister relies upon section 63(7) of the CPP, noted below in paragraph 9. They have denied the benefit because they have determined the Appellant and the Deceased were not living common-law for one year before the marriage, and that the Deceased's health condition was such that there was no expectation of surviving for at least one year after the marriage.

## **What the Appellant must prove**

[6] For the Appellant to succeed, she must prove:

- (i) The Deceased had an expectation of surviving for at least one year after the marriage; or
- (ii) she was living with the Deceased in a common-law relationship for one year before they married.

## The Law

[7] A Survivor's pension is paid to a survivor of a deceased contributor.<sup>1</sup> A survivor is defined in the CPP as person who was married to the contributor at the time of death if there is no common-law partner.<sup>2</sup>

[8] A common-law partner, in relation to a contributor means a person who is cohabitating with the contributor in a conjugal relationship at the relevant time, having so cohabitated with the contributor for a continuous period of at least one year.<sup>3</sup>

[9] A Survivor's pension is not payable if a contributor dies within one year of marriage unless the evidence shows there was an expectation they would live more than one year.<sup>4</sup>

[10] There are exceptions if the period of marriage and cohabitation before the marriage is more than one year.<sup>5</sup>

### – Undisputed facts

[11] The Appellant lived with R. S. in a common-law relationship starting 1999. R. S. was diagnosed with Frontotemporal Dementia and in July 2019 he was admitted to hospital. In October 2019, R. S. was transferred to long term care, where he stayed until the end of his life. R. S. died on September 27, 2022.

[12] The Deceased and the Appellant married legally on October 12, 2022.

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<sup>1</sup> See Paragraph 44(1)(d) of the *CPP*.

<sup>2</sup> See subsection 42(1) of the *CPP*.

<sup>3</sup> See the definition of a common-law partner in Section 2 of the *CPP*.

<sup>4</sup> Section 63 (7) of the *CPP* states: Where a contributor dies within one year of marriage, no survivor's pension is payable if the Minister is not satisfied that the contributor was in such a condition of health as to justify an expectation of surviving at least one year after the marriage.

<sup>5</sup> Subsection 63(7.1) states subsection 63(7) does not apply if the aggregate of the following periods in one year or more:

- a) The period during which the contributor and the survivor had cohabitated during the marriage; and
- b) The period during which the contributor and the survivor had cohabitated in a conjugal relationship immediately before the marriage.

[13] The Deceased was diagnosed with cancer and died on October 20, 2022.

[14] The Appellant currently lives at the Deceased's condominium (condo).

– **The Appellant's testimony**

[15] The Appellant met the Deceased in the parking lot of the hospital where R. S., and the Deceased's wife were staying. This was July or August 2019. They saw each other and talked a few times after that in the parking lot. The Deceased's wife died in August 2019.

[16] The Deceased and the Appellant stayed in touch by text for a year. The Deceased helped the Appellant find long-term care for R. S.

[17] The Deceased went to Florida in January 2020 for a holiday. He asked the Appellant to join him, in a platonic way, so that she could have a break. The Appellant was going to another area of Florida too and was prevented by the new COVID restrictions. The Deceased returned from Florida with a dollar store gift for the Appellant. They agreed to meet and she would buy him breakfast for his gift. COVID delayed the meeting until May 2020. At that time, they began to go out together, looking at the tulips and spending time "dating". They began to have sex in July or August 2020.

[18] In October 2020, the Appellant was to have a knee operation. The Deceased asked her to move in and he would take care of her. She did not officially move in but did spend the majority of her time living with the Deceased at his home.

[19] It was around this point the Appellant and the Deceased, who were both in their 70's, discussed marriage but wanted to wait until R. S. died. Even though the Appellant was not technically living with R. S. any longer, she felt she would wait as she was still R. S.'s caregiver, and in her mind, his common-law partner.

[20] In September 2021 the Appellant sold the home she owned with R. S. She had the Power of Attorney to do so. There was no legal issue with her selling the house.

[21] At that point, in September 2021, the Appellant officially moved in with the Deceased in his condo.

[22] In November 2021, the Deceased passed out. He went to the emergency department on December 2, 2021 and found he had Stage 4 cancer. On December 4, 2021, the Deceased and the Appellant went to the heart institute and the Deceased had a heart bypass.

[23] The Appellant spent the next year, still living with the Deceased, taking him to blood transfusions, radiation, and chemotherapy. She remained living with him and was his constant caregiver and partner. At the same time, she was also the caregiver for R. S., in that she needed to visit him in the long-term care and make decisions on his wellbeing.

[24] The Appellant was listed as the Deceased's contact at the hospital, as was his son. Because the son had issues with speaking, the Deceased put the Appellant as the main contact and she signed for everything.

[25] The Appellant stated she knew the Deceased's son and daughter-in-law very well. She first met them in the fall of 2020. They accepted the relationship she had with the Deceased because they knew he was happy. She spoke to the son often. She continues to speak to him after the Deceased's death. The son and his wife were at the Appellant's and Deceased's' wedding. The son's wife was the witness on the wedding license.

[26] The Appellant stated that because of COVID, they did not socialize with many people. However, her friends, neighbours and co-workers were aware of her relationship with the Deceased.

[27] The Appellant stated that the Deceased was a military man and would never do anything he did not want to do. He remained of sound mind until he died.

[28] The Appellant explained that the doctors and the Deceased never told her he would die. She had no idea how long he would live. During his last month, in August or

September 2022, the Deceased took an extra radiation treatment, hoping it might be the cure.

[29] The Appellant still lives in the Deceased's condo which they shared. The Deceased set it up before he died that she would be able to live there until she died.

### – **The Material Evidence**

[30] There is not much evidence on file. There are no medical records for the Deceased, other than the Power of Attorney for Personal Care. The majority of my determination is from the Appellant's sworn testimony.

[31] There is a signed witness statement from the superintendent of the Deceased's condominium stating that the Appellant officially relocated to the Deceased's condo in September 2021.<sup>6</sup>

[32] The marriage certificate shows the witness as the Deceased's daughter-in-law.<sup>7</sup>

[33] There is an RBC Dominion Securities Statement of Account for the Appellant dated September 30, 2021 with her address as that of the Deceased.<sup>8</sup>

[34] At the hearing, I requested a copy of the Deceased's Power of Attorney for Personal Care because it was relevant information. The Appellant sent a copy to the Tribunal. The document names the Appellant and the Deceased's son to act jointly or separately as Power of Attorney for Personal Care.<sup>9</sup>

## **Reasons for my decision**

[35] The Minister has maintained the denial of the claim at the hearing and stated they still required some evidence to prove the Appellant was in a common-law relationship with the Deceased.

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<sup>6</sup> See GD 1-13.

<sup>7</sup> See GD 2R-45.

<sup>8</sup> See GD 1-9.

<sup>9</sup> See GD 10.

[36] The Appellant told the Minister numerous times they were not common-law. The Minister is taking the Appellant's word on face value. This comment must be seen in a realistic manner, and not simply on face value. The Appellant was considering the term "common-law" in a moral light. She is an older, Catholic woman. She felt she was still in a relationship with R. S. That was because he was still living, albeit not with her. She morally did not believe a person could have two common-law partners. She stated she and the Deceased were in love and planning to marry after R. S. died. Until then, they were living together and having, what she termed, an affair.

[37] Legally, that is true that people cannot have two common-law partners. However, she was living with the Deceased, a year before they married, and having conjugal relations. This is a simplistic definition of "common-law" according to the CPP. That is what I must determine, not the moral aspect of the Appellant being attached to two men.

[38] The evidence shows she moved in with the Deceased a year before they were married. The Appellant testified they began to have conjugal relations in July or August 2020, well before the Deceased died. I accept these are facts.

[39] There are other criteria I have to consider when determining common-law.

[40] The courts have described what is meant to cohabit in a common-law conjugal relationship.<sup>10</sup> This is a non-exhaustive list of elements:

- Financial interdependence, i.e., Shared bank accounts, credit cards, ownership of property.
- A sexual relationship.
- A common residence.
- A sharing of responsibility of household and raising children.

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<sup>10</sup> See *Betts v. Shannon*, 2001 CarswellNat 4429

- Shared assets such as cars.
- Named beneficiary in will, insurance policy of other.
- Knowledge of medical needs.
- Public recognition of the parties; and,
- Representing themselves to tax and social welfare authorities as common-law.<sup>11</sup>

[41] I must look at this situation with a rational, and realistic view in light of a lack of material evidence.

[42] The Appellant was quite aware of the Deceased's medical needs and was named Power of Attorney for Personal Care. I realize this was not a year before they married, but the Deceased was not sick a year before they married. The Deceased realized he had Stage 4 cancer, which is generally considered terminal, in December 2021. This set off numerous treatments, and doctors visits. The Appellant accompanied the Deceased to all of them. The Appellant was aware of his medical needs. As well, the Deceased asked her to move in when she had her knee operation, showing he was aware as well of her medical needs.

[43] At the same time, R. S. was in long-term care on his final months and the Appellant was tending to both men. It is reasonable that there was no time for the Appellant and the Deceased to have dealt with any very complicated issues such as joint wills, bank accounts, charge accounts, loans, etc. As well, I do not put weight on the need for financial interdependence or shared assets given both parties were in their 70's and had already established their own accounts. Not all couples, especially older couples wish to combine their assets.

[44] The relationship played out during the time of COVID. I accept that they would not have seen many friends during that time. However, the son and daughter-in-law of

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<sup>11</sup> See *Dilka v. Canada (Attorney General)* 2009 FCA 90



the Deceased were at their very small wedding. This shows me that their relationship was in the open and they were accepted by friends and family as a couple.

[45] The clause the Minister has relied upon is rarely invoked. I have thought about the intention of the lawmakers when they put that clause into the CPP. I can only determine it is there to prevent some fraudulent marriage by a party to receive the Survivor's pension. The CPP is an insurance benefit, paid for in part by the Deceased through his contributions to the CPP. In which case, it is the Deceased's insurance policy, and he can marry who he wishes knowing they would receive it (subject to him not having another common-law relationship at the time). I can see this clause being invoked if the Deceased was not fully of sound mind when the marriage took place. Or, if the Deceased had another "spouse" who would have benefited but for the marriage.

[46] Neither of these scenarios are the case here. The Deceased was sick of course, but of sound mind when he married the Appellant. His wife had died and there was no other "spouse" that would have benefited. I do not think this clause was meant for this couple. Nonetheless, the Minister has denied the benefit based on this clause<sup>12</sup>, and I must determine if it the Appellant meets the exclusion clause<sup>13</sup>.

[47] The Appellant proved she and the Deceased lived together in a conjugal relationship a year before they married. The Appellant was named his Power of Attorney for Personal Care. His children were aware of the relationship and sanctioned the marriage as witnesses. This satisfies me that the Appellant and the Deceased were in a common-law relationship according to the CPP one year before they married.

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<sup>12</sup> Subsection 63(7) of the CPP.

<sup>13</sup> Subsection 63(7.1) of the CPP.

## **Conclusion**

[48] I find that the Appellant is eligible for a CPP Survivor's pension for the Deceased because they were legally married and living common-law a year before the marriage.

[49] This means the appeal is allowed.

Jackie Laidlaw  
Member, General Division – Income Security Section