Citation: *SS v Minister of Employment and Social Development and PS*, 2022 SST 713

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	S. S.
Respondent:	Minister of Employment and Social Development
Added Party:	P. S.
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated August 19, 2020 (issued by Service Canada)
Tribunal member:	Virginia Saunders
Type of hearing:	Teleconference
Hearing date:	February 10, 2022 May 12, 2022 June 15, 2022
Hearing participant:	Appellant
Decision date:	July 11, 2022
File number:	GP-20-1825

Decision

[1] The appeal is dismissed.

[2] The Appellant, S. S., isn't eligible to have his Guaranteed Income Supplement (GIS) calculated at the rate for a single person.

[3] This decision explains why I am dismissing the appeal.

Overview

[4] The Appellant is 76 years old. He has been married to the Added Party since 1975. He started receiving an Old Age Security (OAS) pension and GIS in September 2010.

[5] The Appellant's GIS was calculated at the married rate. I will explain what this means.

[6] The GIS is paid to OAS pensioners who have little or no other income.[1] The Minister of Employment and Social Development (Minister) determines if a pensioner is eligible for each 12-month payment period.[2] To do this, the Minister usually looks at the pensioner's income (as reported on their income tax return) for the previous calendar year.[3]

[7] If the pensioner has a spouse, their GIS eligibility is based on the couple's combined income.[4] This is called the married rate.

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[1] There are other requirements, but they aren't an issue in this appeal.
[2] The Minister manages the Old Age Security programs through Service Canada. The payment period goes from July of one year to June of the next year.
[3] If the pensioner's regular income is lower than it was in the previous year, the Minister can use an estimate of their current income instead. See section 14 of the *Old Age Security Act* (OAS Act).
[4] See section 12 of the OAS Act.

[8] If the pensioner is separated from their spouse for a continuous period of at least three months, their GIS eligibility is calculated as if they didn't have a spouse.[5] This is called the single rate.

[9] In March 2017, the Canada Revenue Agency reassessed the Added Party's 2014 income.[6] Her 2014 income was now higher than what the Minister had used to determine if the Appellant was eligible for the GIS. As a result, the Minister decided the Appellant wasn't eligible for the GIS from July 2015 to June 2016. The Appellant had to repay the $4,230.00 he had received during that payment period.[7]

[10] After he received the Minister's decision, the Appellant contacted Service Canada. He wanted his GIS to be calculated at the single rate. Service Canada gave him a statutory declaration form to complete.

[11] The Appellant signed the statutory declaration in December 2017. He declared that he and the Added Party had been living separate and apart since September 1, 2015.[8] The Added Party made a similar statutory declaration in February 2020.[9] The Appellant claims they are still separated.

[12] The Minister doesn't agree that the Appellant and the Added Party are separated. The Minister wouldn't change its decision about the Appellant's 2015-2016 GIS, and the Minister continues to calculate the Appellant's GIS entitlement at the married rate.[10]

[13] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] See section 15(4.1) of the OAS Act.
[6] See GD4-7.
[7] See GD4-9-12.
[8] See GD2-5.
[9] See GD5-3.
[10] See the reconsideration decision at GD2-46.

What the Appellant must prove

[14] For the Appellant to succeed, he must prove that he and the Added Party have been separated since September 1, 2015. The Appellant did not claim they were separated before that date.

[15] The Appellant must prove this on a balance of probabilities. This means he has to show it is more likely than not that he was separated under the OAS Act.

Reasons for my decision

[16] I find that the Appellant did not prove that he and the Added Party have been separated since September 1, 2015, or for any continuous period of at least three months since that date.

[17] Here are the reasons for my decision.

What "separated" means

[18] The Minister argued that spouses are separated when

- they live separate and apart by mutual agreement
- there is a legal separation, or
- one has deserted the other according to the law of the province where they last resided together.[11]

[19] However, the OAS Act doesn't say this. The OAS Act doesn't define "separated". It doesn't use the term "separate and apart" either. There aren't any court decisions that set out the factors to consider when deciding if a married couple is separated under the OAS Act.[12]

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[11] See GD6-8.
[12] One decision discusses this, but it was applying a provision in the *Old Age Security Regulations* that explained when parties were separated. That provision was repealed in 2000. See *Canada (Minister of Human Resources Development) v Neron*, 2004 FC 101. I also considered *Kombargi v Minister of Human Resources Development*, 2006 FC 1511.

[20] To decide what "separated" means for this appeal, I have to look at the ordinary meaning of the word and consider how it fits in with the purpose of the OAS and the intention of Parliament.[13]

[21] "Separated" generally describes people or things that are apart. But when we talk about married people being separated, we usually mean more than that. We mean they are apart because at least one of them has decided they no longer want to live or be seen as a married couple, and has acted on that decision.

[22] I find that Parliament intended the OAS Act to mean this as well. I reached this conclusion by looking at a similar rule for common-law partners.[14] Like married spouses, common-law partners' GIS is calculated using both their incomes. If they stop being common-law partners for more than three months, their GIS is calculated at the single rate.

[23] I find that Parliament intended to treat common-law couples and married couples the same way. This means the factors that show two people have stopped being common-law partners are the same ones that show a married couple is separated.

[24] The OAS Act says a common-law partner is "a person who is cohabiting with [an] individual in a conjugal relationship".[15] By extension, spouses are not separated if they are cohabiting in a conjugal relationship.

[25] I will now explain why I decided the Appellant and the Added Party have been cohabiting in a conjugal relationship since September 2015.

What "cohabiting in a conjugal relationship" means

[26] Several court decisions explain what cohabiting in a conjugal relationship means. Although some of these decisions were about the *Canada Pension Plan*, they are

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[13] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC).
[14] See section 15(4.2) of the OAS Act.
[15] See section 2 of the OAS Act.

relevant because the *Canada Pension Plan* defines “common law partner” the same way as the OAS Act.[16]

[27] When I am deciding whether the Appellant and the Added Party are cohabiting in a conjugal relationship, I don’t judge the quality of their relationship. Instead, I have to look at factors such as:

- their living and sleeping arrangements
- their financial arrangements
- their behaviour towards each other privately and in public
- what help they give each other in the home
- how their family and community view their relationship[17]

[28] Not all of these factors are required for there to be a conjugal relationship. They can also be present in varying degrees. I have to take a flexible approach in deciding whether there is a conjugal relationship.[18]

The Appellant is cohabiting in a conjugal relationship

[29] I find that the Appellant and the Added Party were cohabiting in a conjugal relationship in September 2015, and have continued to do so since that date. This means the Appellant has not proven that he was separated during that period.

[30] I accept the Appellant’s evidence that he and the Added Party lived at different addresses from September 2015 until sometime in 2018. I also accept that, since then, the Added Party has lived at the same address as the Appellant but they live in different parts of the house.

[31] A couple can cohabit even if they don’t live under the same roof. They can also be separated even if they still live in the same household.[19]

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[16] See section 2 of the *Canada Pension Plan*.
[17] See *McLaughlin v. Canada (Attorney General)*, 2012 FC 556.
[18] See *M v H*, [1999] 2 SCR 3 at paragraphs 59-60.
[19] See *Hodge v. Canada*, 2004 SCC 65 and *Kombargi v. Canada (MSDC),* 2006 FC 1511.

[32] Although the Appellant and the Added Party were and are physically separated, the rest of the evidence tells me they have continued to cohabit in a conjugal relationship.

[33] I reached this decision by considering the following factors.

– **I believed most of what the Appellant said**

[34] I believed most of what the Appellant said about his relationship with the Added Party. Most of his story was plausible. He told the same story in writing and in person over three hearing dates.[20] He told a Service Canada investigator the same thing in October 2018.[21] In its written submissions, the Minister didn't suggest the Appellant wasn't telling the truth. The Minister didn't send a representative to the hearing to cross-examine the Appellant.

[35] I didn't believe some of what the Appellant said. I will discuss that later. They were minor points, so it didn't affect my conclusion that the Appellant was being honest.

– **How the Appellant and the Added Party live and treat each other**

[36] The Appellant's and the Added Party's living and sleeping arrangements suggest they stopped cohabiting in a conjugal relationship in September 2015. However, as I discuss below, they aren't the only factors I have to consider.

[37] The Appellant told me he and the Added Party stopped having sexual relations a few years before 2015. At first this was because of their age. Later, their worsening relationship played a part as well. The Appellant felt there was no love between them.

[38] The Appellant told me his relationship with the Added Party started to deteriorate in 2014 because of financial stress caused by the Added Party's wish to build a new home. At the time, they were living together in the family home on X in Edmonton. They

[20] See GD1-1 and the audio recordings of the hearing.
[21] See GD11-3-4.

formed a company with their son. The company bought land on X, about eight kilometres away. They started building a new house.

[39] They originally planned that the Appellant and the Added Party would live in the new house with their son. Then their son lost his job. He couldn't contribute to the building costs and he told his parents he wouldn't be moving into the new house.

[40] The Appellant told me he wasn't very involved in the project. He didn't think it was a good idea. He was always worried about the cost. On the other hand, the Added Party was very enthusiastic. She wanted to continue building. This put a strain on their relationship.

[41] The new house was finished in September 2015. The Added Party moved there with all her belongings. The Appellant told me the Added Party thought their son would follow, but he never did. The Appellant stayed at X. He didn't want to have anything to do with the X property because he felt they could not afford it. It caused him a great deal of financial stress and worry.

[42] The Appellant told me he didn't have a key to the new house. He didn't go there at all after it was finished. He didn't see the Added Party at X while she was living at X. However, she could go to X if she wanted because she knew the codes for the main house lock and the garage lock. She continued to receive mail at the community mailbox for X. So did the Appellant.

[43] The family sold X in May 2018. The Appellant told me he had nothing to do with the sale and he never saw any of the proceeds. The Added Party then started a major renovation at X. The Appellant had to move into the basement because of the renovation. The Added Party went to live with a friend until the renovations were finished. Then she moved back to X.

[44] The Appellant and the Added Party still live at X. The Appellant told me the Added Party has lived in the main part of the house since she moved back in 2018. The Appellant still lives in the basement.

[45] The basement has a separate entrance from the garage. It can also be reached through the main part of the house. The Appellant has a fridge, a bedroom, and a bathroom. He has very little contact with the Added Party. He might see her when she comes into the basement to do laundry. She will sometimes prepare food for him and leave it on her kitchen counter. He brings it to the basement to eat.

[46] If I only looked at this part of the Appellant’s relationship with the Added Party, I would be tempted to say they were separated. But I have to look at other factors as well. Their financial arrangements and their actions since September 2015 tell me they were not separated in the way the OAS requires.

– **The Appellant’s and the Added Party’s financial arrangements**

[47] The Appellant’s and the Added Party’s financial arrangements show they continued to cohabit in a conjugal relationship after September 2015.

[48] Their banking and other financial arrangements didn’t change in any significant way in or after September 2015. They continued to present themselves to businesses and government agencies as a married couple living together at X. The Appellant only stopped when he discovered it was going to affect his GIS entitlement.

[49] **Bank accounts:** The Appellant and the Added Party have separate bank accounts. However, the Appellant told me they also had separate accounts before September 2015. The Appellant used her account to deposit her pay cheque. They had a joint account which they used for a line of credit to finance the X house. They paid off the line of credit after they sold X in 2018. The Appellant then closed the account.

[50] Many married and common-law couples have separate accounts. Others have joint accounts. Others have a combination. The Appellant’s banking arrangements before and after September 2015 don’t show that he was no longer cohabiting in a conjugal relationship.

[51] **Household expenses:** Since September 2015, the Appellant and the Added Party have bought their own groceries. They divide the other expenses. If a bill is in the

Appellant's name, he will pay it. The Added Party will give him cash for her share or will pay for a roughly equal expense herself. For example, the Appellant pays the property taxes but the Added Party pays for all the house maintenance costs. She also buys gardening supplies and plants although gardening is the Appellant's hobby, not hers.

[52] The Appellant told me he feels this arrangement is fair. They don't do an exact accounting because they aren't speaking to each other and because he feels it all evens out.

[53] I have trouble accepting that the Appellant and the Added Party don't speak at all, especially about financial matters. But whether they do or not, the casual way they decide who pays for what, and the level of trust involved in arranging their finances this way, tells me that neither of them intended to pause or end their relationship as a married couple, regardless of where the Added Party was living.

[54] **Property ownership:** Since September 2015, neither the Appellant nor the Added Party have taken any steps to divide their assets. This includes their primary assets: the houses on X (until 2018) and X. The Appellant remained as a shareholder in the family company that owned X. He told me he is the owner of X.

[55] The Appellant told me he didn't do anything about dividing assets because he couldn't afford a lawyer. I find this hard to accept. There were things he could have done at little or no cost, such as changing the locks at X. Furthermore, the cost of **not** acting could have been significant, as he remained responsible for the property taxes at X.[22] The Appellant was worried about finances. It would make sense for him to take steps to protect himself if he and the Added Party were truly separated.

[56] The Appellant's failure to act is similar to the informal way that he and the Added Party divided up their expenses. It shows he was willing to leave things as they were rather than separate from the Added Party and formalize the arrangement to protect his financial interests. It also shows he still regarded X as the Added Party's home.

[22] See GD4-23.

[57] I note that the Added Party didn't take any steps either. She had even more reason to, because she isn't on the title for X.

[58] I also note that the Added Party continued to use X as her home address.[23] She continued to receive mail there. When X sold, she started the renovation at X and then moved back in. She has always treated it as her home, and the Appellant has done nothing to show he feels differently.

[59] The fact that the Appellant and the Added Party didn't take any steps to divide their property tells me they didn't view the Added Party's move to X, or the change in their living arrangements in 2018, as a separation or an end to their conjugal relationship.

[60] **Benefits:** The Appellant and the Added Party were both receiving OAS benefits in September 2015. Their eligibility was based on their marital status, so they were supposed to inform the Minister **without delay** if they separated.[24] The Appellant was told this specifically in a letter of July 2015.[25]

[61] Neither the Appellant nor the Added Party told the Minister they had separated until they filed statutory declarations in December 2017 (the Appellant) and February 2020 (the Added Party). Instead, in November 2016 the Added Party applied to convert her OAS allowance to an OAS pension. The application form gave "married" and "separated" as two of the options for marital status. The Added Party said she was married.[26]

[62] I placed very little weight on the statutory declarations. They are inconsistent with the rest of the evidence. The Appellant only made his after he learned he wasn't eligible for the GIS because of the Added Party's income. The Added Party only made hers because the Appellant asked her to.[27]

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[23] See GD1-71-74, GD4-4, and GD4-49.
[24] See s. 15(9) of the OAS Act.
[25] See GD5-8.
[26] See GD4-2.
[27] The Appellant told me this at the hearing.

[63] I don't think the Appellant was being dishonest in making the declaration. He and the Added Party were physically separated, and it wasn't unreasonable for him to think that amounted to a separation for GIS purposes. But, considering that he didn't take that view until he knew it was going to cost him money, I can't accept it as evidence that he and the Added Party actually stopped cohabiting in a conjugal relationship in September 2015, or any time after that.

[64] **Income tax:** The Appellant stated he was married on his income tax returns for 2015, 2016, and 2017.[28] The Appellant told me his accountant prepared these returns, so he didn't know. But the Appellant can't use this as an excuse. He is responsible for what the returns say. If he truly thought that he and the Added Party were separated, he would have informed his accountant.

[65] I recognize that the Appellant later filed returns for 2015–2018 in which he stated he was separated.[29] However, he didn't file these until 2019. Like his statutory declaration, they don't persuade me that he actually was separated in those years.

[66] **Car insurance:** In 2018, the Appellant named the Added Party on his car insurance.[30] He told me this is required because they live at the same address so they have access to each other's keys. He told me they were also named on the same insurance in other years, because the Added Party never changed her address while she was at X. This may be true, but it's another area where the Appellant hasn't taken any steps to protect himself financially from things the Added Party might do. The most logical conclusion is that they are still cohabiting in a conjugal relationship. They aren't separated.

[67] **Alberta Seniors and Housing:** In 2019 and 2020, the Alberta Government updated the Appellant's file and classified him as single. As a result, he receives financial assistance.[31] However, the Appellant told me this classification was based on

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[28] See GD2-27-29. The Minister stated that Marital Status 1 means "separated." The Appellant did not prove otherwise.
[29] See GD2-11-25 and GD2-33-37.
[30] See GD1-61.
[31] See GD2-38 and GD1-53.

the information he gave on his tax return. As I explained above, I don't place much weight on what the Appellant said about his marital status after March 2017. This is because, since then, he has been insisting that he and the Added Party are separated, without sufficient evidence to support that.

– **How family members and the community view the relationship**

[68] The Appellant told me that he sees the Appellant occasionally outside the home at community and family events, but they don't go as a couple. This included their son's wedding in October 2018, when they flew to B.C. together using tickets their son purchased. The Appellant said they stayed at their son's house but didn't sleep together.[32]

[69] But the Appellant didn't provide any evidence to show his family or community members think that he and the Added Party are separated. There are no letters from family members or friends. No one appeared as a witness.

[70] The Added Party didn't come to the hearing. She didn't file anything to dispute an investigator's report of an interview in October 2018. According to that report, the Added Party said she and the Appellant were married and had never separated.[33]

Summary

[71] The Appellant has not proven that it is more likely than not that he and the Added Party separated in September 2015, or at any time after that. They lived at different addresses and now live in different parts of the same house. They do not have a sexual relationship. They may not have much in common any more.

[72] But those factors are outweighed by the fact that they have remained legally married. More importantly, they have not taken any steps at all to unwind their finances and their obligations to each other. They have a casual approach to their finances that shows a level of trust that one is more likely to find in a conjugal relationship. There is no evidence they have presented themselves as separated to their family members or

[32] See GD1-2.
[33] See GD11-8.

the community. Furthermore, they did not tell Service Canada or the Canada Revenue Agency that they were separated until they thought it was in their financial interest to do so.

Conclusion

[73] I find that the Appellant was not separated in September 2015, or at any time since then.

[74] This means the appeal is dismissed.

Virginia Saunders
Member, General Division – Income Security Section