



Citation: *The Estate of MK v Minister of Employment and Social Development*, 2023 SST 374

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

**Decision**

**Appellant:** The Estate of M. K.  
**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated May 3, 2021 (issued by  
Service Canada)

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**Tribunal member:** Wayne van der Meide  
**Type of hearing:** Teleconference  
**Hearing date:** March 30, 2023  
**Hearing participants:** Appellant's representative  
Appellant's witness  
**Decision date:** April 5, 2023  
**File number:** GP-22-662

## Decision

[1] The appeal is dismissed.

[2] The Estate of M. K. (Appellant) isn't entitled to payment of the Guaranteed Income Supplement (GIS) before October 2017.<sup>1</sup>

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

## Overview

[4] The Appellant's son, B. K., became her Power of Attorney (POA) in August 2018. He helped his mother file income tax returns and to apply for the GIS in September 2018. The Minister granted GIS with payments starting in October 2017.

[5] B. K. asked the Minister to reconsider its decision and grant the Appellant the GIS before October 2017. He says she was incapable of applying earlier. The Minister maintained its original decision.

[6] The Appellant died in April 2021. B. K. represents her estate. The Appellant appealed the Minister's decision to the Social Security Tribunal of Canada, General Division.

## What the Appellant must prove

[7] For the Appellant to succeed, she must prove that she could not apply before because she was incapacitated from applying earlier.<sup>2</sup>

[8] Incapacity means that a person was incapable of forming or expressing an intention to make an application before the day on which the application was actually made.

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<sup>1</sup> I will **also** refer to M. K. as the "Appellant," "she" or "her" even though, technically, her estate is the Appellant.

<sup>2</sup> The incapacity provision is contained at subsection 28.1(3) of the *Old Age Security Act*. In this decision I will also refer to decisions about the *Canada Pension Plan* because that Act's section on incapacity is very similar to the one in the *Old Age Security Act*.

[9] The Appellant must show that M. K. was continuously incapable of forming or expressing an intention to make her application during the entire period she claims she was incapacitated.<sup>3</sup>

[10] The test is not whether the Appellant could actually make or complete an application for benefits. She could have capacity to form or express an intention to apply even if she could not complete the application form or process.<sup>4</sup>

[11] The fact that the Appellant may not have known about the benefits at the time does not show that she was incapacitated. Awareness of a benefit is **not** the issue. The issue is whether she could form or express an intention.<sup>5</sup>

[12] The Appellant has the burden to establish the claim of incapacity.<sup>6</sup>

## Reasons for my decision

[13] The Appellant wasn't incapable of forming or expressing an intention to apply for the GIS before she applied with her son's help in September 2018.

[14] Although the Declaration of Incapacity says that the Appellant was incapable from 2010, it only refers to physical limitations.<sup>7</sup> The other medical evidence also **only** refers to physical problems and "social problems" at home.<sup>8</sup>

[15] B. K. says that his mother was incapable starting in 2013, or even as early as 2009, when her husband died.

[16] B. K. says that before his father died his mother handled all the bills for his father's business. He says she could handle financial matters.

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<sup>3</sup> See subsection 28.1(3) and *Flaig v Canada (Attorney General)*, 2017 FC 531.

<sup>4</sup> See *Canada (Attorney General) v Danielson*, 2008 FCA 78.

<sup>5</sup> See *Canada (Attorney General) v Hines*, 2016 FC 112.

<sup>6</sup> See *Grosvenor v Attorney General of Canada*, 2018 FC 36.

<sup>7</sup> See GD1-9 to GD1-1.

<sup>8</sup> See GD2-19 to GD2-33.

[17] B. K.'s wife also testified at the hearing. Both B. K. and his wife said that the Appellant changed, for the worse when her husband died in 2009 and she moved to North Bay.

[18] B. K. says that the Appellant was incapable because:

- She did not file her income tax returns after her husband died.
- She either did not know about, care about or forgot to pay bills like Hydro and phone bills, even though she had the money to pay them.<sup>9</sup>
- She was focussed on taking care of her other children, some of whom had mental and legal challenges.
- She did not stop her children when they took financial advantage of her.
- She did not notice and/or take any action, like tell someone, when her GIS payments stopped because she did not apply for it or file income tax returns.<sup>10</sup>
- She did not tell anyone about her living conditions which were very bad.
- She did not act when she was very sick, for example, when her legs became swollen and infected in 2015. In fact, she did not want to go to the hospital but was forced to by the paramedic.<sup>11</sup>

[19] I believe that all of this is true.

[20] However, there is no medical evidence showing that the Appellant was tested or treated for cognitive or mental problems before she applied with her son's help for the GIS in September 2018. On the contrary, the medical evidence shows that she participated in treatment decisions and decisions about her living arrangements.<sup>12</sup>

[21] For example, the Appellant went to the hospital in September 2017 because of a report/call by a health care aide that raised concerns about her. The doctor said that the

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<sup>9</sup> See GD1A-10.

<sup>10</sup> M. K. received GIS from October 2017 to May 2019.

<sup>11</sup> See GD2-32.

<sup>12</sup> See GD2-19 to GD2-33.

health care aide's call was an overreaction to a "social crisis at home" and that M. K. "concurred with this and was alert and oriented."

[22] At the hearing I asked B. K. why there was no medical evidence or tests of the Appellant's mental and cognitive abilities. He said that it was probably because when someone spoke with her, she could answer clearly, but would forget two minutes later. In other words, he says the doctors did not realize her impairment.

[23] I believe that the Appellant did have a loss of memory. I also believe that in some ways her cognitive and mental abilities declined, starting as early as when her husband died and as she got older. **But** she continued to be able to make decisions about her life.

[24] I asked B. K. how he became the Appellant's POA. He explained that at first his sister wanted to be the Appellant's POA and started the process to do that. B. K. said he was concerned about this and suggested to his mother that he be her POA instead of his sister. B. K. said the Appellant told him that she did not trust her daughter's boyfriend and that she wanted B. K. to be her POA instead. With the assistance of a nurse and lawyer, she then signed documents making B. K. her POA. The lawyer would have been responsible for making sure she had capacity to agree to making B. K. her POA. This tells me that she had the ability to form intentions to do something.

[25] B. K. says that as the Appellant got older, she didn't know about or understand how the GIS worked. He also says she didn't even realise that her GIS benefits had stopped. I believe this is true. But, as I said earlier, knowing about a benefit, or realising that a benefit stopped being paid, isn't the issue.

## **Conclusion**

[26] The Appellant wasn't incapable of forming or expressing an intent to apply for the GIS at any time before she actually applied for the GIS.

[27] The appeal is dismissed.

Wayne van der Meide  
Member, General Division – Income Security Section