

# COURT OF APPEAL FOR ONTARIO

CITATION: Carvalho v. Amorim, 2022 ONCA 158

DATE: 20220218

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Trotter, Coroza and Favreau JJ.A.

BETWEEN

Daniel Carvalho

Applicant (Respondent)

and

Maria Amorim and The Labourers' Pension Fund of Central and Eastern Canada

Respondents (Appellant/Respondent)

Patrick Di Monte, for the appellant

Eli Smolarcik, for the respondent Daniel Carvalho

Demetrios Yiokaris, for the respondent The Labourers' Pension Fund of Central and Eastern Canada

Heard: February 14, 2022 by video conference

On appeal from the judgment of Justice William S. Chalmers of the Superior Court of Justice, dated April 16, 2021.

## REASONS FOR DECISION

[1] After hearing submissions on behalf of the appellant, Maria Amorim, we advised the parties that the appeal would be dismissed with reasons to follow.

These are our reasons.

[2] Ms. Amorim appeals a judgment declaring that she does not meet the eligibility requirements of a “spouse” under s. 44 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8. The application judge based his decision on a finding that Ms. Amorim and the respondent, Daniel Carvalho, were living “separate and apart” at the time Mr. Carvalho started receiving disability benefits from the respondent, The Labourers’ Pension Fund of Central and Eastern Canada (the “Pension Fund”).<sup>1</sup> The effect of this finding is that Ms. Amorim is not entitled to survivor pension benefits and that Mr. Carvalho is entitled to “life-only” benefits, which are paid out at a higher rate than “joint and survivor” benefits.

[3] We see no error in the application judge’s decision.

[4] Mr. Carvalho and Ms. Amorim married in 1980. At the time, they were both residents of Portugal. They had one child together. Mr. Carvalho moved to Canada in 1985. Ms. Amorim joined Mr. Carvalho in Canada in 1990, but she returned to Portugal two months later. Mr. Carvalho traveled to Portugal from time to time, but he worked and lived in Canada while Ms. Amorim lived in Portugal. The couple commenced divorce proceedings in Portugal during 2007-2008, and they were formally divorced on July 14, 2009.

[5] In August 2002, Mr. Carvalho applied to the Pension Fund for a disability pension. At the time, he advised the Pension Fund that he was legally married, but

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<sup>1</sup> The Pension Fund took no position on the merits of the appeal.

provided a waiver allegedly signed by Ms. Amorim waiving her right to a spousal survivor pension.

[6] In 2008, at the time of the divorce proceedings, Ms. Amorim appointed her brother, Leonel Amorim, as her attorney for property in Canada. Mr. Amorim contacted the Pension Fund to enquire about whether Mr. Carvalho had applied for a pension. In the context of those communications, Mr. Amorim advised the Pension Fund that Ms. Amorim had never signed a spousal waiver. The Pension Fund subsequently reduced Mr. Carvalho's monthly payments to the joint and survivor benefit rate and notified him that he would be required to repay the overpayment unless he could prove that Ms. Amorim signed the waiver or that he and Ms. Amorim were living separate and apart when his pension began.

[7] Mr. Carvalho brought an application to the Superior Court. The two issues to be decided on the application were 1) whether Mr. Carvalho and Ms. Amorim had been living separate and apart at the time Mr. Carvalho started receiving his pension and, alternatively, 2) whether Ms. Amorim signed the spousal waiver.

[8] On the first issue, the application judge found, based on the evidence before him, that Mr. Carvalho and Ms. Amorim were living separate and apart at the time Mr. Carvalho started receiving pension benefits. On the second issue, the application judge found that Ms. Amorim did not sign the waiver. Nevertheless, given his finding that Mr. Carvalho and Ms. Amorim were living separate and apart

at the relevant time, the application judge made declarations that Ms. Amorim did not meet the eligibility requirements of a spouse under the *Pension Benefits Act* and that Mr. Carvalho was entitled to pension benefits on a “life-only” basis. On the issue of costs, the application judge found that this was an appropriate case for an order of no costs, given that Mr. Carvalho misrepresented to the Pension Fund that Ms. Amorim had signed the spousal waiver.

[9] In seeking to appeal the application judge’s decision, Ms. Amorim argues that the application judge erred in finding that she and Mr. Carvalho were living separate and apart in 2002.

[10] On appeal, errors of law are to be reviewed on a standard of correctness. Factual findings and issues of mixed fact and law are owed deference and are only to be overturned if the application judge made a palpable and overruling error: *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 8, 10.

[11] As conceded by Ms. Amorim, the application judge started with the correct legal test. Section 44(1) of the *Pension Benefits Act* provides that every pension paid to a member who has a spouse is to be paid out on a “joint and survivor pension” basis unless, pursuant to s. 44(4)(b), the member and his or her spouse are living “separate and apart” on the date that the first pension payment is due.<sup>2</sup>

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<sup>2</sup> The *Pension Benefits Act* has since been amended and the “living separate and apart” exception to the definition of “spouse” is now found in s. 44(1.1).

In determining whether Mr. Carvalho and Ms. Amorim were living “separate and apart” at the relevant time, the application judge turned to the case law under s. 8 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). He described the following indicia, derived from *Greaves v. Greaves* (2004), 4 R.F.L. (6th) 1 (Ont. S.C.), at para. 34, as relevant to his determination of whether the parties were living separate and apart:

- a. Physical separation, however, this is not the deciding factor as spouses may remain together for economic reasons;
- b. A withdrawal by one or both spouses from the matrimonial obligation with the intent of destroying the matrimonial consortium or of repudiating the marital relationship;
- c. the absence of sexual relations however this is not a conclusive factor;
- d. discussions of family problems and communications between the spouses;
- e. presence or absence of joint social activities; and
- f. the true intent of a spouse as opposed to a spouse’s stated intent.

[12] The application judge went on to review the evidence from both parties about their living arrangements at the relevant time. Ultimately, he summarized his factual findings as follows:

I conclude that at the time Mr. Carvalho first began receiving his disability pension he and Ms. Amorim were “living separate and apart”. They were physically separated. From 1990, Mr. Carvalho lived in Canada and

Ms. Amorim lived in Portugal. After 1990, Ms. Amorim did not travel to Toronto. There is also no evidence that they participated in each other's lives in any meaningful way.

I acknowledge that parties can be in a marital relationship even if they live in separate locations: *Greaves v. Greaves*, at para. 34. It is my view, however, that there must be evidence of a common purpose, involvement in each other's lives, and communication either in-person or by letters, texts, e-mails or phone. Here, there is no evidence of any sustained or significant interaction between the parties at the time Mr. Carvalho began receiving the disability pension in August 2002.

[13] We see no reviewable errors in the application judge's findings of fact. They are supported by the record and, as set out above, his factual findings are entitled to deference.

[14] Ms. Amorim takes issue with some of the application judge's factual findings. For example, she argues that he did not consider the contradictions in Mr. Carvalho's evidence regarding when the parties stopped having sexual relations. However, it is evident from the application judge's conclusions that he based his decision on the overall circumstances of the relationship between the parties. He considered the fact that the parties had not lived in the same location for many years and that they had little regular ongoing contact. This uncontradicted evidence supported his conclusion that the parties did not participate in each other's lives "in any meaningful way".

[15] Ms. Amorim also argues that there was no change in the parties' relationship from the mid-1990s to 2007-2008, when Mr. Carvalho initiated divorce

proceedings, thereby suggesting that they were not living separate and apart in 2002. However, the issue for the application judge was not whether there had been any change in the relationship prior to 2002, but whether the parties were living separate and apart at that time.

[16] The list of indicia for determining whether parties are living separate and apart is not formulaic and no individual factor is determinative. In this case, the application judge considered the totality of the evidence. He was aware that there were contradictions between the parties' evidence. However, looking at all the circumstances, he found that they were living separate and apart in 2002. His conclusion is entitled to deference and is supported by the record.

[17] The appeal is therefore dismissed.

[18] Despite being unsuccessful on the appeal, Ms. Amorim asks that no costs be awarded against her. She argues that she did not choose to become involved in the litigation and that the only reason this matter went to court was because of Mr. Carvalho's misrepresentation that she signed a spousal waiver. While the application judge's decision to award no costs was justified given Mr. Carvalho's conduct, the same rationale does not apply to the costs of the appeal. It was Ms. Amorim who chose to pursue the appeal. Therefore, in our view, there is no reason for the court to depart from the usual principle that the unsuccessful party is to pay costs to the successful party.

[19] Ms. Amorim is to pay costs of \$7,500.00, all inclusive, to Mr. Carvalho. No costs are awarded to or against the Pension Fund.

"Gary Trotter J.A."

"S. Coroza J.A."

"L. Favreau J.A."