

**Reasons for Decision:**

**Order# AP1920-0331**

On <date removed>, the appellant appealed the decision of the Director to assess an overpayment of <amount removed> to recover the assistance paid to <name removed> for the period <dates removed>, due to the Department's determination that the appellant and <name removed> had been living in an undeclared common-law relationship. No decision letter was provided as evidence.

At the hearing the appellant told the Board that in <date removed> <name removed> placed a no contact order on them, which stipulated they could not be within 500 yards of them. In <year removed> the appellant was charged with assaulting <name removed> and a three year protection order was placed on them beginning in <date removed>. As a result of these orders the appellant and <name removed> were not living together during the time period for which the department has assessed an overpayment against them.

The department stated it was aware of the protection order <name removed> had placed on <name removed>. However, the department received a letter and a Manitoba Health card which showed <name removed> and the appellant were living together. In addition, the department obtained an affidavit from the courts which stated the appellant and <name removed> were living together from <dates removed>.

The department indicated that it did not have information to assess the appellant's and <name removed>'s eligibility for assistance during this time, however, they did have the evidence to show they were living in a common-law relationship which ended <date removed>. As a result of their common-law relationship the overpayment was divided equally between both the appellant and <name removed>. When the department placed the overpayment on the appellant their address was not known and they could not be notified. The appellant was made aware of the overpayment in <date removed> when they applied for assistance.

In response to questions from the Board the appellant indicated in <year removed> they were working. The appellant was not receiving assistance so they did not report their employment earnings to the department.

The Board asked the department how the overpayment could be assessed against the appellant if they were not receiving assistance. In response, the department stated at the time <name removed> was receiving assistance and the department was not notified that they and the appellant became a common-law couple. The appellant stated they did not know anything about what the department had presented as they and

<name removed> did not reconcile.

The department stated <name removed> was required to inform the department of the changes in their living and working circumstances. As the appellant came to the department's office to report they were working, the appellant was aware that they were receiving assistance. The information provided by the appellant when they attended the office proved that the appellant and <name removed> were living together. With the additional court document showing the appellant and <name removed> had reconciled, they were therefore determined to be living common-law and the overpayment was divided between them.

The appellant disputed that they and <name removed> were living together or were in a common-law union during the time in question. The appellant asserted they were under the no contact order at the time. The appellant questioned the department on how they could determine a common-law relationship exists if a couple is living together for a short period of time.

The department clarified the policy around determining common-law unions. Stating specifically that if a couple had a child together and then began living together this can be considered a common-law union. The Board asked the department if the legislation set this criteria. The department responded in the negative.

The Board asked the department how they became aware of the appellant and <name removed> living together. The department responded that the appellant informed the department of this on <date removed>. The appellant had attended the department office and informed staff that they and <name removed> were living together since <date removed>. The appellant also provided the department with <name removed>'s social assistance health card. The Board asked the department what evidence they had which led to the determination that the appellant and <name removed> were living in a common-law union. The department indicated they had both the court affidavit and the family documents provided by the appellant.

The Board asked the department why the documents pertaining to the common-law determination were not provided for the hearing. The department stated the focus of the hearing was the overpayment and the documents were on <name removed>'s file. Due to the volatility of the relationship between the appellant and <name removed> the department felt a verbal overview was appropriate.

In response to a question from the Board the department stated the appellant and <name removed> separated on <date removed>. <name removed> remained on assistance after the separation and the appellant self supported themselves until <date removed>. The Board asked the department if the overpayment that was added to the appellant's assistance file in <date removed> was from the <dates removed> time period. The department responded affirmatively. The department asked the department if the appellant had been on social assistance prior to <date removed>. The department

indicated they were not, rather, it was <name removed> who was receiving assistance and the overpayment came from their file. The department did not have the opportunity to split the overpayment between <name removed> and the appellant until recently when they applied for assistance.

In response to questions from the Board the department indicated <name removed> had overpayments on their file prior to <date removed>. When the calculation was done for the appellant's half of the overpayment an error was made and these previous overpayments were included in their portion. This was corrected and these previous overpayments removed as they were only to receive an overpayment for the time when the appellant and <name removed> were common-law.

It is clearly established that the overpayment assessed against the appellant was a direct result of the determination that they and <name removed> were in a common-law union. Therefore, in order to assess if the overpayment was correctly assessed, the Board must first determine if the appellant and <name removed> were in a common-law union during the time for which the overpayment was calculated.

The Department's authority for deeming that a common-law relationship exists is contained in Section 18(3) of *The Manitoba Assistance Act*:

Where two persons who are not legally married to each other are living together under circumstances that indicate to the director that they are cohabiting in a conjugal relationship, they shall, for the purposes of this Act and the regulations, be treated in the same manner as two persons who are legally married, and any application by either or both of them for income assistance, general assistance or shelter assistance shall be dealt with in every respect in that manner.

In recent decisions, the Board has stated its concern that the Department's common-law policy does not always anticipate the many forms a relationship can take. While the Board has used the Department's policy as a guide, its decision-making powers are not fettered by the policy. The Board's focus is primarily on determining if, on a balance of probabilities, the two parties are cohabiting in a conjugal relationship.

*Black's Law Dictionary* defines conjugal as "of or belonging to the married state; suitable or appropriate to the married state or married persons; matrimonial; connubial". While a married state can have varying levels of physical intimacy, a functioning married state requires some level of emotional intimacy.

While every relationship must be evaluated on its own merits, the test for a conjugal relationship is well-established in Canadian jurisprudence. The Supreme Court of Canada addressed the issue directly in *M. v. H.* [1999] 2 S.C.R. 3. Subsequent jurisprudence has interpreted the *M. v. H.* test as requiring a relationship of some permanence, where the individuals are interdependent (financially, socially, emotionally and physically), where they share household and related responsibilities, and where

they have made a serious commitment to each other.

The *Act* clearly requires people to be cohabitating in a conjugal relationship before they are treated in the same manner as a married couple.

In the appellant's case, the Department states it relied on documents provided by the appellant as well as court documents which suggested shared residency along with shared parentage to establish common-law status. The appellant disputes the department's assertion that they were in a common-law relationship and denies they and <name removed> were living together, rather they were to have no contact as a result of a court order.

The Board notes that the department did not provide as evidence any of the documents which it relied on when determining that a common-law relationship existed between the appellant and <name removed>. Without this evidence the Board is left to consider only the verbal statements of the department and the appellant with respect to the relationship.

Neither the shared living arrangement that has been suggested by the department or the shared parentage proves or disproves a conjugal relationship.

No evidence was presented to the Board to suggest that from <dates removed> the appellant and <name removed> shared any form of interdependence beyond their child together, had any shared household or domestic responsibilities, or otherwise had a serious commitment to each other.

After careful consideration of the written and verbal evidence submitted to it, the Board determines that there is insufficient evidence on a balance of probabilities to determine the appellant and <name removed> were cohabitating in a conjugal relationship within the meaning of *The Manitoba Assistance Act* from <dates removed>. The Board rescinds the Director's decision to assess an overpayment against the appellant. The Board orders the Department to remove the overpayment from the appellant's assistance file and reimburse them for any assistance which has already been recovered from this overpayment.

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