OMERS ADMINISTRATION CORPORATION

APPEALS COMMITTEE

In the Matter of an Appeal by the Appellant

PANEL:	Eugene Swimmer	Panel Chairperson
	Darcie Beggs	Panel Member
	David Tsubouchi	Panel Member

BETWEEN

Appellant	)	Self- represented
	)	
	)	
- and -	)	
	)	
Respondent	)	Respondent's Counsel
	)	
	)	
	)	
	)	Independent Legal Counsel
	)	
	)	
	)	Heard February 23, 2018
	)	

DECISION AND REASONS FOR DECISION

Description of the Case and Issues in Dispute

Based on documents submitted by the parties in advance of the hearing (and entered into evidence as Exhibit 1), it is possible to summarize the undisputed facts and identify the issues in dispute. The Appellant's husband (the "Member") and the Appellant were married in 1968. The Member worked as an accountant for [Employer name] from 1986 until May 2006, when he retired with an OMERS pension. He passed away on November 30, 2014, and because the pension payments received exceeded his contributions and interest, there is no benefit payable to his estate or designated beneficiary.

The Appellant personally repaid OMERS approximately $1,250 for the December 2014 overpayment to her deceased husband's pension. In January 2015, the Appellant applied to OMERS for a spousal pension. The Member did not leave a will, and the Appellant became the court-appointed estate trustee in March 2015. She was also approved for a survivor's pension under the Canada Pension Plan.

Under the terms of the OMERS Primary Pension Plan [subsection 20(1)], a pension is payable upon the plan member's death to the plan member's "surviving spouse". The plan member's spouse on the date when the plan member's pension commenced is deemed to be the "surviving spouse" [subsection 20(6)]. However, this does not apply if the plan member and his or her spouse were "living separate and apart" on the date the plan member's pension commenced [subsection 20(7)(a)] or on the date of the plan member's death [subsection 20(1)].

The Appellant and the Member began living in separate residences in June 1987, but never divorced or entered into a separation agreement. In a sworn statement, the Appellant indicated

that the primary reason for living apart was an extremely strained relationship between the Member and his elder daughter. She submitted a document indicating they had a joint Visa credit card (but no statements from the card were available), and that she was considered his spouse for the purposes of medical procedures.

After a lengthy series of submissions and correspondence between the Appellant and OMERS staff, in 2016 OMERS made the decision that she was living separate and apart from the member and ineligible for a pension. She was informed that she could appeal to the President of OMERS, and/or submit her information to the Financial Services Commission of Ontario (FSCO) for an independent assessment of her claim [the OMERS Plan is regulated by FSCO].

The Appellant did submit her information to FSCO for review (while putting the OMERS President's determination on hold). In April 2017, she was informed that based on the information submitted, FSCO concluded that OMERS had not contravened the *Pension Benefits Act* by its decision that she was living separate and apart from the Member, for pension eligibility purposes.

The Appellant subsequently appealed the OMERS staff decision to the OMERS President, whose designate ruled in September 2017 that she was not entitled to the spousal pension. The Appellant then appealed the President's decision to this Panel, asking for an oral hearing. Given that OMERS staff did not object to her request and in the interest of fairness, the Panel's Chair determined that an oral hearing would be appropriate.

At the hearing, the Appellant was informed that she had the onus to prove, on the balance of probabilities, that she was an eligible spouse, who was not "living separate and apart" from the

Member on either the date that his pension commenced or the date of his death. The Panel uses a *de novo* process, deciding the matter afresh, based solely on the evidence and submissions provided. Although neither side formally presented any witnesses, it became clear that some of the Appellant's legal submissions involved giving evidence. Given that she was not represented by a lawyer, the Panel (with the parties' consent) had the Appellant sworn in as a witness, and made it clear that any portion of her discussion which involved giving evidence would be subject to cross-examination by the Respondent's Counsel.

The Panel found the Appellant to be a credible witness, and understood that any divergencies between her testimony at the hearing and previous submissions resulted from her reticence to address painful family issues.

The Legal Issue

The *Pensions Benefits Act* (PBA) does not define the phrase, "living separate and apart". The Respondent argued that court decisions from family law defining what constitutes separation of spouses, should be relied upon when determining whether spouses are "living separate and apart". At the hearing, the Respondent's Counsel stated that he was not aware of any court decisions addressing this issue in the pension context. Subsequent to the hearing, the Panel instructed the Independent Legal Counsel's law firm (name of law firm) to determine whether any pension cases define the phrase. The resulting legal memorandum indicated that no pension cases dealing with the definition of 'living separate and apart' were found, but did identify several cases suggesting that the phrase's meaning in the family law context is applicable to pension law.

The parties were given the opportunity to comment on the memorandum. The Appellant's reply stated that the cases referred to in the memorandum are irrelevant because they referred to situations surrounding the possibility of separation or divorce, which were not options for her and the deceased. She also quoted Madam Justice Ryan-Froslie in *Yakiwchuk v. Oaks*, 2003 SKQB 124 at paragraph 10 on how much variation exists among spousal relationships, which can sometimes make the determination of a spousal relationship difficult. As Madam Justice Ryan-Froslie put it, "It is this variation in the way human beings structure their relationships that make the determination of when a 'spousal relationship' exists difficult to determine."

The Panel did not accept the Appellant's argument about the family law cases' relevance, because those cases can provide guidance as to the term "separate and apart", regardless of the parties' formal marital status. Similarly, Madam Justice Ryan-Froslie's statement concerns spousal status (not at issue in this case), and not whether spouses are "living separate and apart". Therefore, based on the independent legal analysis, the Panel accepted that common law criteria for separation from family law should be the basis of a decision in this case.

In *Oswell v. Oswell*(H.C.J.), 1990 CanLII 6747 (ON SC) ("*Oswell*"), Justice Weiler summarized the criteria to be considered when determining whether spouses are 'living separate and apart', as follows:

a. There must be physical separation.
b. There must be a withdrawal by one or both spouses from the matrimonial obligation with the intent of destroying the matrimonial consortium.
c. The absence of sexual relations is not conclusive, but is a factor to be considered.

d. Other matters to be considered are the discussion of family problems and communication between the spouses; the presence or absence of joint social activities; the meal pattern.

e. Although the performance of household tasks is also a factor, weight should be given to those matters which are peculiar to the husband and wife relationship.

Below these criteria are addressed in sequence, based on the documentary and other evidence provided.

<u>There must be a physical separation</u>

There is no dispute here. The Appellant and the Member lived in separate residences from June 1987 onwards, including the dates when the Member's pension commenced and when he passed away.

<u>There must be a withdrawal by one or both spouses from the matrimonial obligation with the intent of destroying the matrimonial consortium</u>

The overwhelming majority of evidence and argument address this criterion. For presentation purposes, the data (and its evaluation) have been divided into the portion favouring the Appellant's view that there was no intent by either spouse to destroy the matrimonial consortium, and those which indicate there was such an intent.

A. Arguments that there was <u>no intent</u> by either spouse to destroy the marriage consortium

1. The Appellant testified that the Member was a functional alcoholic and suffered from several mental issues, including paranoia. He was never formally diagnosed, because

he refused to admit there was a problem. The Member emotionally and physically abused both her eldest daughter and herself over a lengthy period. On June 27, 1987, he attacked the Appellant with a weapon. That incident led the Appellant to take her children and physically separate from the Member. She never reported the incident to the police and actually gave him financial support for the first month of their separation. She maintained financial independence from him to the present, never asking for child support and refusing to use the joint Visa credit card he secured for them. She had health insurance from her own employer so there was no need to be covered by his plan. However, once things cooled down, they began to interact and decided not to divorce, but to maintain a relationship (despite living in separate residences) and help with medical emergencies and other tasks.

2. The Appellant argued that their physical separation was involuntary, given the extent of the Member's mental illness and her need to protect the safety of her children and herself. It must be noted that this claim is exclusively on her testimony and has not been corroborated by either objective evidence or witnesses.

3. The Appellant testified that neither she nor the Member had any other relationships during the 27 year period of physical separation and did not intend to divorce. She believes that they had reconciled their marriage. Realizing that they could not live together, it was healthier for everybody that they keep separate residences. She asserted that a "Living Apart Together" lifestyle is not a stepping stone to divorce but a way of maintaining a marriage by avoiding conflicts associated with living together.

4. The Appellant has been considered the Member's spouse by [Province name] hospitals, as she gave the authorization for his emergency surgery and blood transfusions in 2002. However, medical authorization is based on marital status, rather than "separate and apart" considerations. She also testified that she visited him daily after the brain surgery and took care of him while recovering, until he returned to work.
5. The Appellant testified that when the Member became fatally ill in 2014, she spent time with him in the hospital. She argued that it is unreasonable to expect corroboration from hospital employees about her involvement, given the number of patients dealt with in emergency rooms and the time that has passed. She asserted that she had daily phone contact with the Member, and they discussed him moving to [Town name] (near her) so she could better take care of him. After he did not return phone calls on November 30, 2014, she went to his home and discovered his body.
6. The Appellant's younger daughter submitted a letter indicating that her parents had no interest in divorcing, that her mother helped her father when he was ill, and that her father expected her mother to receive spousal pension benefits, since they were still married. The Appellant's younger daughter's statement cannot be given very much weight as it was not a statutory declaration, nor was she called as a witness. The Appellant explained that she did not want to call her younger daughter as a witness to protect her from dredging up painful memories.

7. After the Member's death, the Appellant and her younger daughter flew to [Country name], so the Member could have a traditional burial and have his ashes interred with the rest of his family.
8. The Appellant receives a pension from CPP, indicating that the Federal administration accepted her as a surviving spouse. However, qualification for a CPP survivor pension is not concerned with whether the spouses were 'living separate and apart'.

B. Arguments that there <u>was intent</u> by either spouse to destroy the marriage consortium

1. The Appellant and the Member kept completely independent finances, which is atypical for a married couple. In addition, she admitted that they both indicated their marital status as separated, not married, when filing their income taxes, which OMERS Staff asserted is a measure of "true intent", rather than the "stated intent" (citing *Oswell* at paragraph 18).
2. There was no evidence that the parties attempted to reconcile, in the sense that reconciliation included cohabitation. Maintaining separate residences for 27 years arguably demonstrates a true intention to dissolve the marriage and "live separate and apart", which is distinct from a temporary separation due to health or employment related issues.
3. Except for his younger daughter's letter (which must be given little weight because she did not testify and her letter is neither sworn nor a statutory declaration) there was no evidence that the Member intended to continue the marriage. He had no will and never communicated to OMERS that he was married, let alone that his wife should be the beneficiary of his pension or be entitled to spousal benefits. The

Appellant admitted that the Member would not help her when she was diagnosed with a serious illness. However, she did assert that he used the prospect of writing a will as a way to manipulate both her and her younger daughter.

4. The Appellant acknowledged that her support of the Member "was occasional as my husband had no one else to depend on in times of crisis." In response, OMERS Staff pointed out that the courts have held that occasional visits to a bedridden spouse do not in themselves establish an intention to continue the marriage (Citing *Norman v. Norman* (1973), 39 C.L.R. (3d) 474 (N.S.S.C.A.D) at paragraph 11).

Absence of sexual relations

No evidence was submitted by either party on this issue.

Discussion of family problems and communication between the spouses; the absence of joint social activities; the meal pattern

1. The Appellant asserted that the Member's mental condition made him a recluse. She and her younger daughter were the only people he trusted, making it impossible to obtain third party corroboration of her social interactions with the Member.
2. The Appellant asserted that she kept in touch with his family in [Country name], and would relay information to the Member, because he declined any direct contact with his family. The Appellant did not present any corroborating evidence from his family.
3. The Appellant asserted that she attempted to bring about a rapprochement between the Member and his elder daughter when he was ill, without success. The elder daughter and her mother have not spoken in two years.

Performance of household tasks

1. The Appellant asserted that she helped the Member with some household errands, particularly, once he had no access to a car.
2. Given that they lived in separate residences, in different cities, the criterion concerning who was responsible for meal preparation, cleaning and other domestic tasks is largely irrelevant.

Decision

As previously noted, the Appellant bore the onus of proof. In practical terms, that meant that she was required to establish that she and the Member were not "living separate and apart", on either the date his pension commenced or the date of his death. On the basis of the record, the Panel concluded that there is not sufficient evidence that the Appellant and the Member were not "living separate and apart", on either of those dates. Although the Appellant and the Member maintained a family bond, living in separate residences in different cities for 27 years, keeping totally separate finances (including declarations of "separated" marital status on their income tax forms) and having only occasional social contact with each other (except during his medical crises), were consistent with a true intent to dissolve the marriage and inconsistent with an intent to maintain it. Although not binding on the Panel, the earlier decision by the independent pension regulator FSCO that the Appellant and the Member were "living separate and apart" provides the Panel with additional support.

It may be the case that OMERS is behind the times with respect to the variety of current marital relationships (as the Appellant asserted in her comments concerning the memorandum on the

relevance of family law cases), but the Panel does not have the luxury of rewriting the OMERS Primary Pension Plan Text. All we can do is apply the rules and jurisprudence as they exist today, and on those grounds she is not entitled to an OMERS spousal survivor's pension.

I, Eugene Swimmer, sign this Decision as Chairperson of the Panel and on behalf of the Panel members listed below.

DATED at Toronto this day of April, 2018.

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Eugene Swimmer, Chair
Darcie Beggs, Member
David Tsubouchi, Member