

OMERS ADMINISTRATION CORPORATION

APPEALS COMMITTEE

In the Matter of an Appeal by “The Appellant”

PANEL: Eugene Swimmer Panel Chairperson
David Tsubouchi Panel Member
Sheila Vandenberg Panel Member

BETWEEN

Appellant) Appellant’s Counsel
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- and -)
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Respondent) Respondent’s Counsel
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) Independent Legal Counsel
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) Heard November 28, 29 and December 21,
) 2016
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DECISION AND REASONS FOR DECISION

Overview of the Case and Issues in Dispute

This was an appeal by the Appellant from the President's Determination holding that the Appellant was not entitled to a survivor's pension benefit relating to OMERS pension plan member [the "Member"]. The appeal was heard by a panel of the Appeals Committee (the "Panel") on November 28, 29, and December 21, 2016. Staff of the Respondent defended the decision to deny the Appellant a survivor's pension benefit.

The central issues raised by the parties, and their basic positions, are as follows:

- a) The Member was a member of the OMERS Primary Pension Plan (the "Plan"). He died on July 6, 2014 at the age of 92.
- b) There are no residual benefits available for anyone other than a surviving spouse. The Appellant claims that she was the Member's common-law spouse at the time of his death.
- c) The Member had been married for many years. His wife passed away in 1987. By April 2007, the Member was 85 years old. He'd had quadruple bypass surgery. He needed assistance in his home. He was looking for a live-in caregiver. The Appellant agreed to move in and care for the Member, in exchange for room and board and \$800 cash per month. The Appellant and the Member did not know each other prior to this.
- d) The Appellant claims that after one or two years, the relationship evolved from paid caregiver to spousal. Her claim is supported by her friends and her daughter, and by two members of the Member's family. Other members of the Member's family gave evidence to support the Respondent's position that the Appellant was never the Member's common-law spouse.

The onus is on the Appellant to satisfy the Panel that she was the Member's common-law spouse at the time of his death, and had been for at least 3 years. The standard of proof is the balance of probabilities. The panel must determine whether the Appellant has proven it is more likely than not that she was the Member's common-law spouse at the time of his death.

The Legal and Factual Issues Raised by the Parties

A. Legal Issues

1. What is the test for determining whether there was a common-law relationship?

The parties are agreed that the test for whether there was a common law relationship is set out in such cases as *Molodowich v. Penttinen* 1980 CanLII 1537 (ONSC) and *Glenn v. MacLean-Kirby Estate* 2006 CarswellOnt 886 (ONSC).

Whether or not a couple have lived in a conjugal relationship is both a subjective and objective test. The Panel must consider what the intention of the parties was, as gleaned from the facts and how were they regarded by others. Intention of the parties is the driving force.

In discerning the intention of the parties, there are descriptive factors that can be useful in assisting the Panel to determine whether a common-law relationship existed. Those categories are:

- a) shelter,
- b) sexual and personal behaviour,
- c) services,
- d) social activities,
- e) economic support,
- f) children, and
- g) societal perception of the couple.

These categories are not exclusive and that not every characteristic of a conjugal relationship needs to be present, or present in the same degree, to establish a conjugal relationship.

The Panel recognizes that there are many different kinds of relationships and no two marriages look exactly alike. Spouses can arrange their affairs in many different ways.

There were two main challenges in this case. The first is that, as everyone agrees, the relationship began when the Appellant moved in to be a live-in caregiver for the Member. According to the Respondent, this means that many aspects of the typical test are present (they lived under the same roof; she cooked and cleaned for him; she took him to appointments and assisted with tasks of daily living), but there is an alternative explanation for them. On behalf of the Appellant, it is argued that one can be a caregiver and a spouse, and just because the Appellant was the Member's paid caregiver does not preclude her from also being a spouse.

The Panel appreciated that the most relevant time frame was the three years prior to the Member's death. The Panel approached its analysis on the premise that the fact that the relationship began as a live-in caregiver relationship is a relevant factor to consider but doesn't automatically mean that the Panel should approach the standard test for spousal relationships differently.

The second challenge for the Panel in this case was that the Member's family was, as his own daughters agreed, dysfunctional. Following the death of the Member's Wife in 1987, there was a split among the children that continues until today. On one side are the Member's daughter ["Member's Daughter 1"] and her daughter ["Member's Granddaughter 1"]. On the other side are the Member's other daughters, ["Member's Daughter 2"] and ["Member's Daughter 3"]. The Member's will and power of attorney was changed more than once as the situation surrounding his children unfolded. In the months prior to his death, the Member went to the police over concerns that one daughter – [Member's Daughter 1] – may have defrauded him. The daughters' feelings toward one another appeared to complicate their ability to give impartial evidence about the Appellant.

B. Factual Issues

1. Were the Member and the Appellant living in a conjugal relationship continuously for the three years prior to the Member's death?

In resolving the issue, the Panel considered the evidence of the following witnesses, all of whom testified at the hearing;

- 1) The “Appellant”;
- 2) The “Appellant’s Daughter”;
- 3) A “Mutual Friend 1” of the Appellant and of the Member;
- 4) A “Mutual Friend 2”, also a friend of the Appellant and of the Member;
- 5) The “Member’s Daughter 1”;
- 6) The “Member’s Granddaughter 1”; and
- 7) The “Member’s Daughter 3”.

In addition, the Panel had affidavits and statutory declarations from witnesses who were unable to testify in person. The most significant of these was the affidavit of the “Member’s Daughter 2”. The evidence in this affidavit was strongly contested, and the Panel did not place much weight on controversial evidence from witnesses who could not be cross-examined. To the extent the affidavits included contemporaneous documents that shed light on the underlying facts, the Panel did rely on those documents. The specific evidence that the Panel found most useful is discussed in its analysis, below.

1. What were the arrangements about shelter?

- a) Did they live under the same roof?

The evidence is clear that they lived continuously in the same home for at least three years prior to the Member’s death. The dispute is whether they lived together as a conjugal couple or as employer-caregiver.

There is no doubt that the genesis of their cohabitation was an agreement whereby the Appellant would move in to provide services as a live-in caregiver for the Member. This arrangement began in April of 2007.

More than a year later in July of 2008, the Member and the Appellant formalized the relationship in an Independent Contractor Agreement. There was a dispute in the evidence about the reason for the Independent Contractor Agreement. One of the Member’s daughters, [Member’s Daughter 1], says the Member was “harassed” into doing it by his other children; two other daughters (Member’s Daughter 2 and Member’s Daughter 3) say it was the Member’s idea. Regardless, it was prepared with the assistance of a lawyer and signed by both the Member and the Appellant freely and voluntarily. The key provision includes:

The parties agree that the relationship between the parties is that of principal (the Member) and independent contractor (the Appellant) and under no circumstance shall any other legal or other relationship between the parties arise or be deemed to arise and, specifically, without limiting the generality of the foregoing, the parties shall not be or deemed to be in a relationship of employer and employee, partnership, agency or joint venture, husband and wife, common law spouse, or any other similar relationships.

The Appellant says that sometime after the Independent Contractor Agreement was signed, she and the Member began cohabiting as spouses.

Other factors relevant to the issue of cohabitation include: the Appellant was never put on title to the Member's home, her name was never added to any utilities or other household-related bills, the Member never sought to bequeath his home to the Appellant, and they did not pay any household-related expenses out of a joint bank account.

b) What were the sleeping arrangements?

There was conflicting evidence on this issue.

While it was agreed that the Appellant had her own bedroom when she first moved in, her evidence was that after a year or two, she moved in to the Member's bedroom and they began sharing the same bed. She moved many of her clothes, jewelry and other items into what she says became the master bedroom.

The Member's Granddaughter 1, testified that she saw the Appellant's clothes and jewelry in the Member's room. She recalled mentioning it to the Member, teasingly. She said the Member seemed embarrassed and said, "It's our room."

The Member's Daughter 1 said that she "just knew" that the Member and the Appellant had begun sharing a room.

The Appellant's Daughter also testified that her mother and the Member began sharing a room, saying, "It was obvious."

Finally, Mutual Friend 1 and Mutual Friend 2 testified that they were friends, first of the Appellant and later of both the Appellant and the Member. They would come to the house on weekends to socialize and sometimes Mutual Friend 2, who was a hairdresser, would do the Appellant's hair in the bedroom which she said was used by both the Appellant and the Member. Mutual Friend 2 testified that the Appellant's things would be in the bedroom, and it was clear that it was a bedroom that was shared. There was only one bed in the bedroom.

On the other hand, the Member's Daughter 3 was emphatic that her father and the Appellant had not slept in the same room. She testified that she would make her father's bed when she visited (generally on the weekends, but not every weekend) and she could see that only one side of the bed had been slept in.

The Panel finds the balance of the evidence is that the Member and the Appellant likely did begin sharing a bedroom at some point around 2008 or 2009. The evidence of the Member's Granddaughter 1 was especially persuasive. Her evidence about her grandfather generally seemed sincere and affectionate and on this particular point her testimony was detailed and credible. The Member's Granddaughter 1 had nothing to gain from the outcome of this proceeding and no reason to give evidence that was not truthful.

c) Did anyone else occupy or share the available accommodation?

While it seems someone else paid rent in what was likely a separate basement unit for at least part of the time, there was no one else living in the shared part of the home with the Member and the Appellant.

2. What was the evidence concerning sexual and personal behaviour?

a) Did they have sexual relations?

At the relevant time the Member was 85-92 years old, and had survived serious heart surgery. His health deteriorated over the time he and the Appellant lived together. The Appellant swore in an affidavit that she and the Member had “a romantic and active love life.” She did not offer much detail in her oral evidence, other than to say that the Member liked to be held and kissed and that they were very affectionate with one another.

The Panel understands that sexual relations do not necessarily mean intercourse, and that romantic and sexual relations can be expressed in many different ways. The Panel accepts that the Appellant and the Member offered physical comfort and romantic affection to one another, limited perhaps by the Member’s health.

b) Did they maintain an attitude of fidelity toward one another?

There was no evidence of any other romantic relationships, and no evidence that either the Member or the Appellant had any other romantic relationship with anyone else.

c) What were their feelings toward one another?

The Appellant testified that she and the Member had a warm and loving relationship just like a married couple.

The witnesses who testified for the Appellant were consistent in saying that the Member seemed very happy to have the Appellant in his life, and that he was very appreciative for everything she did for him. The Appellant’s Daughter and the Member’s Daughter 1 testified that the Member was anxious to ensure that the Appellant would be provided for after his death and protected from the drama that had involved the family for years.

To assess the Member’s feelings toward the Appellant, the Panel carefully considered the numerous exhibits documenting the Member’s stated feelings toward the Appellant. There were a number of such documents, and the explanation given for some of them was somewhat confusing. The Panel examined the documents closely and was able to construct a timeline as follows:

- i. On July 12, 2012, the Member, the Appellant and the Member’s Daughter 1 entered into an agreement, the substance of which reads as follows (Exhibit 1, page 230).

[The Appellant] works as the Member caregiver ... [the Member] and [the Appellant] have a separate agreement for her employment which he pays her \$800 per month under the agreement.

The Member promised the Appellant \$40,000 as appreciation for her services. These funds are to be paid to her after the Member death under the following stipulations.

1. If [the Appellant] quits her employment voluntarily for any reason before the Member's death, she does not receive any money.
2. If the Member fires her and asks her to leave for any reason she does not receive any money.

The Member will give to the Member's Daughter 1 the amount of \$40,000 and the Member's Daughter 1 will give it to the Appellant shortly after the Member death.

On February 15, 2013, the Member executed a will revoking all prior wills and codicils. The will appears to have been executed with the assistance of the Member's Lawyer 1. The Member's Daughter 1 is named as Estate Trustee and Executor. The only mention of the Appellant is in a clause that directs his Estate Trustee "to deliver all furniture purchased by [the Appellant] to her if she survives me." (Exhibit 1, page 236).

On May 5, 2013, the Member, the Appellant and the Member's Daughter 1 executed a second agreement regarding the Member's directions to the Member's Daughter 1 and the Appellant. The substance of this agreement reads as follows (Exhibit 1, page 250):

- i. the Member instructs the Member's Daughter 1 to give to the Appellant the amount of \$60,000 from [the Member's] funds to be paid upon [the Member's] death.

These funds are to be paid to [the Appellant] only after [the Member's] death and only if she cares for [the Member] until his death. If for any reason [the Appellant] is no longer [the Member's] caregiver or leaves the home or she does not care for [the Member] any longer or doesn't act as [the Member's] caregiver then it is agreed and understood there will not be any compensation for [the Appellant].

On September 13, 2013, the Member and the Appellant opened a joint account at [●] Bank. It seems the Appellant could not remove money from this account without the Member's signature.

On October 1, 2013, the Member executed a codicil to his will. Among other things, he replaced the Member's Daughter 1 as Estate Trustee and Executor with the Member's Daughter 2. As with his original will, the Member had the assistance of a lawyer (Member's Lawyer 2), but a different lawyer than the one who assisted with the will. The codicil includes an amendment to his will through the addition of a clause that stated, "Provided that my caregiver, the Appellant, is still my caregiver at the time of my death, I hereby direct my daughter [Member's Daughter 1] to honour the two agreements dated May 2, 2013 and July 1, 2012 to pay my caregiver, [the Appellant], from the proceeds I have already given my daughter, [Member's Daughter 1] and not from my estate." (Exhibit 1, page 253).

On October 4, 2013, the Member designated the Appellant as the beneficiary for a \$100,000 investment with Standard Life. At some later date (it is not clear when) this designation was revoked and the Member's Daughter 2 was named the beneficiary instead.

On November 11, 2013, the Member seems to have signed three documents (the "November Documents"). The November Documents were prepared with the assistance of the Appellant's Daughter. Her evidence was that the Member told her he wanted to ensure that the Appellant was taken care of, and because of his failing eyesight he needed assistance to draft a document that would protect the Appellant after the Member's death. The Appellant's Daughter says she typed up the

Member's wishes, read the document to him aloud, and then she and her husband witnessed the Member's signatures.

- i. The first November Document is addressed To Whom It May Concern, and states, "I, the Member, declare that [the Appellant] has been my caregiver and companion since 2007, and I have been very happy and satisfied with her performance. She takes very good care of me. She is very honest and polite, and a passionate, considerate and responsible person. I declare this because it is the truth, and I want for my children to keep [the Appellant] out of the discrepancies and arguments they may have concerning property and estate matters. I repeat, I want them to leave [the Appellant] alone. I order my children to give [the Appellant] two or three months before requesting that [the Appellant] leave the premises. I order my children, and with my permission, to let [the Appellant] take whatever items she needs from the house, such as, furniture, utilities (fridge, stove), anything she needs." (*Exhibit 1, page 272).
- ii. The second November Document is also addressed To Whom It May Concern. It repeats the language of the first November Document, and adds the words "Furthermore, and most importantly, I request that the estate lawyers give [the Appellant] \$100,000 as a reward for the excellent care she has given to me since 2007." (Exhibit 1, page 275)
- iii. The third November Document is dated at the top November 16, 2013, but the handwritten date under the Member's signature is November 11, 2013. This document says, "I, the Member, declare that [the Appellant] lives with me in my house and is my companion and caregiver, since April 6, 2007. I am very happy with her companionship, and very satisfied with the level of her performance as a caregiver, as she is a good, honest and passionate person. She takes good care of me. For this reason, I want my union pension (OMERS) to be given to her." (Exhibit 1, page 278)
- iv. There was no clear evidence explaining why there were three separate documents signed by the Member on November 11, 2013, or what specific incident (if there was one) prompted the Member to sign these documents.
- v. On December 9, 2013, the Member met with a third lawyer. This lawyer assisted him in amending his Power of Attorney to revoke the Power of Attorney he had granted just months earlier to the Member's Daughter 2. In that same document, he gave directions regarding his "caregiver", the Appellant, directing that she be paid as per their agreement. Apparently a medical certificate was appended to this amendment, certifying that the Member was competent, but that certificate was not in evidence. (Exhibit 1, page 282)
- vi. On January 14, 2014, the Member's physician made a note in the Member's chart that read: "Very insightful conversation with patient. Very clear – competent to made decisions. At this point he is clear that he does not want to fire his caregiver. He is also clear that she is not doing a good job. Unavailable when he needs her. Going away to appointments leaving him alone. He thinks that it is too difficult to find a new caregiver. He doesn't think he has long to live." (Exhibit 2, page 352)

- vii. On February 27, 2014, the Member met again with the Member's Lawyer 2, who had assisted him with the codicil to his will. With the assistance of the Member's Lawyer 2, the Member executed various documents, as follows:
- a) The Member executed a new will, revoking all prior wills and codicils. This ended up being the Member's final will before his death. In this will, the Member's Daughter 2 was restored as Estate Trustee and Executor. The Appellant is mentioned in the will four times.
 - b) First, the Appellant is bequeathed a list of specific household items, including furniture "in [the Appellant's] bedroom", and various household items and appliances.
 - c) Second, the will provides that if the Appellant survives the Member and is still his caregiver at the time of his death, she is to receive her wages for 30 days.
 - d) Third, the will directs the Estate Trustees to take reasonable action to collect funds from the Member's Daughter 1 that the Member says she has taken from him through fraud. Any funds collected from the Member's Daughter 1 are to form part of the residue of the Member's estate "and not paid to my caregiver the Appellant as per memos I may have signed which I have now revoked."
 - e) Finally, the will alerts the Estate Trustees that the Member has a joint bank account with his caregiver, the Appellant, containing \$100,000, half of which was contributed by the Appellant. If the account exists at the time of the Member's death, the balance in the account is to go to the Appellant.

The Member also enacted a written revocation of specified documents, writing that "I do not recall signing some of them." (Exhibit 1, page 301). Among the revoked documents were the November Documents described above regarding the Appellant.

- d) Did they communicate on a personal level?

Apart from general statements that they shared everything the way a married couple would, there was not much clear, specific evidence on this question one way or another. Given that the Appellant was the Member's caregiver, and that they were together much of the time, it is fair to conclude that they did have very personal communications and interactions.

- e) Did they eat their meals together?

The Appellant prepared all of the Member's meals, and presumably they generally ate together. The Respondent says this is consistent with her job as caregiver.

There was some evidence that they ate meals together in a social situation. Mutual Friend 1 testified he would bring pizza. There were some photos of the Appellant and the Member with other family members eating at a Chinese restaurant.

This is a factor that is equally consistent with a spousal relationship, and with a caregiver relationship.

- f) What, if anything, did they do to assist each other with problems or during illness?

The Appellant took care of the Member, including attending the hospital every day during his last days for a good part of each day.

There was no evidence of reciprocal care given by the Member to the Appellant, other than financial support. On the other hand, there was no evidence the Appellant was ever sick and required care. The evidence also suggests that the Member's health deteriorated, and he may not have been able to provide care to the Appellant.

- g) Did they buy gifts for each other on special occasions?

There was no evidence of gifts, cards, or other gestures for special occasions. There was no evidence that they celebrated birthdays or Christmas or other holidays together.

3. What was the evidence about services?

What was the conduct and habit in relation to household maintenance and other domestic services?

The Appellant did what one would expect a paid caregiver to do, which is similar to what you would expect a spouse to do. As the Member was old and in failing health, he did the tasks he could and that he enjoyed, such as gardening and wine making, which they apparently enjoyed together.

4. Social

- a) Did they participate together or separately in neighbourhood and community activities?

As the Member was elderly and was quite reclusive, there weren't many social activities that he engaged in outside the home. The Appellant took the Member to the bank, to the doctor's, and shopping. Again, this was equally consistent with a spousal relationship and with a paid caregiver relationship. The neighbours would stop by and socialize from time to time. There was affidavit evidence that at least some of the neighbours considered the Member and the Appellant to be a couple. However, without cross-examination, it was not clear whether this was an assumption these people made because the two lived together, or whether it was a conclusion reached even with full knowledge of the commercial origin of the arrangements between the Appellant and the Member.

- b) What was the relationship and conduct of each of them toward members of their respective families, and how did the families behave toward them?

Here there was a sharp divide in the evidence. The Appellant's Daughter testified that she felt close to the Member and enjoyed bringing her children to his home. She did not attend the Member's funeral, but explained that was because she gets panic attacks at funerals.

One of the Member's daughters, the Member's Daughter 1, and one of his granddaughters, the Member's Granddaughter 1, treated the Appellant as a member of the family. They both testified that it became apparent to them that the Member and the Appellant had developed a romantic relationship. The Appellant would socialize with this side of the Member's family when they came to visit.

When it came to the Member's other children, the Appellant admitted that she did not get along with them and would not particularly socialize with them when they came to visit. The Member's Daughter 3, who testified in person, said that the Appellant would not be present when she came to visit her father. The Appellant would either be out or would make herself scarce.

5. Societal

- a) What was the attitude and conduct of the community toward each of them and as a couple?

As the Member was fairly reclusive, there did not appear to have been many opportunities for them to engage with the community, other than in the activities of daily living, such as banking, shopping, and doctor's appointments. The Panel accepts that shopkeepers and others would perceive the Appellant and the Member as a couple, since they did these tasks together.

Mutual Friend 1 and Mutual Friend 2 testified about socializing with the Appellant and the Member, and that they did so on the basis that the Appellant and the Member were a couple just like a husband and wife. Both Mutual Friend 1 and Mutual Friend 2 were compelling witnesses who gave specific details that enhanced their credibility. In cross-examination it was revealed that neither of them was aware that the Appellant had only met the Member when she became his paid, live-in caregiver. If they hadn't known that, then of course they would have assumed they were a spousal couple. The Panel finds their perceptions of the relationship between the Appellant and the Member were honestly held, but since they hadn't known about the genesis of the live-in caregiver relationship, the reliability of those perceptions was undermined. They could not recall the Member ever using the word "wife" or "spouse"; rather, they seem to have assumed that because the couple was affectionate with one another and lived together, they must be spouses.

6. Support

- a) What was the financial arrangement between them regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation).

The Appellant was entitled to receive room, board and \$800 per month as part of the Independent Contractor Agreement. The Appellant testified that she would just use the Member's money and/or bank card to buy things she needed for the house and things she needed for herself.

The Appellant had her own small income, and there was no evidence of what she used that for. There was no evidence of what the Appellant was spending and/or saving during this time that would prove that the Member was providing her with a level of financial support in excess of what he was required to provide under the terms of the Independent Contractor Agreement.

The Panel finds on the evidence that this factor is equally consistent with a spousal relationship and with a paid caregiver relationship.

It is clear that the Member intended to provide some degree of financial cushion for the Appellant following his death. The evidence was clear that she received the \$100,000 in the joint [●] account following his death. The Member went to considerable lengths to ensure that the Appellant would receive this sum, which is a significant factor in the Appellant's favour. However, the circumstances surrounding this money, in light of all the other evidence, is not sufficient to show that he gave this to her because he considered the Appellant to be his spouse.

b) What were the arrangements toward the acquisition and ownership of property?

The Member transferred his car to the Appellant, but did not indicate that she was his spouse, which would have saved money in the form of transfer taxes.

The Member never put the Appellant on title to his home, and never made her the beneficiary of his home in any version of his will. His house was always going to his estate, for the benefit of his children. The most generous the Member ever was with his home was to sign a direction (which he later revoked) indicating that his estate trustee should let the Appellant stay in the house for 2-3 months after his death.

The Member did bequeath specific items to the Appellant. This may have been because she would have given up many of her personal items when she moved in. These may also have been bequeathed as transitional gifts, to help the Appellant set up her new home.

The Member did take careful steps to ensure that the Appellant would have \$100,000 following his death. This fact is not clearly consistent with a paid caregiver relationship, as it represents a significant sum for the Appellant, far in excess of her annual salary of \$800 per month plus room and board. The Member had many opportunities to explain, in writing, why he was doing this. The balance of the evidence is that he was likely doing this for two reasons: first, as a token of genuine affection and concern for the Appellant; and second, as a way to ensure that she would not leave him before he died.

c) Was there any special financial arrangement between them that both agreed would be determinative of their overall relationship?

There is the Independent Contractor Agreement, which was first signed in July of 2008, reaffirmed expressly in 2012 in a document entitled “Agreement Between [the Member], [the Member’s Daughter 1] and [the Appellant]”, and reaffirmed implicitly in 2013 in a document entitled “RE: [the Member Instructions to [the Member’s Daughter 1] and [the Appellant] (caregiver)”. All three of these documents were signed by both the Member and the Appellant.

In addition, as outlined above, there were various mentions of the Appellant in the Member’s testamentary documents, and various other agreements purporting to set out the Member’s intentions. Some of these were later revoked by the Member, some were not. Even if the Panel assumes that all documents signed by the Member were honest reflections of his intentions at the time they were signed, none of them, reached the point of calling the Appellant a “spouse” or referring to her in terms that would unequivocally be recognized as spousal. This is especially true in the context of their original paid-caregiver arrangement.

d) Did either of them make any arrangements or plans to protect the other in event of calamity?

There was no evidence that the Appellant made any provisions for the Member in the event she predeceased him. The evidence of what the Member provided for the Appellant is set out above.

Assessment of the Witnesses’ Credibility

The Panel recognizes that credibility is a combination of truthfulness and reliability. In determining whether witnesses are credible, the Panel must ask whether a witness is being truthful, and whether a witness is being accurate. Witnesses may be sincere but mistaken.

In assessing the credibility of the witnesses, the Panel considered the following factors:

1. The witness' appearance and demeanour, keeping in mind the caveat that the Panel should not rely too heavily on demeanour evidence to decide contested issues;
2. The witness' opportunity to observe events, and whether the witness was testifying about matters they actually saw, heard and did;
3. The witness' capacity to remember, recognizing that memory can fade over time;
4. The overall probability or reasonability of the evidence;
5. The internal consistency or inconsistency of a witness' evidence;
6. The consistency of the witness' evidence with other, external, independent evidence that the Panel accepts; and
7. The witness' interest in the outcome of this proceeding.

Some of the Panel's key observations are as follows.

1. Mutual Friend 1

The Mutual Friend 1 had nothing to gain. He did not attend the Member's funeral but indicated that he was sick at the time. He saw the couple once or twice a month. On these occasions he didn't see any family members. This fact disturbed him ("I did everything for my parents, these people never showed up"). He didn't know that a relationship between the Appellant and the Member had begun as caregiver/employer, which is odd and may make his observations less relevant. If he didn't know about the caregiver/employer relationship, it is natural he would assume that the relationship was spousal. There is some possibility of partiality in that he'd known the Appellant for 15 years and was her friend first, but it appeared that he was making an honest attempt to tell the truth and not deceive or exaggerate.

2. Mutual Friend 2

Mutual Friend 2 had no interest in this proceeding, other than the normal partiality that comes with long-term friendship. She said that she cut the Appellant's hair in the Member's bedroom so she had a reason to be there and the opportunity to observe the bedroom. She said that she saw the Appellant's clothes and other things in the bedroom. She was closer to the Appellant than Mutual Friend 1. It seemed odd to the Panel that Mutual Friend 2 didn't know the Appellant had been hired as a caregiver, especially since she indicated that she had a close relationship to the Appellant. Without that important background fact it is understandable that she would perceive the Appellant and the Member as a couple. Her assumption they were a couple is undermined somewhat by not knowing they began as a caregiver/employer relationship.

3. The Appellant's Daughter

The Appellant's Daughter's evidence about documents she prepared for the Member was confusing and unclear, and arguably inconsistent. There are many unusual things about those documents – one is that at least one of them is post-dated. There is no explanation for why there are 3 documents signed November 11. There is some indication of partiality as her mother, the Appellant, would earn steady income for the rest of her life if her claim were allowed.

She said her mother wanted to keep her relationship with the Member secret because of the Member's children. Her reason for being in the "shared" bedroom a "few" times was to get jewelry. She said that her mother, the Appellant, told her they were sharing a room and said it became "obvious" that she and the Member were romantically involved. The Appellant's Daughter asked her mother about this and she said that the Appellant "admitted" they were involved. She said that she considered the Member like her step-father and brought her children over to the house. She said that she never had conversations alone with the Member as "mother was always there" – (transcript of evidence, p 84).

In her original statutory declaration (Exhibit 1, page 58) the Appellant's Daughter said at para 4 that "At family gatherings and whenever they were out, each of them described the other as my husband or wife, respectively". At the hearing, she gave no evidence to substantiate this. In fact, she said she didn't go out with them or see them in anyone else's company, other than the odd neighbour waving hello. Further, this evidence is not consistent with the idea that the Member and the Appellant hid their relationship to keep up a ruse for the sake of family peace. Either it was "obvious" or it was a secret.

4. The Member's Daughter 1

The Member's Daughter 1's evidence at the hearing and her written statutory declaration raised concerns about her credibility. The first statutory declaration (Exhibit 1, page 59) is misleading. She says she had the Power of Attorney for the Member and was his executor after his death. She also says she managed his finances for the last 7 years of his life. In fact, the Member was so worried that the Member's Daughter 1 may have been stealing from him that he went to the police and changed his will and power of attorney. Her claim to not know she'd been removed as power of attorney and executor was simply not credible, as she would have had to do something in the year after the death of the Member in the capacity of the executor.

She admittedly took \$181,000 from a joint account she held with her father, the Member, and only returned \$111,000. Her explanation was hard to believe on its face. It was hard to believe that she would have moved her father's money to get interest and didn't tell him or make it a joint account. She had no evidence to back up her explanation regarding the money. She made it sound as though it was a simple misunderstanding, which ignores the fact that her father was continuing to pursue the charges for months. He even referenced it in his final will.

It seemed strange to the Panel that the Member's Daughter 1 originally inserted herself into the financial arrangement between the Appellant and the Member. This was not the only way to make the arrangement work, as the Member figured out a much simpler way soon after, using a joint account with two signatories.

The changing dates on her various statutory declarations reveal constant mistakes suggesting more than just inattention.

The Appellant told police that she had advised the Member's Daughter 1 that the Member's Daughter 1 could be arrested. The Member's Daughter 1 completely denied this. The Member's Daughter 1's claim was that the police investigation was a simple misunderstanding that was easily cleared up. This is not borne out by the evidence of anyone else, including the Appellant and the transcript from her police interview. With her reputation on the line in that she has been accused of fraud, she may have perceived this hearing as an opportunity to rehabilitate her reputation. The Member's Daughter 1 recanted the suggestion that she had acted inappropriately or sinisterly regarding the Member's money.

Her animosity toward her sister, the Member's Daughter 2, was obvious, and the Member's Daughter 1 may not have wanted her to "win", even symbolically.

5. The Member's Granddaughter 1

The Member's Granddaughter 1 was very credible. The Panel believes she felt that she was close with the Member. She didn't have a father and she felt that the Member was the closest she had to a father. Her evidence about him seemed sincere and affectionate and she referred to him as "nonno". She showed emotion in her testimony about him that was consistent with her evidence.

She was the only one with personal stories to tell about the Member. She described how the Member blushed when she confronted him with potential romance. This had the air of reality and was detailed and credible. She believes that the Member and the Appellant were romantically involved. She was happy for him that the Appellant was in his life. She did not try to exaggerate. She also admitted that there were tensions in the family. She also had nothing to gain. She had no prior inconsistent statements of significance.

Although she testified in her statutory declaration about "family gatherings," (Exhibit 1, page 61, paragraph 3), there were no real details about what these family gatherings entailed.

6. The Member's Daughter 3

The Member's Daughter 3 made some attempts to be fair and balanced in her evidence. For example:

- a) when asked how she would have reacted to her father having the Appellant as a spouse, she did not pretend that she would have welcomed that development, however, she did say "as long as he was happy I would have to accept it and not control his life";
- b) she agreed that the Appellant attended the church funeral for her father; and
- c) she agreed that the Appellant attended the hospital regularly when her father was there.

Some of her evidence was less reliable. She testified that after the family split apart following her mother's death, "we all disowned" [the Member's Daughter 1]. This was clearly not true. The Member remained close to the Member's Daughter 1 for years. The family dynamic was likely more complex and nuanced than the Member's Daughter 3 acknowledged.

Her tendency towards being one-sided showed up in other matters. It appeared to the Panel that she tried to tarnish the Member's Granddaughter 1 in a way that seemed gratuitous and irrelevant.

She might have exaggerated her contact with her father slightly – she wanted the Panel to believe she had an opportunity to give reliable observations about her father's life and his relationship with the Appellant, however, she could only visit on weekends, and she did not visit every weekend. She was never seen by the Mutual Friend 1 and Mutual Friend 2. Her evidence about the bed and bedroom was contradicted by every other witness who testified.

In terms of motivations to be partial, she perhaps had reputational concerns – wanting the Member's Daughter 2's side to "win" over [the Member's Daughter 1's] side. More significantly, the Appellant cost them money with estate litigation that included the costs of litigation and, potentially, the amount

of settlement (if the settlement involved some payment to the Appellant – something the Panel does not know).

7. The Appellant

The Appellant said that she and the Member had a physical relationship, slept in the same bed and that physical intimacy developed. The Panel accepts this evidence as it is corroborated by others.

The Appellant demonstrated a lack of accountability for all the receipts she signed, other documents she was involved with and her statements, including that to police. It is possible that she was just doing what she alleges the Member told her to do, but there were consequences to those actions. It would have been easy for the Appellant to disavow the statements he made about her being a “caregiver”, or qualify them somehow. This was not done even when she gave her statement to the police.

Her explanation for documents that were not helpful to her kept changing, and she would finally fall back on saying, “it’s a mistake”.

The only reasonable way to explain the large amount of evidence that she was a paid caregiver and not a spouse is if we believe the “ruse” story. This is inconsistent with her statutory declaration where she says they held themselves out to the world as a couple – both statements can’t be true.

The idea that they hid their relationship from some of the Member’s children also does not explain the Member’s statements to his doctor, the way the payments to the Appellant were to be structured (only if she stays on as his caregiver), or the way the bank account was set up (with two signatures required).

It is possible that the Member led the Appellant on in some fashion – but the objective evidence is that while he cared for the Appellant, he didn’t consider her a spouse and didn’t consider her as family.

8. The Member’s Daughter 2

The Member’s Daughter 2’s affidavit was given very little to no weight. To the extent it has objective evidence (contemporaneous documents) it was useful. Otherwise, as the Member’s Daughter 2 was not present for cross-examination, it was disregarded.

Decision

Having considered all the evidence, the Panel finds it is more likely than not that the relationship between the Appellant and the Member did become sexual and romantic at one point. The Appellant probably moved into the Member’s bedroom and a new dimension to their relationship developed. A sexual and romantic relationship between people who are living together because of a pre-existing live-in caregiver situation doesn’t necessarily equal common law status.

The Appellant lived with the Member because she was his paid caregiver. The objective evidence suggests that the Member cared for the Appellant and wanted her to have some level of security once he was gone. The weight of the evidence also shows that the Member did not consider the Appellant to be a member of his family or his spouse. For example:

1. In July 2008, more than a year after the Appellant moved in, the Member entered into the Independent Contractor Agreement. According to the Appellant, this would have been around or shortly before the time their relationship evolved into a spousal relationship. If the Member was contemplating a spousal relationship with the Appellant, it is hard to understand why he would choose this time to formalize her relationship as an Independent Contractor caregiver.
2. On the Independent Contractor Agreement, the Appellant's Counsel argues on behalf of the Appellant that this purported "waiver" of her rights as a common-law spouse should be disregarded, based on the case of *Smith v. Casco Inc.*, 2011 ONCA 306. The Panel finds this is not a case where there is a suggestion that the Appellant waived her rights as a common-law spouse. Rather, the issue in this case is whether the Appellant was ever a common-law spouse at all.
3. From April 2007 to December 2011, the Member prepared receipts on a monthly basis indicating that he was paying the Appellant \$800 per month, the amount stipulated in the Independent Contractor Agreement. The Appellant signed these receipts, acknowledging payment. The receipts continued to be issued for long after the Appellant says their relationship became "spousal". The Appellant's explanation was that he only issued these receipts to keep their relationship secret from his children. It is not clear how the children had anything to do with these receipts as many of them have only the Member's and the Appellant's handwriting on them. Further, the suggestion that the Member and the Appellant had to fabricate documents to hide their "real" relationship is at odds with the testimony of those witnesses (including the Member's family members) that the relationship between the Member and the Appellant was obvious to anyone.
4. The Appellant's counsel argued that the receipts should not be construed against the Appellant, because one can be a spouse and a paid employee. The Panel accepts this can be true in some circumstances, however, a spouse doesn't typically get paid a regular, receipted wage for doing cooking, shopping, cleaning, and other tasks associated with domestic life for one's own family unit. Further there was no objective purpose to paying the Appellant, such as income splitting or deduction of business expenses.
5. After his eyesight deteriorated in 2012, the Member transferred ownership of his car to the Appellant, however, he did not designate the Appellant as a spouse when he did so, although he could have saved money on the retail sales tax if he had.
6. Although the Panel did not rely heavily on this factor, the Member described himself as "single" on his income tax returns during the relevant time.
7. Although the Appellant described herself and the Member as "simple people" who would not use legal terms, the evidence is clear that the Member did, in fact, often obtain legal assistance to help him in formalizing his personal relationships. He used a lawyer to assist him with the Independent Contractor Agreement. He saw not just one but three lawyers in the course of preparing his Will and Power of Attorney documents. He executed a number of legal documents over the years, all of which were signed and witnessed. It is hard to believe that if the Member intended for the Appellant to be considered his spouse, he would not have found a way to convey that.
8. The explanation that the Member was trying to hide the real nature of their relationship to protect the Appellant from the wrath of some of his children was not persuasive. There was no clear evidence about what, exactly, the Member thought would happen if he described the Appellant as

his spouse. This theory does not explain why the Member would have described the Appellant as his “caregiver” to his doctor in 2014. It does not explain why the Member declined to refer to the Appellant as his spouse even when he enlisted the help of the Appellant’s Daughter and the Member’s Daughter 1 (who were sympathetic to the Appellant) to draw up documents supposedly intended to help the Appellant.

9. Finally, the Panel notes that even the Appellant did not assert a common-law relationship while the Member was alive. She did not ask the Member to describe her as a spouse or a family member when he was making plans for his future and his estate and she did not describe herself as a spouse or family member when the police were investigating the Member’s allegations of financial fraud in 2014 while being interviewed by the police as to whether the Member’s Daughter 1 had stolen money.
10. On March 14, 2014, the Appellant was interviewed by the police in connection with an allegation of fraud that the Member had made against the Member’s Daughter 1. The Appellant described herself as caregiver being paid \$800. Even though the evidence was not given under oath the Appellant understood it was important to tell the truth. Her explanation was that the Member had asked her not to reveal a romantic relationship and she respected that. She says she didn’t “lie” [she was a caregiver] she just didn’t tell the whole truth.

In light of the evidence that the Member deliberately and repeatedly chose to refer to the Appellant as his “caregiver”, entitled to “compensation” only if she remained his caregiver until his death, the Panel cannot find that the Appellant has met the onus on her to prove she is entitled to a pension benefit by virtue of being the Member’s common-law spouse at the time of his death.

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 _____, 2017.

Eugene Swimmer, Chair
Sheila Vandenberg, Member
David Tsubouchi, Member