

OMERS ADMINISTRATION CORPORATION

APPEALS COMMITTEE

PANEL:

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

In the Matter of an Appeal by “the Appellant”

to the Appeals Committee Panel

March 30, 2017

BETWEEN

Appellant

- and -

OMERS Administration Corporation

DECISION AND REASONS FOR DECISION

Overview of the Case and Issues in Dispute

This is an appeal by the Appellant of the President's Determination holding that she was not entitled to a spousal pension benefit relating to OMERS pension plan member (the "Member"). The appeal was heard in writing.

A panel of the Appeals Committee of the OMERS Administration Corporation (the "Panel") met on March 31, 2017 to deliberate and resolve this case, based on written submissions from the Appellant and from Staff of the OMERS Administration Corporation, who defended the decision to deny the Appellant a spousal pension.

The basic issues involved in this appeal are as follows:

- a) The Member was a member of the OMERS Primary Pension Plan (the "Plan"), who retired and began collecting his pension in 1994.
- b) In 2003, the Member changed his OMERS pension beneficiary to the Appellant, whom he identified at that time as his common-law spouse.
- c) The Member passed away on April 19, 2014. Because he received pension payments for 20 years, the only potential survivor's benefit is for a surviving spouse. The Appellant claims that she was common-law spouse of the Member at the time of his death, and therefore eligible for the spousal pension.
- d) The definition of "spouse" in the Plan is derived from the *Pension Benefits Act*, R.S.O., 1990, c. P 8. For couples who are not married or do not have children together (the situation in this case), the Plan defines common-law spouses as two persons who have lived together in a conjugal relationship, continuously, for a period of not less than three years, up to and including the plan member's date of death.
- e) The Appellant was unable to satisfy the OMERS Staff that she was the Member's common-law spouse for the period from April 19, 2011 to April 19, 2014, based on the documentary evidence she submitted.
- f) The Appellant requested that the OMERS President determine whether she was entitled to the spousal pension. When the President's designate found that she did not meet the definition of spouse, the Appellant asked to have the decision reviewed by this Panel.
- g) The Panel reviewed the case on a *de novo* basis, with the Appellant bearing the onus of proof based on a 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 from April 19, 2011, until the time of his death.

The Legal and Factual Issues

The Panel relies on the legal test of whether a common-law relationship exists, set out in such cases as *Molodowich v. Penttinen* 1980 CanLII 1537 (ONSC) and *Glenn v. MacLean-Kirby Estate*, [2006] O.J. No. 520 (S.C.J.). A conjugal relationship has both a subjective and objective test: What was the intention of the parties as gleaned from the facts and how were they regarded by others?

In discerning the intention of the parties, there are descriptive factors that can be useful in assisting the Panel to determine whether a conjugal 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 not every characteristic 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 common-law spouses can arrange their affairs in a variety of ways.

Below is the summary of how the Panel applied the relevant evidence in this case to the legal definition of common-law spouse.

Shelter

According to the Appellant, her relationship with the Member began in 1999. She resided in [Location 1], he resided in [Location 2], and they shared both properties. They moved to [Location 3] in 2004, where they lived together in the same home, for approximately three years. The Member moved to [Location 4] in November 2007, while the Appellant remained in [Location 3]. The Appellant stated that she put the [Location 3] property up for sale in 2008, with the intention of moving back to [Location 4], but the house did not sell. She did not provide any independent evidence to verify that her house was for sale throughout the nine years she and the Member resided in separate provinces. In November 2013 the Member suffered a heart attack, after which he moved into a health care facility in [Location 1].

The Appellant asserted that despite their separate residences, she and the Member spent much time together, visiting each other 8-10 times per year for up to three weeks per visit, until his heart attack. She also visited him three times between the date of his heart attack and his death. Although no

independent verification has been provided, even taking the Appellant at her word, they would have only spent at most 24-30 weeks together, annually, in the 3 years prior to the Member's death.

Sexual and Personal Behaviour

The Panel accepts the Appellant's evidence that they had a sexual relationship. They seem to have been faithful to one another. The sworn evidence of the Member's stepson helps to demonstrate this: his stepfather was emphatic that he wanted the remainder of his OMERS pension to go to the Appellant after his death. There is also the objective evidence that the Member never modified his choice of the Appellant as his OMERS pension beneficiary.

There is not much detail in the Appellant's evidence concerning such issues as whether, in the three years preceding the Member's death, they bought gifts for one another, cared for each other in times of illness, or presented themselves to the outside world as a conjugal, common-law couple.

Services

No clear evidence was presented about what services they performed for one another, if any.

Social

There is not much independent evidence on their social relations. There are the Appellant's unverified statements in her March 13, 2017 submission that they loved going to restaurants and films, shared dinners with friends and family, and visited the Member's family in [Province] and [Country]. The Member's stepson's statement supports the Appellant with respect to the couple socializing with family members. The statement of a friend, is brief and vague, not offering much assistance to the Panel.

The Panel is prepared to accept that when the Appellant and the Member were together, they socialized and went to events together.

No evidence was provided by the Appellant to demonstrate that she claimed the Member as her spouse on financial or other documents, such as medical forms, tax forms, or others. The Member did claim the Appellant was his common-law spouse on the 2003 OMERS beneficiary form. Apart from that one document in 2003, there is no other evidence that the Member held out the Appellant as his spouse, either in his tax forms, medical forms, or for the purposes of his legal affairs.

Economic Support

Based on the available evidence, it seems that the Appellant and the Member's lives were not financially intertwined during 2011-2014. This is hardly surprising, given that they were largely living in separate provinces. Although there is a joint bank account, the bank statements seem to indicate that it was used exclusively for the Member's purposes. There is no evidence that they shared expenses of daily living or otherwise. They did not own either of their residences jointly.

The Member's will gives the Appellant some consideration, but not very much. He left the Appellant his car and provided that she could have the temporary use of his condo, until it was disposed of by his stepson. The Appellant was not the Member's main beneficiary, possibly because he believed that she would receive an OMERS pension as his common-law spouse.

The Appellant did not provide evidence about her will. She designated her children as the beneficiaries for her Pension; however, if the Member really was her spouse, that designation would have been ineffective – one cannot choose a person to be their spouse for one pension plan, but not another.

Children

They did not have any natural or adopted children together.

They had relationships with each other's children, and the Member seems to have had a relationship with the Appellant's grandchildren. The Member's obituary states that he was Grandpa to both his own and the Appellant's grandchildren.

Decision

"Living separate and apart" is a legal concept that does not depend entirely on cohabitation. Married spouses can be living "separate and apart" even if they reside under the same roof. By the same token, couples who do not reside together can be common-law spouses, but there would generally have to be other, clear evidence of an intention to live as spouses. Common-law spouses who become involuntarily separated could maintain that status in certain cases. These are some examples of where a couple living under different roofs would still be conjugal and not "living separate and apart":

- one spouse is in hospital or long-term care facility;
- one spouse has to move for work, and there are compelling reasons why the other spouse cannot join him or her; or
- one spouse must temporarily move for compelling reasons, i.e., to care for an ailing family member.

The legal definition of common-law spouse may seem old-fashioned to the Appellant, but that is the only definition that the Panel can apply. "Living together in a conjugal relationship" generally means a couple living in the same residence, unless there are very compelling reasons requiring the couple to live apart. In this case, the balance of the evidence is that the Member and the Appellant made a deliberate choice to live apart for the seven years before the Member's death. There may have been good reasons for that choice, but the reasons fall short of making it the kind of involuntary or temporary separation that would allow a common-law couple to meet the definition of "living together in a common-law relationship", while having separate residences.

Therefore, the Panel finds that the Appellant has not 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
Darcie Beggs, Member
David Tsubouchi, Member