

ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SYSTEM

In the matter of an Appeal from the Decision of the President

By: “The Appellant” to the Appeals Committee

Heard: March 30, 2015

The Appellant brings this appeal from the decision of the President’s Designate dated December 12, 2014, made pursuant to Section 41 of the OMERS Primary Pension Plan (the “Plan”).

By this appeal, the Appellant seeks a determination from a panel of the Appeals Committee (the “Panel”) that she is the eligible surviving spouse of the Member under the Plan, and is therefore entitled to a spousal survival benefit from the Plan. This appeal was a hearing *de novo*, conducted by written submissions. The Panel has considered all the evidence and written submissions of the Appellant as well as the evidence submitted by the OMERS staff that was before the President’s designate.

Background

The Member was a Plan member who began receiving pension benefits on May 31, 2010. He was never formally married and died on August 5, 2013.

Following his death, the Appellant applied to OMERS indicating that she and the deceased had been involved in a long term common-law marriage, and eligible for the surviving spouse pension under the OMERS plan.

Section 20 of the Plan establishes the order of precedence for surviving spousal benefits, if the member dies after retirement. If the member had a surviving spouse on the day of his/her retirement, that spouse is entitled to survivor benefits. If the member did not have a spouse on the day of retirement, but the member had a surviving spouse on the date of his/her death, then that spouse is entitled to the survivor benefits.

The definition of “spouse” in section 1 of Plan is derived from the *Pension Benefits Act*, R.S.O. 1990 c. P.8. (“PBA”), subsection 1(1), as follows:

“spouse” means either of two persons who,

- (a) are married to each other, or
- (b) are not married to each other and are living together in a conjugal relationship,
 - (i) continuously for a period of not less than three years, or
 - (ii) In a relationship of some permanence, if they are the natural or adoptive parents of a child, both as defined in the *Family Law Act*;

The Member and the Appellant were never married and had no children; therefore, only subsection (b)(i) is relevant to this appeal. To be successful, the Appellant must demonstrate that on the balance of probabilities, she and the Member were living together in a continuous conjugal relationship for at least the three years prior to his retirement (June 1, 2007 – May 31, 2010) or the three years prior to his death (August 6, 2010 – August 5, 2013). Although the Appellant maintains that their common law relationship had been continuous for many years, almost all of her evidence relates to the 2010-2013 period, because of document availability. Likewise, in making its decision, the Panel has focused on the latter period.

The Panel referred to *Molodowich v. Penttinen*, [1980] O.J. No. 1904 (Ont. Dist. Ct.), a decision of the Ontario District Court, which outlines a list of issues which can be useful in determining whether a conjugal relationship exists:

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

The *Molodowich* decision states that 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.

Assuming a spousal relationship is determined, the Panel must also be satisfied that the Appellant and the Member were not living “separate and apart” at the time of the Member’s death. The Panel believes that the preponderance of evidence supports the Appellant’s claim of being in a continuous conjugal relationship with the Member for the crucial time frame. The relevant documents include:

- a. Statements from one neighbor, one friend and two relatives, which all indicate that they considered the Appellant and the Member as a long-term continuous common law couple.
- b. The OMERS statutory declaration by the Appellant (sworn and dated Dec. 2013) in which she declares that she lived in the same residence as the Member as a common-law spouse, on a continuous basis, from 2002 until his death.
- c. Tax records from the City of [●], which indicate that the Appellant and the Member paid property taxes on the residence at [Address 1] from at least August 1, 2010 (if not earlier). The tax bills and mortgage were paid out of their joint [●Bank] account from August 1, 2010 (if not earlier), until his death. The Appellant was formally registered as the co-owner of the property on September 10, 2010, and eventually inherited the Member’s share.
- d. The Member appointed the Appellant as his power of attorney for personal care, in 2006. In his last will and testament, he appointed the Appellant his executor, and left

her the overwhelming share of his assets, including the aforementioned share of Address 1, another house at [Address 2], his bank accounts, car and motorcycle.

The Panel also addressed two pieces of evidence submitted by the Appellant which potentially could weaken her claim. They are:

- a. A statutory declaration prepared by the Appellant's solicitor (and signed by her), indicating that the Member "resided at a different address than myself in 2010, since he could have used anyone of his addresses" and that there were "Periods of separation were: August 2 and August 3. We were apart 2013".
- b. The Member listed his primary residence as [Address 3] on his 2010 driver's license and their joint application for a vendor credit card application (date unclear).

With respect to the first document, the Panel was satisfied with the Appellant's written explanation that she believed the lawyer's letter indicated that the Member was visiting a friend at the Address 2 house for a couple of days when he was rushed to a hospital and subsequently passed away, not that they had separated. She made a mistake in signing the document, without carefully reading it, due to being distraught about the loss of the Member.

The Panel noted that the document was poorly crafted, and finds that the Appellant could not be denied a spousal benefit on the basis on this document.

It does appear to be that the Member used a different address for his principal residence (other than Address 1) for at least some of the three year period before his death. The Panel finds that keeping a principal residence (for tax purposes) other than one's current residence is a fairly common practice, and therefore was not influenced by this issue.

Conclusion and Decision

Having carefully considered all of the evidence, including the evidence discussed above, the Panel finds that the Appellant has established on a balance of probabilities that she and the Member were living together in a continuous conjugal relationship for at least three years before his death on August 5, 2013 and that she and the Member were not living separate and apart on that date.

The Appellant's appeal is therefore allowed, and the Panel orders that she be entitled to the Member's surviving spouse benefits.

DATED at Toronto this _____ day of _____, 2015.

Eugene Swimmer, Chair

David Tsubouchi, Member

Darcie Beggs, Member