

ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SYSTEM

***In the Matter of an Appeal from the
Decision of the President
By “the Appellant” to the
Appeals Sub-Committee***

Heard on February 4, 2010

DECISION

Introduction

The Appellant brings this appeal to the Appeals Sub-Committee of the OMERS Administration Corporation (the “Committee”) from the decision of the President of OMERS, dated July 15, 2009, wherein he could not conclude based on the evidence and submissions of the Appellant, that OMERS member [the “Member”] and the Appellant were in a common-law relationship at the time of the Member’s retirement or death. As such, the President determined that the Appellant was not eligible for payment of a spousal survivor benefit from the Member’s OMERS pension.

By this appeal, the Appellant seeks a determination from the Committee that she is the Member’s surviving spouse under the provisions of the OMERS Primary Plan (“Plan”) and that she is eligible for payment of a spousal survivor benefit from the Member’s OMERS pension.

This appeal proceeded by way of a written hearing *de novo* held on February 4, 2010.

Background

1. The Member and the Appellant were both employees of the [●] School Board. The Member retired and received the first instalment of his pension effective September 1, 2005. On March 16, 2008, the Member died.

Applicable Statutory Provisions and Plan Provisions

2. The relevant provisions of the Plan and the *Pension Benefits Act* are as follows:

Section 1 of the Plan defines spouse as:

“Spouse” has the same meaning as in the Pension Benefits Act.

Under subsection 1(1) of the *Pension Benefits Act*, R.S.O. 1990 c.P.8 (as amended) the term “spouse” is defined as:

“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

Section 1 of the Plan defines the phrase “surviving spouse” as:

“surviving spouse” means the person who was the spouse of a member immediately before the member’s death.

Section 20 of the Plan provides for a spousal survivor benefit as follows:

- (1) A pension is payable under this section on the death of a member after the date that payment of the first instalment of the pension is due
 - (a) to the surviving spouse of the member
- ...
- (6) Despite the definition of surviving spouse, with respect to a member’s pension under this Plan where payment of the first instalment of the pension was due on or after January 1, 1988, upon the death of the member, the member’s spouse at the date the first instalment of the pension was due shall be deemed to be the surviving spouse instead of the person who would otherwise be the surviving spouse under this Plan.
- (7) Subsection (6) does not apply if,
 - (a) the member and the member’s spouse on the date that payment of the first instalment of the pension was due were living separate and apart on that date, or
 - (b) the member’s spouse at the date that payment of the first instalment of the pension is due is not alive at the date of death of the member, or
 - (c) the entitlement of the spouse at the date that payment of the first instalment of the pension is due is not entitled to receive a benefit by virtue of a valid court order, a valid written domestic contract or any other valid waiver filed with the Administration Corporation.”

3. Based on the abovementioned provisions, in order for the Appellant to establish that she is the Member’s surviving spouse, the Appellant must demonstrate that either:

- (i) she was in a continuous conjugal relationship with the Member for at least three years as at September 1, 2005 (the date that payment of the first instalment of the Member’s pension was due) and that she and the Member were not living separate and apart on that date, or
- (ii) she was in a continuous conjugal relationship with the Member for at least 3 years as at March 16, 2008 (the date the Member died) and that she and the Member were not living separate and apart as of that date.

Evidence and Written Submissions of the Appellant

4. The Appellant submitted the following evidence and written submissions at her hearing before the President and on this appeal:
 - (a) Statutory Declaration of the Appellant declared on May 8, 2008;
 - (b) Funeral Director's Statement of Death for the Member;
 - (c) Letter from the Appellant's Daughter [Daughter 1], dated May 8, 2008;
 - (d) Letter from [Person 1], a close friend of the Appellant, dated April 17, 2008;
 - (e) Employee Data Sheets ([●] School Board):
 - (i) For the Member, dated November 3, 2006, showing the Appellant as beneficiary and dependant as well as the Appellant's children;
 - (ii) For the Appellant, dated December 21, 2004 and March 29, 2005, showing the Member as beneficiary and dependant;
 - (f) Sun Life beneficiary card dated September 27, 1994, signed by the Member showing the Appellant as beneficiary and common-law spouse;
 - (g) Sun Life Financial statement dated December 31, 2002 showing [the Appellant] as beneficiary;
 - (h) Sun Life Financial Portfolio Review dated April 2, 2008, showing the Member (deceased) as owner and [the Appellant] as beneficiary;
 - (i) RBC Investment Statement dated January 1, 2004 – June 30, 2004 for the Member showing the Appellant as beneficiary;
 - (j) RBC RRSP Statement dated April 16, 2008, for the Member showing the Appellant as beneficiary;
 - (k) Pilot Insurance forms dated February 8, 1999 showing the Appellant and the Member as join policy holders;
 - (l) [●] Petroleum Ltd. Statement dated March 31, 1995 addressed to [the Member] at [Address 1];
 - (m) Statutory Declaration of the Appellant declared July 2, 2008;

- (n) Canada Post Invoice dated August 2008 showing the Appellant and the Member as customers for renewal of a [the Town of Address 1] postal box;
 - (o) The Appellant letter dated November 26, 2008, to [OMERS Pension Specialist], Retirement Member Services, OMERS confirming the Appellant's attendance at the Member's retirement dinner in October 2005 and recording contracts with the treatment centre;
 - (p) Letter dated November 19, 2008 from [Person 2], [●] School Board, confirming attendance by the Appellant and family at the Member's retirement dinner and regarding the Appellant's frequent contacts with both the treatment centre staff and the Member throughout his stay in treatment;
 - (q) [●] School Board Employee Data Sheet dated May 1, 2002, showing the Appellant's job title and the Member and [Other Beneficiary] as beneficiaries;
 - (r) Sun Life Explanation of Benefits issues April 15, 2001 to the Member showing the Appellant's Daughter [Daughter 2], as claimant;
 - (s) Sun Life Dental and Health Spending Account Claim Form dated November 1, 2001, showing the Member as spouse respecting dental expenses for the Appellant's Daughter [Daughter 2];
 - (t) A copy of an envelope addressed to the Member and the Appellant, post-dated July 20, 1999, at [Address 1];
 - (u) Letter dated November 14, 2008 from [Person 3], Director of [treatment center] in [Town, Province], advising that information about the facility's clients can not be released without explicit written consent or a legal subpoena; and
 - (v) Letter dated April 15, 2009 to the President of OMERS recording background information for review on her appeal.
5. The Appellant submitted the following additional evidence and written submissions on this appeal:
- (a) Letter dated August 7, 2009 to OMERS providing the Appellant's notice of appeal;

- (b) Letter dated November 12, 2009 from [Person 3], Director of [treatment center] in [Town, Province], confirming that the Appellant came to the facility several times “to participate in the Family component of our program as the spouse of one of our clients.”
- (c) Letter dated November 23, 2009, from [Person 4], a former employee of the [●] School Board and its predecessor board, recording his prior relationship with the Appellant and the Member;
- (d) Letter dated November 23, 2009 from [Person 5], MPP [Region], respecting the common law relationship of the Appellant and the Member;
- (e) Letter dated November 26, 2009 from the Appellant’s Daughter [Daughter 2] to OMERS in support of the Appellant’s appeal;
- (f) Opinion letter dated November 24, 2009, from [Person 6] of the law firm of [●] in support of the Appellant’s appeal;
- (g) Letter dated September 9, 2004 from [Fuel Company] addressed to the Member and the Appellant at [Address 1];
- (h) Life insurance application dated April 7, 1994 for the Member naming “[the Appellant]” as the Member’s spouse and beneficiary;
- (i) Sun Life dental claim form dated July 26, 2005 completed and signed by the Appellant. Under the section entitled “Coordination of benefits”, the Member is signed in the field entitled “Spouse’s Signature”;
- (j) Sun Life dental claim form dated July 15, 2005 completed and signed by the Appellant. Under the section entitled “Coordination of benefits”, the Member is signed in the field entitled “Spouse’s Signature”;
- (k) Sun Life statement dated May 16, 2005 for the Member described as a “Predetermination of Benefits”, listing “[the Appellant]” as a claimant; and
- (l) Sun Life claim payment receipt dated July 20, 2005 for the Member listing “[the Appellant]” as a claimant.

Discussion

6. The Committee referred to *Molodowich v. Penttinen*, [1980] O.J. No. 1904 (Ont. Dist. Ct.), a decision of the Ontario District Court, defining the generally accepted characteristics of a common-law (conjugal) relationship. The *Molodowich* decision states that not every characteristic of a conjugal relationship needs to be present, or present in the same degree, in order for a conjugal relationship to be established. The facts will vary from case to case.
7. After considering all of the evidence and written submissions of the Appellant, the Committee finds that the Appellant and the Member were in a continuous conjugal relationship for at least three years, as defined by the Plan and the *Pension Benefits Act*, and that this relationship existed as at September 1, 2005, the Member's retirement date.
8. The Committee also finds that the Appellant and the Member were not living separate and apart on the Member's retirement date. The evidence presented to the Committee on this point was that:
 - (a) the Appellant and the Member lived together in a conjugal relationship from April 1990 to September 2004 at [Address 1];
 - (b) the Appellant and the Member lived in separate residences from September 2004 until the Member's death in March 2008 due to the Member's alcohol dependency and need for rehabilitation, and
 - (c) the Appellant's and the Member's intentions were to resume living together upon the Member's completion of his substance abuse treatment and when the Member's alcoholism was under control.
9. In *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.R. 357, the Supreme Court of Canada found that common law spouses who move into separate residences do not necessarily terminate their common law relationship. What is important are the intentions of the spouses. If at least one of them has the intention of terminating the common law relationship by moving into a separate residence, the common law relationship can end. As the Committee has found that both the Appellant's and the Member's intentions were to resume living together upon the Member's completion of his substance abuse treatment and when the Member's alcoholism was under control, the fact that they moved into separate residences did not terminate their common law relationship.

10. For the foregoing reasons, the Appellant's appeal is allowed and the Appellant is eligible for payment of a spousal survivor benefit from the Member's OMERS pension.

DATED at Toronto this _____ day of _____, 2010.

John Goodwin, Chair

Eugene Swimmer, Vice Chair

Sheila Vandenberg, Member