

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 July 6, 2011

DECISION

Introduction

The Appellant brings this appeal to a Panel of the Appeals Sub-Committee of the OMERS Administration Corporation (the “Panel”) from the January 5, 2001 decision of the President of OMERS delegate wherein she could not conclude based on the evidence and submissions before her that the Appellant was the surviving spouse of OMERS member (“the Member”) at the time of the Member’s death. As such, the President’s delegate 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 Panel 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 July 6th, 2011.

Background

1. The Member was employed by [Employer] as a firefighter from May 4th, 1998 until his death on April 28, 2009. The “Member’s Mother” is the designated beneficiary of the Member’s OMERS pension.
2. It is undisputed that the Member has a dependent child by the Appellant named [“Member’s Dependent Child”].
3. It is also undisputed that the Appellant and the Member were not in a continuous conjugal relationship for at least three years, as defined by the Plan and the *Pension Benefits Act*, as at April 28, 2009, the date of the Member’s death.

Applicable Statutory Provisions and Plan Provisions

4. 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
 - (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*

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.

When a member of the Plan dies prior to their retirement, section 19 of the Plan provides for the payment of a survivor benefit as follows:

- (1) A pension is payable under this section on the death of a member before the date that payment of the first instalment of the pension is due,
 - (a) to the surviving spouse, if the member and the surviving spouse were not living separate and apart on the date of the member's death; or
 - (b) to each dependent child of the deceased member,
 - (i) if, at the death of the member, there is no surviving spouse entitled to receive a pension under this section,
...
5. Therefore, the Appellant is entitled to the payment of a survivor's pension, if she can establish, on a balance of probabilities, that she was the Member's surviving spouse at the time of his death and that she and the Member were not living separate and apart at the time of his death. If the Appellant cannot establish these two criteria then the Member's Dependent Child, is entitled to payment of a survivor's pension from the Plan.
6. 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,
 - (i) she was in a continuous conjugal relationship with the Member for at least 3 years as at April 28, 2009 (the date the Member died); or
 - (ii) she and the Member were living together in a conjugal relationship, in a relationship of some permanence as at April 28, 2009 (the date the Member died) and they are the natural or adoptive parents of a child, both as defined in the *Family Law Act*;

Because the Appellant has asserted that her relationship with the Member lasted less than 3 years, only (ii) applies in this case. The Appellant must also establish that she and the Member were not living separate and apart as of April 28, 2009 (the date the Member died).

Discussion

7. The Panel referred to *Molodowich v. Penttinen*, [1980] O.J. No. 1904 (Ont. Dist. Ct.), a decision of the Ontario District Court, defining a list of categories and questions decision makers should refer to when assessing whether a conjugal relationship exists. The *Molodowich* decision (which has been cited with approval by the Supreme Court of Canada) suggests that the following categories should be considered when assessing whether a conjugal relationship exists:
 - (a) shelter
 - (b) sexual and personal behaviour
 - (c) services
 - (d) social activities
 - (e) economic support
 - (f) children
 - (g) societal perception of the couple.
8. 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, in order for a conjugal relationship to be established. The facts will vary from case to case.

9. The Panel also referred to *DeSouza v. DeSouza* (1999), 48 R.F.L. (4th) 63 (O.C.J.), suggesting the factors to be considered in determining whether a relationship is of “some permanence”. The *DeSouza* decision suggests that, while each case can present unique circumstances, the following principles are of guidance:
 - (a) the parties’ intentions, as overtly expressed, and reflected in their actions, as to the duration of the relationship;
 - (b) the expression of an intent to marry; and
 - (c) the forming of an “economic unit”
10. The “Appellant’s Counsel” conceded in his December 15, 2010 letter that “some of the usual indicia of a spousal relationship were not in place.” In his May 9, 2011 letter, the Appellant’s Counsel advised “[w]e are asking the Appeals Sub-Committee to look beyond the usual indicia which is presented to prove the common law relationship and accept that a common law relationship can exist without that indicia being present”.
11. The Panel found no evidence that the Member and the Appellant maintained joint bank accounts, nor was the Member listed as a tenant on the lease of the Appellant’s apartment at [Address 1].
12. The Member’s mail was delivered to the Member’s Mother’s home. The address on the Member’s driver’s licence, bank statements, and payroll slips was the address for the Member’s Mother’s home. On his income tax returns, the Member indicated that his marital status was single and the address listed on those returns was the address for the Member’s Mother’s home. The only documents submitted by the Appellant addressed to the Member at the Appellant’s address were an announcement card from [Energy Company] dated after the Member’s death and a document from [Automotive/Tire Company] which appeared to be re-directed by Canada Post to the Appellant’s address after the Member’s death.
13. The Appellant was not listed as a beneficiary on the Member’s RRSP nor on any of his pension plans.
14. While the evidence indicates that the Member, pursuant to an informal arrangement, paid the Appellant approximately \$600 – \$700 per month, it is relatively clear from the evidence that these funds were intended as child support for the Member’s Dependent Child. The evidence from the Member’s friends supports this finding. The Member’s friends indicated that the Member, after learning that he was a father, did everything that he could to ensure that his Dependent Child was well provided for. This is also consistent with the evidence that the Member, from time to time, stayed overnight at the Appellant’s residence to spend time with his Dependent Child and attended with the Appellant when she had appointments with her obstetrician.
15. The Appellant provided no evidence to refute the statement by her “Building Superintendent” about the Member coming to the apartment and not being either let into the building or into the Appellant’s apartment. [Person 1] said that he saw the Member use a key to enter the building, however, the Appellant did not provide any evidence that she gave the Member his own key (i.e., where the key was purchased or on or around what date that she provided it to him).
16. The Panel found that there was some evidence that the Member and the Appellant participated in social activities together, particularly at the [●] horse farm. In her statutory declaration, the Appellant asserted that she and the Member attended family functions,

visited and travelled with friends. However, the Member's long standing friends advised that they had little or no contact with the Appellant in social settings.

17. The Appellant asserted that the Member had made it clear to her that he intended to marry her. No evidence from third parties was put forward by the Appellant to support this assertion. By contrast, a number of the Member's friends indicated that the Member had made it clear to them that he did not love the Appellant.
18. The Member's Mother advised that the Member kept his clothing, toiletries and personal belongings at her house. The Appellant advised that she and the Member ate together, cooked for each other and meal planned together. The Appellant did not offer any evidence from third parties to support these assertions.
19. After considering all of the evidence, including the evidence discussed above, the written submissions of the Appellant and the Appellant's Counsel, the Member's Mother and the Ministry of the Attorney General – Office of the Children's Lawyer on behalf of the Member's Dependent Child, and recognizing that the burden of proof resided with the Appellant to establish that she was the Member's surviving spouse, the Panel finds that the Appellant failed to establish, on a balance of probabilities, that she and the Member were in a conjugal relationship or that their relationship was of 'some permanence', both as required by the *Pension Benefits Act*. Therefore, the Panel concludes that the Appellant was not the Member's spouse at the time of his death.
20. Because the Panel has found that the Member was not the Appellant's spouse, it is unnecessary for the Panel to determine whether the Appellant has established that they were not living separate and apart at the time of the Member's death. However, there is ample evidence before the Panel that suggests that the Appellant and the Member were living separate and apart at the time of the Member's death including the following:
 - (a) the Appellant and the Member maintained separate addresses: the Appellant lived at [Address 1]; while the Member lived at [Address 2];
 - (b) the Member also owned a home at [Address 3];
 - (c) the Member's Mother's home at [Address 2] is the address that is on the Member's last issued driver's licence and is the home where he died; and
 - (d) the Appellant asserted that the Member resided at [his mother's] home to be close to his father who was ill. But the Appellant did not explain why the Member continued to reside at [his mother's] home after the death of his father.
21. For these reasons, the Appellant's appeal is dismissed and the Panel determines that the Appellant is not eligible for payment of a spousal survivor benefit from the Plan.
22. The Panel therefore orders that the Member's Dependent Child is entitled to payment of a survivor's pension from the Plan.

DATED at Toronto this _____ day of _____, 2011.

John Goodwin, Chair

Michael Power, Vice Chair¹

David Carrington, Member

¹ Michael Power took part in the hearing, the Panel's deliberations and concurred in the Panel's decision. Unfortunately, he was ill when these reasons were finalized and could not sign them.