

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 May 31, 2012

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 13, 2012 decision of the OMERS President’s delegate wherein she could not conclude based on the evidence and submissions before her that the Appellant was the surviving spouse of the OMERS 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 he is the Member’s surviving spouse under the provisions of the OMERS Primary Plan (“Plan”) and that he 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 May 31st, 2012.

Background

1. On October 27, 2009, the Member, who was employed by [Employer], died prior to retirement.
2. The Appellant applied to OMERS for a spousal survivor benefit claiming that he was the Member’s common law spouse. In his application, the Appellant asserted that he and the Member had been spouses since January 11, 2005 (written as 1/11/2005). However, it is relatively clear from the evidence that the Appellant submitted that he likely meant to state November 1, 2005.
3. The designated beneficiary of record on the Member’s OMERS pension as of the date of her death is her Estate.

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. The Appellant is entitled to the payment of a survivor’s pension from the Member’s OMERS pension, if he can establish, on a balance of probabilities, that he was the Member’s surviving spouse at the time of her death and that he and the Member were not living separate and apart at the time of her death.
- 6. Based on the abovementioned provisions and because there were no children, in order for the Appellant to establish that he is the Member’s surviving spouse, he must establish that he was in a continuous conjugal relationship with the Member for at least 3 years as at October 27, 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 by the Supreme Court of Canada) suggests that the following categories should be considered when assessing whether a conjugal relationship exists:
 - (i) shelter
 - (ii) sexual and personal behaviour

- (iii) services
 - (iv) social activities
 - (v) economic support
 - (vi) children
 - (vii) 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. Before the Panel was the question of if the Appellant and the Member were in a conjugal relationship and if so when that relationship started. Based on the date of the Member's death (October 27, 2009), the Appellant and the Member would have had to have commenced a continuous conjugal relationship on or before October 27, 2006.
 10. The Appellant submitted the following evidence from friends, neighbours and family:
 - (a) a brief October 16, 2009 letter from [Person 1], a neighbour on [Street 1], stating that the Appellant and the Member were living in a "common-law relationship" since November 2005, but with no explanation why;
 - (b) a brief February 16, 2012 letter from [Person 2], a former neighbour of the Appellant on [Street 2], stating that the Appellant had sold his house in August 2008 since he had been living with the Member for "at least 3 years prior" and that the Appellant had told him that they were committed to their relationship;
 - (c) an undated letter from [Person 3], the Appellant's sister, stating that the Appellant and the Member had been living together at [Street 1] since the fall of 2005. [Person 3] also stated that the Appellant and the Member enjoyed cooking together and that she and her boyfriend would often enjoy BBQs with the Appellant and the Member; and
 - (d) an undated letter from [Person 4], lead-hand for [Employer], a co-worker of the Appellant and the Member, stating that the Appellant and the Member would arrive and leave work together and that they often talked about dinner plans and gardening. [Person 4] also stated that he knew that the Appellant and the Member lived together in the Member's house.
 11. The Appellant also submitted greeting cards and photos and provided significant narratives of his relationship with the Member.
 12. There was evidence of joint bank accounts at [●] Credit Union. The Branch Manager of the Credit Union confirmed that one account was opened by the Member in 1981 and she was the sole name on that account until 2009. The Member's brother, [Brother 1], was added to the account on February 24, 2009. The Appellant was subsequently added to the account on February 26, 2009. However, later that year, on October 23, 2009, the Appellant was removed from the account. Another account of the Member's was opened on July 18, 2008. The Appellant was added to that account on October 14, 2008 and remains on the account.
 13. There was evidence regarding the designated beneficiary of the Member's OMERS pension. On February 20, 2009, the Member changed her designated beneficiary to

the Appellant, listing him as “spouse”. However, on March 13, 2009, the Member changed her designated beneficiary to her estate.

14. On a fine (#●) paid on August 8, 2007 at the [●] Court Office, the Appellant listed his residence as [Street 2].
15. On her tax returns the Member described her marital status in 2006, 2007 and 2008 as “Separated”.
16. In a December 2010 note faxed to OMERS by the Appellant, with which he forwarded the Member’s last Will and Testament, he stated that “the house and property at [Street 1], [City, Province], built by her (the Member’s) father and ...two dogs were granted to myself [the Appellant].”(sic)
17. The Member’s Will is explicit in many respects. First, there is no dispute that the two dogs, [Dog 1] and [Dog 2], were left to the Appellant.
18. However, The Panel found that the Member described the relationship in her last Will as a friendship. She directed her Estate to provide the Appellant with the first right of refusal to purchase her property at [Street 1]. Further she states therein that “should [the Appellant] decide not to purchase the said property...my Trustee is directed to sell the said property at fair market value provided that [the Appellant] shall be allowed, if he chooses, to remain in my house for a period of six months from the date of my death...and be responsible for the monthly payment of all utilities and my Trustee shall be responsible for the payment of the mortgage, if applicable and all property taxes.”
19. In the Member’s Will, again describing the Appellant as her “friend”, the Member bequeathed to her brothers, [Brother 1] and [Brother 2], all contents of the garage and home except for those items belonging to the Appellant. The Member’s RRSPs were bequeathed to her nieces.

The Appellant alleged that the Will was “co-hearsed” but submitted no evidence in support of this allegation.
20. Having reviewed all of the evidence submitted by the parties, including what is discussed above, the Panel finds that the Appellant has not established on a balance of probabilities that he and the Member were living together in a continuous conjugal relationship for at least three years as of the date of the Member’s death.
21. In arriving at this conclusion, the Panel finds that there was insufficient evidence before it, especially during the 2006-2008 timeframe establishing that the Appellant and the Member were living together in a conjugal relationship during that time. In addition, the Member’s statements expressed in her Will and the change of the designated beneficiary of her OMERS pension from the Appellant to her Estate cast doubt on the Appellant’s assertions that he and the Member were in a conjugal relationship as of the date of her death.
22. 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.
23. The Member’s designated beneficiary, her Estate, is therefore entitled to a refund pursuant to section 19(9) of the Plan.

DATED at Toronto this _____ day of _____, 2012.

David Carrington, Chair

Frederick Biro, Vice Chair

Sheila Vandenberg, Member