[2017] NZSSAA 020

Reference No. SSA 147/13 and SSA 055/16

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of XXXX against a decision of a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

This decision is subject to an order directing that the location where the hearing took place, the names of witnesses, counsel, and the parties and where they live are not to be published, as that information may allow some persons to infer the identity of the Appellant, and others.

Mr G Pearson - Chairperson

Mr C Joe - Member

Hearing at **XXXX** on 20 and 21 March, 2017.

Appearances

For Chief Executive of the Ministry of Social Development: XXXX

For the Appellant: XXXX

DECISION

Background

[1] As a preliminary matter we record this appeal follows a failed prosecution brought against the Appellant which related to the same issue. The Appellant was charged with benefit fraud; she was found guilty of 17 of 20 counts in an indictment after a trial by jury. However, the number of

counts does not accurately reflect the result. The counts on which there was a conviction related to various assets and income which she did not declare when seeking support of various kinds from the Ministry. The total amount of benefit which was overpaid due to the failure to declare assets and income amounted to a total of $6,483.28. At the end of the trial, the jury had not agreed on the remaining three counts which related to the issue this Authority is now dealing with.

[2] The issue the jury did not agree on was whether the Appellant was living in a relationship in the nature of marriage, which disentitled her to certain support from the Ministry. By the time the Appellant was sentenced, the Crown had indicated that it would not proceed with the three remaining counts based on that ground, and withdrew them. The three counts the Crown withdrew comprised the vast majority of the alleged fraud for which the Crown prosecuted the Appellant. This appeal concerns a claimed overpayment of $103,838.06. The balance is offset to some degree by some alternative entitlements the Appellant would have if she were in a relationship in the nature of marriage during the relevant periods.

The Issues

[3] The issue in the appeal can be simply stated as whether or not the Appellant was in a relationship in the nature of marriage during two periods:

a. The first period being from 17 January 2007 to 27 October 2008;
b. The second period being from 22 February 2010 to 6 October 2013.

[4] However, the two periods are selected not because they were the only times the Appellant and the other person lived in the same house. They had done so since December 2003, the disputed period is selected due to its significance in relation to the Appellant's benefit entitlements. It is necessary to consider the whole period from 2003 to evaluate the nature of the relationship.

[5] We must decide whether during any or all of the periods in dispute the Appellant was in a relationship in the nature of marriage. The claim by the Chief Executive relates to a relationship with a particular person. The

Appellant's position is quite simply that she has never had a relationship with that person that can be characterised as "a relationship in the nature of marriage".

[6] The Appellant will be referred to in this decision as "the Appellant", and the putative "spouse" will be referred to as "OCI". It is not appropriate to disclose their identities, and for that reason only general information will be set out regarding locations and the like (except as necessary for the reasoning in the decision). For the same reason, the identity of the officers of the Ministry and other persons will not be disclosed in this decision.

[7] After determining whether there was a relationship in the nature of marriage between the Appellant and OCI, there are potentially some ancillary decisions to be made regarding quantifying the financial consequences. However, they are derivative and this decision will reserve those matters for the parties to resolve, if necessary they can be brought back before the Authority for determination.

[8] Aside from the general question to be determined, the parties have agreed on some of the issues to be resolved. The following matters have been recorded in a joint memorandum containing various concessions:

a. The parties agree that the Appellant and OCI lived at the same property between 17 January 2007 and 28 August 2008, and also between mid-2011 and 6 October 2013. However, to understand the concession it is necessary to note:

    i. Whether they lived at the same property between 28 August 2008 and October 2008 is contentious, as is the period between February 2010 and mid-2011. The Chief Executive says they did, and the Appellant disputes that claim.

    ii. Furthermore, while the joint memorandum did not include an agreement as to when the Appellant and OCI first started living in the same house, it was not contentious, and that started in December 2003.

b. They also said in the joint memorandum:

> The parties agree that there is no evidence available that the Appellant and [OCI] have had sexual intercourse.

The legislation

[9] The issue the Authority has to determine is governed by s 63 of the Social Security Act 1964. The relevant parts of the provision are:

> **63 Conjugal status for benefit purposes**
>
> For the purposes of determining any application for any benefit, or of reviewing any benefit already granted… the chief executive may in the chief executive's discretion—
>
> (a) regard as single any applicant or beneficiary who is married or in a civil union but is living apart from his or her spouse or partner:
>
> (b) regard as married any 2 people who, not being legally married or in a civil union, have entered into a relationship in the nature of marriage ...

The position of the parties

[10] The Chief Executive’s essential position is simply that the Appellant and OCI, during the identified periods when they lived together, did so in circumstances that amounted to a relationship in the nature of marriage. The various indicia such as emotional and financial support, commitment and the like were all present in the relationship. The Chief Executive accepts that they did not have “sexual intercourse”, but does claim that they shared a bedroom and physical intimacy. More accurately the concession is there is “no evidence” of sexual intercourse; which, given the attempts to prove intimacy, seems to refer to sexual intercourse in the sense of penetrative sex.

[11] The Appellant disclaims that her relationship with OCI cannot be characterised as a relationship in the nature of marriage; it did not have characteristics that took it beyond mere friendship and support. She says there was no physical intimacy whatever, and the emotional and financial

arrangements between them could not be characterised as being anything in the nature of marriage.

[12] Accordingly, the principal task of the Authority is to make factual findings as to the true nature of the relationship between the Appellant and OCI, having regard to the whole of the evidence before us.

Discussion

The evidence

[13] In this case, an evaluation of the evidence is best considered by first reviewing the evidence presented by the Chief Executive, and then the evidence for the Appellant. The evidence for the Chief Executive principally involves indirect evidence from which the Chief Executive has drawn inferences.

[14] We will consider each of those witnesses in turn.

Witnesses for the Chief Executive

A Police Officer (NNE)

[15] The Chief Executive produced a sworn statement from a Police Officer. He said he knew the Appellant and OCI. He claimed to know of a relationship OCI had with a woman prior to the claimed relationship with the Appellant. He said he had seen the Appellant at a social gathering "rub her hand across [OCI's] shoulders and at one stage I saw the Appellant kiss [OCI] on the lips". He also said he was told by others at this gathering that the Appellant and OCI were "new partners".

[16] NNE failed to present himself for cross-examination. He was required by the Appellant for cross-examination. There were plainly significant matters on which cross-examination would have taken place. Some of his claims are in direct opposition to the witnesses who did attend and faced cross-examination; he would have been cross examined on the length of time since the events and his ability to recall, given the potentially trivial nature of his observations at the time. His description of the touching and kiss was potentially of non-sexual social engagement. His claim that he was told the Appellant and OCI were in a "relationship"

also invited examination. It was not consistent with other evidence the Ministry produced. NNE would obviously have been subject to a challenging cross-examination had he been present. The Ministry provided no explanation for NNE's failure to present for cross-examination.

A homecare person (ECI)

[17] ECI produced an affidavit which said that she was employed by a child homecare service, through which the Appellant provided some home care facilities at relevant times. She produced some documentary records. She also said that the Appellant's home was a two-bedroom house and there was a room available for the children to sleep. The implication appears to be that the Appellant and OCI must have been sleeping in the other bedroom.

[18] The statement from ECI fails to identify the point in time when she made her observations regarding the arrangement of the bedrooms.

[19] The existence of the various documents produced by ECI is not in dispute.

[20] This witness did not attend for cross-examination either; as with NNE, this was not by consent. Had she attended, a number of issues would have been explored in cross-examination, including the reliability of her recollections. The timing was also important as OCI did not live at the property during some of the times ECI potentially made her observations.

A Social Worker (NAS)

[21] NAS is a social worker (senior practitioner) for Child, Youth and Family, which was part of the Ministry at the time. She gave oral evidence, and was subject to cross-examination.

[22] NAS explained her initial contact with the Appellant and OCI related to the care of a family member. The Appellant had a very young family member who was at risk in the situation where she was living. The Appellant was willing to step in to provide care for a period. She later offered to provide short-term care for non-whanau children needing temporary care. NAS gave evidence about the role of OCI in these arrangements and what she observed of the relationship between the

Appellant and OCI. NAS claimed the Appellant and OCI applied to be caregivers as "a de facto couple"; she said they presented as a couple and they shared a room. She said there were two bedrooms in the house and one of them was set up for children and the other was their bedroom. She said she observed them and they appeared to be working as a team. She said they provided referees and access to general practitioners and those persons considered them a couple, including the doctors. She said that they told her they had met through a mutual friend at the end of 2003 and had been in a relationship since then. She said they "also indicated that they were a couple and had a commitment to a future together based on the information they provided".

[23] NAS also said that the Appellant had talked about her American husband and said that she had married him as a "marriage of convenience".

[24] NAS said that the Appellant and OCI cared for the children placed in their care, and while the Appellant was the primary caregiver OCI was substantially engaged, and in her view:

> He was significantly involved in caring for the child. I would have conversations with him, and I would go to the house, he wouldn't always be there but on a lot of visits he was.

[25] She also noted that bank account payments were made for the support of the child in whanau care into OCI's bank account.

[26] In summary, NAS claimed that she had personally observed the sleeping arrangements, and for a range of factors could essentially establish the Appellant and OCI were living together in an intimate relationship, where they slept in the same bed and were fully engaged in all aspects of a shared life.

OCI's flatmate; the Appellant's son (SIH)

[27] OCI is currently a flatmate in a house in a different location from where the Appellant lives. His flatmate is the Appellant's son (SIH), who has suffered from a substance abuse problem. When he gave evidence, he was in the early stage of a treatment program. He, plausibly, could recall little of relevant events. Counsel for the Chief Executive sought to have him declared hostile. However, the application lacked a foundation as the circumstances were evidently that SIH genuinely lacked recall, and

furthermore, there was no document he created that could be put to him to demonstrate any lack of co-operation.

[28] The only relevant evidence he gave was to provide some slight corroboration that OCI was currently in some kind of relationship with a man.

[29] The reliability of SIH's evidence, and the quality of the evidence the Ministry relied on in support of its allegations against the Appellant is illuminated to some degree by counsel for the Ministry attempting to lead evidence from SIH. The evidence counsel sought to lead included that the lawyers acting for the Appellant attempted to procure him to give dishonest evidence regarding the subject of this appeal. SIH would not give any testimony of that kind, the Chief Executive applied to have SIH declared a hostile witness so he could be cross-examined. The application failed on the conventional grounds, as there was no evidence that SIH was uncooperative, he plausibly lacked recall given his substance abuse, and treatment he was undergoing. However, the Authority given its wide discretion to hear probative evidence did allow some leading questions and cross-examination.

[30] Counsel for the Ministry elected to ask SIH:

> … do you recall saying "Mums lawyer contacted me to try to get me to lie in Court" and words to the effect that you declined to do that?

[31] SIH denied any knowledge of saying that. The Chief Executive produced no evidence of a written statement signed by the witness, as would be expected to provide a minimum foundation to attempt to lead such evidence. The Ministry produced no evidence to support the truth of the claim either. Furthermore, there was no evidence or suggestion that counsel for the Chief Executive reported this as misconduct to the Lawyers Complaints Service, as he was obliged[1] to do if he believed there were "reasonable grounds to suspect" it was true.

[32] We have noted this matter, as counsel for the Chief Executive prior to calling SIH as a witness emphasised he was an important witness for the

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[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rule 2008, Rule 2.8.

Chief Executive's case. What SIH said, and what was put to him produced no probative evidence in this appeal at all. However the decision to oppose this appeal on the basis SIH was an important witness is potentially material in relation to costs, given even the absence of the elementary precaution of taking a witness statement before relying on supposed evidence.

The Chief Executive's fraud investigator (ANI)

[33] ANI is an investigation officer for the Ministry's Fraud Services. She described the investigative process concerning the Appellant and the present claims. ANI described the state of the investigation when it concluded that:

> The investigation concluded that the Appellant had received income from various undeclared sources, including interest on investments, employment and insurance payments that affected her income support payments. The Appellant had also received cash assets that were not accurately declared that affected her income support payments. The investigation also concluded and **on the balance of probabilities** the Appellant and [OCI] had been in a relationship in the nature of marriage for the period 17 January 2007 to 27 October 2008 and from 22 February 2010 to 6 October 2013. (emphasis added)

[34] The prosecution followed. ANI described the grounds on which the Chief Executive now relies to claim that the Appellant and OCI were in a relationship in the nature of marriage. She mainly relied on inferences she drew from documents and what other witnesses said:

a. The information provided when gaining approval to be caregivers for children indicated that the Appellant and OCI had been living together for three years in a permanent relationship. It is to be noted, however, that ANI's evidence, beyond the production of documents, in this regard was not direct evidence. The narrative of her evidence was not consistently supported by documentary material. She claimed, for example, that the Appellant and OCI "stated that they had been in a relationship for three years at the time of the home visit", but was neither present at the alleged event, nor produced a documentary record. Accordingly, it was a statement of fact for which she could produce no evidence.

b. Bank statements showed a mortgage agreement where the Appellant and OCI were both borrowers, in respect of two term loans. The mortgage was registered against the property where the Appellant and OCI lived. She referred to OCI making payments of $180 a week, and an explanation that those payments were for board. ANI said that these arrangements involved a financial commitment that made OCI vulnerable.

c. A certificate of title showed that the Appellant and OCI were joint owners of a home, and were both noted as mortgagors.

d. Documents relating to Police checks for the Appellant and OCI indicated that they had been identified on forms as "partners".

e. Various hospital[2] documents showed the Appellant and OCI as being "partners" in the records. Other medical records also showed that the Appellant and OCI were identified as partners.

f. ANI said that information gathered from the Appellant and OCI indicated that OCI provided exceptional emotional support to the Appellant; ANI referred to the Appellant's "vulnerable mental state requiring significant emotional support".

g. The Appellant and OCI both applied for membership of a social club at the same time, on matching forms.

h. The Appellant and OCI joined a different social club under a "joint family membership".

i. Motor vehicle registration indicated that the registration of a motor vehicle for OCI was consistently at the address where the Appellant and OCI lived.

j. OCI purchased a number of household items during a period from 2006 to 2011, and the address was always the address where they lived.

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[2] We understand in some cases an inpatient community mental health hospital.

k. Information from an energy supplier to the address where the Appellant and OCI lived showed a change with a note that OCI was changing the account into "his flatmate's name", with effect from 20 August 2008.

l. OCI obtained finance for a series of vehicles between 2005 and 2009 and the address was the address where he and the Appellant lived.

m. Information obtained from the two motels indicated that:

   (i) OCI stayed at one of the motels on two occasions, namely 7 February 2009 for one night, that the booking was for two guests, and was paid from the Appellant's bank account. The second booking for that motel was for 25 December 2009 for one night and also booked for two guests.

   (ii) The other motel involved a booking for two nights from 7 June 2010; the number of guests was not recorded. ANI said that the financial records "indicate that [the Appellant and OCI] were travelling to other centres and regions". She said that the financial records indicated multiple trips to towns in the area where the Appellant and OCI lived, and one trip to a more distant region. She said that the Appellant and OCI regularly travelled together one to three times a year each year.

n. ANI said that when OCI's father died a death notice was placed in a newspaper which identified the deceased as the Appellant's "father-in-law".

o. ANI referred to conducting an interview with the Appellant. It is unnecessary to discuss the details at this point; they are relevant only to the extent of any discrepancy between the Appellant's evidence and the interview.

p. ANI also presented a description of an interview conducted with OCI; again, its relevance lies in any discrepancies between what he said in his evidence to the Authority.

q. ANI gave an extensive analysis of financial transactions, relating to motel bookings, payments for accommodation (rent or similar) made by OCI to the Appellant and other people, and travel expenses.

[35] It is appropriate to note at this point that ANI's evidence involved the production of a number of documents; mostly they were documents that were not in contention as to their existence or genuineness. The issues related to the circumstances in which they were completed and the reasons. ANI had no direct evidence of those matters; however, she engaged in constructing explanations and drawing conclusions that were plausible but lacked evidence. Moreover, their plausibility relied on assuming what the Appellant and OCI said, both in their interviews and in their evidence given to the Court during the Appellant's trial and before this Authority, were fabrications.

The witnesses for the Appellant

The Appellant

[36] We note that the Appellant filed a brief of evidence in this appeal, and the brief of evidence is the same brief of evidence that she used at the trial when the Crown prosecuted her. The Appellant married in 1973 and separated in 1989, a divorce followed in 1998. The breakdown of the Appellant's marriage was, in her view, largely a result of her suffering from bipolar disorder.

[37] In 1998, the Appellant met her next spouse and they married on XXXX 1999. Her spouse was a citizen of the United States of America, and they both lived there at the time. The Appellant explained that because of her immigration status they married sooner than they had intended, without family present. She emphasised, however, that it was a marriage of love, and they did have a subsequent ceremony with family to properly acknowledge their marriage.

[38] The Appellant returned to New Zealand in 2003 to care for her aged and unwell mother. She said this was not the result of a decision to estrange herself from her husband. Rather, they still loved each other but as matters transpired, they were not in a position to permanently live together again. The Appellant's spouse had been diagnosed with Hepatitis C, his failing health resulted in him not being able to work and

support himself. The Appellant was, accordingly, not in a financial position where she could return to the United States when her mother died in 2005. The Appellant expected that her spouse could not obtain a visa to live permanently in New Zealand, due to his health status. However, during the course of the contentious period of time relating to the Appellant and OCI the Appellant's husband did come to New Zealand. Their relationship was an intimate one at that time, they shared a bed; there were some constraints on intimacy, given her spouse's health status.

[39] The Appellant and OCI first met in 2003. At this point in time the Appellant was living with her mother and OCI was living at another property. They both wished to relocate, but neither of them could afford to rent a place on their own. In December 2003, the Appellant and OCI commenced living in a property which the Appellant rented. The arrangement commenced only after OCI and the Appellant understood that there was and never would be an intimate relationship; OCI had explained he was not sexually interested in women. In 2004, the property where OCI formerly lived became vacant; the Appellant took over the lease there. The Appellant's mother later lived in the property next door. The Appellant was the tenant of the property and OCI was a boarder there; his name was not on the lease.

[40] After the Appellant's mother died in 2005, the Appellant wished to go on a nostalgic holiday to parts of New Zealand where she had lived during earlier parts of her life. The Appellant said she was anxious about travelling alone, and had some degree of paranoia. Accordingly, she asked OCI to travel with her. The arrangement was that the Appellant would pay for the trip, in a campervan which she rented. OCI was to drive the campervan. They slept in separate parts of the campervan.

[41] In 2008, the Appellant used money she had inherited from her mother to purchase the property where she and OCI were living. The electricity account was in the name of OCI, because he had formerly lived at the property and was able to continue the account without paying a bond.

[42] In 2008, the Appellant undertook in-home care for children through an organisation that facilitates care arrangements. Initially, the two children in care were four years of age, and did not sleep during the day.

Accordingly, there were no difficulties with the arrangements that existed throughout the time the Appellant and OCI lived in the house; each had one of the two bedrooms. Later, the Appellant started to care for younger children who did require room to sleep during the day, but did not stay overnight. OCI's bedroom was required as a sleeping space for the younger children. The care services ensured the Appellant had enough money to meet her outgoings without OCI's board money and, accordingly, she asked OCI to find a new place to live. In late 2009, the Appellant's spouse came from America and lived with her in the circumstances previously described for some two months.

[43] Towards the end of 2009, the Appellant had become mentally unwell and attempted suicide. The trigger was allegations concerning abuse of one of the children in the care of the Appellant. The issues did not arise because of anything the Appellant did, or concern what happened when the child was in her care. Nonetheless, the matter concerned her greatly.

[44] In December 2009, following the suicide attempt, the Appellant had the options of remaining in hospital or staying with someone over Christmas. OCI took the Appellant to the town where his family lived. The Appellant stayed in a motel in that town and OCI stayed at his daughter's home. The Appellant did not have anyone else who was in a position to support her at this point in time.

[45] During the period of time after leaving the Appellant's home, OCI continued to maintain his friendship with the Appellant, he would frequently visit to see his cat (it remained at the property), and he collected his mail (he used the address throughout). OCI met the Appellant's husband when he visited from America. There was no change in their relationship throughout the whole period, because the Appellant and OCI did not have a romantic relationship; the relationship was not one of emotional dependence and support, so there was no tension over them not living in the same house, or the Appellant's husband living with her in an intimate relationship.

[46] In the years between 2005 and 2010, the Appellant went to the town where OCI's family lived. She developed a number of relationships within the family. On each of the occasions she stayed in a motel by herself while OCI stayed at his daughter's home. On one occasion she did stay

in a separate room at OCI's daughter's home, but she found it awkward; the Appellant had in fact known OCI's sister before meeting OCI.

[47] Due to the Appellant's paranoia she wanted to book motels, and act as though there were two people staying in the motel. However, there was only one occasion where that was the case; the person staying with her in the motel was OCI's sister who had been a friend before she met OCI.

[48] When OCI's father died, the death notice identified OCI's siblings and partners as siblings and partners using the description in relation to the deceased as "loved father and father-in-law of". The list included the Appellant. She was not present when whoever drafted the notice did so, and did not think it was appropriate when she found out.

[49] In or about June 2011, OCI moved back to live at the Appellant's home. In March 2010, he had been at her home but was only there for a short time while the Appellant was in hospital; he paid rent for a longer period, as he forgot to cancel the payments.

[50] The Appellant and OCI attended some social functions together. The Appellant did not have a car and from time-to-time OCI took the Appellant to visit her children in locations some distance away from where the Appellant lived.

[51] The Appellant was adamant that she had never been in anything that could be described as a relationship in the nature of marriage with OCI, she had never been intimate with him, they had never kissed, neither loved the other; but they were friends. At the time she provided board for the Appellant, he always paid her, always had separate bedrooms and lived fully independent lives.

[52] She said they had never presented themselves as a couple though she accepted the fact that because they lived in the same house, people could have assumed they were a couple.

[53] An exception to the Appellant and OCI not presenting themselves as partners was their use of the description "partner" in various medical records. The Appellant said that they had done so because neither had family living nearby who they could rely on, and in the Appellant's case,

she had serious and ongoing health problems. By describing each other as a “partner”, hospitals and medical facilities would provide information; unless they did that no information would be forthcoming. Both knew each other’s families and, accordingly, were very comfortable that they could trust each other to contact family members in the case of emergencies.

[54] She also produced notes from her psychotherapist that support that OCI was not a significant relationship in terms of her emotional life.

[55] The Appellant and OCI’s financial arrangements were separate, apart from obvious practical arrangements. For example, OCI had access to the Appellant’s debit card when required and he knew the pin number. OCI, the Appellant’s neighbour and others also had access to the card because all of them would do shopping for the Appellant, who had compromised mobility. The Appellant had no access to OCI’s bank cards or accounts.

OCI’s evidence

[56] OCI’s evidence essentially matches the evidence of the Appellant. However, to the extent that his evidence comes from a different perspective or has additional information it is set out below:

a. OCI married more than 34 years ago; he and his wife separated when their daughter was about 12 or 13 years of age.

b. After the separation, OCI had a female flatmate of a similar age. The relationship was simply as flatmates, there was no romantic attachment.

c. After separating from his wife, OCI went out with a woman three or four times, but it was only a social relationship and there was nothing intimate that occurred between them.

d. OCI had become aware he was attracted to men rather than women. OCI has been, and still is; concerned he will face discrimination due to homophobia if his sexuality is disclosed. Only a limited number of his family are aware of his sexuality.

e. After he moved to the town where the Appellant and he lived, he did live with a woman. His niece was also in the flat at that time. The woman wished to have an intimate relationship with OCI; they did share a bed, however, intimacy never extended to sexual intercourse. His appreciation that he could not reciprocate in a heterosexual relationship led to him wishing to leave that property. That was the point when he first began to board with the Appellant, and disclosed his sexuality to her and his lack of desire or capacity to engage in a heterosexual relationship.

f. When the young child who is related to the Appellant was living in the house with the Appellant and OCI, he was prepared to accept shared responsibility for the child's care. He was aware that there was an urgent need to care for and protect the child, and he appreciated that the Appellant's mental health could have been a potential barrier to her providing the support without his help.

g. OCI said that he did not have a close emotional relationship with the Appellant, even at the times they were living in the same house. He said they did not talk a great deal about deep matters, but would discuss day-to-day things. He did provide practical support for the Appellant, and in times of need he provided assistance.

h. OCI said that when he moved out of the Appellant's home due to his bedroom being required for the in-home care arrangements, he was entirely comfortable with that. His relationship with the Appellant continued in much the same way. They remained friends, he would regularly visit to collect his mail and visit his cat. Later, he would take the Appellant's dog for walks. When OCI first moved out of the Appellant's home, he went to stay with his sister. Later, he was in a flat with another man.

i. In late 2009, when the Appellant attempted suicide, OCI found her when he visited and called for medical assistance. He was aware of her problems, including her heart condition, her bipolar and OCD issues. He said her mental health problems would

manifest in her being withdrawn and not comfortable with company; she would sometimes stay in bed all day and be angry and depressed at times. He knew that the best approach when the Appellant was in a difficult situation was to keep his distance.

j. In 2011, when OCI went back to live in the Appellant's home he had become aware the Appellant needed the income to keep her home, as she no longer had income from the in home care. OCI explained that all the financial arrangements between him and the Appellant had been properly accounted for. The Appellant had loaned him some money, and he repaid it by purchasing things for her such as household items. Generally, things were accounted for more or less immediately as he would make purchases for the Appellant, and she would immediately repay him in cash.

k. OCI confirmed the strictly non-romantic and non-intimate relationship he had with the Appellant. Down to the present time, he observed that they had never kissed, never shared a bedroom and had never looked forward to a future together. The arrangements were practical, and that of non-intimate friends without any commitment beyond that.

l. In terms of the day-to-day arrangements at the time OCI lived with the Appellant, they would sometimes have meals together, but quite frequently they would have different meals. Given the Appellant's mobility issues, OCI would often assist by making purchases. However, ordinary food and the like was paid for by the Appellant out of the money that OCI paid to her for board. Accordingly, if he paid for ordinary food the Appellant would reimburse him.

m. OCI has never owned or had a share of the Appellant's house. He did pay his board into an account from which the mortgage on the house was paid. He explained that he did that because, due to her bipolar condition, the Appellant did not manage money well at times; accordingly, paying his board money directly into that account ensured that there was less risk of money being expended recklessly.

The Appellant's son (NOS)

[57] The Appellant's son (not the son called by the Chief Executive) gave evidence and explained that at times his relationship with his mother has been difficult due to her bipolar condition. He was familiar with the arrangements between the Appellant and OCI; he confirmed that at the time they lived in the same house they always had separate bedrooms. He explained that he always thought they were "just good mates". He said that he also knew that his mother was married to her husband and that while they did not live together she still loved him. He spoke of some of the difficulties in the marriage that had arisen when his mother's husband had been diagnosed with Hepatitis C.

[58] He spoke of his knowledge of his mother's husband coming to New Zealand in 2009, that they shared the same bed, and of the time that he spent with him.

[59] During the period when OCI was not living with the Appellant and she was caring for children in the in-home care arrangement, NOS stayed with his mother for a few months. He explained that he would sleep in the same room that the children slept in during the day and that there was a single bed in that room. He said that later he also stayed in the house when both his mother and OCI were living in the house, then he had to sleep on the couch as then there was no spare room.

[60] He said that OCI and his mother had never been physically or romantically affectionate. He confirmed that they had both been at a small number of social functions. He contrasted his mother's relationship with OCI with the way she was affectionate towards his father before their marriage dissolved.

[61] He also spoke of the kind and generous character of OCI and the way that manifested in practical and supportive behaviour toward others.

[62] He also referred to financial arrangements where his mother had helped him and his wife get a deposit for their house, and the difficulties that his mother had dealing with money due to her bipolar condition.

Evaluation of the evidence - the witnesses generally

[63] The account given by the Appellant, OCI and the Appellant's son NOS is uncomplicated. They all say that there is nothing in the nature of a romantic relationship between the Appellant and OCI, their finances have always been separate, they do not depend on each other for emotional support, since 2003, with no complication, the Appellant has sometimes lived with OCI and at other times, OCI has flatted with other people. As it happens, OCI is now flatting with the Appellant's son, who has serious substance abuse difficulties.

[64] The case for the Appellant is that the Chief Executive's characterisation of the relationship between the Appellant and OCI is grossly distorted; OCI is a man who does not have a sexual interest in women and has over a long period of time provided some practical support to a person who is greatly in need of such support due to her mental health. Whether or not a romantic partner could have provided such support; that was not a type of support available to her. What was available to her was the modest financial benefit of having a boarder, the type of companionship provided by a boarder, and the practical support without emotional complication available from someone who is "just a friend", when the Appellant was unwell.

[65] The Chief Executive effectively contends that the Appellant and OCI have dishonestly characterised their relationship, as has the Appellant's son. While the Chief Executive accepts that there is no evidence that the Appellant and OCI have engaged in sexual intercourse, he characterises their relationship as an intimate one; he claims that they did in fact sleep in the same bed and that there is an eye witness to that. Furthermore, he claims that he has produced a very large volume of material that proves that what the Appellant and OCI say is false and inconsistent with the documentation that he has obtained.

[66] After hearing all the evidence, we were left in no doubt that the Appellant, OCI and the Appellant's son gave an honest and frank account of the relationship between the Appellant and OCI. For the reasons we discuss, in the respects that their evidence differs from NNE, ECI, NAS, and ANI, we reject the evidence of NNE, ECI, NAS and ANI. However, in most respects the only element that needs to be rejected is the speculation they engaged in without the support of evidence.

Evaluation of the evidence - direct evidence of sexual intimacy

[67] While the Chief Executive conceded there was no evidence of sexual intercourse between the Appellant and OCI, the concession was an empty one. His case is essentially that they were sexually intimate; they slept in the same bed, and engaged in public displays of affection.

[68] We have found the Chief Executive's evidence in that regard wholly unreliable.

[69] The police officer, NNE, said he had seen the Appellant at a social gathering "rub her hand across [OCI's] shoulders and at one stage I saw the Appellant kiss [OCI] on the lips". He said this occurred in about 2010 (he said approximately 7 years ago), and that he "was informed at the gathering [the Appellant] was [OCI's] new partner". Given that the Chief Executive's case is that the Appellant and OCI lived together from 2003, on its face, the claim he received plausible hearsay evidence in about 2010 that the Appellant and OCI were in a new relationship is inconsistent with the Chief Executive's case. The evidence is that they lived in the same house for some 7 years before NNE's evidence of the "new relationship".

[70] ANI, as the officer in charge of the investigation, in contrast to NNE said:

> It was recorded by the Social Workers that the Appellant and [OCI] had met at the end of 2003 and had been in a relationship ever since …

[71] As it happens, ANI could not produce evidence that the "Social Workers" had in fact recorded that. She said that NAS was one of the social workers and NAS did not produce such a record. We comment on the reliability of ANI and NAS' evidence below. Regardless, it is clear NNE's evidence is inconsistent with the Chief Executive's case in a central respect. The evidence of the "new relationship" is inconsistent with all the other evidence, and implausible on its face, given the claimed point in time was after they lived in the same house for some 7 years.

[72] NNE is imprecise as to timing but his reference to approximately seven years before completing his affidavit means his claim is the event occurred about early 2010. OCI and the Appellant were not living in the same house then. They had ceased living in the same house on 28

August 2008, and did not do so again until mid-2011 (refer below para.[108])

[73] The Appellant did not consent to NNE's evidence being introduced without cross-examination, and objected to it. Nonetheless, the Chief Executive elected not to present NNE for cross-examination despite him being the only witness directly attesting to any physical intimacy (other than inferences relating to sleeping arrangements).

[74] The scope to cross-examine NNE as to reliability and veracity requires no elaboration. Given the unreliability of the evidence on its face and the failure to present for cross-examination, we give no weight to NNE's evidence and treat is as unreliable and inconsistent with that of the witnesses for the Appellant who were cross-examined and gave consistent and reliable evidence.

[75] Two witnesses for the Chief Executive gave evidence regarding the Appellant and OCI sharing the same bed. The first was the in home care employee ECI who inspected the Appellant's home. She inferred that OCI and the Appellant slept in the same bed saying:

> I recall that [The Appellant's] home was a two bedroom house and there was a room available for the children's resources and sleeping.
>
> It is advisable that an educator would not use their own bed for children to sleep in….

[76] Like the police officer, NNE, the Appellant required ECI to attend for cross-examination. The Chief Executive failed to require her to attend the hearing for cross-examination. Her evidence contains an inference the Appellant and OCI shared a bedroom. However, the evidence has little or no probative value, as one of the uncontested facts is that OCI did not live at the Appellant's house during much of the time she had children in the home care arrangement. The Appellant's son, NOS, and her husband both lived at the house during that period. Accordingly, we give no weight to the insinuation in ECI's evidence that she observed that OCI and the Appellant slept in the same bed.

[77] The third "witness" who gave evidence of intimacy between the Appellant and OCI was NAS, a social worker employed by the Chief Executive. She said she engaged with the Appellant and OCI when the Appellant offered

to provide care for a young member of her whanau. She said she made notes of such contacts. She said:

> [The Appellant] and [OCI] applied to be caregivers as a *de facto* couple, they presented as a couple. They shared a room there were two bedrooms in the house and one of them was set up for children and the other was their bedroom.

[78] Accordingly, NAS gave direct evidence she observed the sleeping arrangements in the house, and she observed that the Appellant and OCI slept in the same bedroom. In her evidence she said the bed was a double bed. The notes generally supported the evidence; however, the notes show several persons employed by the Chief Executive contributed to the notes. The notes relating to the bedrooms appear to have been completed by someone other than NAS. NAS had been engaged in an interview with the Appellant some five days earlier. It appears that NAS's evidence was in fact heavily reliant on the records of other persons. When questioned, NAS admitted she could not recall details regarding the sleeping arrangements in the house. It also emerged that NAS was seriously in error regarding the age of the child, which had implications as to what the sleeping arrangements were. When pressed, NAS was unable to identify any behaviour between the Appellant and OCI that is inconsistent with the relationship they say they had. NAS accepted that the events were a long time ago and that affected her evidence.

[79] In relation to the notes NAS made herself, she accepted they were not "word for word", and were made some time after the events.

[80] In our view, NAS's evidence is unreliable. It is clear that her evidence conflated written records made by others with her own recollection, and she admitted to serious inaccuracies in the records. It is of significance that the records were not made in the context of determining whether the Appellant and OCI were in a relationship in the nature of marriage. The situation related to a small child who is related to the Appellant, and the Appellant was the only person in the whanau available to care for her. The situation was extreme, as there were serious concerns regarding the child's safety given the fathers violent behaviour.

[81] The sleeping arrangements in the house were not of great significance at the time. The child in question was some 10 months of age, and could

appropriately sleep in the Appellant's bedroom in her cot. Furthermore, we would not find it at all surprising that the Appellant and OCI would be willing to allow the social workers to make assumptions regarding their relationship. It was very understandable that they would wish to have the child remain in whanau care, rather than have her placed with an unrelated family. For reasons we discuss, the Appellant's mental health has significantly affected her life, and she and OCI considered that OCI's presence potentially added to the social workers being likely to accept the Appellant as a care giver. OCI was also very reticent about disclosing his sexuality, for reasons we discuss in this decision.

[82] There is nothing in NAS's evidence that is inconsistent with her and the other social workers making assumptions about the relationship between the Appellant and OCI. Establishing the relationship was a positive one, and that both the Appellant and OCI were responsible and caring persons, was the focus of the social workers inquiries, not whether they were sexually intimate. At the time, NAS and the other social workers had no reason to direct their minds to whether the Appellant and OCI slept together, or met the range of other factors relevant to whether they were in a relationship in the nature of marriage. The evidence provided by NAS and the notes she relied on prove little more than that the social workers appeared to view the relationship according to assumptions typically made about unrelated adults of opposite gender living in the same house. They were unaware of the true situation, and had no reason to probe or inquire into it.

[83] Accordingly, we place little weight on NAS's evidence regarding the sleeping arrangements. Indeed, she admitted she lacked personal recall when giving evidence.

[84] We also discuss records relating to motel stays which the Chief Executive says evidenced an intimate relationship; the discussion appears below at paragraph [92].

Evaluation of the evidence - admissions of a relationship

[85] A significant component of the Chief Executive's case was that the Appellant and OCI had made admissions on various occasions that they were life partners. The key elements of the evidence are:

a. In various hospital and medical notes they had each described the other as a partner.

b. The Appellant listed OCI as her "companion" on a form for the in home care organisation, but on another form referred to him as her "partner". However, her husband was described as such, and was subject to vetting when he was living in the house for a period.

c. The Appellant and OCI had family memberships of two social clubs.

d. When OCI's father died, he was identified as the Appellant's father-in-law.

[86] As noted, the Appellant and OCI explained they did not have family they could rely on living nearby, and they found it convenient to use the description "partner" as that would allow the hospital and medical facilities to communicate with the other. There is no doubt that the Appellant and OCI had a supportive relationship; as do many people who do not have a relationship in the nature of marriage. The obligation for health practitioners to protect privacy means it can be very difficult indeed for even immediate family to get access to medical information. It is not at all surprising that OCI and the Appellant would use the expedient of describing each other as partners for this purpose. There is no reason to find it had any greater significance.

[87] When going beyond that superficial level of examining the dealings with health practitioners a very different picture emerges. The Appellant produced records from her psychotherapist; the notes of course relate to an intimate examination of her life. The record is notable; it has no significant references to OCI. Had he been an intimate partner, or one on whom the Appellant relied on for emotional support that would, to say the least, be most surprising. Accordingly, we find nothing of significance in the medical records and references to a partnership relationship. On the contrary, the psychotherapist's notes are inconsistent with such a relationship.

[88] The home care forms are not inconsistent with the way the Appellant and OCI describe their relationship. The forms use the description "companion" in relation to OCI, and on another refer to him as a partner. The forms refer to the Appellant's husband as her husband and record that he was living with the Appellant for part of the time. Aside from the fact that the person dealing with the Appellant and OCI did not give evidence, the various descriptions largely serve to demonstrate the looseness of the descriptions. Terms such as "companion" and "partner", in the context of a commercial child caring operation, do little to inform whether or not the Appellant and OCI were actually in a relationship in the nature of marriage. Even less so given OCI had private reasons for being less than frank about why he could not be in a relationship with the Appellant.

[89] The family memberships of two social clubs are of no real significance. One club discounted membership when two persons lived in the same house, and the other preferred that persons join with a companion. Neither asked questions about potential members' intimate lives. The Appellant and OCI said that they rarely attended the clubs together. There was no significant challenge to that, notwithstanding the very comprehensive financial records documenting their activities.

[90] The only element of the admissions that appeared to have a potential to truly bear on whether the Appellant and OCI were in a relationship in the nature of marriage was the death notice relating to the Appellant and OCI. The Appellant and OCI said that they had no part in drafting the death notice, and found it inappropriate. The author of the death notice did not give evidence, and it seems only to be speculation as to who drafted it. It is important to understand the background; the Appellant had a friendship with OCI's sister before she had a friendship with OCI. She developed friendships with other members of OCI's family also. During the time leading up to the death of OCI's father, there were a few occasions when the Appellant and OCI travelled to the town where OCI came from (Town A). His father and other members of his family still lived there. The details of those trips are discussed in the following section. For present purposes, it is sufficient to note that OCI identified as a gay man at this time. However, he had not come out to his daughter and his family, and he had a particular concern identifying he was gay in Town A. He grew up there, and had seen how gay people were treated and regarded in

Town A at that time. It left him with a concern for his wellbeing if he were an openly gay man; he still has that concern today.

[91] It is not surprising that family members may have drawn false conclusions regarding the relationship between OCI and the Appellant. However, there is no reason to reject the evidence from OCI and the Appellant that they had no part in drawing up the death notice, and were uncomfortable when they first saw it (after publication). There was no serious challenge to the evidence from the Appellant that the death notice was published only some four months after her husband was visiting from the USA and sleeping in her bed. Furthermore, at this time, OCI was not living in the same house as the Appellant. He had moved out more than a year and a half before that time, and did not move back in until about a year later. Accordingly, the direct evidence is that OCI and the Appellant had no part in drafting the death notice. Despite the exhaustive body of material and interviews conducted by the Chief Executive in pursuing this claim, there is no evidence of attempts to identify the author of the death notice, and the author has certainly not given evidence. The surrounding circumstances make it wholly implausible that any person with any real knowledge of the relationship between the Appellant and OCI would have drafted a public notice describing OCI's father as the Appellant's father-in-law. Accordingly, we have found the explanation given by OCI and the Appellant compelling; we cannot give weight to the death notice.

Evidence that the Appellant and OCI took holidays together

[92] The Chief Executive's officer in charge of the investigation, ANI, produced various financial records, and claimed that:

> My recollection from the records I examined, which included bank records of both parties, is that the XXXX trip took in XXXX and XXXX and while it is difficult through forensic accounting to be certain of the exact period; that trip lasted as long as 2 months.
>
> [Regional trips] appeared to last anywhere from two days to two weeks and were visited multiple times. The Appellant's sons lived at those destinations. The Appellant and [OCI] regularly travelled together one to three times a year, every year.

[93] ANI also produced records from motels in Town A, she said the records showed that OCI stayed on three occasions with two guests and paid for

the room, and stayed at another motel in the same town without a record of the number of guests.

[94] ANI produced this narrative, notwithstanding that she was well aware of the explanation from the Appellant and OCI. As already noted there was an explanation regarding the trip to XXXX and XXXX, and it was not as long as two months. The regional trips were not holidays as ANI portrayed them. ANI failed to produce any records that raised questions about the Appellant and OCI's explanations such as: one of the trips being a drive to an adjacent town about 45 minutes drive away for the purpose of purchasing takeaway food and shopping; and another trip being about two hours drive when OCI took the Appellant to stay with her son, and returned and picked her up a few days later after she suffered an injury. OCI enjoyed driving; cars were one of his interests, and the Appellant did not have transport. There was nothing inconsistent with the evidence given by the Appellant and OCI that ANI produced.

[95] In relation to the motels in Town A, ANI had no evidence that cast doubt on the evidence from OCI and the Appellant they never stayed in a motel together. OCI's explanation was that he stayed with his daughter when he was there; on one occasion, OCI's sister stayed in a motel unit with the Appellant. We accept his evidence.

Claim that the Appellant and OCI owned a house together

[96] The Chief Executive presented a certificate of title apparently showing that the Appellant and OCI are the joint owners of a house, and both responsible for a loan secured against the house.

[97] While the Chief Executive did not place a great deal of emphasis on the ownership of the house, he did place emphasis on the loan.

[98] The reality is quite different from the appearance. OCI has not contributed any money to the purchase of the house, or otherwise paid for a share of the house. What happened was that the Appellant wanted to assist her son NOS and his wife purchase their home; they needed a family loan to contribute to the deposit. OCI agreed to become liable on a mortgage as a principal (he had an income from working and the Appellant lacked adequate income for the loan advance), and in return the Appellant gave him a minor interest if the house was sold for more than a certain amount.

[99] The Chief Executive characterises this as putting OCI in a position of vulnerability. OCI said he knew that there was more than enough equity in the house, so he was not in a position of vulnerability.

[100] The arrangements were irregular, to say the least. We find the explanation from OCI sensible and his characterisation of them as of little importance to him given the equity in the house as realistic. The real oddity lies in OCI being on the title as a joint owner, though there was a separate agreement purporting to alter that. However, the perspective of the judge when the Appellant was sentenced after her trial more adequately captures the circumstances, he said:

> … from my point of view, the transaction whereby half of the ownership in your property was transferred to [OCI] was the worst piece of legal advice I have heard about for many a year. I cannot avoid saying that. I know the solicitors are not here to defend themselves, but that was naive in the extreme, in my view, to have done that.

[101] There is no more significance to the situation for present purposes other than that OCI assisted the Appellant in a way that cost him nothing, did not affect anything he proposed to do, and gave him a commensurate potential advantage. The arrangements were, apparently, poorly implemented.

Hearsay statements and speculation

[102] The report the Chief Executive lodged under section 12K of the Social Security Act 1964 ran to some 2,200 pages. It is replete with speculation and hearsay claims regarding the Appellant and OCI. The weight we can place on this information is very limited. We have the evidence of witnesses who gave oral evidence tested by cross-examination. However, the contents of the 12K report are significant, as it provides a thorough and rigorous background against which the evidence of the witnesses could be tested. It included extensive financial records showing what the Appellant and OCI purchased and where they purchased it on a daily basis over extended periods of time. However, we can and do place little weight on the speculation, hearsay and untested statements made by a range of people in that material. This was an oral hearing and we have evaluated the evidence accordingly.

[103] The explanations given by the Appellant, OCI, and NOS withstood testing against this body of contemporaneous records.

Conclusion regarding the evidence produced by the Chief Executive

[104] It became evident that ANI did not understand, or was unwilling to accept her role in the hearing was as a witness of fact. She overtly departed from that role and engaged in an exercise in advocacy where she critiqued the evidential value of material the Chief Executive produced as part of the section 12K report, and advocated for the conclusion that the Appellant and OCI were in an intimate relationship. It appeared she constructed a view of the relationship that ignored what the Appellant and OCI said, and instead presented her own view of their lives constructed from financial transactions, hearsay reports and speculations of others who were not at the time focused on whether the Appellant and OCI lived together in a relationship in the nature of marriage. In our view, it was a construction that could not sensibly be maintained at the time ANI presented her evidence, given what the Appellant and OCI said had already been presented in formal interviews, and in the criminal trial where their evidence was presented and tested.

[105] In our view, it became starkly obvious that the Appellant and OCI had a plausible explanation for all of the material elements of the evidence produced by the Chief Executive. A significant consequence of the extensive investigation running to thousands of pages of records relating to the lives of the Appellant and OCI since 2003 gives us a high level of assurance that if what they said was false, those records could not be explained.

The nature of the relationship between the Appellant and OCI

[106] We accept OCI's evidence that he is a gay man, and that he came to appreciate he could not form an intimate sexual relationship with a woman that would be likely to meet her expectations. He came to that realisation in 2003, shortly before he met the Appellant, when he had failed to develop a sexual relationship with the woman he was living with.

[107] We also accept that before OCI and the Appellant lived in the same house, OCI had explained his sexuality to the Appellant.

[108] We also accept the evidence from the Appellant and OCI regarding the times during which they lived in the same house. The position is that the Appellant and OCI lived in the same house from:

a. December 2003 until 28 August 2008; and

b. mid-2011 until 6 October 2013;

[109] The Chief Executive has endeavoured to prove that they also lived in the same house in the period from 28 August 2008 to October 2008, and February 2010 to mid-2011. However, the proof was not substantial; it relied on OCI continuing to use the Appellant's address for his mail, and for retailer's accounts. However, he did that continuously, as they were both happy with the arrangement; whether he lived there or not, he was a regular visitor and collected his mail. He came to see his cat, the Appellant, and take the Appellant's dog for walks. Their relationship stayed the same whether or not the Appellant was living in the same house or not.

[110] We accept the direct evidence from the Appellant and OCI regarding the dates, with some confirmation from NOS. If they are not precise, they are the best evidence available. In December 2003, the Appellant and OCI commenced their boarding arrangement, following OCI's realisation that a heterosexual relationship was not an option for him. The event that precipitated OCI leaving in 2008 was the Appellant starting her in-home care business. OCI was comfortable accommodating that; he moved into his sister's house, and then found a flat. He lived in the house for some five years with the Appellant. After he left, the relationship did not change; he regularly visited as described, and kept using the address. He met the Appellant's husband who lived with her for a time. This was not the breakdown of a romantic relationship, it was two people who lived separate lives throughout, and had no emotional issues relating to whether they lived in the same house or not. There was no envy or jealously when the Appellant's husband was living with her, the relationship between OCI and the Appellant continued in the same way.

[111] The reason for resuming living in the same house was financial; the Appellant needed the money, as she could no longer do the in-home child care. The Appellant and OCI had lived in different houses for some 29

months (two and a half years). There is no evidence this was a source of any tension.

[112] We are satisfied that:

a. The Appellant and OCI lived financially independent lives. Any arrangements between them were founded on repaying each other for any significant financial accommodation.

b. OCI provided some support for the Appellant, particularly when she was unwell. However, it was the support that might be expected of any friend where there is no sexual attraction, or commitment to each other beyond simple friendship.

c. OCI and the Appellant never had any commitment to the arrangements between them; they comfortably lived in separate houses when convenient, and do so currently.

d. The Appellant was free to continue an intimate relationship with her husband, and that was something that was of no concern to OCI, and OCI's connection with the Appellant was of no concern to her husband.

e. There was nothing materially different in the Appellant and OCI's relationship than that enjoyed by any two people sharing a friendship. The relationship lacked the financial and emotional qualities, and commitment to have any approximation to a relationship in the nature of marriage.

What is required to establish a relationship in the nature of marriage

[113] The Court of Appeal's decision in *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 is the leading authority on what the phrase "a relationship in the nature of marriage" means in section 63 of the Act. However, the context was quite different to this case. The Appellant in the *Ruka* case was the victim of extreme domestic violence, the case considered whether she was in a relationship in the nature of marriage with her abuser.

[114] Unsurprisingly, the Court considered that the analysis required a comparison with a legal marriage. Richardson P, and Blanchard J observed at p 162:

> The comparison must seek to identify whether there exists(?) in the relationship of two unmarried persons those key positive features which are to be found in most legal marriages which have not broken down (cohabitation and a degree of companionship demonstrating an emotional commitment). Where these are found together with financial interdependence there will be such a merging of lives as equates for the purposes of the legislation to a legal marriage.

[115] Thomas J noted at p 181:

> It is this underlying commitment to the relationship which distinguishes marriage from the relationship of couples who may nevertheless share premises and living expenses. A relationship will not be a relationship in the nature of marriage for the purposes of s 63(b), therefore, unless it exhibits this mutual commitment and assumption of responsibility. In the context of the Social Security Act, this will necessarily include financial support or interdependence or, at least, a mutual understanding about the parties' financial arrangements of the kind I have suggested.

[116] As that passage indicates, the Court[3] took the view that in the context of the Act financial interdependence was a central consideration. The reasoning of the majority was that:

> … an essential element is that there is an acceptance by one partner that (to take the stereotypical role) he will support the other partner and any child or children of the relationship if she has no income of her own or to the extent that it is or becomes inadequate. The commitment must go beyond mere sharing of living expenses, as platonic flatmates or siblings living together may do; it must amount to a willingness to support, if the need exists. There must be at least that degree of financial engagement or understanding between the couple.[4]

[117] Ultimately, the Court found that the Courts below had applied the wrong test by failing to look primarily at the financial aspects of the relationship.[5]

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3 Refer to *Ruka* at p 156, where Richardson P and Blanchard J discuss the central importance of this aspect.

4 *Ruka* at p 161.

5 Ruka at p 163.

[118] The Court noted that strategies to withdraw support to obtain a benefit would not be effective. However, it is clear that the central feature is commitment to financial responsibility, including commitment to support in future adverse circumstances.

[119] However, financial commitment is not sufficient to find there was a relationship in the nature of marriage. The Court also found emotional commitment was essential:

> Where financial support is available nevertheless there will not be a relationship in the nature of marriage for this purpose unless that support is accompanied by sufficient features evidencing a continuing emotional commitment not arising just from a blood relationship. Of these, the sharing of the same roof and of a sexual relationship (especially if it produces offspring) are likely to be the most significant indicators. But, since the amendment to s 63 in 1978, the sharing of a household is not essential. And, particularly in the case of older couples, the absence of sexual activity will not in itself deprive the relationship of the character of a marriage.
>
> The statutory context is of great importance in determining what is a "relationship in the nature of marriage". Other statutes use the same expression but for different legislative purposes. What is or is not such a relationship may be viewed differently for different purposes.[6]

[120] Ultimately, the Court emphasised the merging of lives, as noted in paragraph [114] above.

[121] The Court of Appeal in the *Ruka* case considered some of the earlier authorities such as *Thompson v Department of Social Welfare* [1994] 2 NZLR 369, which placed some emphasis on a “checklist”. While acknowledging the checklist approach may “give some assistance in deciding some cases”, the Court considered a better approach was the more comprehensive consideration set out above.

Applying the test for a relationship in the nature of marriage to this case

[122] We are satisfied that the relationship between the Appellant and OCI on any measure lay far below the threshold for a relationship in the nature of marriage.

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6 *Ruka* at pp 161 to 162.

[123] Dealing first with the issue of financial commitment. The extent of the relationship was that of a boarder and proprietor. OCI never took financial responsibility for the Appellant, and she did not take financial responsibility for him. They lived financially independent lives in the circumstances already discussed. The extent of gratuities was the sort of "turn about" arrangements between friends, with an expectation of repayment in kind. When one purchased something the other would repay. There was a loan from the Appellant to OCI, she kept a record and he repaid it, as she requested, by purchasing items she asked for.

[124] When the Appellant found it more advantageous to run her in home care operation, OCI moved out. When the home care came to an end, OCI did not take financial responsibility for the Appellant; after a time, he returned as a boarder. The relationship was devoid of any sense of financial responsibility on the part of either the Appellant or OCI for the other. It is to be noted that OCI moved out when the Chief Executive wrongly concluded OCI and the Appellant were in a relationship in the nature of marriage. He did not take financial responsibility for the Appellant and still lives elsewhere.

[125] The practical support that OCI willingly gives others is also manifest in the voluntary community service he provides. Similarly, for the short duration when the Appellant was looking after a young family member due to her father's violence, he willingly helped. OCI's admirable contributions to others do not depend on him being in a relationship with them.

[126] OCI and the Appellant never ran a common household, the Appellant provided meals in the way that would be expected for a boarder, and they did not share domestic tasks, and did not pool resources in any way.

[127] OCI and the Appellant did not usually go on holidays together, or socialise as a couple. The pattern was exactly the kind that might be expected of friends in a non-sexual friendship. There was one trip in a camper van, which the Appellant funded (with minor exceptions) as it was a nostalgic trip she wanted to have, and needed help to undertake, and many years before the contentious period. It was no more than a trip undertaken by two friends. The Appellant travelled to Town A, a number of times, but with one exception always stayed at a motel, and OCI

always stayed with his family. None of the other occasions had any significance on the evidence.

[128] There is no evidence that establishes that the Appellant and OCI presented themselves as a couple, beyond finding it convenient to allow assumptions to be made. In our view, the circumstances were much as would be expected considering OCI is a gay man who chooses not to openly identify as such. For the reasons we have discussed, the specific instances raised were all understandable and explicable with no significant implications as to whether the Appellant and OCI were in a relationship in the nature of marriage.

[129] As this relationship had no financial commitment, no sexual interest, no emotional support beyond friendship, domestic arrangements in the nature of boarder/proprietor, and no presentation as a couple living in a relationship in the nature of marriage, we find there was no such relationship. It follows that we find the Appellant and OCI have never entered into a relationship in the nature of marriage.

Standard of proof

[130] In this case, we have been left in no doubt that the evidence before us establishes that the Appellant and OCI have never entered into a relationship in the nature of marriage.

Costs

[131] The High Court in Chief Executive of the *Ministry of Social Welfare v Genet* [2016] NZHC 2541 established some of the principles relating to awards of cost in this jurisdiction. We understand the Appellant has a grant of legal aid; however, that does not restrict the Authority's ability to award costs, unlike the situation where an award of cost is contemplated against a legally aided person.

[132] It appears that, potentially, the Authority should award costs on a full solicitor-client basis. In the *Genet* case the Authority awarded costs of $500, the Chief Executive sought to have the High Court give directions that would assist in future cases, and an *amicus* was appointed to ensure the issues were fully traversed.

[133] The Court considered section 12O(1) of the Act, which allows this Authority to award the costs of the appeal or any parts thereof, where the appeal is allowed. The section allows the award to be for all the costs of bringing the appeal or part of the costs. The Authority is also allowed to recover its own costs against the Ministry pursuant to section 12OA.

[134] Williams J observed the power is granted to the Authority in the context of meeting "the needs of poor and/or vulnerable people who, for one reason or another, are unable to provide for themselves"[7].

[135] The Chief Executive successfully contended for a departure from the usual principle where costs are awarded on a scale, or discounted basis. Examples being the scale of costs in the Courts, and the discounting of actual costs in some professional disciplinary tribunals. The Chief Executive contended the basis should be the actual costs:

> … his case is that the terms of s 12O must be strictly complied with: any costs award must be to the Appellant, not her advocate; and **the amount awarded must reflect actual costs incurred or a contribution to them**, based on actual evidence of those costs. (emphasis added)

[136] Williams J observed that it was appropriate to resolve costs after the event, in the sense that the work may have been performed on a contingency or *pro bono* basis. Regardless, the value of the work was the appropriate measure. He said:

> The phrase "… the costs of bringing the appeal …," refers, in my view, to an identifiable figure able to be calculated in the orthodox way even if the calculation is made retrospectively.

[137] Accordingly, notwithstanding the grant of legal aid, it may well be that the Appellant is entitled to the full value of the cost of bringing the appeal. Regardless of the grant of legal aid, she potentially bears some liability for the costs. Whether her interests potentially lie in renouncing the grant of legal aid if awarded an appropriate sum; or receiving an award that discharges the liability within the scope of the grant are matters for the Appellant. It would appear the Legal Aid system should not bear any recoverable costs given the principles established in the *Genet* case.

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7 At paragraph [13]

[138] For the reasons discussed, this is an appeal which had no demonstrable merit. Furthermore, the Chief Executive had the benefit of the Appellant and OCI's explanation in formal interviews, and their evidence in the District Court. He chose to disbelieve them, notwithstanding an absence of an objective basis to do so. Further, the conduct of the proceedings included failing to call witnesses who were central to his case, knowing their evidence was not consistent with witnesses who were called. He also attempted to lead evidence that a lawyer attempted to pervert the course of justice by influencing SIH to give perjured evidence; and failed to establish any foundation for doing so. The Chief Executive treated SIH as an important witness, yet failed to adduce any probative evidence from him.

[139] Potentially, this may be a case where the Chief Executive should bear the full solicitor/client costs of this appeal, given both the merits and the conduct of the appeal. However, we are conscious that there may be reasons why the apparent decisions relating to the conduct of the appeal and the merits of them are different from what they seem on the evidence we heard.

[140] The parties will have the opportunity to address the issue of costs, and the Authority will then consider whether the Chief Executive should bear the Authority's costs.

Order

[141] The appeal is allowed; the Appellant has never been in a relationship in the nature of marriage with OCI. Accordingly, the overpayment of $103,838.06 founded on such a relationship is wrong and it is discharged.

[142] The Authority reserves leave for the parties to address the net quantum of the overpayment to be discharged, if there is any dispute.

[143] The Authority reserves leave to address the issues relating to costs. The Authority sets the following timetable.

Timetable

[144] The Appellant may apply for costs, which must be accompanied by a calculation of actual costs within 15 working days of this decision.

[145] The Respondent may within a further 10 working days:

a. Reply to the application, and

b. Provides submissions on whether he should be required to pay the Authority's costs, and if so whether in whole or in part.

[146] Either party may then request a telephone conference to discuss how the application for costs should be heard; if they agree, it may be heard on the papers without further submissions.

Prohibition on publication

[147] The Authority orders that the names of the Appellant and all witnesses, where they live, where this appeal was heard and any other information that may identify the Appellant and OCI is not to be published. Given the previous trial, where the Appellant and OCI live has the capacity to identify them. For that exceptional reason the identity of counsel and all witnesses will not be published as knowing where they work or where the appeal was heard may allow persons to draw inferences regarding the location.

[148] The Authority makes the order to protect the privacy of the Appellant and OCI. They are entitled to privacy in their personal lives.

Observation

[149] We have expressed our concern regarding the management of this appeal. That is particularly so in the context of support for persons suffering from significant mental health conditions. It is very common for persons in that situation to benefit greatly from support persons. Often,

the mental health condition has strained relations with close family members, which was the case here. A person with the emotional distance OCI had from the Appellant, and his disposition to assist others was of great benefit to the Appellant. It was also of direct benefit to the community and health system. Support of this kind is often important to maintain independent living.

[150] When assessing living arrangements made by vulnerable people, it is of crucial importance to do so with an informed understanding that biological sex may not identify sexual interest. Furthermore, it is necessary to listen to the persons concerned to understand their circumstances. None of that diminishes the importance of investigation to detect when persons are dishonestly claiming benefits without entitlement, and the requirement for thorough investigation and enforcement. However, as the Court of Appeal conveyed plainly and compellingly in the *Ruka* case, the evaluation is not a mere ticking of boxes; it requires insight and an application of the principles set out by the Court of Appeal. The failure to do so will inevitably result in unnecessary costs, financial and otherwise.

Dated at **Wellington** this 5th day of May 2017

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G Pearson
Chairperson

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C Joe JP
Member