

UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NANCY L. HARRINGTON,

Plaintiff,

vs.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. C02-4085-MWB

REPORT AND RECOMMENDATION

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	PROCEDURAL AND FACTUAL BACKGROUND	2
	A. Procedural Background	2
	B. Factual Background	3
	1. Summary of documentary evidence	3
	2. Harrington's testimony	10
	3. The ALJ's conclusion	16
III.	ANALYSIS	20
	A. The Substantial Evidence Standard	20
	B. Application of Iowa Law	22
IV.	CONCLUSION	26

I. INTRODUCTION

The plaintiff Nancy L. Harrington (“Harrington”) appeals the decision of an Administrative Law Judge (“ALJ”) denying her application for Widow’s Insurance Benefits under Title II of the Social Security Act. Harrington argues the ALJ erred in finding she was not the common-law wife of Marion W. Torrey, and therefore was not entitled to widow’s insurance benefits.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On November 22, 1999, Harrington filed an application for widow’s insurance benefits. (R. 83-85,) In her application, Harrington claimed she was the widow of Marion W. Torrey, who died November 4, 1999. Harrington claimed she and Torrey entered into a common-law marriage on January 1, 1983, in Sioux City, Iowa, and they were living together in Sioux City at the time of his death. (*Id.*)

Harrington’s application was denied initially on December 28, 1999 (R. 88-92), and upon reconsideration on March 26, 2000. (R. 95-98) Harrington requested a hearing (R. 99), which was held on July 18, 2000, in Sioux City, Iowa, before ALJ Cheryl Rini. (R. 22-82) Attorney John Moeller represented Harrington at the hearing, and Harrington was the only witness who testified at the hearing.

On November 17, 2000, the ALJ ruled Harrington had not established that a common-law marriage existed between herself and Torrey, and ruled she was not entitled to benefits. (R. 11-21) The Appeals Council of the Social Security Administration denied Harrington’s request for review on August 16, 2002, making the ALJ’s decision the final decision of the Commissioner. (R. 6-8)

Harrington filed a timely Complaint in this court on September 20, 2002, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Harrington's claim. Harrington filed a brief supporting her claim on February 14, 2003. (Doc. No. 8) The Commissioner filed a responsive brief on April 1, 2003. (Doc. No. 9) The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Harrington's claim for benefits.

B. Factual Background

1. Summary of documentary evidence

The Record contains numerous exhibits regarding Harrington's relationship with Torrey. In support of her application in 1999, Harrington prepared a Statement of Marital Relationship (R. 107-110) and a written Statement of Claimant (R. 111-112). In these documents, she stated her marital relationship with Torrey was not in writing, but they "were committed to each other" and planned to live together for the rest of their lives. (R. 107) They had agreed their relationship would only end with the death of one of them. (R. 108) She believed their living together made them legally married "[b]ecause of [their] Love & Commitment." (*Id.*)

Harrington stated she did not use the surname Torrey because it was "too confusing" and she wanted the same name as her children. (*Id.*) Mail was addressed to her with the names Harrington and Torrey. (*Id.*) She filed income tax returns as a single person because Torrey was not required to file tax returns. (R. 108, 111) She stated she

and Torrey used each other's charge accounts "on occasion," and they introduced each other as spouse, companion, or "lifetime partner." (R. 108)

According to Harrington, Torrey thought his divorce from his prior wife was final by the time the two started living together in January 1983, but he later learned his former wife had failed to sign the necessary documents. The divorce became final on April 30, 1983. (R. 110; *see* R. 190-200, copy of divorce decree between M.W. Torrey and Angeline M. Torrey)

Harrington began receiving Social Security benefits in 1995, based on her former husband's income. In her written statement, Harrington explained that when she applied for those benefits, she thought the statement, "I am not married now," on the application form "meant that [she] did not have a marriage certificate or had had a cer[e]monial marriage." (R. 111) She claims that when Torrey died, a Social Security representative told her she could elect to receive benefits based on either her former husband's income or Torrey's income. She chose her former husband's income because she assumed her benefits would be higher. (*Id.*)

Four individuals completed Statement of Marriage forms regarding the relationship between Harrington and Torrey. Milo R. Abelson was Torrey's nephew, and he indicated he had known Torrey for 89 years. He stated he had known Harrington for 18 years, ever since she started living with Torrey. He stated he had "visited with them many times - went out to eat - weddings - funerals, etc." (R. 113) Abelson indicated he was not aware Harrington and Torrey were not married until around the time of Torrey's death. He considered Harrington and Torrey to be husband and wife, explaining, "We had always thought they had married. They acted married. I believe for financial reasons they chose not to marry." (*Id.*) Abelson stated he heard Harrington and Torrey refer to each other

as husband and wife “whenever we saw them together.” (R. 114) He indicated Harrington and Torrey lived together continuously for 18 years. (*Id.*)

Robert E. Torrey apparently was Torrey’s cousin. (*See* R. 91) In his written statement, he indicated he had known Harrington for 18 years. He considered Harrington and Torrey to be husband and wife, stating, “They [were] always together and a good loving couple. Never apart and they shared things together.” (R. 115) He heard them refer to each other as husband and wife at all family gatherings, and stated they lived together continuously. (R. 116) He noted, “Nancy Harrington and M.W. (Bud Torrey) were as true to each other for the 18 years as any couple could be. A truly good religious couple.” (*Id.*)

Torrey’s daughter, Carter Torrey, stated she had known Harrington for approximately 20 years, because she “used to be a neighbor.” (R. 117) She stated she did not consider Harrington and Torrey to be husband and wife, indicating “they weren’t married.” (*Id.*) She reported hearing Harrington refer to Torrey as her husband, but not vice versa. (R. 118) She stated Torrey “rented an apartment out of town in winter and they lived in [Harrington’s] house in the summer for close to 15 years.” (*Id.*)

Torrey’s other daughter, Lynn Torrey, also prepared a written statement of marriage form. She indicated she had known Harrington for 28 to 30 years, and had spoken to her briefly once a year for the preceding 15 years. (R. 120) She stated Torrey asked Harrington to marry him but Harrington refused. She reported, “They did not own any property or share credit. To my knowledge [Harrington] never assumed the last name of Torrey. I understood why she did not marry because of SS reasons.” (*Id.*) Like her sister, Lynn Torrey indicated her father had kept an apartment in Tucson, Arizona, from 1984 to 1997. She stated he had lived with Harrington “continuously for the past 10-12

years.” (R. 121) She stated she had “always known Nancy as [Torrey’s] companion not his wife.” (*Id.*)

A representative of the Social Security Administration reviewed the Polk City Directory for the year 1988, 1994, and 1999, for Harrington’s address. In 1988 and 1994, the directory only shows Harrington as a resident of the property. In 1999, the directory shows both Harrington and Torrey, but the listing indicates the two were neighbors, not husband and wife. (R. 119)

Harrington submitted her income tax returns for 1996, 1997, and 1998. All were filed in the name of Nancy L. Harrington, and indicated she was a single person. (*See* R. 123-25) She submitted a copy of the top of a bank statement from Security National Bank in Sioux City, addressed to herself and Torrey. (R. 126)

Harrington submitted several envelopes addressed to her as “Nancy Harrington Torrey” and “Nancy Torrey,” and cards and letters addressed to Harrington and Torrey. (*See* R. 127-47) She also submitted numerous letters from friends and family members attesting to their belief that she and Torrey were common-law married, as follows:

(1) A letter from Robert D. Ellis (R. 136), who described himself as “A Close Friend and Neighbor.” Ellis stated he had known Torrey and “his mate” for at least 15 years, and indicated, “There is no doubt in my mind that their friends all considered their relationship as a ‘common law’ marriage.”

(2) A letter from Mary Eisner, leasing agent at Sun River Apartment Homes in Tucson, Arizona (R. 148). Eisner stated she rented an apartment to Harrington and Torrey on September 9, 1986, when Torrey introduced Harrington as his wife, and the couple continued to stay at the apartment annually for the next nine years. Eisner stated, “I knew that they had a common-law marriage and considered them to be husband and wife.

During the time that I have known them, they were obviously a happy, committed couple and very good to each other.” (*Id.*)

(3) A letter from Thomas E. Schryver, M.D., who was Torrey’s treating physician from April 1993, to his death. Dr. Schryver stated:

I have provided the medical care for Mr. Torrey since April, 1993 and I was familiar with him on a social basis as well. He had been living with [Harrington] in a common law arrangement from that point on, since I had first met them. He introduced her as his wife on first introduction and we routinely referred to her as Mrs. Torrey during social interactions between them and my wife and I. It is my understanding, through conversations with their extended family and their neighbors, that they had been together for quite a long time. They traveled together and lived together and did all the routine duties that are expected of married couples.

(R. 149)

(4) Marilyn Watkins of Fountain Hills, Arizona, stated she and her husband had known Torrey and Harrington for over 30 years. She opined they had a common-law marriage, and had lived together as “a loving and committed couple” since the spring of 1983. (R. 150)

(5) Rudolph L. Schindler had known Torrey since they went to high school together in 1932. He first met Harrington in Scottsdale, Arizona, during the winter of 1983, when Torrey introduced Harrington as “his wife to be.” (R. 151) At Torrey’s high school reunion, he introduced Harrington to his friends “as his wife.” (*Id.*)

(6) Mrs. Wayne E. Rick stated she has known Harrington since their children attended the same schools beginning in approximately 1965. Her husband Wayne “was a friend and business associate of [Torrey’s] for over 30 years.” (R. 153) She stated Torrey took Harrington on a cruise in the winter of 1983, “and later that year he

introduced [Harrington] as ‘his wife’ to Wayne, saying they were committed to each other. Since that time our friendship has flourished. They lived together and we considered them man and wife.” (*Id.*)

(7) Elmer Seible stated he had known Torrey “as a friend for more than seventy years,” and they had spent a lot of time together. (R. 154) He stated, “Back in 1983, [Torrey] introduced [Harrington] to me as his wife. When they visited my home in Houston, they stayed as man and wife. I have no doubt that they lived and shared as man and wife.” (*Id.*)

(8) Greg Branch stated he and his wife lived next door to Torrey and Harrington from 1987 until April 1993. Although the Branches were much younger (in their thirties), the two couples socialized together frequently and enjoyed each other’s company. Branch stated Harrington “wore a wedding ring from [Torrey], they lived together and paid bills together. Everyone, including their closest family[,], considered them husband and wife.” (R. 156) Branch opined that the only reason Harrington and Torrey “were not ever married in name was because of the U.S. Government[’s] severe marriage tax penalty. They were living on limited income and simply could not afford the negative cash impact this tax penalty would have brought them.” (*Id.*)

(9) Janice Smith, a friend, stated she had known Harrington since the 1970s, and knew her to be with Torrey for over 17 years. She observed Harrington wearing a wedding band Torrey had given to her, and stated Torrey “always introduced [Harrington] to his friends as his wife.” (R. 157) She stated further, “They were very, very close and everyone considered them a couple. They did everything together.” (*Id.*)

(10) S. Robert Mendez has known Harrington since high school. He visited Harrington and Torrey on a business trip in 1989, and Harrington introduced Torrey as her husband. He noted, “While spending time with them, it was very evident that they

were husband and wife.” (R. 158) Mendez opined the couple did not undergo a formal marriage ceremony to protect Harrington’s assets for her children. (*Id.*)

(11) Leah J. Wolfe stated she and her husband moved next door to Harrington and Torrey in 1993, “and grew to know them well during that time[.]” (R. 178) She explained, “From the first day we met [the couple,] they presented themselves as husband and wife, and were living together as such when we moved next door. [Torrey and Harrington] always referred to each other as husband and wife, and it was very obvious they considered themselves a normal married couple.” (*Id.*)

(12) Torrey’s niece, LaVonne Abelson, and his nephew, Milo Abelson, also wrote a letter on Harrington’s behalf. They stated they considered Harrington to be their aunt just as Torrey was their uncle. They noted Harrington “was included in all family gatherings for all those years and will continue to be from there on even though our uncle is gone. There should be no doubt that [Harrington] is our relative in all ways and has been very close to the entire family.” (R. 180)

There are a dozen more similar letters in the record. Most of the writers included their contact information and invited the Commissioner to contact them if further information was desired, but there is no indication the ALJ contacted any of these individuals.

Harrington submitted Torrey’s medical records from Mercy Medical Center in Sioux City, for an admission on August 26, 1999. Under Personal and Social History, the intake notes indicate, “He is married.” (R. 203)

2. *Harrington's testimony*

Harrington related the following facts in her hearing testimony. She and Torrey became friends in 1982, “after his wife left him.” (R. 27) They began living together in the fall of 1982, and lived together continuously from that point until Torrey’s death in 1999.¹ (R. 27-28) Harrington began referring to Torrey as her husband in the spring of 1983, after Torrey’s divorce became final, and continued referring to him as her husband throughout their relationship. (R. 28-29) Torrey referred to Harrington as his wife starting at approximately the same time, and continued to do so throughout their relationship. (*Id.*)

Harrington acknowledged that Torrey’s son and daughter had indicated, in their written statements, that the couple were not married. She stated she and Torrey visited his children in Colorado, an average of twice a year throughout their relationship, staying an average of three days on each visit. Lynn Torrey visited them in Sioux City an average of once a year, while Carter Torrey only visited twice in a seventeen-year period. (R. 30-31) Harrington did not recall ever referring to Torrey as her husband in front of Lynn, explaining, “I don’t think I ever said the word. We knew each other from when the girls were small, so there was no introduction.” (R. 31) She also did not recall referring to Torrey as her husband in front of Carter, again stating, “There was . . . no introductions, no need to.” (R. 32) Similarly, she did not recall Torrey referring to her as his wife in front of his daughters. (*Id.*) Harrington expressed surprise that Torrey’s daughters had indicated she was not Torrey’s wife, stating, “I’m surprised that they felt that way . . . [b]ecause they knew differently.” (*Id.*)

¹Based on various evidence in the Record, it appears Torrey would have been 71 or 72 years of age at the time he and Harrington began their relationship, and Harrington would have been 49 years of age, based on her age of 62 in 1995, when she applied for Social Security benefits. Torrey was 89 years of age at the time of his death, and Harrington would have been about 66 years of age at that time.

Harrington stated she and Torrey had planned a “honeymoon cruise” in January 1983, when his divorce was supposed to be final. According to Harrington, sometime before the cruise, Torrey’s attorney called and said his wife “wanted to take him back into court for his inheritance, so he cried and he wanted this all finished before we went on our cruise, but that didn’t happen[.]” (*Id.*) They went on the cruise anyway, and Torrey asked her to marry him and she said yes. (R. 32-33) She explained they talked about it later and decided not to go through a ceremonial marriage to protect her assets. They agreed that with their love and commitment, “a piece of paper didn’t make any difference.” (R. 33)

Harrington explained she used the surname Torrey sometimes, but also continued to use her surname sometimes. She stated she thought there had to be a ceremonial marriage for her to use the name Torrey. She noted all her assets were under the name Harrington, and she also wanted her surname to be the same as her children’s. (*Id.*) She stated other people often referred to her using the name Torrey, and she received correspondence and solicitations in the mail under the name Torrey. (R. 33-34)

Harrington stated Torrey had one sister who was living during their relationship. His sister died ten days after Torrey’s death. His sister introduced Harrington “once or twice” to others as her brother’s wife. (R. 34-35) Torrey’s sister sent the couple an Easter card addressed to “a special brother and wife.” (R. 35, 144-45) She also sent them a Christmas card in 1998, addressed to “brother and wife.” (R. 36, 146-47)

According to Harrington, she and Torrey shared household expenses. They maintained a joint checking account. They did not incur any joint debt because they paid their bills “as they came.” (R. 36-37) They both had credit cards, and they used each other’s cards on occasion, although they did not put each other’s names on their accounts. (R. 37)

Harrington thought that at the time she and Torrey began living together, Torrey was 71 years old. She stated he had filed income tax returns until he retired in February or March of 1983. (R. 37) Harrington filed income tax returns, listing herself as a single person. She had assistance from H&R Block in preparing her returns. She stated she filed as a single person “[b]ecause [Torrey] did not have to file income tax at that point, and we just thought so I’ll do it singly, you know, I’m a one person. If we had done it together, I wouldn’t have said single.” (R. 38)

Harrington applied for Social Security benefits in 1995. She explained what occurred when she went into a Social Security Administration office to apply for benefits, as follows:

Well, I called ahead of time the same day that I went in and talked to a lady and I asked what the procedure was. I was going to go to Arizona with my common law husband or maybe I didn’t say common law, but anyway, and I said what’s the procedure and when should I start taking this and she said you definitely should at 62. It would be to your advantage, and I can take either one. Either Leonard’s [her former husband’s] or Bud’s [Torrey’s], and I said can you – whichever’s highest, whichever you want, and I said can you tell me which is highest, and she said I have a client here, or I’m busy. I will figure it up and you come in and then I will tell you. I said okay, thank you, so later in the afternoon, Bud dropped me off. It was at the downtown place and she was busy and so they sent me to this man and it was almost closing time and he asked me all these questions and he said the same thing. You can have either one. And I said well, will you tell me which is the highest and he was figuring on the computer whatever and he said no, you just tell me which one you want. And I said well, I’d like to know which one is highest and he said you decide, you make up your mind. So in that short time, I thought all right, I’ll take Leonard’s because he made good money. Bud told me he made at the top about \$18,000

without any benefits or anything. So I figured that Leonard's would be highest. So that's what I did.

(R. 39) She stated the reason she indicated on the application, "I am not married now," is because she was using her former husband's income as the basis, and if she put "married," it would sound like she was married to him. (R. 40)

Harrington explained that she and Torrey spent winters in Tucson, Arizona, and summers in Sioux City. She submitted as an exhibit a "Shopper's Passport" card from Smitty's, which she stated is "a large grocery chain out in Tucson, Arizona." (R. 42; *see* R. 201) The card is in the name of Nancy Torrey. She stated Torrey got the card for her maybe ten years earlier, for her to use when she went to buy groceries. (R. 43)

She also submitted a burial permission form (R. 202), on which Torrey indicated Harrington could be buried next to him. She explained Torrey owned several burial plots and he told her he wanted her to be buried next to him. (R. 44) They went to the cemetery together in approximately 1988, and Torrey signed the form at the office. (R. 44-45)

Harrington stated when she first began living with Torrey, she was employed at Hoover Junior High School, "watching children and working in the kitchen." (R. 45) After she and Torrey formed a permanent relationship, he did not want her to work any longer and wanted her to be with him. (*Id.*)

The ALJ spent a considerable amount of time at the hearing explaining why the Commissioner is looking so carefully at Harrington's application for benefits, and then engaging in what appears, from the written record, to be argument with Harrington about her relationship with Torrey. The ALJ explained that if Harrington was married to Torrey, but she did not tell the Social Security Administration she was married so she could obtain benefits based on her ex-husband's income, that would have been fraudulent,

and she should have been so advised by the male employee she talked to when she applied for the benefits in 1995. (R. 46-47) Harrington asked, “Why didn’t he tell me that? He said I could have either” (R. 47), and the ALJ explained:

You could have either one, and if you had decided that you were still ex-wife and not married, then you would qualify for benefits as the ex-wife of Leonard. However, if indeed you were common law married and were holding yourself out as husband and wife and were going to claim benefits, then you would state that you were married and that you were going to be receiving benefits based on your common law husband’s account.

(Id.)

Torrey had one life insurance policy at the time of his death, in the amount of \$2,500. He listed his daughters as beneficiaries and told them to use the proceeds to pay for his burial. (R. 61)

Harrington testified she and Torrey maintained a joint checking account at Security National Bank in Sioux City. He had his Social Security checks deposited directly into that account. She stated she paid the bills from his last illness and other bills from that account.² She had not removed Torrey’s name from the account since his death. (R. 50-53, 61) Harrington’s Social Security checks went into an individual savings account at another bank, where she had maintained a safe deposit box for 38 years. She stated she got a better rate by having the checks directly deposited into that account. (R. 62)

Harrington stated she and Torrey both signed a lease for the Tucson apartment. She noted Mary Eisner, the leasing agent, would have records, and indicated Eisner still lived

²The ALJ requested copies of bank statements from before and after Torrey’s death. (R. 61) There is nothing in the Record to indicate the ALJ ever received the bank statements, or made additional attempts to obtain them.

in Tucson. The ALJ asked for a release from Harrington to obtain a copy of the lease, and Harrington's counsel indicated he would write to Eisner and request a copy. (R. 66-67) There is nothing in the Record to indicate a copy of the lease ever was obtained by either the ALJ or Harrington's attorney, although there was brief discussion of the fact that Eisner might not still have a copy of the lease because it had been seven or eight years since Harrington and Torrey were in the apartment. (RR. 67-68) The ALJ then took notice of a letter in the Record from the leasing agent or manager of a later apartment the couple rented (R. 69-70), but the Record is devoid of evidence that the ALJ attempted to obtain any additional records beyond what was submitted initially by Harrington.

Harrington stated she and Torrey never bought any real property together. Torrey bought a vehicle on credit, stating he did not want Harrington to break one of her CDs. Before he died, he told her to return the vehicle to Knoepfler Chevrolet instead of trying to sell it because he feared she would end up having to make some payments before she could get it sold. (R. 71-72)

Harrington offered a statement from her son David (R. 77), in which he stated he considered Harrington and Torrey to "have always held a married status." (R. 155) He noted, "They have been cohabiting and family, friends, neighbors, & the community have all considered the two to be married." (*Id.*) She stated her daughter's three daughters called Torrey "Poppy and they consider[ed] him a grandpa." (R. 78)

Harrington also agreed to provide the ALJ with a copy of her Will, which she stated she had changed during her relationship with Torrey to provide that he would receive \$100 if she predeceased him. (R. 80) However, Harrington did not believe she listed Torrey as her spouse in her Will. (R. 81)

3. *The ALJ's conclusion*

As noted previously, the ALJ issued her ruling on November 17, 2000, finding Harrington was not Torrey's wife in accordance with Iowa law, and she was not entitled to widow's insurance benefits based on Torrey's wage earnings record. (R. 11-21)

The ALJ initially cited and summarized the Social Security regulations applicable to a determination of whether an individual will be considered a decedent's spouse for purposes of widow's benefits. After finding no "deemed valid marriage" existed in this case (*see* R. 15-16, citing 20 C.F.R. § 404.346), the ALJ noted:

Pursuant to 20 CFR 404.345, to decide the Claimant's relationship as the insured's widow, the Administration looks to the laws of the State where the insured had a permanent home when he or she died. If the Claimant and the insured were validly married under State law at the time the insured died, the relationship requirement will be met. The relationship requirement will also be met if under State law, the Claimant would be able to inherit a widow's share of the insured's personal property if he or she were to die without leaving a will.

(R. 15)

The ALJ found Iowa to be Torrey's state of residence at the time of his death. (R. 16) She found that although Iowa recognizes common-law marriages, they are looked upon with disfavor, and the existence of a common-law marriage must be established by clear and convincing evidence. (*Id.*, citing *In re Estate of Fisher*, 176 N.W.2d 801, 804-05 (1970)) The ALJ noted, "There is no presumption that persons are married. Accordingly, the burden of proving a marriage rests on the party who asserts it." (*Id.*) She noted Iowa requires, for a common-law marriage, that both parties intend and agree at the present time that they are married, they cohabit continuously thereafter, and they make a public declaration that they are husband and wife. (*Id.*)

The ALJ substantially relied on the *Fisher* requirements, and on the Iowa Supreme Court's holding in *In re Estate of Dallman*, 228 N.W.2d 187 (Iowa 1975), from which the ALJ quoted portions of the following passages:³

Although, as aforesaid, common-law marriages are recognized in this jurisdiction, one element essential to the proof of such relationship is a general and substantial 'holding-out' or open declaration thereof to the public by both parties thereto. See *In re Estate of Fisher, supra*; *In re Trope's Estate*, 190 Okl. 453, 124 P.2d 733, 737 (1942); *In re Manfredi's Estate*, 399 Pa. 285, 159 A.2d 697, 701 (1960). In fact such 'holding-out' or open declaration to the public has been said to be the acid test. See *Damron v. Damron*, 301 Ky. 636, 192 S.W.2d 741, 743-744 (1945).

In other words, there can be no secret common-law marriage. [Citations omitted.]

Iowa has long been aligned with the above precept. . . .

. . . .

And in *Schilling v. Parsons, Supra*, [110 Ind. App. 52,] 36 N.E.2d [958,] 961 [(1953)], the court voiced this supportive rationale for the above stated rule:

'To hold that a common law marriage is established without public acknowledgment of the marriage status of the contracting parties where there is an unwitnessed oral agreement would open the door to perjury and fraud, deny the parties themselves the protection to which they are each entitled, and jeopardize the sanctity

³In the ALJ's opinion, she appears to quote the first paragraph quoted here from *Fisher*, and states the second paragraph is from "an earlier case." (R. 16) However, both paragraphs are from the *Dallman* opinion, as cited here. The ALJ did not cite *Dallman*, omitted all internal citations from the quoted passages, and omitted intervening language between the passages. The court, therefore, has cited directly from the *Dallman* opinion rather than from the ALJ's opinion.

of the basic institution of all civilized society, the home.’

Dallman, 228 N.W.2d at 190; *see* R. 16.

The ALJ recognized that Harrington offered evidence indicating she and Torrey had been known and/or had introduced each other as husband and wife to “various individuals . . . over the years,” including Torrey’s doctor, his cousin, and the couple’s long-time friends. (R. 17) However, the ALJ noted Torrey’s children indicated “there was no common-law marriage between their father and Ms. Harrington.” (*Id.*)

Critical to the ALJ’s decision was her determination that Harrington and Torrey had not *consistently* held themselves out as husband and wife to everyone. She noted, “A couple cannot have a common law marriage if they portray themselves as married to some but not all.” (*Id.*) She found that Harrington and Torrey held themselves out as married to certain “friends, neighbors, casual acquaintances and even some family members” to prevent the possible embarrassment that could arise if people knew they were living together without having been through a formal marriage ceremony. (*Id.*) She then found that the following facts supported a decision that no common-law marriage existed:

(1) In spite of Torrey’s marriage proposal in 1983, “the couple did not ceremonially marry because [Harrington] wanted to protect her assets in the event that she pre-deceased him.” (*Id.*)

(2) Harrington “allegedly filed separate federal income tax returns because Mr. Torrey had no reportable income and, therefore, did not have to file a return of his own. However, for reasons she could not adequately explain, she chose to list herself as a ‘single’ individual in these tax returns rather than a ‘married’ individual filing a separate return.” (*Id.*)

(3) Harrington chose, in 1995, to receive benefits on the account of her former husband rather than on Torrey's account. On her application, she listed herself as "not presently married." (R. 17-18) In this regard, the ALJ offered the following opinion:

[Because Harrington] had already been informed by two Administration claims representatives that she could receive benefits on either Mr. Harrington's or Mr. Torrey's account, it is reasonable to conclude that one or both of these individuals had also discussed the Regulatory provisions regarding common law marriages with her prior to the filing of her application. Even so, she still decided to describe herself as "not presently married."

(R. 18)

For these reasons, the ALJ reached the following conclusion regarding Harrington's application for widow's insurance benefits:

Thus, to that part of the public which governed her financial interests, tax liability and monthly Social Security payments, [Harrington], in particular, did not declare herself Mr. Torrey's wife. In point of fact, the first official document in which she claimed to be married to Mr. Torrey was her November 22, 1999 application for widows insurance benefits based upon his wage-earnings record.

It is not unlikely that, when she discovered that Mr. Torrey was terminally ill in late August 1999, [Harrington] was reasonably sure that he would not survive her. Thus, she no longer had to protect her assets from his heirs, and could more openly hold herself out as Mr. Torrey's common-law wife. Note, for example that when he was admitted to the Marian Health Center on August 26, 1999, someone, perhaps [Harrington], listed "M" for married when asked Mr. Torrey's marital status. . . .

However, even if that was the case, the relationship did not satisfy the Iowa law which, again, calls for "clear, consistent

and convincing” evidence of a common law marriage until late August 1999. In view of the fact that Mr. Torrey died on November 4, 1999, the common-law marriage would not have been of 9 months['] duration as required under [the Regulations].

Accordingly, during times pertinent to this inquiry, Nancy Harrington cannot be found to have been the wife of Marion W. Torrey in accordance with Iowa law, and she is not entitled to the payment of widows insurance benefits based upon his wage earnings record.

(R. 18-19)

III. ANALYSIS

A. *The Substantial Evidence Standard*

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ’s findings if they are supported by substantial evidence in the record as a whole. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra*, 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra*, 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) (“The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . .”). Under this standard, “[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner’s conclusion.” *Krogmeier, id.*; *Weiler, id.*; accord *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence “on the record as a whole” requires consideration of the record in its entirety, taking into account both “evidence that detracts from the Commissioner’s decision as well as evidence that supports it.” *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell, id.*; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does “not reweigh the evidence or review the factual record *de novo*.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s findings, [the court] must affirm the [Commissioner’s] decision.” *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); see *Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); accord *Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse “the Commissioner’s decision merely because of the existence of substantial evidence

supporting a different outcome.” *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); accord *Pearsall*, 274 F.3d at 1217; *Gowell*, *supra*.

B. Application of Iowa Law

In *Fisher*, relied upon by the ALJ and cited by nearly every Iowa court that has considered the existence of a common-law marriage since 1970, the Iowa Supreme Court reiterated “the elements and conditions necessary to establish the existence of a common-law marriage” which had been outlined by the court in prior cases, as follows:

(1) intent and agreement *in praesenti* as to marriage on the part of both parties together with continuous cohabitation and public declaration that they are husband and wife; (2) the burden of proof is on the one asserting the claim; (3) all elements of relationship as to marriage must be shown to exist; (4) a claim of such marriage is regarded with suspicion, and will be closely scrutinized; (5) when one party is dead, the essential elements must be shown by clear, consistent and convincing evidence. *In re Estate of Long*, 251 Iowa 1042, 1047, 102 N.W.2d 76[, 79] [(1960)]; *Coleman v. Graves*, 255 Iowa 396, 402, 403, 122 N.W.2d 853[, 856] [(1963)]; *In re Estate of Malli*, 260 Iowa 252, 256[-57], 149 N.W.2d 155[, 158] [(1967)].

Fisher, 176 N.W.2d at 805. The court noted these are the “minimal essentials for proving the establishment of common-law marriages.” *Id.*

The *Fisher* court further noted that the parties’ “purpose and intention” in their relationship with each other was “of the greatest importance as bearing on the fact of marriage.” *Id.* Notably, “[one] person may be entitled to marital rights if his or her intention is to be married, even though the other person’s intention is not the same, provided they cohabit and provided the conduct of one person justifies the other to believe he or she intended to be married.” *In re Marriage of Gebhardt*, 426 N.W.2d 651, 652

(Iowa Ct. App. 1988) (citing *In re Marriage of Winegard*, 257 N.W.2d 609, 617 (Iowa 1977), in turn citing *McFarland v. McFarland*, 51 Iowa 565, 570, 2 N.W. 269, 273-74 (1879)).

The *Fisher* court acknowledged that there are inconsistencies “in all cases,” *Fisher*, 176 N.W.2d at 806, but found, “Introduction of one party by the other as the wife or husband is in and of itself an acknowledgment of the marital relation, and while it may not be in and of itself proof of a present agreement and intent, it may support other evidence and is important in cases of the kind.” *Id.*, 176 N.W.2d at 807 (citing *Gammelgaard v. Gammelgaard*, 247 Iowa 979, 986, 77 N.W.2d 479, 483 (1956)); accord *Gebhardt*, 426 N.W.2d at 652. In addition, “[c]ontinuous cohabitation and the declaration of holding out to the public that the parties are husband and wife constitutes circumstantial evidence which tends to create a fair presumption that a common law marital relationship exists.” *Gebhardt*, 426 N.W.2d at 652 (citing *In re Marriage of Winegard*, 257 N.W.2d 609, 617 (Iowa 1977)).

In the present case, the court finds the opinion of the Iowa Court of Appeals in *Gebhardt* to be particularly instructive. The petitioner, Patricia Probert (“Patt”), moved in with the respondent, Freddie Gebhardt (“Freddie”), in 1970, and lived with him continuously for about sixteen years. Patt filed an action for dissolution of the parties’ common-law marriage, and Freddie denied any marriage existed. Freddie argued, *inter alia*, that Patt referred to herself as Patt Probert when she saw a doctor; she filled out job applications under the name Patt Probert, and noted she was a single person; she purchased a car and stock under the name Patt Probert; and “the parties filed income tax returns listing themselves as single persons.” *Gebhardt*, 426 N.W.2d at 652-53.

The court was unconvinced by Freddie's arguments. The court recited a list of fifteen factors leading to its decision that a common-law marriage existed, including, *inter alia*, the following:

Patt's intent and belief with respect to her relationship with Freddie; (2) opinions of various witnesses that the community generally regarded the parties as married; (3) continuous cohabitation by the parties for sixteen years; (4) Freddie's acquiescence in Patt's use of his name and her representations to the community that they were married; . . . (7) mail received and sent by the parties as Mr. and Mrs. Freddie Gebhardt; (8) payment of family and business debts from a single checking account on which both parties were authorized to draw checks, . . . (9) joint vacations with the parties' purchase of airline tickets under the names of Freddie and Patt Gebhardt; (10) Freddie's introduction of Patt as his wife to friends and business associates; . . . (15) reference to Patt as an "in-law" by Freddie's mother and sister.

Id., 426 N.W.2d at 653. Virtually identical indicators are present in the relationship between Harrington and Torrey.

With regard to Patt's filing of individual income tax returns, listing herself as single, the *Gebhardt* court found as follows:

The fact Patt declared herself as single on tax returns does not defeat her claim that a common-law marriage existed. "Considered alone, the tax information would weigh against the finding of a common-law marriage, but the remainder of the record sufficiently overcomes the contrary inferences which might be drawn." *Winegard*, 278 N.W.2d at 511. We find the tax returns were filed by the parties as single persons in an effort to facilitate Freddie's early retirement program.

Id. Similarly, the court in the present case finds Harrington filed individual income tax returns as a single person because she believed she would avoid negative tax consequences that could result from filing as married.

The *Gebhardt* court's further discussion of Patt's inconsistent use of her maiden name is particularly instructive in the present case when applied to the ALJ's comments regarding Harrington's application for Social Security benefits based on her former husband's income:

Nor do we place emphasis on the fact Patt has signed her maiden name on various documents. The district court made the following comment regarding Patt's use of her maiden name:

Some of the inconsistencies that appear seem to be the result of lack of sophistication by Patt and Freddie in respect to what was necessary to change their status in respect to these "official" documents. It appears to the Court that both parties thought that some of these documents could only be changed after a "ceremonial" marriage had taken place. It appears to the Court very doubtful that either party had much real knowledge about "common-law" marriage.

Id. In the present case, the court finds native, at best, the ALJ's speculation that at least one of the two Social Security Administration employees with whom Harrington spoke would have explained to her "the Regulatory provisions regarding common law marriages." (R. 18) The court finds no fraudulent intent on Harrington's part in applying for benefits using her former husband's income, and accepts her testimony regarding her reasons for doing so and for listing herself as "not presently married" on the application.

The court is free to disagree with the ALJ's interpretation of Iowa law in considering whether substantial evidence exists to support the ALJ's conclusion. *See*

Stokes v. Heckler, 773 F.2d 990, 992 (8th Cir. 1985) (disagreeing with agency's application of Arkansas law). The court finds substantial evidence does not exist to support the ALJ's conclusion, and in fact finds the contrary to be true: overwhelming evidence in the Record supports Harrington's claim that she and Torrey were common-law married. Numerous members of Torey's family, his treating physician, and many long-term friends and business associates have attested to the parties' relationship and the fact that they held themselves out as husband and wife. It is interesting, but somewhat understandable, that the only family members who deny any marital relationship existed are Torrey's two daughters.

The court finds Harrington has proved by clear, consistent, and convincing evidence that she was Torrey's common-law wife, and her application for widow's insurance benefits based upon Torrey's wage earnings record should be granted.

IV. CONCLUSION

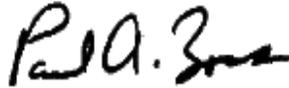
For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections⁴ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that judgment be entered in favor of

⁴Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

Harrington⁵ and against the Commissioner, and that this case be **reversed and remanded** to the Commissioner for the calculation and award of benefits.

IT IS SO ORDERED.

DATED this 30th day of October, 2003.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

⁵**NOTE TO PLAINTIFF'S COUNSEL:** If final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.