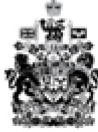

Citation: *BH v Minister of Employment and Social Development*, 2023 SST 1296

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	B. H.
Representative:	T. H.
Respondent:	Minister of Employment and Social Development
Representative:	Jared Porter
Added Party:	The Estate of H. M.

Decision under appeal:	General Division decision dated October 31, 2022 (GP-22-384)

Tribunal member:	Neil Nawaz
Type of hearing:	In Writing
Decision date:	September 27, 2023
File number:	AD-23-44

Decision

[1] I am dismissing this appeal. The Appellant was in a common-law relationship from June 2010 to April 2018. That means that she was not eligible to have her Guaranteed Income Supplement (GIS) calculated at the rate for a single person during that period.

Overview

[2] The Appellant is a 90-year-old woman who has been an Old Age Security (OAS) pensioner since July 1998.[1]

[3] The Appellant applied for the GIS in April 2006.[2] In her application, she said she was widowed. The Minister approved the application and started paying the Appellant the GIS at the single rate. This meant that each month the Appellant received more than she would have if she were living with a spouse or common-law partner.

[4] In February 2019, the Appellant applied for a Canada Pension Plan (CPP) death benefit and survivor's pension.[3] In her applications, she said that she was the common-law spouse of the late H. M., a contributor to the CPP who had died the previous month.[4] The Appellant included with her applications a declaration stating that she and the Added Party had been common-law partners from 2009 to 2018.[5] She also included another declaration saying that, at the time of the Added Party's death, they were living apart for reasons beyond their control—he had been admitted to hospital and then home care because of his health problems.[6]

[5] In May 2019, the Minister began investigating the Appellant's relationship with the Added Party.[7] In February 2020, the Minister concluded that the Appellant and the

[1] See Appellant's OAS application, GD2-76.
[2] See Appellant's GIS application for July 2005 to June 2006 dated April 18, 2006, GD2-13.
[3] See Appellant's CPP Death Benefit application, GD1-20, and CPP Survivor Pension, GD2-62.
[4] The late H. M.'s estate is the Added Party is in this proceeding. Out of convenience, I will refer to both H. M. and his estate as the "Added Party."
[5] See Appellant's Declaration of Common Law Union signed on March 5, 2019, GD2-73.
[6] See Appellant's Statement of Common-law Partners Living Apart for Reasons beyond Their Control dated March 5, 2019, GD2-74.
[7] See Service Canada investigation request, GD2-34.

Added Party were living together in a common-law relationship between June 2010 and April 2018.[8] This meant, in the Minister's view, that the Appellant's GIS should have been calculated as if she were in a common-law relationship between June 2010 and April 2018. The Minister asked the Appellant to repay the government $15,806, which she said was the excess GIS that the Appellant had received during the seven-year period in question.[9]

[6] The Appellant appealed the Minister's decision to the Social Security Tribunal. The Appellant argued that she and the Added Party were never in a common-law relationship. She said that, although they lived under the same roof, they were merely good friends who helped each other out.

[7] The Tribunal's General Division held a hearing by teleconference and dismissed the appeal. It looked at various factors surrounding the Appellant and the Added Party's relationship and found that they were common law partners between June 2010 and April 2018. Above all, it relied on the Appellant's own statements to find that the Added Party was more than just her friend and boarder.

[8] The Appellant then asked the Appeal Division for permission to appeal. Among other things, she alleged that the General Division failed to understand that she and the Added Party had nothing more than a friendly landlord-tenant relationship.

[9] Last March, one of my colleagues on the Appeal Division allowed this appeal to proceed because she thought the Appellant had raised at least an arguable case. At the Appellant's request, I conducted a hearing based on a review of the documents on file.[10]

[10] Now that I have considered submissions from both parties, I have concluded that the Appellant failed to make her case. In my view, the Appellant was in a common-law relationship with the Added Party from June 2010 to April 2018. That means she was not entitled to the GIS at the single rate during that period.

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[8] See Minister's letter dated February 27, 2020, GD2-8.
[9] See GD1-32 to GD1-34, GD2-3, and GD2-4.
[10] See Appellant's letter dated July 5, 2023, AD12.

Issue

[11] For the Appellant to succeed, she must prove, on a balance of probabilities, that she did not have a common-law partner from June 2010 to April 2018.

Preliminary Matters

This appeal operated under new rules

[12] On December 5, 2022, the law governing the appeals to the Social Security Tribunal changed.11 Under the new law, the Appeal Division, once it has granted permission to proceed, must now hold a de novo, or fresh, hearing about the same issues that were before the General Division.12 As I explained at the outset of the hearing, that meant I would not be bound by any of the General Division's findings. I also made it clear that I would be considering all available evidence, including new evidence, about the Appellant's past GIS entitlement.

I considered the recording of the General Division hearing

[13] In a letter dated June 23, 2023, the Minister asked to me to listen to selected segments of the recording of the Appellant's General Division hearing.[13] The Appellant's son and representative objected to this request because (i) it came after the Appeal Division's submission deadline, and (ii) he felt his mother should get new hearing without regard to what was said at the prior proceeding.

[14] For the following reasons, I decided to consider the Minister's request. I also decided that the Appellant would not suffer any prejudice if I listened to the recording of the General Division hearing.

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[11] See section 58.3 of the *Department of Employment and Social Development Act* (DESDA). This appeal is subject to the new law, because the Appellant's application for permission to appeal was filed with the Tribunal on January 4, 2023, after the new law came into force.
[12] The Appeal Division was previously restricted to considering three types of error that the General Division might have made in coming to its decision.
[13] See Minister's letter dated June 23, 2023, AD11.

– The Minister’s submissions were not late

[15] The Appellant’s representative argued that the Minister did not respect the Tribunal’s filing deadline but, having reviewed the record, I can’t agree.

[16] In a letter dated April 25, 2023, the Tribunal informed the parties that they had until May 7, 2023 to file any new evidence and arguments. The Minister met this deadline: the Tribunal received her submissions on May 5, 2023.[14] Those submissions included references to portions of the General Division audio on which the Minister intended to rely.

[17] The Minister’s letter of June 23, 2023 merely confirmed what she had already communicated to the Tribunal. It reiterated that the Minister intended to rely on selections from the recording of the General Division hearing—selections that were identified in the Minister’s submissions of May 5, 2023. In that sense, the letter of June 23, 2023 contained nothing new and could not be fairly characterized as additional evidence submitted past the filing deadline.

– A *de novo* hearing means I can consider any material on the record

[18] The Appellant’s representative argued that his mother was promised a fresh hearing. He pointed to the concluding paragraphs of the decision granting her leave to appeal, which said that the appeal would go ahead as a “new proceeding,” in which the focus would be on whether she was entitled to a GIS at the single rate.

[19] At a case conference last month, the Appellant’s representative argued that, if his mother was to get a “new proceeding,” the Appeal Division could not listen to the recording of the General Division hearing. He suggested that the Appeal Division should be restricted to considering no more than the material that was available to the General Division. In follow-up submissions, he suggested that I had introduced into the proceedings a “Latin phrase” that had no basis in the law.[15]

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[14] See Minister’s submissions dated May 4, 2023, AD7.
[15] See Appellant’s letter dated August 31, 2023, AD17-4.

[20] On that last point, the Appellant's representative is misinformed. The phrase *de novo* is indeed contained in the Tribunal's governing legislation:

> Hearing *de novo* — Income Security Section
>
> An appeal to the Appeal Division of a decision made by the Income Security Section is to be heard and determined as a new proceeding.[16]

[21] What does "*de novo*" mean? The phrase, as the Appellant's representative noted, is Latin for "new" and is commonly used in Canadian legal discourse. The courts have never commented on what a *de novo* hearing should look at the Social Security Tribunal, although they have considered the phrase in other contexts.

[22] The Appeal Division looked at this question three years ago in a case called *R.M.*[17] It surveyed a range of cases from the Federal Court and Federal Court of Appeal that considered *de novo* hearings at the Immigration and Refugee Board. It concluded that a directive to hold a *de novo* hearing permitted wide discretion to review materials that were available to, and generated by, a previous hearing.[18] In other words, a *de novo* hearing does not preclude the Tribunal from considering potentially relevant and useful materials from the earlier General Division hearing, including audio recordings of testimony.

[23] In this case, I see no reason to depart from *R.M.*, which involves circumstances that, while not identical to this case, are similar. There are, of course, exceptions to the general rule. Materials from the previous hearing can't be used (i) to challenge a witness's credibility without first giving that witness an opportunity to respond, and (ii) where the initial decision was set aside due to a breach of procedural fairness.[19] Neither of these exceptions apply here.

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[16] See DESDA, section 58.3.
[17] See *R.M. v Minister of Employment and Social Development*, 2020 SST 743.
[18] *R.M.* involved a case under the old rules, in which the Appeal Division, having found the General Division made an error, ordered a matter to be sent back to the General Division for reconsideration by means of a *de novo* hearing.
[19] See *Lahai v Canada (Minister of Citizenship and Immigration),* 2002 FCA 119.

[24] A *de novo* hearing at the Appeal Division is still an appeal—it flows from an allegation that the General Division made an error of some kind. But how can the Appeal Division be expected to avoid making the same error unless it has a full understanding of what happened at the General Division? And how can the Appeal Division come to such an understanding unless it has access to, not only the General Division's decision, but also the evidence—including testimony—that the General Division considered in coming to that decision?

[25] For the above reasons, I conclude that, when conducting its *de novo* hearings, the Appeal Division has wide discretion to review materials that were available to, or generated by, the General Division.

Analysis

[26] I have applied the law to the available evidence and concluded that the Appellant should not have received the GIS at the single rate.

The GIS is based on a couple's combined income

[27] A person who receives an OAS pension may be eligible to receive a GIS. How much they receive for GIS depends on their income and their relationship status. Usually, a person who is single has a lower income and gets more GIS than a person who has a spouse or a common-law partner.

[28] If the person has a common-law partner, their GIS is based on the couple's combined income.[20] This stops three months after the common-law relationship ends. After that, the Minister calculates the GIS as if the person didn't have a common-law partner.[21]

[20] Section 12 of the *Old Age Security Act* (OAS Act) sets out the rules for calculating the GIS amount.
[21] See section 15(4.2) of the OAS Act.

The existence of a common-law partnership depends on many factors

[29] The *Old Age Security Act* says a common-law partner is "a person who is cohabiting with [a claimant] in a conjugal relationship."[22] Several court decisions explain what this means.[23]

[30] The decisions tell us that two people can cohabit even if they do not live under the same roof.[24] They also say it's possible to be separated yet still live in the same household.[25]

[31] When I am deciding whether the Appellant and the Added Party were cohabiting in a conjugal relationship, I have to look at factors such as:

- Their living and sleeping arrangements;
- Their financial arrangements;
- Their behaviour towards each other privately and in public;
- What help they gave each other in the home; and
- How the community viewed their relationship.[26]

[32] I have to take a flexible approach in assessing these items.[27] Not all of them have to be present for there to be a conjugal relationship. They can also be present in varying degrees. Above all, I have to look for evidence that the parties had a mutual intention to be in a marriage-like relationship.

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[22] See section 2 of the OAS Act.
[23] Although some of these decisions were about the *Canada Pension Plan* (CPP), they are relevant because the CPP defines "common-law partner" the same way as the OAS Act. See CPP, section 2.
[24] See *Hodge v Canada*, 2004 SCC 65.
[25] See *Kombargi v Canada (Minister of Social Development),* 2006 FC 1511.
[26] See *McLaughlin v Canada (Attorney General)*, 2012 FC 556.
[27] See *M v H*, [1999] 2 SCR 3.

The Appellant cohabited with the Added Party in a conjugal relationship

[33] I find that the Appellant and the Added Party were cohabiting in a conjugal relationship from June 2010 to May 2018. I come to this conclusion after considering the following factors.

– The Appellant and the Added Party lived together from June 2010 to May 2018

[34] The Appellant has never denied that she lived with the Added Party, although she insists that they didn't have a romantic relationship. At the General Division hearing, the Appellant said she couldn't remember when the Added Party began living with her, but it appears that he moved into her house in June 2010. She said so in her application for the CPP survivor's pension,[28] and she told a Service Canada investigator that she and the Added Party began living together in the summer of 2010.[29]

[35] The Appellant and the Added Party stopped living under the same roof in May 2018. That was the month, according to declaration signed by the Appellant, that the Added Party was admitted to hospital.[30] He died while living in a rented apartment several months later.

– The Appellant and the Added Party had a conjugal relationship even though they didn't share a bed

[36] The Appellant has stated that she and the Added Party did not engage in "conjugal or intimate relations, any kind." Given the age of the parties (she was 77 and he was 69 when they began living together), I am willing to believe that is true. However, the absence of sexual relations does not decide the matter. Two people can sleep in separate beds and still have a conjugal relationship if other factors point in that direction.[31] It is necessary to look at the relationship as a whole.

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[28] See Appellant's application for the CPP Survivor Pension dated February 11, 2019, GD2-62.
[29] See Service Canada Investigation Information Sheet dated May 22, 2019, GD2-59.
[30] See Statement – Spouses or Common Law Partners Living Apart for Reasons beyond their Control signed by Appellant on March 5, 2019, GD2-74,
[31] See *Squance v Minister of National Health and Welfare* (1993), CCH CEB & PGR, No. 8523 (PAB) and *A.L. v D.P. and Minister of Human Resources and Skills Development* (November 16, 2022), CP 27238 (PAB).

– The Appellant and the Added Party shared financial arrangements

[37] The Appellant has said that she and the Added Party did not share any financial resources: "He had his money, and I had mine."[32] However, this is not entirely true.

[38] The Appellant and the Added Party came together late in life, so it is not surprising that they already had well-established financial arrangements when they began their relationship. The Appellant was the sole owner of the house where she and the Added Party lived.[33] The Appellant filed income taxes as "widowed" from 2010 to 2015, as "single" in 2016, and as "widowed" in 2017 and 2018.[34] The Added Party filed income taxes as "widowed" in 2014 and as "single" in 2010 to 2013, 2015, and 2016. It appears that neither party named the other as beneficiaries in their wills.[35]

[39] The Appellant claimed that she and the Added Party kept their accounts separate, but they did have at least one joint bank account.[36] They also comingled their finances in other ways:

- The Appellant said that they didn't have a lease. Instead, she said that they had an agreement for sharing living quarters on a "quid pro quo basis."[37] She said that she did not charge the Added Party rent and agreed to provide him shelter in exchange for him doing various chores around the house, such as cutting firewood and shovelling snow.[38] At the hearing, the Appellant testified that the Added Party sometimes gave her money and bought groceries.

- In September 2012, the Added Party designated the Appellant as his "spouse" and beneficiary of a Tax-Free Savings Account.[39] At the hearing, the Appellant said that the designation must have been an error, but I think that is

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[32] See Appellant's request for reconsideration dated April 27, 2020, GD2-5.
[33] See deed dated October 4, 1974, GD4-19.
[34] See Appellant's federal income tax returns, GD2-18 to GD2-31.
[35] See Service Canada Investigation Information Sheet dated May 22, 2019, GD2-59. At the General Division hearing, the Appellant's son testified that, even though he was the Added Party's executor, his mother was not a beneficiary under the will.
[36] See TD Canada Trust bank statement for the period January 31, 2013 to February 28, 2013, GD2-70
[37] See Appellant's request for reconsideration dated April 27, 2020, GD2-5.
[38] Refer to recording of General Division hearing at 18:00.
[39] See TD Canada Trust statement dated September 19, 2012, GD2-71.

unlikely. Instead, it suggests that the Added Party regarded the Appellant as something more than her landlord.

- In January 2019, after the Added Party became incapacitated, the Appellant acquired power of attorney over his TD Canada Trust accounts.[40]

- After the Added Party passed away, the Appellant arranged and paid for his funeral.[41] The Added Party's will named the Appellant's son as executor and left him his truck. At the General Division hearing, the Appellant's son testified that the only other beneficiary was the Added Party's daughter, who received $1,000.[42]

[40] These financial arrangements suggest that the Added Party was more than just a boarder to the Appellant. It is also clear that their relationship went deeper than mere friendship. On balance, the evidence points to a common-law relationship.

– The Appellant and the Added Party acted like a couple in private

[41] Much of what the Appellant has said about her home life supports the view that she and the Added Party were in a marriage-like relationship. It appears that she and the Added Party had a relationship for several years before he moved into her home.[43] She told Service Canada's investigator that no one else shared her home except the Added Party and that "from time to time we shared meals."[44] According to the investigator's notes, she and the Added Party supported each other emotionally and financially."[45]

[42] The Added Party's health began to decline, and he eventually developed dementia. He was hospitalized in May 2018, and that was the last time he lived with the

[40] See TD Canada Trust letter dated January 25, 2019, GD2-72.
[41] See Appellant's application for the CPP death benefit dated February 11, 2019, GD1-20.
[42] Refer to recording of General Division hearing at 8:30.
[43] The Appellant told Service Canada's investigator that "prior to residing together she and [the Added Party] were back and forth between her house and his residence in Lunenburg." See Service Canada Investigation Information Sheet dated May 22, 2019, GD2-59.
[44] See Appellant's letter requesting reconsideration dated April 27, 2020, GD2-5.
[45] See Service Canada Investigation Information Sheet dated May 22, 2019, GD2-59.

Appellant. The Appellant later denied that they separated for reasons beyond their control,[46] but she had signed a declaration to that effect the previous year.[47] On that occasion, the Appellant said that, after he was discharged from hospital, the Appellant was placed on a waiting list for a nursing home. The Appellant later explained to the Service Canada investigator that his condition had deteriorated to the point where it difficult to care for him.[48]

[43] While waiting for a nursing home spot to come up, the Added Party lived in a rented apartment and received regular visits from a nurse. During this period, the Appellant acted in a way that suggested she was more than a landlord or even just a friend:

- The Appellant saw to it that the Added Party's rent was paid, albeit from his own funds;
- The Appellant spoke by phone with him several times per day;
- The Appellant often picked him up to bring him home to eat together; and
- The Appellant stayed with him in his apartment for four days and four nights before he returned to hospital for the final time.

[44] The Appellant said that she did these things as a friend and because public health services were insufficient,[49] but I suspect these are rationales meant to mask her true motivations.

[45] By themselves, none of these things were necessarily significant. However, taken together, they showed a level of care and commitment that went beyond mere friendship. On the whole, the Appellant and the Added Party acted like a couple—before the Added Party's hospitalization and after.

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[46] See Appellant's letter requesting reconsideration dated April 27, 2020, GD2-5.
[47] See Statement – Spouses or Common-law Partners Living Apart for Reasons beyond their Control, signed by the Appellant on March 5, 2019, GD2-74.
[48] See Service Canada Investigation Information Sheet dated May 22, 2019, GD2-59.
[49] See Appellant's letter dated May 20, 2022, GD5-5.

– The Appellant and the Added Party socialized together

[46] By her own account, the Appellant and the Added Party went out together as a couple. It didn't happen often, but it did happen occasionally. For example:

- In her request for reconsideration, the Appellant wrote, "We did not socialize together save for occasions when we attended the local Senior's Bingo events, along with many other seniors our age."[50]
- Service Canada's notes indicate that the Appellant told the investigator that, before the Added Party's illness, she accompanied him on a two-week visit to Ontario to visit his family.[51]
- The Appellant told Service Canada that she and the Added Party "went to places together in the community, as it was nice going to events with someone else."[52] She also said that they attended church together and went on days trips to the Annapolis Valley.[53]

[47] The Appellant later attempted to walk back some of her statements about the amount of time she spent with the Added Party outside their home. She said that she visited Ontario for only a couple of days. She said they went to church together only because they happened to be members of the same congregation and it made sense to share a vehicle.

[48] I don't find these revised accounts convincing. It is unlikely that two retirees would travel from Nova Scotia to Ontario for only a two-day visit. It is more likely that they went to church together, not just out of convenience, but because, judging by their many other activities together, they were attached to one another.

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[50] See Appellant's letter requesting reconsideration dated April 27, 2020, GD2-5.
[51] See Service Canada Investigation Information Sheet dated May 22, 2019, GD2-59.
[52] See Service Canada Investigation Information Sheet dated May 22, 2019, GD2-59.
[53] See Service Canada Investigation Information Sheet dated May 22, 2019, GD2-59.

[49] I see no reason to discount Service Canada's investigation reports as unreliable. Indeed, I am inclined to give them more weight because they contain unguarded information.

[50] Service Canada's investigator interviewed the Appellant before she fully understood that winning entitlement to the CPP survivor's pension might jeopardize her entitlement to a portion GIS that she had already received. From what I can see, the investigator was acting in the ordinary course of his job and had no particular interest in seeing a portion of the Appellant's GIS clawed back.

[51] At the time, the Appellant had no incentive to tailor her remarks to her financial advantage. When asked about their behaviour towards each other in public, the Appellant proceeded to volunteer information suggesting that she and the Added Party were involved in a conjugal relationship.

– The Appellant and her son repeatedly said that she was in a common-law relationship

[52] The most compelling reason to conclude that the Appellant was in a common-law relationship is also the simplest: The Appellant herself has repeatedly acknowledged that she was the Added Party's spouse. She only changed her story when it became clear to her that it was in her financial interest to be single.

[53] The Appellant declared that she was the Added Party's common law spouse on several occasions:[54]

- In a form provided by the funeral home after the Added Party's death;[55]
- In an application for the CPP death benefit;[56]

[54] In March 2017, the Added Party filled out a form entitled "Vital Statistics Record" in which he checked off "single" when asked his marital status — see GD4-13. The Added Party's view of his relationship with the Appellant, while significant, does not determine this matter. In the end, I found it was outweighed by the bulk of the remaining evidence, which pointed to a marriage-like relationship between them
[55] See undated form from the X Funeral Home enclosed with Appellant's Notice of Appeal, GD1-19.
[56] See application for the CPP death benefit signed by the Appellant on February 11, 2019, GD1-20.

- In an application for the CPP survivor's pension;[57]
- In a declaration of common law union;[58] and
- In a statement for spouses or common-law partners living apart for reasons beyond their control.[59]

[54] During the General Division hearing, the Appellant either denied having signed the above documents or denied having any memory of signing them.[60] However, she could not explain where the signatures in her name came from. However, I believe those signatures are hers and that she intended to claim the Added Party as her common-law spouse. I say that because the signatures match the signatures on other documents that she is known to have signed. I also say that because the Appellant, who perhaps had forgotten that she had been receiving the GIS at the single rate, had a financial incentive to be recognized as the Added Party's survivor.

[55] It wasn't only the Appellant who changed her story. In June 2019, the Appellant's son told Service Canada's investigator that his mother and the Added Party were in a common-law relationship.[61] Although he later said that he couldn't remember saying such a thing, I find it far more likely that he did so in support of his mother's claim for the survivor's pension. Only later, when he realized that his statement jeopardized his mother's GIS entitlement, did he "forget" what he had said previously.

[56] Finally, since much of the other evidence indicates that the Appellant was in fact in a common-law relationship with the Added Party, it makes sense that she and her son would have believed that she was entitled to the survivor's pension and death benefit.

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[57] See application for the CPP survivor's pension signed by the Appellant on February 11, 2019, GD1-23.
[58] See Declaration of Common-law Union, signed and sworn by the Appellant before a commissioner of oaths on March 5, 2019, GD2-73.
[59] See Statement – Spouses or Common Law Partners Living Apart for Reasons beyond their Control signed by the Appellant on March 5, 2019, GD2-74.
[60] Refer to recording of General Division hearing at 57:00.
[61] See Service Canada's Investigation Information Sheet dated June 5, 2019, GD2-58.

Conclusion

[57] The Appellant has failed to satisfy me that she was entitled to a GIS at the single rate from July 2011 to April 2018. The available evidence instead shows that she was in a common-law relationship with the Added Party during that period. I was not convinced, as the Appellant would have me believe, that she and the Added Party had an essentially commercial relationship with perhaps an overlay of friendship. Their relationship went far deeper than that. When I look at the evidence as a whole, I see two people who cared for each other and who shared resources, responsibilities, and life experiences.

[58] The appeal is dismissed.

Member, Appeal Division