HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **FAIRBAIRN**

Appellant

and

RADECKI

Respondent

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APPELLANT'S SUBMISSIONS IN REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply

2. **Special leave:** Special leave to appeal should not be revoked for the following reasons. *First*, the arguments being advanced to revoke special leave are in substance the same arguments that the respondent made in opposition to the application for special leave. The gravamen of the respondent's arguments at special leave[1] and on appeal[2] is that the appellant's submissions before this Court were not put below. Having been determined by the grant of special leave, the respondent should not be permitted to now re-agitate the matter. *Secondly*, the appeal raises issues of public importance concerning the management of the affairs of persons who lack capacity after "the breakdown of a de facto relationship". This issue is becoming increasingly common for the NSW Trustee and Guardian and its equivalents in other States and Territories with a greater incidence of de facto relationships and an aging population. *Thirdly*, in recognition of the public importance of this appeal, the NSW Trustee and Guardian has paid the costs of both parties of the application for special leave as well as the appeal and has agreed not to seek to disturb the costs orders made by the Full Court in the respondent's favour **(**CAB 67).

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[1] *Fairbairn v Radecki* [2021] HCATrans 166 at 290-331, 366-425, 528-531.
[2] RS at [11]-[16].

3. **Material facts:** It is a mischaracterisation to describe Mr Radecki's conduct as one of continuing practical support following the onset of Ms Fairbairn's dementia and that the changes which occurred simply reflected a different and difficult phase of their ongoing relationship as opposed to a breakdown of the relationship (RS [7]). In April 2017, while Ms Fairbairn's health was "quite precarious", Mr Radecki left her to go on a three-month overseas holiday (J [70]-[71]). While Mr Radecki was away on holidays, Ms Fairbairn was admitted to hospital after accidentally overdosing on her medication (J [76]-[77]). Upon Mr Radecki's return to Australia, the trial judge found that he "effectively manipulated the Wife into making … emotionally fraught calls to her children when she was in a vulnerable and confused state" (J [90]). After Ms Fairbairn's specialists had diagnosed her with moderate dementia which made her "vulnerable to social and financial abuse", Mr Radecki procured a change in Ms Fairbairn's power of attorney partially in favour of himself as well as hospital bedside will granting him a life estate in the Town A Property (J [85]-[98]). This was contrary to a fundamental tenant of their relationship that they keep their assets separate (J [56]-[57], [60], [153]). Mr Radecki continued and repeatedly refused to disclose his financial circumstances to Centrelink which resulted in Ms Fairbairn's income support payments being suspended (J [100], [112], [120], [122]). While living rent free in the house owned by Ms Fairbairn (notwithstanding that Mr Radecki himself owned two properties), Mr Radecki refused for some fifteen months to contribute to the cost of Ms Fairbairn's care and his proposals for her care "plainly favoured" his financial interests over Ms Fairbairn's (J [121]-[123]).

4. **The object of the legislation:** The respondent has identified the central object of the State *Commonwealth Powers (De Facto Relationships) Acts* and the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (**Amendment Act**) as being the ability of a single court to determine parenting and property disputes between de facto partners (RS [21]). However, the appellant's broader construction of "breakdown", which will often coincide with but does not require a final separation, best achieves the purpose of having de facto parenting and property disputes determined within the one court, as there is no requirement that parents have separated for the court to have jurisdiction under the *Family Law Act 1975* (Cth) (**FLA**) to determine de facto parenting disputes.

5. **The statutory scheme (Breakdown does not mean separation):** The respondent's submissions have not grappled with or explained the use of different statutory concepts such as "irretrievable breakdown", the "end" of a de facto relationship, and the "separation" of de facto partners in contradistinction to the "breakdown" of a de facto relationship (RS [26]-[39]; AS [44]-[49]). Instead, the respondent's submissions incorrectly conflated these concepts and presuppose that the word "breakdown" has an identical meaning to "end" and "separate". For example, s 90RD(2)(a) and (d) of the FLA, which is said at RS [36] to confirm the respondent's construction, is not concerned with whether there has been a "breakdown" of a relationship to enliven jurisdiction under s 90SM. Rather, s 90RD(2)(a) is concerned with whether the period or periods of the de facto relationship is (as opposed to was which contemplates the possibility of a continuing relationship) at least two years so as to enliven jurisdiction under s 90SB(a). Section 90RD(2)(d) is concerned with when the relationship "ended", as opposed to broke down, for the purposes of the limitation period in s 44 of the FLA. Language used in media releases and extrinsic material which suggests some equivalence between the breakdown of a relationship and the end of a relationship cannot displace different and distinct concepts used in the FLA (RS [19]-[20], [23]).

6. **Alternative argument (De facto partners must live together):** The respondent's submissions have overlooked the FLA's broader statutory context (RS [50]-[51]). Section 2F of the *Acts Interpretation Act 1901* (Cth) (**AIA**) contains a definition of "de facto relationships" in substantially the same terms as s 4AA of the FLA save that s 2F(4) provides that "persons are taken to be living together on a genuine domestic basis if the persons are not living together on a genuine domestic basis only because of … illness or infirmity of either or both of them." The definition of a de facto relationship in s 2F was originally inserted in s 22C by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth) which was before Parliament at the same time as the Amendment Act. The carve out in what is now s 2F(4) of the AIA reflects a deliberate legislative choice that persons who are not living together by reason of illness or infirmity are not excluded from the definition of a de facto relationship for the purposes of some

Commonwealth statues[3] but are excluded from the definition of a de facto relationship for the purposes of the FLA.

7. Section 4AA(1)(c) of the FLA clearly provides that "A person is in a de facto relationship with another person if … having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis". The respondent's "simple textual point" in answer to that submission is that the appellant seeks to elevate the factor in s 4AA(2)(b) to a precondition for the existence of a de facto relationship (RS [51]). However, s 4AA(2)(b), consistent with the definition of a de facto relationship in s 4AA(1)(c) that persons live together, presupposes a common residence and is only concerned with the "nature and extent" of that common residence. Further, it is apparent from the hearing to s 4AA(2) ("Working out if persons have a relationship as a couple") and the use of a disjunctive clause in s 4AA(1)(c) ("having regard to all the circumstances of their relationship, they have a relationship as a couple"), the factors in s 4AA(2) address specifically whether persons have a relationship as a couple, not the broader test in s 4AA(1) of whether they are in a de facto relationship.

8. Importantly, unlike the present case where the parties have been living separately and apart on a full time and permanent basis, the "strong body of authority" referred to by the respondent at RS [52] involved either part-time cohabitation[4] or an intention to resume cohabitation after the reason for living separately had passed[5]. Paragraph 6 above also highlights the dangers in relying upon decisions in different statutory contexts.

9. **Application to the facts:** A number of matter arise out of the respondent's application of the FLA to the facts of this case. *First*, it is erroneous to look at the events which took place on 25 May 2018 alone and in isolation in determining whether there had been a breakdown by that date (RS [40], [43]). When the history

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[3] AIA, s 2D (previously 22A). See also explanatory memorandum to the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008* (Cth) at [17]-[18], [24].
[4] *Jenkins v Ellis* (1990) DFC 95-086 (Parties mostly resided together); *Vaughan v Hoskovich* [2010] NSWSC 706 (Parties lived separately for a small part of each week).
[5] *Hibberson v George* (1989) 12 Fam LR 725 at 740 (Example given of going on holidays); *McLaughlin v Saillard* (1990) DCF 95-082 (The parties intended to resume cohabitation after de facto wife recovered from her illness); *Howland v Ellis* (2001) 28 Fam LR 656 (The parties intended to resume cohabitation after the de facto husband was released from prison); *PY v CY* (2005) 34 Fam LR 245 (The parties intended to resume cohabitation after the sale of a home and business).

of the parties' relationship is considered, as set at AS [6]-[17] and [3] above, the court can comfortably be satisfied that a breakdown had occurred by that time. *Secondly*, Mr Radecki's subjective beliefs about the status of his relationship with Ms Fairbairn cannot be determinative of whether a breakdown has occurred (RS [41]). *Thirdly*, the respondent has mischaracterised the appellant's submissions. It is not the appellant's position that "once a party suffers incapacity and is unable to actively consent to these types of inevitable changes, the relationship has 'broken down'" (RS [44]). As set out at [3] above, it is wrong to suggest that what has occurred is simply an evolution in the parties' relationship. *Fourthly*, there was and is no suggestion that the dispute between Mr Radecki and Ms Fairbairn's children is the "touchstone" for "breakdown" simply that it is a relevant circumstance in s 4AA(2) (RS [45]). *Fifthly*, NCAT's appointment of the Trustee, as opposed to Mr Radecki, to make financial, health and welfare decisions on Ms Fairbairn's behalf cannot simply be dismissed as "bootstrapping" when considering the circumstances in s 4AA(2)(d) and (i) (RS [45]).

10. **Section 109 of the Constitution:** In an apparent attempt to undo the grant of special leave (RS [16]), the respondent has now for the first time made brief submissions of statutory inconsistency under s 109 of the Constitution (RS [46]-[48]). No issue arises because the Trustee has not exercised, or purported to exercise, power under the *NSW Trustee and Guardianship Act 2009* (NSW) or any other types of State legislation referred to in passing at RS [26]. Any question of inconsistency under s 109 of the Constitution should be determined if, and when, it arises rather than seeking to determine a hypothetical issue recently raised by the respondent for the first time.

4 February 2022

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Annexure

Commonwealth legislation

1. *Acts Interpretation Act 1901* (Cth) (current version).
2. *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth) (as enacted).

State legislation

3. *NSW Trustee and Guardianship Act 2009* (NSW) (current version).