HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S179/2021

BETWEEN: **FAIRBARIN**
Appellant

and

RADECKI
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

1. **The Trustee does not assert error in the manner in which the Full Court decided the appeal before it:**
   (a) Below, the Trustee, after conceding error in the primary judge's finding of imputed intention at J [161], advanced two other arguments: (i) an inference in fact that the respondent intended to separate from the appellant and acted upon such intention; and (ii) that in any event the parties were no longer "in" a de facto relationship as at 25 May 2018 (i.e. the relationship had ended on or before that date): AJ [25].
   (b) The Full Court rejected both arguments on the facts: AJ [38]-[55].
   (c) Neither the notice of appeal (CAB 69), nor the Trustee's written submissions, seek to revive either of those arguments. The Full Court's order (CAB 64) was free from error.
   (d) The Trustee now seeks to raise two wholly new arguments, which raise questions of law, and factual application, never explored below. The appeal should be dismissed or special leave revoked: **RS [11]-[16], [46]-[48]**.

2. **If the Court reaches the Appellant's second argument, it can be disposed of swiftly:**
   (a) The Trustee's second argument (AS [25], [55], [56]) falls wholly outside the grant of leave. It asserts that the appellant's move into an aged care facility in January 2018, irrespective of any other factor, means that the parties are longer "living together" within s 4AA(1)(c) of the Act and their relationship had "broken down" so as to enliven s 90SM jurisdiction.
   (b) This argument (apart from ignoring the appellant's frequent visits to her residence: J [99], [125], [146], [147]) wrongly conflates *one* of the list of nine non-mandatory, non-exhaustive factors that may bear on whether the parties are in a de facto

relationship on a given date – the factor in s 4AA(2)(b) – with the larger, holistic evaluative exercise required under s 4AA(1)(c).

(c) Absence of a "common residence" as referred to in s 4AA(2)(b) (even if established) does not equate to the parties *not* having a "relationship as a couple living together on a genuine domestic basis" within s 4AA(1)(c), just as presence of a common residence does not equate to the parties *being* in such a relationship. Common residence (whether occasional or habitual) may be a relevant factor but is neither a necessary nor a sufficient condition for the parties being in such a relationship: **RS [49]-[53]**.

3. **If the Court reaches the Trustee's primary argument about the meaning of "breakdown", it should reject it as a matter of law:**

(a) The Trustee's primary argument advances a new proposition of law, albeit a slippery one: jurisdiction in de facto financial causes under the Act is engaged upon a concept of "breakdown" of the relationship which can mean something other than the end of the relationship (AS [23]). Breakdown will often coincide with separation or end of the relationship but need not do so (AS [44]). Breakdown can occur without either party intending to separate or communicating a desired end to the relationship (AS [2], [51]). The result is that in some cases federal jurisdiction would be engaged over *intact* de facto relationships, whereas in other cases it would be engaged only for relationships *after their end*.

(b) Correctly viewed, the statutory concept of the point-in-time "after the breakdown of a de facto relationship" in s 90SM and like provisions, and the event precipitating it, does not permit such variable shades of meaning. It requires a clear criterion. "Breakdown" signifies the end of the relationship: **RS [17]-[18]**.

(c) The concept of "breakdown" is central to the State referrals in question and the delineation between the operation of relevant Commonwealth and State laws has critical and ongoing constitutional significance. The chief mischief addressed by the referrals was the problem of de facto couples, *after the breakdown (or end) of the relationship*, having to go to federal courts for disputes concerning children but to State courts in relation to property disputes. Quite deliberately, the referrals were specifically limited – following the model of the then Queensland statute – so as not to extend to *intact* de facto relationships, where jurisdiction would continue to depend on whether State law (such as in NSW) reached intact relationships. "Breakdown" needs a clear, stable legal meaning so that the referrals can do their intended work of

both supplying power and enabling federal law under s 90RC to render State law (such as in NSW) partly inoperative: **RS [19]-[25]**.

(d) This concept of "breakdown" as "end" is embodied in numerous provisions of the Act dealing with de facto relationships: **RS [26]-[39]**.

(e) By contrast, the Act gives the court a general jurisdiction over property or maintenance disputes within marriages *even if intact*. With married couples, "breakdown" plays certain roles: (i) as a condition for a Part VIIIA financial agreement to deal with property or financial resources, but not maintenance (cf Part VIIIAB for de facto couples); (ii) within the concept of "irretrievable breakdown" which under s 48 is the ground for the court to bring the legal shell of the marriage to an end; and (iii) in s 90XJ(1). For de facto couples, the factual relationship and its legal characterisation are fused; once it no longer exhibits the essential character in s 4AA(1) as a matter of fact, it ends.

(f) Further, nothing in the text of the referrals nor the extrinsic materials suggests that the referring States intended to refer power in such a way that their long established laws and jurisdictions dealing with the property and affairs of incapable persons could be rendered inoperative at the election of a person like the Trustee: **RS [46]-[48].**

4. **The Trustee fails at the stage of application**

(a) The Trustee must fail as it does not make a case that the relationship had *ended* by the final date, 25 May 2018, adopted by the primary judge at J[158]: **RS[42]**.

(b) The events of 25 May 2018 were unremarkable within an ongoing relationship in the later stages of one partner's life and did not constitute "breakdown": **RS [40], [43]**.

(c) The Trustee's factual summary at AS[51] is wrong, including understating the respondent's continuing support and overstating the appellant's incapacity: **RS[45]**.

(d) The Court should not accept, as a quasi-proposition of law (AS [51]-[53]), that once one partner suffers diminished capacity and faces the changes which will inevitably occur at such a stage of a de facto relationship, the relationship has "broken down". Nor would such a proposition be acceptable as a trigger for a "breakdown" enlivening a Part VIIIA financial agreement between married couples over property/financial resources or for a s 48 divorce (cf *Main v Main* (1949) 78 CLR 636): **RS [44]**.

Justin Gleeson

8 March 2022

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