

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

FAIRBAIRN

APPELLANT

AND

RADECKI

RESPONDENT

Fairbairn v Radecki
[2022] HCA 18
Date of Hearing: 8 March 2022
Date of Judgment: 11 May 2022
S179/2021

ORDER

1. *Appeal allowed.*
2. *Set aside orders 2, 3 and 4 of the Full Court of the Family Court of Australia made on 11 December 2020 and, in their place, order that the appeal to that Court be dismissed.*
3. *The NSW Trustee and Guardian pay the costs of both parties of the application for special leave to appeal and of the appeal.*

On appeal from the Family Court of Australia

Representation

B W Walker SC with G Levick and R J May for the appellant (instructed by Powe & White Family Lawyers)

J T Gleeson SC with D M Forrester for the respondent (instructed by Attwaters Solicitors)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Fairbairn v Radecki

Family law – De facto financial cause – Alteration of property interests – Meaning of "breakdown of de facto relationship" – Where appellant and respondent had been in de facto relationship and resided in appellant's home – Where appellant and respondent agreed to keep assets strictly separate – Where appellant subsequently suffered rapid cognitive decline and diagnosed with dementia – Where NSW Trustee and Guardian ("Trustee") appointed to manage appellant's financial affairs – Where Trustee moved appellant into aged care facility permanently and resolved to sell appellant's home to fund aged care facility costs – Where respondent opposed proposed sale of home – Where Trustee sought property settlement orders pursuant to s 90SM of *Family Law Act 1975* (Cth) – Whether de facto relationship had broken down within meaning of s 90SM.

Words and phrases – "assets strictly separate", "breakdown of a de facto relationship", "cognitive decline", "cohabitation", "de facto relationship", "financial manager", "living together on a genuine domestic basis", "mutual commitment to a shared life", "necessary or desirable adjustments", "NSW Trustee and Guardian", "property settlement orders", "sharing life as a couple".

Family Law Act 1975 (Cth), ss 4AA, 90SM.

- 1 KIEFEL CJ, GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ. In late 2005 or early 2006, the appellant and the respondent commenced a de facto relationship. They agreed to keep their assets strictly separate but lived in a house owned by the appellant ("the home"). The appellant was subsequently diagnosed with dementia. By 2017, the appellant's capacity to make long-term decisions was largely, if not completely, absent.
- 2 In January 2018, the NSW Civil and Administrative Tribunal ("NCAT") appointed the NSW Trustee and Guardian ("the Trustee") to make health and welfare decisions on behalf of the appellant and, subsequently, to be her financial manager. In March 2018, the Trustee decided to move the appellant into an aged care facility, where she has since resided. The Trustee wished to sell the home to fund the appellant's ongoing care. The respondent opposes this. The Trustee, on behalf of the appellant, sought property settlement orders from the Federal Circuit Court of Australia¹, including for the sale of the home.
- 3 For that Court to have jurisdiction to make orders altering the interests of the parties to their property, there needed to be a de facto relationship between the appellant and the respondent under the *Family Law Act 1975* (Cth) ("the Act") which had existed but which had broken down for the purposes of s 90SM of the Act. There was no dispute that the parties had been in a de facto relationship. The question was whether the de facto relationship had broken down and if so by what date. The primary judge held that by no later than 25 May 2018 it had broken down². The Full Court of the Family Court of Australia³ disagreed⁴. The appellant's appeal to this Court must be allowed. The de facto relationship had broken down by no later than 25 May 2018.

1 Now Division 2 of the Federal Circuit and Family Court of Australia.

2 *Fairbairn v Radecki* [2020] FCCA 1556.

3 Now Division 1 of the Federal Circuit and Family Court of Australia.

4 *Radecki v Fairbairn* (2020) 62 Fam LR 62.

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The statutory framework

4 The jurisdiction of the federal family law courts to make property settlement orders for de facto relationships arises from a series of referrals made to the Parliament of the Commonwealth by several States in accordance with s 51(xxxvii) of the *Constitution*⁵. The existence of jurisdiction turns upon whether a de facto relationship has broken down. Section 90SM of the Act relevantly provides that "[i]n property settlement proceedings after the *breakdown* of a *de facto relationship*, the court may make such order as it considers appropriate" and "in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them" may alter "the interests of the parties to the de facto relationship in the property"⁶. The court, however, must not make an order under s 90SM unless it is satisfied that, in all the circumstances, "it is just and equitable to make the order"⁷.

5 A "de facto relationship" is defined in s 4AA of the Act. It is necessary to set that section out. It relevantly provides:

- "(1) A person is in a *de facto relationship* with another person if:
- (a) the persons are not legally married to each other; and
 - ...
 - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

5 Australia, House of Representatives, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*, Explanatory Memorandum at 1, 6 [14]; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 June 2008 at 5823. These referrals led to the enactment of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), which, in general terms, conferred on federal family law courts the power to make property settlement orders for de facto relationships.

6 *Family Law Act 1975* (Cth), s 90SM(1)(a) (emphasis added).

7 *Family Law Act 1975* (Cth), s 90SM(3).

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<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

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Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

- (2) Those circumstances may include any or all of the following:
 - (a) the duration of the relationship;
 - (b) the nature and extent of their common residence;
 - (c) whether a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (e) the ownership, use and acquisition of their property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
 - (h) the care and support of children;
 - (i) the reputation and public aspects of the relationship.
- (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.
- (4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
- (5) For the purposes of this Act:
 - (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and

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- (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship."

6 The Act contains no exhaustive definition of the term "breakdown", save that s 4 of the Act relevantly provides that in relation to a de facto relationship, it "does not include a breakdown of the relationship by reason of death". It will be necessary to return to consider these provisions.

The relationship

7 The facts recorded by the primary judge were not in dispute. His Honour found that the de facto relationship between the appellant and the respondent had been "very practical and supportive"⁸. In 2010, the appellant and the respondent entered into a "Domestic Relationship Agreement (Cohabitation Agreement)", which recorded that the parties had agreed to quarantine their respective property and that the home was to remain owned absolutely by the appellant; in 2015, they entered into another "Domestic Relationship Agreement (Cohabitation Agreement)", updating their earlier agreement to include the quarantining of a property since acquired by the respondent (together, "the Cohabitation Agreements"). The primary judge found that it was a "core element of the parties' relationship throughout ... that they agreed to keep their assets strictly separate".

8 By 2015, the appellant began to suffer rapid cognitive decline. Her mental state continued to deteriorate during 2016. By early 2017, the appellant's treating specialist thought that she had dementia; she demonstrated Parkinsonian features including a shuffling gait. The specialist also recorded their concern with the respondent's planned three-month holiday overseas, which he commenced in April 2017 when the appellant's health was "quite precarious". By this time the parties occupied separate rooms in the home, with their own personal belongings in their respective rooms. During the respondent's absence, the appellant would oscillate between hating the respondent and missing him. For instance, she complained bitterly to her daughter about the respondent, saying he was on a "bloody good wicket", and that when he returned he would be given his "marching orders". She also told her son that she believed the respondent had been "taking her for a ride"

8 Fairbairn [2020] FCCA 1556 at [54].

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and that she needed to sell the home to get the respondent "out". On other occasions, however, she said she missed the respondent.

9 By mid-2017, the appellant qualified for full-time placement into an aged care facility. On the advice of her doctor, she executed an enduring power of attorney in favour of her children. Subsequently, for the appellant's protection, and at her request, the children stopped her access to her bank accounts.

10 The respondent was very unhappy with what the appellant's children had done while he was overseas. Following his return, he manipulated the appellant, while she was in a vulnerable and confused state, into accusing her children of taking her money, selling her home and putting her into an institution. Shortly thereafter, the respondent sent an email to the children stating that the appellant wanted to suspend the enduring power of attorney in their favour. Attached to the email were letters, handwritten by the respondent but signed by the appellant, in which the appellant told her children that she loved them but that she expected them to support the respondent in his care of her.

11 Two events then took place that led to appointment of the Trustee by NCAT. The first occurred in July 2017. The respondent drove the appellant to a local courthouse whereupon the existing enduring power of attorney was revoked and replaced by another enduring power of attorney in favour of the respondent and the appellant's brother. The primary judge found that by this step the respondent had begun to act as though he were no longer bound by the earlier commitment to keep the parties' assets strictly separate. The second event took place when the appellant was in hospital in late 2017, following a fall at home. The respondent arranged for a solicitor to attend upon her for the purpose of drawing an updated will. The new will, duly executed, was more favourable to the respondent than the appellant's previous will: it conferred upon him a life estate in the home. In contrast, the appellant's previous will gave the respondent only a right to live in the home for six months after her death.

12 Over the opposition of the respondent, in January 2018, NCAT ultimately appointed the Trustee to make health and welfare decisions on behalf of the appellant. A further NCAT hearing was held concerning the new enduring power of attorney. The appellant gave evidence, which included that she could not remember attending the courthouse and was fearful and anxious about people harming her. NCAT was satisfied that the appellant was "significantly cognitively impaired" when she signed the new enduring power of attorney and that she did

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not fully understand what she was signing. NCAT ultimately ordered its revocation.

13 At that subsequent hearing, NCAT also considered who should be appointed the appellant's financial manager pursuant to s 25E(1) of the *Guardianship Act 1987* (NSW). The respondent sought that appointment. He told NCAT that he would pay for the appellant's accommodation costs so that the home could be retained. NCAT declined to appoint the respondent, noting that he was not open to any proposal that might see the home sold to pay for the appellant's care. NCAT also declined to appoint the appellant's children because the respondent would not cooperate with them (given he did not accept the validity of the first enduring power of attorney). The Trustee was instead appointed as the financial manager. The respondent appealed that decision, but his appeal was dismissed.

14 NCAT's orders support two inferences. First, NCAT was satisfied, consistently with s 25G of the *Guardianship Act*, that the appellant was not capable of managing her financial affairs. Secondly, NCAT was not prepared to appoint the respondent to be the appellant's financial manager because he was not a "suitable person" to undertake that role in accordance with s 25M of the *Guardianship Act*.

15 In March 2018, the Trustee placed the appellant into an aged care facility. It was accepted by all parties that this was a permanent move. A dispute took place between the respondent and the Trustee as to how this placement was to be funded. The Trustee wished to sell the home to fund the "refundable accommodation deposit" ("the RAD") required by the aged care facility. Payment of the RAD would avoid the need to otherwise pay the facility the daily accommodation payment ("the DAP"). The respondent disagreed with this plan; he wanted to remain in the home – even though he owned two other properties – claiming this to be the appellant's wish. Instead, he suggested that the DAP first be funded from the appellant's superannuation, and when that was depleted he would make contributions from his own resources. Later, he proposed that he pay the DAP in the first instance but then be reimbursed from the appellant's estate. The Trustee refused these proposals; they were not in the appellant's best financial interests. The Trustee decided that selling the home and using the proceeds of sale to pay the RAD was the best way of supporting the appellant. The primary judge found that the respondent's proposals "plainly" favoured his financial interests,

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permitting him to live at the home rent-free while mortgage repayments, rates and other property outgoings continued to accrue⁹.

16 The respondent was also unwilling to cooperate with the appellant's children in the administration of her affairs. By early 2018, in the words of the primary judge, "the gloves were off" between the respondent and the children¹⁰. Frustrating matters further, the respondent had previously completed a Centrelink "income and assets assessment form" nominating himself as the appellant's "spouse", but had declined or failed to answer questions relating to his own assets and income. His ongoing refusal – even at the insistence of the Trustee – to disclose his financial circumstances to Centrelink meant that in May 2018 Centrelink suspended the appellant's income support payments¹¹.

17 Ultimately, the respondent belatedly – some 15 months after the appellant was first admitted into the aged care facility – commenced making payments of \$1,000 per fortnight to meet the DAP fees. These payments merely kept the aged care facility debt at around the same level. By January 2020, he had paid \$16,000.

18 Not all of the respondent's conduct at this time was unsupportive of the appellant. For example, using the appellant's money, the respondent purchased a Townace van with a wheelchair lift, which he used to transport the appellant. He gave evidence in an NCAT hearing that he brought the appellant home each week in the interest of her general wellbeing. He wanted her to return home. He regularly visited the appellant at the aged care facility to assist at meal times.

19 By 2019, the Trustee had formed the view that the de facto relationship between the appellant and the respondent had broken down. The respondent did not agree with that conclusion. He asserted and maintained that the appellant wanted him to remain living at the home and that there had been no breakdown of

9 *Fairbairn* [2020] FCCA 1556 at [121].

10 *Fairbairn* [2020] FCCA 1556 at [119].

11 Only 12 months later, in May 2019, did the respondent supply details of his financial circumstances. Payments to the appellant resumed, but these were subsequently reduced to nil on the basis of the combined assets of the appellant and the respondent.

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the de facto relationship. Inferentially, due to the serious decline in her mental health, it is impossible to know whether the appellant wished to be in a relationship with the respondent, or whether she was even capable of forming a view one way or the other.

Commencement of proceedings

20 In these unhappy circumstances, rather than pursuing its right to sell the property conferred by the *NSW Trustee and Guardian Act 2009* (NSW)¹², the Trustee commenced proceedings in the Federal Circuit Court on behalf of the appellant seeking property settlement orders pursuant to s 90SM of the Act¹³. In particular, the Trustee sought an order for the sale of the home.

21 Proceedings before the primary judge were confined to the issue of whether the de facto relationship had broken down. The primary judge found that the respondent's conduct during the demise of the appellant's mental capacity was inconsistent with a "fundamental premise" of their relationship, namely the strict separation of their assets¹⁴. That inconsistent conduct, all of which occurred while the appellant was "labouring under an incapacity"¹⁵, comprised¹⁶: the entry into a new enduring power of attorney that "favoured [the respondent's] rights over hers"; the respondent instructing solicitors to prepare an updated will "on terms vastly more favourable to him"; the respondent's "unwillingness to cooperate" with the appellant's children in the administration of her affairs; the respondent's "persistent" refusal to permit the Trustee to sell the home to cover the RAD while "neglecting to pay any of the [appellant's] care costs", thus depleting her estate; the respondent's proposal that the appellant's "super be used in the first instance to meet her costs", and then his subsequent proposal that "he pay the DAP fees in the first instance and be reimbursed by the [appellant's] estate"; and the respondent's

12 Pursuant to s 16(g). See also ss 56-57.

13 *Fairbairn* [2020] FCCA 1556.

14 *Fairbairn* [2020] FCCA 1556 at [154].

15 *Fairbairn* [2020] FCCA 1556 at [154], [161].

16 *Fairbairn* [2020] FCCA 1556 at [155]-[160].

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"ongoing and deliberate frustration" of the Trustee's lawful administration of the appellant's financial affairs. The primary judge found that this conduct was "unequivocally indicative of and consistent only with ... the cessation of the de facto relationship as it previously existed"¹⁷. His Honour held that the relationship had ceased at the latest by 25 May 2018, when the respondent suggested that the DAP be paid for in the first instance from the appellant's superannuation while he remained in the home. On an objective assessment of the respondent's conduct, the primary judge imputed an intention to separate from the appellant. It followed that there had been a breakdown in the de facto relationship.

22 On appeal, the Full Court characterised the events described above differently¹⁸. The respondent sought leave to adduce further evidence of certain matters said to have taken place since the primary hearing. It is unnecessary to traverse that material in any detail but it comprised, in general terms, claims that the respondent had visited the appellant regularly since the date of the primary hearing (until the aged care facility imposed various restrictions due to the onset of COVID-19). As the Full Court found in favour of the respondent for other reasons, it determined that it was not necessary to consider that material. In this Court, that material was only relied upon by the respondent to support an application for revocation of special leave. That application is refused¹⁹.

23 The appellant did not seek to defend the primary judge's conclusion about imputed intention. Nor did she contend that a breakdown had occurred by reason of her mental incapacity and her living permanently in aged care. The appellant accepted that more was needed before it could be concluded that a de facto relationship had broken down. Instead, the appellant submitted that the Full Court should infer from the course of events that the respondent had in fact intended to separate from the appellant. That submission was rejected. The Full Court reviewed the conduct identified by the primary judge. None of the conduct was found to be fundamentally inconsistent with a continuing de facto relationship. Some of it was considered to be "bad behaviour" on the part of the respondent but

¹⁷ *Fairbairn* [2020] FCCA 1556 at [161].

¹⁸ *Radecki* (2020) 62 Fam LR 62.

¹⁹ See [41] below.

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such behaviour, the Full Court observed, is "all too often a hallmark of a relationship"²⁰. At most, their Honours concluded that the conduct demonstrated that a dispute existed between the respondent, on the one hand, and the Trustee and the appellant's children, on the other, "as to how best [to] manage" the appellant's affairs²¹.

The appellant's arguments

24 The appellant's primary argument was that a de facto relationship breaks down when the parties stop "living together", as required by s 4AA(1)(c) of the Act, and in this case that occurred when the appellant moved into the aged care facility. This contention had previously been disavowed by the appellant in the Full Court below.

25 The appellant submitted that the phrase "living together" in s 4AA(1)(c) requires cohabitation at some place and in some way, and that this is an irreducible minimum of what a de facto relationship, as defined, must continuously display. A permanent cessation of cohabitation, whether voluntarily undertaken or involuntarily imposed, and for whatever reason, was said to result, in every case, in a de facto relationship ending.

26 Senior counsel for the appellant did not shy away from the potentially harsh consequences of this primary submission. A breakdown, it was said, would take place for the purposes of s 90SM of the Act, triggering the possibility of property settlement orders, regardless of any continuing genuine love or affection between the couple, so long as there had been a permanent cessation of cohabitation. The appellant submitted that such a bright line test was appropriate because s 90SM was simply the "gateway" to a court having jurisdiction. Thereafter, once seized with jurisdiction, a court has a broad discretion to make orders that would be "just and equitable"²²; such discretion would permit the court to consider factors like the possible presence of continued love and affection. Here, because the appellant had been placed into aged care permanently, and because the parties had ceased to

20 *Radecki* (2020) 62 Fam LR 62 at 70 [49].

21 *Radecki* (2020) 62 Fam LR 62 at 71 [53].

22 *Family Law Act 1975* (Cth), s 90SM(3).

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cohabit at the home, it followed that there had been a breakdown for the purposes of s 90SM of the Act.

27 The appellant's alternative argument was that the de facto relationship between the appellant and the respondent had broken down by no later than 25 May 2018 by reference to the circumstances listed in s 4AA(2). In this context, the appellant submitted that "breakdown" does not necessarily mean "end".

"Living together" and "breakdown"

28 Section 4AA(1)(c) identifies the relationship which is the concern of the Act: "a relationship as a couple living together on a genuine domestic basis". The existence of such a relationship is determined having regard to "all the circumstances" of a relationship; significantly, those "circumstances" include any or all of the circumstances listed in s 4AA(2), and, by reason of s 4AA(3), no particular finding about any circumstance is necessary for there to be a de facto relationship. Consistently with the reality that human relationships are infinitely mutable, in determining whether a de facto relationship exists a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate²³.

29 A de facto relationship will have broken down when, having regard to all the circumstances, the parties no longer "have a relationship as a couple living together on a genuine domestic basis". Such a conclusion is not precluded by the presence of an ongoing relationship of some sort. That is not the inquiry. The question is whether a de facto relationship exists or has broken down.

30 In the context of a human relationship, "breakdown" refers to the "end" or "breakup" of what had been an enduring emotional bond. It is the "breakdown" or "end" of a de facto relationship that is the trigger point for the Federal Circuit and Family Court to be seized of jurisdiction to make a property settlement order under s 90SM of the Act. It would make no sense for such a jurisdiction to arise before a de facto relationship had ended. The appellant's submission finds no support in statutory context, in history, or in any extrinsic material referred to the Court's attention.

23 *Family Law Act 1975* (Cth), s 4AA(4).

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31 Other provisions in the Act support the view that "breakdown" refers to the "end" of a de facto relationship. For example, s 44(5) addresses the timing of when, amongst other things, a proceeding under s 90SM may commence. It relevantly provides that a party to a de facto relationship may apply for an order under s 90SM if the application is made "2 years after the end of the de facto relationship"²⁴. The phrase "after the breakdown" in s 90SM(1), when considered in this context, must refer to what is described in s 44(5) as "the end of the de facto relationship". The temporal fixing of "breakdown" with the "end" of a relationship is reinforced by each of ss 90UB, 90UC and 90UD, which respectively deal with financial agreements made before, during or after the breakdown of a de facto relationship. In that respect, s 90UC(1)(a) is especially instructive. That section refers to parties "while in a de facto relationship" making a "written agreement" about the distribution of their property "in the event of the breakdown of the de facto relationship". The juxtaposition of a continuing de facto relationship, denoted by the phrase "while in", with the word "breakdown" strongly supports the conclusion that "breakdown" refers to the end of a relationship²⁵.

The need for cohabitation

32 The appellant's primary argument that the parties' de facto relationship had broken down when the appellant was placed into an aged care facility such that the parties were no longer physically living together must be rejected. It is contrary to the text of s 4AA and to statutory context and purpose to which reference has been made. It is also contrary to real-world considerations. It would be productive of injustice if two people who live apart (including for reasons of health) were incapable of remaining in a de facto relationship.

33 Living together for the purposes of s 4AA(1) will often, perhaps usually, mean cohabitation of some residence by a couple for some period of time. But cohabitation of a residence or residences is not a necessary feature of "living together". That phrase must be construed to take account of the many various ways in which two people may share their lives together in the modern world²⁶. Two

24 *Family Law Act 1975* (Cth), s 44(5)(a)(i).

25 The respondent also referred to ss 90RC, 90SE, 90SL.

26 cf the circumstances described in *SZOXF v Minister for Immigration and Border Protection* (2015) 231 FCR 1 and in *Crabtree v Crabtree* (1963) 5 FLR 307.

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people, for any number of reasons, may not reside in the same residence, but nonetheless be in a de facto relationship in the sense required by s 4AA.

34 The fact that here the appellant was placed into an aged care facility may be relevant to the existence or breakdown of a de facto relationship under the Act, but it could not, of itself, be determinative of that issue. The same observation applies to the decline in the appellant's cognitive ability.

35 Two decisions support the proposition that physical cohabitation at a single home or homes is not a necessary feature of an ongoing relationship whether by way of marriage or otherwise; it is not an irreducible minimum that all relationships must exhibit.

36 In *SZOX v Minister for Immigration and Border Protection*²⁷, the Full Court of the Federal Court of Australia traversed the authorities concerning the phrase "live separately and apart" in s 5CB(2)(c)(ii) of the *Migration Act 1958* (Cth), for the purposes of the definition of "de facto relationship" in s 5CB(2). Section 5CB(2) provides, amongst other things, that a person is in a de facto relationship with another person if: "they have a mutual commitment to a shared life to the exclusion of all others"²⁸; their relationship is "genuine and continuing"²⁹; and they "live together" or "do not live separately and apart on a permanent basis"³⁰. The authorities considered by the Court included *Crabtree v Crabtree*³¹, in which the Full Court of the Supreme Court of New South Wales concluded that a husband and wife could live "separately and apart"³² even when they both resided in the same home. That might take place where "there is such a forsaking and abandonment by one spouse of the other that the court can say that

27 (2015) 231 FCR 1.

28 *Migration Act 1958* (Cth), s 5CB(2)(a).

29 *Migration Act 1958* (Cth), s 5CB(2)(b).

30 *Migration Act 1958* (Cth), s 5CB(2)(c).

31 (1963) 5 FLR 307.

32 For the purposes of s 28(m) of the *Matrimonial Causes Act 1959* (Cth).

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the spouses were living lives separate and apart from one another"³³. Consistently with that conclusion, the Full Court recognised that it was possible for a husband and wife who maintained "separate residences" to not be living separately and apart, so long as they lived as a "single household"³⁴. The Full Court drew a distinction between living in separate houses as against separate households. That distinction, it was held, applied also to the concept of "cohabitation"³⁵. It followed that in *SZOXP*, the relevant parties did not "live separately and apart" even though they had not physically lived together due to, amongst other things, the applicant being in detention.

37 Next, involuntary and enduring separation – due to, for example, illness – will not always justify a conclusion that a relationship has ended, thus triggering a need for a court to intervene to make a property settlement order. So much was decided in *Stanford v Stanford*³⁶. That case concerned a marriage and a residence in which a husband and wife had lived for 37 years. The wife had a stroke and developed dementia. She was admitted into full-time residential care while the husband remained at the residence. He continued to provide for her and put \$40,000 into a bank account to contribute to her medical needs or requirements. The plurality of this Court held that the "bare fact" of involuntary separation would not demonstrate, for the purposes of s 79(2) of the Act, that it was "just and equitable to make a property settlement order"³⁷. The plurality observed that when both parties are competent it can be assumed that any "necessary or desirable adjustment" to their previous financial arrangements will be made consensually³⁸.

33 *Hopes v Hopes* [1949] P 227 at 234 per Bucknill LJ, approved in *Crabtree* (1963) 5 FLR 307 at 309 per Sugerman and Dovey JJ.

34 *SZOXP* (2015) 231 FCR 1 at 13-14 [57]-[59] per Kenny, McKerracher and Edelman JJ.

35 *SZOXP* (2015) 231 FCR 1 at 13 [58] per Kenny, McKerracher and Edelman JJ.

36 (2012) 247 CLR 108; cf *Main v Main* (1949) 78 CLR 636 at 643 per Latham CJ, Rich and Dixon JJ.

37 *Stanford* (2012) 247 CLR 108 at 122 [43] per French CJ, Hayne, Kiefel and Bell JJ.

38 *Stanford* (2012) 247 CLR 108 at 123 [44] per French CJ, Hayne, Kiefel and Bell JJ.

Importantly, the plurality also observed that if one of the parties has become incompetent "it is not to be assumed that the other party lacks the will and ability to make those necessary or desirable adjustments"³⁹. Those necessary or desirable adjustments were made in *Stanford* when the husband provided for his wife. In such circumstances, it was not "just and equitable" to make a property settlement order requiring the sale of the residence when it had not been shown "that the wife's needs during her life were not being or would not be met"⁴⁰.

38 The presence of a mutually recognised de facto or marital relationship involving a shared life was critical in each of *SZOXP*, *Crabtree* and *Stanford*. In *Stanford*, the continued subsistence of such a relationship explained the making of the "necessary or desirable adjustments" to the property interests of the husband and wife. In contrast, where the "necessary or desirable adjustments" are not made, and one party fundamentally acts contrary to the interests of the other in relation to the property of the couple, it may be possible to conclude that the mutual commitment to a shared life has ceased.

39 The language of s 4AA of the Act and its reference to "living together" requires no different approach to determining whether a relationship exists of the kind defined. "Living together", consistently with authority, should be construed as meaning sharing life as a couple. Section 4AA does not prescribe any way by which a couple may share life together. Its language is sufficiently broad to accommodate the great variety of ways a de facto relationship may exist⁴¹. That conclusion is supported by the varied factors listed in s 4AA(2). In a given case, some of the factors listed in s 4AA(2) may be relevant and some may be irrelevant; inevitably some may have greater prominence than others. A conclusion that a de facto relationship has ended may also arise because of factors *not* listed in s 4AA(2). Such a conclusion is mandated by s 4AA(3) and (4). In particular, s 4AA(4) is a statutory recognition that what may constitute a genuine de facto relationship is not to be determined in the same way in every case by reference to rigid criteria that must always be satisfied. In that respect, the language of

39 *Stanford* (2012) 247 CLR 108 at 123 [44] per French CJ, Hayne, Kiefel and Bell JJ.

40 *Stanford* (2012) 247 CLR 108 at 124 [49] per French CJ, Hayne, Kiefel and Bell JJ.

41 cf *FO v HAF* [2007] 2 Qd R 138 at 149 [26] per Keane JA (White J agreeing).

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s 4AA(2)(b) does not assume that every de facto relationship must have a "common residence" to some "extent" and of some "nature". Such a construction is entirely denied by s 4AA(3).

40 The decision in *Yesilhat v Calokerinos*⁴², upon which the appellant relied, requires no contrary conclusion. The reasoning in that case was directed to the proposition that a de facto relationship cannot exist if two people have *never* lived together⁴³. That is not this case. The correctness of the proposition need not be determined.

41 The respondent here had applied for special leave to be revoked, on the ground that the appellant's primary argument was new. That application is dismissed. The argument has been addressed and dismissed on its merits.

The de facto relationship here had broken down

42 The appeal must be allowed. That is not because the appellant was obliged to move permanently into an aged care facility. Nor is it because of the appellant's mental incapacity. While each of these matters may be relevant to the inquiry into whether the de facto relationship between the appellant and respondent had broken down, neither is determinative. A de facto relationship may continue even though the parties physically reside at different locations, and despite one of those parties suffering from (severe) illness.

43 Instead, for the purposes of ss 90SM and 4AA of the Act, having regard to all of the circumstances, including the conduct of the respondent, the de facto relationship between the appellant and the respondent had, by no later than 25 May 2018, broken down. Those circumstances demonstrated a persistent refusal by the respondent to make "the necessary or desirable adjustments", to use the language of *Stanford*, which might have evidenced an ongoing relationship.

44 Those circumstances included the fact that the parties had lived together since about 2005 but by 2017 were occupying separate rooms, and that from

42 [2021] NSWCA 110.

43 *Yesilhat* [2021] NSWCA 110 at [93] per Macfarlan JA (Bathurst CJ agreeing), [137] per Brereton JA (Bathurst CJ agreeing).

January 2018 the appellant lived at an aged care facility⁴⁴. It may be accepted that those two circumstances are not of themselves determinative.

45 It was, however, an essential feature of the relationship here that the appellant and respondent kept their assets separate from each other, consistently with the Cohabitation Agreements; but by 2017, the respondent had begun to act as if he were no longer bound by this arrangement⁴⁵. He secured a new enduring power of attorney giving him considerable control over the appellant's assets, including the home; he procured a revised will obtained while the appellant was hospitalised, which markedly favoured his financial interests; and he took these steps when he must have known that the appellant's capacity to act in her own best interests was impaired. The respondent's conduct was so marked that it led to the intervention of NCAT and the appointment of the Trustee. Thereafter, the respondent refused to permit the home to be sold, made parsimonious attempts to make financial contributions to support the appellant's care, refused to cooperate with the Trustee and the appellant's children concerning her ongoing care, and failed to disclose his own assets to Centrelink. The respondent's persistent refusal to reside elsewhere and permit the home to be sold served his and not the appellant's interests⁴⁶.

46 Whilst there had been a degree of mutual commitment to a shared life⁴⁷, that commitment ceased when the respondent refused to make the "necessary or desirable adjustments" in support of the appellant and, by his conduct, acted contrary to her needs. It may otherwise be accepted that the breakdown of the respondent's relationship with the appellant's children is not, in the circumstances of this case, a decisive consideration⁴⁸. In contrast, the "public aspects"⁴⁹ of the

44 *Family Law Act 1975* (Cth), s 4AA(2)(b).

45 *Family Law Act 1975* (Cth), s 4AA(2)(d).

46 *Family Law Act 1975* (Cth), s 4AA(2)(e).

47 *Family Law Act 1975* (Cth), s 4AA(2)(f).

48 *Family Law Act 1975* (Cth), s 4AA(2)(h).

49 *Family Law Act 1975* (Cth), s 4AA(2)(i).

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relationship are important. This is a case where the respondent's conduct in threatening the interests of the appellant justified the intervention of NCAT and the appointment of the Trustee to take responsibility for her. Thereafter, it has been the Trustee, and not the respondent, that has made, and is trying to make, the "necessary or desirable adjustments".

47 In aggregate, these circumstances support the conclusion that there had been a breakdown in the parties' de facto relationship by no later than 25 May 2018. With respect to the Full Court below, this was more than just a dispute between the respondent – a man found to have behaved poorly – and the Trustee and the appellant's children.

Orders

48 For these reasons the appeal must be allowed. Orders 2, 3 and 4 made on 11 December 2020 by the Full Court must be set aside and, in their place, the appeal to that Court must be dismissed. It was a condition of the grant of special leave that the Trustee must pay the costs of both parties of the application for special leave and of the appeal. Those orders as to costs should be made.

