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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification.

This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

1. Persons no longer living together by reason of illness or infirmity are not in a de facto relationship under the Family Law Act.

(a) Section 4AA(1)(c) of the *Family Law Act 1975* (Cth) (**FLA**) requires persons to be "living together" to be in a de facto relationship {AS [37]-[43]; JBA 60; cf *Interpretation Act 1987* (NSW), s 21C; *Yesilhat v Calokerinos* [2021] NSWCA 110 at [126]-[152]}.

(b) Unlike the definition of a de facto relationship in s 4AA of the FLA, the otherwise relevantly identical definition of a de facto relationship in s 2F(4) of the *Acts Interpretation Act 1901* (**AIA**) provides that persons are taken to be living together if they are living separately only because of illness or infirmity {JBA 842}.

(c) The definition of a de facto relationship in s 2F of the AIA has its genesis in the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws - Superannuation) Act 2008* which was before Parliament at the same time and considered by the same Senate Committee as the *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (Cth) (**De Facto Amendments Act**) which introduced the definition of a de facto relationship in s 4AA of the FLA {JBA 1071-1072; SJBA 139; AR [6]}.

(d) Unusually for the AIA, the definition of a de facto relationship in s 2F only applies where that definition is specifically invoked {AIA s 2D; JBA 1769; AR [6]}.

2. The "breakdown" of a de facto relationship does not require a separation.

(a) The "breakdown" of a de facto relationship is a jurisdictional requirement for the making of property and maintenance orders in respect of parties to a de facto relationship {FLA, ss 4 (definition of "de facto financial cause"), 39A, 90SE, 90SM; JBA 36-37, 159-160, 471-473, 483-491}.

(b) "Breakdown" is defined in s 4 of the FLA but only insofar as it excludes a breakdown of a de facto relationship by reason of death {JBA 33}.

(c) While the "breakdown" of a de facto relationship may well coincide with a "separation" the concepts should not be conflated because:

(i) the legislation uses "breakdown" rather than "broken down irretrievably" and "separation" {AS [44]-[49]; FLA, 48-49, 90UF-90UG; JBA 180, 508-509};

(ii) the purpose of the De Facto Amendments Act was to extend the financial settlement regime that existed under the FLA to parties to a de facto relationship {AS [26]; JBA 1565, 1650-1651}. There is no requirement that parties to a marriage have separated before the court has jurisdiction to make property and maintenance orders under the equivalent provisions in Part VIII of the FLA {*Stanford v Stanford* (2012) 247 CLR 108}; and

(iii) a "de facto relationship" is a statutory concept that can and will "end" once the parties cease to satisfy the requirements of s 4AA without the need for a "separation" or an intention to separate {AS [50]; FLA, s 44(5); JBA 171}.

3. The Full Court erred in finding that there was "no relevant change of substance to the de facto relationship from 2005 or 2006 to date" {AJ [55]}.

(a) It is wrong to seek to characterise the changes that had occurred as simply reflecting a 'different phase or stage' of the parties' relationship {RS [7], [44]}.

(b) There had been fundamental changes that had occurred since the onset of Ms Fairbairn's dementia which constituted a breakdown including: (i) the parties were no longer living together; (ii) the Trustee had been appointed by NCAT, instead of Mr Radecki, to make financial and health decisions for Ms Fairbairn; and (iii) Mr Radecki procuring a power of attorney and life estate after Ms Fairbairn was vulnerable to social and financial abuse {AS [6]-[17]; AR [3]}.

(c) Alternatively, the parties no longer satisfied the definition of a de facto relationship in s 4AA of the FLA as they had not been living together {AS [55]-[56]}.

4. Special leave should not be revoked.

(a) The respondent's complaint that arguments were not put below is the same argument that was unsuccessfully made in opposition to the application for special leave {AR [2]; RS [11]-[16]; AFM 63-64}.

(b) The appeal raises questions of public importance for the Trustee and its equivalents in other States and Territories about the management of the affairs of parties to a de facto relationship who have lost capacity {AR [2]; AFM 13}.

(c) There is no prejudice to the respondent as: (i) the Trustee has agreed to pay his costs and not disturb existing costs orders {CAB 67}; (ii) the concession as recorded at AJ[52] is not contrary to the appellant's arguments, and in any event the question is one of statutory construction {cf RS [13], [15(d)], [16]; *Stanford v Stanford* (2012) 247 CLR 108 [42]-[46]}; and (iii) no additional evidence could have been led and the evidence sought to be adduced by the respondent in the Full Court was and is irrelevant {cf RS [16]; AFM 5}.

8 March 2022 **Bret Walker**