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

RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION

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

PART II ISSUES ON THE APPEAL

2. The first issue is whether special leave should be revoked: see **Section V, Part I** below.

3. The second set of issues, which arise if the Trustee[1] is permitted to run its primary argument, comprises of the following:

   (a) whether, on the proper construction of the *Family Law Act 1975* (Cth) (**Act**), the term "breakdown of a de facto relationship" has shades of meaning, apt in some situations to embrace "something other than the end of the relationship" (Appellant's Submissions (**AS**)[23], [44]); or whether, as the Respondent contends, it has a fixed meaning of being *breakdown to the point of failure*, or the *termination* or *end* of the de facto relationship;

   (b) whether, and if so how, a consideration of the State referrals of legislative power for the purposes of s 51(xxxvii) of the Constitution, and the extrinsic materials thereto,

[1] These submissions will use the term "Trustee" to refer to the Appellant. In name, the Appellant is Ms Fairbairn, but, in substance, it is the Trustee who has conducted this litigation as case guardian on her behalf (and of necessity without recourse to her instructions) at all stages, including in this Court.

inform the above question of construction, including in the light of likely inconsistencies under s 109 of the Constitution that would arise on the Trustee's argument; and

(c) if "breakdown" is capable of the shades of meaning alleged by the Trustee, how the term applies in the present situation which, in the Trustee's view, can be reduced to one where "one party to the de facto relationship has lost capacity and the other party to the relationship may not intend that they separate" (AS[2]): see **Section V, Part II** below.

4. The third issue, which arises if the Trustee is permitted to run its alternative argument, is whether a de facto relationship has necessarily broken down, irrespective of any other enquiry into the facts, where the parties live separately and apart on a permanent and full-time basis because of ill health (AS[55]-[56]): see **Section V, Part III** below.

PART III SECTION 78B NOTICES

5. The Trustee's notice under s 78B of the *Judiciary Act 1903* (Cth) requires supplementation by the Respondent to identify more clearly how the State referrals of power for the purposes of s 51(xxxvii) of the Constitution are relevant to the present case, including the likely inconsistencies under s 109 on the Trustee's primary argument.

PART IV MATERIAL FACTS

6. The Trustee's recitation of the facts omits the following matters that require emphasis.

7. *First*, the factual analysis reveals what the trial judge observed: Ms Fairbairn and the Respondent have enjoyed "a very practical and supportive relationship": *Fairbairn v Radecki* [2020] FCCA 1556 (**J**) (Core Appeal Book (**CAB**) 20) at J[54]. That practical support continues, although necessarily in a modified form in light of the decline in Ms Fairbairn's health and the onset of dementia. The Respondent visits Ms Fairbairn at the aged care facility in which she now resides "often and regularly": *Radecki v Fairbairn* (2020) 62 Fam LR 62; [2020] FamCAFC 307 (**AJ**) at [51]. These ongoing visits were "common ground" between the parties below: J[136]; [147]. In doing so, the Respondent assists with feeding Ms Fairbairn as she now has difficulties in that regard: J[136]. The Respondent has also arranged for a wheelchair-accessible vehicle for Ms Fairbairn's use: J[147]. The Respondent's evidence at trial to the effect that he continues to provide

Ms Fairbairn with "social, welfare and financial support" was accepted: J[146]-[147]. Ms Fairbairn – at least at the time of the trial in March 2020 – was continuing to visit the Town A Property (to adopt the term used at AS[6]): J[146]. While rejecting the legal characterisation of a continuing de facto relationship, the trial judge accepted that "there remains affection between the parties, and some ongoing relationship of sorts": J[163] (see also AJ[55]). This is simply a different and, sadly, difficult phase of the ongoing and longstanding de facto relationship between Ms Fairbairn and the Respondent.

8. *Secondly*, the duration of the de facto relationship is significant. The de facto relationship commenced in late 2005 or early 2006: J[1]; [52]-[53]; AJ[10]. When Ms Fairbairn was admitted to care in January 2018 (which is the earliest date by which the Trustee contends that the relationship had broken down), the couple had been in a de facto relationship for more than 12 years.

9. *Thirdly*, while there is an underlying conflict in this matter, it is not one as between Ms Fairbairn and the Respondent. The dispute exists between the Respondent and the Trustee, and relatedly with Ms Fairbairn's children "as to how [her] needs should be met": J[6]. It is a dispute as to *how* Ms Fairbairn's care is to be funded. This is not a dispute, for example, with the Public Guardian in relation to the nature of Ms Fairbairn's health care.[2] There is no suggestion that Ms Fairbairn is in a state of neglect, nor that her care has been affected: AJ[44]. The question is simply one as to which assets are to be deployed, and in which order, in funding her care. While unfortunate, the Respondent's resentment of the involvement of the Trustee (J[8]) cannot be equated in and of itself to a "breakdown" in his personal relationship with Ms Fairbairn. This conflict, the existence of which does not necessitate the "breakdown" of the de facto relationship, was recognised and accepted by the Full Court as being a distinct matter: AJ[46], [53].

10. *Fourthly,* the Respondent's resentment of the Trustee's involvement is in some part accounted for by the fact that Ms Fairbairn "had a longstanding reliance upon [the Respondent] to manage her affairs": J[108]. Notwithstanding the protracted dispute with the Trustee about the nature of the funding of Ms Fairbairn's care, it is not in contest that the Respondent has been making fortnightly payments of $1,000 for Ms Fairbairn's

[2] The Public Guardian was appointed in January 2018 to make health and welfare decisions on behalf of Ms Fairbairn, including in relation to accommodation and healthcare: J[101]; AJ[2].

ongoing accommodation expenses: J[134]-[135]. This arrangement has been in place since June 2019: AJ[5], [19] and [51].

PART V ARGUMENT

I Revocation of special leave

11. The Trustee succeeded at first instance *only* because – after the primary judge formed an adverse view of the Respondent's conduct (J[54]-[160]) (albeit one formed without the Trustee putting any of the propositions to the Respondent in cross-examination (J[46])) – the judge imputed an *objective intention* to the Respondent to separate from Ms Fairbairn (J[161]). Contra AS[20], J[161] (expressly premised upon J[154]-[160]) is not simply an additional, separate basis for the decision; it is *the* basis for the "overall" finding of the "cessation" of the de facto relationship. On appeal, the Trustee did not seek to support the concept of an imputed intention to separate (AJ[38]); nor does it do so here, disavowing an objective intention to "terminate" (AS[20]). Thus, the central plank of its success at first instance no longer remains; it has been expressly abandoned.

12. On appeal, the Trustee's primary argument (AJ[25]) was that the trial judge should be read as inferring that the Respondent *actually intended* to separate from Ms Fairbairn, an inference said to be open on the evidence. The Full Court soundly rejected both steps in that argument (AJ[40]-[54]). The Trustee does not reassert it (AS[22]).

13. The Trustee's alternative argument in the Full Court – which it now claims is the basis for its arguments in this Court (AS[22]) – is difficult to discern from the Full Court's judgment. It was disposed of swiftly at AJ[55], in reliance on what had been said in the preceding paragraphs of the judgment. From AJ[52] it emerges that the Trustee accepted that "breakdown" required more to be established than the diminution in Ms Fairbairn's capacity or the fact she was now in a managed care facility. The "more" which was asserted were the imputations about the Respondent's conduct summarised at AJ[42] (see AJ[53]). The Full Court concluded this demonstrated no more than a dispute between the Respondent and the Trustee/Ms Fairbairn's children as to how best to manage her affairs.

14. The Trustee was granted special leave to appeal against a clear indication from the Court that the notice of appeal would need concisely to capture the point sought to be advanced

in oral argument, rather than simply mirroring the diffuse proposed seven grounds of appeal.[3] Leave to appeal was not at large. The notice now filed is so general as to be uninformative: CAB 69.

15. From reading the Trustee's written outline, four central observations emerge:

(a) the Trustee does *not* reassert the contentions that the Respondent objectively intended, or actually intended, to separate from Ms Fairbairn;

(b) the Trustee does *not* assert specific error in how the Full Court at AJ[52]-[54] and AJ-[55] rejected its arguments;

(c) the Trustee raises arguments about the meaning of "breakdown", including the scope of the State referrals of power, which have not been advanced, or considered, in either court below (nor does the Trustee clearly bring to account in its written outline before this Court how the scope of the referrals bears upon the construction for which it contends, other than saying that it does not "offend against" the referrals: AS[49]); and

(d) the Trustee reneges on its clear and express concessions in the Full Court (as recorded in AJ[52]) in its framing of its primary and alternative arguments in this Court.

16. The Respondent respectfully submits that, when the entire history of the Trustee's conduct of this litigation is reviewed, special leave should be revoked. Important questions of construction with constitutional underpinnings, not exposed at the time special leave was granted, should not now be thrown up on appeal for the first time with no explanation why a skilled litigant bearing model litigant obligations did not raise them earlier. Concessions as to issues that the lower courts were being asked to determine should also not be thrown aside. Further, this Court cannot comfortably be satisfied that, had the Trustee squarely run in the courts below the two arguments now advanced, they might not have been met by additional evidence and argument on the Respondent's part.[4] All these matters demonstrate that this is an inappropriate vehicle for the test case that the Trustee seeks to advance.

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3 *Fairbairn v Radecki* [2021] HCATrans 1661 at 15.595-600.

4 Relevantly, the Respondent applied to adduce additional evidence in the Full Court below, but the application ultimately did not need to be determined because of his success on appeal: AJ[57].

II The Trustee's primary argument should be rejected

(a) *Introduction*

17. The key question to be resolved is the meaning to be attributed to a central statutory phrase in s 90SM of the Act: "after the breakdown of a de facto relationship". While it is a statutory concept that will always operate in a fact-intensive context, the "breakdown of a de facto relationship" is one that nevertheless requires a clear criterion for its application. This is especially so where it enlivens the Court's jurisdiction, and – even more fundamentally – is the linchpin for the referrals supporting the Commonwealth legislative scheme with respect to financial matters relating to de facto relationships.

18. The Trustee's approach offers no clear criterion; rather, the Trustee contends that the "breakdown" of a de facto relationship "can mean something other than the end of the relationship": AS[23]. Effectively the Trustee contends that there can be shades of "breakdown". So understood, a "breakdown" will often manifest as the "end" of the de facto relationship, but can also be a label to be applied to a relationship that has not "ended" or where there has been no "separation": AS[44]. The Trustee's proposed construction of the term to mean something other than *breakdown to the point of failure*, or *the termination* or *end* of the de facto relationship produces significant uncertainty and runs counter to the operation of the scheme established by Part VIIIAB of the Act concerning "Financial matters relation to de facto relationships". Correctly viewed, the "breakdown of the de facto relationship" is the statutory synonym for the relationship having ended. As demonstrated below, the referrals of legislative power by the relevant States were predicated upon the understanding that the scope of the referral was delineated by it being in respect of "financial matters relating to de facto partners arising out of the *breakdown* … of de facto relationships", and not otherwise.

(b) *State referrals of legislative power*

19. The enactment of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (**Amendment Act**), which introduced Part VIIIAB of the Act, relied on referrals by States to the Commonwealth in accordance with s 51(xxxvii) of the Constitution. The referrals implemented an agreement reached in 2002 by the Standing Committee of Attorneys-General (**SCAG**), which had "agreed to a referral of powers to

the Commonwealth in relation to dealing with property disputes relating to *separating* de facto couples".[5] Earlier referrals (excepting Western Australia) made it possible for disputes relating to the residence of and contact with children to be dealt with at the Commonwealth level; this further agreement would mean that property disputes could now also be dealt with in the same framework.[6]

20. New South Wales[7], Queensland[8], Victoria[9] and Tasmania[10] each referred power before the Amendment Act commenced in the period of 2003 to 2006. South Australia referred power in 2009[11] after the Amendment Act had commenced.[12] The terms of the referrals were developed in SCAG.[13] While the term "breakdown" is not directly defined in the respective referrals (other than by expressly excluding breakdown "by reason of

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5 The Hon Daryl Williams, Attorney-General, *Commonwealth wins de facto property power*, media release, 8 November 2002, https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/NJU76/upload_binary/nju761.pdf;fileType=application%2Fpdf#search=%22media/pressrel/NJU76%22 (accessed 13 December 2021; emphasis added) (**2002 Media Release**). See also the Second Reading Speech to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth), Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008 (**Commonwealth Amendment Bill Second Reading Speech**) , 5823.

6 2002 Media Release. See also Commonwealth Amendment Bill Second Reading Speech, 5823.

7 *Commonwealth Powers (De Facto Relationships Act 2003* (NSW) (**NSW Referral Act**). The purpose of the NSW Referral Act is set out in s 1(2) (emphasis added): "The purpose of this Act is to refer certain financial matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth for the purposes of section 51 (xxxvii) of the Constitution of the Commonwealth."

8 *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) (**Qld Referral Act**). The purpose of the Qld Referral Act is set out in s 1(2) (emphasis added): "The purpose of this Act is to refer certain financial matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth for the purposes of section 51 (xxxvii) of the Constitution of the Commonwealth." The Explanatory Note to the Bill enacting the Qld Referral Act noted at p. 2: "The major benefit that will flow from having de facto property disputes dealt with under the Family Law Act is that both child and property issues will be dealt with by a single court. This will reduce duplication of proceedings, costs and help minimise the stress that accompanies the breakdown of relationships."

9 *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic) (**Vic Referral Act**). The purpose of the Vic Referral Act is set out in s 1: "The purpose of this Act is to refer certain financial matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth for the purposes of section 51(xxxvii) of the Constitution of the Commonwealth."

10 *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas) (**Tas Referral Act**).

11 *Commonwealth Powers (De Facto Relationships) Act 2009* (SA). The referral of power with respect to de facto relationships by the State of South Australia became operative on 1 July 2010.

12 A partial referral by Western Australia with respect to superannuation matters was not taken up in the Amendment Act. See the *Commonwealth Powers (De facto Relationships) Act 2006* (WA) and s 90RA(3) of the Act.

13 For example, it was noted in respect of the NSW Referral Act that the NSW referring legislation was "prepared in conjunction with SCAG": New South Wales, *Parliamentary Debates*, Legislative Council, 15 October 2003, 3843. See also the Explanatory Notes to the Qld Referral Act at p. 2, and the Second Reading Speech in respect of the Tas Referral Act, Tasmania, *Parliamentary Debates*, Legislative Council, 1 November 2006, 45.

death"[14]), its equivalence to the *breakdown to the point of failure*, *termination* or *end* of the relationship clearly emerges from a review of the extrinsic materials both in relation to the referral legislation and the Amendment Act.

21. The extrinsic materials in respect of the referrals clearly identify the central mischief to be addressed as being the inability to have a single court determine the issues flowing from the end of a relationship, where disputes as to both the custody of and access to children and also the division of property were in issue.[15] When the Amendment Act was introduced, the then-Commonwealth Attorney-General noted that the legislation "implement[ed]" the 2002 SCAG agreement, and that it would provide "greater protection for *separating* couples" and would apply to "de facto relationships that breakdown after the amendments commence in the States that have referred power to the Commonwealth and in the Territories".[16] The referrals also achieved uniformity, where previously the "laws concerning the property of de facto couples var[ied] from one State to another".[17]

22. Quite deliberately, and in contra-distinction to the position with legal marriages, the referrals were not drafted by reference to *intact* de facto relationships (that is, relationships that have not "broken down"). Writing extrajudicially in 2008, his Honour Justice Watts observed that the "power that has been referred by the States is the power

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14 NSW Referral Act, s 4(1); Qld Referral Act, s 4(1); Vic Referral Act, s 4(1); Tas Referral Act, s 4(1); SA Referral Act, s 4(1).

15 For example, in respect of the NSW Referral Act, it was noted that de facto couples would "be able to use federal courts to resolve issues relating to both children and property upon the breakdown of a relationship. The ability to have both children and property issues dealt with by a single court will help minimise the heavy burdens and stresses that accompany the breakdown of any relationship": New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 September 2003, 3237 and New South Wales, *Parliamentary Debates*, Legislative Council, 15 October 2003, 3844. It was similarly observed in the Explanatory Notes to the Qld Referral Act at p. 2: "The major benefit that will flow from having de facto property disputes dealt with under the Family Law Act is that both child and property issues will be dealt with by a single court. This will reduce duplication of proceedings, costs and help minimise the stress that accompanies the breakdown of relationships." In respect of the Tas Referral Act, it was observed that the "ability to have both children and property issues dealt with by a single court will help minimise the heavy burdens and stresses that accompany the breakdown of any relationship".

16 The Hon Robert McClelland, Attorney-General, *Financial burden lifted from separating de facto couples*, media release, 25 June 2008 [emphasis added], https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/HSTQ6/upload_binary/hstq60.pdf;fileType=application%2Fpdf#search=%22media/pressrel/HSTQ6%22 (accessed 13 December 2021). See also Commonwealth Amendment Bill Second Reading Speech, 5823.

17 Commonwealth, Parliament of Australia, Bills Digest, Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) (**Commonwealth Bills Digest**), p. 7. See also Commonwealth Amendment Bill Second Reading Speech, 5823.

to deal with financial matters arising out of the breakdown of a relationship (other than by reason of death)" and that "this creates a difference between marriage and de facto relationships as to when the power to make orders arises", observing that "[t]echnically", the "parties to a marriage can apply for a s 74 or s 79 order *even if their marriage is intact*". Justice Watts further observed that "State property laws therefore still govern arrangements for people living in *intact de facto relationships*"[18]. The Explanatory Memorandum to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) (**Commonwealth EM**) makes the same observation, flowing from the scope of the referrals: "…Part VIIIA agreements can be made in respect of arrangements for maintenance of a party to the marriage *during the marriage*, while Part VIIIAB financial agreements are confined to dealing with financial arrangements in the *event of breakdown* of the relationship".[19]

23. The terms of the referrals by NSW, Queensland, Victoria and Tasmania were relevantly in respect of "financial matters relating to de facto partners arising out of the *breakdown* (other than by reason of death) of de facto relationships". The referral made by South Australia included "companion couple relationships", but otherwise was in identical terms. The Commonwealth EM explains that the referrals were made in circumstances where the "breakdown" of a relationship equated to the event of separation and its "end":

> Presently, the financial arrangements between *separated* de facto couples are subject to State and Territory law, and these laws vary between jurisdictions. The Bill will offer *de facto couples covered by the bill* a nationally consistent financial settlement regime, to minimise jurisdictional disputes and uncertainties that sometime impede settlement of these matters under State and Territory law. The Bill will also offer *these de facto couples* access to the family law system for determination of their financial matters arising on *relationship breakdown*.[20]

24. Further, it was critical to consider upon enactment of the Amendment Act *when* a "breakdown" had occurred. For referring States other than South Australia, the Commonwealth laws for the division of property for people in de facto relationships that

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18 The Honourable Justice Garry Watts, "De facto property under the Family Law Act" (FamCA) [2008] FedJSchol 29, pp. 3, 26 (emphasis added).

19 Commonwealth EM at [176] (emphasis added).

20 Commonwealth EM at p. 1 ("General Outline") (emphasis added).

break down commenced on 1 March 2009: see s 2, Amendment Act. If the parties separated before 1 March 2009 then the relevant State laws would continue to apply: see s 86(1), Amendment Act. The Commonwealth laws commenced in South Australia on 1 July 2010. The need to clearly identify the circumstances in which the new Commonwealth regime would apply by reference to the "breakdown" of the relationship further reinforces that what is caught by that term is the end of the relationship.

25. In summary, the terms of the referrals support the construction of the "breakdown of a de facto relationship" for the purpose of the Act as meaning that the relationship has broken down to the point of failure and has ended.[21]

(c) ***The scheme of the Act***

26. The following features of the Act are important. *First*, within Part I of the Act, s 4(1) defines the term "breakdown" in the same terms for marriage as it does for a de facto relationship – that is, by excluding the event of death from its scope. This is consistent with the scope of the referrals and replicates the definition of "breakdown" in the State referral legislation.[22] The exclusion of death from breakdown serves as an important limitation. The evident purpose is that the ample jurisdiction that State courts and tribunals possess over the common law and statutory law of wills, probate and succession, is not to be surrendered to the Commonwealth or rendered inoperative under s 109 of the Constitution by inconsistent Commonwealth legislation.

27. *Secondly*, the implications flowing from the terms of the referrals are seen again in relation to the definition of "de facto financial cause" in s 4(1) of the Act, which provides (emphasis added):

> ***de facto financial cause*** means:
>
> (a) proceedings between the parties to a de facto relationship with respect to the maintenance of one of them after the breakdown of their de facto relationship; or

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[21] The impact of the referrals on the task of construction was correctly observed in *Vine v Carey* [2009] FMCAFam 1017 at [18]: "It is in the nature of relationships that they tend to break down over time. I consider though that the term breakdown in the context of the Act and having regard to the referral of powers by participating States, should be interpreted such that the Court, before exercising power under the Act, should be satisfied, according to the requisite standard of proof (the balance of probabilities), that the de facto relationship had broken down *to the point that it had failed and had ended.*" [emphasis added].

[22] NSW Referral Act, s 4(1); Qld Referral Act, s 4(1); Vic Referral Act, s 4(1); Tas Referral Act, s 4(1); SA Referral Act, s 4(1).

(b) proceedings between:

(i) a party to a de facto relationship; and

(ii) the bankruptcy trustee of a bankrupt party to the de facto relationship;

with respect to the maintenance of the first-mentioned party after the breakdown of the de facto relationship; or

(c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them; or

(d) proceedings between:

(i) a party to a de facto relationship; and

(ii) the bankruptcy trustee of a bankrupt party to the de facto relationship;

with respect to the distribution, after the breakdown of the de facto relationship, of any vested bankruptcy property in relation to the bankrupt party; or

…

28. As can be seen, paragraphs (a) to (d) of the definition – so as to fall within the terms of the referrals – are limited to proceedings taken "*after the breakdown*" of the relevant de facto relationship. Indeed, "[d]ue to the particular reference of power from the states, the definition limits the proceedings in these matters to proceedings taken once the relevant de facto relationship has broken down".[23] As the Full Court observed in *Harriott v Arena* [2016] FamCAFC 69; [2016] FLC 93-702 at [31], the definition of "de facto financial cause" is such that it "largely corresponds" with the definition of "matrimonial cause" in the Act in relation to married couples, but the "only point of difference in cases involving couples who never married is that the jurisdiction is confined to the 'distribution' of property after the 'breakdown' of the de facto relationship". The language of "*after* the breakdown of a de facto relationship" in this suggests that the "breakdown" can be attributed to a fixed point in time where circumstances that existed prior to that event are fundamentally different to those that exist after it.

29. *Thirdly*, s 4(1) of the Act provides that "de facto relationship" has the meaning given by s 4AA. Subsection 4AA(1) makes it plain that "all the circumstances of" the relationship are to be considered in determining whether persons are "in a de facto relationship". Subsection 4AA(2) then non-exhaustively lists relevant circumstances for the purpose of

[23] Commonwealth Bills Digest, p. 19.

that enquiry. The effect of s 4AA(3) is that no particular circumstance, or combination of circumstances, is "necessary" for the purpose of "deciding whether the persons have a de facto relationship", within the framework of being a "couple living together on a genuine domestic basis" as defined by s 4AA(1)(c). Conversely, as the Full Court has held, the "task of determining whether a relationship has ended at or before a particular date is precisely the same task that must be performed when determining whether a de facto relationship exists in the first place".[24]

30. *Fourthly,* within Part V of the Act, concerning "Jurisdiction", Division 2 deals with jurisdiction in "de facto financial causes". Section 39A makes provision for the institution of a "de facto financial cause" under the Act, and s 39A(5) prevents such a de facto financial causes from being instituted otherwise than under the Act. Section 39B then confers jurisdiction on the listed courts in respect of de facto financial causes instituted under the Act.

31. *Fifthly,* Part VIIIAB of the Act then deals with "Financial matters relating to de facto relationships". Within Division 1, Subdivision B addresses the "Relationship with State and Territory laws". As highlighted in the Commonwealth EM, s 90RC(2) "is a critical provision that delineates the operation of federal de facto financial provisions under the Act, and the continued operation of State and Territory law where federal law does not apply".[25] The Commonwealth EM further describes s 90RC as carving out an "exclusion zone" for the operation of the new provisions, and states that the ousted State and Territory laws "are necessarily confined to the scope of the State referred powers, *being in relation to financial matters arising out of the breakdown of de facto relationships, and to the area dealt with under federal law"*.[26] In short, "[w]here federal jurisdiction applies to de facto financial matters under the provisions of the Bill, state and territory laws dealing with the same subject matter are excluded".[27] Thus, the meaning of "breakdown" is critical to the interrelationship between the Act and relevant State and

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[24] *Clarence v Crisp* (2016) FLC 93-728; 55 FamLR 292 at [52], as recently cited with approval in *Lombard v Wamsley* [2021] FamCAFC 124 at [24] and in *Mayson v Wellard* [2021] FamCAFC 115; 359 FLR 165 at [43]. See also *Moby v Schulter* [2010] FamCA 748; (2010) FLC 93-447 at [132]; *H v P* [2011] WASCA 78 (unreported) at [56]; *Yim v Zieth (No 3)* [2019] FCCA 3404 at [366].

[25] Commonwealth EM at [112].

[26] Commonwealth EM at [113].

[27] Commonwealth Bills Digest, p. 21.

Territory laws, consonant with it being the concept at the heart of the referrals of power themselves. It is also critical in considering the operation of s 109 of the Constitution, including in light of the exclusivity brought about by ss 39A and 39B as outlined above.

32. *Sixthly*, the critical phrase ("after the breakdown of a de facto relationship") is also found, for example, in s 90SE concerning the power of a court in maintenance proceedings. As noted in the Commonwealth EM at [136], once again, there is a "significant difference" between s 74 and s 90SE of the Act. Relevantly, "[d]e facto maintenance orders can only be made after the breakdown of the relationship due to the terms of referred powers, relating to de facto financial matters arising on the breakdown of the relationship": Commonwealth EM at [136]. Section 90SL concerning the power to declare interests in property is similarly limited to proceedings brought "after the breakdown of the de facto relationship".

33. *Seventhly*, Division 4 of Part VIIIAB concerns "Financial agreements" between parties to a de facto relationship. Once again, the Commonwealth EM makes plain the critical impact of the scope of the referral on the reach of the Commonwealth provisions, noting at [162]: "A Part VIIIAB financial agreement can only deal with matters after the de facto relationship to which the agreement has broken down (as confined by the specific terms of referred State powers)."[28] The temporal fixing of the "breakdown" of the de facto relationship as its end point is highlighted by considering ss 90UB, 90UC and 90UD together.[29] Section 90UB concerns financial agreements made "before" a de facto relationship. Section 90UC concerns financial agreements made "during" a de facto relationship. Section 90UD concerns financial agreements made "after" the breakdown of a de facto relationship.

34. Section 90UC is particularly instructive. It contrasts the period during which persons are "*in* a de facto relationship" with the period that follows "in the event of the breakdown of the de facto relationship" (that is, "out" of the relationship). Section 90UD also clearly draws out the precise use of the term "breakdown" in the scheme. The temporal fixing of

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28 Commonwealth Bills Digest, p. 26.

29 See the Explanatory Memorandum to the Commonwealth Referral Act at [165], p. 34. See also, in s 4(1) of the Act, the definition of "spouse party" in paragraph (b), which defines the terms to mean "in relation to a Part VIIIAB financial agreement--a party to the agreement who is a party to the contemplated de facto relationship, de facto relationship or former de facto relationship to which the agreement relates".

the point of "breakdown" suggests that a clear or discernible event has occurred, as does reference to the "*former*" de facto relationship" in s 90UD(1).[30] The contrast of the periods "before" and "during" a de facto relationship, with the period "after the breakdown" of a de facto relationship, which these provisions establish, runs counter to the Trustee's contention that "breakdown" can mean something less certain than that the relationship has ceased or ended.

35. *Eighthly*, under s 90SM, which confers the Court's jurisdiction to alter the property interests in respect of de facto couples, such proceedings may be instituted and determined only "after the breakdown of a de facto relationship".

36. From the above survey of the legislative provisions, it clearly emerges that the "breakdown of the de facto relationship" is the statutory synonym for the relationship having ended. This construction of this key phrase in s 90SM is also informed and confirmed by s 90RD of the Act, which confers powers on the Court to make a declaration that "a de facto relationship existed, or never existed" between the relevant parties where, relevantly, an application is made under s 90SM. The past tense – "existed" – is telling. Subsection 90RD(2) provides that the declaration can extend to the period or periods over which the de facto relationship persisted (s 90RD(2)(a)) and to "when the de facto relationship ended" (s 90RD(2)(d)). As outlined in the Commonwealth EM at [118]-[119], s 90RD "enables the court, where a claim is made in support of the application that a de facto relationship existed between the applicant and another person, to make a declaration about the existence of the de facto relationship", and to "declare certain other matters relating to the existence of the relationship as set out in subsection 90RD(2)". The matters in s 90RD(2) are relevantly described in the Commonwealth EM at [121] as "gateway" issues for the application of Part VIIIAB.

37. It is a condition of the making of a s 90SM order that the Court is satisfied of one of the alternative matters in s 90SB, including that the "period, or the total periods, of the de facto relationship is at least 2 years". This reinforces that there needs to be a clear criterion for fixing the period for which a de facto relationship has existed. Further, the requirement in s 90SB "does not arise in proceedings in relation to maintenance or

[30] See the Supplementary Explanatory Memorandum to the Amendment Act at [23]-[25] and [27]-[29].

property of parties to a marriage under Part VIII, but is derived from equivalent provisions operating under State law before the commencement of these provisions": Commonwealth EM at [129].

38. The construction of the key phrase in s 90SM – "after the breakdown of a de facto relationship" – is also informed by s 44(5) of the Act, which relevantly provides that an application under s 90SM is to be made within "2 years after the end of the de facto relationship". This reinforces the temporal certainty that the phrase "after the breakdown of a de facto relationship" seeks to introduce to the scheme of the Act.

39. In summary, the "breakdown of a de facto relationship" equates to the end of a de facto relationship, where the relationship has broken down to the point of its failure. This is borne out by the broader statutory context in which the term must be construed, and also by the clearly documented legislative history of the referrals of State legislative power.

(d) ***The Trustee's argument on the facts of this case***

40. The Trustee contends that the de facto relationship underwent "significant changes" and that Ms Fairbairn was unable to "reaffirm" the relationship, with the result that the relationship was in a state of "breakdown" by 25 May 2018 (AS[24]; [54]), being the date on which the primary judge found the relationship had broken down (J[158]). What in fact occurred on that date was unremarkable within a continuing relationship. The Respondent spoke with an employee of the Trustee and advised: (i) that he and Ms Fairbairn were still in a relationship; (ii) that they had spoken about the daily care fee before Ms Fairbairn had gone into care; (iii) that he agreed that he needed to contribute to the fee; and (iv) that he suggested that Ms Fairbairn's superannuation be used in the first instance, after which he would commence contributing: J[121].

41. The Trustee asserts "breakdown" by 25 May 2018, while accepting that the Respondent had no intention to separate (AS[2]) and without claiming that the relationship had "ended" on that date (if it were otherwise, the present elaborate attempt to distinguish "breakdown" from "end" would be unnecessary: AS[44]-[49]).

42. The Respondent answers the Trustee's primary argument on four levels. *First,* for the reasons given above, "breakdown" cannot be established in law before the relationship

has "ended". As the Trustee does not seek to make a case that the relationship has "ended", its primary argument must fail.

43. *Secondly*, the conduct of the Respondent on 25 May 2018 (see [40] above) could hardly be "the clincher" that doomed the relationship to "breakdown" status. It is no more than one party expressing a (firm) view as to the best way, and correct order, in which assets of one or other party to the relationship are to be marshalled to a need created by the next phase of the relationship – Ms Fairbairn's aged care accommodation.

44. *Thirdly*, a relationship very commonly will go through different phases or stages over its life.[31] Whether parties are legally married or in a de facto relationship, judicial notice can be taken that tens or hundreds of thousands of couples will necessarily go through the forced challenges of a relationship in later life – one or other having to move into care, or suffering reduced capacity or cessation of sexual relationship (to take some of the "substantial changes" the Trustee relies on here: AS[51]). It would be a highly dangerous proposition to adopt – as apparently is the Trustee's intent in using the circumstances of this couple as a test case – that once one party suffers incapacity and is unable to actively consent to these types of inevitable changes, the relationship has "broken down" enlivening federal jurisdiction to alter property entitlements. Indeed, whether the parties are legally married or not, to attribute the label of "breakdown" to the inability of one party actively to consent to the continuation of the relationship under such commonplace challenges of latter life is offensive to common mores. (This submission, as noted above at [13] reneges on the concession below that incapacity – put now by the Trustee at AS[24] as the inability to "reaffirm" the relationship – does not sever it).

45. *Fourthly*, a number of the factors asserted at AS[51] are simply wrong or so incomplete as to be misleading. As to (b), absence, by necessity, of a continued physical sexual relationship did not preclude continued shows of real affection: see [7] above; as to (c), the parties' financial affairs were not wholly separate and as seen at [40] above, the Respondent did show a willingness to contribute to Ms Fairbairn's care costs and it was legitimate for him to consider whether superannuation should be used first for the care costs (AJ[43]); as to (d), Ms Fairbairn had indicated an intent in her 2016 will (made at

[31] For legal marriages, see *Stanford v Stanford* (2012) 247 CLR 108 at [123]; for de facto relationships, see *Moby v Schulter* (2010) FLC 93-447 at [168], [177]; *Cadman v Hallett* [2013] FamCA 819 at [31].

a time when there was no suggestion of incapacity) that the Respondent be able to continue to live in her property for 6 months after her death (AJ[47]), indicating both an intent for common use of the property and that the Respondent's suggestions for funding Ms Fairbairn's case were within the bounds of the continuing relationship; as to (f) that was true over the whole relationship; as to (g), if disputes over financial matters between one partner and the children of the other were the touchstone for "breakdown", many such relationships would be implicated; and as to (h), the Trustee cannot bootstrap its own appointment to manage Ms Fairbairn's financial affairs into a finding of "breakdown" without setting a dangerous precedent.

46. The last remark leads to a larger point, of constitutional significance, and further destructive of the Trustee's attempts to shoehorn this relationship into the framework of a "breakdown". As seen at J[7]-[9], the Trustee presented this case at first instance on the basis that its objective, consistent with the wishes of Ms Fairbairn's children, was: to sell the Town A Property (in which the Respondent resides) and thus evict the Respondent; use the proceeds to fund Ms Fairbairn's accommodation; defeat the partial life estate (6 months) in Ms Fairbairn's will; and preserve her superannuation for her children.

47. As appears from J[9], the Trustee persuaded the primary judge that if the relationship "was still on foot" it could bring civil proceedings in the NSW State Courts to evict the Respondent and achieve its goal, but if there was a "breakdown" of the relationship the correct place to bring proceedings was under the Act. All of this was and is fundamentally misconceived. The Trustee was appointed by the the NSW Civil and Administrative Tribunal (**NCAT**) under the *Guardianship Act 1987* (NSW) to manage the financial affairs of Ms Fairbairn who was considered incapable of managing those affairs: J[109]; AJ[2]. Once so appointed, the Trustee has broad statutory powers and functions under the *NSW Trustee and Guardianship Act 2009* (NSW), including "all the functions the [protected] person … could exercise if under no capacity" (see especially ss 16, 56 and 57). As such, the Trustee has power under NSW law to sell the property and evict the Respondent. Admittedly, the Respondent, as an "affected person", could seek review of such decisions to NCAT: s 62.

48. What follows is this. *First*, on the face of the NSW statutes, the Trustee is capable of achieving its objectives under State law, but subject to NCAT review. *Secondly*, if the Trustee maintains the submission recorded at J[9], it is necessarily arguing that the

presence of "breakdown" renders the NSW statutes inoperative under s 109 of the Constitution, a proposition which it has neither exposed nor supported in its submissions or its s 78B notice. *Thirdly*, there must be very grave doubt whether the State referrals were intended to bring about such a result, namely that existing, and longstanding, State regimes for managing the property of persons lacking capacity were intended to be rendered inoperative by the referral of powers over "breakdown" to the Commonwealth – not a word of such an extraordinary intent being revealed in any of the extrinsic materials at State or Commonwealth level. *Fourthly*, the true conclusion is that there is no intent, in the State referrals or the Act, to extend the concept of "breakdown" into the territory being staked out by the Trustee: the fact that one party may suffer the common event in later life of incapacity, inevitably at a time when other significant changes in the relationship will be forced on the parties by external events, does not "end" a relationship, or signal its "breakdown" so as to allow federal jurisdiction to be invoked to alter property rights recognised and vindicated under State law.

III *The Trustee's alternative argument should be rejected*

49. In the alternative, the Trustee contends that Ms Fairbairn's placement in an aged care facility resulted in the "breakdown" of the de facto relationship from January 2018 onwards (that is, four months earlier than its primary case) because the couple were not "living together" within the meaning of s 4AA(1)(c) of the Act. The Appellant deals with this alternative case briefly at AS[55]-[56], without recourse to authority or detailed statutory analysis.

50. The socially unpalatable proposition advanced by the Trustee should be exposed for what it is: once one is infirm and lacking capacity – such that one is placed in an aged care facility – one is no longer capable of being in a legally recognised de facto relationship with the result that the Trustee, or such other person as is appointed to manage the affairs of the protected person, can automatically access federal jurisdiction to achieve an alteration in property interests against the other party to the relationship. As the Trustee boldly contended at trial: "…in her present state of health and given that they now live apart, the Wife is simply incapable of continuing to participate in a de facto relationship" (J[145](f)). This is a power grab *par excellence* by the Trustee. The submission was not directly engaged with, or approved, in the judgment at first instance. It was correctly disavowed on appeal (AJ[52]), only to be resuscitated in this Court without explanation.

51. As with the Appellant's primary case, such a proposition ignores the changing phases of any relationship, including changes brought about by ill-health or age, or both, wrongly suggesting that such involuntary changes can, in and of themselves, destroy the fabric of the relationship. It is also answered by a simple textual point. It seeks to elevate one of the factors in s 4AA(2) as to whether persons are in a de facto relationship into a necessary precondition – beyond what is in fact required by s 4AA(1)(c) – for a continuing relationship, contrary to the structure of the provision and the express commands of s 4AA(2)(b) and s 4AA(3).

52. Further, there is a strong body of authority, concerning the State provisions and now the Act, which indicates that a need to reside separately, brought about by external circumstances such ill-health,[32] does not necessitate the end of the law's recognition of a continuing de facto relationship. This entire body of authority is ignored by the Trustee.

53. The present legislative scheme, and the composite phrase in s 4AA(1)(c) of "a couple living together on a genuine domestic basis", was considered by the Full Court of the Family Court in *Jonah v White* [2012] FamCAFC 200; (2012) 48 Fam LR 562.[33] The

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[32] In *Hibberson v George* (1989) DFC 95-064; 12 Fam LR 725 (***Hibberson)***, Mahoney JA, in noting the differences between de jure and de facto marriage and the relevance of conduct to the ongoing existence of the latter, nevertheless observed at 739-740 that "[t]here is, of course, more to the relevant relationship than living in the same house", and that "holidays and the like" show that cohabitation is not essential to its continuance. (Although Mahoney JA was in dissent, the appeal was allowed on a separate issue and neither Hope nor McHugh JJA separately commented on the question of the physical separation of the parties.) The analysis in *Hibberson* was applied in *McLaughlin v Saillard* (1990) DFC 95-082 (***McLaughlin***) in finding that a de facto relationship continued to exist in circumstances where one party, who was gravely ill, returned to live with parents but with the hope that she would commence cohabitation with her partner in the event she recovered. The definition of a "de facto relationship" in that case was found in s 32G(1) of the *Wills, Probate and Administration Act 1898* (NSW) (**NSW Probate Act**) in the following terms: "the relationship of a man and a woman living together on a bona fide domestic basis although not married to each other". Similar circumstances prevailed in *Jenkin v Ellis* (1990) DFC 95-086 where ill-health was the underlying catalyst for a party to a de facto relationship renting a separate flat less than a year before he died. There, the Court relied upon the analysis in both *Hibberson* and *McLaughlin*, finding that the parties did not intend to sever their relationship; it continued up until the deceased's death. Again, the definition of "de facto relationship" in s 32G of the NSW Probate Act was in issue. In *Howland v Ellis* [2001] NSWCA 456; 28 Fam LR 656, in reliance upon *McLaughlin*, Stein JA held at [26] (Meagher JA agreeing at [1] and Ipp AJA at [50]) that physical separation will not normally signal the end of a de facto relationship when it occurs relevantly for reasons of "ill health". Stein JA further held at [27] that physical separation must be accompanied by a "determination by one or both of the parties to end the relationship" and that involuntary separation like imprisonment and hospitalisation, unless accompanied by an intention to end the relationship, will not terminate the relationship. See also *PY v CY* [2005] QCA 247; 34 Fam LR 245; [2005] DFC 95-323 at [31], [44] and *Vaughan v Hoskovich* [2010] NSWSC 706 at [51]-[65] (White J).

[33] A first instance application of this principle can be found in *Halstron v Halstron* [2021] FamCA 437 at [201]: "… it is well established that parties do not have to reside consistently in the same household in order for the Court to find that they were 'living together' on a genuine domestic basis, with the proper focus being the 'nature and quality of the asserted relationship, rather than a quantification of time spent together': *Jonah & White* (2012) FLC 93-522, 86,683."

Full Court described this composite phrase at [32] as the "the touchstone for the determination of whether a de facto relationship exists", and accepted that none of the matters enumerated in s 4AA(2) "has precedence over any other, nor must all necessarily be found before a finding of a de facto relationship is made". The Full Court accepted at [40] that a de facto relationship within the meaning of the Act can exist where, depending on the balance of the relevant considerations, the parties "have lived together for limited periods". The Full Court at [44] endorsed the approach of the trial judge in focussing on "the nature and quality of the asserted relationship rather than a quantification of time spent together". More recently, the Full Court of the Family Court has also observed that "a de facto relationship may subsist even though the partners do not share a common residence": *Lennon v Sanil* [2020] FamCAFC 109 at [71].

54. For all the above reasons, leave should be revoked or the appeal should be dismissed. Costs orders should follow the conditions attached to the grant of leave: CAB 67.

PART VI ESTIMATED HOURS

55. It is estimated that approximately 2 hours may be required for the presentation of the Respondent's oral argument.

Dated: 14 January 2022

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ANNEXURE

1. *Commonwealth of Australia Constitution Act* (current version).

Commonwealth legislation

2. *Family Law Act 1975* (Cth) (version as at 25 April 2019).
3. *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (version as enacted).

State legislation

4. *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) (version as enacted).
5. *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) (version as enacted).
6. *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic) (version as enacted).
7. *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas) (version as enacted).
8. *Commonwealth Powers (De Facto Relationships) Act 2009* (SA) (version as enacted).
9. *Guardianship Act 1987* (NSW) (current version)
10. *NSW Trustee and Guardianship Act 2009* (NSW) (current version)