HIGH COURT OF AUSTRALIA

11 May 2022

FAIRBAIRN v RADECKI
[2022] HCA 18

Today, the High Court unanimously allowed an appeal from the Full Court of the Family Court of Australia. The appeal concerned the meaning of "breakdown of a de facto relationship" for the purposes of making property settlement orders pursuant to s 90SM of the *Family Law Act 1975* (Cth) and whether there had been a breakdown in the parties' de facto relationship.

The appellant and the respondent had been in a de facto relationship from late 2005 or early 2006. They had resided in the appellant's home. A fundamental premise of their relationship was that they agreed to keep their assets strictly separate. The appellant suffered a rapid cognitive decline in 2015 and was diagnosed with dementia in 2017. On account of family disputes as to the appellant's care, the NSW Civil and Administrative Tribunal ("NCAT") appointed the NSW Trustee and Guardian ("the Trustee") to make health and welfare decisions on her behalf and to manage her financial affairs. The Trustee decided to place the appellant permanently into an aged care facility and resolved to sell the appellant's home to fund those costs. Faced with the respondent's opposition to the proposal to sell the home, the Trustee sought property settlement orders from the Federal Circuit Court of Australia pursuant to s 90SM of the Act. That Court's jurisdiction to make the property settlement orders depended on the parties' de facto relationship having broken down. The primary judge imputed to the respondent an intention to separate from the appellant, meaning the de facto relationship had broken down. That finding was reversed by the Full Court.

The High Court held that the parties' de facto relationship, within the meaning of s 4AA of the Act, had broken down for the purposes of s 90SM. In that context, the term "breakdown" was taken to mean "end" or "breakup". Having regard to all the circumstances, including those set out in s 4AA(2), the Court was satisfied the parties no longer had a relationship as a couple living together – that is, sharing life as a couple – on a genuine domestic basis within the meaning of s 4AA(1). That conclusion did not follow from the end of the parties' cohabitation, nor from the appellant's mental incapacity. Consistently with the reality that human relationships are infinitely mutable, a court is entitled to have regard to such matters as may seem appropriate. Accordingly, the relevant matters included: the fact that the parties occupied separate rooms in the appellant's home by 2017; the respondent acting as if he were no longer bound by the essential premise of the relationship that the parties keep their assets separate, including by securing on behalf of the appellant a new enduring power of attorney and revised will that markedly favoured his financial interests, obtained while the appellant was labouring under an incapacity; the respondent's refusal to permit the appellant's home to be sold; the respondent's parsimonious attempts to make financial contributions to support the appellant's care; and the fact that the respondent's conduct justified the intervention of NCAT and the appointment of the Trustee. Those circumstances, in aggregate, demonstrated the respondent's persistent refusal to make the necessary or desirable adjustments that might have evidenced an ongoing relationship, therefore marking the end of the parties' de facto relationship.

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- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*