

What constitutes the breakdown of a de facto relationship?

Chauntelle Ingenito reports on *Fairbairn v Radecki* [2022] HCA 18



In *Fairbairn v Radecki*, the High Court was faced with the following question: what constitutes a separation of a de facto relationship? Often, the answer to that question is simple. It is usually when one party leaves the home, moves out, and tells the world they are now single. It can be as public as a change of relationship status to 'single' on Facebook, or as private as sleeping in separate rooms.

In this matter, the situation was unique but increasingly common: does a forced separation of a couple due to medical reasons, constitute a separation of a de facto

relationship in the context of the *Family Law Act 1975* (Cth) (the Act). It highlights that the statutory factors used to determine this question (the s 4AA factors) cannot be considered in isolation, but should rather be considered in a holistic manner depending on the circumstances of each case. Significantly, the court found that the 'cohabitation of a residence or residences' is not a necessary feature of 'living together' within the meaning of s 4AA(1)(c) of the Act.

Factual background

The appellant de facto wife and the

respondent de facto husband entered into a de facto relationship in about 2005–06. The parties were in their 50s at the commencement of their relationship. During their relationship, they had agreed to keep their assets ‘strictly separate’ but lived at the appellant’s farm.

Both parties had adult children. The husband had an acrimonious relationship with the wife’s children, stemming mostly from the dispute as to how the wife should be cared for.

The wife was subsequently diagnosed with dementia and her capacity to make long-term decisions was significantly impaired. The New South Wales Trustee and Guardian (NSW TAG) was appointed by NSW Civil and Administrative Tribunal to make health and welfare decisions on her behalf. The NSW TAG moved the appellant into an aged care facility due to her failing health. The husband remained living at the wife’s farm.

The NSW TAG wished to sell the farm to fund the wife’s ongoing care, which the husband opposed.

The NSW TAG commenced proceedings against the husband on behalf of the wife, seeking property settlement orders under s 90SM of the Act. Under that section, the court only has power to make orders altering the property interests of parties to a de facto relationship ‘after’ the breakdown of a de facto relationship.

The husband denied that there had been a breakdown of the relationship, and accordingly contended that the court lacked jurisdiction to determine the matter. The husband’s case was that he should be entitled to remain at the farm, as it was consistent with the wife’s wishes, prior to her decline.

The primary judge determined the jurisdictional issue as a threshold issue and found that there had been a breakdown of the parties’ relationship. In reaching this conclusion, the primary judge found that the circumstances of the parties’ particular

relationship, including the husband’s attitude and actions in relation to the occupation of the property and entitlement to each other’s assets, were indicative of a breakdown of the relationship.

The actions included the husband asking the wife to execute a power of attorney and revocation documents to give the husband powers and authorities which favoured his rights over the wife’s, including in preparing an updated will which favoured the husband. The primary judge found that these facts were incompatible with the foundations of the parties’ relationship, and the wishes of the wife during their relationship.

In determining whether the de facto relationship had indeed broken down, the court considered that although the parties slept in separate bedrooms for a short period of time before the wife’s transfer to the aged care facility, it was not a determinative factor of separation. In this matter, the court considered that the determining factor of the breakdown of this de facto relationship was the respondent acting against the agreement of the parties to keep their assets separate and his refusal to have the appellant’s house sold.

The husband appealed to the Full Court of the Family Court of Australia. The husband’s appeal was allowed, on the basis that, *inter alia*, the primary judge had imputed an intention upon the husband, but that there had been no evidence to make that finding (and as such the primary judge had erred), and that they were not satisfied that the actions of the husband had the intention of causing a breakdown in the relationship.

The NSW TAG sought special leave to appeal to the High Court, which was granted.

The High Court’s decision

The High Court allowed the NSW TAG’s appeal, which specifically was concerned with the meaning of ‘breakdown of a de facto relationship’.

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. Having regard to all the circumstances, including those set out in s 4AA(2), the High Court was satisfied the parties no longer had a relationship as a couple on a genuine domestic basis within the meaning of s 4AA(1).

The relevant matters included the fact that the parties occupied separate rooms at the farm from 2017, the husband acting as if he were no longer bound by the agreement that the parties keep their assets separate, including by seeking a new enduring power of attorney and revised will that favoured him, the husband’s refusal to permit the wife’s farm to be sold, the husband’s little attempts to make contributions to support the wife’s care, and the fact that the husband’s conduct required the intervention of NCAT and the appointment of a guardian for the wife.

Implications

The High Court’s decision is significant for its findings that cohabitation is not a necessary feature of an ongoing de facto relationship, and that a loss of capacity by one party does not necessarily cause a relationship to breakdown.

The court recognised that human relationships are, in reality, ‘infinitely mutable’, and consistently with this reality, a court is entitled to have regard to ‘all the circumstances’ of a relationship, including any or all of those listed in s 4AA(2) of the Act, as may seem appropriate. The combined circumstances in this case however, in aggregate, demonstrated the respondent’s persistent refusal to make the necessary or desirable adjustments that might have evidenced an ongoing relationship, and marked the legal end of their parties’ de facto relationship.

Of course, every matter will turn on its facts. The breakdown of a relationship in some cases may be evidenced by something as simple as the change of a Facebook relationship status.

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