FAMILY LAW LAWYER EXPLORES NEW FAMILY LAW HIGH COURT DECISION – BREAK UP OF DE FACTO COUPLE

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In May 2022, the High Court of Australia made a decision in the case of *Fairbairn v Radecki* [2022] HCA 18. This case gives very important commentary on de facto relationships, in particular on the issue of whether a de facto relationship has broken down.

THE FACTS

The parties were in a de facto relationship from around 2005. They lived together, in a property owned by the de facto Wife, but kept their finances “separate”. The couple had even entered into some (non-binding or enforceable) “financial agreements” as to how they would maintain their separate property. They structured their financial affairs around the agreements and acted separately.

The de facto Wife was diagnosed with dementia. By 2017, it was determined that she was not capable of making long-term decisions. In 2018, a Trustee was appointed to make decisions on her behalf in relation to her welfare and health and she thereafter commenced residing at an aged care facility. The Trustee sought to sell the de facto Wife’s home to fund her accommodation at the aged care facility. This was opposed by the de facto Husband who remained living there at the time. The Trustee then commenced Family Law property settlement proceedings on behalf of the de facto Wife to seek a division of the parties’ property pool on the basis that the de facto relationship had broken down.

THE TRIAL JUDGE’S DECISION

The Trial Judge agreed that the de facto relationship had broken down. The Trial Judge found the de facto Husband had acted in a way which was inconsistent with the essential premise of their relationship being that their property was to be kept separated. Some examples of actions the de facto Husband took were:-

1. He arranged for the preparation and execution of a new enduring Power of Attorney and Will for the de facto Wife that favoured his rights;
2. He refused to cooperate with the de facto Wife’s adult children in the administration of her affairs;
3. He consistently refused to allow the sale of the home (to fund her accommodation in the aged care facility), but also refused to meet the cost of her ongoing stay at the facility.

The Trial Judge found the de facto Husband’s actions overall demonstrated that the

relationship had ended.

FULL COURT APPEAL BY THE DE FACTO HUSBAND

On Appeal to the Full Court, the de facto Husband was successful in convincing the court that the de facto relationship had not broken down.

The Court was of the view that his actions were not necessarily “good” but did not in essence demonstrate the end of the relationship.

The Court also considered the fact that he had paid for some of her accommodation fees at the aged care facility and was visiting her there.

HIGH COURT APPEAL – THE LAST PORT OF CALL

On appeal by the de facto Wife (her Trustee) to the High Court of Australia, the Court sided with the de facto Wife and declared that the de facto relationship had broken down.

Importantly, the Court addressed the issue of the parties no longer living together, and clarified that this fact, in and of itself, does not determine that a relationship has ended. Meaning that, the Court acknowlegdes that circumstances may arise in relationships, such as one party entering into an aged care facility, which do not signal the end of the relationship. Also, the Court addressed the issue of mental incapacity and, similarly indicated that just because a party loses capacity does not always mean that the relationship has ended.

The *Family Law Act 1975* (Cth) at section 4AA sets out the definition of a de facto relationship. The Court held that in this case, in light of all the relevant facts and circumstances before the Court, the parties were broken up and were no longer deemed a ‘couple living together on a genuine domestic basis’.

OUR FAMILY LAW LAWYERS ARE HERE TO HELP

If you have questions and need legal advice about your de facto relationship or property settlement, please contact our expert Family Law Lawyers on 1800 300 170 or email us at famlaw@matthewsfolbigg.com.au or by using the CONTACT US or LIVE CHAT functions on this website.

Disclaimer

Family law situations can be complex and sometimes they can involve serious issues. Information outlined is proposed to provide general guidance only. Due to the seriousness of legal matters as well as the uniqueness of your individual situation, professional advice should be sought. For advice, please contact one of our Family Lawyers.