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Death benefit payments can hinge on definition of ‘de facto’

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

The timing and definition of what constitutes the official ending of a relationship can be problematic and can impact how death benefits are dealt with as recent court rulings have illustrated, says a specialist legal adviser.

“What is considered a de facto relationship is an inherently nebulous concept, at least in comparison to being formally married and in this context, so too is the question of whether a de facto relationship has ended is often problematic,” said Matthew Burgess, director of View Legal.

He said a High Court decision in Fairbairn v Radecki [2022] HCA 18 is a leading example.

In this case, it was agreed that a de facto relationship had existed for some time with the parties entering into a binding cohabitation agreement and agreeing to keep all property separate.

However, the court had to consider whether the relationship had ended based on several facts, including that one spouse suffered rapid cognitive decline, with evidence of dementia and Parkinsonian features, and the fact that the parties occupied separate rooms in the home, with their personal belongings in their respective rooms.

Additionally, it was presented in court that during periods of absence of the other spouse, the impaired spouse would oscillate between hating and missing the spouse, and subsequently signed an enduring power of attorney in favour of her children, not the spouse.

“The court also heard that the impaired spouse was manipulated by the other, while in a vulnerable and confused state, into accusing her children of taking her money, selling her home and putting her into an institution and demanding they step aside as attorneys,” Burgess said.

“The facts continued that the partner then forced the impaired spouse to sign a new document appointing him as enduring attorney and making a new will that was more favourable to him particularly in relation to creating a life interest in a property, instead of only a right to occupy for six months, as had been the case under the previous will.”

He said the court heard that ultimately an independent attorney was appointed and after further concerning events, that attorney commenced property settlement proceedings on the basis that the de facto relationship had broken down.

“In agreeing that the relationship had ended, the court confirmed the relationship did not end merely because one spouse was obliged to move permanently into an aged care facility, nor due to their failing mental incapacity. While each of these aspects may be relevant, they are not determinative,” Burgess said.

“Furthermore, physical cohabitation at a single home is not a necessary feature of an ongoing relationship whether by way of marriage or otherwise; that is, it is not an irreducible minimum that all relationships

must exhibit (see SZOXP v Minister for Immigration and Border Protection (2015) 231 FCR 1 and Crabtree v Crabtree (1963) 5 FLR 307).”

Involuntary and enduring separation for example due to illness will not always justify a conclusion that a relationship has ended and trigger a need for a court to intervene to make a property settlement order (see Stanford v Stanford (2012) 247 CLR 108).

“The key factor was the non-impaired spouse's demonstrated persistent refusal to make the necessary or desirable adjustments which might have evidenced an ongoing relationship, including that the parties were occupying separate rooms before the impaired spouse moved to an aged care facility and that the parties kept their assets separate from each other consistently with the cohabitation agreement, but the non-impaired spouse began to act as if he were no longer bound by this arrangement,” Burgess said.

“It continued that the general conduct of the non-impaired spouse, including 'parsimonious attempts to make financial contributions' to support the other's care, refusal to cooperate with her attorney and children, failure to disclose his own assets to Centrelink and persistent refusal to reside elsewhere and permit the home to be sold all of which conduct served his, and not the impaired spouse's, interests.”

Public aspects of the relationship also significantly counted against the non-impaired spouse, particularly the need in the first place to have an external attorney appointed.

A more recent BDBN-related case provides further context, said Burgess.

Corbisieri v NM Superannuation Proprietary Limited [2023] FCA 1319 involved a superannuation fund member who informed his sister via a WhatsApp message that ending the relationship with his spouse was the key reason he was taking his own life. The spouse had not been informed of the decision and subsequently tried to enforce a BDBN in his favour.

“The trust deed for the relevant superannuation fund provided that a BDBN that was otherwise valid would be void if the de facto relationship had ended. The court in the original decision, in holding that the BDBN was void, confirmed firstly that desertion, a unilateral act, can commence without knowledge of the fact being communicated to the other spouse; that is a spouse may be deserted without being aware of the fact (see Pulford v Pulford [1923] P 18),” Burgess said.

“As well, it stated that a de facto relationship ends when one party decides they no longer wish to live in the required degree of mutuality with the other and to instead live apart and that it is unnecessary to communicate this intention to the other party provided the party that is desirous of ending the relationship acts on their decision which here was the act of suicide.”

Finally, the court found that it is also unnecessary that the other party agree with or accept the decision as was ruled in S v B (No 2) [2005] 1 Qd R 537 and Hibberson v George (1989) 12 Fam LR 725.

“As explored in a recent SMSF Adviser article, while the above points were accepted on appeal (in Nguyen v Australian Financial Complaints Authority [2024] FCAFC 77) the court reached the opposite conclusion and held that the relationship, while terminated by the suicide had not ended prior to the death which was the key question given the rules of the fund and thus the BDBN in favour of the de facto remained valid,” Burgess said.

“Specifically, the court confirmed a relationship cannot be terminated merely as a consequence of a person's state of mind. Rather, there needs to be some conduct competent to terminate it. Here, leaving aside the suicide, no such conduct was apparent prior to death. Additionally, the court stated if someone tells a third party of an intention to end a de facto relationship as was the case here, this mere communication will of itself be insufficient.”

Finally, Burgess said the court stated that termination requires some other conduct inconsistent with the continuation of the relationship, for example, desertion as in the Marriage of Tye (1976) 9 ALR 529, unilateral relocation with children as in Hibberson v George (1989) 12 Fam LR 725, refusal to cohabitate as in S v S [2000] FMCAfam 50, or refusal to communicate otherwise than in writing as in S v B (No 2) [2005] 1 QdR 537.

If you are suffering from depression, anxiety or suicidal thoughts, or you’re worried about someone else and feel that urgent professional support is needed you can contact your local doctor or one of the 24/7 crisis agencies below.

Lifeline: 13 11 14

http://www.lifeline.org.au

Suicide Call Back Service: tel:1300%20659%20467

http://www.suicidecallbackservice.org.au