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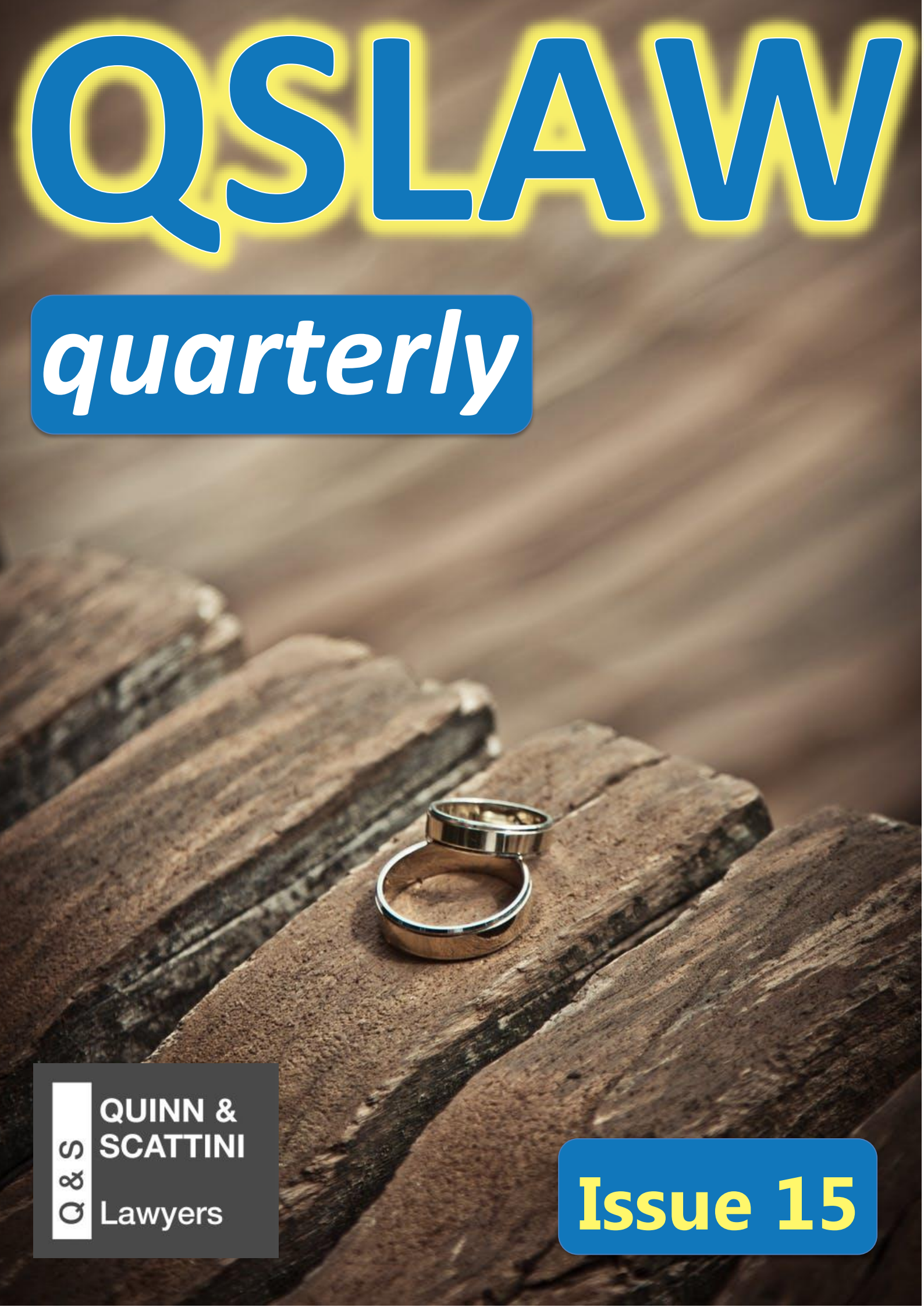

Q&S QUINN & SCATTINI Lawyers

Issue 15

Binding Financial Agreements - Pitfalls of the 'Pre-Nup'

Family & De Facto Law Team

As a family lawyer, people often ask whether '*pre-nuptial agreement*" or '*binding financial agreements'* (as they are known in Australia) are worth the paper they are written on.

So, if you have entered into a binding financial agreement (**BFA**) and feel that the terms of it are unfair, pay attention.

What is a Binding Financial Agreement?

A BFA is a written, signed and dated agreement made between two parties to a relationship under the *Family Law Act 1975* (**the Act**). A BFA may be made at any stage of a relationship including:

- prior to the commencement of a relationship;
- during a relationship; and
- after the breakdown of a relationship.

To be binding, a BFA must be signed by all parties. Further, both parties must have sought and obtained independent legal advice as to the effect of the agreement and the advantages and disadvantages of entering into it.

This article focuses on a recent high court case which set aside a BFA which was entered into prior to marriage.

The Recent Decision of Thorne v Kennedy

The case of *Thorne v Kennedy* [2017] HCA 49 involved a 'pre-nuptial' BFA along with a further BFA 'made during a marriage'.

In that case, the parties had plans to marry. The date of the wedding had been scheduled and a mere 11 days prior to the wedding the husband presented the wife with a BFA which he requested she sign before the wedding.

Both parties obtained independent legal advice as to the BFA. The wife received advice that the amount she would receive pursuant to the BFA was 'piteously small'. She was advised not sign the agreement. Despite this, the wife signed the agreement and the wedding went ahead.

The parties separated some four years later. The wife applied for and was granted leave of the Federal Circuit Court of Australia seeking orders that the BFA be overturned. She claimed that she was subjected to duress and that she was pressured into signing the BFA. The wife was successful in her application and the BFA was set aside.

The husband appealed. On appeal the Full Court of the Family Court accepted the husband's appeal, and ordered the enforcement of the terms of the BFA.

The wife filed a further appeal to the High Court of Australia (**HCA**). The HCA set aside the BFA and enabled the wife to seek a property adjustment under the Act.

The following were notable factors which played an important part in the decision made by the HCA:

- Whether there was any negotiation offered by the person in the greater position of power. In this case, the husband dictated the terms of the agreement and there was no offer of negotiation as to these terms.
- The emotional circumstances in which the agreement was entered, including any explicit or implicit threat. In this case, the husband was threatening not to follow through with the wedding. Essentially, the wife's choice was to either accept the terms of the agreement or call off the wedding.
- Whether there was time for careful reflection of the proposed agreement. In this case, the wife was given minimal time to properly consider the BFA since the husband had insisted it be signed prior to the scheduled wedding.
- The nature of the parties' relationship and whether one party was more vulnerable than the other. In this case, the wife had moved to Australia from a different country. She was a woman of modest means and as such was dependent upon the husband to provide for her financially. The husband was in a substantially greater position of wealth.
- The independent advice that was received and whether there was time to reflect on that advice. In this case, the court accepted that the wife had received appropriate advice but the amount of time she had to reflect upon the advice was inadequate.

The HCA acknowledged that BFA's are generally created to favour one party. However, it was noted that if the imbalance is so significant that the agreement was totally skewed in one party's favour, then that inequity alone can indicate undue influence or unconscionable conduct and give rise for BFA to be set aside.

To be binding, a BFA must be signed by all parties and both parties must obtain independent legal advice.

Setting Aside a BFA

What the recent decision in *Thorne v Kennedy* has made abundantly clear to family lawyers, is two-fold.

Firstly, preparation of a BFA should be undertaken with a great deal of care and consideration for the circumstances surrounding the matter and particular attention should be paid to whether the agreement wholly or substantially disadvantages one party.

Secondly, there are numerous avenues available to seek that a BFA be overturned and even the provision of thorough independent legal advice may not necessarily protect parties from having a BFA set aside.

Get In Touch!

If you or someone you know seeks advice with respect to setting aside a BFA, we suggest you contact Quinn and Scattini Lawyers for an initial consultation. Quinn and Scattini we have a team of Family Law experts who are just a call away from helping you navigate the family law system.

Foreign Until Proven Australian

Business & Property Team

In 2016, the Government introduced the Foreign Resident Capital Gains Withholding Scheme (**the FRCGW Scheme**) which requires a foreign person or entity who sells certain property which they own in Australia to pay tax on the sale.

As of 1 July 2017, a foreign person or entity who sells certain property in Australia for a price of $750,000 or more must pay to the ATO a rate of 12.5% of the contract price on settlement of the transaction.

The FRCGW Scheme

The FRCGW Scheme is structured as 'Foreign until proven Australian'. That means that any person or entity who sells certain property in Australia for a price of $750,000 or more is required to obtain a clearance certificate from the Australian Taxation Office (**ATO**) to certify that they are not a foreign person or entity and therefore do not need to pay 12.5% of the contract price to the ATO on the settlement of the sale.

If the seller of a property is unable to produce a clearance certificate which matches the name registered owner recorded on title of the property, then the onus falls on the buyer to withhold 12.5% of the contract price from settlement to pay the withholding tax to the ATO.

What Property Does This Apply To?

The FRCGW Scheme applies to:

- **Real property in Australia** – including vacant land, buildings, residential and commercial property, mining quarrying or prospecting rights; and a lease over real property in Australia, and
- **Other assets** – which include indirect Australian real property interests in Australian entities, whose majority of assets consist of real property in Australia and options or rights to acquire any of the above asset types.

A foreign person or entity who sells certain property in Australia for a price of $750,000 or more must pay to the ATO a rate of 12.5% of the contract price on settlement of the transaction.

Example of Other Assets

If you are the sole shareholder of a company which owns three properties, which combined have a market value of $1.2 million, and you sell 100% of the shares in the property to a buyer, you are caught by the FRCGW Scheme and must provide to the buyer a clearance certificate in your personal name as seller of the shares to certify that you are not foreign and no withholding tax is required to be paid to the ATO on settlement.

Valid Clearance Certificate

A clearance certificate is valid for 12 months from the date of issue. For the purposes of the transaction, the certificate must be valid on the date it is made available to the buyer.

Clearance certificates are issued for the person named in the clearance certificate and are not property specific, so a seller may utilise the same clearance certificate for the sale of multiple properties provided that settlement of the properties are within the 12 months which the clearance certificate is valid.

Clearance certificates are issued for individuals or corporations so if the seller is a married couple who own the property jointly, each seller must apply for a clearance certificate in their own name.

Variation Notice

The ATO allows a seller to apply for a variation where the seller believes that the balance sale proceeds at settlement will not allow sufficient funds remaining for 12.5% of the contract price to be retained and paid to the ATO (for example if the outstanding balance on the mortgage is in excess of 90% of the purchase price). In this instance, if the variation is approved, the ATO may reduce the rate of retention required on the sale.

Note, a variation notice will be different to a clearance certificate in that it will specify the property to which it applies to and include an expiry date on the notice.

Foreign, But Not Always

In September 2017, the Queensland Titles Registry and the Office of State Revenue (**OSR**) introduced new requirements to be included in the Form 24 Property Information when selling or purchasing property and when stamping the contract and Form 1 Transfer to pay transfer duty.

The two institutions introduced a new question to be completed by the seller – "*Is the transferor a non-Australian entity*?".

If the seller is indeed a foreign person or entity, the seller must complete and provide to the OSR an identity details annexure in which must include details of the seller's country of residence for tax purposes, nationality of citizenship, passport number and country of issue, visa information and Foreign Investment Review Board (**FIRB**) application number from when the property was purchased.

A person or entity is considered a non-Australian entity when selling property if:

- an individual is not an Australian citizen (this is regardless of whether they are a permanent resident);
- a company is incorporated outside of Australia;
- a trust whose country of tax residence is not Australia; or
- another body formed outside of Australia.

Unfortunately, the contradiction exists where, for the purposes of selling a property, a permanent resident of Australia is considered a foreign entity despite when purchasing the property, no FIRB approval was required, Additional Foreign Acquirer Duty (**AFAD**) was not required to be paid and the permanent resident was entitled to the same concessions on transfer duty as would an Australian Citizen.

A Binding Agreement to Compromise

Commercial Litigation Team

"Let us never negotiate out of fear. But let us never fear to negotiate." John. F. Kennedy.

One unavoidable aspect of commercial litigation is the fast and furious nature of negotiations. Regardless of whether negotiations are face-to-face or over the phone, the importance of following strict procedures and officially recording all information when negotiating outside of the courtroom was highlighted in the case of *Gailey Projects Pty Ltd v McCartney* ("**Gailey**"). (https://archive.sclqld.org.au/qjudgment/2017/QSC17-185.pdf)

The Case At Hand

Gailey involved a dispute relating to an alleged consultancy agreement.

What was to be a two week trial, turned out to be a negotiation exercise on the first day of the trial. The plaintiff was represented by senior counsel and an instructing lawyer, and the defendants were represented by senior counsel, junior counsel and an instructing lawyer.

The Conversation

Negotiations ensued between the five legal representatives and resulted in the defendant making an offer of $450,000, payable to the plaintiff within 24 hours. A call option (an agreement to buy assets at an agreed price on or before a particular date) was also to be exercised by the plaintiff's nominee over a two-bedroom unit, which the plaintiff could choose from a range of units available at a particular development.

The plaintiff's senior counsel accepted the offer by saying the words "*We accept*", "*We have a deal*" and "*You must have worked hard on your guy.*"

The defendant's senior counsel then recommended that the next steps would be confirming the settlement terms by email that evening and advising the judge of the agreement the following morning.

The Claims

The defendants argued that a compromise had been reached at 5pm on the first day of trial. The plaintiffs argued there was no verbal acceptance of that compromise, or in the alternative, any agreement had been conditional upon execution of a deed of settlement, repudiated by the defendants or made unenforceable by sections 11(1)(a) and 59 of the *Property Law Act 1974* (Qld) (**the Act**) which require certain agreements to be in writing.

The Evidence

The evidence that was presented by all five legal representatives contained several discrepancies and, as a result, the court was unable to determine the sequence of events.

The Issue

The main consideration for the trial judge was whether the litigation had been compromised by a binding verbal agreement made at 5pm on the first day of the trial.

The Parties' Intentions

The judge took into consideration a number of factors, particularly:

- senior counsel from each side conducted the negotiations;
- previous attempts to settle at mediation had occurred;
- negotiations occurred on the first day of trial, while the matter had been stood down to allow for discussions;
- language used by the plaintiff's senior counsel constituted acceptance of the offer; and
- the terms of the offer were to be actioned within 24 hours.

The Certainty

The judge found that, although the parties did not use specific times for certain steps to be taken, the implied terms of 'reasonable time' and requiring 'reasonable steps' to be taken were sufficient to overcome any uncertainty regarding the defendant's lawyer's timing of certain steps in the email.

The Deed

Despite the plaintiff's claim that the offer had been conditional upon execution of a deed of settlement, the judge found that the offer was not dependent on a deed of settlement being executed.

The judge noted that it was "*hardly surprising that no condition requiring a deed of settlement prior to there being a concluded agreement was discussed*."

The Alleged Rejection of Offer

The plaintiff alleged that the defendant's solicitor's email contained terms differing from the verbal agreement and that that amounted to rejection of the offer.

The judge found that the differing terms within the defendant's lawyer's email did not constitute a rejection of the offer, but was instead merely seeking further clarification, proposing new terms that may or may not be accepted, and attempting to be more precise regarding the implied term of reasonable time.

To avoid issues it is important to follow strict procedures and official recording of all information when negotiating outside of the courtroom.

The Law

Regarding the call option for the two-bedroom unit, the judge considered sections 11(1)(a) and 50 of the Act. These sections state that no interest in land can be created or disposed of unless in writing and that no action can be taken regarding contracts for sale of land, unless the contract is in writing.

It was noted that there is a difference between an agreement to compromise and formal execution of written

documentation regarding the creation or transfer of land interests.

The Outcome

The judge determined that a binding agreement to compromise the litigation had indeed been reached.

Key Takeaways

In order to avoid confusion, lawyers are urged to record detailed file notes of the circumstances of negotiations, particularly any terms of offers made.

If a compromise is reached, the best safeguard is to set out all the details in an email.

Key information should include the terms of compromise reached, any terms that have been agreed, terms that require further clarification and any clarification required regarding any implied terms.

The Importance of Rehabilitation in Sentencing

A common question clients ask the first time they speak to a criminal lawyer is "*What can I do to help my sentence?*"

The answer to that question of course depends upon a number of things, including the nature of the charges and seriousness of the offence.

Generally speaking , if a client makes a concerted effort to undertake rehabilitation prior to sentencing, this will be viewed favourably and can in many instances mean the difference between having to serve time in an actual jail or remaining in the community.

Section 9 of the *Penalties and Sentences Act 1992* (Qld) provides the purposes for which a sentence may be imposed by a court on an offender.

Whilst a sentence must:

- punish a person to the extent that is just in the circumstances;
- deter the offender and other community members from offending; and
- make it clear that the community denounces such behaviour;

a sentence should also provide conditions to rehabilitate an offender.

Therefore, if a client is able to show demonstrated rehabilitation upon being sentenced, this will be viewed favourably by a court and can make all the difference.

As criminal lawyers, we always recommend our client to try to address the cause of

their offending prior to being sentenced by a court.

Submissions can then be made by your lawyer at sentencing that a supervised order may not be necessary, or that it is within the community's interest to have a rehabilitated person remain in the community as opposed to being sentenced to actual jail at the community's expense.

Types of Rehabilitation

The type of rehabilitation required will depend upon the type of offence:

a. Drugs and Alcohol

The most common offence a criminal lawyer will encounter is the use of drugs and/or alcohol.

If a client has been suffering from an addiction to drugs or alcohol for a significant period of time, the addiction is difficult to address without the help of professionals. The types of rehabilitation beneficial for matters where drugs or alcohol are involved can be:

- attending your GP for a referral to a psychologist or counsellor who can assist in providing coping strategies to deal with addiction;
- attending a drug or alcohol service provider at a local hospital or community centre, such as Drug Arm or ATODS (the Alcohol Tobacco and Other Drug Service); or
- attending a 'live in' or residential rehabilitation program, which provides detox, counselling and other services assisting with addiction.

If a person has been able to successfully complete any rehabilitation programme, a letter from that service outlining the client's engagement and progress can significantly impact the range of sentences that a court is likely to consider. Further, if a person is able to successfully cease drug use, clean urine tests can be obtained and provided to the court evidencing this fact. These circumstances are likely to impact favourably on your sentence.

b. Domestic Violence and Other Violent Offending

Another type of offence that court's see regularly is domestic violence and other violent or anger-related offences. The types of rehabilitation beneficial for this type of matter can be:

- attending your GP for a referral to a psychologist or counsellor who can assist with anger management problems;
- attending relationship or domestic violence targeted counselling, if the offence relates to a domestic relationship; or
- attending a parenting course if the offending relates to children.

In cases such as these, rehabilitation can vastly impact a client's sentence and again mean the difference between jail and remaining in the community.

If a client makes a concerted effort to undertake rehabilitation prior to sentencing, this will be viewed favourably by the courts.

c. Drink, Drug or Dangerous Driving

Another type of offence that court's see regularly relates to traffic matters. Traffic matters can range from drink or drug driving, to dangerous driving, to repeat careless or negligent driving.

If a client is at risk of losing their licence, it is always beneficial for the client to attend a traffic offender's program or safe driver awareness program. These programs are aimed at persons who have pending traffic charges before a court, and in some cases poor traffic history. The purpose of these courses is to demonstrate the risks of dangerous or poor driving habits, and remind clients of the serious consequences of poor behaviour on the road.

For this reason, completing these courses can assist a client to obtain a lower disqualification, or can mean the difference between the court granting or refusing a restricted licence.

Conclusion

It is always best you obtain legal advice from an experienced criminal lawyer, who can provide you with the best types of rehabilitation to undertake for your type of offending.

The sooner you get in touch with a criminal lawyer, the better the outcome can be.

Mental Capacity When Preparing Your Will

Wills & Estates Team

Background

Often requests are received to prepare a will while the client is suffering from some sort of life-threatening illness.

When these circumstances arise, there are many factors to consider and it is easy for loved ones to get caught up in the moment. However, the question of the will-maker's mental capacity must be at the forefront of the minds of all interested parties and not dismissed as 'irrelevant', or just a ploy by the solicitor to obtain more fees.

But just how far do you need to go to satisfy the courts that the will-maker had mental capacity? And more importantly, what are the consequences for the will-maker's family if mental capacity is not adequately assessed? A decision in the Queensland Supreme Court, *Ruskey-Fleming v Cook* [2013] QSC 142, addresses both of these issues.

The Facts

The will-maker was 91 years of age at the time of his death.

Following his death, his daughter made an application to the Supreme Court to uphold a will executed by the deceased on 8 June 2007 (**the 2007 will**).

The deceased's son challenged the application, claiming that the deceased did not have 'testamentary capacity' at the time of making the 2007 will. Instead, the son sought to propound an earlier will made by the deceased on 6 March 2000 (**the 2000 will**).

The deceased's estate consisted of three properties and cash with a total approximate value of $2.6 million.

Under the 2000 will, the distributions to the son and the daughter were roughly equal. Under the 2007 will, the daughter's interest increased by $207,000 and the son's interest decreased by $277,000.

The court had to decide if the deceased had testamentary capacity. In considering this, the court considered the circumstances leading up to the signing of the 2007 will and in particular noted:

1. The lawyer who prepared the 2007 will had no prior involvement or professional relationship with the deceased and did not obtain expert medical evidence as to the deceased's testamentary capacity at the time of signing the 2007 will.
2. The lawyer took precautionary steps and performed his own capacity tests on the deceased and made 'contemporaneous, comprehensive' diary notes. In particular, those notes concluded (in the lawyer's opinion) that the deceased had testamentary capacity.
3. There was evidence that the daughter was involved in giving instructions for the 2007 will. In particular, there was evidence to suggest that the 2007 will was what the daughter wanted.
4. Medical documents by treating doctors indicated a clear lack of capacity and ongoing lapses of memory by the deceased.

Despite the solicitor taking precautionary steps and believing that the deceased had testamentary capacity at the time of making the 2007 will, the court decided that the deceased did not have testamentary capacity.

This decision resulted in the daughter's application being dismissed and the 2000 will being upheld as the "last will" of the deceased.

Judgment mentioned in this post:

Title: Ruskey-Fleming v Cook [2013] QSC 142
Date: 3 June 2013
Court: Supreme Court of Queensland

Connect with

Quinn & Scattini Lawyers

mail@qslaw.com.au

www.qslaw.com.au

1800 999 LAW

(1800 999 529)

Brisbane CBD
Level 2, 102 Adelaide Street
(Next to King George Square)
Brisbane City
GPO Box 2612
Brisbane QLD 4001
Phone: (07) 3222 8222
Fax: (07) 3221 5350

Beenleigh
99 George Street
(Opposite Court
Cnr York Street) Beenleigh
PO Box 688
Beenleigh QLD 4207
Phone: (07) 3807 7688
Fax: (07) 3807 7514

Cleveland
141 Shore Street West
(Opp. Train Station)
Cleveland
PO Box 898
Cleveland QLD 4163
Phone: (07) 3821 2766
Fax: (07) 3821 2083

Gold Coast
1/2406 Gold Coast Hwy
(Cnr Markeri St.)
Mermaid Beach
PO Box 293
Mermaid Beach QLD 4218
Phone: (07) 5554 6700
Fax: (07) 5554 6900

Jimboomba
Shop 1
689 Cusack Lane
Jimboomba
PO Box 705
Jimboomba QLD 4280
Phone: (07) 5540 3940
Fax: (07) 5540 3233