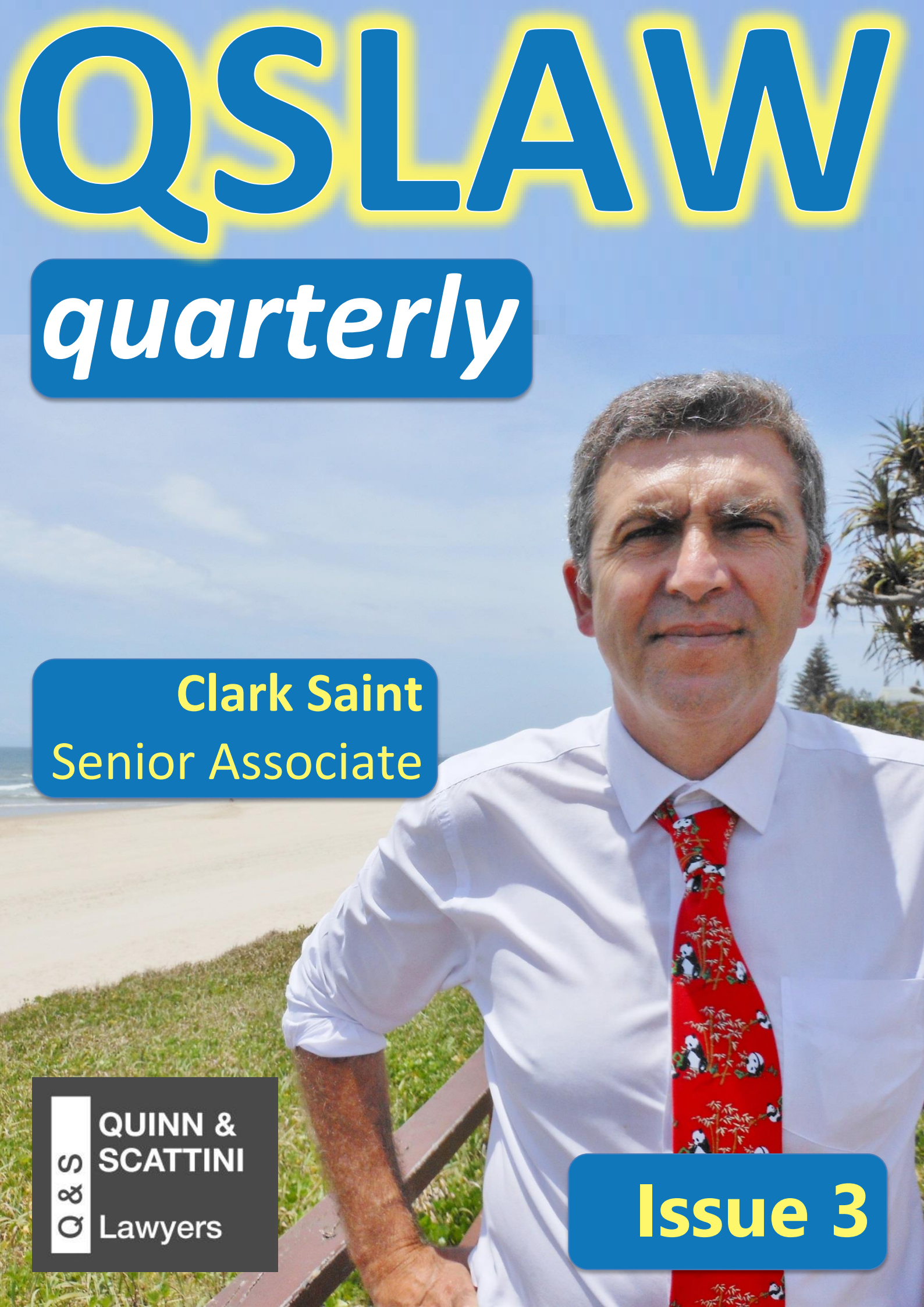
QSLAW

quarterly



Clark Saint
Senior Associate

Q&S QUINN & SCATTINI Lawyers

Issue 3

The Role of an Executor

Clark Saint
Senior Associate
Wills & Estates

When a person makes their will it is necessary for them to appoint at least one executor to carry out their instructions in the will.

It is possible to appoint multiple executors but the court will not give a grant of probate to more than four executors at any one time.

If you have been appointed an executor to act jointly with other persons then you should contact the other executors to administer the deceased person's estate. If the other executor has died you may need to obtain a copy of their death certificate. It is possible for a co-executor to sign a form renouncing their rights as an executor.

If your co-executor is not co-operating in the administration of the estate you can apply to the court for a grant of probate for yourself only, and reserve the right for the other executor to also apply for a grant of probate if they choose to do so.

If you are appointed as an executor your duties will include locating the deceased's original will and establishing the deceased's assets and liabilities.

An executor will need to examine the deceased person's debts and decide which debts should be paid and whether the estate has sufficient funds to pay the debts. An estate will be insolvent when it does not have adequate assets for the executor to pay the deceased person's debts.

An executor needs to consider whether there are any outstanding tax liabilities owed by the deceased person, or by their estate for income received after their death. If the deceased was retired it could appear that there are no outstanding tax liabilities. But if the deceased person had funds invested in a term deposit or other form of investment they might have earned income which when added to their pension income during a financial year exceeds the tax-free threshold.

There may be delays in the administration of the estate while the deceased's tax liability is established. Once an executor has paid the debts of the estate, the executor will then need to distribute the estate in accordance with the terms of the will.

An executor will need to consider whether any of the named beneficiaries died before the deceased person or otherwise failed to survive the deceased person for more than 30 days. If that is the case the executor will need to establish whether the deceased's will specifies that the children of any beneficiary who predeceased them or did not survive for more than 30 days are not to take that deceased beneficiary's gift.

An executor will often receive requests for copies of a deceased person's will. Section 33Z of the *Succession Act 1981* (Qld) provides that an

executor is required to provide a copy of the will to a child or spouse of the deceased, any person named in the will and any person who would be entitled to a share of the estate if the person had died without a will. An executor will also need to consider whether they should or need to obtain a grant of probate of the deceased person's will.

It is not always necessary to obtain a grant of probate but by obtaining a grant of probate an executor receives protection from liability in the event that a later will of the deceased is located. Generally if the deceased has more than $50,000 in a bank at the date of their death or owned shares then those assets will not be released to an executor without a grant of probate being obtained from the court.

An executor might find themselves involved in litigation as a result of someone making a claim for further provision from the deceased's estate or claiming that the deceased person did not have capacity when they made the will or claiming that undue influence was placed upon the deceased person to make the will.

In these cases the executor is required to take reasonable steps to uphold the deceased's persons will. In the case of a claim for further provision against the deceased person's estate an executor might make a realistic decision to reach an agreement with a claimant rather than spend the estate on legal costs.

If you are appointed an executor and require assistance to administer the estate or need to be represented in legal proceedings, Quinn & Scattini Lawyers have the experience to provide you with the best professional advice and service.

New Year Resolution … Or is that Dissolution?

Tim Ryan
Director
Family & De Facto
Law Team

Tradition has it that the New Year is an opportunity to begin again and to reinvigorate. It is also a time for family get-togethers and a new school year for the children.

The Dilemma

It is common knowledge amongst family lawyers that life changing decisions are made at this time. A partner to a relationship will cry 'never again' as they return home from dinner with the 'in-laws.' Others make decisions based simply on a new beginning. Quite often it's the case where one half of a relationship has deeply considered the ramifications of separation. The other half? It's like a tonne of bricks have fallen upon them. They are devastated and it's a fine line as to how they respond.

Family lawyers are left to tread a knife edge when their respective clients line up against each other.

The Dynamics

The logical and objective approach of the law often struggles with this competing dynamic borne of domestic circumstances. What goes on behind closed doors and the domestic arguments that may have been honed over years, sometimes decades, are reignited in the public arena.

The Family Court and its enabling legislation, the *Family Law Act 1975* (**the Act**) has struggled with this dilemma since its inception. The Act has undergone constant revision in an attempt to address the seeming impossible…taking emotion out of family law proceedings.

Of course this is impossible and it is recommended that resolving a property dispute or arguments relating to proper arrangements for children within the judicial arena should only be regarded as a last resort. It would seem logical that couples who have bought and sold properties together, trusted each other, sworn allegiances and raised children should be able to resolve issues that might arise at separation.

However these are the ties that bind and sometimes when broken, depending on the reason, no amount of logical recourse can assist. The couple who call time on a mutually agreeable basis are rarely seen within the court process.

Behind Closed Doors

Often the disputes and arguments that are heard in the court room should more appropriately be left behind closed doors. This dynamic is often the reason for separation and newly separated couples will not agree that white is white or black is black. Grey will not be tolerated because it is a compromise. He/she always gets their own way and enough is enough seems to be the modus operandi of separated partners who have reached the stage of litigation.

The Stakes

The stakes can be high and incredibly poignant in Family Law. This is particularly so where there are children involved. Most parties to family law disputes have children. The good parents resolve their issues regarding the children's needs with a view to their best interests. Some parents treat their kids like chattels and use them either as a bargaining tool or, a different tool; more like a hammer to bash the other parent over the head. Judges cannot emulate King Solomon of biblical times and 'divide' the child in equal shares for each parent.

Perhaps this scenario plays out in the minds of the judge when hearing evidence and argument concerning the 'best interest' of the child. One judge has been heard to mutter "*…these children would be better raised by monkeys. Unfortunately there are no monkeys before me today and I must decide between the competing interests of their parents…*" (not a direct quote).

The Last Resort

Mediation, conciliation or arbitration are now a pre-requisite of all jurisdictions and none more so than the family court. Mediation is sanctioned by the family court and it is necessary to establish before the court that this facility has, at least, been tried. Clearly it takes two to tango and if one party is not interested in a civilised discussion, is uncomfortable or in fear of the other then the court is the only means of determining what is a fit

and proper regime for the ongoing care, and welfare, of the children.

This is not a preferred option and quite frankly, no one with any experience in these matters believes it is appropriate. Solomon no longer presides and monkeys do not get a look in.

The Bottom Line

Avoid the court process. If there is no alternative and all other avenues have been tried then the family court is structured to at least keep in touch with the most basic of principles; the best interests of the child. If it is a property dispute then there is an emphasis on what is fair and equitable in the particular circumstances.

Get yourself a good lawyer, one that is focussed on the best way through the quagmire given the unique (always) factual situation. Instructing an 'attack dog' lawyer driven by ego and aggression may initially seem appealing. Be careful however as this could result in more stress and higher costs.

Conclusion

The best family lawyer is one who has the ability to play nice in the beginning but can still bring their 'A game' if the situation calls for it. The most important goal is resolution and closure. A family lawyer's role is sometimes to be a mediator, sometimes a litigator and other times a social worker.

For the most part all these skills are needed in equal measure. If the ex-partner does not want to negotiate and simply wants to 'win' the final argument, it is difficult to progress and resolve the dispute without resorting to litigation.

A good family lawyer must be prepared and be capable of advancing their client's entitlement in whatever role is appropriate in the circumstances.

When Does Online Bullying Become Defamation?

Commercial Litigation Team

Online bullying has gone viral and many experience defamation, but few know their legal position or ways to effectively manage it.

If a photo or statement has been published, whether in print or online, or a nasty email about you has been sent out to your work colleagues, you may feel as though there is nothing you can do.

However, if the published material harms your reputation or causes hatred and ridicule, you may have a right to sue for defamation.

What is Defamation?

With the expanding scope of the internet, and the immediate rate at which information can be shared, online publications and statements are an easy and accessible publishing platform.

But when is the line crossed between freedom of expression and defamation?

Defamation can be defined as imputations that create a negative opinion of a person to whom the defamatory statements can clearly relate.

The *Defamation Act 2005* (Qld) (**the Act**) abolished the distinction between libel and slander, however the general law determines the circumstances in which a cause of action may exist.

What is Online Bullying?

Bullying is the repeated unfavourable treatment of a person which is unreasonable and inappropriate, usually to torment, tease, humiliate or offend a person. The reliance on and accessibility of technology means that bullying can now occur online, the impact of which is almost immediate.

However, not all instances of online bullying automatically allow an aggrieved person a claim in defamation. A claim for defamation requires the plaintiff (the aggrieved party) to establish that the matter complained of:

- was published to at least one third party;
- specifically related to the plaintiff; and
- was defamatory.

What Practical Steps Should I Take?

If you believe that you are a victim of online bullying, or unfavourable statements have been made about you online, you should contact the site administrator and request that the post/statement be removed.

Alternatively, and if the circumstances allow, you can directly seek that the publisher remove the matter complained of.

What are the Next Steps?

A claim for defamation must be brought within one year from the date of the publication of the matter complained of.

However, prior to commencing proceedings for a claim in defamation, the aggrieved party is required to comply with requirements of the Act by issuing a notice, and allow the publisher sufficient time to respond to the notice.

Thinking of Buying or Selling a Business This Year?

Business & Property Team

Buying or selling a business and thinking you can save money by making the sale by yourself?

There are numerous problems that can arise in the maze of contracts, leases and trading without sufficient legal involvement.

First of all, a contract of sale is imperative. It is not satisfactory to have only a written agreement or to just hand over the

money, which unfortunately is quite a common issue.

The REIQ business contract of sale contains important terms and warranties which protect both parties. If you are obtaining finance to purchase a business your financier will require a copy of the signed business contract. If you are buying a business you will need to pay stamp duty on the contract. Failure to pay stamp duty or not to enter into a business contract of sale to avoid the payment of duty is an offence under the *Duties Act 2001*.

One of the most important aspects of buying or selling a business is making sure that the premises which the business trades from is correctly transferred to the new business owner. If you are selling a retail business it is most important to ensure the lease is transferred to the buyer in accordance with the procedures set out in the *Retail Shop Leases Act 1994*.

If the correct disclosures are provided, in the right order, you will be released from all obligations under the lease and personal guarantees upon transfer of the lease. If you do not transfer the lease correctly you may still be liable under the lease and personal guarantee.

Most people are unaware that for commercial premises a standard lease contains a provision providing that should you sell your business and transfer the lease to the buyer you are still liable under the current lease. If the buyer defaults under the lease the landlord will have rights to request you to pay for outstanding rental and legal costs due to the buyer's default under the lease.

When negotiating a new lease you should request the lease be amended to allow for you to be released from the lease when you sell the business and transfer the lease. The contract may be conditional upon you obtaining the consent of the landlord to the transfer of the lease to you or being granted a new lease.

It is important to know that when buying a business you will need to provide references and financial statements to the landlord in order for them to consent to you being a tenant. The landlord may refuse your application and therefore as you will not have a lease for the premises in which to operate the business the contract cannot proceed.

You should make sure that your contract contains a due diligence clause, which will allow you to make enquiries regarding the business and any licenses and permits you may need to operate the business.

If you are not satisfied with your results you may terminate the contract in your absolute discretion. For example when you a purchasing a restaurant business you will need to obtain a food licence. This licence is obtained from the local council and generally takes up to 30 days to obtain.

If you are purchasing a business, a restraint of trade or a non-competition is a must. This is a deed signed by all directors and shareholders of the company you are purchasing, which prevents them from setting up a related business to the one you are purchasing within a prescribed area from the premises and for a prescribed time. The restraint provisions must be reasonable.

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