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Kylie Shaw

Senior Associate
Wills & Estates

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SCATTINI**

Lawyers

SMSF Trustees: Trustee Discretion, Good Faith and Payment of SMSF Death Benefits (Wareham v Marsella (2020) VSCA 92)



Kylie Shaw
Senior Associate
Wills & Estates

In February 2019, in the Victorian Supreme Court decision of *Re Marsella; Marsella v Wareham (No 2)* [2019] VSC 65, the court set aside the trustee's decision to pay the death benefit to herself, and the trustee was removed as a trustee of the fund.

In this case, the deceased was survived by her second husband and her two children from her first marriage. The deceased was a widow when she met her second husband, and they were married for 32 years before her death in 2016.

During her lifetime, the deceased had established a SMSF of which she and her daughter were individual co-trustees. The deceased had left an earlier binding death benefit nomination, however, at the date of her death, the binding nomination had lapsed. Accordingly, no valid nomination was in place at the deceased's date of death.

Pursuant to the SMSF Deed, the daughter as surviving trustee appointed her husband as a co-trustee and on the same day they elected to exercise their

discretion, as trustees, to pay the entire death benefit of approximately \$450,416 to the daughter as the dependant of the deceased, with nothing to the deceased's surviving husband (the trustee's stepfather) of 32 years.

The deceased's surviving husband brought a claim against the daughter and her husband, as co-trustees of the SMSF, on the basis that the daughter and her husband did not exercise their discretion as the trustee of the SMSF in "good faith, upon real and genuine consideration and for a proper purpose" and that they acted in conflict with their duties as trustees.

The key questions for the court were:

- Whether the trustees properly exercised their discretion when paying the deceased's death benefit; specifically, the court considered whether the trustees acted in good faith, with real and genuine consideration and in accordance with the purposes for which the power was conferred, and
- Whether the trustees should be removed as trustees and whether a new trustee should be appointed.

McMillan J held that the trustees failed to exercise their discretion with a real and genuine consideration of the interests of the fund's beneficiaries, and in the context of an improper exercise of discretion, and significant personal acrimony between the daughter and the deceased's husband, the trustees were to be removed as trustees of the fund.

The trustees appealed this decision.

On 20 April 2020, the Victorian Court of Appeal dismissed the appeal.

The decision to dismiss the appeal reinforced many of the important lessons from the original judgment in trustees acting improperly in making the death benefit payment decision.

So What Did The Court Of Appeal Say?

For the appeal, the principal issues were:

- Whether the trustees gave a real and genuine consideration to the persons who might potentially benefit from the exercise of the discretion regarding the payment of the death benefit,
- Whether the daughter had acted in bad faith, and
- Whether the trustees should be removed.

The decision by the Court of Appeal confirmed that, in making death benefit payment decisions, the trustee of an SMSF must act in good faith, upon a real and genuine consideration, and in accordance with the purpose for which the choice was given. The court

confirmed that, in this case, the trustees did not do so.

Particularly (at 62) they said:-

"On balance, the inference to be drawn from the evidence is that the first defendant acted arbitrarily in distributing the fund, with ignorance of, or insolence toward, her duties. She acted in the context of uncertainty, misapprehensions as to the identity of a beneficiary, her duties as trustee, and her position of conflict. As such, she was not in a position to give real and genuine consideration to the interests of the dependants. This conclusion is supported by the outcome of the exercise of discretion."

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Real & Genuine Consideration

In the appeal decision, the court commented that, although the trustee obtained legal and accounting advice, it was not from a specialist in the superannuation field. The court carefully reviewed the trustees' minutes and correspondence from the trustees' solicitors, noting errors in the trustees' minutes.

The court commented that the fact that the minutes referred to the definition of "dependant" did not mean the trustees understood the definition and it could not be inferred that the trustees had properly considered all dependants.

In relation to the correspondence from the trustees' solicitor, this was sent after the death benefit decision had been made and stated that the estate and the deceased's husband had no interest in the death benefit payment. This was relevant to determining the likely advice the trustees received before making the death benefit decision.

Conflict Of Interest

The trust deed contained a clause allowing the trustee of the fund to enter into conflict transactions. The trustee argued that this clause forgave the conflict that the trustee had in paying the death benefit to herself. However, the court held a different view. The court said that the provision in the trust deed was not enough to forgive the actual conflict and that the personal conflict between the parties and the relationship

breakdown meant that the trustee could not have exercised her duties impartially.

Removal As Trustee

The trustee argued that, even if the original death benefit decision was to be set aside, the trustee should remain as trustee to re-make the decision. In considering this, the court said the trustee's decision to pay the death benefit to herself was based on a failure to give the decision real and genuine consideration. There was a risk moving forward that, even with proper advice, the trustee would not properly consider all potential beneficiaries.

As a result, her removal as a trustee was justified.

Conclusion

The court decisions in *Re Marsella* provide some very useful reminders on what an SMSF trustee must do when exercising their discretion to pay a death benefit. In particular, the decisions highlight that:

- All advice provided to the decision-maker should be clear and consistent with their legal obligations.
- The trustee should obtain specialist advice from a superannuation and trust law specialist.
- Where the decision-maker is also a possible beneficiary, extreme care should be taken to ensure that any conflict has been properly assessed.

- All communications (both verbally and in writing) should be legally correct and not contain any wrong information.

The decision of the Court of Appeal is a reminder that courts will reverse trustee's decisions and remove trustees if they do not act in accordance with their duties.

This case highlights that a disingenuous approach to the exercise of discretion may result in an aggrieved potential beneficiary bringing an application against a SMSF trustee.

How We Can Help

We will work with you to ensure you meet the legalities of deceased estate administration and provide high quality, professional trustee/executor services.

We are available at any of our local offices or by telephone or video-conference.

Speak to our experienced wills and estates lawyers on [1800 999 529](tel:1800999529), email mail@qslaw.com.au or visit qslaw.com.au.

Have You Been Defamed By A Keyboard Warrior Or An Online Troll? What You Need To Know!



Roly O'Regan
Special Counsel
Commercial Litigation

Did you know almost 8 in 10 people in Australia have an active social media account?

The popularity and accessibility of social media has advantages but there are also disadvantages. One disadvantage is the increase in "keyboard warriors" and "online trolls". Keyboard warriors are known to behave aggressively and unreasonably online, but unsurprisingly in "real life" they do not behave in that way.

Internet trolls conduct themselves in a similar manner, but are known to target newsgroups, forums, chat rooms and

blogs and do so to evoke an emotional reaction which can constitute defamation.

Whether it be published on Facebook, Instagram, Snapchat, Twitter, Pinterest or LinkedIn, all social media organisations (and newspaper outlets and radio stations) have policies and procedures in place to counter this online behaviour. The issue with these policies is you see what has been published before you can take appropriate action. Or in some instances, you are unaware about the posts until long after being published in cyber space when the damage to your personal or professional reputation has already occurred.

So what can you do if you have been targeted by a keyboard warrior or internet troll?

Have I Been Defamed?

Firstly, you need to determine whether the publication is defamatory or not. Defamation is defined as “false and derogatory statements about another person published in the press, electronic media or by word of mouth, without any justification recognised by law”. The legislation concerning defamation in Queensland is found in the *Defamation Act 2005* (Qld).

Obtaining Evidence Of The Imputations

Secondly, you need to obtain evidence of the defamatory content to initiate a case of defamation. Ideally, as much information as possible should be recorded. Whether this record be in the form of handwritten notes (including date, time, location and content of discussion, for verbal defamation), or screenshots taken from the relevant online sources evidencing the defamatory content concerning you.

Once you have the relevant evidence of the defamatory conduct, whether it be published on social media, radio or television, or in the newspaper, the next step is to seek legal advice from an experienced defamation lawyer who will provide you with the right advice and legal options to ascertain whether the publication is defamatory and what remedies are available to you.

Are There Any Defences Available For The Defamatory Publication?

It must be noted, however, that although the publication may be defamatory to you, the *Defamation Act 2005* (Qld) and the common law include a number of defences including these:

- justification,
- contextual truth,
- absolute privilege,
- public documents,
- fair report of proceedings of public concern,
- qualified privilege,
- honest opinion, and
- innocent dissemination

Therefore, it is important to obtain advice before any correspondence is sent to the publisher of the defamatory material as a defence may well be available.

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A Recent Example

Although this case concerned defamatory material published on the radio, the same legal principles apply to defamatory posts published on social media.

Recently, the well-known broadcaster, Mr Alan Jones, along with radio stations 2GB and 4BC, defamed the highly successful Wagner family in a series of radio broadcasts where it was published that the Wagner family were responsible for the deaths of 12 people, including two children, in the 2011 Grantham floods when a quarry wall owned by the family collapsed.

Justice Flanagan of the Supreme Court of Queensland found that the allegations were defamatory and ordered that Mr Jones and 2GB and 4BC pay the family \$3.75 million in damages. (See *Wagner and Others v Harbour Radio Pty Ltd and Others* [2018] QSC 201).

Why Do I Need A Lawyer To Assist Me?

Defamation is a serious matter and can have a disastrous impact on your personal and professional reputation. Defamation matters can be complex and you need an expert lawyer on your side to effectively navigate the legislation and put forward your best possible case so you obtain the right outcome, whether it be having the content permanently removed or receiving

compensation for having your reputation injured.

How Long Does A Defamation Case Take?

Defamation cases may take some time to resolve. However, it is normal practice to firstly send the defamer a letter or 'concerns notice' inviting them to make amends before any court proceedings are commenced.

How We Can Help

Just as easily as content can be published online, the damage to a person's reputation may have already occurred. Simply removing the publication may be insufficient to redress the damage to reputation. That is when you should contact us at Quinn & Scattini Lawyers.

We are available at any of our local offices or by telephone or video-conference.

Speak to our experienced defamation lawyers on [1800 999 529](tel:1800999529), email mail@qslaw.com.au or visit qslaw.com.au.

So You Want To Divorce?



Shelley Johnson
Associate
Family & De Facto Law

So you have decided to divorce your spouse. There are a few things that you need to know before you take this step.

The only legal requirement that you need to meet in order to file for a divorce is to prove that the marriage has irretrievably broken down. This is proven in one way

only – by the parties having lived separately and apart for twelve months and a day.

There are provisions whereby parties can prove the marriage has broken down while they are still living under the same roof, but they must be able to show that they have lived separately and apart during that time.

You can make a sole application for divorce or a joint application. A sole application means that your spouse does

not sign or necessarily have to agree with the application. Once you have filed it you will need to have a sealed copy served on your spouse. This is usually carried out by a process server who will provide you with an affidavit of service that must also be filed with the court to prove the other party has been served. (You cannot serve it yourself!)

A joint divorce is simpler. This is where both parties agree to the divorce and both sign the application. In this case there is no need for service of the divorce on either party.

If you have children under 18 years of age, you must attend at the court on the day of the divorce hearing. If you do not have children under 18 years of age you are not obliged to do so.

The Federal Circuit Court of Australia ("**FCCA**") has sole jurisdiction to deal with applications for divorce.

Accordingly, whether you choose to file for divorce electronically through the court website, or do a paper application, you must do so through the FCCA and not the Family Court.

Both types of divorce can be done online with a relatively user-friendly site on the FCCA. The current filing fee is a whopping \$930.

That is the charge that the court makes for filing your application and for the subsequent hearing.

If you can prove financial hardship you may be able to seek a reduction or even an exemption from that fee.

Q&A

Is it necessary for our property settlement to be completed before I file for divorce?

No, you can file for divorce after you have been separated for one year and one day irrespective of whether you have finalised your property settlement. However, it is important to note that there is a time limit of 12 months from the day your divorce becomes final to finalise your property matters, either by way of consent orders, binding financial agreement or orders of the court. The 12 month time limit is not an absolute bar to proceeding in property matters, but there are certain steps that must be taken to be able to proceed after 12 months.

Do I need a solicitor to make an application for divorce?

That depends on your circumstances. The court has made the procedures more accessible to the public and many people undertake their own divorces. However, in some circumstances the court requirements can be difficult to follow and assistance may be required.

How much does it cost to get a divorce?

That depends on your particular circumstances. The filing fee is a charge that the court makes. A joint divorce generally costs less than a sole divorce.

How We Can Help

To obtain an estimate of costs, call Quinn & Scattini Lawyers and one of our experienced family lawyers will be happy to discuss this with you.

We are available at any of our local offices or by telephone or video-conference.

Speak to our experienced family lawyers on [1800 999 529](tel:1800999529), email mail@qslaw.com.au or visit qslaw.com.au.

Work Licences: Keeping You On The Road



Do you require a work licence?

If you have been charged with an offence of drink or drug driving or failing to provide a specimen as required, and you need to your licence for your employment, you may qualify for a restricted licence, otherwise known as a work licence.

A work licence allows you to drive for the purpose of your employment during the disqualification period imposed by the court.

It is important that you are aware if you are convicted of the above offences you will face a mandatory disqualification of your licence of at least 1 month, and in many cases much longer.

This article outlines the eligibility criteria, conditions and success story of obtaining a work licence for 1 of our clients.

Am I Eligible For A Work Licence?

There are a number of conditions that must be met before you can apply for a work licence.

You must:

- Have a blood alcohol content less than 0.15% or only have a relevant drug in your blood or saliva (this means that if you are charged with high range drink driving or driving under the influence of a drug, you will not be able to apply).
- Be the holder of a valid open Queensland driver licence.
- NOT have had your licence suspended, cancelled or disqualified within the previous 5 years.
- NOT been convicted of an offence of drink or drug driving, failing to provide a specimen as required or dangerous operation of a motor vehicle in the previous 5 years.
- NOT have been driving for the purpose of work when you committed this offence.
- NOT have been the holder of a work licence at the time of the offence.

- NOT have been driving certain classes of vehicle at the time of the offence.

The Application Process

The application must be made before the court cancels your licence.

It must be made in the approved form along with evidence to support the application in the form of affidavits. Any witnesses must be available for cross-examination during the hearing if required.

An application for a work licence can only be granted if the court is satisfied that:

- You are a fit and proper person to hold a work licence. The court must consider the safety of other road users and members of the public, and
- That a refusal to grant the licence would cause extreme hardship to you or your family by depriving you of your means of earning a livelihood.

The Conditions

The conditions are set by the court and will vary from person to person, depending on their individual circumstances.

They may include:

- Days and hours that you are allowed to drive.
- What purposes you are allowed to drive for.
- The type of vehicle you may drive.
- Whether you are able to carry passengers.

Increase In Maximum Disqualification Period

If an order is made granting a restricted licence, the court is able to impose a maximum period of disqualification that is twice as long as if no restricted licence was granted.

This means that you may be able to drive for the purpose of your work, but you may potentially be disqualified for longer than if you did not make an application for a restricted licence

Success Story – Another Work Licence Granted

Case Reference: 191559

Type Of Case: Traffic Law – Work Licences

The Situation: Our client, *John, had a few drinks at the pub with his friend. On his way home he was pulled over by police and breathalysed with a BAC of 0.074. He had no previous convictions for drink or drug driving on his traffic history.

His job requires him to work 5 days each week between the hours of 5:00am to 6:00pm, travelling to locations around South East Queensland to attend call outs for plumbing work. He is unable to use public transport to attend these jobs as he is required to have access to a variety of tools and equipment in his vehicle.

Our client pleaded guilty to the offence of low range drink driving and an application was made for a restricted licence for the purpose of his work. His employer provided an affidavit stating that he would not be able to offer him employment while his licence was disqualified. We

were able to show that this would cause him extreme hardship and that due to his previous good behaviour, he was a fit and proper person to hold a restricted licence.

The Result: He was convicted and fined \$600 and his licence was disqualified for 1 month. His application for a work licence was granted, allowing him to drive for the purpose of his work during 5am and 6pm on weekdays, for the period of the disqualification.

How We Can Help

If you need your licence to earn a living, you need our expert legal help to prepare your work licence application for your best chance of being granted a work licence.

We are available at any of our local offices or by telephone or video-conference.

Speak to our experienced traffic lawyers on [1800 999 529](tel:1800999529), email mail@qslaw.com.au or visit qslaw.com.au.

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