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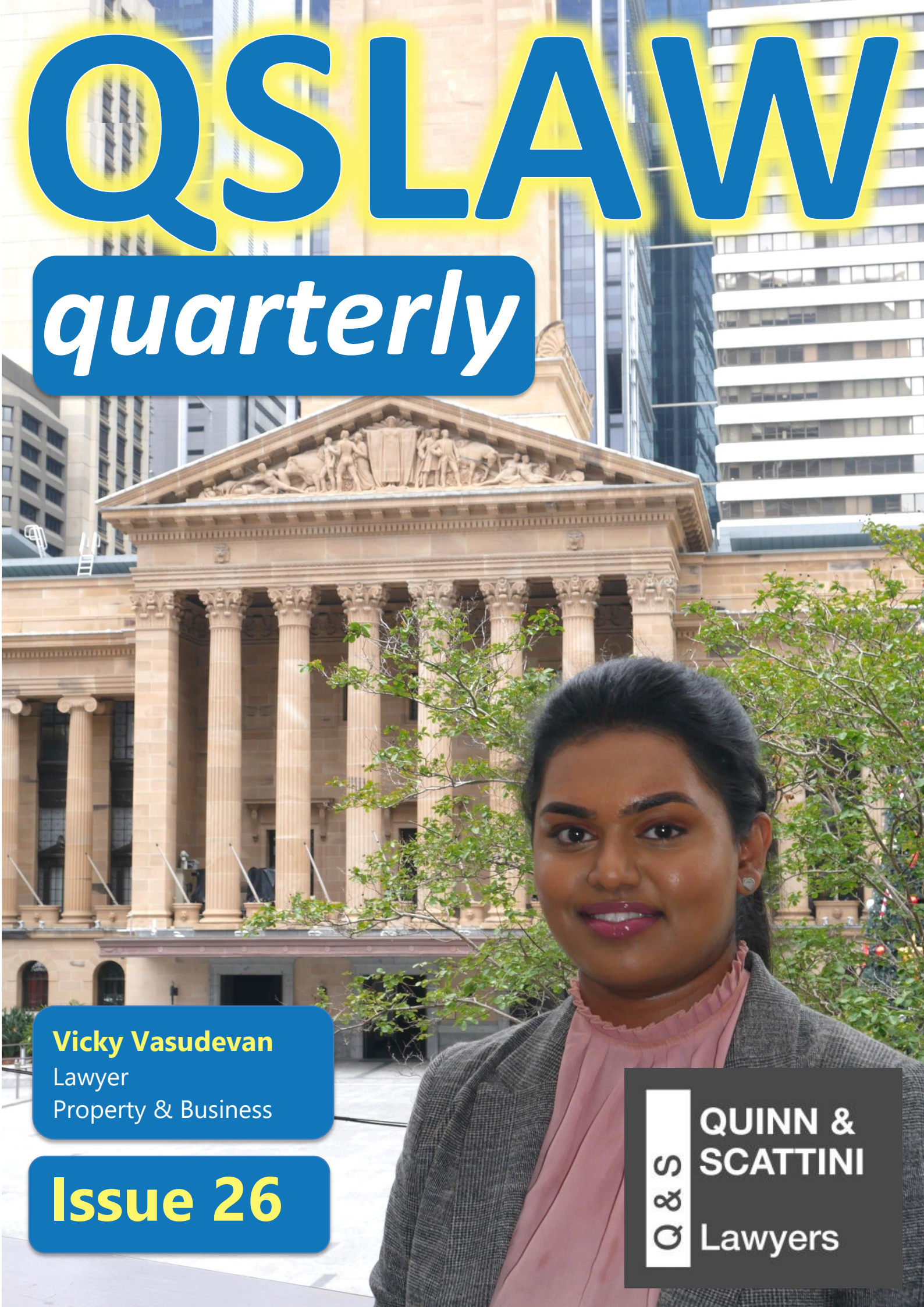

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Q&S QUINN & SCATTINI Lawyers

Caveats In Queensland: Protecting Unregistered Interests In Land

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Do you have an unregistered interest in land, which needs protection? This article explains how to protect your interest, by way of lodging a caveat.

What Is A Caveat?

A caveat is a legal document which, when recorded on the title of real property, prevents the registration of any dealings which may defeat or diminish the interest claimed in the caveat. The term itself is derived from the Latin word 'cavete' meaning 'beware'. The party who lodges a caveat is known as a 'caveator' and the party who has an interest in the land over which the caveat is lodged, is called the 'caveatee'. The *Land Title Act 1994* (Qld) ('the Act') primarily governs the creation, use and effect of a caveat.

Effect Of Lodging A Caveat

The primary effect of a caveat is to prevent the legal owner or any third party from:

1. transferring or selling the property to another person, or
2. registering other instruments against it, such as a mortgage.

According to Mason CJ, Dawson and McHugh JJ in the High Court case of *Leros Pty Ltd v. Terara Pty Ltd* (1992) 174 CLR 407 at paragraph 422, the purpose of a caveat is to "*operate as an injunction to the Registrar-General to prevent registration of dealings forbidden by the Caveat until notice is given to the Caveator, so that he or she has an opportunity to oppose such registration*"

Exceptions To The Effect Of Lodging A Caveat

Under section 124 (2) of the Act, the lodgement of a caveat does not prevent registration of the following:

1. 'an instrument specified in the caveat, as one to which the caveat does not apply,
2. an instrument, if the caveator consents to its registration,
3. an instrument executed by a mortgagee whose interest was registered before lodgement of the caveat, if:
    i. the mortgagee has power under the mortgage to execute the instrument, and
    ii. the caveator claims an interest in the lot as security for the payment of money or money's worth,
4. an instrument of transfer of mortgage executed by a mortgagee whose interest was registered before lodgement of the caveat; and
5. another interest that, if registered, will not affect the interest claimed by the caveator.'

Who Can Lodge A Caveat?

Pursuant to section 122 (1) of the Act, a caveat may be lodged by:

1. a person claiming an interest in the land;
2. the Registrar at the Land Titles Office;
3. the registered owner of the land;
4. a person to whom an Australian court has ordered that an interest in the land be transferred; or
5. a person who has the benefit of a subsisting order of an Australian Court, restraining a registered proprietor from dealing with the property.

A caveat may also be lodged by:

1. a person objecting to an application for adverse possession (section 104 of the Act);
2. a person applying to the Supreme Court for an order that another person be made registered proprietor of the land (Section 114 of the Act); and
3. a purchaser under an instalment contract (section 74 of the *Property Law Act* (QLD) 1974).

Caveatable Interest

The party wishing to lodge a caveat, will need to show that they have a 'caveatable interest' in the property. The interest claimed will need to be an actual interest in the land. A mere personal or contractual right is not sufficient. Schedule 1 of the *Acts Interpretation Act* (QLD) 1954 defines "interest in relation to the land or property" as:

1. 'a legal or equitable estate in the land or other property; or
2. a right, power or privilege over, or in relation to, the land or other property'.

The following are examples where Courts have found that a caveatable interest exists:

1. a buyer's interest under an unconditional sale contract (Re Oiltool Sales Pty Ltd; Classified Pre-mixed Concrete Pty Ltd [1996] QWN 11);
2. an unregistered mortgagee's interest in land (Re Dixon's Caveat (1922) 39 WN (NSW) 89); and
3. a buyer's lien for the return of a deposit under a terminated sale contract (Ex parte Lord [1985] Qd R 198).

The following are examples where Courts have held that a caveatable interest does not exist.

1. a shareholder's interest in a company (Apartment Developments Pty Ltd v. Johnson [2013] VSC 136);
2. a beneficiary's interest under a discretionary trust (Walter v. Registrar of Titles [2003] VSCA 122); and
3. a partner's interest in a partnership (Chettle v. Brown [1993] 2 Qd R 604).

These situations do not constitute a caveatable interest, as the interest held does not give rise to a specific right to property owned by the company, trust or partnership.

What Happens After A Caveat Is Lodged?

Once a caveat has been lodged, the registered owner and other interested parties will be notified of the lodgement. The registered owner may serve the caveator with a notice to commence legal proceedings within 14 days of receiving the notice.

If proceedings are not commenced within the requisite time-frame, the registered owner may apply to have the caveat removed. If a notice to commence legal proceedings is not served, the caveat will

remain in place for 3 months (section 122(1)(a) of the Act).

Pursuant to section 126 (1) of the Act, a caveat will not lapse after 3 months, if:

1. consent of the registered owner was deposited when the caveat was lodged;
2. a copy of the court order is deposited when the caveat is lodged;
3. lodged by the Registrar;
4. lodged other than under section 126; or
5. lodged by the registered owner of the property.

According to section 126 (1A) of the Act, a caveat lodged by a registered owner will only lapse after 3 months, if

1. there is a mortgage over the property; and
2. the caveat is in relation to the actions of the mortgagee.

Removal Of A Caveat

In *Landlush Pty Ltd v. Rutherford* [2003] 1 Qd R 236 at paragraph 240, Wilson J stated that 'a current caveat should be removed, unless the caveator shows that there is a serious question to be tried, which would justify leaving the caveat undisturbed'.

A caveat can be removed in the following ways:

1. withdrawal of the caveat by the caveator;
2. lapsing of the caveat (section 126 of the Act);
3. an order by the Supreme Court of Queensland that the caveat be removed (section 127 of the Act); or
4. cancellation or rejection of the caveat by the Registrar (section 128 of the Act).

Can A Second Caveat Be Lodged?

Pursuant to section 129 of the Act, a further caveat cannot be lodged by same caveator, on the same or substantially same grounds, without the leave of the court.

Compensation For Lodging An Improper Caveat

The consequences for lodging an improper caveat may be severe. According to section 130 (1) of the Act, '*a person who lodges a caveat or continues a caveat without reasonable cause, must compensate any person who suffers loss or damage, as a result of this*'.

In Queensland, the onus is on the caveator to show that the caveat was lodged or continued with reasonable cause (section 130 (3) of the Act).

In *Von Risefer & Ors v. Permanent Trustee Company Pty Ltd & Ors* [2004] QSC 248, the plaintiffs lodged four additional caveats over the property, on substantially the same grounds as the three previous caveats which had been removed by a court order. The previous caveats had been removed on the basis that the plaintiffs had no caveatable interest in the property.

Accordingly, Atkinson J was of the view that '*each of the caveats lodged was lodged without reasonable cause*' and ordered that:

1. the caveats be removed, and
2. the plaintiffs,
    i. be restrained by way of an injunction,
    ii. from lodging any further dealings against the property, without obtaining leave of this Court;

i. compensate the defendants the sum of $2,170.30, being the defendant's legal fees for removing the caveats; and
ii. pay the defendants costs of and incidental to the legal proceeding.

Conclusion

In order to be successful in lodging a caveat, the:

i. caveat must be drafted correctly, in accordance with the Land Titles Office requirements; and
ii. caveator must have a caveatable interest in the property.

Legal advice should be sought to determine whether a caveatable interest exists. The existence of a caveatable interest will depend on the facts of each individual case.

If the caveat is incorrectly drafted or lodged on improper grounds:

1. the caveat will be removed,
2. compensation may be incurred, for improper lodgement, and
3. the right to lodge another caveat on the same or substantially same basis, will be lost.

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Special Hardship Licence: The Criteria & Conditions

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A special hardship order is available to people that hold a provisional or open licence and have had their licence suspended by the Department of Transport and Main Roads. It is an order made by a Magistrates Court that allows you to drive during the suspension of your licence, but only under certain conditions. The two most common reasons to apply for a special hardship order are either for gaining two or more points whilst subject to a good driving behaviour period or being fined for driving more than 40km per hour over the speed limit.

You are not automatically eligible if the either of the above applies. There are instances when you are not eligible to apply, such as having a suspension or disqualification of your licence in the previous five years. If in the last five years your licence was suspended as a result of a SPER debt, then you are eligible to apply for a special hardship order. This is the only type of suspension that is an exception.

You may apply for a special hardship order at any time during the suspension of your licence, but your licence must be suspended first. For example, if you are due to pay a fine which results in losing demerit points and being suspended from driving, then you must pay the fine and wait to receive a letter in the mail with your suspension date. We recommend having your special hardship

order application and supporting material ready to file before the suspension date, as you will be able to drive in the period of time between the suspension and your court date once the application is filed. Your application cannot be filed before the suspension commences.

When you file your application in the Magistrates Court nearest to your residential address, you will receive a court date. You must serve the application and your supporting material on the Department of Transport and Main Roads and obtain a permit to drive until the court date. You must not drive to court to file your application or from the court to the Department of Transport and Main Roads, otherwise you are driving unlicensed, which is a criminal offence and carries penalties, including possible disqualification of your licence by the court.

At your court date, the magistrate will consider whether:

- You will experience extreme financial hardship without a licence or you and your family will experience severe hardship if you do not hold a licence, and
- You are a fit and proper person.

If you can satisfy both of the above, then you will be granted a special hardship order.

Experiencing extreme financial hardship as a result of losing your licence means that you will lose your job or be demoted and receive a significant pay reduction, which affects your ability to pay your expenses and/or support your family. You will need to obtain an affidavit from your employer detailing how losing your licence will affect you (i.e. you will lose your job). Your employer will need to be available for the court date in the event they are required for cross-examination. You will also need to do an affidavit detailing how you would experience hardship if you lost your licence. The hardship that you suffer must be extreme, not a mere inconvenience, and alternate transport (such as public transport) cannot be available to you.

In order to satisfy the court that you are a fit and proper person, you must show the court that you have regard for other road users' safety. This is done by way of an affidavit and is usually more difficult to satisfy. The court will want to be satisfied that you have the knowledge and ability to drive safely. The court will look to your traffic history and make an assessment on whether you have a history of having regard to other road users and their safety. For example, if you have a history of driving dangerously or without due care, the court may conclude that you do not have regard to other road users' safety and the public in general.

By way of another example, if you have numerous speeding offences in recent months, it may also be more difficult to obtain a special hardship order as the court may also interpret your pattern of speeding as a disregard for other road users' safety. You could complete a road safety course in matters like these, to show the court that you are knowledgeable on road safety.

If you are granted a special hardship order, there will be conditions that you must abide by and you must have a copy of the order with you at all times when driving. The order will state:

1. The class of vehicle you are allowed to drive,
2. The purpose for which you are allowed to drive for, and
3. The times that you are allowed to drive between.

The court is able to insert any additional conditions that are reasonable and appropriate based on your circumstances.

It is very important that you do not breach any of the conditions of your special hardship order, because if you do, you will be brought before the court and face a potentially significant fine and a further three month suspension of your licence. If you have lost your licence as a result of a drink or drug driving charge, then you are not eligible for a special hardship order.

Contact Us

Speak to our experienced traffic lawyers on 1800 999 529, email mail@qslaw.com.au or visit qslaw.com.au.

Parenting Matters: Living Separated With Children?

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Who will my children live with and what time will they spend with each parent?

There are many different living arrangements for children once their parents have separated. Where parents can get along, they may be able to agree on living arrangements for their children. However, it is common for parents to have different views on what living arrangements will suit their children best. When this happens, it can be helpful to talk to child development professionals and get some information on the topic and to talk to an experienced family lawyer to get some advice. We can help you to set out your parenting arrangements in a Parenting Plan or Court Orders.

Below you can find information on how the law relates to parenting arrangements.

The law is important to understand when making parenting arrangements, but it is also helpful to think about your children and their unique personalities, developmental stages and ages. As children grow up, the parenting arrangements might grow and change with them.

How does the court make decisions about my children?

The court will be guided by Part 7 of the *Family Law Act 1975* when making decisions about your children. The objects are to ensure that the best interests of your children are met by:

- ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child,
- protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence,

- ensuring that children receive adequate and proper parenting to help them achieve their full potential, and
- ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

- children have the right to know and be cared for by both their parents regardless of whether their parents are married, separated, have never married or have never lived together,
- children have the right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives),
- parents jointly share duties and responsibilities concerning the care welfare and development of their children,
- parents should agree about the future parenting of their children, and
- children have the right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Who makes the parenting decisions now we are separated?

Each parent has parental responsibility for their children under 18 years of age. Parental responsibility is the powers, duties and responsibilities which parents have at law in relation to their children.

There is a presumption that it is in the best interests of the children for parents to have equal shared parental responsibility for them. Shared parental responsibility is not the same as equal time. This is about both parents being equally responsible to make the major long-term decisions for their children. It includes (but is not limited to) matters relating to your child's:

- education
- religious and cultural upbringing
- health
- name
- living arrangements so far as changes to those arrangements may impact on the time the child spends with a parent.

The presumption of equal shared parental responsibility will not apply, where the court is satisfied there was evidence to suggest it was not in the child's best interests, for instance where there is family violence or if a child was being abused.

What is equal time or substantial and significant time?

When a child lives primarily with one parent that means they will spend most of the time in that parent's care. They may spend time with the other parent on alternate weekends or on overnights at other times during the weeks.

Equal time is where children spend the same amount of time with each parent. This can be done in numerous arrangements. A common equal time arrangement is where children live with their parents in a week about arrangement.

Where children spend substantial and significant time with a parent, this means:

- time including days that fall on weekends and holidays and days which do not fall on these days,

- time which allows the parent to be involved in the child's daily routine and days of significance to the child (such as birthdays), and
- time which allows the child to be involved in days of significance to the parent.

How does the court make decisions on where children live?

The legal framework to determine living arrangements for children can be complicated to understand.

If the presumption for equal parental responsibility applies, then the court must go through the following steps:

- **STEP 1**: the court considers whether the child living in an equal shared care arrangement is in the child's best interests and 'reasonably practicable' and:
    - if so make an order for equal shared care, or
    - if not the court goes to step 2.
- **STEP 2**: the court considers whether the child spending substantial and significant time is in the child's best interests and 'reasonably practicable' and
    - if so: make an order for substantial and significant time, or
    - If not: go to Step 3.
- **STEP 3**: if the court decides it is not in the child's best interests to make orders for equal shared care or substantial and significant time, then the court will consider making such orders having regard to the best interests of the child.

Therefore, children will only live in an equal shared care arrangement where parents can agree on it or where the court finds that it is in the best interests of the child and is the most suitable arrangement. Each case will be considered on its own facts and circumstances. There are no automatic rules about living arrangements.

What does 'best interests of the child' mean?

The court must have regard to the best interests of the child as the paramount consideration when making determinations about your children.

The factors the court will have regard to are contained in s 60CC of the *Family Law Act 1975*. The most important factors are the primary considerations, and then there is a longer list of additional considerations.

Primary considerations

- The benefit to the child of having a meaningful relationship with both of the child's parents, and
- The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

If these primary considerations conflict, the need to protect the child is the more important consideration.

Additional considerations

Some of the additional considerations are:

- any views expressed by the Child
- the nature of the relationship of the Child with each of the Child's parents and other persons.
- the extent to which each of the child's parents has taken, or failed to take, the opportunity to participate in decision making relating to the child and spending time with and communicating with the child.

- the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child.
- the likely effect of any changes in the Child's circumstances, including the likely effect on the Child of any separation from the parents or other person who the child has been living.
- the practical difficulty and expense of a Child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the Child's right to maintain personal relations and direct contact with both parents on a regular basis.
- the capacity to provide for the needs (including emotional and intellectual) of the Child, by each of the parents and any other person.
- the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the Child and of either of the Child's parents.
- if the Child is an Aboriginal Child or a Torres Strait Islander Child, the right to enjoy their culture and any impact a parenting order will have on that right.
- the attitude to the Child, and to the responsibilities of parenthood, demonstrated by each of the Child's parents.
- any family violence involving the Child or a member of the Child's family.
- if a family violence order applies, or has applied, to the child or a member of the child's family – any relevant inferences that can be drawn from the order.
- whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the Child.
- any other fact or circumstance that the court thinks is relevant.

What does 'reasonably practicable' mean?

When determining whether an arrangement for equal or substantial and significant time may be reasonably practicable, the court must have regard to factors such as:

- How far apart the parents live from each other,
- The parents current and future capacity to implement an agreement for the child spending equal time, or substantial and significant time, with each of the parents,
- The parents current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind,
- The impact that an arrangement of that kind would have on the child, and
- Other matters the court considers relevant.

The court will take a firm stance against a parent who makes decisions for their children without regard and involvement of the other parent in the decision making.

How do we document our agreement?

If you are able to reach an agreement for parenting arrangements, you can do so with either a Parenting Plan or Court Orders.

A Parenting Plan is a signed and dated document setting out the parenting arrangements.

A Court Order is filed in the court and needs to be approved by the court, it is also legally binding on all parties and enforceable.

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Unfair Dismissal vs Redundancy

Commercial Litigation

Have you been dismissed from your job? If you were made redundant, was the redundancy genuine?

The recent economic downturn has had a major effect on the workforce. We have all seen images of people lined up at Centrelink offices to register for an unemployment benefit. Although many have lost their jobs due to businesses (or entire industries) failing, a good majority of the workforce remains employed. Some sectors are even thriving.

For those who have become unemployed, it is vital to understand principles of employment law regarding the termination of employment. This article will look at two key aspects of ceasing employment – unfair dismissal and genuine redundancies – and their inter-relationship under the Fair Work Act ("**the Act**").

Unfair Dismissal

The Fair Work Commission ("**FWC**") manages applications for unfair dismissal. Most employees are protected from unfair dismissal where:

- The person has completed the minimum period of employment (six months, or one year if the employer is a "small business"); and
- The person earns less than the high income threshold (currently $153,600).

Criteria Of Protection

The minimum period of employment (6 months) will be extended if the employer is a "small business." Under the Small Business Fair Dismissal Code ("**the Code**"), a small business is defined as a business that employs 15 employees or less (including all full-time and part-time employees).

The high income threshold is adjusted annually on 1 July. This is not exclusive to wages and may include non-monetary benefits or amounts directed to a third party by the employee.

Most employees are covered by an enterprise agreement or "modern award" under the Act. Modern awards provide minimal standards for employment which include leave entitlements, breaks, and pay rates. Modern awards apply even if there is no employment contract between the employee and the employer.

Unfair Dismissal

Once an application for unfair dismissal has been filed, the FWC will determine whether the dismissal was harsh, unjust or unreasonable. Only one of these elements

needs to be proven to find that the dismissal was unfair.

There are a variety of issues that the FWC will consider when deciding whether the termination was unfair. These include:

- The reason for the dismissal.
- The alleged misconduct by the employee.
- A failure to provide an opportunity to respond to allegations of misconduct.
- The steps taken by the employer leading to termination (e.g., holding meetings with the employee and involving a support person).
- The size of the employer business.
- Whether the employer has a dedicated human resource manager.

Each of the above issues (plus any other relevant issues) will need to be considered on the facts of each case.

Redundancy

A person will not have protection against unfair dismissal where the employment has been terminated as a result of a genuine redundancy. A genuine redundancy occurs when:

a) The employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
b) The employer has complied with any obligations imposed by an applicable modern award or enterprise agreement to consult about the redundancy.

By contrast, a person's dismissal will not be a genuine redundancy "if it would have been reasonable in the circumstances for the person to be redeployed within:

- the employer's enterprise, or
- the enterprise of an associated entity of the employer."

So the key indicia of a genuine redundancy are a discontinuance of the person's job, compliance with obligations under the enterprise agreement or modern award, and the inability to have the employee redeployed to another position. Modern awards and enterprise agreements include clauses requiring consultation with employees regarding changes that will significantly affect their employment. This would obviously include being made redundant.

Dismissal vs Redundancy

If the above requirements of a genuine redundancy are met, then the FWC will not have jurisdiction to hear a claim of unfair dismissal. Alternatively, if an employer has not met the requirements of a genuine redundancy, then the termination of employment may be treated as an unfair dismissal and the FWC will consider the factors listed in section 387 of the Act.

The Bourdon Case

In the case of *Bourdon v AR-Rahmann Investments Pty Ltd T/A The Cheesecake Shop* ("**Bourdon**") the FWC needed to determine if a genuine redundancy had occurred or if the employee was unfairly dismissed. In reaching his decision in Bourdon, Commissioner Wilson applied the usual test for a genuine redundancy. The issue that required greater consideration was whether the employer had complied with the obligation to consult with the employee before implementing the redundancy. On the facts in Bourdon, it was found that the employer had not adequately consulted with the employee. In fact, the employer had already made up their mind to make the

employee redundant, and informed the employee of that fact, during the alleged consultation. Commissioner Wilson found that the termination of employment was not a genuine redundancy.

Commissioner Wilson then considered whether the termination of employment was an unfair dismissal. Commissioner Wilson referred to sections 387(c) and 396 of the Act when reaching his decision, noting that that the employee was not provided with an opportunity to respond to the reasons for termination of their employment. Consequently, it was decided that the dismissal of the employee was unjust and unreasonable.

How Can We Help?

It is essential for both employers and employees to understand the relationship between an unfair dismissal and a genuine redundancy.

If you are an employer thinking about terminating the employment of an employee, or an employee who has recently been dismissed from your work, please contact us to arrange a consultation to discuss your rights and obligations.

Contact Us

Speak to our experienced employment lawyers on 1800 999 529, email mail@qslaw.com.au or visit qslaw.com.au.

1. Note: applications for unfair dismissal must be filed with the FWC within 21 days after the date of termination.
2. s 387
3. s 387
4. s 389(1)
5. s 389(2)
6. [2019] FWC 239
7. Bourdon at paras [33]-[40]
8. Bourdon at paras [41]-[42]
9. Bourdon at para [56]
10. Bourdon at paras [57]-[59]

Elder Abuse: The Abuse, Neglect & Exploitation Of The Elderly

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People with impaired capacity are among the most vulnerable members of our society. Much like other forms of domestic or family violence, elder abuse can be difficult to spot because of the dynamic in which it happens. It is often perpetrated by family members, carers, friends or other trusted persons.

The abuse, neglect and exploitation of older Queenslanders is a significant and growing concern. Older people with impaired decision-making capacity are particularly vulnerable to elder abuse.

Common situations where elder abuse occurs include:

- A breakdown in family agreements to lend money, build a granny flat, provide money/assets in exchange for care.

- Receipt of a carer's pension without providing care.
- A family member (for example a son, daughter or grandchild) living in the home and being verbally abusive, not contributing financially or refusing to move out when requested.
- Misuse of a power of attorney.
- Denial of an older person's right to make their own decisions and control their finances.
- Isolating the older person from other loved ones.
- Older people being forced to sign legal documents.

One significant issue is the misuse of enduring powers of attorney.

An Enduring Power of Attorney ("**EPA**") is an important tool that allows older people to choose the person (or persons) who will make decisions on their behalf if they lose decision-making ability in the future. They may also protect an older person with impaired decision-making ability from being exploited and abused by others. However, EPAs are capable of being misused, often with devastating consequences for the elderly person.

Often the abused elderly person is embarrassed, and unwilling to complain. Elder abuse can be subtle and difficult to pick up. Abusers often rationalise themselves into thinking that they are simply getting their inheritance or other entitlements early, sometimes referred to as "inheritance impatience."

People who are appointed by an EPA must know that they have an absolute and unconditional duty to act in the best interests of the person who appointed them. If an appointed person acts improperly, he or she can be held personally and criminally liable.

When making an EPA, t is prudent to take precautions to reduce the possibility of such abuse. This may include considering the following options:

- Appointing two people and requiring that they act jointly, instead of relying on just one person.
- Carefully choosing the person/s who will act as your attorney/s. They must be someone you trust to act in your interests.
- Making it a condition of your EPA that someone else (e.g. another family member or friend) receives copies of bank and other financial statements and regular reports from your attorney.
- Making other people you know aware of who you have appointed so they know what is happening.
- Requiring that a doctor must certify any incapacity before the EPA comes into force.
- Possibly requiring that your affairs are independently audited each year. (Obviously there would be costs for this).
- Limiting the attorney's power to deal with major assets, such as by selling or mortgaging your home. (This can make arranging future accommodation difficult, though).

If you are concerned that an EPA is being misused by an attorney for an elderly person who is incapable of doing anything about the situation, you may need to take action to assist them.

When elder abuse is suspected, there are arrangements (both legal and practical) that can be put in place to protect the elder from further exploitation and to provide them with the safety and security to which they are entitled.

If the reason that the older person cannot do anything about the situation is because they suffer from impaired cognitive capacity (for example, because of dementia), then you could consider making a complaint to the Office of the Public Guardian.

The Office of the Public Guardian of Queensland is responsible for investigating and taking action where an adult with impaired capacity is being exploited, neglected or abused.

The Office of the Public Guardian also has the power to require documents and records to be produced by an attorney and to look at bank records and other documents as part of its investigations.

Sometimes an application to the Queensland Civil Administrative Tribunal ("**QCAT**") is necessary.

QCAT has the power to appoint an administrator or guardian for a person with impaired capacity. Before QCAT can appoint an administrator or guardian there must be sufficient evidence that:

- The adult has impaired decision-making capacity.
- There is a need for a decision; and
- A decision-maker is needed to ensure that the adult's needs are met and that their interests are protected.

QCAT also has the power to remove attorneys who are not carrying out their duties, and to appoint other people or entitles, such as the Public Trustee of Queensland, to make decisions for the person with impaired capacity.

In Queensland, on 1 May 2019, parliament passed an Act amending the Criminal Code of Queensland in relation to crimes against elders and children. These important changes include:

- s 302 - The definition of murder is now defined to include "if death is caused by an act done, or omission made, with reckless indifference to human life"; and
- s 324 - The offence of "failure to supply the necessaries of life" will now be treated as a crime, rather than a misdemeanour, with a maximum penalty of up to 7 years imprisonment.

While much of the commentary on those changes focussed on child abuse, the amendments are equally applicable to elder abuse where someone has failed to adequately care for an older person.

Contact Us

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