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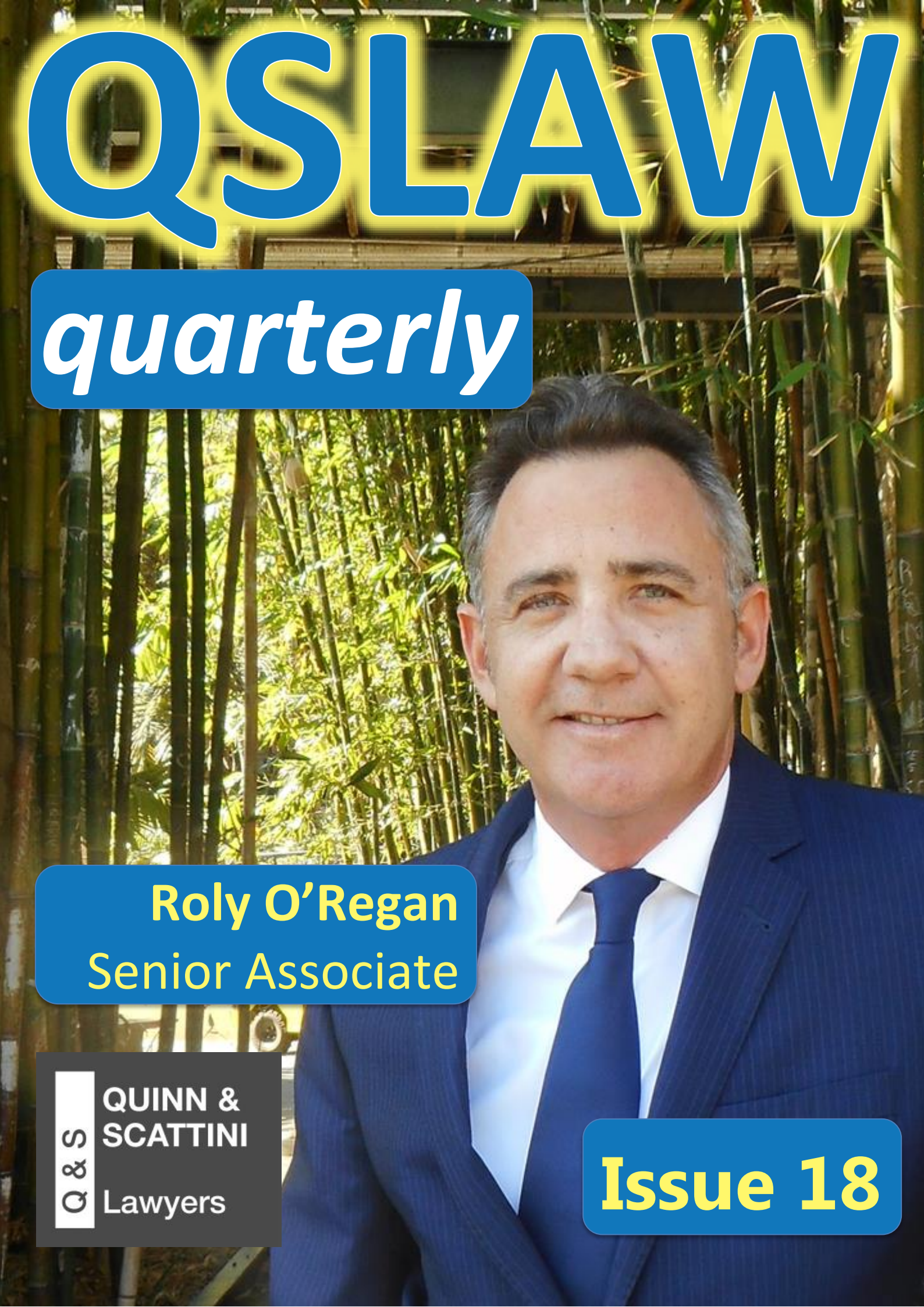

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Personal Insolvency Agreement – A Flexible Alternative to Bankruptcy

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(Information sourced from Worrells Guide to Personal Insolvency. Used with permission. https://worrells.net.au/)

Introduction

Part X of the *Bankruptcy Act* allows a debtor to enter into an arrangement with their creditors to satisfy their debts without being made bankrupt. This arrangement is called a 'Personal Insolvency Agreement' (**PIA**).

A debtor will usually use a PIA to:

- Get relief from their debts;
- Ensure a fair distribution of their assets to creditors;
- Provide a higher dividend than would be payable in bankruptcy;
- Maintain their sources of income; and
- Avoid the restrictions of bankruptcy.

A PIA is a formal agreement between the debtor and their creditors that records how the debtor will satisfy their debts.

The proposal will usually provide for the payment of money over time and the sale of some assets. It will also usually contain a suspension of creditors' claims throughout the term of the agreement and payment of less than the full amount in full satisfaction of claims.

What is the Process?

An individual can propose a PIA when certain conditions are met:

- The debtor must be insolvent;
- The debtor must be present in Australia or otherwise have an Australian connection;
- Unless the debtor has permission from the court, they cannot propose a PIA if they have proposed another PIA in the previous 6 months; and
- A debtor must choose a controlling trustee – either a solicitor or a registered trustee in bankruptcy – and must provide them with these documents:
    - An authority under section 188 of the *Bankruptcy Act* giving the controlling trustee control over their assets and requiring them to call a meeting of creditors to consider the proposal;
    - A statement of affairs detailing the debtor's assets, liabilities and other personal information; and
    - A draft PIA detailing the terms of the proposal to be made to creditors.

The controlling trustee will sign a consent to act and will send the material to the Australian Financial Security Authority (**AFSA**) for registration on the official record.

Accepting the Proposal

For the debtor's proposal to be accepted, the majority of creditors and more than 75% in value of the creditors attending and voting at the meeting must be in favour of the proposal.

If the proposal is not accepted by the required majority, the creditors may resolve that the debtor be placed into bankruptcy.

Debtor's Property and Income

There are no income, asset or debt limits involved in a PIA.

Only property that is included in the PIA is affected. Property that is not included in the agreement is not available to creditors. The debtor is only required to contribute some of their income if the agreement includes terms requiring them to do so. For example, the agreement may specify that the debtor will make the same type of contribution out of income that they would make if they were bankrupt.

End Date

The agreement ends when the debtor fully satisfies the requirements set out in the PIA, and the available funds are distributed by the trustee as a dividend.

Who Administers a PIA?

The proposal for an agreement must include the appointment of a registered trustee or the official receiver to administer the agreement. The official receiver will be the trustee if a registered trustee is not nominated.

The powers and obligations of the trustee will be set out in the agreement and the *Bankruptcy Act*. Those powers and obligations will essentially be to enforce the terms of the agreement, sell any assets, collect any monies and make a distribution to creditors.

Will It Affect the Debtor's Credit Rating?

The fact that the debtor has signed a section 188 authority will be noted by credit agencies. This may be more favourable than outstanding writs, defaults and a bankruptcy on the debtor's file.

Directorships

A debtor cannot act as a director of a company while subject to the terms of a PIA. This restriction is lifted when the agreement has been fulfilled.

How Quinn & Scattini Can Assist

If you are experiencing financial difficulty, Quinn & Scattini's Commercial Litigation Team can assist in negotiating with your creditors, including, if appropriate to your circumstances, taking steps to assist with a PIA.

Gifts in Contemplation of Death – Understanding the Risk

Commercial Litigation Team

A verbal gift made by a person in anticipation of death is known as a donatio mortis causa ('gift in contemplation of death'). The reasons for making such gifts vary, but may include that the person making the gift (the donor) has not made a will, the donor may wish to reward or benefit someone who has provided recent assistance, or the donor may not have had the opportunity to update their will.

However, such gifts will frequently be the subject of careful scrutiny as they carry a substantial risk for both the intended recipient of the gift and the legal personal representative of the donor's estate. An oft-cited reason for such scrutiny is as follows:

"Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend these deathbed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and by a slight change of words, to convert their expressions of intended benefit into an actual gift of property… "

The fundamental risk associated with a donatio mortis causa is whether the gift will be held to be a valid legal gift.

There are three essential elements of a donatio mortis causa. In *Public Trustee v Bussell (*1993) 30 NSWLR 11, those elements were specified as being:

1. The gift must be made in contemplation of the donor's death, although not necessarily expectation of death;
2. There must be delivery of the subject matter of the gift to the donee or a transfer of the means or part of the means of getting at the property, or, as has been said, the essential indicia of title; and
3. The gift must be conditional upon it taking effect on the death of the donor, being revocable until that event occurs.

Generally, the first and third elements outlined above are ordinarily relatively straightforward to establish. However, factors to bear in mind in respect of those elements include that:

- In order to support a donatio mortis causa, there must be more than a general contemplation of death or recognition of the inevitability of death. The mere fact that a donor is elderly is not sufficient. Something more specific such as extreme age or an existing illness is required, although it need not amount to an expectation of immediate death.
- The operation of a valid donatio mortis causa is conditional upon the death of the donor; and only then

will the gift become absolute. Accordingly, the gift may be revoked by the donor at any time before dying (whether that is by way of a recovery from illness or by giving express notice of revocation to the intended recipient).

The second element of a valid donatio mortis causa referred to above, namely the delivery of the subject matter of the gift, is the element which appears to be subject to the most careful analysis in the reported cases. What constitutes delivery will depend upon the circumstances of each case and could be the subject of an entirely separate article. However, by way of example, the following acts have been held by the courts to satisfy the act of delivery:

- The delivery of a bank passport or term deposit card constitutes delivery of an essential indicium of title to the money in the bank account to which the passbook or term deposit relates;
- The delivery of a share certificate can be an effective gift mortis causa, as such a document has been found to be an essential document for the purposes of shares being transferred; and
- The delivery of keys to a vehicle with the requisite intention may also be adequate.

Notably, in Australia, the doctrine of donatio mortis causa does not extend to land.

Ultimately, it is important to note that there is potentially significant risk and costs associated with court proceedings if the donor's legal personal representative is compelled to defend a claim that a gift made in contemplation of death is a valid legal gift. This is particularly the case if the gift was made only in the presence of the donor and the intended recipient, as the question of whether the gift is valid will largely turn on the credibility of one person's evidence and an analysis of surrounding circumstances.

It is for this reason, among others, that careful and proactive estate planning is important prior to death becoming imminent.

How We Can Help

Our wills and estate planning lawyers are experts across the range of wills and estates.

We work comprehensively to ensure all your estate planning needs have been addressed, answer any questions you have so you understand the legalities and importance of the estate planning documentation and provide superior support, from the first phone call to finalising your estate planning.

Get In Touch

Contact us to secure your future wishes and get peace of mind. Call 1800 999 LAW (1800 999 529), email wills@qslaw.com.au or visit www.qslaw.com.au and submit an online enquiry.

Attention: Step-Parents!

Stephanie Clutterbuck
Lawyer
Family & De Facto Law

You and your partner have recently decided to go your separate ways. Your partner has a child from a previous relationship and you have developed a strong relationship with this child that you want to maintain. Maybe you are the biological parent of a child and want to know how the logistics work with any separation that occurs between your child and their step-parent.

What Are the Step-Parent's Rights and Most Importantly What Are the Child's Rights?

Under the Family Law Act, a step-parent is defined as a relative of the child that:

- is a person who is not the child's parent; and
- is either married or in a de facto relationship with the child's biological parent and treats the child as a member of the family.

In family law, a relative can make an application in the Family Court in relation to a child, but more on that later.

Also under the Family Law Act, there is a presumption that the biological parents of a child have what is called 'Equal Shared Parental Responsibility'.

This simply means, that both biological parents can determine where the child goes to school, can sign consent forms for the child and are responsible for the day to day care of the child, just to name a few examples. Essentially, legally assuming the roles and duties as a parent.

While a step-parent in a relationship may have undertaken duties and responsibilities that are usually akin to those of biological parents, this does not automatically translate to legal parental responsibility.

The biological parent's duty will always take priority over that of a step-parent, no matter how close the relationship between the child and step-parent. Parental responsibility can only be transferred to another person through an order of the court.

Can You Still See the Child Post-Separation?

Yes. In making any orders in relation to a child, the court also takes into consideration the child's relationship with relatives, including step-parents.

As with any parenting matters, it is always easier if the parties can come to an agreement on time spent or other contact involving the child and the parent or step-parent.

If needed, step-parents are also able to attend mediation with biological parents to resolve any disputes.

What about Child Support?

A step-parent is not liable to pay child support through the Child Support Agency. One option is to enter into a Binding Child Support Agreement with the parent.

Death of a Parent

In the event that one of the child's biological parents pass away, the parental responsibility does not transfer to a step-parent; the surviving biological parent will have what is called 'Sole Parental Responsibility'.

In limited circumstances, a step-parent may apply to the court for parental responsibility. However, this is a very rare occurrence.

There are three options available to a step-parent seeking parental responsibility for a step-child:

1. Parenting Order;
2. Adoption; and
3. Legal Guardianship.

Parenting orders will usually require the agreement between the biological parents and the step-parent. In any application, the court will primarily consider whether the orders are in the best interest of the child, which includes maintaining a relationship with their biological parents.

The court will also take into consideration:

- The ability of the biological parents to provide for the child, in terms of welfare and financial support;
- Any care arrangements that are in place for the child involving the step-parent;
- The circumstances of the relationship between the child and the step-parent and biological parents;
- Whether the step-parent and biological parent are married or are de facto as per the definitions under the Family Law Act; and
- Any other circumstances the court thinks relevant.

How We Can Help

Quinn & Scattini Lawyers' expert Family Law Team can assess your individual situation in accordance with the Act, provide expert guidance in negotiations with your former partner, offer practical and experienced advice if appearing before the court is unavoidable, and provide you with the best possible representation if court-ordered agreements are required.

With over 40 years' experience, Q&S's Family Law Team are experts in the family law field. The Team also boasts two Accredited Family Law Specialists.

Get In Touch

Contact us to start again with confidence. Call 1800 999 LAW (1800 999 529), email mail@qslaw.com.au or visit www.qslaw.com.au and submit an online enquiry.

Re-Introduction of the Drug Court in Queensland

Criminal Law Team

In 2012, the Queensland Government ceased operation of the Queensland Drug Court, a specialist jurisdiction that had been operating for over a decade.

Earlier this year, the sentencing regime was re-introduced in the form of the Queensland Drug and Alcohol Court (**QDAC**). The purpose of the court is to identify and address substance abuse problems connected with criminal offending and provide structured penalties to address them.

Who is Eligible to be referred to QDAC?

In order to be eligible for a referral, a defendant must, as a starting point:

- Be an adult;
- Be pleading guilty to their offences;
- Be charged with offences that can be dealt with summarily (in the Magistrates Court);
- If convicted, be likely to be sentenced to a period of imprisonment of up to 4 years;
- Not be subject to a parole order or serving a sentence of actual imprisonment; and
- Not be charged with a sexual assault offence.

At this stage QDAC referrals are only available to persons residing within the jurisdiction of the Brisbane Magistrates Court but greater availability is planned for the future.

What is the Effect of Being Sentenced in QDAC?

QDAC has a unique power to make a Drug and Alcohol Treatment Order, which serves to monitor and assist with rehabilitation for a period of 2 years.

Among other things, the 'core conditions' of a treatment order require a person to remain within Queensland and regularly report to authorities. Orders may also require persons to attend specific treatment, submit to drug testing, wear a drug and alcohol monitoring device and install a monitoring device in their home.

If a person fails to comply with a treatment order by not complying with directions or committing certain types of offences, QDAC has the power to impose periods of community service, revoke treatment orders and order offenders serve all or part of their original sentence.

Persons considering a referral to QDAC should obtain legal advice as early as possible. Our Criminal Law Team can determine whether a referral is available and in a person's best interests.

How We Can Help

Our expert criminal lawyers can expertly navigate the complexities of being charged

with a drug offence, explore all possible defences, ensure all required documentation is prepared in a timely manner, provide extensive support in the lead up to court appearances, respond to your questions in a timely manner, and provide reliable and professional representation in all court proceedings.

Why Choose Us?

You will be talking to a real expert, local to you. You will not be treated like a file number, but as a real person, and a person going through a difficult and stressful experience. Get expert advice, not just what you want to hear, in a language you can understand not legal jargon.

Get In Touch

Serious times require a strong defence. Call 1800 999 LAW (1800 999 529), email mail@qslaw.com.au or visit www.qslaw.com.au and submit an online enquiry.

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