

When details matter; beware the socials and covert video footage

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A recent SMSF Adviser article mentioned the decision in *Clayton v Clayton* [2023] NSWSC 399 in the context of what amounts to a de facto relationship.

The case is of interest for at least two other reasons important for advisers.

Creation of a trust relationship

The first key aspect of the case relates to the well established principle that an individual person can not be the sole trustee and sole beneficiary of a trust, including an SMSF - that is, no trust relationship can be created in such a situation as there is a merger of legal and beneficial ownership.

The case of *Saul & Ors v Lin* [2004] NSWSC 307 further explains the issues in this regard.

In particular the decision confirms as follows:

1. A trustee of a trust may be one of the beneficiaries - however cannot be the sole beneficiary.
2. Where the owner of property declares themselves trustee of it and the person is the sole beneficiary of the trust, no trust is created since the person has the entire legal and beneficial interest in the property.
3. A trust may exist where the owner declares that they hold the property as trustee for another designated person or persons, even including themselves.
4. It is irrelevant that the declarant of the trust does not part with possession of the property or the instrument creating the trust, or that the beneficiary has no notice of the trust and has not accepted it.

Thus in relation to SMSFs, section 17A(2)(b) of the SIS Act also mandates that there can not be a sole trustee and sole member. Rather, if the trustees of the fund are individuals the sole member must be one of only 2 trustees, of whom one is the member and the other is a relative of the member - or there must be a corporate trustee. As a company is a separate legal entity, a sole member can be the sole director without breaching the rule against a sole trustee and sole beneficiary.

Admission of evidence

The second key issue of the case arose out of the way the court considered what evidence was useful in determining the integrity of the statements of the plaintiff as part of his claim for further provision out of a deceased estate.

In assessing the claims, material FaceBook, text message and video footage was put as evidence before the court - all of which essentially called into question the legitimacy of a number of the claims being made by the plaintiff.

Specifically in relation to the nature and extent of a relationship it was alleged the claimant was in, and the extent of injuries he claimed to have, the court provided the following summary of the video evidence that it appears had been sourced covertly:

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1. The footage disclosed that the plaintiff met "Amanda" and travelled to a destination on a camping trip, and to a seaside beach location (possibly Stradbroke Island).
2. The plaintiff met Amanda via the dating app "Bumble".
3. Some video footage disclosed the plaintiff and Amanda meeting on a suburban street with their cars parked adjacent to another. It showed the plaintiff taking a surfboard from the back of his vehicle and placing it on top of Amanda's vehicle and travelling to a destination where amongst other things they set up a tent with pegs overnight. They then spent the night together.
4. The next day they travelled to a seaside beach location and took surfboards to the beach. The plaintiff was seen apparently waxing the surfboard and then demonstrating to Amanda some rudimentary skills of attempting to stand on a surfboard. The boards are then carried to the water and there is then footage of the plaintiff attempting to catch some waves.

As part of the plaintiff's argument that there was no relationship with Amanda of any importance, the plaintiff indicated that he did not know her surname.

In assessing this aspect of the arguments, the court also reviewed a material number of text messages that had been seized and FaceBook posts that had been secured.

As mentioned in the previous article, when a barrister for the defendant (apparently incredulously) suggested to the plaintiff that it seemed unlikely he would "go away with somebody, share a swag together and ... have no idea what her surname is?", the plaintiff (apparently mundanely) replied "[t]hat's how dating goes these days".

The court ultimately determined, as part of a wider analysis rejecting the plaintiff's claim for any further provision from the estate, that it was difficult to accept the plaintiff's arguments in light of the video evidence, nor that he had no idea of Amanda's surname.

The fact that the court so readily accessed social media posts, hidden video recordings, text messages and considered aspects of a popular dating app should be timely reminders to all advisers and their clients of the evolving evidentiary regime.

