

STEP Perth Newsletter

December 2010

STEP
Society of Trust and
Estate Practitioners



www.step.org

How quickly the year has gone! Since STEP Perth launched in July 2009 we have gone from strength to strength. We now have 35 members and are continuing to grow.

This year we have held several events, and have been lucky enough to hear from international speakers Ian Marsh and Victor Joffe QC. We have also hosted a number of round table events and Elizabeth Heenan was our November speaker. We were grateful to Jeremy Curthoys who presented the paper written by the Hon Justice Tom Gray and also provided his interesting comments.

STEP Perth's co-branding events with LegalWise and the Tax Institute of Australia have also been very successful in encouraging new members to join STEP Perth.

Following our recent Tax Institute of Australia mail-out, we are also pleased to report that we have received lots of queries from accountants and other trust practitioners who are interested in joining STEP.

In addition, as the end to the STEP financial year is approaching, potential new members should be aware that any new members wishing to join STEP after 1 December 2010, until the next financial year commences on 1 April 2011, need only pay the £75.00 TEP joining fee.

From everybody at STEP Perth, we wish you a safe and happy Christmas and look forward to seeing you either at our Champagne Tasting Christmas Party or, alternatively, in the New Year.

Susan Fielding, Acting Chair STEP Perth



LAMONT'S



UPCOMING EVENTS

Christmas Wind-up

Special guests: Hon. Justice Eric Heenan and Registrar Sandra Boyle of the Supreme Court of Western Australia

Date: 9 December 2010

Time: 5.30 - 7.30pm

Location: Lamonts, Bishop's House
Cnr Spring Street and Mounts Bay Road

Note: places are limited!

Save the Date

Never mind the weather - tax consequences of Australians relocating to Europe

Speaker: Anna Steward, Jackson McDonald

Date: 16 February 2011

Time: 5.30pm - 7.30pm

Location: to be confirmed

Watch this space for information on future events

STEP isn't just for lawyers
If you work in any aspect of trusts and estates you can become a member.

Visit www.step.org for more information
or contact Sarah Walton at
swalton@jacmac.com.au

Recent Events

Bamford - have we got it right?

Facilitator, Richard Norton - 7 September 2010

The event was held on a wet and windy night, but that didn't stop over 35 trust and estate practitioners gathering together to discuss the mysteries of the recent High Court Bamford [2010] HC 10 decision and the ATO's decision impact statement.

The facilitator of the event was Richard Norton, of Norton & Smiles, who introduced participants to a number of key issues and focus points. Participants then brainstormed the practical implications of Bamford.

Outcome of Roundtable

The points below are some of the issues which were either noted or discussed during the Bamford roundtable event. The points are neither definitive nor exhaustive and are simply points that practitioners may wish to consider in the future.

- Bamford has reiterated to trust practitioners that the ATO reads trust deeds.



STEP Perth Chairperson Adam Levin, Anna Steward and Tony Underhill

- Trustees should be aware that their duties are onerous.
- Trust practitioners should ensure that the trustees are aware of their fiduciary duties.
- When considering a breach of trust, the Court's main focus is not the fairness of a decision – instead it is whether or not the trustee exercised his or her power correctly.
- The Bamford ATO Decision Impact Statement refers to Taxation Ruling TR92/13 being withdrawn. The ATO website refers to the statement being reviewed. Does this mean that Bamford will be tested and reconsidered in the near future?



STEP members and friends at the Bamford presentation

The importance of defining income should never be underestimated, particularly as some income-only-beneficiaries are heavily reliant upon this income.

- Whilst there may be a trend towards plain English style documentation the importance of retaining powers, and the flexibility these powers allow, cannot be overlooked.

- The distinction between tax law and trust law should always be considered. Whilst the trust deed may enable the trustees to change and re-characterise receipts the same powers cannot be used to circumnavigate tax laws.

- The practicalities of income streaming often result in these provisions being unused. How widespread is income streaming? Should income streaming be legitimised outside of Division 6?

Is it advisable to have a clause in the trust deed that states any income not allocated to a beneficiary should not be treated as income on a proportionate basis? Is this sufficient to circumnavigate s99A of ITAA 1936

- Is it always advisable to have standard default provisions regarding income for all trust deeds? Is there a greater need to personalise and tailor make trust deeds?

- There is no reference in section 95 or 95A of ITAA 1936 to income having to be allocated within "the year of income". There is therefore a question as to whether or not trustees may be able to allocate funds after the year of income has ended. A point to note is how the standard trust position may be contrasted with that of a partnership (where the standard position is to allocate income after the year end); whether or not this distinction would or should be put to the test is another matter.

- It is important to remind clients how complex trust law is and the importance of maintaining an accurate chain of documentation to ensure that trust practitioners are provided with all deeds of variation and relevant minutes.

See the attachment to this newsletter for a list of articles and cases referred to during the course of the event and suggested helpful reading.

Welcome Lamont's!

STEP Perth is pleased to announce our newest sponsor Lamont's.

As part of the sponsorship Lamont's have offered STEP members a copy of Kate Lamont's latest cook book

"Wine and Food"

for any meals members have at the Lamont's Perth venue during the month of December.

STEP members are requested to please quote their STEP membership number when making the booking. Please note that this offer is limited to one book per member.

In addition, please be aware that Lamont's has another new venue – Lamont's Bishop's House, located on the corner of Spring Street & Mounts Bay Road, Perth which opened at the end of November.

This new venue is the latest addition to the Lamont's venues which include Swan Valley, Margaret River and Cottesloe.

The logo for Lamont's, featuring the word "LAMONT'S" in a white, serif, all-caps font centered within a dark rectangular background.

A Christmas message from Perpetual...

Perpetual Private Clients is proud to be a supporter of STEP in WA.

Since 1886, we have been a leading provider of financial management and fiduciary services to generations of Australians.

Today, we work in alliance with many STEP members to service their clients.

To find out more please call Ray Knight on (08) 9224 4420



STEP's CPD Requirements

As most of you will be aware, it is a requirement for members of STEP that each member completes a minimum of 35 hours of CPD each year, 15 hours of which must be structured training. For members joining part way through the year, this may be on a pro rata basis. Structured training includes all learning events, relevant to trust and estate practitioners, involving interaction with other individuals.

The remaining 20 hours of training may be unstructured training. Unstructured training includes any form of learning where there is no interaction with other individuals including informal, personal research and reading. The STEP CPD year commences on 1 April annually and ends on 31 March in the following calendar year.

In order to assist its members, STEP Perth seeks CPD approval for all of the educational events held by STEP Perth and all of STEP Perth's educational events have been awarded CPD points. Further, please note that the costs involved in attending STEP functions are relatively minimal for both members and non members.



SPECIAL OFFER

STEP Members receive 20% discount off all Legalwise seminars and 1 free past paper!

For more information phone Legalwise direct on (02) 9387 8133

Your Guide to the STEP Journal

By Craig McKie



On page 71 of the October 2010 "STEP Journal", Peter McGeown and Stuart Adams consider a recent High Court of England decision in which the doctrine of mutual wills was invoked in the absence of any express evidence of an agreement.

The writers observe that the decision in *Charles & Ors v Fraser* [2010] EWHC 2124 (Ch) is a rare opportunity to understand how the doctrine works. They go on to observe that in the last 80 years (presumably in England), only 3 cases have resulted in a finding in favour of mutual wills.

The doctrine of mutual wills is observed to apply where 2 or more persons agree to make wills disposing of their property in a particular way. There must be an arrangement or agreement not to revoke the wills without the consent of the other(s).

The English Court accepted that (in the absence of express evidence), the following factors, if present, may persuade the Court of the mutual agreement:

- the wills must suggest they were the subject of negotiation and agreement (ie identical or near identical terms);
- a careful division of the estate (ie very detailed and identical dispositions); and
- the evidence of independent witnesses as to the agreement existing (ie the testatrices who were sisters spoke openly with a range of people about "the wills must never be touched or altered").

While on the subject of mutual wills, in the recent WA Supreme Court case of *Fazari v Consentino* [2010] WASC 40, the Court determined that a disposition of property in the lifetime of the surviving party of a mutual will was not a gift or settlement inter vivos calculated to defeat the intention of the mutual wills agreement.

The underlying reason for this decision was that the transfer of the property (from the survivor to a discretionary family trust), was not of a testamentary nature. *Le Miere J* followed the High Court of Australia decision of *Palmer v Bank of New South Wales* (1975) 133 CLR 150.

Interestingly, *Le Miere J* drew upon judgments and articles from England and Canada as well as Australia. This analysis by His Honour indicates how Courts in the common law jurisdictions can look to each other for guidance on developments in this area of the law.

Trust and Estate Practitioners should also consider the leading Western Australia case of *Barns v Barns* 214 CLR 169.



Have you read a relevant article of interest lately? Let us know by emailing Sarah Walton at swalton@jacmac.com.au and we will feature it in the next newsletter.

Member Profile

Grahame Young

Grahame practises as a barrister in 3 main areas: trusts, equity and succession; revenue, in particular the transaction taxes of State duties, capital gains tax and CGT; and general corporate, commercial and property law.

These disparate areas come together in structuring and restructuring family and corporate groups whether for succession planning, capital markets transactions or in a family law context which form the main focus of his work.

Grahame has had extensive experience as partner of a national law firm and as a director of a number of public companies. He has written and presented numerous papers to a wide range of professional bodies.

As a member of the Taxation Institute of Australia for more than 25 years he has held all State positions up to State Chair and was a National Councillor for 5 years.

Grahame is the foundation editor of the loose-leaf service Thomson Duties Legislation Western Australia and edited and updated its forerunner from 2003. He was instrumental in forming the State Revenue Liaison Committee and advised Treasury on aspects of the Duties Act.

Although his practice is largely advisory he appears as counsel in State duties, trust and corporate matters.



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STEP member since June 2009

If you would like to be featured in "Member Profile" please send a brief professional profile and a photo to Sarah Walton at swalton@jacmac.com.au

Christmas Message from NAB...

The management and staff of
nabprivatewealth and National Australia Trustees
would like to wish all STEP Members and
their families a safe and Happy Christmas
and a prosperous New Year

