

# STEP Perth Newsletter

June 2011



www.step.org

It hardly seems like last week since our last newsletter! However, a lot has happened in the last few months.

First, I would like to thank all of the members who have renewed their subscriptions. Your continued support of STEP Perth and regular attendance at our seminars is much appreciated. It is this support and regular attendance which shows that a Perth branch of STEP is required.

Second, we have been lucky to have had several presentations. In March Justice Chaney, as president of the State Administrative Tribunal, explained to STEP members and friends the impact that the legislation creating advance health directives and enduring powers of guardianships has had in the twelve months since their introduction in Western Australia. Justice Chaney's insight as the president of SAT was both enlightening and informative. A detailed summary of Justice Chaney's event is set out later in this newsletter.

Grahame Young of Francis Burt Chambers was our April speaker. Grahame's paper was on reviewing deeds of trust. This paper was originally presented by Grahame at a Law Society Seminar about ten years ago. Many of the concerns which Grahame expressed then have proved to be valid. The popular event was kindly hosted by Perpetual.

In May Jonathan Ilbery of Jackson McDonald was the facilitator of a roundtable discussion and helped guide us through the taxation of trusts. Jonathan explained to those present how to deal with the changes in tax legislation post Bamford in a pragmatic and realistic way. A copy of Jonathan's detailed paper was circulated to attendees after the event.

Whilst in London in December I attended a meeting to discuss whether STEP should start a Special Interest Group. As a result

## UPCOMING EVENTS

### Conflicts of interest between trustee and beneficiary

**Speaker:** Justice Tom Gray of the Supreme Court of South Australia and Justice Eric Heenan of the Supreme Court of Western Australia

**Date:** 28 July 2011

**Time:** 5.30 - 7.30pm

**Location:** Courtroom 1 of the Supreme Court, Stirling Gardens, Perth

### Posthumous Conception

**Speaker:** Andrew Davies of O'Sullivan Davies

**Date:** September 2011

**Time:** 5.30pm - 7.30pm

**Location:** TBC

### 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.

Accountants, trust officers, tax specialists and bankers worldwide are welcome to join.

Visit [www.step.org](http://www.step.org) for more information or contact Sarah Walton at [swalton@jacmac.com.au](mailto:swalton@jacmac.com.au)



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of this meeting I contributed in May to a telephone conference with the STEP Mental Capacity – Elder Client Special Interest Group (SIG) as part of my role in the “working group”. The SIG is focused on raising the level of knowledge and awareness in what is a growing and developing area of law.

The group was established because the increase in a person’s life expectancy and the rise in the amount of individuals living and retiring abroad means that information about cross border requirements concerning “capacity” should be readily available to practitioners. The SIG will conduct a survey of STEP members to determine how the area is growing and how the group may be of assistance. The SIG aims to provide practitioners with useful tools such as Attorney Guides for different jurisdictions, on-line forums to discuss practitioner issues and questions and to hold CPD seminars which may be available online.

As June is tax time and I know most of our members and friends will be busy we have not held a STEP seminar this month. However, we are very excited about our July speakers: Justice Tom Gray of the Supreme Court of South Australia and Justice Eric Heenan of the Supreme Court of Western Australia. Justice Gray will give a paper about the conflicts of interests between trustee and beneficiary and Justice Eric Heenan will comment on the paper.

Finally, STEP Perth is run by a committee. If you have any ideas or suggestions that you would like to put forward to the committee or, alternatively, would like to know how to go about joining the committee, please contact either me or a member of the committee.

**Susan Fielding,**  
**Chairperson STEP Perth**



## How can you help safeguard your ageing clients’ financial future

**Identifying clients in need. Do you have clients who:**

- **Are unsure about aged care costs and how they will protect their wealth for the future?**
- **Are struggling to cope with their investments and associated paperwork?**
- **Are affected by their ability to make sound financial decisions or give you proper instructions due to health reasons?**
- **Don’t have an enduring power of attorney and estate plan in place?**

As your loyal clients become elderly, it may become more challenging for them to make important financial decisions or to manage their investments. If you recognise clients in this situation, it is important to consider how they will cope and whether their best interests will be looked after. You can give your clients and their families peace of mind by offering them a solution for their financial management.

A trusted partner like Perpetual can work with you and your client to help protect their current and future financial needs. We complement your services by providing strategic advice and can act as a financial manager for your clients. We can be your client’s attorney, prepare a sound estate plan and will, manage their financial affairs, and structure their finances to best fund and minimise the cost of aged care. We have a duty of care to protect your client’s interests – it’s at the core of everything we do and has been since 1886.

**To find out how we can help and you and your clients with executorial and estate administration services, please call Ray Knight on (08) 9224 4401.**



# Recent Events

## Advanced Health Directives and Enduring Powers of Guardianship - 12 Months On

Presenter, Justice John Chaney - 23 March 2011

**Sarah Walton of Jackson McDonald reports**

On 15 February 2010 enduring powers of guardianship (EPGs) and advanced health directives (AHDs) were introduced to Western Australia by the Acts Amendment (Consent to Medical Treatment) Act 2008 which amended the Guardianship and Administration Act 1990 (GA Act).

On 23 March 2011 Justice John Chaney, the President of the State Administrative Tribunal (SAT), spoke to STEP Perth members and friends about the effect AHDs and EPGs have had in Western Australia. He also discussed how the SAT has dealt with the introduction of these new documents.

By way of background, the SAT was established in 2005 replacing approximately 50 Courts, Tribunals, Boards and other adjudicators. By far the greatest number of applications at the SAT relate to the "human rights" stream. Approximately 6,500 matters a year are dealt with by the SAT, 3,500 of which relate to applications under the GA Act and reviewing decisions of the Mental Health Review Board. The aim of the SAT is to attend to 80% of the applications within 8 weeks from the date of lodgement.



Loreena Gillon (left) and Andrew Davies (right)

Justice Chaney reminded those present that the underlying principal behind EPGs and AHDs is the ability for a person to have a say their own medical treatment after the capacity to make reasonable decisions has been lost.

Under the legislation the SAT has the powers to give directions about the exercise of and construction of an EPG and AHD, as well as revoke or vary treatment decisions made via an AHD.

Justice Chaney said that the bulk of health care decisions are dealt with between family members and medical practitioners. The SAT is generally only called into situations where there is a conflict between family members or an individual has no family or dependants who may help him or her.



Spencer Percival (left) and Siobhan Daly (right)

During the course of the evening, Justice Chaney examined some of the questions the legislation has created, including:

- What does “full legal capacity” mean for the purposes of section 110B and section 110P of the GA Act [The sections which relate to appointing a guardian and being able to make an AHD].

In this regard, Justice Chaney said that there is a distinction between the Banks v Goodfellow test and the actual ability to enter into an AHD or an EPG. The capacity requirements are arguably more rigorous than the level of capacity required to make a will. Full legal capacity means that a person is able to make a formal agreement and [must be] able to understand the implications of statements contained in the document.

- What is a consequence of the maker of an AHD failing to seek legal or medical advice, prior to making the directive? The legislation sets out that medical and legal advice is encouraged but states that is not required for an AHD to be made.
- Section 110S (3) of the GA Act states that the treatment decision in an AHD does not operate if circumstances exist or have arisen that the maker of that directive would not have reasonably anticipated at the time of making that directive and would have caused a reasonable person in the maker’s position to have changed his or her mind about the treatment decision.

This section calls into question a number of issues, including what if the maker was not a reasonable person but made the decision anyway? Also, how does SAT assess what would have changed a person’s mind in the absence of knowledge as to why the initial decision was made?

Justice Chaney said that people have the right to make unreasonable decisions and it is difficult to apply an objective test to subjective wishes, particularly in area where values and emotions impact on a person’s decision.

Overall Justice Chaney said that that the answers to the unanswered questions may only become clear when, and if, the SAT is required to consider these issues. It may take some time for these questions to be answered.

It was agreed that problems arise where individuals try to “play God” and seek to rely on documents signed some time ago. AHDs and EPGs are documents that should be regularly reviewed, with the review being noted in writing by the maker (ideally with the maker having sought medical and legal advice), so that those who are asked to put a person’s wishes into effect know that the individual is aware of current medical treatment options and has not had a change of mind.

A number of the guests present said that they felt that EPGs are a better long term option for individuals who have no serious life threatening medical condition.

Justice Chaney reiterated that the SAT is not a Court. The rules of evidence do not apply at the SAT and the aim of the SAT is to maintain informal proceedings whilst avoiding the expense and technicalities that may arise in a Court action. However, Justice Chaney acknowledged that individuals may be assisted by having legal representation when attending the SAT and welcomed practitioners to hearings.

Justice Chaney told attendees that the importance of AHDs and EPGs on a person’s life cannot be underestimated and reminded everyone that the SAT can face a difficult job in determining a person’s life or death decisions.



Justice John Chaney

# Recent Events

## Taxation of Trusts

Jackson McDonald – 12 May 2011

STEP member Jim O'Donnell of Jackson McDonald reports

In this session chaired by Jocelyne Boujos, Jonathan Ilbery, a Senior Tax Partner at Jackson McDonald and former National President of the Tax Institute of Australia, led us in a high level open forum discussion, journeying through some very difficult current issues in the taxation of trusts.

We were treated to valuable insights from Jonathan on the proposed tax treatment of trusts under new interim draft legislation and where the wider reforms may be heading.

Topics examined included:

- **'Where we were'** - Review of taxation of trust income under Division 6 of the Income Tax Assessment Act 1936 pre the High Court decision in the Bamford case and techniques employed to overcome problems with its application.
- **'Where we are now'** - What did the Bamford decision resolve and what did it not resolve.
- **Where we are going'** – the suggested interim and longer term legislative solutions and their likely outcomes.

The audience joined Jonathan in a robust discussion. Numerous questions were fired from the floor. The ensuing discussion highlighted some of the more problematic issues likely to be faced by our members in their day to day practices. Key issues include:

- Whether the interim proposed new legislation will provide certainty in relation to the streaming of capital gains and dividends.
- The concept of 'specific entitlement', how it differs from 'present entitlement', and why it is critical under the proposed legislation
- What happens with other taxable income (notional or otherwise) and why it is important to ensure that a trust still has 'other income'.

- Examples of where the new legislation is likely to cause a problem, e.g. trusts that equate distributable trust income with section 95 'net income' without an effective recharacterisation power, and determining where the tax liability lies where trust assets are vested in specie to beneficiaries.
- The mechanics and timing of trust distributions having regard to the proposed legislation.
- Why the longer term solution needs to involve a complete rewrite based on general principles, and why an 'alignment model' won't succeed.

Jonathan has prepared a technical paper on the topic, which he subsequently presented to the Tax Institute of Australia on 19 May 2011. The paper was emailed to those who attended the STEP session on 12 May.



Marissa Bechta (left) and Jocelyne Boujos (right)



### 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

# STEP Members Thoughts

## Warring Executors – How to Resolve Disputes Between Executors

Most practitioners who deal with estate administration know that it can be challenging and that disputes between parties can arise very easily. Arguments over tea cups, recipe books, money and instructions are unfortunately common.

Disputes between executors may arise for a number of different reasons including, to name but a few, where:

- one, or more, of the executors has a personal interest in the distribution of the estate;
- one of the executors is a friend or professional advisor of one of the principal beneficiaries;
- one of the executors has acted dishonestly or unreasonably; or
- the appropriateness of a particular investment or other administrative act is challenged.

Estates administrations which involve an executor having a dispute with either another executor or a beneficiary can create challenging and strenuous situations for all parties involved.

Accordingly, *STEP Perth* invites its members and friends to contact us in order to provide their comments on how to best resolve these disputes.

*We look forward to hearing from members on this subject. Please contact Sarah Walton at [swalton@jacmac.com.au](mailto:swalton@jacmac.com.au) with your comments regarding warring executors – how to resolve disputes between executors.*

## Advance Health Directives & Enduring Powers of Guardianship

Thank you to all of our members and friends who responded to call for comments as to what they think of advance health directives and enduring powers of guardianship. Below, is a selection of the comments which we have received:

- “We don’t know who is doing them [advance health directives]”
- “An advance health directive is something that should only be done for somebody who is terminally ill, with limited time to live and who knows the full treatment options available to them”
- “The documents help provide certainty and protect an individuals ability to chose his or her treatment decisions”
- “Every advance health directive that you draft is a challenge”
- “Although the legislation has been in force for over a year it is only now that the public is becoming aware of it!”

## Your STEP Perth Committee

**Susan Fielding** of Jackson McDonald (Chair)

**Craig Mckie** of Norton Smailes (Secretary) (retiring 30 June 2011)

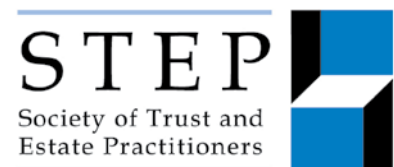
**Tony Underhill** of Grant Thornton (Treasurer)

**Jocelyne Boujos** of Scales & Company (Committee Member)

**Wayne Rimmer** of NAB (Committee Member)

**Adam Levin** of Jackson McDonald (Committee Member)

**Maree Van Der Kwast** of Dwyer Durack (Committee Member)



[www.step.org](http://www.step.org)

# Thank you to Members

Thank you again to all of those members who renewed their STEP memberships. We appreciate your continued support towards STEP Perth.

STEP currently has more than 14,500 members in 66 countries. As you are aware there are lots of benefits to being a STEP member, including:

- Full members may use the accreditation "TEP" to showcase their specialist expertise in the field of trusts and estates;
- Increase their profile in the industry;
- STEP's regional, national and international networks offer unparalleled opportunities for professional networking and business development opportunities;
- STEP Perth members receive regular updates, including the twice weekly Wealth Structuring News Digest, email newsletters, copies of the STEP Journal and local news in the form of our quarterly newsletter!

## Lamont's *"Wine and Food"*

Family owned and operated, Lamonts winery was established in the Swan Valley by Corin and Neil Lamont, who commenced commercial production in the late 1970's.

From those small and quite modest beginnings Lamont's has built a brand based on premium and super premium wines, delicious food and genuine service.

Now sisters Kate and Fiona Lamont personally oversee a wine and food business that encompasses a 8,000 case winery, sourcing grapes from 4 viticultural regions (Swan Valley, Margaret River, Donnybrook and Mt Barker), two cellar doors (Margaret River and Swan Valley) a CBD restaurant (Bishops House), a wine store in Cottesloe and a beautiful lakeside winery restaurant at Yallingup (Margaret River wine region).

LAMONT'S

## Membership - The Different STEPS

Remember that there are number of levels of membership within STEP:

**Full membership** - requires an individual to have more than 5 years experience in trust and estate planning. Full members are regarded as being experts in the areas of trust and estate planning. Being a full member entitles an individual to use the TEP designation and the STEP logo – enhancing your profile in the industry; and

**Associate membership** - requires a minimum of two years experience in trust and estate planning. Becoming an associate member of STEP is an excellent way for the younger generation to meet experienced practitioners, build up a network within the area and attend our educational seminars at a reduced fee. An associate member will be invited to apply for full membership when the full five year qualifying period has been completed.

# Binding Death Benefit Nominations Industry Funds

Sarah Walton, Jackson McDonald

Superannuation has become an important part of estate planning. The extensive assets that may be contained in a person's superannuation fund means careful thought must be given as to how the assets are to be dealt with after the person's death.

Practitioners commonly advise clients to make a Binding Death Benefit Nomination (BDBN). A BDBN directs the trustee of the superannuation fund as to how the proceeds of the individual's superannuation are to be paid. If there is no BDBN in place, the trustee of the superannuation fund may exercise his or her limited discretion in relation to the distribution of the proceeds. A trustee of a superannuation fund may only pay the funds to a dependant of the deceased or the deceased's legal personal representative. An appeal against the trustee's decision may be made via the Superannuation Complaints Tribunal.

To be binding a death benefit nomination must comply with the formalities as set out in regulation 6.17A of the Superannuation Industry (Supervision) Regulations 1994. The formalities include, but are not limited to the following: the nomination must be in writing, direct how the benefit is to be paid and the form must be signed and dated by the member in the presence of two individuals. It is advisable to use the superannuation fund's standard form where possible.

It is important to remember that a BDBN is only valid if the benefit entitlement is paid to a "dependant" within the meaning of section 10 of the Superannuation Industry Supervision Act 1993. The meaning of "dependant" includes: spouse, child or a person who was in an interdependent relationship with the deceased. Practitioner's sometimes forget that the member's natural children are not the only people who may be classified as a "child" under the SIS ACT; step children, ex nuptial children as well as the step and ex-nuptial children of the member's spouse may also be included in this category.

Clients should be advised that if a BDBN is not renewed every three years, it may no longer be binding, and will instead turn into a non binding direction. However, some self managed superannuation funds provide for non lapsing BDBNs. The terms of the client's superannuation fund deed should always be considered to see if this is the case.

For taxation purposes, superannuation may be categorised into three separate components, namely a tax free component (defined in section 307-210 of the Income Tax Assessment Act 1997), a taxed element of a taxable component (which includes employer contributions) and the untaxed element of the taxable component (which includes life insurance). The different components are treated differently for tax purposes.

The tax advantages of paying superannuation to a "death benefit dependant" should always be considered. Payment to a "death benefit dependant" of a lump sum superannuation death benefit is tax free. The meaning of "death benefit dependant" is set out in section 302-195 of the Income Tax Assessment Act 1997 and is different to that of a "dependant" i.e. whilst a child may be considered a "dependant" an adult child over the age of 18 is not automatically a "death benefit dependant".

Where superannuation is paid to a non dependant then the tax consequences must be understood. Non dependants will pay 16.5% (inclusive of the Medicare levy) on the taxed element. Primarily this will consist of the member's employer's contributions. Non dependants will pay tax at their personal marginal rate (capped at 31.5%) on the untaxed element of the taxable component, which is usually an individual's life insurance.

The complexities of superannuation and potential tax consequences mean a client's already existing nomination should always be examined when considering a client's estate planning.

# Your Guide to the STEP Journal

By Craig McKie



In the March 2011 “STEP Journal” at pages 62-65, writer Andrew Auchincloss discusses the complexities associated with the interaction of asset allocation and the distributional policy of a foreign trust and United States (“US”) tax law.

The writer seeks to fashion a set of solutions to a case study, which are most appropriate for meeting the fiduciary obligations of the trustee of a foreign non-grantor trust while optimising the benefit of the trust to the US beneficiaries.

This can be a commonly encountered issue for advisers in Australia, where an inter vivos trust or a testamentary trust has, among its objects, a US resident.

A non-grantor trust refers to a trust that is recognised as a separate entity for US income tax purposes. By contrast, a grantor trust is effectively ignored for many US income tax purposes since it is deemed to be owned by its grantor (i.e. the person(s) who make transfers to the trust).

The US tax law applicable to foreign non-grantor trusts divide the assets of the foreign trust three ways, namely: current year income, accumulated income and finally, the remaining balance of the trust. Distributions from the trust are deemed to be sourced in the same order.

Receipt by a US beneficiary of the foreign trust’s current year income attracts US income taxation at the normal rates. However, receipt of accumulated income incurs two additional US taxes, a “throw-back” tax (that subjects distribution of accumulated income to taxation at ordinary US rates), and a non-deductible interest charge (that addresses the time value of the delay in US tax payment caused by accumulation offshore).

The writer notes that in many cases the two additional taxes are highly punitive.

The three options for distributing current year income are considered **via** the case study.

The writer suggests that a thorough analysis of the distribution options of the foreign trust are essential in providing the most optimum result for a US beneficiary.

Advisers in WA will be well served to at least read the article to be alive to the potential for punitive tax consequences in the US for a US beneficiary of an Australian trust.



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

# Member Profile

## Loreena Gillon

Loreena operates a boutique Chartered Accounting firm in West Perth and has done so for the past 13 years. Her practice provides accounting, taxation compliance and planning services.

The practice client base is predominantly professionals including medical specialists (operating through incorporated entities with associated trust structures), general practitioners, engineers, architects, solicitors, for whom the firm prepares the financial statements and income tax returns. The practice also prepares the financial statements and income tax returns for a number of small to medium businesses and Self Managed Superannuation Funds.

Prior to establishing her practice Loreena worked for large accounting firms in the business services area. The success of Loreena's firm is largely due to the personalized service offered to her clients.

### Professional Details

**Qualifications:** Post Graduate Diploma (Business) – Curtin University of Technology.  
Bachelor of Commerce Degree – The University of Western Australia.

**Memberships:** Member of STEP  
Member of the Institute of Chartered Accountants in Australia.  
Member and Fellow of the Taxation Institute of Australia  
Member of the National Tax & Accountants Association

**Professional Participation:** Loreena is the Deputy Chair of the Education Committee of the Tax Institute, and is the Chair of the 2011 WA State Convention Committee for the Tax Institute.

### Contact details

**Principal**  
**Loreena Gillon Chartered Accountants**  
Phone: +618 9226 3232  
E-mail: lgillon@loreenagillon.com.au

## NAB Private Wealth

Dedicated to supporting affluent Australians with complex financial needs, NAB Private Wealth is Australia's leading private bank and one of the country's most trusted wealth advisers.

For more information in relation to how NAB Private Wealth can assist you or your clients, including with the repatriation of funds where there are substantial accounts abroad, please contact Barbara Di Labio on 0414 873 482 or [Barbara.DiLabio@nab.com.au](mailto:Barbara.DiLabio@nab.com.au)

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](mailto:swalton@jacmac.com.au).