

STEP Perth Newsletter

March 2011

STEP
Society of Trust and
Estate Practitioners



www.step.org

Nearly two years have elapsed since our launch and the Perth branch of STEP continues to grow. We now have 37 members and continue to get new enquiries regularly.

Due to pressure of work Adam Levin has retired as Chair of STEP Perth and I have taken on the role of Chair. I would like to take this opportunity to thank Adam for all his efforts during his time as Chair. Fortunately Adam remains on our committee as his ideas and enthusiasm are invaluable.

In early December as Acting Chair I attended the STEP AGM and conference in London. The level of attendance at the conference was affected by early winter snow which brought trains and traffic to a standstill in the north and south of England and closed Gatwick airport. For those who managed to get there it was well worthwhile. The most interesting session I attended was about elder law which is a growing area of practice in many jurisdictions. There is also an awareness in STEP worldwide that in jurisdictions such as Australia and some of the civil law jurisdictions where offshore trusts and the related planning are not possible, STEP has to provide education and information which is of use to practitioners in these jurisdictions.

As part of the conference I attended the regional meeting at which it was determined that the Australasian region would now comprise Australia and New Zealand and that Hong Kong and Singapore would no longer be a part of this region. The Honourable Justice Ian Gzell of the New South Wales Supreme Court has recently been nominated without opposition to be the regional representative.

Workshops at the conference provided ideas as to how we can develop STEP Perth and how education programmes are run in Canada which has similar problems to Western Australia where some practitioners live far away from the bigger cities.

UPCOMING EVENTS

Reviewing Deeds of Trust

Speaker: Grahame Young

Date: 14 April 2011

Time: 5.30 - 7.30pm

Location: Perpetual Trustee Company, Level 29, Exchange Plaza, 2 The Esplanade, Perth

Save the Date

Round table on Taxation of Trusts

Speaker: Jonathan Ilbery, Jackson McDonald

Date: 12 May 2011

Time: 5.30pm - 7.30pm

Location: Jackson McDonald, Level 25, 140 St Georges Terrace, Perth

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



LAMONT'S

Since our last newsletter we have had a champagne tasting Christmas party at Lamont's Bishop House. The event was enjoyed by all. It was not all champagne tasting. The Honourable Justice Eric Heenan and Registrar Sandra Boyle were our guest speakers for the evening. Registrar Boyle provided us with some interesting statistics from the Probate Registry. In particular, there were 6,007 probate applications last year (an increase of 1.4%) and of these 2,770 were in person applications which is an increase of 7.2%. There were also 112 new applications under the Inheritance Act which was an increase of 30.2%. Justice Heenan spoke about a recent case on informal wills and as usual had some pertinent comments to make.

We welcomed in the new year by hearing from Anna Steward. Anna is an English lawyer who worked at Withers LLP in the area of international wealth planning for four years. She is also fluent in both French and Italian. She spoke about the opportunities for tax planning for Australian and other 'Non-Doms' moving to the United Kingdom. For those of us who have clients who are about to make this move forward planning is the best advice.

This year we are aiming to host educational events on an almost monthly basis except for June (tax reasons) and December (fun reasons) as well as producing our quarterly newsletter.

On 17 February 2011 I attended as the STEP representative the Supreme Court Probate committee which was chaired by Justice Heenan. STEP were invited to have a representative attend the meeting of this committee so that the representative could discuss with the committee any matters of interest or concern to STEP members which may lead to an improvement in the practices and services of the Probate Office of the Supreme Court. Mrs Elizabeth Heenan also attended the committee meeting as the representative of the Law Society of Western Australia.

If any STEP member has any concerns regarding the practices and services of the Probate Office which they would like me to raise at the next committee meeting would you please contact me in writing. At the meeting both Elizabeth Heenan and I mentioned that in the past the Probate Office has always dealt with matters quickly and efficiently. Unfortunately, the introduction to the

Probate Office of the Supreme Court computer system resulted in long delays in dealing with applications which everyone at the Probate Office has worked hard to overcome.

As a result of the meeting I agreed to circulate to our members some changes in practice which are designed to increase the efficiency of the Probate Office. These changes are set out later in the newsletter.

By the time you receive this newsletter you will have received notice that your annual subscriptions are due at the end of the month. I hope you will all renew these subscriptions. If you have any ideas for seminars or other activities which would be of interest to our members please contact me or a member of the committee.

Susan Fielding, Chairperson STEP Perth



Recent Events

A Position of Trust

Presenter, Elizabeth Heenan - 24 November 2010

Sarah Walton of Jackson McDonald reports

On 24 November 2010 Elizabeth Heenan special counsel at Marks & Sands Lawyers presented her seminar paper to 27 STEP members and friends.

Elizabeth provided insight and guidance into the obligations and responsibilities that lawyers and accountants assume when they agree to act as executors for clients.

Some of the points that attendees took away with them were

- Clients appoint lawyers and accountants as they are considered to have a higher degree of responsibility in administering their duties than a lay person.
- It is preferable to appoint a specific person within a firm with a named substitute if the institute executor predeceases, is unable to take out the grant or is no longer practising. When drafting a will, practitioners should remember not only to include a reference to successive firms but also to limited liability partnerships.
- Where a lawyer is named as the preferred executor, it is prudent to include a clause regarding whether



Susan Fielding (left) and Anna Steward (right)

or not the appointment would be valid if the solicitor no longer holds a practising certificate. This is because some clients prefer to have the extra layer of protection that the practising certificate and accompanying insurance offers.

- Where the original will is not retained in safe custody it is a good idea to keep a photocopy in safe custody.
- Even if it is a will made in 1940, do not presume it has been revoked!
- Practitioners should always remember that the executor has primary responsibility for the funeral. The professional executor should liaise with the family members to ensure that they are aware of this in order to avoid the estate being responsible for funeral costs which the executor has not approved. It is helpful to advise family members that banks will pay funeral costs if there are sufficient funds in the bank to do so in order to alleviate the family's stress.
- When taking the client's instructions for the will, it is helpful to obtain the details required for the death certificate. It is surprising how many grandchildren do not know their grandparents' full names and occupations.



John Gillett (left) and Craig McKie (right)

- Executors should remember that under the *Cremations Act 1929* a cremation should not take place where the deceased person has left a written direction not to be cremated (there are limited exceptions). However, there is that distinction between a wish clause and an actual direction.
- Whilst a formal reading of the will is not actually required, where a professional is acting as the executor it is often useful in clarifying whether or not any Inheritance (*Family and Dependants*) Act 1972 claims may arise!
- Residual beneficiaries of the deceased estate are entitled to a copy of the will; legatees are not. Legatees should be advised of their potential legacy.
- A letter of engagement should be entered into between the professional executor and their own firm.
- Accountants should be aware that they are not entitled to charge for legal work.
- Unless there is a specific term in a will allowing the executor to claim commission, commission can only be obtained either by agreement with the residuary beneficiaries (they being adults of full capacity) or by application to the Supreme Court.
- Whilst the *Trustees Act 1962* allows professionals to charge legal costs, there is a school of thought that having a charging clause within the will is a way of ensuring that the client is aware that the professional executor intends to charge their usual fees for administering the estate. *[Editor's note: since 1 January 2011 the provisions of Rule 15 of the Professional Conduct Rules must be complied with]*
- There is a distinction between the legal and equitable position as to who is entitled to administer the estate pre-grant. Section 9 of *Public Trustee Act 1941* states that pending probate or administration the estate of the deceased vests in the Public Trustee. This may be contrasted with the equitable position that the executor derives authority from the will.
- When taking instructions for a will it is sensible to get full details of assets and liabilities. This means including details as to when items have been purchased, the location of Certificate of Titles, who owns an insurance policy and asking whether or not the client has any family trusts.
- Professional executors should remember that one of the most onerous obligations is to secure the assets as soon as possible. This can include changing locks on a property and liaising with the relevant insurance company to ensure that the property is adequately insured. In some cases the police may need to be notified in order to carry out regular patrols in the area. Practitioners should note that it is not always advisable to cancel the phone line as some alarm systems direct dial to the security companies and the telephone line is required for this.
- Some practitioners prefer to be appointed as the sole executor when acting in a professional capacity.
- The professional executor should always obtain a formal valuation of the property which assists in protecting the executor at the time of sale. If a prolonged period has occurred since the date of valuation and date of sale, it is advisable to have the valuation updated in order to take into account movements in the property market.
- When lodging the application for probate always ensure that the person moving the motion to obtain probate is not the same person who took the oath in the affidavit in support of the application.
- Copies of a will certified by the executor may not be acceptable; it is better to have them certified by an independent person.
- A professional executor should remember that if the deceased operated from several states or places, a notice to creditors should be placed in each of those places to be effective.
- The Legal Practice Board should be notified when controlled moneys accounts are opened with financial institutions in accordance with the *Legal Practice Act*.

STEP Members Thoughts

Advanced Health Directives and Enduring Powers of Guardianship

1903. 1936. 1962. 1970. 1972.

Hopefully most readers have recognised that these numbers relate to some of the salient legislation in Western Australian trust and estate practice. Whilst the legislation may have been put in place some time ago the continuing evolution of the day to day affairs of individuals has meant that estate planning, estate administration and trust practices have also had to change.

Advance health directives and enduring powers of guardianship were introduced to Western Australia over one year ago. The impact that these documents have had in our area of practice has yet to be fully appreciated and is causing interesting discussions.

Accordingly, STEP Perth invites its members and friends to contact us in order to provide their comments on the impact which advance health directives and enduring powers of guardianship is having and whether or not they consider their introduction has been beneficial.

We look forward to hearing from members on this subject. Please contact Sarah Walton at swalton@jacmac.com.au with your comments regarding advanced health directives and enduring powers of guardianship.

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.

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SEMINARS

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Recent Events

Trusts Symposium

Adelaide – 18 February 2011

STEP member Brendan Ashdown of John Toohey Chambers reports

The Law Society of South Australia and STEP Adelaide hosted a symposium upon issues related to trusts on 18 February 2011 with an extensive list of distinguished and quality presenters.

In opening the symposium the Honourable Justice Doyle, Chief Justice of the Supreme Court of South Australia, spoke about the concerns because of the cost of litigation.

The Honourable Justice Heydon of the High Court examined the issues of knowledge (both subjective and objective) as it applies to the interpretation of trusts by looking at the line of authorities leading to *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

The Honourable Justice Gray of the South Australia Supreme Court addressed the position of conflicts of interest between trustees and beneficiaries. He looked at the position where an appointor appoints a person to an office despite knowing that the person appointed may or will have a conflict. The use of the advisory and directions powers of the Court in such circumstances was recommended.

The Honourable Justice Bergin, Chief Justice in Equity of the Supreme Court of New South Wales, spoke about the repentant trustee and the requirements for obtaining statutory relief from breach of trust. He emphasised that in order to obtain such relief the repentant trustee must seek relief and repent while the money can still be recovered. The trustee must not sin first and ask for forgiveness later. A trustee should seek directions before acting and this will either guide the trustee or provide protection. If a trustee acts in breach of trust then repentance must swiftly follow before it is too late to correct the problem. Where illegal conduct is involved it is necessary for the trustee to abandon the illegal conduct before any violation of the law takes place, and repent while the money or trust property can still be recovered. It is harder for professional trustees to obtain such relief.

The Honourable Justice Croft of the Victorian Supreme Court looked at charitable trusts. He discussed the position of commercial trusts which make provision for the distribution to charities if the objects of the trust fail. He pointed out that a liquidator of a trustee company does not necessarily stand in the position of the trustee or donee of a power, which may result in the power only being exercisable by the Court.

Mr David Wright, Senior Lecturer in Law at the University of Adelaide, spoke on the topic 'Taking the High Court Seriously: How Remedial is the Remedial Constructive Trust'.

First, he commented on how the legal profession does not read whole cases (just largely the headnotes) and therefore the profession took a narrow view of what is binding in any High Court decision.

Second, the position of the intermediate Courts of Appeal was discussed including the propensity for the intermediate Courts of Appeal to distinguish or find a way around the High Court's decisions. He referred to the rebuke from the High Court in *Farah Constructions v Say-Dee* (2007) 230 CLR 89 at [130], [131] and [147].

Third, and perhaps most provocatively, the position of the universities was reviewed. The speaker considered that the universities have equated research with publication. As a result universities have adopted a point scoring system based upon which publications an academic gets published in. This did not necessarily reflect publications which the profession or the courts considered useful. Further, points are awarded for the first editions of texts (and for single edition monographs) but not for subsequent editions of a text. As a result the system measured quantity and not quality.

Dr Campbell Rankine addressed the position of a beneficiary's interests in discretionary trusts as a result of the decision in *Buckle and CPT Custodians*. He pointed out the artifice arising from the deeming of present entitlements under section 101 of the Income

Tax Assessment Act and the interaction with the true position of beneficiaries at law and in equity. He also commented on the problem that arises from the fact that choses in action can be disposed of absolutely but cannot be fractured or assigned in part.

Mr Dick Whittington QC spoke on issues arising out of the tracing of trust property (including freezing orders against third parties and the potential to trace property in the hands of those third parties). A question which arose from the decision in *Kennon v Spry* has been left unanswered, namely how a section 79 Family Law Act order may be framed in a given case to take into account the potential interests of other beneficiaries.

STEP Adelaide wish to make the trust symposium an annual event. It should be a fixture in the annual calendar for those interested in the operation of and the law of trusts.

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 Renewal

As most members will be aware the STEP membership year runs from 1 April to 31 March annually. You will shortly receive your membership renewal forms. We encourage you to continue to support our branch by renewing your membership and spreading the word amongst friends and colleagues.

Being a member of STEP means being part of a unique professional body providing members with a local, national and international learning and business network focusing on the responsible stewardship of assets today and across the generations. STEP has more than 14,500 members in 66 countries.

Remember STEP is not just limited to lawyers! Accountants whose practice involves trusts and succession planning are welcome and strongly encouraged to join. We also remind members and friends that there are a number of levels of membership within STEP. Full members (being those members who are entitled to use the letters TEP after their name) have more than 5 years experience in trust and estate planning and associate members have a minimum of 2 years trust and estate experience. Student memberships are also available.

Probate News - Message from the Supreme Court

Following a meeting of the Supreme Court Probate Committee held on 17 February 2011, which Susan Fielding attended, we have been asked to notify STEP members and friends about the following points:

Henceforth, if there is no compliance with NCP Rule 12 (1) at the time the documents are lodged at the Registry they will be rejected by counter clerks without any further checks at that time.

A caveat that is sought to be re-registered or extended after the 6 months has lapsed will no longer be simply renewed. The Registrars will insist on compliance with the provisions in the Rules being 33(3) (5) and (6). The reference to "unless otherwise ordered" in Rule 33 (3) will require any caveator to apply to the Registrar by motion with a supporting affidavit setting out in the clearest possible terms why the caveat is sought to be renewed. Caveats were never intended to be permanent injunctions and that is the principle upon which they will be rejected after the initial period has lapsed. Without cogent and compelling reasons as to the requirement for an extension, a caveat will not be renewed.

There is soon to be published an amendment to the Supreme Court's Practice Directions which will provide that where there is an application made in the contentious jurisdiction the applicant must provide to the Court at the time of filing the contentious proceedings details of any Non-Contentious application that has been made. This information will be the number at the Court of such application, the name of the deceased, the date of death and any alias by which the deceased was described in the Non-Contentious application. This enables the Court to ensure that the Non-Contentious file is available to any judicial officer dealing with the contentious proceedings. The files travelling together in this way will also ensure that any orders that should be made on the Non-Contentious file will be properly made at the time the Contentious proceedings are being finalised.

For an alias to be used in a grant practitioners must ensure they identify the property which is said to be in the name of the deceased under the alias. If no such property is identified, the alias will not form part of the grant.

New STEP Members

We would like to take this opportunity to welcome the following new members to STEP.

Miss Anna Steward, **Jackson McDonald**
Miss Jemma Sanderson, **Cooper Partners Financial Services**
Ms Loreena Gillon, **Loreena Gillon Chartered Accountant**
Ms Karen Jaycock, **Jackson McDonald**

NAB Private Wealth

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Your Guide to the STEP Journal

By Craig McKie



On page 25 of the January 2011 "STEP Journal", Toby Graham and Joanna Poole discuss the application of arbitration clauses in trusts and wills.

The use of arbitration as an alternative to court proceedings is governed by the Arbitration Act 1996 (UK) (the Act). The Act defines an 'arbitration agreement' as an agreement in writing to submit to the arbitration present or future disputes (whether contractual or not). Arbitration is a more private forum, quicker and potentially cheaper, and more flexible than Court. The most appealing feature of arbitration is the ability to have an expert in the field of the dispute deciding the case.

The authors observe that given a Trust and a Will are very different creatures to a contract, there is doubt as to whether the Act has application in this context. Of particular concern is whether an arbitration agreement between settlor and trustee compels a beneficiary to submit to arbitration.

The authors state that generally practitioners believe a beneficiary is not bound by an arbitration clause. Whilst no English authority exists on this point, the American experience suggests that the fundamental prerequisite to arbitration is the existence of a provision in a written contract to submit to arbitration and that the trusts are not contracts.

A short comparison was made to employing mediation in trust and estate disputes. The authors note that although mediation is similar to arbitration, being a confidential forum, it differs in that it is cheaper, quicker, more flexible and importantly, the mediator facilitates resolution of the dispute rather than deciding it in a quasi judicial capacity. All these characteristics, the authors observe, may preserve family accord into the future.

In the WA context, mediation is ideal for disputes involving Trusts and Wills. The parties are often new to litigation in which emotions run high with associated costs and stresses. The lawyers and the mediators (usually Registrars) are usually well versed with any technical arguments.

Conversely, arbitration seems to attract sophisticated litigants often in dispute over technical issues, which will benefit from at least one arbiter being well versed in the subject technical area (ie construction or engineering).

In WA, mediation is a proven means of ending the litigation involving Trusts and Wills (and associated costs and stresses for the parties). The preservation of the "family accord", if achieved, is a bonus.



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.

Executors and Foreign Exchange

Wendy Casey of NAB Private Wealth & Anna Steward of Jackson McDonald point out the problems.

Increasingly we see clients with assets in more than one country. Different governing laws which affect both who can inherit and how can give rise to some interesting issues for executors and their advisors.

Common problems include heirs having rights to inherit which are not reflected in a will and the ineffectiveness of one country's grant of probate (or similar document) in another. Where an estate includes foreign assets, executors should always seek local advice from the outset. They should also be aware of any inheritance or succession tax payable in relation to foreign assets. It may be that Australian situate assets have to be liquidated in order to meet such tax liabilities.

Executors need to give careful consideration to the repatriation of funds where there are substantial

accounts abroad. Often it is easy to overlook how volatile the foreign exchange market can be and how the value of funds being repatriated can change significantly over even a short space of time.

Executors should seek advice as to the foreign exchange services provided by financial institutions and may need to seek advice in order to mitigate some of the foreign exchange rate risks. In addition, foreign currency structured deposit accounts can sometimes offer a potentially higher interest rate in comparison to rates being offered in the country of origination. Foreign deposit accounts of this nature can be a short-term solution for executors whilst waiting for a more favourable exchange rate. However the weight of importance given to the exchange rate should be balanced against the needs for beneficiaries to have access to funds and possible tax implications.



Has your client appointed you as executor of their estate?

As you know, when you take on the role of executor, you also take on significant responsibility which can be challenging and time-consuming.

Have you considered some of the consequences for you and your business?

- Do you have the time or business resources over the months or even years it will take to administer your client's estate?
- Could there be challenges to the Will or family disputes which could interrupt your work or be a conflict of interest?
- Are you retiring soon or having an extended break from work where you would be unavailable to attend to your executorial duties?
- Are you concerned about the legal and administrative responsibilities involved?

Perpetual can help other professionals who are appointed as executor by offering you and your clients the support that you need. Our estate administration options include:

- Appointing Perpetual to help you administer your client's estate
- Transferring your executorial responsibilities to Perpetual
- Your client can nominate Perpetual as executor of their future Will

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

Member Profile

Robert Durey

Rob has more than 10 years experience providing estate planning and administration services for his clients. He has an in-depth knowledge of these areas of practice combined with an understanding of the sensitive nature of his clients' personal affairs.

He has extensive experience in preparing both simple and complex Wills. He provides advice to members in relation to their binding and non-binding nominations for self-managed superannuation funds. He also prepares and advises on enduring powers of attorney, enduring powers of guardianship and trusts deeds.

Rob's extensive knowledge of the procedures of the Supreme Court Probate Registry is invaluable when obtaining grants of Probate and Letters of Administration in complex circumstances.

As an experienced law practitioner, Rob has also advised property developers, mortgage fund managers, banks and individuals in many circumstances, including project financing, preparing applications for new certificates of title, commercial leases and mortgage securities.

Career Highlights

- Complex estate planning case involving a client whose portfolio was valued at more than \$30 million.
- Estate planning for former UK-domiciled client, with international assets worth close to \$10 million, involving complicated UK Inheritance Tax and trust issues.
- Acted for one of Australia's leading investment banks in financing the development of Eastport, (Stages 2-6) at Port Bouvard

Professional Details

Admitted to practice: 1998.

Qualifications: Bachelor of Laws, Bachelor of Arts (History).

Memberships: Law Society of Western Australia, Property Council of Western Australia, Taxation Institute of Australia, Family Business Australia.

Presentations/publications: Rob has delivered seminars for the Law Society of Western Australia, Lexis Nexis, Tonkin Corporation and Grant Thornton on topics such as Contract Law and Wills. He has also had an article published in Brief Magazine on the making of Enduring Powers of Attorney

Contact details

Principal

Talbot Olivier

Phone: +618 9420 7105

E-mail: rdurey@talbotolivier.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.