

STEP Perth Newsletter

March 2010

Well here we are, one year on from the establishment of the Perth chapter of STEP and we are proud of our achievements and look forward to building the chapter in 2010/2011.

Since our last newsletter we have enjoyed hearing from our international speakers, Ian Marsh and Victor Joffe QC and we have more events in the pipeline for you.

The membership year runs from 1 April to 31 March annually and you will shortly receive your membership renewal. I encourage you to support our chapter by renewing your membership and spreading the word amongst friends and colleagues.

For more information on membership visit www.step.org or email Alison Gee at agee@jacmac.com.au.
Adam Levin, Chairman STEP Perth

STEP
Society of Trust and
Estate Practitioners



www.step.org

UPCOMING EVENTS

NAB Event

Guest Speaker: Eastern States Economist
Event Information to be provided

April 2010

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 Alison Gee via
email agee@jacmac.com.au***

A message from our sponsors....



We are pleased to announce that
Perpetual Private Clients, Nab Private Wealth and Jackson McDonald
have all renewed their sponsorship for the 2010/2011 Membership Year.

Their support ensures we can continue to deliver quality
member events throughout the year.

Welcome to New Members

We welcome the following new members to STEP Perth:

Mr Peter Nettleton
Manager,
National Australia Trustees Limited

Mr Anthony Underhill
Manager,
William Buck Chartered Accountants

A FULL LIST OF OUR MEMBERS CAN BE LOCATED ON PAGE 8

Recent Events

1. International Speaker Ian Marsh of familydr - 21 January 2010

Building bespoke conflict management processes into family arrangements

By Emma Chinnery

STEP Perth held its first event for the year on 21 January 2010 in the Jackson McDonald boardrooms.

Ian Marsh is a longstanding member of STEP UK. He is the founder of familydr which serves clients across the world by, amongst other things, facilitating mediation and conciliation processes in multigenerational families.

Background

Ian introduced us to the topic by citing a number of UK statistics. One in four families fall out over a family member's Will. In the business context, less than 24 percent of family businesses are carried on by the second generation and less than 10 percent are carried on by the third generation.

One of Ian's key messages was that in order to facilitate a satisfactory resolution of a family conflict, one needs to truly identify what is driving the conflict and how it has developed.



Ian Marsh presenting his paper

The drivers will often not be money and assets. Too frequently, advisors can become focussed on the legal character of a conflict and its resolution.

The Anatomy of Conflict

Any conflict begins with a perceived

threat to one or more individuals. This centres around an individual's belief or perception that they have incompatible goals with another person or that other person is interfering with them achieving their goals.

Miscommunication is a key element of family conflict. Where individuals do not know or understand another person's intentions, they can make incorrect assumptions resulting in a loss of trust between individuals.

Ian described the role that **entrenchment** can play in family conflict. Each time a story or event is remembered and narrated, the natural tendency is for the individual to change or exaggerate the facts. This becomes the reality of the events for that person and is the version of events that they bring to the table during a conflict.

Practical Learnings

The conflict management process often requires the parties to recognise that the process may need to fully "run its course" to give parties the satisfaction of having experienced a fair process.

It is useful to identify, as early as possible, the natural approaches to conflict of the relevant family members involved. Styles may include peacemakers, bridge-builders, talkers, victims or oppressors.

Ian offered practical advice for developing ongoing governance mechanisms for a family, whether it relate to private wealth management or business operations:

- firstly, it is essential to engage family

members in this process. If governance materials are prepared solely by a professional advisor, family members are unlikely to have any sense of ownership of those materials or respect for the processes; and

- ensure that both the governance mechanisms, and the materials that record them, have regard to the different styles by which family members may communicate. Consider visual, aural, cultural and kinaesthetic (both emotional and physical) styles of communication.

Meeting Around the Table

An overall message from Ian's experiences was that there is no substitute for holding open family discussions and addressing the issues and concerns of family succession.

Step Members and Guests at the Ian Marsh Presentation



To locate a copy of the paper by Ian Marsh, please visit our website www.step.org and search "Perth"

2. International Speaker English QC Victor Joffe - 4 March 2010

Beneficiaries Knowledge, Concurrence or Acquiescence as Defences to Breach of Trust and the Significance of a New Trustee

By Sally Bruce

During a recent visit to WA, Mr Victor Joffe QC from Serle Chambers in the UK very kindly gave a presentation to members of STEP Perth about the legal issues arising from the **Alhamrani litigation** in Jersey.

While the litigation settled before trial, Mr Joffe explained that it highlighted some interesting questions about the extent to which beneficiaries' knowledge, concurrence or

acquiescence can be raised as a defence to a claim for breach of trust, and the significance of the appointment of a new trustee.

The Alhamrani litigation in Jersey concerned a \$120M breach of trust claim. The trustee involved in the breach sought to defend the claim on the basis that the beneficiaries concurred or acquiesced in the breach of trust.

Mr Joffe explained that a beneficiary who concurs in a breach of trust may be prevented from suing the trustee for the consequences of the breach. Further, even if there is no concurrence by the beneficiary at the time of the relevant breach, subsequent agreement by a beneficiary may bar the beneficiary from relief.

What of the situation where a new trustee has been appointed in circumstances where the former trustee has committed a breach of trust, and where one or more of the beneficiaries have concurred in or acquiesced in the former trustee's breach of trust? Does the new trustee still have standing to sue the former trustee? Mr Joffe cited *Young v Murphy* [1996] 1 VR 279 as authority for the proposition that a new trustee has the right to bring proceedings for breach of trust against a former trustee and the duty to do so in circumstances where (having taken into account the merits of those claims and all other relevant circumstances) it forms the view that bringing such proceedings would be of benefit to the trust. Further, the



Victor Joffe QC

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Susan Fielding at the Victor Joffe QC Presentation

existence of an equitable bar on a claim by a particular beneficiary or group of beneficiaries does not bar a claim on the same facts being made by a new trustee of the fund against whom no such equitable bar is directly applicable.

Mr Joffe discussed the Court's power to remove a trustee and noted that the fact that a breach of trust claim has been commenced or intimated will not, of itself, justify the removal of the trustee pending the hearing of that claim, however serious the allegations involved.

We extend our sincere thanks to Mr Joffe for a most interesting presentation. Mr Joffe proved to be a man of good humour and modest disposition and it was a great pleasure to meet him.

To locate a copy of the paper by Victor Joffe please visit our website www.step.org and search "Perth"

STEP Web Site

The STEP Web Site is now up and running - visit the website at www.step.org and search "Perth" for more information on STEP Perth, including:

- further information on past and upcoming events
- minutes from STEP Perth Committee meetings
- links to online resources of interest
- a members discussion forum



Your guide to the STEP Journal

by Craig McKie

On Page 21 of the February 2010 edition of the “Step Journal” Mark Keenan considers the implication of the English and Wales High Court (Chancery Division) decision of **Gill v Woodall (RSPCA) [2009] EWHC B34 (Ch)** decision of 5 October 2009 is a recent English decision on proprietary estoppel.

In this case the question for the Court was whether, in all the circumstances of the case, it was unconscionable for the deceased (the mother of the claimant) not to have left a farm to her daughter Christine by her Will.

The principle of proprietary estoppel is as follows:

Where one person, “A”, has acted to his detriment on the faith of a belief, which was known to and encouraged by another person, “B”, that he either has or is going to be given a right over B’s property, B cannot insist on his strict legal rights if to do so would be inconsistent with A’s beliefs.

The Court accepted that Christine had acted to her detriment on the assurances of her parents that she would be left the farm in the deceased’s Will. The detriment included:

- substantial time and labour expended on the farm;
- her decision to adopt one career at the expense of another career to facilitate the expenditure of time and labour;
- utilising nearly all of her and her husband’s savings to purchase and redevelop an adjacent property;
- providing daily care and support for her parents.

Interestingly, the RSPCA suggested in its public response to the judgment that it was legally obliged (under charitable law) to seek the funds and that it was concerned about the implications of the decision for other charities.

The WA case of **Consolaro v Consolaro [2009] WASC 240** is the most recent proprietary estoppel decision in the WA Supreme Court. This case involves a huge factual matrix. As such cases so often turn on the facts, consideration of **Gill v Woodall (RSPCA)** could assist in advising clients in respect of a potential proprietary estoppel claim.

The commentator considers that it is prudent practice for practitioners to treat family members including husband and wife as separate clients, in circumstances where proprietary estoppel could arise.

Introduction of Enduring Powers of Guardianship and Advanced Health Directives to Western Australia

Enduring Powers of Guardianship and Advanced Health Directives were introduced in Western Australia on 15 February 2010, following changes to the Guardianship and Administration Act 1990, brought about by the Acts Amendment (Consent to Medical Treatment) Act 2008.

Enduring Powers of Guardianship

An enduring guardian can make limited or expansive personal, lifestyle and health care decisions in situations where the donor is incapable of making such decisions. It is important to note that an enduring guardian cannot make decisions for the donor on property or financial matters.

Advanced Health Directives

An Advanced Health Directive (AHD) enables the individual to make decisions now about the treatment they would or would not want to receive if they ever became sick or injured and were incapacitated. In such circumstances, an AHD effectively becomes the individual’s voice.

An AHD will only come into effect if it applies to the treatment required and only if the individual is unable to make reasoned judgements about a treatment decision at the time that the treatment is required.

Information as to Enduring Powers of Guardianship and Advanced Health Directives is available through the Office of the Public Advocate website - www.publicadvocate.wa.gov.au

Member Profile

Andrew Davies

Employer: O'Sullivan Davies

Position: Partner



When asked about his membership of STEP, he replied “it has been of considerable benefit to my practice because of the significant number of cases in which I am involved both here and overseas involving Trusts and other files where clients are seeking to protect assets from family law claims by others. I have been able to gain useful knowledge and ideas about trusts and estate planning from STEP members in Perth and the regular news digests published by email which keeps me abreast of developments. I commend any practitioner involved in this area to become a member.”

Contact details

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Andrew graduated from the University of Western Australia with a B. Juris and LLB and was subsequently admitted to the Supreme Court of Western Australia. He has been practising Family Law for over 25 years and is an accredited Family Law Specialist. He has a particular interest in the areas of complex financial settlements, Financial Agreements, International Family Law, trusts and matrimonial estate planning. This has involved him working with clients in numerous countries with particular regard to issues of conflict of laws between different states.

Andrew has established many contacts with lawyers and other professional advisors around the world who provide considerable assistance to his clients when seeking a final resolution to matrimonial dispute or wishing to protect estates from family law claims.

Andrew has presented numerous papers and lectures at state, national and international conferences and has been a guest lecturer at Murdoch University Law School. He is also a mediator, a fellow of the International Academy of Matrimonial Lawyers and former Chair of the Family Law & Family Rights Section of LawAsia.

If you would like to be featured in “Member Profile” please send a brief professional profile and a photo to Alison Gee at agee@jacmac.com.au.



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

THANK YOU

Thank you to the following members for making our first year of STEP Perth a success. We look forward to making our second membership year an even greater success with the help of yourselves and our new members.

ASHDOWN, Brendan

Barrister - John Toohey Chambers

BLOCH, Merle

Barrister & Solicitor - Merle Bloch

BOUJOS, Jocelyne

Partner - Scales & Co

BOYLE, Christopher

Registrar, Supreme Court of Western Australia

BOYLE, Sandra

Registrar, Supreme Court of Western Australia

DAVIES, Andrew

Partner, O'Sullivan Davies

DE HAAS, Martin

Consultant Lawyer, Martin de Haas

DUREY, Robert

Principal Solicitor, Talbot Olivier

ELLIOTT, Meredith

Barrister & Solicitor, Elliott & Co

FIELDING, Susan

Special Counsel, Jackson McDonald

FRY, Daniel

Partner, Norton & Smailes

GAFFNEY, Angela

Wealth Succession Planner, OPEZ

GILLETT, John

Solicitor, Jackson McDonald

HENN, Thomas

Solicitor, Brett Davies Lawyers

HOCKLEY, JOHN

Barrister, Francis Burt Chambers

HUGHES, Patrick

Special Counsel, Jackson McDonald

ILBERY, Jonathan

Partner, Jackson McDonald

LEVIN, Adam

Partners, Jackson McDonald

LOVITT, Brian

Director, Solicitor, Hewett & Lovitt

McKIE, Craig

Partner, Norton & Smailes

NETTLETON, Peter

Manager, National Australia Trustees Ltd

O'DONNELL, Jim

Associate, Jackson McDonald

OSBORN, Christopher

Lawyer, Williams & Hughes

SCEALES, Alexander

Partner, Scales & Company

SLOAN, William

Senior Associate, O'Sullivan Davies

SMAILES, Chistopher

Partner, Norton & Smailes

UNDERHILL, Anthony

Manager, William Buck

VAN DER KWAST, Maree-Louise

Partner, Dwyer Durack

WORLEY, Marc

Director, KD Johns & Co

YOUNG, John

Barrister, Francis Burt Chambers