

STEP Perth Newsletter

September 2010

Welcome to Step Perth's September Newsletter. Since our last newsletter STEP members and friends enjoyed hearing from Jeremy Curthoys who spoke to a paper delivered by STEP Adelaide member Justice Tom Gray of the Supreme Court of South Australia.

We have an exciting calendar of events planned for the remainder of 2010 beginning with a round table workshop on High Court case Bamford, facilitated by Richard Norton of Norton & Smailes. If you would like to attend this event please see the registration details on page seven.

Congratulations to the STEP Adelaide branch that was established earlier this year and already has over 50 members. I encourage you to show your support by joining STEP Perth and spreading the word amongst friends and colleagues.

Your committee has embarked on two new initiatives in 2010. Firstly, STEP is building relationships with all the law schools in Perth in order to support the study of trusts and estates. Secondly your committee is preparing links to useful resources and services for inclusion on the STEP Perth Website. If you have useful links for inclusion on the website, please let us know.

Thankyou for your on going support. If you require any further information on STEP please contact Sarah Walton on 08 9426 6750 or email swalton@jacmac.com.au.

Adam Levin, Chairman STEP Perth.



www.step.org

UPCOMING EVENTS

Educational Event: Bamford have we got it right?

Discussion Facilitator: Richard Norton of Norton & Smailes
Date: **7 September 2010**
Time: 5.30 - 7.30pm
Location: Jackson McDonald Boardrooms
Level 25, 140 St Georges Terrace, Perth WA

Annual Estate Planning Intensive

The Tax Institute of Australia and STEP Perth have joined together for the Annual Estate Planning Intensive which is due to be held on **1 November 2010**. Members of STEP who are not Tax Institute of Australia Members will be entitled to attend the event at the members price

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 via email
swalton@jacmac.com.au***



Recent Events

STEP Educational Event - Speaker, Jeremy Curthoys of John Toohey Chambers -15 June 2010

Jeremy Curthoys kindly spoke to a paper delivered in February 2010 by the Honourable Justice Tom Gray of the Supreme Court of South Australia at the launch of the STEP Adelaide branch on the topic of “Beneficiary’s rights on breaches by trustees and executors”. Jeremy drew our attention to a number of important points made by Justice Gray, which will be canvassed in this article.

Jeremy was admitted to practice in 1980 and worked at Parker and Parker in Perth and Freshfields in London, before he joined the independent bar in 1985. Jeremy is now a member of John Toohey Chambers.

The nature of a beneficiary’s rights

The basic right of a beneficiary is “to have the trust duly administered in accordance with the provisions of the trust instrument (if any) and the general law (*Target Holdings Ltd v Redferns* [1996] AC 421 at 434, *Lord Browne Wilkinson*). The trustee has a duty to obey the terms of the trust and beneficiaries therefore



Stephen McGurk, NAB Private



Andrew Davies, William Sloan and Jonathan Ilbery

have rights which arise if the trustee fails to obey the terms of the trust.

The office of Trustee and Executor

Jeremy highlighted the fact that the powers and duties of trustees and executors differ in important aspects, although they are both in a fiduciary relationship with the beneficiary. The distinguishing point is *timing*. A beneficiary of an un-administered estate may not possess a tangible interest in the assets of the estate, but still has rights if the executor or trustee breaches their duty to duly administer the estate. Justice Gray’s paper contains a useful summary of the principles relating to the rights of a beneficiary in an un-administered estate.

Remedies

Jeremy then discussed the remedies for breach of trust which may be available to a beneficiary including compensation and account for profits, which are outlined in Justice Gray’s paper.

Other alternatives to the above remedies discussed include injunctive relief, applications for administrative action, the appointment of a receiver and applications by the beneficiary seeking removal of the trustee.

Devastavit

The most interesting remedy and one which has seen little use in recent years is the old common law remedy of *devastavit*. If executors are found to have “squandered” and “misapplied” the assets, or failed to take reasonable steps to safeguard the assets, contrary to the duty imposed on them, beneficiaries may be entitled to the remedy of *devastavit*. Jeremy gave the example of allowing a business of an estate or trust to run down or simply closing the business without making an effort to recover the goodwill and assets of the business.

Jeremy highlighted that there is an overlap between liability arising from *devastavit* and a liability for breach of trust, and relief under both types of remedies should be pleaded.

Other Remedies

A beneficiary may also bring an action to compel the performance of a trustee’s duty, which may be achieved by applying for the removal of the trustee. However, as Jeremy noted, it remains difficult to remove trustees as the test is “what will best serve the interests of the estate or trust”. If a trustee is refusing to bring an action against a third person, such as a debtor, a beneficiary may bring that action in their own name, provided that the relief sought is equitable and the circumstances are exceptional. Jeremy also pointed out, that if a beneficiary has a right to due administration of a trust, the beneficiary may seek an injunction to restrain trustees from committing a breach or to compel them to perform their duty or

may apply to the court seeking a declaration. In the context of an estate, an administration order may be available to a beneficiary, but usually only where there is no other form of relief available.

Judicial advice or directions - The Macedonian Church case

Jeremy highlighted the decision of the High Court in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66. Essentially, the High Court held that the fact of a proceeding being adversarial will not necessarily act as a bar to a trustee obtaining judicial advice and directions on a question relating to the management or administration of trust property (see section 92 of the *Trustees Act 1962* (WA)).

Jeremy noted Justice Gray’s view that an obvious consequence of the High Court’s decision is that applications for advice and directions may become more frequent. It may be a vehicle for beneficiaries to ask trustees to apply for directions when faced with a possible breach (particularly non-malicious breaches).



Susan Fielding and David Williams

Jeremy offered some insights into this decision, noting the courts' usual unwillingness to become involved in hypothetical questions which have not become controversial. However, he did suggest that an application for directions is a useful means of dealing with potential disputes expeditiously. In all cases it will be a matter of balancing the burden being placed on the courts with the potential advantage of minimising lengthy disputes between trustees and beneficiaries.

Right to trace

Finally, Jeremy touched on a beneficiary's right to trace. This right enables a beneficiary to identify property in which the beneficiary has a proprietary interest and follow that property into the hands of third parties who have received it. A beneficiary who has a right to trace property, may also have a personal claim against the trustee who has breached their obligation.

There was some discussion regarding the use of corporate trustees and the ability of beneficiaries tracing property where a corporate trustee has no assets of its own. The most recent Western Australian decision suggests that directors of corporate trustee companies do not owe a duty to beneficiaries, which would deprive a beneficiary of the ability

to trace. In Jeremy's view, this is likely to be considered by the High Court in due course.

Closing comments

Jeremy expressed his appreciation for Justice Gray's paper in providing a detailed outline of the remedies available to beneficiaries in respect of breaches by executors and trustees, in particular for drawing our attention to the often forgotten remedy of *devastavit*. Following discussion from the audience regarding the costs of beneficiaries pursuing such remedies and the length of time in which it takes to do so, Jeremy's closing message was that all parties will benefit from the lines of communication being kept open as between executors and trustees and beneficiaries.

We take this opportunity to thank Jeremy Curthoys for providing us with his well considered comments and thoughts on Justice Gray's paper and on this topic generally.

STEP's CPD Requirements

It is a requirement of STEP membership that each member completes a minimum of 35 hours of CPD each year. The CPD year commences on 1 April annually and ends on 31 March in the following year. For Members joining part way through the CPD year, CPD will apply on a pro-rata basis. Visit the STEP web site at www.step.org and follow the "Education" link to download the CPD Guidelines, a CPD Record Sheet and CPD Self-certification Form.

Your Guide to the STEP Journal

By Craig McKie and Sean Hayes



On page 65 of the **May 2010 Edition** of the “STEP Journal” Jennifer Pfuetzner discussed common drafting errors in wills with the misuse of technical legal terminology, highlighted through the writer’s analysis of Canadian case law.

First, the writer considers the correct meaning of the following “archaic” terms:

- ‘*issue*’ refers to descendants of all degrees (i.e. child, grandchild, great-grandchild etc);
- ‘*per stirpes*’ refers the manner property is divided amongst the nominated class with a predeceased’s share divided amongst his or her descendants; and
- ‘*per capita*’ refers to the manner property is divided equally amongst each living member of a nominated class of beneficiaries.



Secondly, the writer considers the common pitfalls and advises on prudent measures when gifting a testator’s estate through:

- residuary clauses, recommending division by way of equal shares as opposed to percentages, and providing for alternative gifts in the event the named beneficiary predeceases the testator; and
- testamentary trusts, recommending against those that are conditional on a life tenant surviving the testator, that do not contain direction as to the disposal and accumulation of the income and capital of the trust and those with remaindermen interests vesting on the death of the testator.

Finally, the writer addresses potential problems where:

- spouses with mirror wills are drafted as such that nominated legatees are incorrectly paid out twice, from each spouses’ estate; and
- spouses who pass shortly after one another and leave everything to the surviving spouse and thereafter each nominate different ultimate beneficiaries.

It is interesting to note the lessons identified by the writer that are easily adapted to WA practice.

Sean Hayes / Craig McKie



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Member Profile

Tony Underhill

Employer: William Buck Chartered Accountants

Position: Manager

STEP member since: March 2010



Tony has a wealth of experience in Australia and the United Kingdom having worked for Coopers & Lybrand, Arthur Andersen and Pannell Kerr Forster, advising both corporate and personal clients on a wide range of tax matters. He has also worked as an independent tax consultant advising, lawyers and smaller accounting firms on tax matters.

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In both Australia and the United Kingdom Tony has been involved with representing clients before appeal tribunals and resolving ATO disputes, including multi jurisdictional audits.

In addition to working in the accountancy profession, including spells as a senior tax manager in big four firms, Tony has worked in academia lecturing on taxation, accountancy, finance and management topics. An accomplished public speaker in addition to presenting to clients and professional groups he has also taught and marked for several of the professional accountancy bodies.

In the UK Tony has worked with and for STEP members and has seen first hand the benefits of STEP as a professional body. On the point of joining STEP when he and his wife decided to emigrate to Australia he has welcomed the opportunity to join the Perth branch and looks forward to playing a part in its development.

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.

Welcome To Our New Members

We welcome the following new members to STEP Perth:

Ms Sarah Walton
Jackson McDonald

Mr Joseph Scurria
Joe Scurria & Associates

Mr Charles Kleiman

Gus Irdi
Irdi Legal

Ms Sally Bruce
Jackson McDonald



Bamford – Have We Got It Right?

Facilitator: **Richard Norton of Norton & Smailes (Partner)**

Richard Norton was admitted to practice in 1985 and is one of the founding partners of Norton & Smailes, a specialist tax firm which was established in 1994.

Date: Tuesday, 7 September 2010

Time: 5:30pm – 7:30pm

Cost: \$20 (members) and \$60 (non-members)

Limited to 30 people only

Drinks and canapes will be provided

Location: The boardroom of Jackson McDonald Lawyers
Level 25, 140 St Georges Terrace, Perth

Format: Round table discussion

Topic: *Bamford* High Court decision.

In keeping with STEP WA's desire to deliver quality educational events not otherwise available in Perth, STEP is holding a high level round table discussion for STEP members and potential STEP members. The facilitator will introduce a specific topic or questions and invite participants to collectively explore possible solutions.

Following the recent *Bamford* High Court decision, there has been much activity, as trust practitioners debate the implications, at a practical level, for trusts.

This informal (high level) discussion will attract experienced practitioners keen to exchange views on the *Bamford* decision. Less experienced practitioners are encouraged to attend to hear leading practitioners develop and road test solutions and checklists. Some prior knowledge (reading the case) will be assumed.

The discussion will not involve the presentation of a paper. The outcomes of the round table will be reduced to writing and circulated to all participants. All registered participants will be issued a "bullet point" discussion paper prior to the event.

Adam Levin
STEP Chairman (WA)