

STEP Newsletter

Western Australia - December 2011



www.step.org

Chair's Welcome

2011 is nearly over and what a busy year it has been. STEP Western Australia continues to go from strength to strength. We now have 44 members. During the year we have held ten educational events, produced four newsletters and had one social event.

In December we celebrated the end of the year with a cheese and wine tasting Christmas party, which was held in the Bell Tower. Before sampling the cheese and wine, supplied by the Wine Industry Association of WA, the Honorable Justice Eric Heenan commented on three cases relevant to trust and estate law which had been decided by the Supreme Court during the year.* Registrar Sandra Boyle then reported on what has occurred in the Probate Registry in the past year. In our next newsletter we hope to provide you with the statistics which show the type of applications the Registry is dealing with and how many applications are made by lawyers and how many are made with the use of "the Wizard".

At the beginning of December I went to the STEP Branch Chair's Assembly which was held in London. I will report to you more fully regarding my visit to London in our next newsletter.

In November Registrar Sandra Boyle presented an ethical seminar entitled "The Known Unknowns – Ignore them at your peril". In this seminar the Registrar drew our attention to the obligations and duties placed upon a lawyer when making wills. She emphasised the need to keep proper file notes particularly if the client is elderly or ill. She spoke in some detail of the judgment in *Brown v Wade***, a decision of Simmonds J where the lawyer concerned had kept proper file notes and was therefore able to give evidence which assisted the Court in coming to its decision. As always, the Registrar was an entertaining speaker who left with us some serious issues to consider as to how we practise in this area. A Challenging Wills seminar, co-hosted with Legalwise, also took place in November. Speakers at the seminar included Maree Van Der Kwast, Sally Bruce and Registrar Christopher Boyle.

In October Jemma Sanderson of Cooper Partners presented a seminar on TR 2011/D3 and what it really means for self managed superannuation funds. A summary of Jemma's presentation is set out in this newsletter.

October also saw the Inheritance (Family and Dependents Provision) Amendment Act 2011 receiving assent, although the substantive provisions have yet to be proclaimed.

UPCOMING EVENTS

A Position of Trust - the role of the professional executor pre and post grant

Speakers: Elizabeth Heenan of Culshaw Miller &
Susan Fielding of Jackson McDonald

Date: 16 February 2012

Time: 4:30 - 6:30pm

Venue: City West Receptions,
Plastowe Mews
West Perth

Rule Against Perpetuities

Speakers: Robyn Honey of Murdoch University

Date: 21 March 2012

Time: 5:30pm to 7:30pm

Venue: TBA



Public Trustee



nab



LAMONT'S

Sally Bruce from Jackson McDonald has written an article on the amending Act which is set out in this newsletter.

In September Andrew Davies of O'Sullivan Davies presented a seminar on the topic of posthumous conception, a summary of which is also set out in this newsletter.

Looking ahead we already have four seminars planned for 2012. In February we are holding a co-branded event with the Tax Institute of Australia. Elizabeth Heenan and I will talk about the role of the professional executor and trustee. In March Robyn Honey of Murdoch University will speak to STEP members and friends about the rule against perpetuities.

Finally, I wish all our members and the many friends of STEP who have supported us over the past year a safe and happy Christmas and we look forward to seeing you in the New Year.

*Chair's footnote:

(a) **Lashko v Lashko** [2011] WASC 214

Dealing with an application for leave to swear to death

(b) **Scarpuzza v Scarpuzza** [2011] WASC 65

Dealing with a Will for a testator not fluent in English and proved not to have been translated to him. This case contains a discussion of significance of attestation clauses, particularly for attestation clauses for testators who are blind, illiterate or not fluent in English.

(c) **Nolan v Nolan** [2011] WASC 224

This is the only case of which Justice Heenan was aware that has dealt with an application under s.66(5) of the Trustees Act 1962 (WA) seeking an application for directions to distribute trust estate in the case of missing beneficiaries who cannot be found. It deals with the general documents of equity and "Benjamin orders" and also the significance of an order granting leave to distribute in disregard of a missing beneficiary which, despite its terms, does not eliminate all claims of such a beneficiary.

** **Brown v Wade** [2010] WASC 326



Susan Fielding,
Chairperson
STEP
Western Australia

Welcome to New Members

We would like to take this opportunity to welcome the following new members to STEP Western Australia:

Wayne Rimmer
NAB Private Wealth

Emily Nixon
Public Trustee

Constantyn Receveur
Downings Legal



Public Trustee

The Public Trustee offers independent, professional trustee and asset management services to the WA community. These include Will and Enduring Power of Attorney drafting, deceased estate administration, executor support, financial administration and trust management services.

The Public Trustee is a statutory body that operates under the authority of the Parliament of Western Australia.

Recent Events

Life after Death? Posthumous Conception

Presented by: Andrew Davies, O'Sullivan Davies

29 September 2011

Sarah Walton of Jackson McDonald reporting

In this session, chaired by Wayne Rimmer of National Australia Bank Trustees, Andrew Davies of O'Sullivan Davies tackled the fascinating topic of posthumous conception. The seminar considered both the removal of sperm from a donor who is near death, as well as posthumously, and the impact that a posthumous conception may have in the administration of an estate.

Andrew explained that generally the legal authorities in Australia distinguish between the making of orders for the removal and storage of sperm from deceased men and the making of orders allowing the usage of the semen.

The cases dealing with the removal of sperm are typically heard on an urgent basis, whilst the parties are still grieving, as sperm must be removed within 48 hours after death. As a result of this limited time period the majority of cases appear to result in an order being granted, as the balance of convenience favours the making of the order. Evidence that assists an applicant to obtain such an order generally involves the applicant showing that the couple were trying to have children and that the man consented to the removal of sperm during his lifetime.

Andrew drew his audience's attention to the case of *AB v Attorney-General for the State of Victoria*, unreported, 23 July 1998. In this matter, Justice Gillard of the Victorian Supreme Court decided to make the order for the removal of sperm and noted that the basis for the order and the subsequent use of the semen were matters that would have to be debated later.

Currently in Western Australia Part 8.9 of the 2004 Directions made by the Commissioner of Health under the Human Reproductive Technology Act 1991 provides that even if explicit consent for the use of semen has been given by a donor prior to death, the semen is still unable to be used once the donor is deceased.

Each State has different legislation about the use of a deceased man's semen. This has led to a number of cases,

which Andrew discussed, where the applicant seeks to move the semen in dispute to a location which would allow the semen to be used.



Dr John Hockley (left) and Andrew Davies (right)

Once frozen to whom do the sperm or eggs belong? It is well known that there is no property in a corpse. The duties and powers of the legal personal representative are limited to a right of possession of the corpse for the purpose of a prompt burial. However, the case of *Doodeward v Spence* (1908) 6 CLR 406 provides an exception to this rule. In this case the High Court held that if a person by lawful exercise or skill has dealt with a human body or part thereof such that it has acquired attributes differentiating it from a mere corpse, that person acquires a right to remain in possession of it.

In *Yearworth v North Bristol Hospital Trust* [2010] 1 QB1 the English Court of Appeal held that the semen stored at a fertility clinic was property, the ownership of which vested in the deceased while alive and in his personal representatives after his death. The key factor in deciding that semen could be property was that the men retained a right to direct that the semen not be used. It has held that the relationship between the deceased and the hospital was one of bailor and bailee. The deceased's personal representatives could request the return of the property.

Recent Events

Posthumous Conception (continued)

The cases raise a number of issues from an estate planning perspective. For instance should wills be drafted to refer to my children as at my date of death or children who are born within ten months of my date of death? What should an executor do if he knows that sperm or embryos are stored at a fertility clinic? Does the legislation need to catch up with technology to ensure that the rights of children born posthumously are protected?*

Finally, should a will contain a specific consent to the extraction and use of sperm after death – in order to support a potential applicant's claim? While such documentation may not guarantee a favorable result for an applicant, it certainly assists to eliminate the issue of the man not having consented to the procedure.

A lively debate followed Andrew's presentation. The audience agreed that it is a difficult and emotional area of law where each case turns on the individual facts.

**Author's note: In this respect it should be noted that the Inheritance (Family and Dependants Provision) Amendment Act 2011, which received Royal assent in October 2011 but has yet to be proclaimed, amends the definition of child to delete the reference to "en ventre sa mere" and inserts wording that clarifies that a child must be born within 10 months after the deceased's death to be an applicant. The definition of grandchild has also been amended in the Act to include a grandchild, whose parent was a child of the deceased, must be born within 10 months of the deceased's date of death.*

STEP Members' Thoughts - Warring executors - how to resolve disputes between executors

Thank you to all of our members and friends who responded to call for comments as to how they deal with warring executors. Below, is a selection of the comments which we have received:

"I get my clients to write down their frustrations and show them to me. Sometimes allowing the client to vent their anger, and for you to acknowledge and understand their issues, means that the matter can be resolved more quickly. I don't recommend the other side receive a copy of the document."

"Tell your client about the commercial realities and the potential cost consequences of a dispute."

"I advise my client about their obligations and duties. Sometimes, executors do not know about the limitations of their powers or the ambit of their discretion."

"Remind your client about the fragility of relationships, particularly when family members are involved. Sometimes people appear to forget that they only have limited family members."

"I explain to my client that the role of an Executor/ Trustee can be an onerous one."

"I explain to my clients that often things are said and offence taken, immediately following a death, when all concerned are upset. It is better to ignore those upsets and try and resolve the issues."

STEP and the Community

In their professional practice, STEP members often help people at difficult points in their lives, such as after the death of a close family member.

To help consumers, STEP has produced a range of leaflets, written by experts, on various topics such as 'Trusts explained'. These leaflets can be found at www.step.org/leaflets

Recent Events

STEP Christmas Party - Wine and Cheese 8 December 2011

For those individuals who attended our Christmas party and would like a reminder about the products tasted during the evening and/or impress their friends and family with their wine and cheese matching abilities the wine and cheeses which the Wine Industry Association WA (Inc.) used during the evening are as follows:

- Blue Cow Double Cream Brie - Villa Jolanda Prosecco
- La Tradition du bon Chevre des Cremiers – Capel Vale Regional Series Chardonnay 2010
- Maffra Aged Ashed Cheddar – Moss Wood Ribbon Vale Vineyard Cabernet Sauvignon Merlot 2009
- Guffanti Gorgonzola Piccante - De Bortoli Noble One Botrytis Semillon 2008



Susan Fielding (left), The Hon Justice EM Heenan (middle) and Registrar Sandra Boyle (right)

STEP World Wide

The Society of Trust and Estate Practitioners (STEP) is the leading worldwide professional body for practitioners in the fields of trusts, estates and related issues.

As at June 2011, STEP had nearly 17,000 members in 80 countries.

STEP branches are all over the world, including in Africa, Asia, Australasia, the British Isles, Canada, the Caribbean, Central and Southern America, Europe, the Middle East and the USA.

But where are these STEP members? The table below, details the geographical split of STEP's membership:

Africa and the Indian Ocean	1%	Europe	16%
Australasia and Asia	7%	Middle East	1%
Canada	12%	UK and Ireland	37%
Caribbean, Central and South America	9%	USA	3%
Channel Isles and Isle of Man	14%		

STEP Members' Thoughts

Christmas is traditionally the time of year when families get together to eat, drink and be merry.

But for some it is a highly stressful period when relationships are stretched to their limits. Sadly some relationships disintegrate over the festive period to such a degree that wills are changed and communication between family members stops altogether. It is this kind of situation that can lead to Inheritance (Family and Defendants Provision) Act applications being lodged.

With this problem in mind, STEP Western Australia invites its members and friends to contact us in order to provide their comments as to how best to deal with emotional parties in Inheritance (Family and Defendants Provision) Act mediations.

We look forward to hearing from members on this subject. Please contact Julie Blood at jblood@jacmac.com.au with your comments regarding tips for Inheritance (Family and Defendants Provision) Act mediations.

Recent Events

Estate Planning and SMSFs - TR 2011/D3 What does it really mean for SMSFs?

Presented by: Jemma Sanderson, Cooper Partners Financial Services

Jackson McDonald – 20 October 2011

Sarah Walton of Jackson McDonald reporting

On 13 July 2011 the ATO released Taxation Ruling 2011/D3, which confirmed the ATO's long held view with respect to the cessation of a superannuation pension upon a member's death. Since the draft was released there has been much debate in the media and the industry with respect to the implications of the draft ruling, particularly from a capital gains tax perspective.

During the seminar, chaired by Tony Underhill of Grant Thornton, Jemma considered what the ruling meant for members of self managed superannuation funds (SMSFs), the implications for beneficiaries, the strategies to put in place within the fund with respect to a member's overall succession planning and other areas of concern outlined in the draft ruling.

Jemma explained that upon a pension holder's death, the important things to consider with superannuation pensions is whether a reversionary beneficiary has been nominated or, alternatively, can the trustee use his or her discretion to make a nomination. Jemma said that whether the nominated beneficiary, if one exists or is nominated, is actually eligible to receive the reversionary pension should always be considered, because generally adult children cannot receive a reversionary or new pension as they are non-death benefit dependents.

From a CGT perspective it should be remembered that the payment of a superannuation death benefit is a CGT event in the accumulation phase. If a pension is not reversionary at the outset then there may be potential tax implications. However, if there is available reversionary benefit (for example the spouse) as a member of the fund, any CGT implications may be mitigated.

Jemma reminded attendees that with lump sum payments, there are different tax consequences depending on who is the beneficiary. An important estate planning strategy is to consider who is the most

appropriate beneficiary to receive the superannuation benefits, and ensure this is taken into consideration in the overall estate planning of the member.

Jemma also explained a number of estate planning opportunities. In particular Jemma reminded her audience that financially dependent beneficiaries who are not children of the superannuation fund member can receive an income stream beyond the age of 25 years (this may include the grandchildren, nieces and nephews etc of the member). However, financial dependency will need to be established. Jemma also reiterated that children over 25 years of age who were still financially dependent on the deceased are able to receive a tax-free benefit from their parent's superannuation benefit regardless of the taxation components – an advantage not available to financially independent children.



William Sloan, O'Sullivan Davies (left) and Jemma Sanderson, Cooper Partners (right)

Inheritance Act Amendments

By Sally Bruce of Jackson McDonald

The Inheritance (Family & Dependents Provision) Amendment Act 2011 ("**the Amending Act**") was assented to on 25 October 2011, but the substantive provisions will not become operative until a date fixed by proclamation.

A new name

By the Amending Act the name of the Inheritance (Family & Dependents Provision) Act 1972 will be changed to the Family Provision Act 1972.

Stepchildren given standing to claim in certain circumstances

The Amending Act will give stepchildren standing to claim against the estate of a step-parent in these circumstances:

- (a) where the stepchild was being maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased step-parent immediately prior to the deceased step-parent's death; or
- (b) where the deceased step-parent had received or was entitled to receive property with a value greater than the prescribed amount from the estate of a parent of the stepchild, otherwise than as a creditor of the deceased parent's estate.

The prescribed amount will be specified in the regulations. No regulations have been made to date, but if Hansard is a guide, it appears the prescribed amount will be based on the median house price in Western Australia from time to time.

Undisclosed property

The Amending Act will also enable the court to make or vary an order previously made to cater for the situation where, at the time an order was made or could have been made for increased provision, the evidence about the nature and extent of the estate did not reveal the existence of certain property (called "undisclosed property") which would have materially affected the provision the court ordered or could have ordered in favour of an eligible person.

In such case, an eligible person may apply for an order, or to vary an order, under s6(1) of the Act within six months from the date on which the eligible person became aware of the existence of the undisclosed property, or later with the court's leave.

Interim order

The Amending Act will enable the court to make an interim order if it is of the opinion that such an order is necessary for the purpose of providing those things immediately necessary for the maintenance, support or education (including past maintenance, support or education provided after the death of the deceased) of any person who was totally or partially dependent on the deceased immediately before the deceased's death. If the court does make an interim order, it must then proceed to determine an application under s6(1) of the Act by confirming, revoking or altering the interim order.

New exception to the hearsay rule

Interestingly, the Amending Act will introduce an exception to the hearsay rule, in the context of proceedings under the Act, in relation to statements made by a deceased person. Evidence of statements made by a deceased person will be admissible as evidence of any fact stated in them of which direct oral evidence by the deceased person would, if the person were able to give that evidence, be admissible.

Where evidence of a statement of a deceased person is admitted, then evidence will also be admitted for the purpose of destroying or supporting the credibility of the deceased person, or for the purpose of showing that the statement is inconsistent with another statement made by the deceased person.

Timeframe

It is not yet known when the substantive provisions of the Amending Act will come into force. Some anomalies have been identified with the definition of "stepchild" in the Amending Act and it is possible that the Amending Act will go back to Parliament so that these anomalies may be addressed. If that occurs, the substantive provisions of the Amending Act may not become operative for some months.

Why Join STEP?

STEP is the professional body for trust and estate practitioners worldwide comprising over 16,500 lawyers, accountants, trust officers, tax specialists, and bankers.

STEP
Society of Trust and
Estate Practitioners



- Use the accreditation “TEP” which showcases your specialist expertise in the field of trusts and estates and increases your profile in the industry.
- Become more involved within the industry, with opportunities to speak at conferences, join special interest groups and sit on industry related committees
- Take advantage of reduced attendance fees at branch meetings, seminars and conferences. These events allow you to network with practitioners from different backgrounds, allowing those from the legal profession to discuss issues with financial experts etc.
- Have your name added to the STEP Directory and the international database.
- Develop your organisation’s reputation: TEPs are considered the experts in the field of trusts and estates and the private client departments of the leading firms have a significant TEP presence
- Receive regular updates, including the twice weekly Wealth Structuring NewsDigest, email newsletters and our flagship publication, the STEP Journal



How to Join

1. Go to www.step.org
2. Download and complete the membership form applicable to your level of experience (ie Full Membership or Associate Membership)
3. Ensure you attach a brief CV or professional biography to your application form
4. Send completed form to the Secretary of STEP Western Australia either by emailing a scanned form to swalton@jacmac.com.au or via post to STEP c/o Jackson McDonald. GPO Box M971, PERTH WA 6843.

Membership Promotion

The 50th member of STEP (Western Australia) will receive a special gift of the book “The Australian Game of Football since 1858” kindly donated by National Australia Bank Trustees who are one of our sponsors.

“The Management and staff of NAB Private Wealth and National Australia Trustees would like to wish all STEP Members and their Families a Safe and Happy Christmas and a Prosperous New Year”



STEP Journal

Hastings Bass Article

By Tanya Campbell of Norton Smailes

The September 2011 Step Journal contains an article titled "Hastings-Bass Test Cases will go to UK Supreme Court" (on page 14).

The article provides a short summary of the latest appeal news in the UK Supreme Court.

In general terms the Hastings-Bass rule is that a court will not interfere with the exercise of a trustee's discretion where the transaction did not achieve the intended effect, unless it is clear that the trustee would not have acted as he did:

- (a) had he not taken into account considerations which he should not have taken into account, or
- (b) had he not failed to take into account considerations which he ought to have taken into account.

The rule in Hastings-Bass has been applied by Australian courts (see for example BMD v KWD [2008] WASC 196).

The rule is not without its flaws, and the test cases mentioned in the article (Pitt v Holt and Futter v Futter) highlight some of the limitations which can be placed upon the rule. The Hastings-Bass principle, if it survives, may be useful to Australian practitioners who wish to "undo" a trustee resolution resulting in an unwanted tax effect. It may apply to a deceased estate or to a testamentary trust (see for example, Sinclair v Moss [2006] VSC 130).



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.

A Christmas message from Perpetual

"Perpetual wishes all our clients Merry Christmas and a happy and safe 2012"

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 Chris Marshall on (08) 9224 4401.

Perpetual

Your STEP WA Committee

Chair Susan Fielding of Jackson McDonald

Treasurer Tony Underhill of Grant Thornton

Secretary Sarah Walton of Jackson McDonald

Other Committee Members

Jocelyne Boujos of Scales & Company

Wayne Rimmer of NAB Private Wealth

Adam Levin of Jackson McDonald

Maree Van Der Kwast of Dwyer Durack

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SEMINARS

STEP Members receive 20% discount off all Legalwise seminars. For more information phone Legalwise direct on (02) 9387 8133 or book through their website www.legalwiseseminars.com.au

Member Profile

Wayne Rimmer, Head of Private Clients S.A & W.A. NAB Private Wealth

"Our business is dedicated to the needs of an exclusive group of clients and their families. Our role is more than just banking – it's about providing a holistic service to clients whose complex financial situations require a specialist approach."



Practice Focus

Wayne has over 27 years experience in financial services including Philanthropy, Trusts, Estates, Relationship banking, Wealth and Protection advice, Funds Management and business coaching. In his current role he leads a team of 50 people across W.A. and S.A. providing clients with peace of mind across the full spectrum of banking and wealth management services.

In his previous role as the State Manager W.A for Perpetual Trustee Company Ltd he gained tremendous exposure to Estates and Trusts and continues to have a passion about ensuring everyone has a quality Estate Plan, underpinned by quality advice. In the past 12 months, through the appointment of high quality in-house Estate Planning Solicitors and a tighter banker focus, Wayne's team have more than tripled the number of clients they have provided Estate planning services for.

Wayne is continuing to develop his knowledge and experience in the Trust, Estate and Philanthropy space by serving on the Committee of STEP WA and as a Director on the Board of Lifeline WA. He holds a Bachelor of Business Majoring in Accounting and Finance, is Completing the Certificate in Estate and Trust Management at UNSW, is an AAICD and a FINSIA A. Fin.

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.

First Class People First Class Service



Karen Jaycock
Solicitor



Patrick Hughes
Special Counsel



Susan Fielding
Special Counsel



Sally Bruce
Senior Associate



Sarah Walton
Solicitor

Jackson McDonald has one of the largest Private Client practices in Western Australia. Among our many Private Client services is a highly experienced estate litigation team who can assist on contentious probate and trust matters, inheritance claims, solemn form probate and court directions on will interpretation.



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