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Welcome to the first edition of the *STEP Australia Newsletter*. I hope you find the newsletter of interest and value.

**STEP has over 20,000 members across 113 branches and chapters around the world. Today, the members of STEP in Australia number more than 750. With your support and involvement, the branches of STEP in Australia will continue their growth and achievement of excellence.**

The **STEP Australia Newsletter** Sub-Committee is chaired by Andrea Olsson, who is supported by committee members David Gibbs, Rob Cummings, Pamela Suttor, Christina Flourentzou, Chris Osborn and Claire Hawke-Gundill.

The Sub-Committee welcomes expressions of interest from members. Please email any feedback or expressions of interest to Dior Locke at dior.locke@step.org

With best wishes,

Neil Wickenden TEP,
STEP Australia Chair
The Turners and the Grahams were friends, living in separate suburbs. The Turners were about 30 years older than the Grahams. The Turners owned two adjoining units; the Grahams were renting. The Grahams alleged that Mr Turner had promised that if they moved to the adjoining unit and cared for them, the Turners would leave them that property outright by will.

In fact, Mr Turner left a will that left an occupancy right for life (conditional on no more than a three-month absence), with the remainder going to a hospital. They claimed the estate held the unit upon trust for them by reason of proprietary estoppel.

The promise was made, and the Grahams moved in, in 1974. Mrs Turner died in 1980 and Mr Turner died in 1997. A question arose as to whether action was statute-barred or not. A further question arose about the cost of proceedings in the face of a refusal to accept Calderbank offers.

The Grahams said that, in reliance on the Turners’ promise, they moved next door and provided care (which, as the years went by, involved daily checking, meals, shopping, driving, cleaning up incontinence, and dealing with Mr Turner’s alcohol consumption and incoherence). They insisted on paying rent, albeit at a modest rate. The unit was nicer, and cheaper, than where they had rented.

They asserted a claim, but did not make a claim, at the death of Mr Turner in 1997. They were told by (the late) Finn McBab that they would not have a claim. They did not obtain any advice of their own. They did nothing further for many years, living at the property (as they were entitled to do under the will), spending some money on maintenance and making no claim.

The proceeding raised many typical issues, including:

- the extent of the promise and whether it was accommodation for life or absolutely (as in all such cases, no written agreement confirming the arrangement was ever prepared); and
- the extent of their detrimental reliance (they had given up their previous flat, not looked to buy their own place and spent money on the Turners’ flat).

The Grahams’ evidence was accepted that, on many occasions over the years, both Mr and Mrs Turner assured them the flat would be theirs, that they could renovate it as they wished and that they didn’t need to buy it, as it would be left to them.

There was some corroborative evidence from friends and family about the Turners saying they would ‘look after’ the Grahams, etc – but that was held to be of limited weight as also being consistent with a life interest being given. There was some responsive evidence to the effect that the Turners told others that the flat was tenanted and with conditions, and was going under Mr Turner’s will to the hospital. The trial judge accepted the Turners were telling each of them something different.

The ‘detriment’ had elements for both sides – the Grahams were able to live in a nice flat at low rent, and some of the money spent on improvements was to their own enjoyment. However, the court accepted that detriment was sufficient when the care was considered. It was not solely to be measured in the value of the services provided.

Unconscionability was found in the fact that the Grahams may not have anticipated the extent of care needed, but the Turners may well have invited the Grahams with some idea of the anticipated increasing care being required. The Court of Appeal accepted the judge’s application of the substantive law as correct.

However, the time question was the subject of appeal. Readers will appreciate that there are, in essence, four relevant time periods relating to executors and trustees:

- s22 of the Limitation of Actions Act (LOA Act) provides a 15-year time frame to recover personal property in the hands of an executor;
- s8 of the LOA provides that an action to recover land (including equitable interests – s11) must be brought within a 15-year limitation period. But that is made subject to s21;
- s21(1) of the LOA Act provides that no limitation period applies to a breach of trust where the trustee was involved in fraud (s21(1)(a) or where property is still held by the trustee (s21(1)b));

and

- for breaches of trust and fiduciary duty not specified above, the usual six-year time limit applies (s21(2) of the LOA Act).

The tricky part can be to establish what kind of trust is under question, and when it began.

In the present case, the plaintiffs sought the declaration that the Turners, while alive, and the
executors, after death, held the promised property upon constructive trust for them. The trial judge granted that claim and held that no limitation period applied.

The limitation question on appeal was whether Smith J was correct in concluding that the application for a declaration of constructive trust, based on the principles of proprietary estoppel, is a proceeding ‘to recover... trust property’ from ‘the trustee’.

The definition of ‘trustee’ under s3 of the LOA Act extends to implied trustees.

It has been accepted in general terms that a constructive trust may fall under the ‘unlimited’ time period (Rasmussen v Rasmussen [1995] 1 VR 613), as the act of denying a promised estoppel arrangement is a species of equitable fraud.

The case of Nolan v Nolan took a detailed look at the nature of trusteeship, and this was a good opportunity for the court to consider that question again.

The consideration in Nolan centred on the distinction between ‘remedial’ and ‘institutional’ constructive trusts. Similarly, in the present case, the court considered the question of when a trust arises. Upon the making of the promise? The breaking of the promise? The court making its declaration? It was argued:

• If the remedy is a remedial constructive trust, then it springs into being upon the court declaring a remedy. Thus (it was argued), it springs into being at the moment the court declares it. Therefore, it did not exist at the time the proceeding commenced and therefore could not be ‘trust property’ in the hands of trustees – there was no ‘property’ being held. Thus s21(1)(b) could not apply.

• Conversely, if the remedy is an ‘institutional’ constructive trust, then the promisee clothes himself as trustee and holds ‘trust property’, a claim against which can still be pursued under s21(1)(b).

The Court of Appeal (Tate JA giving the lead judgment) concluded that the constructive trust arises when the conduct giving rise to the trust occurs – that is, at the time when the detrimental reliance renders it unconscionable for the promisor to depart from the representation. Her Honour said that such a constructive trust arises independently of any declaration of a court [102]. She also said:

‘Furthermore, I reject the view that the constructive trust declared had no independent existence apart from the order of the Court and that it came into existence when it was imposed by the Court after the commencement of the proceeding. There is considerable authority for the proposition that, where detrimental reliance upon a promise gives rise to a constructive trust, in the context of an estoppel, the constructive trust comes into existence before a court makes any order. It comes into existence at the time of the conduct which gives rise to the trust. As Ward J said in Varma (2010) 6 ASTLR 152 at [507]: “As a matter of general principle, it seems to be the accepted position under Australian and English law that a constructive trust will be treated as coming into existence at the time of the conduct which gives rise to the trust.”’

She went on to say:

‘In such a case, the doctrine of priorities would apply and, where the equities are equal, the beneficiary of the constructive trust would be entitled to priority over the holder of a later equitable interest, a later legal interest (providing they are not a bona fide purchaser for value without notice) or an unsecured creditor of the constructive trustee.’

The Court concluded that the trust was properly founded on the promises made by the Turners and therefore pre-dated the proceeding. The proceeding was therefore for the recovery of ‘trust property’, for which there is no limitation period.

There were further issues about costs.

Leading up to the appeal, there were three offers made – ‘walk away and bear own costs’, and two offers (in effect) to receive only 85% of the value of the property and costs below, with the other 15% to pass to the estate.

The correspondence making those offers pointed out that the basis for the appellant executors’ argument was ill-founded, predicated on cases that involved remedial constructive trusts rather than institutional constructive trusts.

The appeal court affirmed the principles that apply:

‘The critical question is whether the rejection was unreasonable in the circumstances. Among the matters that may be considered when determining reasonableness are the prospects of success assessed as at the date of the offer.’

The appeal court said that the conduct of the appellant executors was:

‘[not] so manifestly misconceived that rejection of the offers was unreasonable. The issues raised by the proceeding are complex and required a careful examination of the various authorities having regard to the doctrinal basis upon which relief is afforded in the context of proprietary estoppel... The fact that the arguments advanced by a party are upheld by the Court should not of itself expose the losing party to a special costs order... [i]t is important that litigants not be discouraged from bringing their dispute to the courts, particularly where the questions of law are not straightforward, but open to different interpretations... [13]’

The order made was therefore that the executors pay the Grahams’ costs of appeal on the standard basis (refusing the indemnity order sought).

The trial decision can be found at Graham v McNab [2016] VCC 1128, the appeal decision at McNab v Graham [2017] VSCA 352. The costs decision is at McNab v Graham (No 2) [2018] VSCA 8

1 s21(1)(b) provides that no period of limitation applies to a proceeding ‘to recover... trust property’ from ‘the trustee’.
Incapacity in relationships: the tension between administrative tribunals and family courts – who wins?

Andrew Davies TEP, Partner, O’Sullivan Davies Lawyers, Perth

INTRODUCTION
In recent years, family courts and administrative tribunals have had to deal with an increasing number of property settlement and maintenance claims, and applications for administration, involving couples who are still married, or in a steady de facto relationship, but who no longer live together because of failing health or specific care needs.

A spouse may not be in a position to assume the role of guardian or administrator of their incapacitated partner, resulting in others (such as adult children, siblings or the Public Trustee) being appointed in those roles.

Unfortunately, it is not uncommon for proceedings to be issued in a family court seeking financial relief and, concurrently, for proceedings to be issued in an administrative tribunal to take over the financial affairs of the incapacitated spouse.

This emerging trend of cases being dealt with in separate forums has the potential to create great difficulties for practitioners and litigants.

This article briefly outlines the issues causing these difficulties and provides an example of a case I conducted to illustrate these tensions (from a Western Australian perspective, but, from my discussions with other practitioners and anecdotally, equally relevant to other jurisdictions).

CONFLICTING FORUMS AND LEGISLATION
In Western Australia, the Guardianship and Administration Act 1990 (GAA) empowers the State Administrative Tribunal (SAT) to make decisions about the appointment of guardians or administrators.

A guardian can be appointed for someone deemed unable to look after their own health and safety,1 to make personal, medical or lifestyle decisions. If the SAT does not consider any nominated guardian appropriate, it can appoint the Office of Public Advocate to this role.

An administrator can be appointed for someone unable to make reasonable judgments about all or part of their estate by reason of a mental disability,2 to make financial or legal decisions. If no nominees are deemed appropriate, the SAT can appoint the Public Trustee to this role, provided it consents.3

The GAA is not the sole piece of legislation under which someone may seek the appointment of a guardian to a person with a disability.

If unsuccessful in SAT proceedings, an applicant wishing to ‘hedge their bets’ is currently permitted to concurrently or subsequently lodge an application in the Family Court of Western Australia.

Under rule 6.10 of the Family Law Rules 2004 (Cth) (FLR), a person may apply for a case guardian to be appointed for a party with a disability who is involved in proceedings. The case guardian is usually a relative or friend of the affected party, but, if the Court deems none of the nominees suitable, the Attorney-General of Australia may nominate someone.4

There is also the option of making an application pursuant to the Public Trustee Act 1941 (PTA) of Western Australia. This legislation empowers the Public Trustee to be appointed as, inter alia, a guardian or administrator to an affected person, in any matter where a court or judge is entitled to make such an appointment.5

The lack of guidance or statute preventing concurrent proceedings being commenced in separate forums – each potentially seeking the same outcome – can lead to situations of conflict and what may essentially be seen as ‘forum shopping’.

This is not desirable in any situation, but particularly where the affected parties are already vulnerable due to factors such as disability, age and ill health.

The following is an example of a case that highlights the tension and difficulty caused by this conflict.

“The lack of guidance or statute preventing concurrent proceedings can lead to what may essentially be seen as “forum shopping”.”
‘A more cooperative approach, at a much earlier stage, would have enabled the husband and wife to spend their remaining years living together’

B & B (2016)
I acted for the husband in this family law case, involving a 92-year-old man who had been married to his 86-year-old wife for over 30 years. She had dementia and he was her primary carer.

Unfortunately, the husband broke his hip, requiring ongoing hospital care. He was unable to care for his wife, and had executed enduring powers of attorney appointing his adult sons from a previous marriage to assist him.

His wife moved into a facility some distance away, having been taken into the care of her sister. Due to animosity between the husband and the sister, contact with his wife became infrequent, causing him great distress.

The sister applied to the SAT to become the wife’s guardian, and at the same time, the Public Trustee applied to be appointed the wife’s administrator. Both applications were successful.

Negotiations were entered into with the Public Trustee for the wife to be moved closer to her husband, so he could visit her and possibly move into the same complex, allowing them to spend their remaining days together in a safe facility. However, the Public Trustee advised that this was beyond its scope and was a matter for the guardian – the wife’s sister, who was not facilitating any contact between the parties. She refused, therefore continuing the husband’s distress at essentially being forcibly separated from his wife.

Further difficulties arose when the Public Trustee commenced proceedings in the Family Court of Western Australia for funds to be made available for the care of the wife. The proceedings sought the sale of a property that was owned by both parties, but which was registered in the wife’s sole name. The husband was (understandably) concerned that if this sale occurred, as the administrator wished and with only the wife’s interests in mind, the Public Trustee would not make any funds available to him, even though it was clearly ‘matrimonial property’.

The husband lodged a caveat against the property, which the Public Trustee objected to. With little choice, the husband commenced proceedings in the Family Court seeking urgent orders that the Public Trustee be restrained from selling the property without his approval.

At the age of 92, this was certainly not where the husband wanted to be, in terms of both personal distress and financial outlay.

Ultimately, the Public Trustee and the husband agreed on a 50/50 property settlement, and orders were made accordingly, but at significant financial and personal cost. A more cooperative approach, at a much earlier stage, would have enabled the husband and wife to spend their remaining years living together and avoided significant fees.

FUTURE OPTIONS
If practitioners have difficult matters concerning capacity arising from dementia, drug use or mental health issues, then I recommend pursuing the family court avenue, due to its significantly wider powers and the ability to make orders that are just and equitable. This protects both parties.

In contrast, an administrative tribunal generally has regard only for the interests of the affected spouse for whom an application is made.

Unfortunately, in most cases, there is no ability to transfer proceedings between an administrative tribunal and a family court. Accordingly, where an administrative tribunal application is made, practitioners may be able to persuade the tribunal to adjourn proceedings until there is a final determination in a family court, or direct parties to issue proceedings in that court for matters relating to the estate, leaving in abeyance issues concerning administration or guardianship.

There may also be an option for summary dismissal of administrative tribunal proceedings.

Ultimately, the objective is to work with the courts, governments and practitioners to put in place guidelines that properly support parties who are in difficult circumstances where they cannot live together, in a way that is sensitive to their needs and the continuation of their relationships.
CASE NOTE: *Lemon v Mead*

Buss P, Mitchell and Beech JJA, 22 November 2017
Case note prepared by: Kate Varcoe TEP, Special Counsel, and Katie Worsnop TEP, Senior Associate, de Groots wills and estate lawyers, Brisbane

Succession – Wills – Inheritance – Appeal against a decision granting an application made by the respondent under s60(1) of the *Family Provision Act 1972* (WA) for further and better provision from the testator’s estate – Appeal allowed

The date 26 February 2015 marked an extraordinary date in family provision history in Australia. On that day, the largest ever award ($25 million) was made in favour of Olivia Mead, daughter of mining tycoon Michael Wright. Of particular note from the judgment at first instance was the seeming resurgence of the ‘moral duty test’ and the notion that a judiciary faced with a ‘colossal estate’ enjoyed an almost unbridled discretion. In allowing a recent appeal, however, the Full Court of the Supreme Court of Western Australia found that Master Sanderson had overreached.

BACKGROUND

The deceased was survived by his wife, three ex-wives and three adult children. The plaintiff, Olivia Mead, was the youngest child of the deceased at 19 years of age. The deceased’s last will, as it related to Ms Mead, essentially provided Ms Mead with benefits from a trust created by the deceased during his lifetime (‘the trust’). The executor was directed, by the terms of the will, to fund the trust in the amount of $3 million. Pursuant to the terms of the trust, the trustee had an absolute discretion to distribute the income and capital to the trust beneficiaries, of whom Ms Mead was one. The trust was to vest upon Ms Mead turning 30 years of age.

Ms Mead sought $12 million by way of further provision. At first instance, in applying the well-established *Singer v Berghouse* two-stage test, Master Sanderson found the deceased had failed to make adequate provision for Ms Mead and awarded her the sum of $25 million. In so doing, he had regard to the following:

- The estate was ‘colossal’ and no other person would be materially prejudiced by the award to Ms Mead.
- The trust structure was unwieldy and there was no guarantee Ms Mead would receive anything from it.
- When considering the testator’s moral duty, in terms of ‘community expectations’, the deceased should have made ‘more than adequate provision’ and even ‘spoiled’ Ms Mead.

THE APPEAL

The defendant executor appealed the decision. On 22 November 2017, the appeal was allowed, and Ms Mead’s provision was reduced from $25 million to $6.142 million. Principally, the court found that Master Sanderson had correctly applied the first stage of the test (i.e. in determining that adequate provision had not been made for Ms Mead). As to the second stage, Master Sanderson had erred in considering his discretion to be unfettered because, fundamentally, he failed to have due regard to the limiting nature of the statutory text and purpose that conferred the discretion (i.e. that there be no more than adequate provision made).

In ‘re-exercising’ its discretion at the second stage of the test, the Court preferred to adopt what might be described as the ‘reasonably substantial test’ in terms of the quantum of the award.

The Court relied on actuarial evidence as to the present value of the sum required by Ms Mead when awarding her a capital sum ‘likely to ensure her financial security for the remainder of her life’. The sum of $6.142 million was said to enable Ms Mead:

(a) to purchase a ‘reasonably substantial house’ ($1.5 million); and
(b) to receive a ‘reasonably substantial’ annuity for the rest of her life from the balance invested.

Ms Mead has since sought leave to appeal the decision to the High Court of Australia.

IN MEMORIAM

The STEP Victoria Committee regrets to advise that Richard Phillips Barrister died on Tuesday 2 January 2018. He was aged 60. Richard had been a member of STEP for over 15 years. He served as a member of the STEP Victoria Branch Committee for a number of years, and on the *STEP Directory* Editorial Committee for Australia. Richard was also a speaker at a number of our meetings and at our 2012 annual conference.

He had practised as a barrister at the Victorian bar since 1983, having previously practised at the English bar as a member of Lincoln’s Inn. He was also a co-author of the LexisNexis *Wills, Probate and Administration Service Victoria*. Richard’s services were always in demand both as a barrister and as an accredited mediator.

He will be sadly missed.
UPCOMING EVENTS

The STEP branches provide forums in which professionals from different areas can collaborate and share knowledge and experience. We welcome all professional advisors, educators and students with a trusts and estates focus in their practice, whether for private or corporate clients. We are committed to building strong links between our local, national and international STEP colleagues.

<table>
<thead>
<tr>
<th>THU 12 April 2018</th>
<th>WA</th>
<th>5:30pm to 7:30pm</th>
<th>Evening Seminar</th>
<th>Insolvent Trusts and Insolvent Trustees</th>
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<td>Speaker – John Vaughan</td>
<td>O'Sullivan Davies Lawyers</td>
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<tr>
<th>MON 16 April 2018</th>
<th>VIC</th>
<th>5:30pm</th>
<th>Special Interest Group – Estate Planning</th>
<th>Superannuation Caps and Estate Planning</th>
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<td></td>
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<td>Speaker: Chair Daniel Kelliher TEP</td>
<td>Russell Kennedy, 469 LaTrobe Street, Melbourne</td>
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<th>WED 18 April 2018</th>
<th>NSW</th>
<th>5:30pm to 7pm</th>
<th>Evening Seminar</th>
<th>Lessons from Hobhouse v Macarthur Onslow, 2016 NSWSC 1831</th>
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<td>Speaker: John Stinson TEP</td>
<td>Banco Court, Supreme Court of NSW</td>
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<th>TUE 8 May 2018</th>
<th>QLD</th>
<th>12:30pm to 2pm</th>
<th>Lunchtime Seminar</th>
<th>Fun with Tax – Foreign Beneficiaries and Trusts</th>
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<td>Speaker: Mr Mark Brabazon SC TEP</td>
<td>Queensland Law Society, 179 Ann Street, Brisbane</td>
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<th>Evening Seminar</th>
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<td>Speaker: Malcolm Schyvens, Deputy President and Division Head of the NCAT Guardianship Division</td>
<td>Banco Court, Supreme Court of NSW</td>
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<th>MON 21 May 2018</th>
<th>VIC</th>
<th>5:30pm</th>
<th>AGM and Members’ Meeting</th>
<th>Intestacy Laws and Executor Commission – the Law Applied</th>
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<td>Speaker: Rick Wells, Barrister</td>
<td>Russell Kennedy, 469 LaTrobe Street, Melbourne</td>
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<th>WED 23 May 2018</th>
<th>QLD</th>
<th>5:15pm to 7:30pm</th>
<th>STEP Nextgen Lecture and Networking Series</th>
<th>Estate Litigation</th>
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<td></td>
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<td>Speaker: Rob Cumming TEP</td>
<td>– Family provision applications practical tips</td>
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<td>Speaker: Richard Williams TEP</td>
<td>– Other contentious applications College of Law, Brisbane</td>
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<th>TUE 5 June 2018</th>
<th>QLD</th>
<th>12:30pm to 2pm</th>
<th>Lunchtime Seminar</th>
<th>Structuring Charitable and Philanthropic Giving</th>
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<td>Speaker: Ms Frances Fredriksen TEP</td>
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<th>MON 18 June 2018</th>
<th>VIC</th>
<th>5:30pm to 6:30pm</th>
<th>Special Interest Group – Litigation</th>
<th>Court eFiling: Current Court Filing Requirements and Procedure for the TFM List</th>
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<td>Speaker: Judicial Registrar TFM Associate</td>
<td>Chair Georgina Borg</td>
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<td>Speaker: Rick Wells, Barrister</td>
<td>Russell Kennedy, 469 LaTrobe Street, Melbourne</td>
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We welcome all STEP members to attend events hosted by other branches. For more information on the STEP Australia events calendar, contact Dior Locke at dior.locke@step.org

Keep informed on upcoming STEP events online:
- STEP Australia events – https://stepaustralia.com/events
- STEP Worldwide events – https://www.step.org/events

Register your interest to be a speaker at STEP Australia events by emailing Dior Locke at dior.locke@step.org

Can’t make an event? Many speakers provide a paper for members. Get in contact to find out more.