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MORE STEP AUSTRALIA EVENTS
Welcome to the fifth edition of the quarterly STEP Australia Newsletter.

The STEP Australia Conference 2019 is fast approaching. If you have not yet registered to attend, I encourage you to do so. The conference will be held at the Stamford Plaza, Brisbane, on 15–17 May 2019. To complete your delegate registration, please visit www.step.org/step-australia-conference-2019. This STEP conference brings together leading minds in trusts and estates from across STEP Australia and beyond, and is not to be missed. The programme is designed to enable practitioners to update their knowledge of recent developments, hear about cutting-edge industry trends and benefit from networking opportunities. I look forward to seeing you there.

The STEP Australia web events platform recently uploaded the content from the STEP Western Australia Incapacity Conference, held in October 2018. This comprises ten web events. Members can purchase the whole event for AUD400. As this would usually cost AUD1,000, the offer represents a AUD600 saving. Visit the web events page (webevents.stepaustralia.com) to purchase the bundle now.

The STEP Australia Newsletter Sub-Committee, chaired by Andrea Olsson, 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

ANNOUNCEMENTS

Congratulations to Mercia Chapman TEP from the STEP Victoria branch, recipient of a 2018 STEP Founder’s Award. These awards are given to members who have made exceptional and outstanding long-term contributions to the Society. Volunteers are a key factor in STEP’s continuing success, and the Founder’s Awards recognise the importance of this.

Entry to the STEP Private Client Awards 2019/20 is open until 30 April 2019. Last year, Kimberley Martin TEP, Director at Worrall Moss Martin Lawyers in Tasmania, won the Young Practitioner of the Year Award. Peter Bobbin TEP’s firm Argyle Lawyers, based in Sydney, has twice been shortlisted for the Boutique Firm of the Year Award – in 2016 and 2018. Being listed as a finalist twice in such quick succession represents significant worldwide recognition from STEP colleagues. Visit www.steppca.org to enter.
‘Super’ estate planning

Bernard McMenamin TEP, Director, Clarke & Company

Recently, there have been a number of taxation announcements, legislative amendments and rulings that may impact an estate plan. These range from the taxing of testamentary trusts to the vesting of trusts and superannuation. This article will focus on succession planning for superannuation.

BABY BOOMER GENERATION
There is a misunderstanding about those born between 1946 and 1960. Discussions by professionals seem to focus on retirement and succession planning. Let me challenge this notion.

A significant number of baby boomers are not retiring, and, in some cases, this is driven by passion and enjoyment, not financial need. There is a growing group of financially secure baby boomers who continue to be involved in their chosen work, business, profession, or charitable or philanthropic activities. Baby boomers are driving retirement change in many retail businesses, such as furniture, cars and fashion.

Another significant misunderstanding is that baby boomers are the only generation that requires estate planning. In fact, a number of baby boomers are about to inherit significant assets from their parents, who are in their late 80s or early 90s. In addition, it is quite common for this generation to inherit from an unmarried sibling.

With the above in mind, what are some of the ‘super’ estate issues?

THE AUD1.6 MILLION CAP AND REVERSIONARY PENSION STREAM

EXAMPLE 1
John and Mary have a self-managed superannuation fund in which John has AUD3 million and Mary AUD2 million. They are both over 65 years of age and drawing a pension from the fund. John dies. If John’s pension is non-reversionary, the entire AUD3 million will need to be paid out to his estate or Mary. This is a bad tax result for Mary, as the payment she receives will earn income and she will pay a higher personal tax rate.

On the other hand, if the pension were reversionary, Mary would have 12 months to restructure the fund by converting her AUD2 million back to accumulation, and then she could receive AUD1.6 million of John’s superannuation funds as a pension. This means that only AUD1.4 million of John’s superannuation assets will be paid out to his estate or Mary, and Mary will have AUD3.6 million of assets in the fund – a significant tax saving.

Note: to enable a fund to pay a reversionary pension to another member, there must be documentation to support this.

EXAMPLE 2
George and Helen are 64-years-old and run a successful manufacturing business. When they initially arranged their estate planning with their advisors, superannuation was not an issue, as they did not have any superannuation assets. They had both spent their working lives building up the family business and investing any spare cash back into the business. George and Helen sell their manufacturing business and make a capital gain of AUD3 million. On the basis that they satisfy the small business capital gains tax (CGT) concessions, George and Helen can make contributions to a superannuation fund as shown in the table below.

Note: the non-concessationally taxed contribution must be made first.

| NON-CONCESSIONALLY TAXED CONTRIBUTIONS | $300,000 EACH = $600,000 |
| SMALL BUSINESS ROLLOVER | $1.48 MILLION EACH = $2.960 MILLION |
| TOTAL | $3.56 MILLION |

DOWNSIZING CONTRIBUTIONS
A year after retirement, when George and Helen are both 65-years-old, they decide to downsize and sell their family home. Providing the home has been owned for over ten years and the proceeds of the home are at least AUD600,000, they can each roll AUD300,000 into superannuation within 90 days of the property settlement. This means that the fund now has a total of AUD4.16 million.

Note: the property must be exempt or partially exempt from CGT under the main residence exemption or if a pre-CGT asset would be entitled to one of these exemptions.

NEW BORROWING RULES
Superannuation funds are allowed to borrow to acquire assets via a limited recourse borrowing arrangement (LRBA). However, borrowings entered into after 1 July 2018 will increase a member’s total superannuation balance by their share of the borrowing if that member has satisfied a condition of release or the LRBA is between the fund and one of its associates. If this transaction causes the AUD1.6 million cap to be notionally exceeded, the member is prevented from making...
non-concessionally taxed contributions and is also ineligible for the government co-contribution or spouse contribution.

The segregated asset method is not available to the trustee.

A plan to abolish borrowing by self-managed super funds may be introduced by a change of government. Accordingly, to put an LRBA in place, this needs to be undertaken as soon as possible.

FRANKING CREDITS
The potential loss of franking credit refunds can be mitigated in certain circumstances. If the fund is currently in pension phase, the proposed franking credits lost will be significant. The potential loss of these franking credits can be mitigated if part of the fund is in accumulation, such as when the member in pension phase also has funds in excess of the AUD1.6 million cap.

Another planning opportunity would be to consider admitting other family members to the fund (the limit being four members in total) who are in accumulation phase and also making deductible contributions. In this circumstance, the income of those members and their contributions may in fact be tax free, or the tax payable reduced, because of the effect of the excess franking credits.

This result can be accelerated by the members in pension phase withdrawing any amounts over the AUD1.6 million cap and gifting those funds to the children, who re-contribute AUD300,000 each to the fund as non-concessionally taxed contributions. This can be contributed every three years until the cap is reached.

This re-contribution strategy can also form part of a succession planning structure whereby the parents effectively reduce their entitlement in the superannuation fund and pass these amounts on to the next generation. This strategy also provides them with an understanding of the management of assets and income. This may also have the effect of reducing the death tax payable by the fund. Remember, a superannuation trust continues as long as there are fund beneficiaries.

Alternatively, a family could consider two funds. The AUD1.6 million cap for each member in pension phase could be rolled out to a new fund, meaning all income of that fund would be exempt from income tax, providing none of the assets derived from franked income. For example, the fund may have term deposits and/or property, which may need to be segregated prior to transfer. Assuming the original fund in accumulation phase invested in company shares, it could enjoy a partial offset of tax payable on income due to franking credits. This could be enhanced if other family members joined that fund who are in accumulation phase and/or making deductible contributions.

Of course, the above option may be subject to family issues, as investment strategies and the family members’ relationships may cause conflict.

Note: all members must be trustees or directors of the trustee company.

As a result of the above superannuation transactions, the estate plan needs to be revisited.

ALTERNATIVES
In addition to the superannuation issues outlined above, are there any alternative tax planning strategies? One is a corporate beneficiary, often referred to as a ‘bucket’ company.

If the client has the ability to inject assets into a company or derive income in a trust, and that trust is able to stream income to a corporate beneficiary, that company can form a significant part of planning in retirement. In that company, the income tax rate is either 27.5 per cent or 30 per cent, depending on the nature of the income. Providing the income (less taxation) remains in the company, there are no adverse tax issues.

The other advantage of this structure is that the income tax paid is retained as a franking credit in the company, which will allow the distribution of future franked dividends. Compare this to a superannuation fund, where tax paid on income or contributions is 15 per cent (30 per cent for high-income earners) and is effectively lost. There is always the risk in a super fund of what is known as the ‘death tax’, which is a 17 per cent tax rate on the taxable component of a payout to a non-dependant beneficiary.

A combination of superannuation and a company would mean that on retirement a taxpayer could receive a tax-free pension on the AUD1.6 million cap and, assuming no other income, a tax-free dividend of AUD98,000 fully franked (30 per cent) or AUD79,000 fully franked (27.5 per cent).

A warning to practitioners: give careful consideration to the shareholders in the corporate beneficiary. Depending on family structure and flexibility, the shareholders can be individuals or a discretionary trust.

In view of the above, superannuation, and perhaps in some cases a company, will continue to be significant issues in estate planning.

SUMMARY
An estate plan including a significant superannuation asset must consider the following:

- trust deed provisions;
- binding death benefit nominations;
- mitigating superannuation payout on the death of one partner, to reduce future taxation and the death tax; and
- if the superannuation structure has changed, regular reviews to determine the possible effect on the estate plan.
Introducing... Kate Moss TEP

Director at Worrall Moss Martin Lawyers

WHY DID YOU BECOME A MEMBER OF STEP?
During the early stages of my career as a trust and estate lawyer, I recognised the importance of having an association with a broader network of colleagues practising in similar areas of law. I saw that, as the prestigious international professional body for those specialising in trusts and estates, STEP would provide me with international recognition of my specialisation, and the opportunity to expand my network globally and continue developing my skills and expertise.

WHAT DOES BEING A STEP MEMBER MEAN TO YOU?
Being a STEP member enables me to actively contribute to the ongoing education of trust and estate practitioners in Tasmania through my role with the STEP Tasmania branch. I see education as critical to our profession. I obtain a great deal of personal and professional satisfaction by contributing to the availability of high-quality professional development opportunities for colleagues in Tasmania.

WHAT IS YOUR MOST-USED STEP RESOURCE?
The STEP Directory is a vital resource for my personal practice. I frequently encounter multi-jurisdictional estates and need to find practitioners interstate and overseas with whom I can work collaboratively. The fact that I can quickly and easily find a trusted and experienced practitioner in a specific jurisdiction is invaluable, and I also benefit from the STEP Directory by way of the referrals I receive.

CAN YOU GIVE US SOME INSIGHT INTO YOUR EXPERTISE?
My expertise is in the areas of trust and estate law, with a particular focus on estate administration and complex legal issues arising from death, including trust law, superannuation law, property law, company law and tax law.

I recently published a detailed paper on the limits of open instructions. This is a topic of significant gravity, as the scope of instructions can be misunderstood and overlooked, leading to disputes not only between clients but also between clients and their advisors. This can give rise to particularly obscure issues in the administration of estates. I have developed techniques for raising and dealing with these issues, and am determined to contribute to a uniform practice for scoping instructions in estate administration.

My involvement in inter-jurisdictional issues inspired my interest in ancillary areas of international certification and recognition. In 2017, after a period of study and an informal ‘apprenticeship’ working with Peter Worrall, I was appointed by the Chief Justice of the Supreme Court of Tasmania as a notary public. I am the youngest, and only female, notary public practising in Tasmania.

TELL US WHAT MOTIVATED AND INSPIRED YOU TO GAIN THE EXPERTISE YOU HAVE TODAY?
I consider that it is truly a privilege to be able to act for and work with clients who need sensitive and comprehensive advice about the legal issues arising from death. Good counsel, practical advice and understanding during the grieving process are essential.

Estate administration is a wonderfully diverse area of law. Each matter is unique, whether that be due to the circumstances of the death, the personalities involved or the assets comprising the estate, so each challenge requires its own bespoke solutions.

I am grateful that I can practise in an area of law that enables me to utilise my intelligence and creativity, and my sense of decency as a human being. Few professions truly allow for both.

WHAT ISSUES CAN YOU SEE STEP ADDRESSING IN THE FUTURE?
Fundamentally, I see estates involving people, assets and wealth as being key areas for STEP to focus on in future. Other areas that I see as evolving are the taxation considerations relating to trusts and estates, and the digitalisation of a person’s assets, including the rise of cryptocurrency.

I consider that STEP has a critical role to play in providing comment on behalf of estate and trust practitioners in relation to law reform in these areas.

WHAT IS YOUR MOST MEMORABLE STEP EVENT?
I participated in a panel discussion hosted by STEP entitled ‘Problems Caused by Open Instructions to Complete the Administration of an Estate’. This is a very important topic because of the day-to-day challenges we face in our profession. It was also important having my expertise recognised by way of an invitation to participate, and to have the opportunity to directly discuss these issues with other expert speakers in a collegiate and contributory way.

WHAT ‘MUST READ’ BOOK WOULD YOU RECOMMEND?
Sun Tzu’s The Art of War. While often interpreted as being relevant to the question of strategy and tactics, I consider the text to be educational in teaching the necessary skills to deal with issues often faced in practice.

OUTSIDE THE OFFICE, WHAT DO YOU LOOK FORWARD TO?
As a director of a law firm, I have long accepted that there is no time that is exclusively ‘out of the office’. Fortunately, I love what I do and genuinely do not feel that the crossover of professional and personal time is an imposition. I do enjoy cultural experiences; travel is the best way to open your mind and find perspective.

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Planning for death or disability in business succession

Paul Paxton-Hall TEP, Director, Paxton-Hall Lawyers

The constitution for the trading entity of a business is likely to address issues around the voluntary transfer of an owner’s interest, usually involving pre-emptive rights. But it has become common commercial practice these days for business owners to enter into a stakeholders’ agreement that addresses various exit scenarios that are not able to be addressed in the constitution. These would typically include:

• the insolvency of a party;
• breach by an employee shareholder of an employment agreement; or
• material breach of the stakeholders’ agreement itself.

Exit mechanism arrangements would be included in the stakeholders’ agreement, which would normally include the exit price to be paid – particularly to a party who had breached the agreement, often referred to as a ‘bad leaver’.

Other associated exit provisions also need to be considered. These include drag-along and tag-along rights and, potentially, buy-back provisions to afford the opportunity for the company to fund the exit of a shareholder, rather than a transfer of shares being involved.

To address the death, incapacity or trauma of a business owner, it is wise to ensure that business succession arrangements are enshrined in a stakeholders’ agreement that deals with these insurable transfer events. Alternatively, a supplementary deed dedicated to insurable transfer events only, frequently called a ‘buy-sell’ or business succession agreement (BSA), could be used.

WHAT IS A BSA?
A BSA is an agreement between members of a jointly owned business that provides that if a trigger event is suffered by a member of the structure, then the other owners (continuing owners) must, or must have the option to, buy the interest of the outgoing owner, and the outgoing owner has the right to require the continuing owners to acquire their interest.

A BSA is normally styled as a put-and-call option, though it can be drafted as a conditional contract. It can operate for individuals or related entities, e.g. shareholding trusts in a trading company. BSAs have two key components, namely:

• the put/call option provisions; and
• the funding provisions.

The funding provisions oblige the members to effect cover to fund the buy-out obligation for the agreed option trigger events; these are usually death and total permanent disability (TPD), but can also include trauma.

WHY HAVE A BSA?
The benefit of a BSA is that it provides a mechanism for the continuing business owners to acquire the interest of the outgoing/deceased owner so that the business can continue to run smoothly. It provides certainty for the business in the event of an insurable event and so avoids the uncertainties that can arise from unwritten ‘understandings’ between business owners and the vagaries of estoppel by encouragement arguments.

The outgoing owner or estate receives compensation as consideration for their equity entitlement in the business, whether that be by way of the transfer of shares in a trading company, units in a unit trust or partnership interest. If appropriate funding mechanisms are in place, it avoids the risks of there being insufficient capital for the remaining owners to buy out the estate of the outgoing/deceased owner.

This arrangement will not address the ongoing funding concerns of the business itself, if that is an issue. This is where keyman insurance or other debt-reduction arrangements will need to be considered.

INSURANCE OWNERSHIP ALTERNATIVES
Insurance can be effected by:

• each individual (a self-owned policy);
• other partners (a cross-owned policy); or
• a trust owning all policies.

Other than for complicated business structures with a large number of shareholders, I would normally recommend that shareholders effect self-owned policies.

If self-insurance is used, then:

• the estate of the deceased shareholder ought to receive the life insurance payment free of capital gains tax (CGT) (s.118-300 of the Income Tax Assessment Act 1997 (Tax Act)); and
• if the payment is for injury or illness, then the payment should also be CGT-free if received by the individual or their relative (s.118-37 of the Tax Act).

However, in the case of cross-insurance, each owner will have a fractional interest only in the policy. There is a risk that the two CGT exemptions just mentioned may not apply as a consequence. This potential, coupled with the practical advantage that self-insurance permits a business owner to
retain a policy on departure from the business, indicates that self-insurance is the preferred strategy.

WHO PAYS THE PREMIUMS?
If premiums are paid by the employing entity, other issues, such as fringe benefits tax and Division 7A loans, can arise. Care needs to be taken. So, for example, if the trading company effects the various policies, then it will be important for the company to account for premium payments as a debit against the respective shareholders’ dividend entitlements.

For a long time, it was thought that effecting insurance for a BSA through superannuation was to be preferred because of the deductibility of premiums and the ability to apply proceeds to fund tax-effective income streams by way of pension payments.

However, ATO ID2015/10 makes it clear that the Australian Tax Office takes the view that a self-managed superannuation fund (SMSF) will contravene the sole-purpose requirements of the Superannuation Industry (Supervision) Act 1993 by purchasing a life insurance policy over the life of a member of the SMSF where the purchase is a condition of a BSA.

It is recommended that individual shareholders effect premium payments out of their own pocket.

MATTERS FOR CONSIDERATION IN THE BSA
TRAUMA COVERED?
If the parties want to include trauma as a trigger event in a BSA, then regard will need to be had to how the trigger mechanism will work in practice. For example, should trauma automatically trigger an option event, or should it only apply if the person affected is unable to return to full-time work within a reasonable period of time, e.g. six months? The normal trauma events of a heart attack or cancer diagnosis often conclude with the affected business partner being able to return after medical treatment. Someone in that situation may not want to be forced to leave if they have made an adequate recovery and want to go back to work.

VALUATION ALTERNATIVES
Valuation methodology will normally be considered by the parties to a business structure in the stakeholders’ agreement. If not, the parties may agree that the accountant for the business should determine value at the time of the trigger event or adopt a prescriptive valuation methodology.

TERMS OF PAYMENT
The BSA should not require payment for the interest of the outgoing owner until after insurance proceeds have been received.

In cases where there are no insurance proceeds paid, e.g. where the insurer has denied the claim, then provision ought to be made for payment over a delayed period of time. Practitioners should query whether security from the continuing owners ought to be obtained in this instance. Terms of payment will also need to be carefully considered if a party to the agreement is unable to effect appropriate insurance.

There are different ways in which price can be determined. A convenient strategy is for the BSA to provide that the consideration for the outgoing partner’s interest is the agreed value (as stipulated in the BSA), but on the basis that the consideration is reduced by insurance proceeds received.

However the consideration/price is expressed to be paid, the CGT market value substitution rule under s.116-30 of the Tax Act applies, to ensure that the cost base for CGT purposes is the market value at the date of the trigger event. The flip side, then, is that the estate of the deceased owner is deemed to have received market value for the transfer. Insurance proceeds will be necessary to fund the consequential tax obligation.

RELEVANT TAX ISSUES
Concerns around tax issues, particularly for TPD and trauma, have largely been settled now with 2015 amendments made to the Tax Act.

In general terms, the position is that:
• CGT event C2 will not apply on the payment of life insurance proceeds if paid to the original owner of the policy or an entity that acquired the policy for no consideration.
• In the case of TPD and trauma, no CGT consequence arises for payment of policy proceeds received for any wrong, injury or illness that the insured or a relative suffers personally. This position has now been clarified as extending to the situation where the policy is held by a trustee.

CONCLUSION
A BSA is really like a ‘business will’. It is a vital aspect of the overall estate plan where a client is involved in business and a necessary part of the estate planner’s toolkit. As with any will, a BSA needs regular review along with associated insurances. BSAs are not simple documents: clients generally need careful and patient advice to get a BSA document over the line.
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.

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<td>‘Estate Administration’</td>
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We welcome all STEP members to attend events hosted by other STEP branches. For more information on the STEP Australia events calendar, contact 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.

STEP AUSTRALIA NEWSLETTER SUB-COMMITTEE
CHAIR: ANDREA OLSSON
COMMITTEE MEMBERS: DAVID GIBBS, ROB CUMMING, PAMELA SUTTOR, FIONA FAGAN, CHRIS OSBORN, 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