

# STEP AUSTRALIA NEWSLETTER

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# WELCOME FROM STEP AUSTRALIA CHAIR

Welcome to the second edition of the quarterly *STEP Australia Newsletter*

**F**or more in-depth analysis and discussion of the type of subjects covered in this newsletter, please make a note to attend the next STEP Australia Conference, which will be held in Brisbane in May 2019. A save-the-date flyer will be emailed shortly.

I am also pleased to invite you all to follow STEP Australia on our new LinkedIn page at [www.linkedin.com/company/step-australia](http://www.linkedin.com/company/step-australia)

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](mailto:dior.locke@step.org)

With best wishes,

*Neil Wickenden TEP,  
STEP Australia Chair*



## STEP AUSTRALIA CONTACT INFORMATION

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# Removal of principal place of residence CGT exemption for some deceased estates

Ian Raspin TEP, Director, BNR Partners

The *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No 2) Bill 2018*, which is an imminently pending piece of legislation, proposes, among other things, to remove the capital gains tax (CGT) main residence exemption for non-resident individuals effective from 9 May 2017.

This is an extremely harsh and draconian measure that will impact on a number of deceased estates and Australian residents living abroad, either at the time of their death or when they elect to sell their Australian residence.

## KEY PROPOSED AMENDMENTS

Very broadly, the key amendments in the Bill concerning the removal of the CGT main residence exemption for individual taxpayers and deceased estates are summarised below.

### 1. REMOVAL OF MAIN RESIDENCE EXEMPTION FOR INDIVIDUAL TAXPAYERS

The federal government announced in the federal budget on 9 May 2017 that the CGT main residence exemption would be removed for foreign residents who would otherwise have been entitled to the exemption effective from 9 May 2017.

The residency tests that generally apply for income tax purposes will be applied to determine whether an individual is a foreign resident at the time when they enter into a contract for the sale of their main residence.

Where a person is a foreign resident at the time of contract, they will have to recognise any capital gain or loss arising on a disposal of that main residence where the contract for sale is entered into on or after 9 May 2017. Any resulting gain will be applied to the entire period of ownership, not just the proportional period during which the person was a non-resident.



‘This is an extremely harsh and draconian measure that will impact on a number of deceased estates’

### 2. REMOVAL OF MAIN RESIDENCE EXEMPTION FOR DECEASED ESTATES

The impact of the removal of the CGT main residence exemption on deceased estates differs depending on whether the deceased was a foreign resident or an Australian resident at the time of their death, as respectively discussed below.

#### Deceased was a foreign resident at time of death

The effect of removing the CGT main residence exemption on a deceased estate where the deceased was a foreign resident from 9 May 2017 is as follows:

- A legal personal representative of a deceased estate cannot apply the main residence exemption on any disposal of a dwelling owned by the deceased if that person was a foreign resident at the time of their death. This applies retrospectively to the entire ownership period and ignores any period of occupancy of the deceased as an Australian tax resident during their ownership.
- Similarly, a beneficiary of a deceased estate is not entitled to any portion of the CGT main residence exemption that accrued in respect to the ownership interest in the dwelling of a deceased individual if the deceased had been a foreign resident at the time of death.
- A beneficiary will therefore only be entitled to a partial CGT main residence exemption that subsequently accrues in their own right. This will require that person to be an Australian tax resident at the time of entering into a contract to sell their ownership interest in the dwelling.
- No CGT main residence exemption will be available if the deceased person was a foreign resident at the time of their death and the beneficiary who inherits the ownership interest in the dwelling was also a foreign resident at the time of entering into a contract to sell their ownership interest in the dwelling.
- The current main residency exemption of s118–210 of the *Income Tax Assessment Act 1997* will not be available to a life interest where a trustee of a testamentary trust acquires a dwelling under the terms of a deceased non-resident’s will in which to accommodate a resident Australian individual who has been granted a right of occupancy.

#### Deceased was an Australian resident at time of death

By contrast, the effect of removing the CGT main residence exemption on a deceased estate where the

deceased was an Australian resident from 9 May 2017 is as follows:

- If the deceased was a resident of Australia for taxation purposes at the time of death, then the main residence exemption accrued by the deceased in respect to the dwelling continues to be available to the trustee of the deceased estate or the beneficiary of the deceased who is bequeathed the property under the estate.
- However, the beneficiary is denied any additional component of the main residence exemption that accrued in their own right if they were a foreign resident at the time when that person entered into a contract to sell that dwelling. Broadly, where such a scenario occurs, it will be necessary to apportion the periods of ownership of the deceased resident and

the foreign beneficiary to ensure that a partial main residence exemption is available in relation to the period of days during which the deceased resident used the dwelling as a main residence.

#### TRANSITIONAL PROVISIONS

Under transitional provisions, the proposed amendments do not apply to dwellings held by such individuals before 9 May 2017, provided the sale of the ownership interest in the dwelling occurs on or before 30 June 2019.

*Ian Raspin TEP is author of The Australian Tax Pitfalls of Administering an Estate with International Connections, which will be released in July 2018*

#### MEMBER PROFILE FIONA FAGAN TEP

## Introducing... Fiona Fagan

Christina Flourentzou interviews Fiona Fagan TEP,  
Senior Associate at Tindall Gask Bentley Lawyers



#### WHY DID YOU BECOME A MEMBER OF STEP?

Because of the appeal of the TEP accreditation and its worldwide recognition, and the networking opportunities.

#### WHAT DOES BEING A STEP MEMBER MEAN TO YOU?

It means being a member of a highly regarded community

of professionals, which unlocks access to resources and the ability to network with members of varying backgrounds and experiences. The calibre of the professional development events offered is invaluable to my practice and my career.

Being part of the STEP South Australia Branch Committee provides me with an opportunity to work in a dynamic environment with leaders in their field.

#### WHAT IS YOUR MOST-USED STEP RESOURCE?

The members! Our firm has offices in South Australia, Western Australia, Northern Territory and Queensland, and I have also previously practised in New South Wales. The networking opportunities and relationships formed with members across all of these states through STEP is an invaluable resource. The STEP Member Directory provides me with the ability to have contact with practitioners around the globe within moments, and I can be assured that they are highly regarded practitioners.

#### CAN YOU GIVE SOME INSIGHT INTO YOUR EXPERTISE?

I practise as a solicitor in Adelaide and I am fortunate to practise exclusively in wills and estates, including drafting testamentary documents and assisting with the administration of estates. I have a particular interest in estate litigation and superannuation complaints, which I consider to be an ever-changing and evolving aspect of our practice that will continue to become more prominent as Australians accumulate more wealth in superannuation. I also enjoy providing family enterprises with long-term and flexible options for their business succession plans.

#### WHAT MOTIVATED AND INSPIRED YOU TO GAIN THE EXPERTISE YOU HAVE TODAY?

Growing up in rural New South Wales, I realised the importance of sound succession planning for rural enterprises. I am also passionate about the varying use of trust structures and providing options and solutions to my clients.

#### WHAT IS THE BEST ADVICE OR GUIDANCE YOU HAVE EVER BEEN GIVEN?

Investment in education is the best investment you will ever make. It cannot be taken away from you, it won't depreciate and it will continue to pay dividends.

#### WHAT IS YOUR MOST MEMORABLE STEP EVENT?

The STEP Australia Conference 2017 at the Langham Hotel in Melbourne, and in particular the gala dinner, where Dylan Alcott gave a speech to STEP members.

# Wills, revocation and the Marriage Act

Jennifer Sheean TEP, Queensland Bar, and Juanita Maiden TEP,  
Senior Associate, MacDonnells Law

**W**ith the passing of amendments to the *Marriage Act 1961 (Cth)* (the Marriage Act) late last year, same-sex couples may now marry in Australia. Further, same-sex couples who have married overseas are now recognised as being married in Australia.

What, then, in light of the general revocation of wills upon the marriage of the testator, is the implication of the recognition of foreign same-sex marriages for those couples who married overseas? The important question is whether the change to the Marriage Act means that, for the purposes of applying the law relating to the revocation of a will upon marriage, the relevant date is the date of solemnisation overseas or the date of recognition of the marriage in Australia.

## THE CHANGE TO THE LAW

On 7 December 2017, the *Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)* (MADRA) passed the House of Representatives. Commencing on 9 December 2017, the Marriage Act was amended to define marriage as ‘the union of two people to the exclusion of all others, voluntarily entered into for life’.

Part VA of the Marriage Act deals with the recognition of foreign marriages in Australia, and contains ss88A to 88G.

With the passing of MADRA, s88EA was removed from Part VA of the Marriage Act. This section stated that a union solemnised in a foreign country between a man and another man, or a woman and another woman, ‘must not be recognised as a marriage in Australia’.

Section 88D of the Marriage Act states that marriages solemnised in a foreign country in accordance with local law ‘shall be recognised in Australia as valid’.

Prior to MADRA, section 88EA, together with the definition of marriage in the Marriage Act, prevented the recognition of same-sex marriages, even if they had been lawfully solemnised in a foreign country.

Section 70(2) of MADRA provides that Part VA of the Marriage Act applies at and after 9 December 2017, even if the marriage took place before that date.

The effect of the change to the Marriage Act is that any same-sex marriage that was lawfully solemnised overseas prior to 9 December 2017 is recognised in Australia as at that date. The question remains as to whether that recognition means that the marriage only became valid on 9 December 2017 for the purposes of the general statutory revocation of wills upon

marriage, which exists in all states and territories of Australia.

## LEGISLATION REVOKES WILLS UPON A TESTATOR’S MARRIAGE

All states and territories in Australia have legislation that revokes a will upon the marriage of a testator. The various sections contain certain exceptions to revocation, including when the will is made in contemplation of marriage.

The many variations that can occur as a result of the different pieces of legislation are beyond the scope of this article, which focuses on whether the effect of the change to the Marriage Act means wills made by same-sex couples who have married overseas prior to 9 December 2017 are revoked by the recognition of their marriage.

Same-sex marriage has been legalised in 25 other countries, with the Netherlands being the first in 2001. In 2013, New Zealand passed legislation enabling same-sex couples to marry. Since that time, close to 1,000 Australian same-sex couples have taken the trip across the Tasman to get married. There are also about 450 same-sex couples who have married on Australian soil at British consulates, taking advantage of the rights of dual citizens. It is reasonable to assume that some same-sex couples have headed to other overseas countries, such as Canada and the US, in order to marry.

Many of those couples are likely to have made wills in Australia after their marriages were solemnised overseas.

## WHAT DOES THIS MEAN FOR WILLS MADE BY SAME-SEX COUPLES WHO HAVE MARRIED OVERSEAS?

The concern for practitioners is whether the date from which an overseas same-sex marriage is recognised in Australia is taken to be the date the marriage occurred, triggering the statutory revocation of a will made prior to that date. Given the number of same-sex couples who have married overseas, this is a question that many practitioners may need to consider.

As noted earlier, the effect of s70(2) of MADRA is that a same-sex marriage that was solemnised overseas prior to 9 December 2017 is recognised as valid in Australia from 9 December 2017. But does that mean that all same-sex marriages solemnised overseas prior to that date have an arbitrary date of marriage of 9 December 2017?

There is nothing in MADRA that states that the date upon which an overseas marriage is recognised in Australia as valid is taken to be the date of the marriage. It is silent on the issue.

It has been held that ss88C(1)(a) and 88(D)(1) of the Marriage Act mean that '(a)n overseas marriage will be recognised in Australia as valid if it was valid under the local law at the time it was solemnised'. Thus, Australian law recognises an overseas marriage from the time it is solemnised in accordance with the local law.

The former s88EA of the Marriage Act stated that a same-sex union solemnised in a foreign country 'must not be recognised as a marriage in Australia'. It did not state that it must not be recognised as a valid marriage, simply that it must not be recognised as a marriage.

In the various Explanatory Memoranda and the Second Reading Speech to the Bill that became MADRA, there are references to allowing foreign same-sex marriages to be 'recognised'. There is no mention of the validity of those marriages.

Section 15AA of the *Acts Interpretation Act 1901 (Cth)* provides that the interpretation of a provision of an Act that would 'best achieve the purpose or object of the Act is to be preferred to each other interpretation'. The purpose of Part VA of the Marriage Act is stated to be 'to give effect to Chapter II of the Convention on Celebration and Recognition of the Validity of Marriages signed at The Hague on 14 March 1978'.

Chapter II of that Convention does not refer to dates of validity of marriage, but does refer to the recognition of the validity of a marriage.

This may not assist the practitioner grappling with the question of whether a will made by a person who is a party to a same-sex marriage solemnised overseas prior to 9 December 2017 is revoked by their state or territory legislation as a result of the changes to the Marriage Act.

The courts have considered issues in relation to the validity of foreign marriages, but those decisions have not dealt with a situation where a change in the law has meant that a foreign marriage that was previously unable to be recognised in Australia can now be recognised. Also, the date of the marriage, as opposed to the date of recognition in Australia, does not appear to have arisen as a question that was relevant in those cases.

So, the question remains: for the purposes of the statutory revocation of wills, are overseas same-sex marriages taken to have occurred at the date of solemnisation or at the date of recognition in Australia? Section 88F of the Marriage Act provides that Part VA of that Act determines whether a marriage solemnised in a foreign country is to be recognised in Australia as valid, even if that question is incidental to the determination of another question.

Therefore, when the question does arise, it will need to be determined in accordance with Part VA of the Marriage Act.

It is the writers' opinion that the adoption of 9 December 2017 as the date upon which all earlier foreign same-sex marriages were entered into would open many avenues for unfairness. It would treat all foreign same-sex marriages as subsisting for the same length of time, regardless of when they were actually solemnised. The potential unfairness can be illustrated in relation to divorce proceedings pursuant to the *Family Law Act 1975 (Cth)*, where the parties must be separated for not less than 12 months immediately before commencing proceedings. If a same-sex couple married in New Zealand in 2013 and separated in January 2017, why should the date of their marriage be taken to be 9 December 2017? It would require them to wait until 10 December 2018, rather than January 2018, to commence divorce proceedings.

There is also the potential for unfairness (and cost to testators) in determining that wills are revoked as a result of the imposition of an arbitrary date for an overseas same-sex marriage, as opposed to the actual date of the marriage.

Courts generally will look to preserve rights if that avenue is open to them. Nevertheless, until the issue comes before the courts to be determined, it is unclear whether the statutory revocation of wills upon marriage is triggered by the recognition of same-sex marriages solemnised overseas before 9 December 2017.

Until that question is decided, practitioners may wish to bear the following in mind and consider what practicalities they should address in their day to day practice:

1. Wills may be revoked by the amendments if the testators have entered into a same-sex marriage overseas prior to 9 December 2017. The interaction between the Commonwealth legislation and various state and territory legislation is not clear, and until further legislative or judicial clarity is provided, practitioners should not simply assume that if the will was made after the overseas marriage it will not be revoked as result of the change to the legislation.
2. The changes to the Marriage Act may need to be considered when addressing claims for further provision from a deceased's estate.
3. The changes to the Marriage Act may need to be considered by an administrator before distributing an intestate deceased's estate.



# CASE NOTE:

## *Homersham v Carr* [2017] NSWSC 753 & *Carr v Homersham* [2018] NSWCA 65

Chris Windeyer TEP, Partner, L Rundle & Co Solicitors

**B**eryl Hordern died on 25 September 2014, leaving a will dated 5 April 2004 in which she named Cynthia Carr, her cleaner, companion and friend, as the sole executor and beneficiary of her estate. The deceased's niece and closest living relative, Ann Richardson, commenced proceedings (by way of attorney, she residing in Portugal) propounding an earlier will dated 2 December 2001, alleging that the deceased lacked testamentary capacity at the time of execution of the 2004 will. Ms Richardson was the sole beneficiary and executor named in the earlier will.

At first instance, Robb J held that the deceased lacked capacity when the 2004 will was executed. While the first limbs of the *Banks v Goodfellow* test were satisfied, Robb J found that the deceased was suffering from a delusion at the time of making the will by her belief that her niece had made statements that the illness and death of her mother (the deceased's sister) in 1972 had 'ruined' her life, and that this belief perverted the deceased's ability to comprehend and appreciate the claims to which she ought to give effect. The Court of Appeal unanimously overturned the first instance decision, ordering that probate in solemn form of the 2004 will be granted to Ms Carr.

Each of the appeal judges reviewed the relevant authorities as to delusions, most notably *Bull v Fulton* (1942) 66 CLR 295 and *Easter v Griffiths* (1995) 217 ALR 284. MacFarlan JA considered that the authorities supported the following propositions (at 113):

1. It is insufficient to demonstrate the absence of testamentary capacity to prove that the deceased acted on a material mistaken belief in making his or her will.

2. For a mistaken belief to rise to the level of a "delusion" which affects the validity of the will, there must at least be a high degree of irrationality in the belief

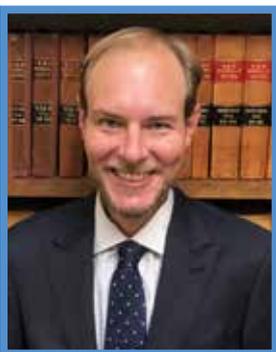
and ordinarily evidence will be required that there has been an attempt to reason the deceased out of the belief, such that the deceased's adherence to it suggests that the deceased has a mental disorder or deficiency precluding the deceased from comprehending and appreciating "the claims to which he [or she] ought to give effect" (*Banks v Goodfellow* at 565).

3. Whether or not there is such evidence, generally the circumstances must be such that it can be inferred that the deceased was wedded to the belief irrespective of its truth. If that is not the case, the belief is likely to be no more than a mistaken view, the holding of which cannot be inferred to reflect on the deceased's mental competence.'

The judgment highlights the vital role of practitioners when taking instructions, particularly when capacity may be in doubt. The importance of comprehensive file notes cannot be underestimated, especially given the length of time that may pass between the instructions for, and signing of, the will and the testator's death. It also supports the file management procedure that will files be retained indefinitely, Leeming JA noting (at 136) that it was 'completely artificial to think that the unaided recollection of any witness of his or her dealings... 13 years earlier could much assist in the determination' of the case. Conflicting evidence was apparent in contemporaneous file notes prepared by the solicitors who attended the deceased on the execution of the will, and in a report by Dr Sandy Beveridge, prepared approximately a month earlier. Leeming JA gave greater weight to the solicitors' notes, they being 'present on the very day that the deceased executed her will, their minds squarely directed to [the deceased's] testamentary capacity' (at 145).

Finally, practitioners should take appropriate measures when capacity may be in doubt to ensure that the best evidence is available if the will is challenged. Nevertheless, 'the solicitor is not an insurer for the

validity of the will, but can only act with reasonable diligence' (per Robb J at first instance at 205). When there is doubt, solicitors should give preference to a testator's apparent wishes, rather than refusing to act. Ultimately it is a matter for the court to determine.



**'Practitioners should take measures to ensure that the best evidence is available if the will is challenged'**

# 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.

<p><b>TUE 5 June 2018</b> <b>QLD</b></p> <p><b>12:30pm to 2pm</b> Lunchtime Seminar <b>Structuring Charitable and Philanthropic Giving</b> <b>Speaker: Frances Fredriksen TEP</b> <i>Queensland Law Society, 179 Ann Street, Brisbane</i></p>	<p><b>WED 13 June 2018</b> <b>NSW</b></p> <p><b>2:30pm to 1:30pm</b> Lunch and Learn Session <b>Philanthropy and their Giving Consultancy</b> <b>Speaker: Will Beresford, Equity Trustees</b> <i>Equity Trustees, 56 Pitt Street, Sydney</i></p>	<p><b>THU 14 June 2018</b> <b>SA</b></p> <p><b>5.30pm to 7.00pm</b> Lecture with Q&amp;A <b>Super Death: All you need to know and didn't know you needed to know</b> <b>Speaker: Peter Bobbin TEP</b> <i>Naval Military and Air Force Club, 111 Hutt Street, Adelaide</i></p>
<p><b>MON 18 June 2018</b> <b>VIC</b></p> <p><b>5:30pm to 6:30pm</b> SIG – Litigation <b>Court E-Filing: Current court filing requirements and procedure for the TFM list</b> <b>Speaker: Judicial Registrar TFM</b> <b>Associate Chair Georgina Borg TEP</b> <i>Russell Kennedy, 469 La Trobe Street, Melbourne</i></p>	<p><b>WED 20 June 2018</b> <b>NSW</b></p> <p><b>5:30pm to 7pm</b> Seminar <b>The ATO speaks SMSF: Hear what is of current interest to the regulator</b> <b>Speaker: Jeremy Geale, Deputy Chief Tax Counsel, Tax Counsel Network Australian Taxation Office</b> <i>Banco Court, Supreme Court of NSW</i></p>	<p><b>WED 4 July 2018</b> <b>WA</b></p> <p><b>5:30pm to 7:30pm</b> Seminar <b>SMSFs: 2017/2018 planning and beyond</b> <b>Speaker: Jemma Sanderson TEP</b> <i>O'Sullivan Davies Lawyers, Perth</i></p>
<p><b>WED 11 July 2018</b> <b>NSW</b></p> <p><b>12:30pm to 1:30pm</b> Lunch and Learn Session <b>Financial Agreements</b> <b>Speaker: Carla Santo, Santo Family Lawyers</b> <i>Santo Family Lawyers, Level 21/133 Castlereagh Street, Sydney</i></p>	<p><b>WED 18 July 2018</b> <b>NSW</b></p> <p><b>5:30pm to 7pm</b> Seminar <b>Entitlement of Accounting Parties to Remuneration</b> <b>Speaker: The Honourable Justice Geoff Lindsay</b> <i>Banco Court, Supreme Court of NSW</i></p>	<p><b>MON 23 July 2018</b> <b>VIC</b></p> <p><b>5:30pm to 7pm</b> Members' Meeting <b>Tricks, Traps and Options when Valuing a Business</b> <b>Speakers: Daniel Aghion, Barrister; Rory Maguire, Russell Kennedy; Piera Murone, Pitcher Partners</b> <i>Equity Trustees, 575 Bourke Street, Melbourne</i></p>
<p><b>TUE 7 August 2018</b> <b>QLD</b></p> <p><b>12:30pm to 2pm</b> Lunchtime Seminar <b>Cy-près Schemes: A practical guide</b> <b>Speaker: Mr Robert Whiteford TEP</b> <i>Queensland Law Society, 179 Ann Street, Brisbane</i></p>	<p><b>WED 15 August 2018</b> <b>NSW</b></p> <p><b>5:30pm to 7pm</b> Seminar <b>The Australian Tax Pitfalls of Administering an Estate with International Connections</b> <b>Speaker: Ian Raspin TEP</b> <i>Banco Court, Supreme Court of NSW</i></p>	<p><b>MON 20 August 2018</b> <b>VIC</b></p> <p><b>5:30pm to 6:30pm</b> SIG – Estate Planning <b>Topic to be advised</b> <b>Chair: Daniel Kelliher TEP</b> <i>Septimus Jones and Lee, 5/99 William Street, Melbourne</i></p>

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](mailto:dior.locke@step.org)

Keep informed on upcoming STEP events online:

- STEP Australia events – [www.stepaustralia.com/events](http://www.stepaustralia.com/events)
- STEP Worldwide events – [www.step.org/events](http://www.step.org/events)

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

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COMMITTEE MEMBERS: DAVID GIBBS, ROB CUMMING, PAMELA SUTTOR,

CHRISTINA FLOURENTZOU, 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](mailto:dior.locke@step.org)