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Welcome to the seventh edition of the quarterly STEP Australia Newsletter.

At the STEP Australia Conference in Brisbane in May, the STEP Australia Board and Branch committee members had opportunities to meet and share information and ideas to enhance Branch activities and STEP member benefits. The Board continues to advance, among other things, the STEP Australia website; the Web Events platform offering videos of seminar presentations, increased engagement with sponsors and increased sponsorship; use of the STEP Australia LinkedIn page (www.linkedin.com/company/step-australia) for sharing information; the production of this newsletter; review of constitutional matters; and the creation of a number of sub-committees. The Board is pursuing initiatives for increasing membership and the value proposition to members, and for improved communication with Branch committees, and it works hard to ensure STEP in Australia is a well-respected professional body.

Through the policy sub-committee, STEP Australia made submissions to the Australian Taxation Office (ATO) that were considered in the development of Practical Compliance Guideline PCG 2019/5, issued 27 June 2019, providing clarity on when the ATO will extend the two-year deceased residence exemption from capital gains tax. Given our ageing society and the significant intergenerational wealth transfer that is occurring, STEP Australia welcomes this initiative of the ATO to simplify and clarify processes relating to deceased estates, providing bereaved families with reassurance and certainty at a difficult time. Should any members be interested in participating in sub-committees of STEP Australia, please contact me or your Branch Chair.

I am also pleased to invite you all to follow STEP Australia on our LinkedIn page at 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

With best wishes,
Mark Fatharly TEP,
STEP Australia Chair

Announcements

Congratulations to BNR Partners Pty Ltd for being announced as a global finalist in the Accountancy Team of the Year (midsize firm) category in the STEP Private Client Awards 2019/20. Read BNR Managing Director Ian Raspin’s reaction at bit.ly/2GBRqnc

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www.stepaustralia.com
Death benefit and reversionary income streams

Allan Swan TEP, Director,
Estate Planning Equation – Preventative Law

The creation of transfer balance caps in Division 294 of the federal Income Tax Assessment Act 1997 has created obstacles for many prospective recipients of Australian death benefit and reversionary income streams (i.e. superannuation pensions or annuities). The purpose of this article is to identify both the obstacles that have been created by Australian superannuation legislation and the potential ways forward.

TRANSFER BALANCE CAPS

Transfer balance caps apply whenever a superannuation income stream is to be commenced, whether that pension starts during the lifetime of a fund member or following the death of a fund member. For living fund members, the indexed cap (currently AUD1.6 million) is calculated by reference to the fund member’s ‘total superannuation balance’, including accumulation and income stream phase entitlements across all forms of Australian superannuation. Special rules relate to funds above AUD1.6 million that were already in accumulation phase in superannuation prior to 1 July 2017.

Income streams that follow the death of a fund member can only be paid if the recipient dependant of the fund member falls within the definition of dependant in subregulation 6.21(2A) of the federal Superannuation Industry (Supervision) Regulations 1994. Most commonly, such a dependant will be a ‘spouse’, as defined by s.10 of the federal Superannuation Industry (Supervision) Act 1993.

DEFINITIONS OF ‘DEPENDANT’

While most adult children do not fall within the definition of income stream ‘dependant’ in subregulation 6.21(2A), children of the deceased who have a significant disability within the terms of subsection 8(1) of the federal Disability Services Act 1986 are potential candidates for a death benefit or reversionary income stream. Such children are taxed as if they are at least 60 years of age, if the deceased fund member had attained that age prior to death.

It is important to distinguish the definition of income stream ‘dependant’ from two other definitions in the superannuation legislation, i.e.:

- a lump-sum ‘dependant’, including (as eligible recipients of death benefits lump sum) all children of a fund member, regardless of health; and
- a ‘death benefits dependant’, able to receive otherwise taxable lump-sum superannuation death benefits free of superannuation death benefits tax.

GRANDCHILDREN AS INCOME STREAM DEPENDANTS

Grandchildren may receive death benefit or reversionary income streams. To do so, they need to meet the requirements of financial dependency or interdependency.

Examples of grandchildren meeting either of those tests include grandchildren who resided with their grandparent at the time of death and grandchildren who were financially supported by their grandparent to a material degree, e.g. via the payment of tertiary education fees.

CREATION OF DEATH BENEFIT OR REVERSIONARY INCOME STREAMS

Income streams that follow the death of a fund member can be created in four ways:

- as the second stage of a reversionary income stream, where the reversionary nominee in the pension document survives the initial income stream recipient (reversionary income streams are not an option for a fund member to the extent that the fund member’s entitlements are held in accumulation phase); or
- as a result of a valid binding death benefit nomination made when the initial fund member, who may have been in either accumulation or income stream phase at the date of death, was living and had sufficient decision-making capacity to make such a nomination; or
- if permitted by a particular superannuation fund deed, as a result of a valid binding death benefit nomination made by a financial attorney or administrator; or, in the case of the many industry and retail funds that only permit...
three-year lapsing binding death benefit nominations, confirmed by the financial attorney or administrator; or
■ as a result of the trustee exercising their discretion to choose one or more income stream dependants to receive the deceased fund member’s entitlements.

The Australian Financial Complaints Authority can review the exercise of the trustee’s discretionary powers if the superannuation fund is an industry or retail fund. In addition, where the superannuation fund is subject to the laws of New South Wales, e.g. a self-managed superannuation fund holding real estate located in New South Wales, a fund member’s entitlements will fall into ‘notional estate’ for the purposes of deceased estate challenges, pursuant to the New South Wales Succession Act 2006.

EXAMPLES OF THE IMPACT OF THE TRANSFER BALANCE CAP

In all of the above alternatives, the transfer balance cap rules in Division 294 have the potential to limit or eliminate the commencement of a death benefits or reversionary income stream. The following three scenarios highlight the potential impact of the transfer balance cap:

■ A 79-year-old fund member dies with an income stream account balance of AUD800,000, and no other Australian superannuation. The income stream funds can remain in a transfer balance account for a period of up to 12 months (free of income tax). The fund member’s ‘spouse’ has existing income stream superannuation fund balances of AUD600,000 (as at the end of the 12-month period). At the end of the 12-month period, the income stream funds in the transfer balance account have increased to AUD850,000. The spouse is still able to commence a death benefits pension as the spouse’s income stream funds are less than AUD1.6 million at the commencement of the death benefits pension, i.e. the income stream funds are AUD850,000 + AUD600,000 = AUD1.45 million.

■ An 85-year-old fund member dies with an income stream account balance of AUD1.2 million and no other Australian superannuation. Again, the income stream funds can remain in a transfer balance account for a period of up to 12 months (free of income tax). The fund member’s spouse had existing income stream superannuation fund balances of AUD1 million when the fund member died. Prior to the end of the 12-month period, the income stream funds in the transfer balance account have increased to AUD1.3 million. The spouse’s existing funds have remained unchanged during the 12-month period. If the spouse rolls back AUD1.3 million of existing income stream superannuation entitlements into accumulation phase, they are still able to commence a death benefits pension as the spouse’s income stream funds will now be AUD300,000 + AUD1.3 million = AUD1.6 million.

■ A 91-year-old fund member dies with an income stream account balance of AUD1.6 million and an accumulation account balance of AUD2.4 million. Once again, the income stream funds can remain in a transfer balance account for a period of up to 12 months (free of income tax). The fund member’s spouse had existing income stream superannuation fund balances of AUD1.2 million when the fund member died, as well as an accumulation account balance of AUD1.8 million. Prior to the end of the 12-month period, the funds in the transfer balance account have increased to AUD1.7 million. The spouse’s existing funds have remained unchanged during the 12-month period.

If the spouse rolls back AUD1.6 million of existing income stream superannuation entitlements into accumulation phase, the spouse is still able to commence a death benefits pension as the spouse’s funds income stream funds equal AUD1.6 million at the commencement of the death benefits pension, i.e. the income stream funds will now be AUD0 + AUD1.6 million = AUD1.6 million.

CHALLENGES FOR LAWYERS

Traditionally, the preparation of estate-planning documentation was the responsibility of the legal profession, with lawyers having studied the laws of equity at university and many lawyers being well versed in the preparation of documents such as wills and powers of attorney. The field of superannuation, however, is a different world, with federal governments prone to changing the governing rules on a regular basis.

The challenge for lawyers is to accept that the expertise of other professionals such as accountants and financial advisors will often exceed their own – superannuation having been part of their university subjects and ongoing professional development. Lawyers need to develop and maintain sufficient expertise to be able to draft:

■ wills where lump-sum superannuation death benefits are paid into a deceased estate;

■ wills where lump-sum or income stream superannuation death benefits are paid directly to dependants – such payments may need to be adjusted for in the wills; and

■ binding death-benefit nominations where transfer balance caps may be exceeded, and the next best option is the payment of an income stream that may be either a payment into the deceased estate to fund a testamentary trust or a lump-sum payment to the surviving spouse.

1 See the Australian Taxation Office’s Law Companion Ruling LCR 2016/12 2 See regulation 6.22 of the federal Superannuation Industry (Supervision) Regulations 1994 3 s.302-195 of the federal Income Tax Assessment Act 1997 4 s.10 of the federal Superannuation Industry (Supervision) Act 1993 5 Payment of primary and secondary education fees do not serve to meet the dependency requirements where the grandchild’s parent, rather than grandparent, is liable for payment of the fees.
Introducing...

Anna Hacker TEP
National Manager, Australian Unity Trustees

Why did you become a STEP member?
As a junior lawyer, all of the most knowledgeable lawyers I worked with were STEP members. It seemed a natural step: if I wanted to be a succession-law lawyer, I should be a member.

What benefit does membership bring?
Instant recognition among colleagues and other practitioners that I am a specialised lawyer who deals with trusts and estates. It is so important to be part of a worldwide organisation that links so many knowledgeable practitioners from related professions together.

What is your most-used STEP resource?
The on-demand webinars; as a practitioner who has flexible working arrangements, I can access the best-quality educational materials from highly sought-after presenters when it suits me best.

Give us some insight into your expertise
When I was studying, I thought my future would be in human rights law. I had been heavily involved in volunteer work with asylum seekers, studying at the Freie Universitaet in Berlin and looking at the language of persecution based on translating 20 letters written by Jewish refugees escaping Vienna in 1938. When I started practising as a lawyer, I was drawn to succession law and thought human rights was behind me, until I began gaining experience as an elder-law lawyer. My passion for assisting those vulnerable people in our society means that I have a sense of purpose every single day I come to work.

What is the best advice you have ever been given?
‘That is the way we have always done things’ is one of the most dangerous sentences in the English language – I always strive for greater innovation and new ways of doing things.

What issues can you see STEP addressing in the future?
In Australia, I think STEP will continue to look at more opportunities for international collaboration with our overseas colleagues, given the multicultural background of Australia.

What inspired you to gain this expertise?
My background at Public Trustee NSW as an all-round advisor and litigator, and ultimately CEO, taught me how important family relationships are. I realised that hard conversations are needed to make family succession a positive experience. I guess I feel like I have seen it all, the good and the bad, but both motivate me to inspire families to become better where governance and succession are concerned.

What is your most memorable STEP event?
Delivering a paper on the complex trust structures for ‘Mining Benefits Trusts for Indigenous Communities’ and seeing the ‘what the heck?’ looks in the audience!

What is your ‘must read’ book?
I love true crime. I have just finished The Killer Across the Table by John Douglas and Mark Olshaker of Mindhunter fame.

Peter Whitehead TEP
Trustee and Family Succession Specialist, Myer Family Company

What does being a STEP member mean to you?
It provides me with an immediate network of multi-disciplinary practitioners, as well as an international forum to keep ahead of the game.

What is your most-used STEP resource?
Reading email updates and the STEP Journal is a constant activity, but the STEP Australia National Conference always has a lasting impact.

Give us some insight into your expertise
I work at a multi-family office where I specialise in ultra-high-net-worth intergenerational governance and succession. This gives me a complete understanding of what matters most for my clients: purpose of wealth, strategy, and how best to ensure families continue to be successful with their own stewardship and alliances with advisors or fiduciaries.

What is the best advice you have ever been given?
‘Listen and be creative, as clients don’t need commoditised solutions for what matters most to them.’

What issues can you see STEP addressing in the future?
Stronger international alliances. Next-gens are already global citizens.

What is your most memorable STEP event?
Delivering a paper on the complex trust structures for ‘Mining Benefits Trusts for Indigenous Communities’ and seeing the ‘what the heck?’ looks in the audience!

What is your ‘must read’ book?
I was going to say Jacobs’ Law of Trusts, but I prefer anything by Tim Winton.

Outside work, how do you relax?
Family holidays are a priority, but selfish painting time in the Kimberley region is very inspiring.
Hair of STEP Australia Mark Fatharly TEP has given a warm welcome to a new guideline on capital gains tax (CGT) for deceased estates announced in June by the Australian Taxation Office (ATO). Practical Compliance Guideline PCG 2019/5, issued on 27 June 2019, provides an executor (or beneficiary) of a deceased estate with clarity on when the ATO will extend the two-year period that exempts a deceased residence from CGT on sale where it cannot be sold and settled within two years of the deceased’s death.

Until now, executors or beneficiaries could disregard any capital gain or loss arising from the sale of the deceased’s main residence if the sale was settled within two years of the deceased’s death. This period could be extended at the Commissioner of Taxation’s discretion, which resulted in a number of applications for extensions, as many deceased estates exceed this two-year period.

The PCG further enables the executor or beneficiary to self-assess whether the CGT exemption can be extended by a ‘safe harbour’ provision by up to 18 months, providing greater certainty in an area that has caused confusion and concern.

To qualify for the ‘safe harbour provisions’, a number of conditions apply. These conditions include the stipulations that the property was either the deceased’s main residence and not used to produce assessable income, or the dwelling was acquired by the deceased before 20 September 1985, and subject to defined circumstances that it was not possible to sell and settle the property within two years of the death. The PCG also includes examples to illustrate how the safe harbour applies in various situations.

Mark noted: ‘We welcome this initiative from the ATO. This is an area of tax law that can still be rather subjective, and any move to simplify or clarify things is to be commended. It will provide welcome guidance to many executors and professional advisors on a very difficult issue. STEP Australia was pleased to have provided a submission to the ATO through its policy sub-committee on the draft guideline advocating for change.

‘Given the significant intergenerational wealth transfer that is occurring and our ageing society, we welcome all such initiatives to simplify and clarify processes relating to deceased estates, providing bereaved families with reassurance and certainty at a difficult time.’

PCG 2019/5 can be viewed at bit.ly/2Na7TDt
STEP AUSTRALIA WEB EVENTS

The STEP Australia Web Events platform (webevents.stepaustralia.com) features over 50 STEP presentations from around Australia. It enables you to view STEP branch seminars and presentations at your convenience – anytime, anywhere. All STEP members are entitled to a discounted price that is listed in the description for each web event. STEP Australia has several new web events available for you to view:

- **STEP Australia Conference 2019, ‘Trusts and Estates – Preparing for the next decade’, featuring the following presentations:**
  - Opening address by the Hon Chief Justice Catherine Holmes, Supreme Court of Queensland
  - ‘Mutual Wills – Will they still be relevant today?’ by the Hon Justice Rene Le Miere
  - ‘The Nature of a Trustee’s Indemnity’ by Dr Bernard Walrut TEP
  - ‘Same Same, But Different – Succession laws across Australia’ by the Hon Roslyn Atkinson AO TEP
  - ‘Valuation of Family Entities - What could possibly go wrong?’ by David Hughes
  - ‘Trusts at the Intersection of Tax and Criminal Laws: Unexplained wealth and the effective control of trusts’ by Prof John Glover
  - ‘An Update on Family Provision Claims in Victoria’ by Judicial Registrar Rene Le Miere
  - ‘Disclaimer of Testamentary Gifts’ by David Marks QC TEP
  - ‘Forgiveness of Debts by Will: A “bone” of contention’ by Judge Bernard Porter QC TEP
  - ‘Construction of Wills – Extrinsic evidence and the impact of Marley v Rawlings’ by Richard Williams TEP
  - ‘When the IRS’ Long Arm reaches Down Under’ by Marsha Dungog
  - ‘Fraud on a Power in a Modern Discretionary Trust’ by Carolyn Sparke QC TEP
  - ‘Removal Applications – Executors be gone’ by Dr Dan Morgan TEP

- **STEP Queensland Conference, featuring presentations by:**
  - Renee Bennett TEP
  - Peter Bobbin TEP
  - Justice Martin Daubney
  - Michael Klatt TEP
  - Jeff Otto TEP
  - Angela Rae
  - Angela Cornford Scott TEP
  - Rebecca Treston QC TEP

- **STEP Queensland intensive seminar on ‘Dealing with Superannuation Claims’, featuring:**
  - Debbie Robinson
  - Pam McAlistter
  - Terry Batch

- **STEP Western Australia Incapacity Conference, featuring ten presenters from the conference**

Plus more seminars from STEP branches around Australia. Visit webevents.stepaustralia.com to view them now.
STEP AUSTRALIA WEBSITE

TECHNICAL RESOURCES LIBRARY

Visit the STEP Australia website at www.stepaustralia.com
The website’s main feature for STEP members is the Technical Resources Library.

- New papers available:
  - ‘Construction of Wills and the Impact of Marley v Rawlings’ by Richard Williams TEP
  - ‘Removal of Executors – Is fault needed?’ by Dr Daniel Morgan TEP
  - ‘Trust Obligations’ by Dyson Heydon AC QC
  - ‘Fraud on a Power in Discretionary Trusts’ by Carolyn Sparke QC TEP
  - ‘Forgiveness of Debt by Will: A bone of contention’ by Judge Bernard Porter QC
  - ‘Update on Family Provision Claims in Victoria’ by Judicial Registrar Leonie Englefield
  - ‘Disclaimer of Testamentary Gifts’ by David Marks QC TEP
  - ‘Trusts at the Intersection of Tax and Criminal Laws: “Unexplained wealth orders” and the Proceeds of Crime Act 2002’ by Professor John Glover
  - ‘Valuations for Family Entities – What could possibly go wrong?’ by David Hughes
  - ‘Trustee’s Right of Indemnity’ by Bernard Walut TEP
  - ‘Mutual Wills: Are they still relevant today?’ by Justice Rene Le Miere

The Technical Resources Library is exclusively for STEP Australia members and provides you with speaker papers from all branches across Australia, policy submissions made by STEP Australia, and interactive PDF versions of each issue of the quarterly STEP Australia Newsletter. The STEP Australia website also features the events programme for the year, information on all the STEP branches within Australia and other information for STEP Australia members.

Contact Dior Locke at dior.locke@step.org if you are having issues logging into your member account.