

# STEP AUSTRALIA *NEWSLETTER*

## CONTENTS

- 02 WELCOME  
PETER BOBBIN TEP
- 03 *RE OWIES FAMILY TRUST*  
JIM O'DONNELL TEP
- 05 CASE NOTE: *RE GRAHAM (DECEASED)*  
ROB CUMMING
- 06 MEMBER PROFILE  
ASHLEIGH POOLE TEP
- 07 MEMBER PROFILE  
ANDREW DAVIES TEP
- 08 STEP AUSTRALIA  
EVENTS

NEWSLETTER SPONSOR



# WELCOME FROM STEP AUSTRALIA CHAIR

**W**elcome to the 14th edition of the quarterly *STEP Australia Newsletter*. As we reach the midpoint of 2021, STEP's presence in Australia is growing faster than ever before. This growth comes in the form of not only membership size but also, more importantly, recognition as the nation's professional leader in trust and estate planning. We intend to put STEP at the forefront of everybody's mind, fostering national awareness among families, professionals and legislators. It is an exciting time to be a part of STEP, and our evolution has only just begun.

I would like to sincerely encourage all of our members to take an active involvement in STEP's activities. If you have a passion to make a difference, no matter how large or small, STEP will provide you the opportunity to realise it. As a member of STEP, you can get involved with your local branch or at the national level through STEP Australia. Our members are fundamental to our success, and your contributions will meaningfully influence the way our organisation evolves into the future. To make your mark, do not hesitate to get in touch with your local branch committee or a STEP Australia Board member.

Furthermore, the upcoming national conference is an event no STEP member will want to miss. It is by far the pre-eminent conference of its kind in the country, featuring an international roster of expert speakers ranging from esteemed TEPs to the Chief Justice of Australia. Over 100 members and guests are expected to attend, making this a priceless networking opportunity, as well as an invaluable chance to learn from leading experts in trust and estate planning.

To find out more about the STEP Australia Conference 2021, visit [www.step.org/events/step-australia-conference-2021](http://www.step.org/events/step-australia-conference-2021)

## STEP Australia Newsletter Sub-Committee

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,

Peter Bobbin TEP,  
STEP Australia Chair



## STEP AUSTRALIA CONTACT INFORMATION

Australia	STEP Australia Board Chair Peter Bobbin TEP <a href="mailto:pbobbin@colemangreig.com.au">pbobbin@colemangreig.com.au</a> <a href="http://www.stepaustralia.com/about-us/step-australia-board">www.stepaustralia.com/about-us/step-australia-board</a>
NSW	STEP New South Wales Branch Chair Mark Streeter TEP <a href="mailto:mark@streeterlaw.com.au">mark@streeterlaw.com.au</a> <a href="http://www.stepaustralia.com/branch/step-new-south-wales">www.stepaustralia.com/branch/step-new-south-wales</a>
QLD	STEP Queensland Branch Chair Chris Herrald TEP <a href="mailto:cherrald@mullinslaw.com.au">cherrald@mullinslaw.com.au</a> <a href="http://www.stepaustralia.com/branch/step-queensland">www.stepaustralia.com/branch/step-queensland</a>
SA	STEP South Australia Branch Chair Richard Ross-Smith TEP <a href="mailto:rross-smith@anthonymasonchambers.com.au">rross-smith@anthonymasonchambers.com.au</a> <a href="http://www.stepaustralia.com/branch/step-south-australia">www.stepaustralia.com/branch/step-south-australia</a>
VIC	STEP Victoria Branch Co-Chairs Mercia Chapman TEP and David Gibbs TEP <a href="mailto:mchapman@eqt.com.au">mchapman@eqt.com.au</a> <a href="http://www.stepaustralia.com/branch/step-victoria">www.stepaustralia.com/branch/step-victoria</a>
WA	STEP Western Australia Branch Chair Jim O'Donnell TEP <a href="mailto:jodonnell@jacmac.com.au">jodonnell@jacmac.com.au</a> <a href="http://www.stepaustralia.com/branch/step-western-australia">www.stepaustralia.com/branch/step-western-australia</a>
TAS	STEP Tasmania Branch Secretary Gaylene Cunningham <a href="mailto:gcunningham@publictrustee.tas.gov.au">gcunningham@publictrustee.tas.gov.au</a> <a href="http://www.stepaustralia.com/branch/step-tasmania">www.stepaustralia.com/branch/step-tasmania</a>



# Genuine decision-making when exercising discretionary powers for family trusts, part 2

**JIM O'DONNELL TEP**, JACKSON McDONALD LAWYERS, AND SECRETARY, STEP AUSTRALIA

**A**n earlier edition of this newsletter<sup>1</sup> included an article I wrote on *Wareham v Marsella*.<sup>2</sup> That case centred on a decision by trustees of a self-managed super fund (SMSF) to pay benefits upon the death of a member when there was no binding death benefit nomination (BDBN).

A key lesson from that case was that care should be taken to ensure that SMSF trustees, in the absence of a BDBN, properly inform themselves and exercise their discretion in good faith, upon real and genuine consideration, and for the purposes for which that discretion was conferred.

To what extent can this principle apply to family trusts? With family trusts, there is typically a wide and sometimes open class of general beneficiaries. The trustee may decide not to distribute anything prior to the vesting day of the trust. That discretion is more akin to a general dispositive power.

My earlier article predicted that generally it would be more difficult, but not impossible, to apply the principles of genuine decision-making to family trusts in Australia, though it would more likely get a successful run in cases of conflict.

Time would tell. Hot on the heels of *Marsella*, Moore J at the Supreme Court of Victoria handed down a judgment in a case concerning a family trust on 28 October 2020.

## **RE OWIES FAMILY TRUST<sup>3</sup>**

This case involved a dispute between the children of Dr John Owies and Dr Eva Owies over the control of the Owies Family Trust (the trust) and the entitlement to the trust's substantial income over ten preceding income years (2010–2019).

Eva died in November 2018, two days before the proceeding commenced, at age 89. John died in January 2020, less than three weeks before the trial began, at age 96. They had three children – each being a primary beneficiary of the



trust. Two were the plaintiffs in the case (Paul and Deborah). The third (Michael) was the second defendant. JJE Nominees Pty Ltd (the trustee) was the first defendant.

Michael held one share and was appointed as a director of the trustee in November 2019. John attempted to appoint their solicitor of many years, Mr Sampson, as a director, in December 2017, but the validity of that appointment was in question.

The trust held major assets, including an apartment in South Yarra, where Deborah had lived since 1984 from age 26. Eva and John both had

substantial loan accounts in the trust.

From 2011–2018, the trustee distributed 40 per cent of the trust's income to John, 40 per cent to Michael and 20 per cent to Eva. They applied this formula based on the fact that Eva derived additional income from a large share portfolio in her name.

Despite being elderly and in aged care, with limited needs and very substantial personal assets, the 2019 income resolutions distributed all of the trust's income for that year (nearly AUD1 million) to John.

In contrast, Deborah, who was also a doctor, had limited income as a medical consultant who worked limited hours and had significant medical needs. She suffered from numerous medical conditions, causing her to be unwell for much of her adult life. In 2019, she was diagnosed with primary liver cancer and drug-induced hepatitis. She had little disposable income over the preceding 13 years.

Deborah was estranged from John from 1994 until about 2012. They had lunch a few times together in 2012. Deborah saw John in hospital in 2013. They did not have contact again until 2017, when John moved into care. In 2019, the trustee agreed to transfer the South Yarra apartment to Deborah; however, the transfer had still not been completed prior to trial. Since 2012, contact between Deborah and Michael was limited to when John was in hospital in 2013 and when Eva was in care in 2017. ►

*'Re Owies  
Family Trust ...  
confirms that  
real and genuine  
consideration  
principles can apply  
to family trusts'*

Paul worked in the financial industry in Australia and overseas for many years before purchasing a business in New South Wales, where he moved to in 2013. He had a close relationship with his parents until 2010, but became somewhat distant with Eva. He was always financially independent from them.

Paul discussed the affairs of the trust with his father at weekly lunches between 2010 and 2013. He had strong views about Michael and mistrusted him. Paul tried to become more involved in the administration of the trust but his requests were ignored. Paul renewed contact with John in 2016 after John went into care. He visited John at least ten times between November 2016 and May 2018. Paul saw Eva twice in 2017, the second time after discovering she had had a stroke.

## OUTCOME

This decision confirms that the trustee of a family trust does have a duty to give genuine consideration to the beneficiaries.

Whether a trustee has exercised real and genuine consideration is a matter of fact unique to each case.

The plaintiffs succeeded in arguing that the trustee failed to give genuine consideration to the beneficiaries when exercising its discretion to distribute income. They won this argument in respect of two of the ten years (2015 and 2016) by convincing the trial judge that the trustee failed in those years to make enquiries about their circumstances as beneficiaries at all.

The trial judge reasoned [at 339]:

*"... sub-cl 3(i) of the trust deed imposed a duty on the trustee to consider, each year, exercising its discretion in relation to the distribution of the trust's income. Despite this ... there is no evidence that the trustee received any information at all about either of Paul or Deborah's circumstances in 2015 or 2016 (or Deborah's circumstances in 2018). This is striking given that, because the trustee must be taken to have knowledge about John and Eva's circumstances by virtue of their positions as directors of the trustee, there were only three other potential objects of the exercise of the trustee's discretion. Although the trustee, through John and Eva, held knowledge about Paul and Deborah's circumstances at earlier periods, those circumstances could not be assumed to be unchanging. These matters, in conjunction with the fact that no enquiries were made of Paul or Deborah at any relevant time as to any need they might have for a distribution of income, support an inference that, in 2015 and 2016 (and in 2018 in relation to Deborah), the trustee did not take an informed view of whether or not to exercise its discretion in relation to the making of an income distribution to Deborah or Paul."*

The plaintiffs' 2010–2012 claims were statute barred. Regarding 2013–2019, the trial judge noted that the question

of whether the trustee failed to give real and genuine consideration to the making of distributions required a year-by-year assessment, not by reference to general conclusions about the trustee's decision-making over the period but to the information the trustee had when each distribution resolution was made.

This task was not straightforward. The knowledge that the trustee had at any particular time was the sum of the knowledge that it previously accrued. However, there were lengthy periods when there was no evidence that the trustee acquired any information about Deborah and Paul. The assessment was also made more difficult because of the inherent complexity of familial relations and the various indirect ways in which information may be conveyed in that setting.<sup>4</sup>

Oddly enough, differences in financial position and relative means or needs of each beneficiary did not seem to matter in years when the trustee had kept itself informed.

## IMPLICATIONS

The judgment in *Re Owies Family Trust* is instructive for Australian trust practitioners in several ways.

It confirms that real and genuine consideration principles can apply to family trusts.

Trustees of family trusts should properly inform themselves as to the circumstances of all family members who are beneficiaries of the trust and exercise their discretion to distribute income

and capital from a family trust in good faith, upon real and genuine consideration.

Although the judgment indicates that those principles can apply to family trusts, these can be difficult grounds to prove. The decision deals methodically with multiple years of income distributions on the question of genuine consideration of beneficiaries, and in doing so provides a helpful guide as to how and when a *Marsella* argument may be applied with success to a family trust.

The judgment also dissected various other trust arguments and issues, including the validity of a purported variation to the identity of guardians and appointors, and the court's power to remove guardians, appointors and the trustee. It also underlined the importance of trustees keeping good written records.<sup>5</sup>

The judgment, although lengthy, is worth reading. This case is a useful reference for practitioners when acting for beneficiaries or trustees.

It will be interesting to see more cases running this type of argument involving family trusts in other states. Victoria seems to have done all the heavy lifting so far. ■

*'This case is a useful  
reference for  
practitioners when  
acting for  
beneficiaries  
or trustees'*

<sup>1</sup> STEP Australia Newsletter, Issue 12, December 2020 <sup>2</sup> [2020] VSCA 92 <sup>3</sup> [2020] VSC 716 <sup>4</sup> [2020] VSC 716, at [311] to [345] <sup>5</sup> The trustee directors' failure to keep minutes for 2011, 2013, 2014 and 2016 meant that they had to try and adduce other evidence to prove the distribution decisions they had made. If those decisions could not be proven, then different beneficiaries (the primary beneficiaries – the takers in default) would have been entitled to the income of the trust for each of those years.



# A supervening charitable gift failure case

Case note: *Re Graham (deceased)* (2020) 3 QR 433

ROB CUMMING, BARRISTER AT LAW, 19 INNS CHAMBERS

Mr Graham made a will dividing his estate: half to the National Heart Foundation and half to the Stroke Association of Queensland (SAQ). When he made his will, SAQ was still in existence, as it was on his date of death. However, after his death, before the estate had been administered, SAQ ceased to exist. Although there was some association with the entity Synapse Australia Ltd (Synapse), and resolutions were passed for SAQ's winding up and for the transfer of assets and liabilities to Synapse, SAQ's registration as an incorporated association was cancelled after Mr Graham's death.

The estate, supported by Synapse, applied for the gift to SAQ to pass to Synapse on the basis it was the successor to SAQ. The Attorney-General of Queensland intervened and submitted that the evidence did not establish Synapse as the successor to SAQ and thus the court should apply the gift *cy-près*.

The history of SAQ was examined. SAQ was registered as an incorporated association in 1995 with its objects limited to matters to do with strokes, such as assisting stroke victims and their families. Synapse, on the other hand, had as its objects to assist people who had acquired brain injury from a range of conditions including, but not limited to, strokes. There was an association between the two entities in that there was some sharing of premises, and when SAQ was to be wound up its assets and liabilities were to pass to Synapse, but, in fact, what happened was that SAQ was deregistered.

Justice Bowskill looked closely at the evidence and had to determine whether, as a result of the interactions between SAQ and Synapse prior to SAQ's deregistration, the work and operations of SAQ could properly be said to have merged into, or amalgamated with, Synapse; such that SAQ continued to exist, for the purpose of the bequest, albeit in the form, and under the name, of Synapse.

Her Honour also highlighted the distinction between initial failure of charitable gifts such that, at death, the organisation is no longer in existence. Then, it was a question of determining if the gift was supported by a general



charitable intention, and if so, the gift would not lapse but could be applied *cy-près*. That is distinct from the situation of supervening failure whereby the gift has taken effect but, at some later stage, it cannot practically take place. In this case, the gift could have taken effect, in which case, if there was a successor entity, it would be unnecessary for a scheme as the gift under the will could be given effect. If not, it would be necessary to apply the gift *cy-près*.

Her Honour found that Synapse was not the successor to SAQ. Although there was some overlap between the work that had been done by SAQ,

with a focus on people with strokes and their families and the work of Synapse, the operations of Synapse were far broader. Second, properly construed, the deed of gift did not involve the transfer of the entire undertaking and work of SAQ, only identified assets. Third, although some of the work had been taken over by Synapse, for instance the provision of information kits, other aspects of SAQ's work, in particular the Stroke Support Groups, had been taken over by another entity, the National Stroke Foundation (NSF) after government funding to SAQ had been cut. Thus, the application was refused and the parties were directed to make submissions in respect to a distribution of the gift under the will *cy-près*.

In *Re Graham (deceased)* (No 2),<sup>1</sup> Justice Bowskill reviewed the submissions of Synapse, NSF and Stroke Recovery Trial Fund (SRTF) and what their particular objects and operations are. As a result, Her Honour distributed the gift 45 per cent to Synapse, 45 per cent to NSF and 10 per cent to SRTF.

The case is instructive on the issue of determining whether there is a successor entity in the case of the failure of a charitable gift. That requires determination of whether it

is initial failure or supervening failure. Moreover, it involves obtaining detailed evidence of the objects and undertakings of the entity named; how that translates through to the new organisation; whether the whole undertaking has been moved and it is merely a change of name; or whether, as in this case, there is not a true successor, in which case a *cy-près* application is required. ■

**‘The case is instructive on the issue of determining whether there is a successor entity in the case of the failure of a charitable gift’**

<sup>1</sup>[2020] QSC 168

# Introducing...

## Ashleigh Poole TEP

Partner, Thynne & Macartney

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

STEP is the premier professional association for trusts and estates practitioners. As a global organisation, it links members working in the trusts and estates space all over the world and has a strong reputation in Queensland. It was an obvious choice to become a member.

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

It means:

- being a part of a community where everyone else is also passionate about trusts and estates;
- having the opportunity to attend relevant events and meet like-minded professionals;
- attending high-quality educational offerings pitched at a specialist level; and
- connecting with trusts and estates practitioners from around the world.

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

The website and, in particular, the STEP Directory is one of the most-used resources for me. Multi-jurisdictional issues are quite common, and being able to locate professionals in other jurisdictions is really helpful.

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

I am a partner with over 11 years' experience in all areas of succession law: estate planning, estate administration and estate litigation. Since 2015, I have been a Queensland Law Society Accredited Specialist in Succession Law.

I work on complex estate-administration matters, estate and succession planning for high-net-worth individuals, estate and equity litigation, trusts and Queensland Civil and Administrative Tribunal matters. I am particularly interested in complex deceased estates and estate planning



where there is a risk of a challenge to the estate.

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

Landing a role in the mailroom of a specialist wills and estates firm while completing my tertiary studies introduced me to this area of law at an early stage. I quickly discovered that I love succession law and it suits my personality. Finding my niche early in my career has allowed me to focus on goals that relate to this area of law.

I have had some wonderful mentors throughout my career. Each of them has helped to shape my career in a positive way, and I am so grateful to them. An early mentor continues to be my role model and an inspiration to me.

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

There are so many tips I have received along my career journey that have helped me, including:

- Treat your client the way you would want a lawyer to treat a member of your family.
- Spend the time to build rapport with your clients.
- Strive to be your client's 'trusted advisor'.

- Relationships with referrers are so important. Spend the time to build and maintain those relationships.
- Learn from your mistakes.
- Be a nice person: clients and referrers will want to deal with you if you are (and they will tell other people you are a nice person to deal with and a good lawyer).

### WHAT ISSUES CAN YOU SEE STEP ADDRESSING IN THE FUTURE?

Building the STEP brand across Australia, which I understand is a focus for 2021, will be a positive development. Internationally, it will be important to learn from STEP branches in other countries about the issues they have faced during the COVID-19 pandemic and the initiatives and policies that governments have implemented in response to it, with respect to trusts and estates.

### WHAT IS YOUR MOST MEMORABLE STEP EVENT?

The STEP Queensland Annual Conference is my favourite event. It is the perfect combination of networking and learning, with high-calibre speakers. The STEP community is a collegiate group of professionals, and I really feel this when I attend the conference.

### WHAT 'MUST READ' BOOK WOULD YOU RECOMMEND?

*Lean In: Women, Work and the Will to Lead* by Sheryl Sandberg. The title says it all. For some lighter reading, I also love the Don Tillman series by Graeme Simsion.

### OUTSIDE OF THE OFFICE, WHAT DO YOU LOOK FORWARD TO?

Spending time with my young boys, watching them grow and seeing their interests and passions develop. I also look forward to my Monday night netball games and getting to the gym for a bit of 'me time' when I can. ■

**MEMBER PROFILE**

# Introducing...

## Andrew Davies TEP

Partner, O'Sullivan Davies Lawyers

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

Adam Levin approached me at the time the Western Australia Chapter was being established. He spoke about the benefits to lawyers, accountants and other advisors involved with trusts and estate planning and extending to family law. I agreed that it was a good initiative.

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

The ability to have up-to-date information about important developments concerning trusts, estate planning, tax and its impact on family law.

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

The presentations, papers and the *STEP Journal*.

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

I am an accredited specialist family lawyer and accredited family law mediator and arbitrator with over 40 years' experience in this area.

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

Working with families in dispute and the need for me to develop a high skill level in



*'You have two ears and one mouth for a reason. Listening is really important'*

this area, due to the complex ways families structure their affairs. STEP has helped with this building of expertise.

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

You have two ears and one mouth for a reason. Listening is really important.

### WHAT ISSUES CAN YOU SEE STEP ADDRESSING IN THE FUTURE?

Continuing the important function of providing ongoing professional development for advisors on the importance of trust and estate planning and helping families in the future.

### WHAT IS YOUR MOST MEMORABLE STEP EVENT?

Last year, when I was presented with my ten-year membership badge.

### WHAT 'MUST READ' BOOK WOULD YOU RECOMMEND?

Everyone should have a copy of *Brilliant Bread* by James Morton – it's great and, to use a quote from the author, 'you'll never feel quite right buying bread again'.

### WHAT DO YOU LOOK FORWARD TO OUTSIDE OF THE OFFICE?

Enjoying the wonderful boating opportunities on Perth Coastal Waters, Rottnest and up and down the coast. ■

## ADVOCACY: We want to hear from you!

*Do you have a burning policy issue that needs to be given the voice of STEP?  
STEP members, we want to hear from you!*

*We welcome your input, thoughts and feedback on policy issues you would like to see STEP involved in.*

### GET IN TOUCH...

Philip Davis TEP  
STEP Australia Policy Committee Chair

🌐 [www.stepaustralia.com](http://www.stepaustralia.com)  
✉ [stepaustralia@step.org](mailto:stepaustralia@step.org)

**STEP**   
ADVISING FAMILIES ACROSS GENERATIONS



## MEMBER EVENTS

**Head over to view the latest STEP Presentations available on Webinar!**

**WEBEVENTS.STEPAUSTRALIA.COM**

“

STEP is the global professional association for practitioners who specialise in family inheritance and succession planning

**STEP**  
ADVISING FAMILIES ACROSS GENERATIONS

## STEP AUSTRALIA WEB EVENTS

Visit [webevents.stepaustralia.com](https://webevents.stepaustralia.com) to view the latest web events.

## STEP AUSTRALIA TECHNICAL RESOURCE LIBRARY

Contact [dior.locke@step.org](mailto:dior.locke@step.org) if you are having issues logging into your member account.

**STEP AUSTRALIA TECHNICAL RESOURCE LIBRARY**

*Head over to read the latest Papers, Policy Submissions and Australian Newsletter.*

**STEP**  
ADVISING FAMILIES ACROSS GENERATIONS

[stepaustralia.com/technical-resources-library](https://stepaustralia.com/technical-resources-library)

## SEE MORE ON EVENTS AND KEEP UP-TO-DATE

Keep informed on upcoming STEP events via the following links:

STEP AUSTRALIA EVENTS: [stepaustralia.com/events](https://stepaustralia.com/events)

STEP EVENTS: [www.step.org/events](https://www.step.org/events)

We welcome all STEP members to attend events hosted by other branches. For more information, or to register your interest to be a speaker at STEP Australia events, email [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 WEBSITE: [www.stepaustralia.com](https://www.stepaustralia.com)

STEP WEBSITE: [www.step.org](https://www.step.org)

## STEP AUSTRALIA NEWSLETTER SUB-COMMITTEE

CHAIR: ANDREA OLSSON COMMITTEE MEMBERS: RACHAEL GRABOVIC, DAVID GIBBS, ROB CUMMING, JONATHAN HAEUSLER, ROD JONES

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)