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QUARTERLY NEWSLETTER

STEP AUSTRALIA NEWSLETTER

CONTENTS

STEP Australia
ADVISING FAMILIES ACROSS GENERATIONS

WELCOME
FROM STEP AUSTRALIA CHAIR

Welcome to the 16th edition of the quarterly *STEP Australia Newsletter*. The year 2021 has been one of great challenges and greater progress. As an organisation, we have battled through the stifling influence of the COVID-19 pandemic and continued to progress towards a shared vision – STEP Australia as the definitive voice in trusts and estates across the nation.

The challenges faced this year have been significant. Restrictions in New South Wales led to the postponement of our much-anticipated national conference, many in-person events had to be cancelled and the connection between our members was tested through the necessity of social distancing. In the face of these numerous challenges, I am proud to say STEP Australia and its members have excelled in adapting to the tumultuous environment brought on by COVID-19. We have hosted countless online events with great attendance and reception, strengthened our relationships with adjacent organisations through collaboration and mutual sponsorship, and made great strides towards bringing STEP to the forefront of people's minds through our advocacy and promotional efforts.

As the nation begins on its path to reopening, we can look forward to a new year of propitious opportunities. Enthusiasm for the upcoming national conference could not be higher, and the greater-capacity conference will be another landmark event for STEP Australia. All the while, we have steadfastly fought to protect families through our advocacy and continued our membership growth initiative in full force. The future of STEP is looking brighter than ever.

I encourage all members of STEP Australia to get involved at the local, branch or national level. If you have the drive to make a positive impact, rest assured you will have the chance to make it. Get in touch with your branch committee or a STEP Australia Board member today.

With best wishes,
Peter Bobbin TEP,
STEP Australia Chair

STEP AUSTRALIA CONTACT INFORMATION

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Collaborative practice:
A new advocacy in the face of a perfect storm

ZINTA HARRIS TEP, FOUNDER, RESOLVE ESTATE LAW

Australia is at the beginning of an intergenerational wealth transfer tsunami, with an estimated AUD3.5 trillion to be transferred from baby boomers to younger Australians in the next 20 years.

Recent surveys[1] indicate that a majority of Australians still do not have a will in place, and over half who are parents have not discussed their succession plan with their children.

Reading these statistics together with court data, showing a significant increase in contested estate matters over the past decade, makes it clear that estates professionals and courts alike are facing a perfect storm.

SOUND THE TSUNAMI WARNING

Courts and registries around the country are already innovating and adapting, particularly for disputes involving further provision claims. Solutions range from compulsory mediations before trial dates are set (or before affidavit materials are filed) to dedicated wills and estates lists and judicial settlement conferences. All are crucial in the quest to settle matters.

But the stories behind the 85 per cent success rate settlement statistics, more often than not, speak of forever-broken family relationships and family business casualties when 'commercial settlements' are made under the pressure of mounting legal costs. These settlements do not bring resolution, they just stop court processes.

Estate planning professionals work hard crafting plans to distribute their clients' wealth in accordance with their wishes, while balancing lofty goals like 'fairness', 'asset protection' and 'tax effectiveness'. Some recommend that the plan be explained to the family after completion, but only the brave consider actively involving those who might benefit (let alone those who might not) in a pre-death family succession facilitation. The thought of holding such discussions strikes fear into the heart of clients, let alone their lawyers who feel ill-equipped to manage these difficult (yet important) conversations.

Post-death, the almost universal response in contested matters is to file proceedings, sometimes with the hope that early settlement or mediation will resolve the matter to avoid a trial. But sometimes, 'principles' and the quest for a 'win' mean a court must decide. But the win always comes at a cost both human and financial. And if the matter attracts unwanted media attention, clients learn the hard way that their private family war is not private at all.

Twenty years ago, mediation was considered a 'novel' approach, but now it is a normal part of the litigation process. Many of these mediations are, however, late-stage mediations held only after an acrimonious exchange of positioned affidavits and correspondence. By the time they are held, the damage to the family relationships has been done. Mediators 'shuttle' between rooms of parties no longer communicating to resolve the dispute on a commercial basis. After a long day, parties are exhausted by the 'horse trading' and bewildered by the process. Many experience settlement remorse when reflecting on the compromises they have made.

Lawyers are trained to put their blinkers on to see only the legal issues and the evidence, but this necessarily means that the impacts of grief on family members are treated as 'irrelevant'. Yet clients present angry, in denial, depressed and sad – often incapable of making good, rational decisions for themselves and their futures.

Assets are valued only for their monetary worth. Their intrinsic value (to provide continuity or financial stability) or sentimental value is not recognised. Family values, unique family structures and cultural nuances are not discussed, because the focus is on likely percentage outcomes based on the case precedent lens lawyers are trained to look through.

BROADENING THE HORIZON

Consider the anecdote about the 18th camel.

When their father passed away owning only 17 camels, three sons read his will. The will had been made according to the custom of the land and stated that the eldest son should get half, the middle son one-third and the youngest son one-ninth. Because it was not possible to divide 17 by two, three or nine, the sons started to argue. So, they decided to visit a wise old woman.

The wise woman listened patiently and, after giving the matter thought, she gave them her only camel and told them to distribute the 18 camels according to their father's will. With 18 camels, the eldest son ►

> 'Sometimes, "principles" and the quest for a "win" mean a court must decide. But the win always comes at a cost both human and financial'

entitled to half took his nine camels, the middle son entitled to one-third took his six camels and the youngest son entitled to one-ninth took his two camels. But this totalled only 17, so the extra camel was returned to the wise old woman!

A NEW MODEL FOR WILLS AND ESTATES ADVOCACY?

It is time we looked for ways to add the 18th camel to the negotiation, to broaden out the discussion to include the things that actually matter to the humans involved in the conflict.

Collaborative practice does just this, in a way that has the potential to preserve family relationships when used to resolve disputes post-death, and to prevent disputes over inheritance arising in the first place when applied in the planning context pre-death.

HOW?

By offering families a bespoke alternative to litigation, where they control the process, reaching confidential resolutions that address both legal and non-legal issues. By scaffolding families early with a team of collaboratively trained professionals – lawyers for each party, a mutual financial neutral and a communications coach (skilled in social sciences/mediation) – who work together rather than in opposition to support the parties in the process.

The collaborative team and their clients contract together by signing a participation agreement to work in a respectful, dignified, problem-solving manner to negotiate in good faith on all issues that concern all clients.

The parties disclose all relevant information (about the estate and each other's circumstances) transparently. The mutual financial neutral then helps synthesise that data so that parties make fully informed decisions about the impact the inheritance might have on their futures. Clients and professionals brainstorm together to find solutions that advantage all or disadvantage none – the proverbial 'win/win'. The value brought and time saved by the convergence of problem-solving intellect is undeniable.

The process can be will maker-funded (pre-death) or agreed to be jointly funded or estate-funded so that financial stressors often in play in litigation are eliminated. Although not 'cheap', it costs less than litigation.

This model is much more than working collaboratively or collegiately with opposing lawyers to reach a lawyer-assisted settlement within the litigation framework. It is a procedurally non-adversarial model based in interest-based negotiation theory (rather than adversarial bargaining).

The central participation agreement is a contract not to litigate. It fundamentally changes the way in which the professional team operates, particularly in the post-death setting. Not in a 'without prejudice' tactical way, with one eye on the court door, but with the sole purpose to help the parties reach resolution without a court contest. If they do not, the professional team must withdraw.

> 'This is not a new or novel model, rather an established one newly applied in the (slightly more complex) succession law arena'

Unlike a lawyer-negotiated settlement, the control lies with the clients to reach settlement within the parameters of the law but on their terms. Unlike mediation, the pressure to reach settlement does not lie with the mediator over one day, but with a trained team of professionals over a series of meetings timetabled to suit the family's needs – not deadlines set by courts and statutes.

Those who have seen it operate attest to the power of the model.

That said, the process is not for every family and not for every dispute. The process requires not only the commitment, skills and emotional intelligence of the professional team but also of each family member. It requires trust, transparency, constructive communication and an ability to see things from another person's perspective.

The team must possess not only a high level of professional skills but also advanced skills in dispute analysis, negotiation preparation and strategising; high-level people skills; and an understanding of both conflict dynamics and conflict management.

It is a new form of advocacy – designed to bring climate change.

ESTABLISHED MODEL, NEW CONTEXT

With all 'new' ideas, there is inevitably resistance. However, this is not a new or novel model, rather an established one newly applied in the (slightly more complex) succession law arena.

Stuart Webb developed collaborative law as an out-of-court dispute resolution model for family law matters in the US in 1999. The enactment of the *Uniform Collaborative Law Act* in 2010 normalised collaborative law as accepted legal practice in the US.

Its acceptance in Australia since 2005 was solidified with the Law Council of Australia releasing ethical guidelines for its practice in the family law context in 2011 and several law societies around the country doing the same.

Its application in the wills and estates context began with practice groups in the US developing the model in pre-death and post-death contexts in 2017. Australian models developed in 2018 are now applied in Queensland, New South Wales, Western Australia and Victoria, with 60 professionals (lawyers, financial professionals and communications coaches) now trained in the models for wills and estates.

GETTING TO HIGHER GROUND

Professionals working in the succession law arena know that litigation is 'too costly, too painful, too destructive, and too inefficient for a truly civilized people'.[2] The climate is changing. The demand for out-of-court resolution options like those offered in collaborative practice has never been higher. The tsunami siren is ringing. It is time to look for ways to get to higher ground. ■

1 Perpetual's Client Insight and Analytics annual *What do you care about: The personal edition*, surveying over 3,000 Australians annually. **2** Former Chief Justice of the US Supreme Court Warren E. Burger.

Gift and loan back strategies: *Re Permewan*

NOUR HARB, ASSOCIATE, TINDALL GASK BENTLEY LAWYERS

'Gift and loan back' transactions hold benefits for individuals with occupational or bankruptcy risk, minimising their personal asset pool with the intended effect of circumventing creditors. The scheme can also be implemented as a tactic within offensive estate planning, as it acts as an obstacle, and therefore deterrent, to potential inheritance challenges.

Recently, the Supreme Court of Queensland (the Court) in *Re Permewan*[1] had cause to consider whether an executor's failure to consider investigating the validity of the deceased's gift and loan back transactions was grounds for his removal.

BACKGROUND

Prudence Permewan died in September 2019, leaving three adult children: Donna, Scott and Marla. The deceased's last will:

- appointed her son, Scott, as the executor and trustee;
- gifted her shares in Zalerina Pty Ltd to Scott; and
- gave the rest of her estate to the Lotus Trust,[2] which was the discretionary family trust.

In April 2018, the deceased gifted the sum of AUD3 million to the Lotus Trust by way of promissory note. The Lotus Trust then loaned that amount by way of loan agreement. The Lotus Trust secured the loan by registering a mortgage over the deceased's home and a charge over her shares in Orion Investments Pty Ltd (the Transactions).

Neither the deceased nor the Lotus Trust had AUD3 million in available funds to gift or loan. Furthermore, no assets were liquidated to perfect the Transactions and no money was ever exchanged.

The effect of the Transactions was twofold. First, they completely diminished the deceased's assets; and second, the deceased's estate now owed a significant debt to the Lotus Trust. A claim for further provision brought by the excluded children would therefore be futile. In other words, the entirety of the deceased's wealth was effectively transferred to Scott or to Zalerina, as trustee of the Lotus Trust, which Scott controls.

The applicant submitted that the personal interests of the executor conflicted so greatly with the interests of the estate that the executor could not impartially investigate the validity of the Transactions, which were effectively for his benefit.

In a colourfully worded judgment, the Honourable Justice Davis set out his considerations, which enlivened the Court's jurisdiction over an asserted conflict of interest and the discretion to order the removal of an executor.

In the course of the hearing, the respondent asserted that a conflict of interest is not, of itself, sufficient to warrant removal[3] and that the executor, to date, had otherwise acted properly to administer the estate in accordance with the will.[4]

Davis J rejected this argument because it was not the correct question that required determination on the application before him. Rather, the proper question was whether, based on the facts and circumstances of the case, the executor ought to be considering investigating the Transactions.[5] This difference is important, and the answer in this particular case was 'yes'.

The next question was whether the executor would consider investigating the validity of the transfers. Davis J found that the only inference open on the evidence before him was that Scott had 'no intention to consider, let alone act, on any issue as to [the Transactions'] enforceability'[6] from Scott's failure to tender any evidence at the hearing to that effect.

In support of the applicant's case, a recorded telephone conversation between Marla and Scott was put before Davis J that 'did not inspire confidence that he will act honestly and in accordance with his obligations'[7] as executor. Unsurprisingly, Scott initially objected to admission of the phone recording. An interesting comment was made by Davis J in relation to the objection, being whether Scott should even be objecting to the admission of evidence that may advance the position of the estate over his own,[8] which only furthered the position of the applicant. Although Davis J did not finally decide this point, it further illustrates the position of 'hopeless'[9] conflict that the executor in this matter found himself in.

In the result, Davis J found that Scott was incapable of putting the estate's interests before his own and ordered he be removed as executor and an independent administrator be appointed.

Ultimately, through a concession by the counsel for the respondent, Davis J took the view that the Transactions appeared to have no commercial purpose and were engineered to circumvent the deceased's estate and defeat claims pursuant to family provision laws.[10]

The Court is yet to examine the validity of the *inter vivos* transactions should the substantive hearing proceed. Estate practitioners await the judgment on the substantive question with interest, as the enforceability of such transactions, in circumstances where the actual transfer of funds does not occur, is an area of uncertainty for circumventing claims on an estate. ■

1 [2021] QSC 151 **2** Relevantly, Zalerina Pty Ltd is the trustee of the Lotus Trust. **3** Above, note 1, [40] **4** *Ibid*, [41] **5** *Ibid*, [44] **6** *Ibid*, [51] **7** *Ibid*, [34] **8** *Ibid*, [32] **9** *Ibid*, [45] **10** *Ibid*, [24]

MEMBER PROFILES

Introducing...

David Barber TEP

Senior Advisor, State Trustees

WHY DID YOU BECOME A STEP MEMBER?

I came to the trustee industry 30 years ago and, although responsible for information systems, I needed to understand estates, trusts, attorneyships and other roles state trustees are responsible for. I learned a lot from the Executor and Trustee Institute and Trustee Companies Association courses. After those bodies finished, I came across STEP and have been a member ever since.

WHAT DOES BEING A STEP MEMBER MEAN TO YOU?

It's being part of a group of professionals who use financial structures and genuinely useful law for the protection and benefit of clients. A lot of my work involves finding ways to use tools, like trusts, to help people with modest means make the most of what they have and look after their loved ones. STEP allows me insights I would never otherwise encounter and builds knowledge that I can apply when it fits.

WHAT IS YOUR MOST-USED STEP RESOURCE?

Certainly, the network of other members whom I know, respect and can call upon for thoughts and referrals is first to mind. The presentations and Special Interest Groups always inject food for thought into my work.

GIVE US SOME INSIGHT INTO YOUR EXPERTISE

Starting in an IT and taxation role, I became interested in trusts (as a beneficiary of a compensation trust and a recipient of a testamentary scholarship) and gained understanding of their use and operation. This led me to work directly with trusts on a larger scale (we operated about 4,000 trusts at one time), including certain commercial and government trusts. Now I have expanded into deceased estates and trusts in wills and elements of estate planning.

I apply what I have learnt to assist colleagues and clients in ways that primarily involve disability, estates and trusts. I have had particular involvement in Special Disability Trusts and how they can be incorporated for the financial security of a family.

WHAT INSPIRED YOU TO GAIN THE EXPERTISE YOU HAVE TODAY?

Many years ago, I administered a small trust from the 1950s for a man who had been injured in the workplace. Workmates and others contributed funds for his funeral. However, he survived, severely disabled and cared for by his family. The money was placed in trust and it paid many personal expenses over the years – especially his annual Victorian Football League, now the Australian Football League, membership. In days of high earnings and low costs, the trust continued on and on. Finally, the money ran out. He handed me a note of thanks – to me and others he remembered, but names that I only knew from the file history – for looking after his funds for so long.

From this, I saw how so much can be delivered from a little, if planned properly and carried out well. This inspires me to keep learning and helping.

WHAT IS THE BEST ADVICE YOU HAVE EVER BEEN GIVEN?

Wills, deeds, settlements, agreements: read and re-read. The number of times something is overlooked, forgotten or open to interpretation is surprising.

> 'STEP Australia should continue efforts to unify state differences in legislation. Australia is too small by population and too challenged by distance to have the disparities we do'

In life, it's 'their perception is their reality'. It matters little what you think of yourself if others think differently based on encounters with you. The challenge is to have others see the 'you' that you hope they experience.

WHAT ISSUES CAN YOU SEE STEP ADDRESSING IN THE FUTURE?

STEP Australia should continue efforts to unify state differences in legislation. Australia is too small by population and too challenged by distance to have the disparities we do.

WHAT IS YOUR MOST MEMORABLE STEP EVENT?

Unexpectedly attending a STEP meeting in London and seeing so many similar issues and needs. The hospitality was appreciated. I don't recall if I got back to my lodgings by tube, taxi or bus!

WHAT IS YOUR 'MUST READ' BOOK?

Professionally, *Jacobs' Law of Trusts in Australia*. For recreational reading, *A Tale of Two Cities* by Charles Dickens.

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

The joy of my family and grandsons. Watching my daughter play football and have the team success she contributes to is terrific. And nothing beats a weekend road trip to a market and a fresh egg and bacon roll with friends. ■

Rachael Grabovic TEP

Partner, Rigby Cooke Lawyers

WHY DID YOU BECOME A STEP MEMBER?

I had been specialising in the area of wills and estates for a number of years and wanted to grow my network with like-minded people. I also saw STEP as a fountain of knowledge, somewhere I could go and seek the opinions of experienced colleagues from different professions.

WHAT DOES BEING A STEP MEMBER MEAN TO YOU?

It is a privilege. It is about being part of a worldwide community of professionals.

WHAT IS YOUR MOST-USED STEP RESOURCE?

The members. The membership is STEP's greatest resource and this is demonstrated regularly through the presentations members deliver and the articles written for the various newsletters.

GIVE US SOME INSIGHT INTO YOUR EXPERTISE

I have practised in the area of wills, trusts and estates exclusively for 18 years. I am an accredited Wills and Estates Specialist, and I have a particular interest in trusts and estate planning. Although I also litigate, my preference is to focus on the planning and implementation side, to mitigate against future disputes.

WHAT MOTIVATED YOU TO GAIN THE EXPERTISE YOU HAVE TODAY?

While completing my practical training course at Leo Cussen, I was introduced to the practical side of trusts and wills. It was the tax planning and structuring element that captivated me – how the drafting of these documents could either create great opportunities or close doors. The idea of drafting documents that controlled outcomes and solved clients' concerns was enticing. I wanted to make a positive difference, empowering people with the knowledge and ability to fulfil their objectives.

WHAT IS THE BEST ADVICE YOU HAVE BEEN GIVEN?

Don't be scared to ask questions.

WHAT ISSUES CAN YOU SEE STEP ADDRESSING IN THE FUTURE?

I would like to see STEP at the forefront of policymaking in this space. Recently, STEP has made great headway in the area of taxation as it effects trusts and estates. I think we will see STEP become a leader in policy change.

WHAT IS YOUR MOST MEMORABLE STEP EVENT?

A STEP Australia Conference in Melbourne, at a dinner where Dylan Alcott (an Australian Paralympian) spoke. It was quite inspiring.

WHAT IS YOUR 'MUST READ' BOOK?

An oldie but a goodie: *Pride and Prejudice* by Jane Austen.

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

Catching up with friends and family – but if it is a long stint out of the office, far-away holidays on soft white sand with turquoise waters. ■

ADVOCACY UPDATE

The STEP Australia Policy Committee has continued to be an active and vigilant voice in trust and estate policy, making numerous submissions protecting and advocating for policy supporting Australian families in recent months.

Most recently, a substantial submission was made to the Foreign Investment Review Board (FIRB) regarding the recent amendments to regulations on foreign investment, which have the potential to affect millions of Australians.

To read more about this submission and its impact, read the press release at **www.stepaustralia.com/wp-content/uploads/2021/10/FIRB-Press-Release-Final.pdf**

View the full catalogue of submissions made by the STEP Australia Policy Committee at **www.stepaustralia.com/advocacy-and-policy-submissions-in-australia**

Meet the STEP Australia Advocacy Committee

STEP EVENTS

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...

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STEP
ADVISING FAMILIES ACROSS GENERATIONS

ONLINE RESOURCES

STEP AUSTRALIA EVENTS PROGRAMME

View the full events programme at
www.stepaustralia.com/events

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**

SEE MORE ON EVENTS AND KEEP UP-TO-DATE

Keep informed on upcoming STEP events via the following links:

STEP AUSTRALIA EVENTS PROGRAMME:
www.stepaustralia.com/events

STEP EVENTS: **www.step.org/events**

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

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

STEP AUSTRALIA WEBSITE: **www.stepaustralia.com**
STEP WEBSITE: **www.step.org**

STEP AUSTRALIA WEBSITE

The STEP Australia website has recently undergone a site-wide redesign, which brings a revitalised, modern aesthetic to the STEP brand.

On our upgraded site, you will find many new pages, member functions and publicly displayed content, including advocacy, events, conferences, industry news, webinars on demand, national newsletters, the members' Technical Resource Library and international connections.

www.stepaustralia.com