STEP AUSTRALIA NEWSLETTER

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WELCOME BRYAN MITCHELL TEP

WELCOM FROM STEP AUSTRALIA CHAIR

elcome to another amazing edition of the quarterly STEP Australia Newsletter. I wish to thank the Newsletter Sub-Committee for its work and Andrea Olsson TEP for chairing it.

It is an honour and a privilege to have been appointed as Chair of STEP Australia, and I am looking forward to serving in that role to the best of my ability. Our immediate past Chair, Peter Bobbin TEP, in his leadership, has done an inspiring job and I look forward to building on his fine work in looking for ways to add value to STEP members here in Australia.

STEP Australia is the regional voice of STEP in Australia. Through the activities of the board of STEP Australia and its national committees, there is a common desire to enhance and support the state branches of STEP in Australia. My vision for this year is one of growth: in membership, member engagement, STEP activities and the brand.

I wish to applaud and encourage the members of the various state branch committees. It is through your hard work that local members of STEP find most opportunities to network, learn and volunteer.

By the time this new sletter is published, the STEP Australia $\,$ National Mentorship Programme will have begun. This year sees the launch of the pilot programme, under which roughly 15 mentors will engage in mentoring 15 mentees. I wish to thank the College of Law for its sponsorship of this programme, which will assist in funding the structured training to be provided by Art of Mentoring. Only STEP members may participate in this programme - yet another reason to become a STEP member. I wish to thank Ashleigh Poole TEP, Chair of the organising committee, and the committee members for their hard work in birthing this programme. I also wish to thank those who have volunteered to be mentors. It is very generous of you.

Though the year has only just begun, I have already borne witness to the nimble and thoughtful contributions of the National Advocacy Committee, through its Chair Danielle Bechelet and committee members. Advocacy is a powerful means by which STEP is able to speak out for the sake of good law and good policy, for the betterment of its membership and the community more broadly.

There are many ways you can get involved in STEP in Australia. Here are a few:

- Reach out to your branch Chair/committee.
- Advocacy: our National Advocacy Committee would love to hear from you.
- Newsletter: contribute to this publication.

Enjoy reading the newsletter,

Bryan Mitchell TEP, STEP Australia Chair





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RECTIFICATION ROB CUMMING TEP

What law applies in rectification cases with assets in two states?

Case note: Kay v Miller [2021] QSC 185

ROB CUMMING TEP. BARRISTER AT LAW. 19 INNS CHAMBERS

regory Miller and his partner, Jocelyn Villaneuva, made mirror wills in February 2010 in New South Wales (NSW), where they both then resided. However, they owned property in both NSW and Queensland (Qld).

Tragically, both Miller and Villaneuva died in a helicopter crash in 2019. Villaneuva's remains were not recovered. Despite extensive investigations, it had not been possible to decide affirmatively which of the two had died first. At their deaths, Miller was aged 39 and Villaneuva was aged 50.

Under Miller's will, in clause 2, he appointed Villaneuva as his executor. Clause 3 distributed his whole estate, the majority going to Villaneuva, with other parts going to his family members. Clause 4 provided that if 'my said de facto partner does not survive me then I declare that the following provisions of this my Will shall take effect in lieu of the provisions of Clause 2 hereof'.

Clause 5 appointed Miller's mother (the applicant) as executor. Clause 6 then distributed the whole of his estate predominantly to the applicant, but again with parts going to his family members, including his father (the respondent).

The applicant had obtained probate of the will in Qld.

The issue was as to the effect of clause 4, which applied because Villaneuva was deemed to have died before Miller under both NSW and Qld law.¹ Those provisions are to the general effect that, where the order of death of two or more persons cannot be determined, the younger is presumed to have survived the elder.

As drafted, clause 4 provided only that the substitutionary provisions took effect in lieu of clause 2. That meant that both clauses 3 and 6 (each disposing of the whole estate) were operational. Both clauses could not stand together.

The application sought rectification of the will to provide, in particular, that clause 4 be rectified to provide that the substitutionary provisions should take effect 'in lieu of the provisions of Clauses 2 and 3' of the will.

Justice Brown was concerned with which of NSW or Qld law should apply to the application, given that Miller resided and died in NSW and owned property and made the will there, but also owned property in Qld, where the grant of probate had properly been made.

neuva as generally

But Brown J referred to the traditional distinction between property that is movable (law of the domicile applies) and property that is immovable (law of the place where the property is situated applies). She went on to consider authority that showed that, where issues of construction are concerned, the law of the domicile applies unless the testator intended some other law to apply. That had been extended to matters of the testator's intentions. Brown J found that the better view was that, as far as rectification was concerned, as this seeks to give effect to a party's intention, the law to be applied is

generally that of the testator's domicile. In the circumstances, Miller was domiciled in NSW and that law would apply to the rectification application.

Under both NSW and Qld law,² rectification of wills was possible where 'a clerical error was made' or 'the will did not give effect to the testator's instructions'. Brown J found that, apart from time limits³ and the grounds for extensions of time,⁴ there was little difference between the statutory provisions in each state.

Eventually, the solicitor who prepared the will supplied an affidavit to the court, on the basis of which, Brown J found that Miller's intentions were that, if Villaneuva did not survive him, he wished his estate to be distributed in accordance with clause 6 of the will. As clause 4 did not provide for that, Brown J found that the will did not give effect to Miller's instructions and ordered an extension of time and rectification of the will.

In addition to emphasising taking care in will drafting, the case highlights the intricacies attending succession cases where assets are in more than one jurisdiction and examination of the testator's intentions is necessary for construction cases and, with the authority of this case, rectification cases. The traditional movable/immovable distinction is not applicable. Fortunately, in this case the legislation in each

legislation, that may usually be the case.

Nevertheless, it may not always be so, and practitioners need to be alive to these issues when dealing with estates with multi-jurisdictional aspects.

'The case highlights the intricacies attending succession cases where assets are in more than one jurisdiction'

1 s.65, Succession Act 1981 (Qld) and s.35, Conveyancing Act 1919 (NSW) 2 s.33, Succession Act 1981 (Qld) and s.27, Succession Act 2006 (NSW) 3 Within six months of death in Qld, but within 12 months of death in NSW. 4 'Necessary' in NSW and 'appropriate' in Qld.

Trust options for children with disabilities

MARIE BROWNELL TEP, NATIONAL MANAGER, ESTATE PLANNING EQUITY TRUSTEES

aising children is challenging at the best of times, but for parents of children with disabilities, it can bring additional concerns. A common question estate planning lawyers are asked is 'what assets should I leave to a family member with high support needs and in what form?' The good news is that there are many potential estate planning options available for parents to consider. For estate planning lawyers, our role is not to decide what is the right option but rather to educate and empower clients to make the estate planning decisions that are best for their family.

In my experience, it is not just the financial details that keep parents up at night. Parents want peace of mind in knowing that whoever is caring for or providing support to their child knows about the personal and health issues relevant to their child. This information is often referred to as a 'care plan' and usually includes information about:

- the wishes of the person living with disability;
- what accommodation will satisfy their needs and desires;
- what activities they enjoy and want to continue;
- which family and social connections are important for them to maintain; and
- how capable their child is in managing their own affairs.

 Care plans can serve as a guide for the estate planning lawyer, carers, guardians, executors and trustees. From an estate planning perspective, the information in a care plan can assist in understanding the level of disability, the support required and the estate planning strategies that could benefit the child.

COMMON ESTATE PLANNING STRATEGIES: TRUST OPTIONS

There are many estate planning strategies to canvass with clients, ranging from trust options through to outright gifts. In many circumstances, the strategy will involve a combination of options.

Where a child is in receipt of a Disability Support Pension (DSP), a Department of Veterans' Affairs (DVA) Invalidity Service Pension or DVA Invalidity Income Support Supplement, a special disability trust (SDT) may be an option. Part 3.18A of the *Social Security Act, 1991 (Cth)* (the Act) sets out the legislative requirements for an SDT.

An SDT is designed to assist family members to provide for the current and future care and accommodation needs of a child with a 'severe disability'. It can also meet some of their discretionary spending needs, currently up to AUD12,500



per annum,¹ for items such as food, clothing, therapy and recreation, without affecting social security entitlements.

It is necessary that, before the SDT is established, the child is assessed as 'severely disabled'.² This definition differs between individuals aged under 16 and those aged 16 and over.³

For individuals aged 16 and over to be 'severely disabled', they must:

■ have an impairment that would qualify the person for a DSP or already receive a DVA

Invalidity Service Pension or DVA Invalidity Income Support Supplement; and

- have a disability that would, if the individual had a sole carer, qualify the carer for carer payment or carer allowance, or where the individual is living in an institution, hostel or group home, care is provided for people with disabilities and funding is provided under an agreement between the Commonwealth, states and territories; and
- have a disability that means that the individual is unable to work more than seven hours a week in the open labour market.

For individuals aged under 16 to be 'severely disabled', the individual must:

- be a person with a severe disability or a severe medical condition; and
- have a carer who has been given a qualifying rating of intense under the Disability Care Load Assessment (Child) determination for caring for that person.

Proof of a child's disability or condition is required by a treating health professional certifying in writing that, because of that disability or condition, either the child will need personal care for six months or more or the personal care is required to be provided by a specified number of persons.

Unlike giving assets directly or through a testamentary trust, the main benefit of an SDT is that it attracts social security means test concessions for the beneficiary and eligible contributors. For a beneficiary in 2021, the asset value limit was AUD700,250 (indexed annually)⁴ and assets up to this value are not included in the assets of the beneficiary. This is in addition to the beneficiary's interest or right in the principal home owned by the SDT. SDTs are also eligible for concessional gifting by eligible contributors, capped at AUD500,000.⁵ There are also tax concessions for undistributed income that are taxed at the beneficiary's marginal tax rate, and the capital gains tax main residence exemption extends to property owned by the trustee of the SDT and used by the beneficiary as their main residence.

DISABLED CHILDREN AND ESTATE PLANNING MARIE BROWNELL TEP

To obtain the benefits, an SDT can have only one 'severely disabled' beneficiary known as the 'Principal Beneficiary' and the model trust provisions must be used in creating the trust. The model trust provisions can be found on the Australian government's Department of Social Services website. An SDT can be created by deed or the SDT provisions can be incorporated into a will. Other essential elements required to comply with the SDT requirements include:

- a professional trustee that is either a trustee corporation, an Australian legal practitioner or two or more individuals acting jointly (individuals must comply with the requirements in s.1209Q of the Act);⁸
- complying with the investment restrictions;9
- providing annual financial statements;¹⁰ and
- on the death of the Principal Beneficiary, parents can stipulate what is to happen to the remaining capital and income.

Although an SDT can be an attractive option to preserve social security entitlements, the purpose, restrictions and requirements for the trust need careful consideration. It is important to discuss the elements of the SDT with your client to determine if the SDT is capable of not just preserving social security entitlements but also providing the right type of financial assistance for the child.

It is important to bear in mind that, although the SDT may be one option, it may not be the only option.

Testamentary trusts such as protective trusts and discretionary trusts are other structures to consider. These types of trust do not have the same constraints as an SDT and can be useful for a child who is not 'severely disabled' or used in conjunction with an SDT to provide a fund for other expenses that cannot be supported by an SDT.

With any trust, it is important to consider trustee appointments, particularly where the trustee has the discretion to decide how income and capital should be distributed.

Matters to consider include:

- the time and acumen of the trustee to administer the trust;
- whether the trustee is a beneficiary or remainder beneficiary; and
- whether the trustee will act impartially and without bias in exercising their discretionary powers.

However, unlike SDTs, assets in a testamentary trust will count towards the income and asset test for determining eligibility for social security entitlements. Therefore, if used in conjunction with an SDT, the assets in the testamentary trust must not exceed income and asset test thresholds; otherwise, the benefits may be reduced to a part pension or lost completely.

DIRECT GIFTS AND SUPERANNUATION DEATH BENEFITS

Of course, some disabled children can independently manage their own personal and financial affairs. Further, in some cases, the child may have a financial attorney or appointed financial manager (LPR) managing their finances. In these cases, a direct gift may be a suitable strategy. A direct gift can take many forms and could include a cash legacy, a specific asset or superannuation death benefits.

Children are dependants¹² for the purposes of superannuation and can receive superannuation death benefits directly from the fund or via the estate. A lump-sum payment can be made tax free to an adult child if that child meets the definition of a dependant under s.302-195(1) of the *Income Tax Assessment Act, 1997 (Cth)*. An adult child who has a disability, as defined in s.8 of the *Disability Services Act 1986 (Cth)*, can also receive a superannuation death benefit as an income stream.¹³

It may be attractive to save tax by distributing superannuation death benefits to a disabled adult child; however, there are other factors to consider. Before making a direct gift, it is important to consider the impact the gift will have on the child in relation to their own tax position, asset protection, balance transfer caps and social security entitlements. Any direct gifts will be managed by the beneficiary or LPR. Unlike trust options, it is difficult to place controls over how the funds are dealt with after distribution. Where there is concern that the child may lack full capacity or be vulnerable to financial abuse, the risks need to be weighed against the benefits.

PROVISION

Some clients will also ask if no or little entitlement should be made from the estate to their disabled child in order to maximise social security benefits. The idea of proceeding down this track is risky for many reasons. The child's circumstances may change, leaving the child without sufficient support in the future. The other significant risk is exposing the estate to dispute and litigation. Provision in the form of a trust, particularly a discretionary trust, may also trigger a family provision claim, as the provision may be considered illusory.¹⁴

In all Australian jurisdictions, a child is an eligible claimant for family provision purposes and a disabled child will have their own unique needs and circumstances. The estate planning lawyer must consider whether the provision is adequate in the circumstances and advise the client of the litigation and cost risks to the estate and beneficiaries.

CONCLUSION

Parents with a disabled child are well informed and, on a regular basis, are navigating health, personal, living and resourcing issues for their child. They know their child and make myriad decisions based on what they think is right. Estate planning is no different. To get the estate planning right requires a detailed understanding of the needs and circumstances of the child and careful consideration of the many options available. No one strategy will be exactly right for the beneficiary and combining two or more strategies may be appropriate.

1 bit.ly/3HPn5iJ 2 Details about the process for assessment can be found at bit.ly/3gGrqZE 3 s.1209M, Social Security Act, 1991 (Cth) 4 s.1209Y, Social Security Act, 1991 (Cth) 5 s.1209Z, Social Security Act, 1991 (Cth) 6 s.1209M(1), Social Security Act, 1991 (Cth) 7 bit.ly/3BIGEN3 8 s.1209Q, Social Security Act, 1991 (Cth) 9 s.1209R, Social Security Act, 1991 (Cth) 10 s.1209S, Social Security Act, 1991 (Cth) 11 s.1209T, Social Security Act, 1991 (Cth) 12 s.10(1), Superanuation Industry (Supervision) Act 1993 (Cth) 13 Regulation 6.21 (2B), Superanuation Industry (Supervision) Regulations 1994 (Cth) 14 Stansfield v National Australia Trustees Limited, Cory & Ors v National Australia Trustees Limited (2004) NSWSC 1107

MEMBER PROFILES

Introducing...

Paul Brennan TEP

Director, Brennans Solicitors

WHY DID YOU BECOME A STEP MEMBER?

To keep up-to-date with the law quickly and, if possible, painlessly.



TELL US WHAT MOTIVATED AND INSPIRED YOU TO GAIN THE EXPERTISE YOU HAVE TODAY? The selection of outrageous,

excruciating, fraudulent, shocking, odious, interesting and often funny legal cases and characters over the years.

WHAT DOES BEING A STEP MEMBER MEAN TO YOU?

It is a highly convenient source of practical, hands-on information: case summaries, regular seminars, etc.

WHAT IS YOUR MOST-USED STEP RESOURCE?

A sense of humour.

CAN YOU GIVE SOME INSIGHT TO YOUR EXPERTISE?

Faced with the cavalcade of judges, textbook academics, barristers and hardened veterans that STEP attracts as members, it is difficult for me to claim expertise in any particular subject. I am in practice with my wife on the Sunshine Coast. I deal with the wills and estates of our clients in the usual way. I can claim years of experience as a solicitor acting in will and estate disputes.

WHAT IS THE BEST ADVICE YOU HAVE BEEN GIVEN?

'Saving is a very fine thing. Especially when your parents have done it for you.' – Winston Churchill.

WHAT ISSUES CAN YOU SEE STEP ADDRESSING IN THE FUTURE?

The apparent surge in the number of will and estate disputes has put pressure on the many small practices to get it right. They often do not, or so judges say. STEP offers the expertise needed by practitioners in this area.

WHAT IS YOUR MOST MEMORABLE STEP EVENT?

My first annual STEP Queensland Conference. A cascade of practical tips,

'The apparent surge in the number of will and estate disputes has put pressure on the many small practices to get it right... STEP offers the expertise needed by practitioners in this area' up-to-date case law and relevant information. It was enjoyable rather than dull (yes, I was surprised too). Now I go every year. The company is excellent.

WHAT 'MUST READ' BOOK WOULD YOU RECOMMEND?

101 Reasons to Kill all the Lawyers is funny, but not so funny that busy STEP members must read it (disclaimer, I am the author). My latest book is The Art of War, Peace and Palaver: The Contentious Guide to Legal Disputes.

OUTSIDE THE OFFICE, WHAT DO YOU LOOK FORWARD TO?

I have taken up golf and found it just as frustrating as I remember. My wife and I run a 24/7 support team for our four children. I am writing a novel. The last time I tried this, I stopped at 16,100 words, when I discovered that I could not be bothered to read it myself. Therefore, most days, I look forward to getting back to the office.

WHY DID YOU BECOME A STEP MEMBER?

It was as simple as a colleague telling me that it would be a good idea.

WHAT DOES BEING A STEP MEMBER MEAN TO YOU?

To my mind, the best things about STEP Queensland are our lunchtime seminars and annual conference. They foster a real sense of collegiality within the STEP Queensland community.

WHAT IS YOUR MOST-USED STEP RESOURCE?

I'm an unapologetically parochial Queenslander, so the focus of my attention has always been on STEP Queensland and making the most of the events we organise. Our annual conference, in particular, is popular with members and very convivial. In my opinion, the quality of its offering gets better with every passing year.

CAN YOU GIVE SOME INSIGHT TO YOUR EXPERTISE?

I commenced practice in 1998 and worked as a solicitor in commercial litigation. One of my first cases as an articled clerk was the estate litigation following the death of Michael Hutchence, the lead singer of INXS. That set my course, so when I was called to the bar in 2005 I set about developing a practice in equity, trusts and succession, and since 2010 my practice has been nearly exclusively in that area.

Within my practice area, I do the full spectrum of work for the neediest to the wealthiest clients. I have an eye for detail, so tend to be briefed in more complex matters where

MEMBER PROFILES

Jeff Otto QC TEP

Barrister, Chancery Barristers + Mediators

there is a need to trace through corporate and trust structures. I particularly enjoy those types of matters where there are overseas assets or



connections that raise issues of private international law.

I'm briefed by some of Brisbane's biggest private client firms to some of the smallest suburban and regional firms. Meeting people from all walks of life is one of the more enjoyable aspects of the practice area.

TELL US WHAT MOTIVATED AND INSPIRED YOU TO HAVE THE EXPERTISE YOU HAVE TODAY?

I was a schoolbov when I decided that I wanted to be a barrister, a law student when I developed an interest in equity and trusts, and an articled clerk/young solicitor (working on the Hutchence case) when I decided that I wanted to practise at the bar in equity. trusts and succession.

Outside the law, I have an interest in history. One of the things I find enjoyable about practising law is that it requires a knowledge and understanding of legal history. Another is the history, traditions and etiquette of the profession. If I could have been anything, I would have been a Chancery barrister in Lincoln's Inn, and I am fortunate enough to have the practice of a Chancery barrister in Brisbane.

WHAT IS THE BEST ADVICE YOU HAVE BEEN GIVEN?

My old master, Joe Ganim,

was always giving me advice and guidance, usually in colourful terms. He drummed into me the need to 'think like a lawyer' and, almost daily. I call that

advice to mind. It can be important to remember what we are (lawyers) and what we are not (psychologists or social workers). Although it is important to understand the human motivations of clients, I see my role as a lawyer being to help them find a legal solution to their problem.

WHAT IS YOUR MOST MEMORABLE STEP EVENT?

There isn't one that is more memorable than another. STEP Oueensland's annual conference is a fixture in my calendar because I most enjoy attending it.

WHAT 'MUST READ' BOOK WOULD YOU RECOMMEND?

I have been acting for the administrators of a very large estate that may eventually come to rival Jarndyce v Jarndyce. One of its administrators thinks that I sleep with Lewin on Trusts under my pillow (which isn't true by the way!).

OUTSIDE THE OFFICE. WHAT DO YOU LOOK **FORWARD TO?**

Time with my family - my wife and our two boys. When I took silk in 2021, my wife told me that the achievement of which I should be most proud is that I had done it while maintaining a wonderful family life. As always, she was right. ■

ADVOCACY UPDATE

Our dedicated National Policy Committee supports the goal of STEP being the leading professional body advocating for trust and estates matters. Key areas of advocacy are informed by the views of our expert members.

To view the latest submissions made by the STEP Australia policy committee visit our advocacy page:

www.stepaustralia.com/advocacy-andpolicy-submissions-in-australia

Meet the STEP Australia **Advocacy Committee**



BECHELET Chair and WA representative



DAVID MARKS QC TEP Committee member and QLD representative



PETER BOBBIN TEP Committee member and NSW representative



FRESHWATER TEP Committee member and QLD representative



SPARKE QC TEP

Committee



SHEEAN TEP Committee member and QLD representative



CHAPMAN TEP Committee member and VIC representative



PHILIP DAVIS TEP Committee member and NSW

representative

Treasurer of STEP Australia and STEP VIC member

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STEP EVENTS





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

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** VISIT OUR NEW WEBSITE **STEPAUSTRAUA CONFERENCE 2021** **STEPAUSTRAUA CONFEREN

stepaustralia.com

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STEP AUSTRALIA NEWSLETTER SUB-COMMITTEE

CHAIR: ANDREA OLSSON TEP

COMMITTEE MEMBERS: **ROB CUMMING TEP, JONATHAN HAEUSLER TEP AND ROD JONES TEP**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**