

STEP AUSTRALIA *NEWSLETTER*

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NEWSLETTER SPONSOR



WELCOME

FROM STEP AUSTRALIA CHAIR

Welcome to another wonderful edition of the *STEP Australia Newsletter*.

I wish to reflect on the calendar year just gone. STEP Australia had much to celebrate in 2022, through the work of the Board and its various national committees, and the ways it has added value to the membership and the branches.

It is exciting that the inaugural STEP Australia Incapacity Conference will take place in June 2023 at the Gold Coast. I wish to publicly thank those who have supported my vision for this conference. Special mention goes to Peter Bobbin TEP (former STEP Australia Chair), the STEP Australia Board and the organising committee members for this conference, especially its Chair, Christine Smyth TEP.

I turn now to the national STEP Australia mentorship programme. The pilot programme ran successfully in 2022 and I am excited to report that an expanded version will run in 2023. A massive thank you to Ashleigh Poole TEP for her vision for this programme, which she has now put into practice through her leadership as Chair of the organising committee. I wish to also publicly thank those who have served on that organising committee over a long stretch of time, for the mentees who have given the programme a go and more particularly for the mentors who have selflessly given their time. I am looking forward to volunteering as a mentor in 2023.

Volunteering is rewarding. My time as Chair of STEP Australia will end as of 31 December 2022, as will my time on the Board. I have cherished working with and getting to know members of the Board. In the past 12 months, Ian Raspin TEP, in his service as Deputy Chair, has been incredibly active and supportive and I have every confidence that when Ian steps up to chair STEP Australia in 2023 he will do a sterling job.

There is great value in being a STEP member both here and internationally, and volunteering as part of STEP allows for deep friendships to be formed and for us to make a difference.

With best wishes,

*Bryan Mitchell TEP,
STEP Australia Chair*



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‘More’ or ‘meaningful’?

JON KENFIELD MBO, FOUNDER, THE SOLUTIONIST GROUP

James E Hughes Jr is a US attorney and the author of several influential books about preserving and enhancing family wealth. Hughes says that financial capital provides practical support for multi-generational families, but true wealth lies in their human capital – the quality of their family members – whose personal happiness, and admirable achievements as members of society, are far more valuable and meaningful than the size of their bank balances.



Flossie is a devoted wife whose insecurities made her stick like glue to Peter whenever he went off on frequent business trips. As a result, their three children all developed serious fears of being abandoned during childhood.

Phillip and Amore are well educated, intelligent and highly strung. Both suffer from severe depression and have been on heavy medication for many years. Neither have their own families nor have ever been in long-term relationships.

Rupert is the golden child. Although expelled from four private schools by the age of 12, he's bright, charming and highly extroverted. He's also currently heading towards a fourth marriage, having had two children with each of his first three wives – all of whom are now being financially supported by Peter as they receive little attention from Rupert.

Peter is slowing down and has unilaterally decided to sell all his operating businesses, notwithstanding the conflicting private promises he's made over the years to all his children that 'one day this will all be yours'.

Phillip and Amore have spent their entire working lives in operational roles in Peter's businesses. They haven't been trained to do anything else and are unemployable outside the family's businesses at anything like the remuneration levels they've learnt to enjoy.

Rupert has always flitted in and out of the family's businesses, never lasting anywhere more than 12 months. He spends a lot of money 'improving' the businesses he inserts himself into – being wined and dined by consultants and salespeople who sell him plant, equipment and IT systems the businesses don't need and can't commercially justify.

If Peter can sell his operating businesses, he'll emerge with around AUD120 million in cash, AUD60 million in a commercial property portfolio and around AUD20 million in lifestyle assets.

PROBLEMS

Peter has suddenly realised he's charting a path that puts him out to pasture. He's visualised his future and it looks like a black hole. Three of his friends have passed away in the past two years – all within 24 months of stepping down from ownership and leadership roles. He feels there's nobody he can talk to, as he's used to dominating his family, friends and staff. Trying to reach a resolution with Flossie or his kids exhausts him, and he's starting to panic.

Flossie can't wait to get rid of the businesses so she has more time to 'heal' her family. She has two out of three

At a recent STEP Victoria conference, Simon Costa AO spoke passionately about his experiences as a member of an ultra-high-net-worth family. As CEO of the Costa Group, he rubbed shoulders with some of the world's wealthiest entrepreneurs, inheritors, investors and philanthropists.

He eventually had a personal epiphany: many enormously wealthy individuals were trapped within treadmills of their own making – where the pursuit of 'success' and the 'need to win' had morphed into endlessly, all-consuming compulsions to acquire 'more'.

Without any real goals, these individuals struggled to frame the question: how much will be enough? Consequently, they couldn't work out 'when' their labours would end and they could find peace and satisfaction in their own achievements.

Costa says good people can't be satisfied by material success alone; they also need to lead lives of 'significance' – doing worthwhile things that help to improve the lives of others. Good people become great by doing a lot of worthwhile things. Significance requires living a meaningful life, where people devote themselves to some larger concept of benevolence to humanity, a prime motivator for many philanthropists.

ANGST FAMILY CASE STUDY: 'MORE' OR 'MEANINGFUL'?

The Angst family – Peter (aged 74), Flossie (72), Phillip (42), Amore (40) and Rupert (38) – is a first- and second-generation business family with diverse commercial interests in South Australia.

Peter is a smart, driven entrepreneur. Making money is not his main driver and he's always reinvested most of his profits into growth. The family is worth over AUD200 million, but there's never been much spare cash available, and the family has always lived relatively modestly.

‘Without any real goals, these individuals struggled to frame the question: how much will be enough?’

children at serious risk of suicide and another at serious risk of complete dissipation. She feels guilty that her family is so dysfunctional, suspecting she may be the root cause of their issues. She’s taken the family to appointments with psychologists, family counsellors, priests, rabbis, yogis, imams and faith healers over the years. None have achieved much.

The siblings have nothing to do with each other socially, and family gatherings usually end with one person storming out after screaming and cursing.

Due to the tension in the family, none of Rupert’s six children are ever brought to family gatherings. His former wives appreciate their maintenance payments, but have explained to Peter and Flossie they feel obliged to shield their children from the family’s aggressive, corrosive culture.

Peter and Flossie are devastated they have almost no relationship with any of their grandchildren and feel very ashamed when their own friends talk about their families and grandkids. Paying childcare and school fees, buying expensive birthday and Christmas presents, and occasional FaceTime meetings are about all they’re allowed to do.

ADVISORY CHALLENGES

For this highly conflicted family, wealth management and estate planning aren’t immediate priorities, despite their impending need for good, long-term financial advice.

They’re at a tipping point and if the Angst family is to survive at all as a family, it needs to create a sense of shared purpose and hope. This requires a comprehensive family plan and a lot of non-financial advice, training and support.

In reality, this family has a once-in-a-lifetime opportunity to change the unhappy trajectories of everyone’s lives.

QUESTION: Given the huge material success they’ve achieved, what legacy do Peter and Flossie want to leave behind to benefit current and future generations of their family? What will make them feel proud and give their lives meaning?

‘You can’t have a healthy family business without a healthy business family.’ – David Smorgon

Simply put: they need to commit to better parenting and grandparenting, and transitioning from a life devoted to making more to a life that contains genuine meaning.

ADVISORY PROCESS STAGES

1. Develop a project plan: from where they are to where they want to be.
2. Initiate counselling/psychological support to help family members understand and manage themselves and their relationships with other family members. Demand results within business-like timeframes. Focus on coaching and team building rather than personal therapy.
Improved relationships and understanding encourage the family to be more forward-focused and more willing to invest resources to achieve family objectives. As the family begins to appreciate what they need to change to have more meaningful lives, they feel an urgent need to put things in place they’ve neglected to do over all the years they’ve been primarily focused on making more.
3. Develop a family plan (Strategies) to chart a course for the family for at least the next 25 years – including Peter and Flossie’s probable passing:
 - Explore the values, visions and life’s purpose of all family members. Shape them into agreed individual and family goals. Nothing helps to build teams and teamwork like a well-guided, shared activity.
 - Encourage issues of concern to be raised between family members as they work together. Deal with them constructively to resolve lifelong tensions. This may require a form of mediation to help the family become more cohesive.
 - Enable the Strategies to succeed by establishing appropriate governance, such as a family council, advisory board, family office and family forums (Structures).
 - Enable the family’s new Structures and each individual to know what to do, who will do it, and when and how to do it, by creating and adopting appropriate governance policies and procedures, family constitutions, charters of mutual obligations and other agreements (Systems). These should all be developed collaboratively – as creative, educational and bonding activities.
 - Improve skills. Everyone should know what they need to do and have the confidence to do it.

There’s a mass of work in there for an appropriately multi-skilled advisory team.

Trusted advisors working with families across generations should help to implement business family best practices, so whatever needs to happen does happen when it needs to.

This requires an increasing diversity of skills within our advisor community and a willingness to take a longer-term, more holistic approach towards advising most business families. ■

SIGN UP TO THE STEP NEWS DIGESTS

STEP produces four separate regional news digests, collating global news and updates. The International and UK News Digests are issued twice weekly, while the North America and Latin America News Digests go out on alternate weeks. The digests provide a quick reference for busy practitioners to all the relevant news and issues, as well as including job listings and local STEP branch events and conferences.

Below is a selection of summarised news stories that featured in the STEP International News Digests in 2022. If you would like to keep abreast of the latest developments in the industry, sign up to the digest of your choice by visiting www.step.org/industry-news/industry-news-digests



JANUARY: Some decline seen in foreign investment in residential property

Recent fiscal measures by Australian federal and state governments have had some deterrent effect on foreign investment in residential property, according to a report by the Foreign Investment Review Board. The number of purchase transactions and their total value both fell by about 19 per cent between 2019 and 2020. The number of disposals increased by 66 per cent and their total value increased by 49 per cent. However, levels of foreign investment in residential property remain high, with foreign owners buying AUD6 billion of real estate in the year to July 2020 and disposing of only AUD1.5 billion. New South Wales, Queensland and Victoria accounted for the vast majority of foreign ownership.

FEBRUARY: New draft guidance on entitlements to amounts from private trusts

The Australian Taxation Office (ATO) has issued draft advice and guidance on the tax treatment of trust entitlements arising out of reimbursement agreements and unpaid present entitlements of trust beneficiaries. It is consulting on the guidance until 8 April 2022.

MARCH: New trust distribution guidance attacks 'ordinary family dealings'

Guidance published by the ATO this month indicates when it will audit families who have arranged distribution from a family trust to an adult child while the parents get the economic benefit. Tax advisors say the guidance has 'completely repurposed' the s.100A trust stripping provision to attack trust distributions that are ordinary family dealings, in apparent defiance of the Federal Court's decision in the *Guardian* case, which the ATO has appealed.

APRIL: Pension assets can no longer be kept secret in divorce settlements

Changes to Australia's superannuation laws mean that, from 1 April 2022, persons involved in post-separation legal disputes will be able to apply to the Federal Circuit and Family Court of Australia for information from the ATO about their former partner's pension holdings. The effect will be that pension assets can no longer be hidden during a divorce or separation property settlement.

MAY: Legislators request that non-financial businesses be brought under AML controls

Australia's Senate Standing Committee on Legal and Constitutional Affairs has

published a report asking the federal government to immediately extend anti-money laundering (AML) legislation to cover designated non-financial businesses and professions (DNFBPs). Australia is one of only three countries that have committed to Financial Action Task Force compliance but do not regulate DNFBPs.

MAY: ATO gives update on new approach to family trust distributions

The ATO has announced a partial retreat from its recently issued guidance on s.100A trust reimbursement agreements and unpaid present entitlements. It notes that the guidance 'unsettled' tax advisors by calling into question some practices that have been relatively long-standing. It now says it will not retrospectively pursue taxpayers who relied, in good faith, on the previous 2014 guidance.

MAY: Big changes to stamp duties in New South Wales

The New South Wales state parliament has passed a Bill imposing purchaser duty on transactions that result in a change in the beneficial ownership of dutiable property, including land. For the purposes of the Bill, beneficial ownership includes ownership by a trustee. Duty will also be charged on the making of a statement that 'purports to be a declaration of trust but merely acknowledges that identified property is already held, or to be held, in trust'. The Bill also introduces new general anti-avoidance provisions, penalties to deter promotion of tax avoidance schemes and new penalty tax provisions.

MAY: ATO adds crypto-asset capital gains to priority list

The ATO has today announced that its four key scrutiny areas in 2022 include ►

capital gains from crypto-assets, property and shares. It will also focus on rental property income and deductions, record-keeping and work-related expenses. It expects to see more crypto-asset capital gains or capital losses reported in tax returns in 2022, as their popularity increases.

JUNE: New government to consult on international tax policy

The new Australian federal government is expected to launch a consultation on its international business tax plan prior to implementation in 2023. The measures include country-by-country reporting, beneficial ownership disclosure and mandatory reporting of shareholders' tax risk for companies doing business in low-tax jurisdictions.

JUNE: ATO issues guidance on LPP disputes

The ATO has published a voluntary protocol for cases where taxpayers served with production notices claim that the relevant documents are protected by legal professional privilege (LPP). The protocol has been developed to address ATO concerns that LPP claims are sometimes inappropriately asserted, especially where large businesses have received a formal notice as part of a dispute or audit activity. The new protocol covers all LPP claims made by legal or non-legal practitioners, regardless of the firm or business structure.

JUNE: Increased taxes for foreign property investors in New South Wales

The New South Wales state government has introduced a Bill doubling the land tax surcharge on New South Wales residential land owned by a foreign person, from 31 December 2022.

JULY: Final guidance on Division 7A trust entitlement rules published

The ATO has published a final view on how the Division 7A deemed dividend provision applies to trust entitlements arising to private company beneficiaries on or after 1 July 2022. There will be no deemed dividend for the trust entitlement if, before the private company's tax return is lodged or is due to be lodged, either the trustee pays the private company its entitlement or the entity that uses the fund enters into a complying loan agreement with the private company.

JULY: Companies warned of enforcement drive against treaty shopping

The ATO has released a taxpayer alert warning companies that it will investigate treaty shopping arrangements designed to obtain the benefit of a reduced withholding tax rate under a double tax agreement in relation to royalty or dividend payments from Australia. The ATO is currently reviewing international transactions for these types of arrangements, which it says may attract the operation of the anti-avoidance rules.

AUGUST: Queensland legislates new interstate land tax

Queensland has enacted the *Revenue Legislation Amendment Act 2022*, increasing entities' and individuals' liability to land tax on Queensland landholdings by taking into account their Australia-wide landholdings. The Act's provisions will come into force from 30 June 2023.

AUGUST: Consultation on measures to force multinational tax transparency

The Australian Treasury has released a consultation paper on extensive

proposed multinational tax integrity and transparency measures impacting both inbound and outbound investment. The measures include amending the thin capitalisation rules to limit debt deductions, limiting the deductibility of payments relating to intangibles and royalties, broader public disclosure of multinationals' tax arrangements and country-by-country reporting. The consultation closes on 2 September 2022.

SEPTEMBER: Government confirms cryptocurrencies to be taxed as capital assets and not foreign currencies

The Australian government has released draft legislation clarifying that cryptocurrencies will not be treated as foreign currency for income tax purposes unless they have been issued by a government. The changes will apply retrospectively from 1 July 2021, meaning that gains or losses arising from the disposal of virtual currencies since then will be subject to the capital gains tax rules. At the same time, the Australian Government Board of Taxation is consulting on changes to digital asset taxation. Submissions are invited until 30 September 2022 and a report to the government is due by 31 December 2022.

OCTOBER: Image rights income to be attributed directly to celebrities

The ATO has announced it intends to treat income received by an entity associated with a celebrity, such as fees for licensing of image rights, as income received directly by the individual. The corresponding tax determination *Draft TD 2022/D3*, out for consultation, covers family trusts as well as companies and is expected to apply to tax years before as well as after its date of final issue, except where arrangements were entered into based on earlier guidance. The consultation on the determination closes on 4 November 2022.

Case note on mutual wills: *Forster v Forster* [2022] QSC 30

ROB CUMMING TEP, BARRISTER, 19 INNS CHAMBERS

This Queensland case is instructive for the extensive consideration of the case law that the Hon Justice Ryan undertook in the course of her judgment.

Timothy Forster (the deceased) and his second wife of 24 years, Annabel (the respondent), made a mutual wills agreement (MWA) on 20 August 2015. Timothy's will was made the same day and took effect on his death on 28 September 2018.

The will largely provided for Annabel and allowed her to use the estate to maintain her lifestyle and pay for her necessary health and aged care; however, she was not permitted to intentionally 'substantially diminish' the estate. Although making certain provisions for the deceased's own children on his death, as the first to die, the intent was that both his three children and Annabel's two children would share equally in the estate of the survivor.

The deceased's son, James (the applicant), and his siblings brought a family provision application in his father's estate, but that was later discontinued with him paying costs.

James and Annabel did not have a good relationship. James sought, in correspondence, disclosure of Annabel's financial position because he feared she would breach the MWA. Annabel refused, stating she had not and would not breach the MWA. There was no evidence of any breach of the MWA, which James' lawyers confirmed.

An application was brought under s.8 of the Queensland *Trusts Act 1973* seeking annual disclosure of Annabel's financial position.

Ryan J refused the application. Her Honour identified a number of principles as to mutual wills, as follows:

- That during the lifetime of the survivor in an MWA, in the absence of fraud, the survivor is not trustee of the property subject to the MWA, but equity will intervene, and the survivor will be converted into a trustee, if the survivor commits a fraud by refusing to carry out the survivor's part of the MWA.
- The survivor in an MWA is, during their lifetime, absolute owner of the property that is subject to the MWA, subject to a floating obligation to deal with the property only in accordance with the MWA. The MWA may envision some using up of the property during the survivor's lifetime and which obligation crystallises on the death of the survivor into a trust over the property (subject to the MWA) which remains to ensure its distribution as per the terms of the MWA.

‘Usually only on the death of the survivor will any breach be evident, and it is only at that time that equity can intervene to provide a remedy for any breach’

- Where the survivor in an MWA commits a fraud in relation to the MWA, equity will intervene to prevent that fraud. If the survivor adheres to the MWA, there is no need for equitable intervention to ensure its performance (including by way of declaration of trust) because the terms of the contract would have been fulfilled.



- Absent an express promise not to do so, a survivor may dispose of the property the subject of the MWA in any way (but not testamentary in nature or directly contrary to the terms of the MWA) that is inconsistent with a requirement that the survivor account to those who are ultimately to benefit under the MWA for the property during the survivor's lifetime.
- Notwithstanding that a will is made pursuant to an MWA, it remains a revocable instrument; however, should this occur and another will is made by the survivor in breach of the MWA, that would not prevent that later will being granted probate. However, equity would intervene to prevent the fraud (that is, contrary to the MWA, revoking the survivor's mutual will or disposing of the property the subject of the MWA contrary to it).

Accordingly, in this case, although the beneficiaries had an interest in the estate subject to the MWA, the survivor, Annabel, was entitled to full enjoyment of the property (the subject of the MWA) subject to her obligation to abide by the terms of the MWA. That is an obligation equity will enforce. Notwithstanding that obligation, in the absence of fraud by Annabel, she is entitled to full absolute ownership of the property, not obligated to account to the beneficiaries for the property during her lifetime and such orders would not be made.

This was an unsuccessful pre-emptive attempt to have a constructive trust, in effect, declared. Usually only on the death of the survivor will any breach be evident, and it is only at that time that equity can intervene to provide a remedy for any breach. During the lifetime of the survivor, careful examination of the terms of the MWA is required to look to the extent the property has to be preserved, or as in this case, to what usage as absolute owner of the property the survivor is entitled. ■

EVENTS AND RESOURCES

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

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ADVISING FAMILIES ACROSS GENERATIONS

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.

To view the full catalogue of submissions made by the STEP Australia Policy Committee, visit:

www.stepaustralia.com/advocacy-and-policy-submissions-in-australia

GET IN TOUCH...

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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

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AND KEEP UP-TO-DATE**

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**STEP AUSTRALIA
INCAPACITY
CONFERENCE 2023****REGISTER NOW**

This will be STEP Australia's first national Incapacity Conference. This STEP conference will bring together leading minds in capacity from across STEP Australia and beyond. It is not to be missed.

Conference details

Date: 4-6 June 2023

Venue: The Star Gold Coast,
Queensland, Australia

The programme will provide unparalleled opportunity to network with Australian trust and estate practitioners.

Contact stepaustralia@step.org to
be advised when registration opens

STEP AUSTRALIA NEWSLETTER SUB-COMMITTEE

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