ISSUE 12 DECEMBER 2020

QUARTERLY NEWSLETTER

STEP AUSTRALIA *NEWSLETTER*

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WELCOME
FROM STEP AUSTRALIA CHAIR

Welcome to the twelfth edition of the quarterly *STEP Australia Newsletter*.

And wow, what a year this has been. I trust that you, your families and colleagues are thriving or surviving and are turning your mind to the future.

Suffering a little more isolation time than normal has enabled us in the STEP world of Australia to work on Future STEP 2021+. Under the steerage of STEP Australia and with the engagement of all STEP branches, we have been working on the objective of achieving a greater STEP presence in Australia. We have already developed policy initiatives that have successfully affected the operation and administration of some of the estate laws of Australia. We are gaining a greater recognition among our professional colleagues of the skill and planning attributes that a STEP member brings to any task. We are building the presence of STEP in Australia, particularly through expanding the breadth of our branch memberships.

We have launched our Member-Get-Member initiative and have been building upon existing employer relationships. Thought leadership is central to the growth of STEP in Australia. We will be championing a few key themes that demonstrate our members' expertise and help to influence policy and gain coverage – all of which will enhance STEP's profile and reputation.

HOW YOU CAN GET INVOLVED IN THE MEMBERSHIP GROWTH PROJECT

1. Ensure you invite one or more colleagues to your next STEP branch event.
2. Talk to your colleagues about why you are a member and what you get from being a part of STEP.
3. Encourage your colleagues who are trust and estate experts to join at www.stepaustralia.com/join-us/how-to-join-step

There are various other ways you can get involved and contribute. Get in touch with your branch committee or a STEP Australia Board member if you would like to further your involvement with STEP. The board comprises the Chair of each of our branches in Australia, together with other elected members.

HAVE YOUR VOICE HEARD

We are keen to develop a greater involvement in policy matters. Join us and help us to make the STEP voice one to be listened to. If you have a burning policy issue that needs to be given the voice of STEP, send your thoughts to Philip Davis TEP, STEP Australia Policy Committee Chair, via philip_davis@tresscox.com.au

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

With best wishes for 2021,
Peter Bobbin TEP,
STEP Australia Chair

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Australia/UK testamentary trust topical issues

ROBERT GORDON TEP, VICTORIAN BAR

The purpose of this article is to alert readers to some tax issues that are currently troubling advisors in relation to what might be considered to be an otherwise straightforward testamentary trust scenario.

CASE STUDY

Consider an Australian resident and domicile deceased in the past three years, whose will provided for a testamentary trust that took effect 18 months ago. Although the beneficiaries include a wide class of family members, the deceased had three adult children. The eldest child is an Australian tax resident and domicile and has considerable investment expertise, but is in a high-risk profession. The younger two children are Australian domiciled and moved to the UK before their parent's death but after the will was made.

The two younger children are trustees of the testamentary trust (because of the eldest child's risk status), but the eldest is the appointor/guardian. The deceased left a memorandum of wishes that the trustees' discretion should be exercised to protect the trust assets for the benefit of the trustees and guardian. The appointor has the power to change the trustees. The guardian has a power of veto over what investments the trustees might make.

Originally, the assets of the testamentary trust were composed of Australian listed shares (in non-land-rich companies), Australian cash deposits and an Australian rental property. More recently, the Australian guardian has prevailed over the UK trustees so that the assets now also include UK listed shares, Canadian listed shares and UK cash deposits.

All income and capital gains are distributed each year, although the trustees have a discretion to accumulate income and gains.

RESIDENCE OF TESTAMENTARY TRUST

As all of the trustees are assumed to be resident in the UK, under UK domestic law the testamentary trust will be a UK resident.

Under Australian domestic law, the trust is a resident if it has even one Australian resident trustee, or it has its central management and control (CMAC) in Australia.

However, as the appointor/guardian is an Australian tax resident, under Australian domestic law there is an argument that the CMAC of the trust is in Australia, if that Australian resident is the 'controlling mind' of the trust due to his powers, and the fact that his proposals for investment have prevailed.

This arises due to the Australian Tax Office (ATO) approach to the High Court of Australia decision in *Bywater*.[1] In particular, the ATO practical compliance guidance PCG 2018/9 equates one Australian resident director of a foreign company participating in board decisions as being partial CMAC in Australia.

It is also worthy of note that the Barbados trust in the Supreme Court of Canada *Fundy Settlement*[2] was held to be a Canadian resident as the 'client' was in Canada and 'called the shots', whereas the Barbados trustee carried out administrative functions only: referred to in *Bywater* at [84].

RESOLUTION OF DUAL RESIDENCE OF TRUST

The UK/Australia double-taxation agreement (DTA) contemplates trustees and estates as 'persons' subject to the DTA. In contrast, many DTAs do not mention trustees or estates as 'persons' subject to such a DTA.

Residence of persons in DTAs is to be determined under domestic law. As there is an argument that the testamentary trust in this case is a dual resident, the DTA provides a tiebreaker.

As a result of the OECD base erosion and profit shifting (BEPS) initiative, the OECD Multilateral Instrument (MLI) changed the UK/Australia DTA in 2019 to resolve dual residence other than of individuals, not according to 'effective management' as a tiebreaker, but by a Mutual Agreement Procedure (MAP), i.e. the competent authorities are required to resolve the issue.

> 'The UK/Australia double-taxation agreement (DTA) contemplates trustees and estates as "persons" subject to the DTA'

CORPORATE TRUSTEE AS AN ALTERNATIVE

Would the result be different if the trustee was a UK company with the three siblings as directors, but with the Australian resident director's investment proposals prevailing? ►

> ‘The Board of Taxation has advanced in recommending simpler and more certain rules for determining the tax residence of individuals’

Before *Bywater*, under the old TR 2004/15, the ATO accepted that there was a two-tier test for corporate tax residence (CMAC in Australia as well as carrying on business in Australia).

However, after *Bywater*, TR 2004/15 was replaced with TR 2018/5, which collapsed the two-tier test into one (CMAC in Australia equals carrying on business in Australia). The government has referred the issue to the Board of Taxation (BOT) for law reform – perhaps involving determining corporate tax residence by place of incorporation only, as the BOT originally recommended in 2003, or cementing the former two-tier test by legislation – but this has been delayed by COVID-19.

So, in our case, the contemplated UK corporate trustee may be a dual resident, making the testamentary trust a dual resident as well, for the same reasons, i.e. PCG 2018/9 equates one Australian resident director of a foreign company participating in board decisions as being partial CMAC in Australia, and that is enough to meet the new one-tier test.

If an Australian company was the trustee, it would be an Australian tax resident as it is incorporated in Australia. It would also be a UK tax resident if the CMAC was in the UK. Under the UK rules, as there are a majority of UK directors carrying out their duties properly, it may well be a UK resident, and therefore a dual resident, i.e. the new ATO interpretation of CMAC is harsher than HMRC’s view. As such, the testamentary trust with such an Australian company as trustee may well be a dual resident.

ARE THE INDIVIDUAL TRUSTEES REALLY UK RESIDENTS?

The above has assumed that the two children who moved to the UK are UK tax residents and not Australian tax residents or dual residents. However, the difficulties in this area were highlighted by *Harding*’s case[3] (High Court leave refused), where the taxpayer had worked for many years overseas, but had lasting Australian connections.

The BOT has also advanced in recommending simpler and more certain rules for determining the tax residence of individuals. The ATO has expressed concern that such revised rules could be exploited. This is also relevant to the residence of a trust or company, as this will depend on the residence of trustees or directors, and of persons who ‘pull the strings’.

The ATO voiced concern about the likelihood of persons becoming non-resident (in a country that does not tax foreign-source income) and then getting large franked dividends or capital gains from non-resident trusts.

STREAMING INCOME AND GAINS

The types of assets of the testamentary trust means that there will be interest, dividends, rents and, potentially, capital gains on shares and the rental property.

As different types of income and gains are treated differently under Australian tax law, the question of streaming different types of income to non-resident and resident beneficiaries arises.

Streaming of franked dividends and capital gains was expressly legislated for in 2011, but whether there is any scope for streaming interest, unfranked dividends, rents and royalties after *Bamford*[4] and *Greenhatch*[5] is problematical.

Under Australian domestic law, if the testamentary trust is an Australian resident:

- franked dividends should go to Australian resident beneficiaries who can benefit from franking credits;
- capital gains should go to Australian resident beneficiaries who can use 50 per cent CGT discount; and
- UK-resident beneficiaries who would have got a tax-free capital gain on the disposal of non-Taxable Australian Property (non-TAP)[6] had they owned the asset directly, will be fully taxable on the gain (TD 2017/23;[7] *N&M Martin Holdings*),[8] nor will they be entitled to a 50 per cent CGT discount.

Under Australian domestic law, if the testamentary trust is a UK resident:

- franking credits will be lost, and Australian dividends can be paid to UK-resident beneficiaries; and
- Australian residents will not be entitled to a 50 per cent CGT discount or the benefit of beneficiary carry-forward losses.[9]

If the testamentary trust is a dual resident, then it will be necessary to consider whether the resolution of the dual residence for the purpose of the DTA will have any impact on the choices the trustee may make as to allocation of income or, indeed, whether it would be better to accumulate it.

For example, if the testamentary trust is solely a resident of the UK under the DTA, Canadian-source income and gains would, under the ‘Other Income’ article 20 of the DTA, only be taxable to the trustees or beneficiaries in the UK if that was the allocation or accumulation by the trustees.

INHERITANCE TAX

Australia’s DTAs say nothing about inheritance tax (such as exists in the UK and US). There is no estate taxes treaty with the UK. The old Australia/US Estate Tax Treaty was repealed in 1999.

UK TRUST REGISTER

The non-public UK Trust Register, set up in 2017, records persons with significant influence over resident trusts (e.g. appointor) and non-resident trusts with a ‘connection’ to the UK, e.g. a beneficiary resident in UK or assets in the UK. ■

1 [2016] HCA 45 **2** [2012] SCC 14 **3** [2019] FCAFC 29 **4** [2010] HCA 10 **5** [2012] FCAFC 84 **6** Shares in Australian or foreign companies that are not ‘Australian land rich’. **7** *Greensill* [2020] FCA 559 (on appeal) **8** [2020] FCA 1186 **9** TD 2017/24

Genuine decision-making when exercising discretionary powers

JIM O'DONNELL TEP, JACKSON MCDONALD LAWYERS AND CHAIR, STEP WESTERN AUSTRALIA

The hallmark of a discretionary trust is that a broad range of discretionary powers is conferred on the trustee, including the power to distribute income and capital.

Although a trust deed may give the trustee absolute and unfettered discretion, this does not give the trustee carte blanche to act maliciously or wantonly. There are higher obligations attached to the office of trustee, including a duty to act in the best interests of the beneficiaries.

Those discretions must be exercised in 'good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred': *Karger* v *Paul*.[1]

Wareham v *Marsella*[2] is a recent case in the Supreme Court of Victoria (the Court) that highlights the importance of genuine decision-making when trustees exercise discretionary powers. But what exactly does this mean?

RELEVANT FACTS

This case centred on a decision by a trustee of a self-managed super fund (SMSF) to pay benefits upon the death of its sole member, Mrs Swanson (S), in April 2016.

Super law and the trust deed limited the class of potential death benefit beneficiaries to four people – S's surviving second husband Mr Marsella (M), S's children from her first marriage Charles (C) and Caroline Wareham (W), and/or S' legal personal representative (LPR).

M was of limited financial means. Despite their 32-year marriage, S's will made only limited provision for M, including a right to occupy one house and a fixed sum of money for its upkeep. The bulk of the estate was to pass to C and W.

M brought a family provision claim against the estate. There was property but not much cash in the estate. The super fund balance was sizeable. S's death benefit nomination favoured her grandchildren. This was ineffective at law as grandchildren do not fall within the meaning of 'dependants' and, in any event, the nomination had lapsed.

The trust deed left the death benefits decision up to the trustee as a matter of discretion to choose between any or all of the eligible four.

According to W, S's intention had been to preserve the assets she had accumulated with her first husband, who died in a motor vehicle accident in 1981, for the benefit of their bloodline, namely C and W and their descendants.

After S died, W remained the sole trustee of the SMSF and her relations with M became strained. There was evidence of a physical altercation between M and W's husband in July 2016 in connection with a disputed clock, which W removed from S and M's marital home.

After taking advice from her accountant and a lawyer who was not a superannuation specialist, W as trustee decided to pay all of the death benefits to herself. On the same day, W appointed her husband as a co-trustee and they both made the same determination again.

THE PROCEEDINGS

M brought an application to set aside the death benefit decision, to remove the trustees and to order them to repay any benefits already distributed. Justice McMillan, who was also dealing with the family provision claim, at first instance granted those orders.

When considering whether a trustee has acted in good faith, upon real and genuine consideration and in accordance with the purpose for which the power was conferred, Her Honour said that a Court may look at the enquiries the trustee made, the information they had and their reasons for, and manner of, exercising their discretion. This includes consideration of any gaps or errors in the information. The trustee must inform themselves of the matters relevant to the decision. If consideration is not properly informed, it is not genuine.

Her Honour stated that the donee of a fiduciary power ought to be even more vigilant that she has discharged her duties when exercising the power in her own favour, and found the approach taken by W was quite the opposite. The Court could draw an inference from correspondence and surrounding circumstances that W had acted arbitrarily in distributing the death benefits, with ignorance of, or insolence toward, her duties. She acted in the context of uncertainty, misapprehensions as to the identity of a beneficiary, her duties as trustee and her position of conflict. There was a permitted conflicts clause in the deed but that was not effective to excuse her. As such, W was not in a position to give real and genuine consideration to the interests of the dependants.

> 'W was not in a position to give real and genuine consideration to the interests of the dependants'

As there had been an improper exercise of discretion and there remained significant personal acrimony between W and M, W and her husband had to be removed as trustees of the SMSF.

W appealed McMillan J's decision. That appeal was dismissed by the Court of Appeal on all ten grounds in April 2020. ►

IMPLICATIONS FOR SMSFS

Clearly, this case affects SMSF trustee decision-making when distributing death benefits.

The discretionary power to pay out death benefits from a super fund, in the absence of a binding death benefit nomination (BDBN), involves the exercise of a special power, as the choice of beneficiaries is limited to dependants or the LPR of the member. All of the benefits must be paid out. The ambit of the discretionary power is quite narrow.

'The trustee of a discretionary trust must give proper consideration to the beneficiaries when deciding how to distribute'

Great care should be taken to ensure that SMSF trustees properly inform themselves and exercise their discretion, in the absence of a BDBN, in good faith, upon real and genuine consideration, and for the purposes for which it was conferred. If in doubt, specialist legal advice should be sought.

IMPLICATIONS FOR DISCRETIONARY TRUSTS

One thing I find interesting about this case is that it challenges you to think how these principles might apply to discretionary trusts as a basis for attacking trustees. With family trusts there is typically a wide and sometimes open class of general beneficiaries, and 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.

It will generally be more difficult, but not impossible,[3] to apply these principles of genuine decision-making to a discretionary trust of the common or garden variety that we typically see with family trusts in Australia.

According to *Thomas on Powers* (2012) 2nd edn at [10.119]:

> *'The range of relevant inquiries into the circumstances of objects and beneficiaries, and the consequent number of factors which ought to be taken into consideration and balanced against each other, are undoubtedly greater and more complex where there is a large class.*
>
> *'However, the greater the size of the class, the more difficult it is likely to be to challenge a particular exercise of a power in favour of some member(s) of that class on the grounds of failure to take into account what are alleged to be relevant considerations (or of considering irrelevant ones). Similarly, the width of a power, even if exercisable in favour of just one object (or a few objects), may be such that (as in* Karger*) it may be difficult to identify a relevant consideration which has been overlooked. Nevertheless, the underlying principle is broadly the same in all cases: any exercise of a power or discretion (irrespective of its width or of the purpose for which it was created) must be based on a real and genuine consideration, even if the implications of the principle may vary widely in different circumstances.'*

The trustee of a discretionary trust must give proper consideration to the beneficiaries when deciding how to distribute. This, in my opinion, means the trustee needs to know who the primary beneficiaries and general beneficiaries are. Who falls within the class? What are their circumstances? Are certain objects in more need than others?

In some cases, the trustee may be able to justify proceeding on the basis that those objects with the least income and who are on the lowest marginal tax rate are in the most need or are the most deserving of the income of the trust.

Reflecting on this case, the most risk will attach for trustees in cases where there is a relationship breakdown involving acrimony and actual conflict between the trustee and one or more other beneficiaries.

One instance of this may be in separation and divorce. For example, a party to the marriage has control of a family trust that holds a majority of the family wealth. Perhaps the trustee operates a business from which the family has drawn income year after year to meet living costs. Suddenly, the husband and wife separate and commence divorce proceedings.

In those circumstances, the parties would be wise to engage legal representation early and try to reach agreement as to the distribution of income and, if necessary, capital from the trust to ensure their living costs can continue to be met throughout the proceedings.

If, on the other hand, the party who is trustee suddenly decides to wind up the trust and distribute its assets solely to himself or another preferred beneficiary, disregarding his wife and children, then he may be more exposed to an argument of failure to give genuine consideration (as well as a risk of those actions being set aside under s.106B of the *Family Law Act 1975* (Cth)).

We practitioners come across this and countless other scenarios of family conflict quite frequently, such as conflict between a parent and children;[4] between siblings or other immediate family;[5] or after mum and dad die;[6] mum and dad retire and hand over control to one child with whom their relationship later breaks down;[7] and a fight over control of the trust between the widow and a sibling of the deceased.[8]

The case of *Karger* was referred to in *Marsella* and is well known among trust practitioners as highlighting the undesirability of a trustee to record reasons for a decision. Where reasons for a decision are recorded, a court can then examine the merits of those reasons and whether they meet the standard of being valid reasons. That is a similar but different gateway to attack trustees than the genuine consideration grounds highlighted in *Marsella*. ■

1 [1984] VR 161 **2** [2020] VSCA 92 **3** *Trani* v *Trani* [2018] VSC 274 **4** *Hancock* v *Rinehart* [2015] NSWSC 646 **5** *Trani* v *Trani* [2018] VSC 274 **6** *Montevento Holdings Pty Ltd* v *Scaffidi* [2012] HCA 48 **7** *Mercanti* v *Mercanti* [2016] WASCA 206 **8** *Cardaci* v *Cardaci* [2018] WASC 100

Introducing...

RODNEY P LUKER TEP

Australasian representative on STEP's worldwide Council, STEP Australia Board Secretary, Past Chair of STEP South Australia, Special Counsel (and former Partner) at Hume Taylor & Co

WHY DID YOU BECOME A MEMBER OF STEP?

A representative of STEP South Australia directly approached me. STEP seemed to address the need for ongoing professional development concerning trusts and estates. I had been heavily involved in these areas of law for many years. I felt I might have had something to offer the organisation and anticipated that my ongoing commitment to high professional standards would be enhanced by becoming a TEP.

WHAT DOES BEING A STEP MEMBER MEAN TO YOU?

Being a STEP member has indeed enhanced my managerial, business, professional and personal development. A wonderful feeling of wellbeing emanates from that.

WHAT IS YOUR MOST-USED STEP RESOURCE?

The STEP resource I use mostly is the member's centre on the website. Apart from the member tools and benefits available, the materials provided are considerable. They encompass technical competence but also offer assistance in the further development of skills required for the rounded professional.

CAN YOU GIVE SOME INSIGHT INTO YOUR EXPERTISE?

I have practised law for more than 40 years. I was also a registered tax agent. I have been the trusted legal advisor to many families, especially on trusts and estates issues, and have been in a position to act for three generations in some of those families. I have worked with numerous private business clients and, in many cases, their accountants and financial advisors in contentious and non-contentious matters. I have also managed significant litigious, contested deceased estates, some with exceedingly high-net value and with assets in multiple jurisdictions.

WHAT MOTIVATED AND INSPIRED YOU TO GAIN THE EXPERTISE YOU HAVE TODAY?

I was motivated and inspired by some family members and family friends with exceptional professional and personal leadership skills.

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

Build a strong reputation and earn respect.

> 'Being a STEP member has indeed enhanced my managerial, business, professional and personal development'

WHAT ISSUES CAN YOU SEE STEP ADDRESSING IN THE FUTURE?

STEP will further develop its strategies to build momentum for its vision to be globally recognised as setting the standard for those advising families across generations.

To be a global leader among professional organisations:

- STEP must continue to receive considerable ongoing support from its members (who are its volunteers) and the branches and chapters they manage;
- STEP must maintain a well-structured head office working to sound business that has been strategically crafted; and
- The STEP brand must be more highly regarded and, at all times, be protected with appropriate safeguards.

WHAT IS YOUR MOST MEMORABLE STEP EVENT?

I had the pleasure of co-chairing the 2018 STEP Global Congress in Vancouver, Canada.

WHAT IS YOUR 'MUST READ' BOOK THAT YOU WOULD RECOMMEND?

Anna Karenina by Leo Tolstoy. I still quote from it: 'Anything is better than lies and deceit.' From a STEP point of view, the standout quotation would be: 'All happy families are alike; each unhappy family is unhappy in its own way.'

OUTSIDE THE OFFICE, WHAT DO YOU LOOK FORWARD TO?

I look forward to *'ōlelo kama'ilio* – sharing ideas, stories, history, music and opinions with my family, particularly at our beachside home in the Aldinga Scrub.

I have surfed for half a century. I still look forward to that next wave. ■

STEP AUSTRALIA EVENTS PROGRAM

Australia Events Program link – 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

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

SEE MORE ON EVENTS AND KEEP UP-TO-DATE

Keep informed on upcoming STEP events via the following links:

STEP AUSTRALIA EVENTS PROGRAM: **www.stepaustralia.com/events**

STEP WORLDWIDE 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 WORLDWIDE WEBSITE: **www.step.org**

STEP AUSTRALIA MENTORSHIP PROGRAM

Good news, if you are a STEP member in Australia there is an opportunity for you to participate in a mentorship program. There will be openings for both mentors and mentees. To make this happen, a national, diverse and representative mentorship framework planning committee has been formed, which needs your help to take the next step in building the program.

A survey was sent out in November 2020, giving members an opportunity to provide valuable insights. Make sure you contribute!

STEP AUSTRALIA MENTORSHIP FRAMEWORK PLANNING COMMITTEE: **Ashleigh Poole TEP**, Chair (Queensland); **Bryan Mitchell TEP** (Queensland); **Danielle Bechelet TEP** (Western Australia); **Janene Bon TEP** (Western Australia); **Debra Davis TEP** (Victoria); **Michele Davis TEP** (Queensland); **Warwick Gilbertson TEP** (New South Wales); **Paul White TEP** (South Australia) and **Andrew Woods TEP** (Victoria).

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