

STEP AUSTRALIA *NEWSLETTER*

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WELCOME FROM STEP AUSTRALIA CHAIR

Welcome to the sixth edition of the quarterly *STEP Australia Newsletter*.
The STEP Australia Conference, held at the Stamford Plaza, Brisbane, on 15–17 May 2019, was the highlight of this

year. We have been very fortunate to have had an exceptionally high calibre of speakers presenting papers at the conference this year, together with the attendance of STEP worldwide representatives Simon Morgan (Chair), Mark Walley (CEO), William Ahern (Director) and Rod Luker (Council member representing Australasia). With a conference theme of ‘Trusts and Estates – Preparing for the next decade’, the event programme was designed to enable practitioners to update their knowledge of recent developments and hear about cutting-edge industry trends and challenges, and also to provide an unparalleled opportunity for networking.

The conference coincided with the STEP Australia AGM, at which there were some changes to the Board. I would like to thank Neil Wickenden TEP as the outgoing Chair for his dedication and extensive service to STEP Australia, and for his efforts in advancing STEP as a professional body representing trust and estate practitioners in Australia. I hope that I am able to represent STEP Australia as Chair as ably as Neil has over the last two years.

Should any member wish to contact me to raise or discuss any issues or ideas, my contact details are contained within the new STEP Directory: www.step.org/step-directory

With best wishes,
Mark Fatharly TEP,
STEP Australia Chair



ANNOUNCEMENTS

Rod Luker TEP has joined STEP’s worldwide Council as representative for Australasia, following the resignation of David Russell AM QC TEP from this seat. David remains a Director of STEP, serving on the worldwide Board of Directors as Deputy Chair.

Grahame Young TEP, who is on the STEP Western Australia Committee and the STEP Australia membership sub-committee, has achieved 50 years of practising in Western Australia, having been admitted as a solicitor on 18 March 1969. He has joined a select group of 30 who continue to hold a practising certificate after achieving this milestone. It is a privilege to have his regular involvement with STEP and his ongoing role in the profession.

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The definition of income in trusts

Greg Russo TEP, Solicitor, Featherbys Lawyers

This paper identifies issues that can arise in the taxation of capital gains in trusts that distinguish between income and capital beneficiaries (Capital Protected Trusts).

In view of the complexity of the relevant legislation and case law, particularly since the introduction of the *Tax Laws Amendment (2011 Measures No.5) Act 2011* (Cth) (the 2011 Legislation), the treatment is necessarily general. However, a number of specific issues are identified, the importance of an appropriate definition of trust income is highlighted, bespoke trustee powers are suggested and a number of illustrative clauses are included at the end of this paper.



effectively taxable income (Net Income), and ‘income of the trust estate’, which is income for trust purposes (Trust Income). In summary:

1. The Net Income of a trust is defined in ITAA 1936 as: ‘the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions’.¹⁵
2. The *Bamford* case¹⁶ established that Trust Income is determined with reference to the trust deed – that is, the trust deed can provide a definition or formula for the determination of Trust Income, or it can leave the determination to the discretion of the trustee in some cases.¹⁷
3. Trust beneficiaries who are presently entitled:
 - a. to a share of the income of the trust estate (Trust Income)
 - b. must pay tax on so much of ‘that share’ of the net income of the trust (Net Income).¹⁸

The *Bamford* case decided that the percentage liability for tax is determined with reference to Trust Income, but that that percentage is then applied to the Net Income on a proportionate basis.¹⁹
4. To the extent that there is income of a trust to which no beneficiary is presently entitled, the trustee will be assessed and is liable to pay tax.²⁰ Or if there is no Trust Income but there is Net Income, the trustee will be assessed.
5. There are separate provisions that apply to a presently entitled beneficiary who is under a legal disability.²¹ Basically, the trustee is assessed on the beneficiary’s share of Net Income at progressive rates of tax. The beneficiary may also be assessed but allowed a credit for the tax paid by the trustee.

INCOME

Income comprises non-capital receipts that taxpayers receive. Income can be either ordinary or statutory.¹ Ordinary income and statutory income will either be assessable,² exempt³ or non-assessable and non-exempt.⁴ Tax is payable by taxpayers on assessable income (less applicable deductions).⁵

TAXATION OF TRUSTS

DIVISION 6 OF PART III ITAA 1936

Trusts (and, to an extent, deceased estates) are currently taxed pursuant to Division 6⁶ of Part III of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936).⁷ A detailed analysis is beyond the scope of this paper.⁸ A brief summary follows.

PRESENT ENTITLEMENT

It is a basic premise of the taxation of trusts that a beneficiary ‘presently entitled’ to a share of income is responsible to pay tax on that share of net income.⁹ Present entitlement includes a beneficiary’s right to demand immediate payment of income¹⁰ and income set aside for a minor beneficiary.¹¹

Present entitlement may also be ‘deemed’ to beneficiaries who have a vested and indefeasible interest in trust income but who would otherwise not be presently entitled.¹²

LIABILITY FOR TAXATION ON TRUST INCOME

Generally¹³ tax is payable by each trust beneficiary on their ‘share of the trust’s net income’.¹⁴ The legislative framework deals with two distinct concepts: ‘net income’, which is

‘It is essential that the income be defined appropriately in the trust deed at the outset’

CAPITAL PROTECTED TRUSTS AND INCOME DEFINITION

TRUST INCOME v NET INCOME – INCOME DEFINITION

Trust Income and Net Income will often be different in Capital Protected Trusts (CPTs), because it is usually the desire of the settlor²² or will maker²³ that the capital beneficiaries (and not the income beneficiaries) receive the benefit of any capital gains made by the trust.

That is generally achieved by defining Trust Income in a trust deed in a way that excludes capital gains – an illustrative clause is included at the end of this paper – or by leaving Trust Income undefined.

The Australian Taxation Office (ATO) has provided a draft view²⁴ (relying on the decision in the *Forrest* case)²⁵ that it may not be appropriate for a trustee to be granted a power to modify the definition of Trust Income where income beneficiaries and

capital beneficiaries of the trust are not identical – such as in a CPT. Accordingly, it is essential that the income be defined appropriately in the trust deed at the outset.

INCOME EQUALISATION CLAUSES

CPTs rarely include a clause equating Trust Income to Net Income. Such clauses have featured in many discretionary trusts since the *Bamford* case. An illustrative clause is included at the end of this paper.

A detailed analysis of equalisation clauses is beyond the scope of this paper. Under cover of that comment, such a clause will not guarantee that Trust Income will always equal Net Income. It is the ATO's view²⁶ that Trust Income for the purposes of the tax legislation refers to the 'net amount of income to which a beneficiary could be made presently entitled, or accumulated'. Accordingly, Trust Income does not include notional amounts (such as franking credits and capital gains resulting from the market value substitution rule), which are included in Net Income.

TAX ISSUES THAT ARISE WHEN TRUST INCOME AND NET INCOME DIFFER IN A CPT

Tax issues can arise when there is a difference between Net Income and Trust Income, such as often occurs in CPTs.

In a CPT, the income beneficiaries of the trust will generally be presently entitled to 100 per cent of the Trust Income (which often excludes capital gains) and accordingly will be responsible for 100 per cent of tax on the Net Income (which includes capital gains). That could result in income beneficiaries being assessed as liable for tax on capital gains that they will never benefit from.

The alternative of equating Net Income to Trust Income is likely to undermine the trust's objectives. Historically, a solution to this issue has been sought in a number of ways, including:

1. The ATO issued a concessional administrative Practice Statement in 2005,²⁷ which allowed the trustee, income and capital beneficiaries to all reach agreement that the capital beneficiaries would be taxed on the capital gains. That Practice Statement was withdrawn on 13 October 2010.
2. In 2007, the *Income Tax Assessment Act 1997* (Cth) was amended to enable a trustee of a testamentary trust (only) to elect to be taxed on the capital gain if the income beneficiary had no interest in trust property representing the gain.²⁸ This provision was discussed in ATO ID 2009/144.

These measures were superseded by the 2011 Legislation following the *Bamford* case.

2011 LEGISLATION AND CURRENT STRATEGIES

2011 LEGISLATION

The 2011 Legislation was enacted in the context of the outcome of the *Bamford* case and the ATO's concern that, as a consequence of that decision, trustees would no longer be able to stream different categories of income. Under the 2011 Legislation:

1. Capital gains (and franked distributions) are now brought to tax separately from Division 6 of Part III of ITAA 1936.²⁹
2. Beneficiaries may be made 'specifically entitled' to capital gains (and franked distributions)³⁰ if the trust deed allows it. The beneficiary must be reasonably expected to receive the capital gain, and record-keeping requirements must be met.³¹
3. Trustees may elect to be taxed on capital gains if the trust deed allows it and provided that the gain has not been paid to or applied for the benefit of a beneficiary of the trust.³²
4. Any capital gains (and franked distributions) to which no one is specifically entitled are assessed proportionally to the beneficiaries based on their adjusted Division 6 percentage of the Trust Income (Trust Income disregarding capital gains and franked distributions to which a beneficiary or the trustee is specifically entitled). If the Trust Income is nil, the trustee is assessed.

Accordingly, a number of matters arise for consideration.

SPECIFIC ENTITLEMENT

If it is intended (and possible) to utilise specific entitlement in the administration of a CPT (in favour of capital beneficiaries, or, depending on the terms of the trust, one or more of the income beneficiaries), it is recommended that the trustee be given the powers to stream income and to make a beneficiary specifically entitled to a capital gain. Illustrative clauses are included at the end of this paper.

Further, while it may be deemed advantageous for a capital beneficiary to be made specifically entitled to a capital gain, it is a requirement for specific entitlement that a beneficiary can be 'reasonably expected to receive' the capital. It is arguable that the interest of a remainderman would not satisfy that requirement.³³

ELECTION TO BE ASSESSED ON THE CAPITAL GAIN

In some circumstances, it may be advantageous for a trustee to be assessed on the capital gain rather than the income beneficiaries (e.g. in the case of testamentary trusts, where s.99 ITAA 1936 marginal tax rates may apply). Under the 2011 Legislation³⁴ a trustee may choose to be specifically entitled to a capital gain provided it is permitted under the trust deed³⁵ and no trust property representing the gain is paid to or applied to the benefit of the beneficiary. An illustrative clause is included at the end of this paper.

REIMBURSEMENT OF TAX LIABILITY

In the event that neither the trustee nor any other beneficiary is specifically entitled to a capital gain, liability for payment of tax on the capital gain will flow proportionally to the income beneficiaries (with reference to their respective shares of the adjusted Division 6 percentage of the Trust Income). In those circumstances, a power could be given to the trustee to reimburse the beneficiary for that liability. An illustrative clause is included at the end of this paper.

POSSIBILITY OF NIL TRUST INCOME

When drafting trusts, practitioners should have regard to the possibility, with reference to the likely future trust assets,³⁶

that the trust may make a capital gain in an accounting period during which there is no Trust Income. In those circumstances, there is a risk that the trustee will be assessed in respect of the capital gain. If the trustee were assessed under s.99A of ITAA 1936, the general 50 per cent capital gains tax (CGT) discount would not be available.

CONCLUSION

In the context of CPTs, apportioning liability for CGT between beneficiaries remains an ongoing issue.

The 2011 Legislation partly addressed the issue through the concept of specific entitlement and by extending the ability for trustees to be assessed for CGT to trusts other than testamentary trusts.

The 2011 Legislation was only ever intended to be an interim measure, however, and complexities remain. It remains important whenever drafting CPTs that practitioners give specific consideration to:

1. the definition of Trust Income – in the context of CPTs and in view of the ATO's comments in TR 2012/D1, it may be problematic for a trustee to determine the definition of income once the trust has commenced;
2. the use of trustee powers to elect to be taxed on capital gains; and
3. the inclusion of trustee directions to reimburse income beneficiaries who may be taxed on capital gains not received by them.

ILLUSTRATIVE CLAUSES

INCOME DEFINITION CLAUSE

In calculating the net income of the trust, my trustee shall use generally accepted accounting concepts.

INCOME EQUALISATION CLAUSE

The income of the trust shall mean, unless the trustee otherwise determines, net income as defined in subsection 95(1) of the *Income Tax Assessment Act 1997* (Cth).

STREAMING CLAUSE

If the trust has income that is derived from a number of different sources or consists of a number of different types of income, and one or more of the beneficiaries become presently entitled to all or part of such income, the trustee may choose the type or source of the share of the income to which each beneficiary is entitled.

SPECIFIC ENTITLEMENT

The trustee may make a beneficiary specifically entitled to any part of a capital gain made by the trustee.

TRUSTEE ELECTION TO BE TAXED ON CAPITAL GAIN

The trustee may elect to be assessed on any part of a capital gain that results in a capital gains tax liability and shall be entitled to seek reimbursement from the capital of the trust fund required to meet any capital gains tax liability resulting from such capital gain.

REIMBURSEMENT OF BENEFICIARY

The trustee shall use such of the capital of the trust fund to reimburse a beneficiary in respect of any capital gains tax liability they may bear resulting from a capital gain, to which no one is specifically entitled within the meaning of the *Income Tax Assessment Act 1997* (Cth).

IMPORTANT NOTE

The information given by Greg Russo and Featherbys Lawyers in this paper is given in good faith but is of a general nature only. It is not intended that the information will be acted or relied on. Each person's requirements and circumstances will be different and, accordingly, each person should engage professional assistance according to their own particular needs. The illustrative clauses in this paper have been prepared for educational and general information purposes only and should not be relied on as (or in substitution for) legal, accounting, financial or other professional advice. Neither Greg Russo nor Featherbys Lawyers warrant or represent that the information is accurate, reliable, complete or free from error or omissions. None of the information should be taken as legal or accounting advice. Subject to any law which cannot be excluded Greg Russo and Featherbys Lawyers do not accept any responsibility for errors in or omissions contained in the information. Copyright in this paper is owned by Featherbys Lawyers.

1 Division 6 ITAA 1997. Ordinary income is defined as 'income according to ordinary concepts'. The definition is an inclusive one and not otherwise defined in legislation. Interest and dividends paid on ordinary shares are examples of ordinary income. Statutory income is defined as amounts that are not ordinary income, but that are required to be 'included in ... assessable income by provisions about assessable income'. Capital gains and franking credits are examples of statutory income. **2** ss.6.5 and 6.10 ITAA 1997 **3** s.6.20 ITAA 1997 **4** s.6.23 ITAA 1997 **5** s.4.15 ITAA 1997 **6** Including Divisions 6AA, 6A, 6C, 6D and 6E of ITAA 1936. Division 6E was inserted by the 2011 Legislation and is relevant to the taxation of capital gains and franked dividends from the 2010/2011 financial years. **7** Where the tax treatment of deceased estates and testamentary trusts differs from the tax treatment of trusts generally, it is generally preferential for testamentary trusts and deceased estates. **8** See A. Kayis-Kumar and C. J. Taylor, 'The Application of Capital Gains to Trusts: Conceptual, technical and practical issues, and a proposal for reform', presented at the 31st Australasian Tax Teachers Association Conference 2019, Curtin Law School, Perth, 16-18 January 2019. **9** s.97(1) ITAA 1936 **10** *FCT v Whiting* (1943) 69 CLR 199, *Harmer v FCT* (1991) 173 CLR 264 **11** *Taylor v FCT* (1969) 123 CLR 206 **12** s.95A(2) ITAA 1936 **13** Ignoring non-resident beneficiaries and beneficiaries under a disability. **14** See below as to what this phrase means. **15** s.95(1) ITAA 1936 **16** *FCT v Bamford & Ors, Bamford & Anor v FCT* [2010] HCA 10 **17** Where no definition is included, Trust Income will equate to ordinary income (para.37 TD 2012/22). **18** s.97 ITAA 1936 **19** The *Bamford* case is also an authority for the proposition that the proportionate approach (rather than the quantum approach) is to be applied in determining a presently entitled beneficiary's share of the Net Income that tax is payable in respect of. **20** At the highest marginal tax rate where the trust is one that s.99 ITAA 1936 does not apply to – most *inter vivos* trusts – and at ordinary progressive marginal tax rates exclusive of the tax-free threshold where s.99 ITAA 1936 does apply – most testamentary trusts. **21** s.98 ITAA 1936 **22** In the case of *inter vivos* trusts. **23** In the case of testamentary trusts. **24** TR 2012/D1 paras.66–68 **25** [2010] FCAFC 6; 2010 ATC 20-163 **26** TR 2012/D1 **27** PSLA 2005/1(GA) **28** s.115.230 ITAA 1997 **29** Subdivision 115-C ITAA 1997 (Capital Gains) and subdivision 207-B ITAA 1997 (Franked Distributions) **30** Subdivision 115-C ITAA 1997 (Capital Gains) and Subdivision 207-B ITAA 1997 (Franked Distributions). **31** Division 115-C ITAA 1997 and TD 2012/11, ATO ID 2013/33 **32** s.115.230 ITAA 1997 **33** The explanatory memorandum to the 2011 Legislation noted that 'a beneficiary can reasonably be expected to receive an amount if ... the beneficiary has a present entitlement to the amount, or a ... vested and indefeasible interest ... or the amount has been set aside exclusively for the beneficiary'. **34** s.115.230 ITAA 1997 **35** *Australian Master Tax Guide 2012*, CCH 11-060 **36** And the ATO's view regarding notional amounts not being included in Trust Income – TR 2012/D1

Issues to consider when the deceased controlled assets in a company

Kim Reynolds TEP, Director – Taxation Advisory, Vincents

The financial affairs of individuals are increasingly complex, with asset ownership across various entities, such as a company.

This means that, when an individual dies, consideration may need to be given to what to do with not only an existing company, but also its assets. Any dealings will likely give rise to tax consequences.

This article highlights some tax issues often overlooked when dealing with a company that was in the control of a deceased individual.



responsible for making minimum repayments, which include principal and interest, each year.

Where the loan is forgiven by the company, a deemed unfranked dividend may arise under s.109F of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936). An LPR steps into the shoes of the deceased once probate is granted, therefore s.109F would apply if the company decided to forgive a loan owed by the estate. It is interesting to note that, in

a Private Ruling (Number 1012448642775), the Australian Taxation Office (ATO) took the view that, where the loan was forgiven prior to probate being granted, a deemed dividend would not arise. Caution should be exercised in adopting this approach, as succession laws differ in each state, and Private Rulings are not binding on the ATO.

Generally, where minimum loan repayments are not made in each income year, a deemed unfranked dividend will arise to the borrower under s.109E of ITAA 1936 equal to the minimum repayment shortfall. However, the ATO took the view in ATO ID 2002/741 that the deemed dividend will not arise where the original debtor (the deceased) is different to the current debtor (the LPR).

Although failure to make minimum repayments may not subject the estate to a deemed dividend under s.109E, if the loan is formally forgiven or deemed to be forgiven by the company, a deemed dividend will arise under s.109F. The loan therefore will still need to be repaid by the LPR.

DISTRIBUTION OF COMPANY ASSETS TO SHAREHOLDERS OR THEIR ASSOCIATES

The distribution of company assets (cash and property) to shareholders will be a dividend for tax purposes and may be franked. This may be an effective method of extracting company assets over a period of time and managing the associated tax cost.

However, it should be noted that the transfer of property to a shareholder, or an associate of a shareholder, at less than market value can be a payment under Division 7A, which would be a deemed unfranked dividend.

OTHER CONSIDERATIONS

In addition to the above issues, advisors should also be alert to:

- income arising from disposal of plant and equipment;
- goods and services tax;
- utilisation of tax losses; and
- whether or not the company should be liquidated.

The points highlighted above can be complicated to deal with, so it is prudent to seek advice early to effectively manage the potential tax implications to the estate.

WHO OWNS THE COMPANY?

Before a company can be dealt with, it is important to determine who owns the shares – they may be held by the individual or another entity, e.g. a trust, controlled by the individual. The nature of the owner will impact on the tax consequences associated with dealing with the company and its assets.

CAPITAL GAINS TAX ON DISPOSAL OF ASSETS

Where a beneficiary inherits an asset, they will acquire the capital gains tax (CGT) cost base equal to its market value at the date of death (if acquired by the deceased before 20 September 1985 (pre-CGT)) or the cost base of the asset to the deceased (if acquired by the deceased after 19 September 1985 (post-CGT)).

The disposal of shares acquired pre-CGT will generally not give rise to CGT. However, s.104.230 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) (CGT Event K6) may apply where, rather than a company disposing of an asset it acquired post-CGT, pre-CGT shares in the company are disposed of instead.

Further, Division 149 of ITAA 1997 may deem pre-CGT assets of a company to be treated as post-CGT assets where there is no longer continuity in majority underlying ownership of the company.

Therefore, CGT may apply not only to post-CGT shares, but also if there has been a change in shareholding or there are post-CGT assets in the company.

Other CGT considerations include:

- use of market value, particularly dealing with related parties; and
- using the general 50 per cent CGT discount and/or the small business CGT concessions to reduce any potential CGT liability.

PRIVATE COMPANY LOANS (DIVISION 7A OF ITAA 1936)

Loans owed by the deceased to a private company at their date of death will form part of their estate and the legal personal representative (LPR) will assume the liability and be

Going beyond capacity and testing your client's cognitive abilities

Dr Jane Lonie, Clinical Neuropsychologist

While capacity is a legal construct, its underpinnings are cognitive. When capacity is in doubt and we refer on for specialist medical opinion, we are asking for information about whether our client's cognitive abilities are intact or impaired, and to what extent any cognitive impairments impact on our client's capacity to execute the legal transaction in question. We should also be asking whether and how it might be possible to support our client's decision-making capabilities in order to facilitate and maximise their capacity.¹

The place of cognition in determining legal capacity gives rise to what has been referred to as the *lingua franca* problem.² Different dialects or languages, if you like, are employed by lawyers and medical experts in dealing with the issue of legal capacity. In criminal law, notions of conforming and controlling behaviour, appreciating wrong and the consequences of behaviour and premeditation are underpinned by cognitive constructs like inhibition, empathy and adaptability. In civil law, notions of understanding, appreciating, evaluating, 'sound mind' and lucid interval are underpinned by cognitive constructs like memory, attention/arousal, working memory, reasoning, future thinking, judgment and appraisal.

We are reasonably good at recognising the less complex cognitive functions that impact on decision-making and legal capacity, such as comprehension or communicating. We are considerably less good at recognising the higher-level aspects of cognitive function that impact on decision-making capacity, including those cognitive functions outlined above.

This is problematic, in a practical sense, for three reasons. First, understanding within the context of legal capacity is not considered synonymous with simple comprehension and is seen to encompass a range of what we refer to medically as higher-level or executive brain functions, listed above.³ Second, cognitive impairments of this higher-level or executive nature are present prior to the point at which cognitive impairment or dementia is diagnosed or even recognised as being present among elderly clients.⁴ Finally, contested wills, enduring powers of attorney and guardianship matters centre around these higher-level or executive aspects of cognition, not around whether or not a client is able to communicate or understand⁵ – which are cognitive abilities that are far more obvious for all to see and agree on.

Capacity is to be assumed unless there is reason to suspect otherwise.⁶ However, we cannot abdicate responsibility for



assessing capacity, leaving it to medical specialists, as the very process of deciding to seek out a specialist opinion requires some preliminary evaluation of a client's capacity in and of itself.⁷ At what point, then, should the assumption of capacity be questioned or at least not assumed? If we assume capacity when dealing with clients aged 65, 80 and 90 years of age, we may be incorrect in doing so at rates of 1/10, 3/10 and 1/2 respectively.

Justice Kunc has made some suggestions in the judgment of *Ryan v Dalton; Re Estate of Ryan*.⁸ If the assumption of capacity is to be based solely on a client's ability to comprehend at a conversational level and to communicate, it follows that it will rarely be questioned. This being the case, be prepared to face the uncertainty that comes with determining who your client is, i.e. the cognitively impaired mother or her 'helpful and supportive' son, and be prepared to accept the fact that the service you provide may not be aligned with the will and preference of your client.

An alternative approach is to consider cognitive factors beyond those of surface-level conversation with the potential to impact on a client's decision-making ability. In relation to testamentary capacity, for example, how might the decision-making process of a client be impacted on by a client's inability to recall and retain relevant facts, information and advice, or indeed to hold the relevant facts and advice in mind for long enough to reason through and evaluate a range of options? If your client is unable to appraise their own situation as a result of a loss of insight into their own cognitive illness/loss, or if they no longer have the cognitive ability to consider future consequences, how might this affect the decisions they make? How, if at all, would any loss of ability to read and to question the underlying intent and motives of others impact on their testamentary decision-making.

The integrity of these higher-level aspects of decision-making must be verified in order to establish that it is 'safe to proceed' from the perspective of client decision-making capacity. Consideration of cognitive aspects of decision-making extending beyond conversational skill is a necessary means of safeguarding the will and preference of the client and minimising professional risk.

¹ UN General Assembly, *Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106*, available at bit.ly/2ZLYCtU (accessed 22 March 2019) ² J. W. Buckholtz and D. L. Faigman, 'Promises, Promises for Neuroscience and Law', *Current Biology*, 24:18 (2014), PR861-R867 ³ K. I. Shulman, S. G. Himel, I. M. Hull, C. Peisah, S. Amodeo and C. Barnes, 'Banks v Goodfellow (1870): Time to update the test for testamentary capacity', *Canadian Bar Review*, 95:1 (2017), pp.251-267 ⁴ Harrington et al, 'Executive Function Changes Before Memory in Preclinical Alzheimer's Pathology: A prospective, cross-sectional, case control study', *PLoS One* 8(11): e79378 (2013) ⁵ J. A. Lonie and K. Purser, 'Assessing Testamentary Capacity from the Medical Perspective', *Australian Bar Review*, 44:297 (2017) ⁶ bit.ly/2LdoJSq ⁷ bit.ly/2Jciwr ⁸ [2017] NSWSC 1007 (31 July 2017) [68]

EVENTS

The STEP branches provide forums in which professionals from different areas can collaborate and share knowledge and experience. We welcome all professional advisors, educators and students with a trusts and estates focus in their practice, whether for private or corporate clients. We are committed to building strong links between our local, national and international STEP colleagues.

TUESDAY 4 JUNE 2019	QLD	WEDNESDAY 12 JUNE 2019	NSW	MONDAY 17 JUNE 2019	VIC
12.30pm-2pm Lunchtime Seminar Guardianship/administration/ EPA focus - elder abuse Speaker: Natalie Siegel-Brown of the Public Guardian Venue: Queensland Law Society, 2nd floor, 179 Ann Street, Brisbane		12.30pm-2pm Lunch and Learn Session Elder law issues including the impact of the Royal Commission into aged care Speaker: Kim Boettcher, Chalfont Chambers Venue: TBA, Sydney		5.30pm-7pm SIG - Family Business Facilitator: David Gibbs Members only Venue: Septimus Jones & Lee	
WEDNESDAY 19 JUNE 2019	NSW	WEDNESDAY 26 JUNE 2019	QLD	WEDNESDAY 10 JULY 2019	NSW
5.30pm-7.30pm Seminar Foreign residency with reference to the <i>Harding</i> case Speaker: Peter Norman Venue: Banco Court, Supreme Court of NSW		5.15pm-7.30pm STEP Queensland #STEPNEXTGEN Series How to prepare estate cases for hearing or trial; practice, procedure and evidence; working with counsel; mediation; the day of the hearing or trial Presenter: Jeff Otto TEP, Chancery Barristers + Mediators Venue: College of Law Rooftop, 140 Ann Street, Brisbane		12.30pm-2pm Lunch and Learn Session International estates Speaker: Phillip Davis TEP, HWL Ebsworth Venue: Office of HWL Ebsworth, Sydney	
WEDNESDAY 17 JULY 2019	NSW	MONDAY 22 JULY 2019	VIC	MONDAY 5 AUGUST 2019	VIC
5.30pm-7pm Seminar The Institutional Constructive Trust - a modern look at a remedy or a trust? Speaker: David Raphael TEP Venue: Banco Court, Supreme Court of NSW		5.30pm-7pm SIG - Litigation Facilitator: Eleanor Coates, Barrister Venue: Septimus Jones & Lee		5.30pm-7pm Members Meeting Seminar: End of Life Speakers: Panel Members only Venue: Russell Kennedy	
TUESDAY 6 AUGUST 2019	QLD	WEDNESDAY 14 AUGUST 2019	NSW	WEDNESDAY 21 AUGUST 2019	NSW
12.30pm-2pm Lunchtime Seminar Core area for solicitors and barristers - advocacy - a view from the bench - practical advocacy tips for succession lawyers Speaker: The Hon Justice Ann Lyons SJA TEP, Supreme Court of Queensland Venue: Queensland Law Society, 2nd floor, 179 Ann Street, Brisbane		12.30pm-2pm Lunch and Learn Session Asset allocation and investment powers under s.14A of the <i>Trustee Act</i> Speaker: Duane O'Donnell TEP, Crestone Wealth Management Venue: Office of Crestone Wealth Management, Sydney		5.30pm-7pm Seminar Key aspects of estate mediation Speaker: Steve Lancken, Negocio Resolutions Venue: Banco Court, Supreme Court of NSW	

We welcome all STEP members to attend events hosted by other STEP branches. For more information on the STEP Australia events calendar, contact Dior Locke at dior.locke@step.org

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

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