ISSUE 25 | JUNE 2024

QUARTERLY NEWSLETTER

STEP AUSTRALIA *NEWSLETTER*

CONTENTS

STEP Australia
ADVISING FAMILIES ACROSS GENERATIONS

MESSAGE FROM STEP AUSTRALIA CHAIR

Welcome to our latest STEP Australia Newsletter.

Thank you for your patience in the release of this newsletter.

STEP Australia has had a very successful and strong few months right across the country, with many impressive branch events. Nationally, the highlight was unquestionably the success of our Trusts and Estates Conference held in Melbourne on 8–10 May. This year's theme, 'The Life Cycle of a Trust' proved to be very popular with delegates from right across Australia and abroad. The level of preparation of all presenters was extremely evident, and the feedback from the conference would suggest that this was among, if not the, most successful national conference ever. A massive thank you to all our presenters and the organising committee for delivering such a high educational and networking event.

Congratulations again to this year's winners of the 2024 STEP Australia Excellence Awards: Carolyn Sparke KC TEP, winner of the STEP Australia Masters Award and Rachael Grabovic TEP, winner of the STEP Australia Excellence Award. The winners were announced at the STEP Australia Conference gala dinner on 9 May 2024.

STEP Australia also recently delivered our first joint event with the SMSF Association. This three-hour virtual conference, 'In-STEP with SMSFs' was presented by leading members from both associations. The event proved very popular with over 100 attendees. My personal thanks to the following STEP members for agreeing to present: Ann Janssen TEP, Caite Brewer TEP, Bryan Mitchell TEP and Scott Hay-Bartlam TEP. It is hoped that this relationship and such events will continue to grow, drawing more awareness to the expertise of members of both organisations, opportunities for collaborative practice and growth in attendance at events across the country.

As a closing comment, I would like to encourage you to consider using your TEP destination through social media and on your email signatures. Market awareness of both the brand and the high expertise of our members is significantly increasing and your support in building this awareness would be greatly appreciated and will open more doors and opportunities for us all. ■

With best wishes,

Ian Raspin TEP
STEP Australia Chair

STEP AUSTRALIA CONTACT INFORMATION

AUSTRALIA
STEP Australia Board Chair
Ian Raspin TEP
iraspin@bnrpartners.com.au
www.stepaustralia.com/about-us/step-australia-board

NSW
STEP New South Wales Branch Chair
Phillip McGowan TEP
pmcgowan@mccullough.com.au
www.stepaustralia.com/branch/step-new-south-wales

QLD
STEP Queensland Branch Chair
Andrea Rae TEP
agrae@qldbar.asn.au
www.stepaustralia.com/branch/step-queensland

SA
STEP South Australia Branch Chair
Adrian Cartland TEP
adrian@cartlandlaw.com
www.stepaustralia.com/branch/step-south-australia

VIC
STEP Victoria-Tasmania Branch Chair
Andrea Olsson TEP
andrea.olsson@mst.com.au
www.stepaustralia.com/branch/step-victoria

WA
STEP Western Australia Branch Chair
Janene Bon TEP
janene.bon@hallandwilcox.com.au
www.stepaustralia.com/branch/step-western-australia

Cross-border estate-planning considerations for Indian Australians

SIMRAN JOSHI, ASSOCIATE LAWYER
HUTCHINSON LEGAL

Australia, a prominent 'immigrant nation', hosts a rapidly growing Indian community, constituting 3.1 per cent of the population. This demographic, encompassing both native Australians and those who migrated, contributes significantly to the nation's tax base.[1]

Given India's policy of not permitting dual citizenship, individuals of Indian origin residing in Australia can broadly be categorised into two groups:

- residents in Australia who are citizens of India; and
- residents and citizens of Australia.

Crafting an estate plan for these individuals necessitates a comprehensive understanding of both Australian and Indian laws. Here are key considerations for developing an estate plan with an Indian nexus.

SUCCESSION LAWS

India's succession laws are uniquely intricate, guided by diverse personal laws across communities and religions. Unlike many nations, religious affiliation governs succession in India. The complexity is further heightened by additional legal frameworks, including community-specific marriage laws.

Focusing on Indian Hindus, who constitute 80 per cent of India's population, including Buddhists, Jains and Sikhs, this discussion aims to simplify understanding while avoiding the complexities introduced by the diverse range of personal laws in the country.

Historically, Hindu inheritance laws centered on the Hindu Undivided Family (HUF) and had a patriarchal structure. In this traditional framework, inheritance rights favoured Hindu males by birth and 'dowry' (gifts during a daughter's marriage), was seen as an 'advance legacy' with the estate eventually passing on to the sons.[2] Post-2005,[3] legal changes transformed this landscape, ensuring equal inheritance rights for daughters, marking a significant shift from the traditional framework.

In India, inheritance laws are governed by two key legislations: *The Indian Succession Act*, 1925 (ISA) and *The Hindu Succession Act*, 1956 (HSA). Hindus have been granted comprehensive testamentary freedom and can bequeath all their assets, whether ancestral or self-acquired, through a will.

INTERNATIONAL WILLS

India is notably absent from the 1973 UNIDROIT convention on international wills.[4] This convention recognises an 'international will' as valid across signatory countries, including Australia, regardless of the will's origin, location of the assets or the testator's residence. As international wills are not an option for those with assets in India, the recommended strategy is to opt for separate wills for each jurisdiction, known as concurrent wills.

Having concurrent wills streamlines estate administration, enabling simultaneous probate proceedings across jurisdictions. This eliminates the need for a time-consuming re-sealing process, enhancing overall efficiency. In cases of potential contentious probate in a specific jurisdiction, separate wills shield assets in other jurisdictions from challenges. The prolonged legal processes in Indian courts, marked by substantial backlogs,[5] highlight the possibility of testamentary suits enduring for years, if not decades.

However, while drafting concurrent wills, legal practitioners must diligently enquire about existing wills in other jurisdictions to avoid unintentional revocation of a prior will.

RESTRICTIONS ON OWNERSHIP OF LAND

Non-resident Indians, under the *Foreign Exchange Management Act*, 1999[6] and the 2018 regulations,[7] can acquire immovable properties in India excluding agricultural or plantation land, without special permission from the Reserve Bank of India. Nevertheless, inheriting agricultural or plantation land or a farmhouse is allowed, while adhering to prevailing foreign exchange laws.

DOMICILE AND MOVABLE/IMMOVABLE ASSETS

Regarding immovable properties, all matters relating to capacity to make will, revocation of will, power of disposition and related matters are governed by *lex situs*, i.e., the law of the land where the property is situated. For movable property, succession is regulated by the law of the country where the person had domicile at the time of death.[8]

The domicile of a person is a question of fact. The presumption, for someone born in India who migrates abroad, is that they maintain domicile in India. This presumption remains unless evidence demonstrates a deliberate change in domicile to the country of residence.

Indian Australians creating concurrent wills, especially for jurisdictions outside India, must explicitly declare and affirm in each will that their chosen country of residence is their permanent domicile, indicating a shift from their birth country of India. This affirmation is especially critical for movable properties, ensuring clear testamentary documentation for assets across different jurisdictions. ▶

ESSENTIALS OF A VALID WILL IN INDIA AND THE PLACE OF EXECUTION

The mandatory requirements[9] for the execution of a valid will are that a person of sound mind, having attained majority, can create a valid will in writing. The execution requires the testator's signature or mark in the presence of at least two witnesses.[10]

Importantly, the ISA does not impose any specific requirements regarding the place of execution for a valid Indian will. Therefore, Indian Australians need not travel to India to create a valid will. It is advisable to notarise the will in the presence of an Australian notary public and then have it attested by the Consulate General of India in Australia.

IS A GRANT OF PROBATE ALWAYS NECESSARY?

In India, the requirement for Hindus to obtain probate, certifying the validity of a will, is applicable primarily to wills executed in or concerning immovable property situated in Mumbai, Kolkata or Chennai.[11] In other parts of India, obtaining a Grant of Probate is not mandatory.[12] However, it may be advisable if mandated by regulators or service providers.

DOES MARRIAGE REVOKE A WILL IN INDIA?

Section 69 of the ISA revokes a will by marriage, but this provision does not extend to Hindus, they being specifically covered in Schedule III.[13] Notably, s.69 is absent from this schedule. Moreover, the proviso to s.57 explicitly states that marriage shall not revoke any will or codicil.

This divergence in legal provisions creates complexity for Hindu Indians with assets in multiple jurisdictions. While countries like Australia and the UK revoke wills by marriage, such revocation does not apply under Indian law.

CHALLENGE TO A WILL

Freedom to bequeath one's own property among Hindus is absolute both in extent and person, including rank stranger.[14] Unlike Australian laws, where inadequate provision can lead to family provision claims,[15] in India a son or daughter can challenge a will on capacity or non-compliance grounds but not for greater provision.

Challenging a will in India becomes formidable without issues like fraud, coercion or undue influence. These challenges are exceedingly difficult, expensive and prolonged. To mitigate potential challenges, it is advisable to carefully draft the will, providing background and rationale for contentious bequests.

INTESTATE SUCCESSION

In the event of a Hindu's intestacy, the HSA determines the inheritance. For a Hindu male, the Class I heirs, who inherit equally, include the wife, children and the mother; whereas for Hindu females it is the husband and children. Class II heirs for a Hindu male include the father, siblings and their descendants; whereas for a Hindu female it is the heirs of the husband. The father and mother of the Hindu female fall under her Class III heirs. This system based on gender and familial relationships contrasts with Australia's relatively straightforward intestate succession laws.

It is important for Hindu males to prepare their wills, ensuring careful consideration of potential conflicts among Class I heirs, like the mother, wife and children. Additionally, the evolving wealth ownership dynamics among modern Indian women, juxtaposed against the evolving succession legislation in India, underscore the equal importance for Hindu women to promptly create their wills.

Notably, inter-religious marriages in India are governed by *The Special Marriage Act*, 1954. The impact of such marriages on intestate succession to an individual's estate is complex and exceeds the scope of this article.

TESTAMENTARY TRUSTS

Like Australia, trusts are a preferred choice in India for conducting business and managing succession, especially for high-net-worth Indian families. Trusts eliminate the need for probate, mitigate litigation risks and offer asset protection and tax efficiency.

Governed by the *Indian Trusts Act*, 1882 (ITA), private trusts in India face a challenge regarding the appointment of a non-resident Indian trustee. While the ITA[16] stipulates that a person domiciled abroad is not a proper person[17] this provision is subject to the trust deed, allowing management by a non-resident Indian trustee with beneficiary consent. However, the applicability of exchange control laws in India needs further exploration regarding a non-resident trustee holding properties in India.

Similar complexities arise in trusts set up in Australia where an Indian resident trustee may result in the trust being deemed a resident in India for taxation and exchange control purposes.

CONCLUSION

In summary, effective estate planning for Indian Australians demands a nuanced understanding of both Australian and Indian laws. Adopting concurrent wills, addressing land ownership complexities and navigating the intricacies of testamentary trusts are crucial. The process requires meticulous consideration of legal, cultural and familial issues for a comprehensive cross-border strategy. ■

1 General Community Profile, 2021 Census of Population and Housing: Australian Bureau of Statistics. Retrieved 21 January 2024. **2** Srimati Basu, *She Comes to Take Her Rights: Indian Women, Property and Propriety* (Kali for Women, 2005). **3** *Hindu Succession (Amendment) Act, 2005* granted daughters equal rights in ancestral property. **4** Status, *Convention Providing A Uniform Law On The Form Of An International Will*. Retrieved 21 January 2024. **5** Vital Stats. Pendency of cases in the judiciary. Retrieved 21 January 2024. **6** *s6 Foreign Exchange Management Act, 1999* read with *Notification No. FEMA 7(R)/2015-RB* dated 21 January 2016 and *Notifcation No. FEMA 21/2000-RB* dated 3 May, 2000. **7** *Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations*, 2018 **8** S 5(2) *Indian Succession Act 1925* **9** S 59 *Indian Succession Act 1925* **10** S 63 *Indian Succession Act 1925* **11** Section 213 (2) read with s.57 *Indian Succession Act 1925*. **12** *Nobat Ram and another v Gayatri Devi* 1968 ALJ 69; *Fazalur Rehman v Gopal Sahu*, 2016 (117) ALR 135. **13** Section 57 *Indian Succession Act* 1925. **14** Supreme Court of India in *Ram Piari v Bhangwant & Ors* 1990 AIR 1742; 1990 SCR (1) 813. **15** Part IV of *Administration and Probate Act 1958* (Vic); Part 3.2 of *Succession Act 2006* (NSW) and similar provisions in other states of Australia. **16** Section 60 *Indian Trusts Act 1882* **17** Explanation I to s.60 *Indian Trusts Act 1882*

Probate Challenges in Cross-Jurisdictional Wills: Insights from *Anderson v Yongpairojwong*

MARY-ANN DE MESTRE TEP, PRINCIPAL
M DE MESTRE LAWYERS PTY LTD

The case of *Anderson v Yongpairojwong*[1] involved a contested probate application centred on two wills executed by the testatrix in different jurisdictions. One will was executed in New South Wales (the Australian Will) in 2017 and another was executed in Thailand (the Thai Will) in 2020. These wills pertained to similar property distribution and appointed the same executor, albeit with varying degrees of benefit entitlements to the plaintiff and second defendant.

The plaintiff contested the validity of the Thai Will, despite its compliance with formal requirements. The contention was based on the claim that the testatrix lacked testamentary capacity or the knowledge or approval to execute the Thai Will due to her health conditions. The testatrix had been diagnosed with lung cancer in November 2018, which later spread to her brain. By June 2020, when the Thai Will was executed, she had undergone extensive medical treatments. The plaintiff argued that those treatments impaired the testatrix's mental faculties at the time of executing the Thai Will.

The case presented several key issues for determination, namely;

- Whether the Thai Will was formally a valid testamentary instrument.
- If the Thai Will was formally valid, whether it lacked essential validity.
- Whether the plaintiff should receive a family provision order under the Thai Will.
- The grant of letters of administration or probate based on the Thai Will.

The Supreme Court of New South Wales (the Court) assessed the testatrix's testamentary capacity and determined that the second defendant demonstrated that she had the required capacity at the time of executing the Thai Will. The instrument was deemed rational and made adequate provision for the beneficiaries. Lay evidence suggested that the testatrix retained cognitive abilities aligned with her testamentary intentions, as reflected in the Thai Will. Medical evidence presented by the plaintiff was deemed insufficient to displace these findings, partly due to the non-treating nature of the medical experts.Additionally, there was no evidence suggesting the testatrix lacked knowledge or approval of the Thai Will's contents, nor were there any suspicious circumstances surrounding her consent to the document.

Regarding private international law principles, it was established that the testatrix was domiciled in New South Wales, supported by various factors such as her Australian citizenship, possession of an Australian passport, driver license, Medicare card and tax-related activities in Australia. This domicile determination was crucial in deciding the applicable jurisdiction.

The Court referred to s.48 of the *Succession Act 2006* (NSW) in making its determination as to the respective wills. An expert provided evidence to support the assertion that the Thai Will was validly executed under the laws of Thailand.

Ultimately, the Court ruled that the Thai Will was a valid testamentary instrument under s.6 of the *Succession Act*. Therefore, it superseded the Australian Will and stood as the most recent expression of the testatrix's testamentary intentions.

The parties agreed that as the testatrix was domiciled in NSW it was the NSW laws on testamentary capacity that applied. The lay evidence before the Court revealed the testatrix maintained appreciable levels of business acumen, social intuit and awareness of her surroundings, signifying a level of cognition which demonstrated her testamentary intentions were those as captured in the Thai Will.

The case of *Anderson v Yongpairojwong* illuminates the complexities of probate disputes involving wills executed in different jurisdictions. It underscores the significance of proving testamentary capacity and understanding the principles of domicile in determining the applicable laws governing such disputes. The ruling also emphasises the weight given to evidence regarding a testator's mental state and awareness during the execution of a will. Expert medical evidence tendered by the plaintiff did not displace findings of testamentary capacity and was accorded limited weight, including because of the fact that the two experts were not treating physicians. Relatedly, there was no evidence of the testatrix not having knowledge and approval of the contents of the latter will and there were no circumstances arousing the Court's suspicion that the document did not have her full consent. ■

STEP Australia Excellence Awards 2024

The winners of the Second Annual STEP Australia Excellence Awards were announced at the STEP Australia National Trust and Estate Conference Gala Dinner on 9 May 2024!

Congratulations to Carolyn Sparke KC TEP on being awarded the STEP Australia Masters Award 2024 and Rachael Grabovic TEP of Rigby Cooke Lawyers on being awarded the STEP Australia Excellence Award 2024.

The STEP Australia Excellence Awards recognise exceptional and outstanding Australian TEPs. Find out more by heading to **www.stepaustralia.com/step-excellence-award**

Thank you to our STEP Australia Trust and Estate Conference Gala Dinner Sponsor: Equity Trustees ■

STEP Australia National Trust and Estate Conference 2024

STEP Australia held its biennial National Trust and Estate Conference at The Langham Melbourne on the 8-10 May 2024. It has been praised to have delivered interesting and thought-provoking presentations.

STEP Australia would like to thank our presenters and conference organising committee who provided delegates with an unparalleled opportunity to broaden their knowledge on trust and estates.

We would like to extend a special acknowledgement to the following STEP representatives who attended the conference: Kelly Greig TEP, worldwide STEP Chair, Rodney Luker TEP, worldwide STEP Deputy Chair, Michael Olesnicky TEP, worldwide STEP Board Director, Mark Walley, STEP CEO, Ian Raspin TEP, Chair of STEP Australia, Alison Gilbert TEP, Chair of STEP New Zealand, Angela Rae TEP, Chair of STEP Queensland, Andrea Olsson TEP, Chair of STEP Victoria-Tasmania, and Phillip McGowan TEP, Chair of STEP New South Wales.

Thank you also to our conference sponsors and supporting organisations: Gold and Dinner Sponsor – Equity Trustees, Coffee Cart Sponsor – BNR Partners, Trade Exhibitor Sponsor – The College of Law Australia, Trade Exhibitor Sponsor – Australian Unity Trustees, Trade Exhibitor Sponsor – Send Payments, Trade Exhibitor Sponsor – Morgans Financial Limited, Supporting Organisation – The Tax Institute, and Supporting Organisation – SMSF Association.

A final special mention and thank you to Amanda Luker, our Official Conference Photographer, for her talent in capturing the moments throughout the conference. ■

STEP AUSTRALIA WEBSITE

Keep up-to-date with news, events and national initiatives by visiting the STEP Australia website.

You can find out more about STEP's advocacy work, upcoming events and conferences, industry news, the latest webinars on demand and national newsletters. You can also access our members' technical resource library and see what's happening with our international connections.

www.stepaustralia.com

STEP
ADVISING FAMILIES ACROSS GENERATIONS

WEB LINKS AND CONTACTS

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**

STEP AUSTRALIA WEBSITE INFORMATION
www.stepaustralia.com

STEP WORLDWIDE WEBSITE INFORMATION
www.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 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 NATIONAL COMMITTEE CONTACTS

Advocacy — STEP Australia National Policy Committee Chair
Jennifer Sheean TEP
sheean@qldbar.asn.au
www.stepaustralia.com/advocacy-and-policy-submissions-in-australia

Mentorship — STEP Australia National Mentorship Committee Chair
Andrew Woods TEP
andrew@woodswills.com.au
www.stepaustralia.com/step-mentorship-program

Newsletter — STEP Australia National Newsletter Committee Chair
Rob Cumming TEP
rdcumming@qldbar.asn.au
www.stepaustralia.com/step-australia-newsletters

Conference — STEP Australia Conference Committee Chair
Bryan Mitchell TEP
bmitchell@mitchellsol.com.au

Excellence Awards — STEP Australia National Excellence Awards Committee Chair
Kimberley Martin TEP
kimberley.martin@wmmlaw.com.au
www.stepaustralia.com/step-excellence-award

STEP AUSTRALIA NEWSLETTER COMMITTEE
CHAIR: **ROB CUMMING TEP**; COMMITTEE MEMBERS: **ESTERINA AZZI, EVELYN BURKE-SHYNE TEP, KIMBERLEY MARTIN 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**