

## **PRESENTERS**



### **Amanda Donovan, Haigh Lyon Lawyers, Auckland**

Amanda undertakes work in all areas of family law with a particular interest in relationship property (at commencement and separation of relationships), estate litigation and children issues (especially matters involving relocation). She is a contributing author for the *Westlaw Family Law* publication (NZ) and while working in London, Amanda was a consultant editor for *Hershman and McFarlane: Children Law and Practice*; a publication firmly established as the leading reference work on child law in the United Kingdom.



### **Jennie Hawker, Wynyard Wood, Auckland**

Jennie is a partner at Wynyard Wood, and leads the firm's thriving family law team. She has experience in all family law issues, with a particular interest and specialty in relationship property and spousal maintenance issues. Jennie graduated from the University of Canterbury with an LLB (Hons). She has been a member of the Auckland District Law Society Family Law Subcommittee, and is a contributing author to *Westlaw's Child Law* – child support commentary.

## **Acknowledgement**

The authors would like to thank Henry Holmes and Claire Green both of Haigh Lyon, for their contributions, editing and/or review.

Cover and text stocks used in this publication are from Forestry Stewardship Council certified mills, manufactured under the environmentally responsible paper manufactured environmental management system ISO 14001, using pulp from well managed forests and other controlled sources.

---

## CONTENTS

<b>1. INTRODUCTION.....</b>	<b>1</b>
HOW WE GOT HERE.....	1
TYPES OF S 21 AGREEMENTS – WHO, WHEN AND WHAT .....	2
TYPES OF AGREEMENTS .....	4
<b>2. PROCEDURAL REQUIREMENTS - FORMALITIES.....</b>	<b>5</b>
OVERVIEW .....	5
BEWARE – OF THE FAST AND THE FURIOUS .....	5
AN AGREEMENT IS VOID UNLESS.....	5
THE AGREEMENT MUST BE SIGNED AND IN WRITING – S 21F(2) .....	6
WHAT IS “INDEPENDENT” ADVICE? – s 21F(3).....	6
IS MY HUSBAND’S LAWYER TRULY INDEPENDENT?.....	6
THE LAWYER “FRIEND”.....	8
SO WHERE DO YOU DRAW THE LINE WITH RESPECT TO INDEPENDENCE? .....	10
WHAT IS “ADEQUATE” ADVICE? – THE <i>COXHEAD</i> TEST .....	11
ONUS OF PROOF – PRESENTING YOUR CASE.....	13
DO YOU NEED EVIDENCE FROM THE LAWYER WHO CERTIFIED THE AGREEMENT? .....	13
TIME PRESSURES AND LANGUAGE BARRIERS .....	15
<b>3. DUTY OF CARE.....</b>	<b>17</b>
DUTY OF CARE TO YOUR OWN CLIENT.....	17
DUTY OF CARE TO THE OTHER SPOUSE.....	17
LIMITATION PERIOD .....	19
AFTER ALL OF THIS SHOULD I CERTIFY?.....	21
SOLICITOR’S CHECK LIST OF TASKS – BEST PRACTICE .....	22
THINGS TO REMEMBER.....	23
<b>4. COMPLYING WITH THE PROCEDURAL REQUIREMENTS FOR AN OVERSEAS CLIENT.....</b>	<b>25</b>
CAN YOUR CLIENT SIGN OVERSEAS? .....	25
<i>Option One</i> .....	26
<i>Option Two</i> .....	26
<b>5. VALIDATING A DEFUNCT AGREEMENT – S 21H.....</b>	<b>27</b>
REQUIREMENTS OF THE SECTION .....	27
IS THERE AN AGREEMENT?.....	27
MATERIAL PREJUDICE.....	28
RESIDUAL DISCRETION.....	29
OVERLAP BETWEEN SS 21F, 21H AND 21J .....	30
PARTIAL VALIDATION .....	31
ORAL AGREEMENTS .....	31
SUMMARY.....	33
<b>6. SERIOUS INJUSTICE – S 21J .....</b>	<b>35</b>
STATUTORY CRITERIA .....	35
THE DISTINCTION BETWEEN SS 21 AND 21A.....	36
CASES POST <i>HARRISON</i> .....	38
DURESS.....	43
KEY POINTS TO CONSIDER.....	44
<b>7. JURISDICTIONAL ISSUES.....</b>	<b>47</b>
RELEVANT LAW .....	47
<i>Elementary questions of jurisdiction</i> .....	47
<i>Enforcing foreign agreements</i> .....	47
MAKING MULTI-JURISDICTIONAL ARRANGEMENTS .....	48
<i>Other jurisdictions may be relevant</i> .....	48
<i>The law in those jurisdictions will probably not be similar to New Zealand’s law</i> .....	48

---

SUGGESTED APPROACHES TO DRAFTING AN AGREEMENT.....	49
<b>8. SECTION 15 – IN, OUT OR SILENT?.....</b>	<b>51</b>
IS AVOIDANCE OF THE ISSUE AN ANSWER? – No! .....	52
SO HOW DO WE APPROACH THIS? .....	53
CONTEXTUALISING S 15.....	53
THE “HOW TO” .....	54
THE PARTICULAR NATURE OF ECONOMIC DISPARITY CLAIMS MEANS THAT CONTRACTING OUT OF S 15 CAN BE DIFFICULT .....	55
BEST PRACTICE .....	57
GET CREATIVE .....	58
<b>9. DEFEATING CREDITORS – S 47.....</b>	<b>61</b>
TYPE OF AGREEMENTS FALLING UNDER S 47.....	61
AN INTENTION TO DEFEAT CREDITORS .....	62
<i>GATESHEAD INVESTMENTS LTD V HARVEY</i> .....	62
<i>OFFICIAL ASSIGNEE V JOHNSON</i> .....	64
ASSISTANCE FROM SECTION 60 PROPERTY LAW ACT 1962 .....	65
<b>10. SECTION 21 AGREEMENTS AND TRUST PROPERTY – FRAUGHT? .....</b>	<b>67</b>
THE DRAFTING APPROACH .....	67
THE ORTHODOX VIEW .....	67
SUBJECT MATTER OF THE AGREEMENT.....	68
THE ALTERNATIVE PERSPECTIVE.....	69
SECTION 44C .....	69
SECTION 44 .....	69
SECTION 182, FAMILY PROCEEDINGS ACT 1980.....	70
CONCLUSION ON THE ALTERNATIVE VIEW .....	70
SO, HOW SHOULD ONE DEAL WITH TRUST PROPERTY?.....	71
HYBRID AGREEMENTS.....	71
CONCLUSION.....	72
<b>11. CLAUSES TO CONSIDER.....</b>	<b>73</b>
REVIEW CLAUSES .....	73
THE ISSUE OF EXPRESS AND CONSTRUCTIVE TRUSTS .....	73
CLAUSES EXCLUDING INCOME .....	74
INCREASES IN VALUE OF SEPARATE PROPERTY.....	75
DEATH CLAUSES .....	75
GENERAL .....	76