

## PRESENTERS



### **Theresa Donnelly, Perpetual Guardian, Auckland**

Theresa has a wealth of experience in elder law and trust and estate-related matters. She was formerly at Public Trust (senior solicitor and team leader) and the Ministry of Social Development where she was lead senior in the public law team, working with Parliamentary Counsel, older people's policy and the Office of Senior Citizens. Theresa worked on the 2017 changes to the EPA forms and has in-depth knowledge of the PPPR Act from a number of perspectives. She is a regular presenter to professional groups and is known for her practical approach to thorny issues.



### **Henry Stokes, Perpetual Guardian, Auckland**

Henry is an expert in the trusts and estates field and is a regular seminar presenter as well as accepting media interviews for trust, estates and wills-related matters. He has experience in all facets of the process from the preparation and implementation stages through to disputes, claims and proceedings, having appeared in the Family and High Courts as well as the Court of Appeal. Henry was appointed General Counsel in 2019.

*The statements and conclusions contained in this presentation are those of the author(s) only and not those of the New Zealand Law Society. This presentation has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.*

# CONTENTS

<b>1. INTRODUCTION</b>	<b>1</b>
<b>2. COMMON FORM</b>	<b>3</b>
APPLICATIONS AT A GLANCE	3
<b>3. COMPLEX COMMON FORM APPLICATIONS</b>	<b>5</b>
#HOWTOGETAWAYWITHCOMMONFORM	5
DEFECTS IN EXECUTION	5
WHERE A SHORT-CUT IS INDICATED	5
#BLINDINGLYOBVIOUS	5
“CUT AND PASTE” ERRORS	6
EVIDENCE	6
DON’T SELL YOURSELF SHORT	7
<b>4. INTESTACY</b>	<b>9</b>
#DON’TFORGETABOUTASIMPLEINTESTACY	9
<b>5. WHEN IS AN INTESTACY NOT AN INTESTACY?</b>	<b>11</b>
<b>6. WATCH OUT FOR ELECTIONS</b>	<b>13</b>
<b>7. SOLEMN FORM – BACK TO BASICS</b>	<b>15</b>
COURT’S VOLITION	15
<b>8. FORM</b>	<b>17</b>
IRREVOCABLE NATURE	17
<b>9. SOLEMN FORM AND CAPACITY ISSUES</b>	<b>19</b>
GATHERING THE EVIDENCE	19
UNDUE INFLUENCE	20
THRESHOLD FOR UNDUE INFLUENCE	20
<b>10. CAVEATS AGAINST ADMINISTRATION</b>	<b>23</b>
LODGING A CAVEAT	23
LAPSE OF CAVEAT	23
ADDRESSING CAVEATS	24
WHAT CAN YOU DO NEXT?	24
CHALLENGES TO CAVEATS – REQUIRING THE CAVEATOR TO SHOW CAUSE	24
PROGRESSING THE FILE – CAVEAT OPTIONS	25
WITHDRAWAL OF CAVEAT	25
COSTS ON WITHDRAWAL	26
SEEKING AN ORDER NISI	26
SECTION 61	26
MEMORANDUM OF COUNSEL (RELATING TO ORDER NISI)	26
SAMPLE MEMORANDUM EXTRACT	27
FILING COURT (ORDER NISI)	27
<b>11. EXECUTOR FAILS TO ACT (S 8 TRUSTEE COMPANIES ACT OR S 19 ADMINISTRATION ACT)</b>	<b>29</b>
COSTS AWARDS AGAINST DO-NOTHING EXECUTORS	29
SOLEMN FORM – ADDRESSING A “WHICH WILL IS WHICH?” SCENARIO	29
SOLEMN FORM – DOCUMENTATION	30
YES, BUT; R 19.5	30
NOTICE OF PROCEEDING	31
STATEMENT OF CLAIM	31
SAMPLE EXTRACT – BASIC STATEMENT OF CLAIM:	31
AFFIDAVIT	32
FILING REGISTRY	32

<b>12. COSTS IN RELATION TO SOLEMN FORM APPLICATIONS .....</b>	<b>33</b>
SOLEMN FORM COSTS CASES .....	33
#DON'TCRYWOLF .....	33
#DON'TWINGIT .....	33
#TOOHASTY .....	34
UPLIFT .....	34
PROSPECTIVE COSTS ORDER .....	34
<b>13. RECALL .....</b>	<b>37</b>
AFFIDAVIT IN SUPPORT OF RECALL .....	38
SAMPLE RECALL AFFIDAVIT EXTRACT .....	38
CONTESTED RECALL .....	38
<b>14. USE OF THE CORRECTION POWER.....</b>	<b>41</b>
STEP 1 – IS THERE A NEED TO CORRECT? .....	41
NO ACCRUAL CLAUSE .....	41
CIRCUMSTANCES CLEAR .....	41
END OF RELATIONSHIP .....	41
EXAMPLE AND DISCUSSION .....	42
SUITABLY MINOR .....	42
DEFECTS IN EXECUTION .....	42
DIY WILLS .....	43
IS A SHORT-CUT AVAILABLE?.....	43
CUT AND PASTE ERRORS .....	44
EVIDENCE .....	44
CASE LAW – s 31 .....	45
THE CORRECTION PATHWAY .....	46
CLERICAL ERROR .....	47
EXTERNAL EVIDENCE.....	47
DO YOU IN FACT HAVE A VALID WILL?.....	48
GATHERING EVIDENCE.....	48
PRACTICAL TIPS .....	48
MISTAKE AS TO THE DESCRIPTION OF BENEFICIARIES – USE OF S 31.....	49
ERRORS OF OWNERSHIP.....	50
THE KITCHEN SINK.....	51
MISUNDERSTANDING OF HOW COMPANIES WORK .....	52
DISCOVERY OF A PROBLEM AFTER THE FACT .....	53
SECTION 31 – IS SERVICE REQUIRED?.....	53
<b>15. MISTAKES.....</b>	<b>55</b>
WILL HANDLING ERRORS .....	55
NOT A PANACEA FOR ALL ILLS .....	55
JUST DON'T DO IT IN THE FIRST PLACE .....	55
A LITTLE BIT OF EVERYTHING .....	56
OTHER DRAFTING ERRORS .....	56
<b>16. MORE MISTAKES .....</b>	<b>57</b>
OOPS!.....	57
FAMILY MATTERS .....	57
BLENDED FAMILY ISSUES .....	57
WHEN ONE SMALL WORD “THOROUGHLY” MAKES THE DIFFERENCE.....	58
<b>17. CORRECTION POWER VS VALIDATION.....</b>	<b>61</b>
MAKING THE APPLICATION – s 31 .....	61
CONSENTS.....	61
WHEN VALIDATION WINS THE DAY .....	61
VALIDATION – DISCRETION.....	62
PRE-VALIDATION CHECKING – WHAT TO DO BEFORE YOU LOOK TO S 14.....	62
ADVERTISING – ENQUIRIES AS TO EXISTENCE OF A VALID WILL. WHAT IS NEEDED ? .....	62
PHYSICAL SEARCH .....	62
VALIDATION VS S 31 .....	63

VALIDATION OF NON-COMPLIANT WILLS .....	63
WHEN NOT TO VALIDATE .....	64
VALIDATION OF A SUICIDE NOTE.....	65
CORRESPONDENCE AND OTHER DOCUMENTS .....	65
MULTIPLE DOCUMENTS TOGETHER CONSTITUTING A WILL .....	66
CAPACITY – STILL A LIVE ISSUE IN A VALIDATION PROCESS .....	67
<b>18. REVOCATION .....</b>	<b>69</b>
PRESUMPTION OF REVOCATION AND THE “SAVING” OF THE WILL .....	69
CASE STUDY .....	69
<b>19. FIXING THE WILL AFTER THE FACT.....</b>	<b>71</b>
<b>20. CONCLUSION.....</b>	<b>73</b>
<b>APPENDIX A.....</b>	<b>75</b>
<b>APPENDIX B.....</b>	<b>77</b>
<b>APPENDIX C.....</b>	<b>81</b>
<b>APPENDIX D.....</b>	<b>85</b>
<b>APPENDIX E.....</b>	<b>87</b>
<b>APPENDIX F.....</b>	<b>91</b>
<b>APPENDIX G.....</b>	<b>93</b>
<b>APPENDIX H.....</b>	<b>97</b>
<b>APPENDIX I.....</b>	<b>99</b>