

## **PRESENTERS (TITLES)**

### **Michelle Burke and Helen Melrose, Burke Melrose, Auckland**

Michelle and Helen specialise in retirement village developments and aged care services. They advise retirement village operators in all aspects of village development, Securities Act compliance and the Retirement Villages Act 2003. They also advise retirement village operators and rest home operators in all aspects of their operations and on sales and purchases.

### **Ken Lord, Parry Field, Christchurch**

Ken's focus is on property and personal law and he has a strong interest in issues relating to the elderly and charitable trusts. He derives especial pleasure from the people and family aspects of law and is keen to assist his business clients with personal and family matters.

### **Duncan Webb, University of Canterbury, and Lane Neave, Christchurch**

Duncan chairs the Canterbury District Law Society Ethics Committee, sits on the New Zealand Law Society Ethics Committee and is the Director for the Centre for Commercial and Corporate Law at the University of Canterbury. In 2003 Duncan was the Distinguished International Visiting Professor at the University of Cincinnati.

# CONTENTS

|   |           |
|---|-----------|
| <b>INTRODUCTION .....</b>   | <b>1</b>  |
| The demographic facts .....   | 1         |
| Significance for the lawyer? .....  | 2         |
| <b>1. ADVISING SENIORS.....</b>   | <b>3</b>  |
| Acting for the aged client.....   | 3         |
| Ethical issues in acting for the aged.....  | 5         |
| The role of the lawyer .....  | 5         |
| Identifying the client .....  | 6         |
| Identifying the scope of the work .....   | 6         |
| Client competence.....  | 7         |
| Dealing with a questionably competent client .....  | 9         |
| Acting for an incapacitated client .....  | 11        |
| Principle of least restrictive intervention .....   | 12        |
| Identifying the interests of the aged client .....  | 13        |
| The lawyer and elder abuse.....   | 15        |
| Standards of competence .....   | 16        |
| <i>Presumption of competence</i> .....  | 16        |
| <i>The Protection of Personal Property and Rights Act 1988 standards</i> .....  | 17        |
| <i>Contractual capacity and unconscionable conduct</i> .....  | 18        |
| <i>Capacity to sign a power of attorney</i> .....   | 22        |
| <i>Testamentary capacity</i> .....  | 23        |
| <i>Undue influence and testamentary capacity</i> .....  | 24        |
| <i>Family law competence – marriage</i> .....   | 25        |
| <b>2. PROPERTY RELATIONSHIP ISSUES FOR THE ELDERLY .....</b>  | <b>29</b> |
| Twilight Romance.....   | 29        |
| Apathy resulting in inaction .....  | 29        |
| Client competence/conflict of interest – tactful interviews .....   | 30        |
| Ought a solicitor refuse to act in a conflict of interest situation? .....  | 30        |
| Living together .....   | 31        |
| Contributions.....  | 32        |
| Estates and Property Relationship Issues .....  | 33        |
| Housekeeper and companion .....   | 34        |
| Inheritance rights for partners or spouses under the Property (Relationships) Act 1976 – Option A/Option B .....  | 34        |
| Time Limits for election choice .....   | 35        |
| Who can apply for administration of an estate on an intestacy? Does the election of option “B” preclude a claim by anyone other than the surviving spouse to be administrator of an estate on an intestacy? ..... | 35        |
| Administration Amendment Act 2001 .....   | 36        |
| Family Protection Amendment Act 2001 (“FP”) .....   | 36        |
| <b>3. DYING.....</b>  | <b>39</b> |
| Donation of body parts.....   | 39        |
| Human Tissue Act 1964.....  | 39        |
| Family members can override a testator’s wish to donate organs.....   | 41        |
| Living wills .....  | 41        |
| Legislation.....  | 41        |
| A precedent living will.....  | 41        |
| May withdrawal of treatment be a criminal act? .....  | 43        |
| <i>Auckland Area Health Board v Attorney-General</i> .....  | 44        |
| Parens patriae (the court consenting on behalf of the patient to withdrawal of treatment) .....   | 45        |
| Wills .....   | 45        |
| <i>Fairness to family members</i> .....   | 45        |
| <i>Family Protection Claims</i> .....   | 45        |

|   |           |
|---|-----------|
| <i>Moral duty</i> .....   | 47        |
| <i>Interviewing the testator</i> .....  | 47        |
| <i>Testamentary capacity</i> .....  | 48        |
| <i>Refusal to act?</i> .....  | 48        |
| <i>The Wills Act 1837 (UK) Revocation of wills on marriage</i> .....  | 50        |
| <i>Wills executed by a property manager under s 55 of the Protection of Personal and Property Rights Act 1988</i> ..... | 50        |
| <i>Do not make a will for a person subject to a property order without leave of the court</i> .....                     | 52        |
| <i>The test for testamentary capacity for a person subject to a property order</i> .....                                | 52        |
| <i>Extensive discretionary jurisdiction for the court</i> .....   | 52        |
| <i>Who should be served with an application to have a will made under s 55?</i> .....                                   | 52        |
| <i>Can a will made with the authority of s 55 be challenged?</i> .....  | 53        |
| Medical treatment.....  | 53        |
| <i>Patient rights</i> .....   | 53        |
| <i>Legislation regarding patient rights</i> .....   | 53        |
| <i>Complaint Procedure under the Code of Health and Disability Services</i> .....                                       | 54        |
| <i>Advocates</i> .....  | 55        |
| <i>Complaints</i> .....   | 55        |
| <i>Investigations</i> .....   | 55        |
| <i>Cases</i> .....  | 57        |
| <i>Who has the final say regarding the body?</i> .....  | 57        |
| <b>4. FINANCING FOR OLD AGE.....</b>  | <b>59</b> |
| EQUITY RELEASE .....  | 59        |
| <i>Background</i> .....   | 59        |
| <i>Types Of equity release schemes available in New Zealand</i> .....   | 59        |
| <i>Current list of providers</i> .....  | 61        |
| <i>Advantages to a borrower</i> .....   | 63        |
| <i>Disadvantages for a borrower</i> .....   | 63        |
| <i>Impact on government benefits</i> .....  | 65        |
| <i>Credit Contracts and Consumer Finance Act 2003</i> .....   | 65        |
| Benefits and subsidies .....  | 67        |
| <i>Residential Care</i> .....   | 67        |
| <i>Other subsidies</i> .....  | 68        |
| <i>Types Of Support Available For Living In Own Or Rental Accommodation</i> .....                                       | 69        |
| Financial advisers.....   | 69        |
| Adviser disclosure duties .....   | 70        |
| A duty of care.....   | 71        |
| A fiduciary obligation .....  | 72        |
| Fair Trading Act liability of advisers .....  | 73        |
| Consumer Guarantees Act liability of financial advisers.....  | 74        |
| Ombudsman schemes.....  | 75        |
| <i>Banking Ombudsman</i> .....  | 76        |
| Insurance and Savings Ombudsman .....   | 76        |
| Financial Services Federation .....   | 77        |
| <b>5. TRUSTS.....</b>   | <b>79</b> |
| <i>Trustee succession – will provisions</i> .....   | 79        |
| <i>Trustee succession – Memorandum of Wishes</i> .....  | 80        |
| <i>Family meetings</i> .....  | 80        |
| <i>Removal and appointment of trustees under the Trustee Act 1956</i> .....   | 80        |
| What rights do beneficiaries have to access trust documents?.....   | 82        |
| <i>General Observations</i> .....   | 82        |
| <i>Life interest wills</i> .....  | 85        |
| <i>Abuse of trustee powers</i> .....  | 86        |
| Trustee power to invest in wasting assets .....   | 87        |
| <b>6. PROTECTION – RISKS, PREVENTION AND REMEDY.....</b>  | <b>89</b> |
| Conflicts of interest – acting for “The Family” .....   | 89        |
| Conflicts before <i>Etridge</i> .....   | 90        |
| Limited retainers .....   | 92        |

|  |            |
|--|------------|
| Advising family after <i>Etridge</i> .....                                     | 93         |
| <i>Explanation</i> .....   | 94         |
| <i>Inform of nature and extent of risks</i> .....                              | 94         |
| <i>Impressing availability of choice</i> .....                                 | 94         |
| <i>Obtain informed instructions</i> .....                                      | 95         |
| Legal adviser must be chosen by client.....                                    | 95         |
| A refusal of independent advice.....   | 96         |
| Refusing explanations.....   | 96         |
| Proceeding with an unwise transaction.....                                     | 97         |
| The obvious wrong problem .....  | 98         |
| The lingering suspicion problem.....   | 99         |
| Concurrent retainers.....  | 100        |
| Enduring powers of attorney.....   | 101        |
| <i>Expectation of consultation?</i> .....                                      | 102        |
| <i>Fiduciary Relationship</i> .....  | 102        |
| <i>Duty to take care of principal's property</i> .....                         | 102        |
| <i>Duty to avoid conflicts</i> .....   | 103        |
| <i>Obligation to obey instructions</i> .....                                   | 103        |
| <i>Consultation where the donor does not at all lack mental capacity</i> ..... | 103        |
| <i>Consultation where the donor lacks some mental capacity</i> .....           | 104        |
| <i>Conclusion</i> .....  | 105        |
| <b>7. ACCOMMODATION.....</b>   | <b>107</b> |
| Granny Flats.....  | 107        |
| <i>Definition of granny flat</i> .....   | 107        |
| <i>Resource Management and Building Consent Issues</i> .....                   | 107        |
| <i>Living Alone Payment</i> .....  | 108        |
| <i>Payment for the granny flat and the registration of an interest</i> .....   | 108        |
| <i>Independent advice</i> .....  | 109        |
| <i>Importance of Documenting Granny Flat Contributions</i> .....               | 109        |
| Rental versus ownership .....  | 109        |
| <i>Residential Tenancies Act 1986</i> .....                                    | 110        |
| Retirement Villages Act 2003 .....   | 110        |
| Common occupancy arrangements .....  | 111        |
| <i>Occupation licence</i> .....  | 111        |
| <i>Unit title</i> .....  | 112        |
| <i>Unit title or composite title life interest</i> .....                       | 112        |
| <i>Trusts and Occupation Licences</i> .....                                    | 112        |
| <i>Borrowing and Occupation Licences</i> .....                                 | 113        |
| Common terms of an occupation licence or occupation agreement.....             | 114        |
| <i>Capital sum</i> .....   | 114        |
| <i>Weekly payments</i> .....   | 114        |
| <i>Termination</i> .....   | 115        |
| <i>Payments on Termination</i> .....   | 115        |
| <i>Refurbishment</i> .....   | 115        |
| Retirement Villages Act 2003 .....   | 116        |
| <i>General Background</i> .....  | 116        |
| <i>Operator</i> .....  | 116        |
| <i>Statutory Supervisor</i> .....  | 117        |
| <i>Memorial on village title</i> .....   | 117        |
| <i>Monitoring and supervision</i> .....  | 118        |
| <i>Entering into an occupation right agreement</i> .....                       | 118        |
| <i>Clear explanations and language</i> .....                                   | 118        |
| <i>Lawyer certification</i> .....  | 119        |
| <i>Cooling off</i> .....   | 120        |
| Complaints and disputes .....  | 121        |
| <i>Code of resident's rights</i> .....   | 123        |
| <i>Code of Practice</i> .....  | 124        |
| <i>Voidability of occupation right agreement</i> .....                         | 124        |
| <i>Ongoing disclosure</i> .....  | 125        |
| Rest home accommodation .....  | 126        |

|  |     |
|--|-----|
| <i>Overview</i> .....                      | 126 |
| <i>Residential care agreements</i> .....   | 127 |
| <i>Rights of rest home residents</i> ..... | 131 |
| Home-based support services.....           | 132 |
| <i>Services</i> .....                      | 132 |
| <i>Government assistance</i> .....         | 133 |

**APPENDIX 1: CASES BROUGHT UNDER SECTION 3 OF THE FAMILY PROTECTION ACT 1955..... 135**

**APPENDIX 2: CODE OF HEALTH AND DISABILITY SERVICES CONSUMERS' RIGHTS..... 139**

**APPENDIX 3: THE HEALTH AND DISABILITY COMMISSIONER ACT 1994 COMPLAINTS PROCESS..... 145**