

CHAIR & PRESENTERS

Anita Chan, Barrister, Dunedin

Anita is a family law barrister based in Dunedin. She graduated from Otago University and has over 20 years' experience. Anita is a former chair of the NZLS Family Law Section. She is currently a member of the NZLS CLE board and is a regular guest lecturer in family law at the University of Otago.

Robert Hacking, Barrister, William Martin Chambers, Auckland

Robert Hacking graduated from Otago University in 1984 and has practised in both Western Australia and England. Exclusively practising in family law, he has a particular interest in trusts, estates and relationship property disputes.

Chris Kelly, Senior Legal Counsel, NZ Guardian Trust, Wellington

Chris has nearly 30 years' legal experience as an estates and trust lawyer, including a number of years as a family trusts specialist. As the senior legal counsel at Guardian Trust, he is now responsible for developing in-house legal services. Chris has contributed to several legal texts, including two of the titles in *New Zealand Forms and Precedents* and is co-author of the recently published 6th edition of Garrow and Kelly *Law of Trusts and Trustees*.

Greg Kelly, Gillespie Young Watson, Lower Hutt

Greg has 25 years of experience in the wills, trusts and estate area. He is a member of the Wills and Trusts Technical Committee of the NZLS Property Law Section, and a member of STEP. Greg is a contributor to *Butterworth's Law of Trusts*, probate and administration author for *McGechan on Procedure* and co-author of the 6th edition of Garrow and Kelly *Law of Trusts and Trustees*. He has presented papers at a number of seminars and conferences.

Bill Patterson, Partner, Patterson Hopkins, Auckland

Bill has an extensive trust, commercial and equity litigation practice. He has presented many seminar papers for the NZLS, ADLS and the Institute of Chartered Accountants, including most recently the 1999, 2001, 2003 and 2005 Trusts Conferences of the New Zealand Law Society, regular topics for the Institute's Trusts Special Interest Group and papers for the Accountants' Trusts Conferences of 2001 and 2004.

Nicola Peart, Professor of Law, University of Otago

Nicola was appointed to the Law Faculty at the University of Otago in 1987, where her research has focused on family property and medical law. She is the principal author of *Relationship Property on Death* published by Brookers in 2004 and a regular presenter at NZLS seminars and conferences.

The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet 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

1. TRUST CLAIMS ON SEPARATION	1
INTRODUCTION	1
TRUST CLAIMS UNDER THE PRA	1
<i>Nature of interest in trust</i>	2
<i>Distributions from trusts: s 10</i>	4
<i>Claims under ss 9A and 17 in relation to distributions from a trust</i>	4
<i>Section 44</i>	5
<i>Section 44C</i>	6
<i>Section 21 agreements and trusts</i>	12
CLAIMS IN RELATION TO TRUSTS UNDER S 182 FAMILY PROCEEDINGS ACT	12
<i>Requirements</i>	13
<i>The court's discretion</i>	13
<i>Orders</i>	14
ALTER EGO AND SHAM TRUSTS	14
<i>Sham trusts</i>	14
<i>Alter ego trust</i>	15
CONSTRUCTIVE TRUSTS	18
BREACH OF FIDUCIARY OBLIGATION	19
<i>Duty to adhere to the trust terms</i>	19
<i>Duty of trustees to act personally and unanimously</i>	19
<i>Duties of investment and evenhandedness</i>	20
<i>No conflict rule</i>	21
<i>No profit rule</i>	21
<i>Duty of diligence and prudence</i>	21
<i>Capital and income</i>	22
FAMILY COURT'S EQUITY JURISDICTION	22
CONCLUSION	22
2. PREPARING AND RUNNING THE CASE	25
INTRODUCTION	25
WHAT CAN BE DONE IN THE FAMILY COURT AND WHAT CANNOT	25
TRANSFERING UP TO THE HIGH COURT	26
CONSOLIDATING PROCEEDINGS	29
THE IMPORTANT EVIDENCE THAT NEEDS TO BE COLLECTED	30
GETTING ACCESS TO DOCUMENTS, INCLUDING DISCOVERY	31
REMOVAL OF TRUSTEES	34
CONCLUSION	37
3A. HOW TO PLAN TO AVOID THE MESS	39
ISSUE 1 – THE PARENTS AND THEIR TRUST	39
ISSUE 2 – MARK'S TRUST OR A RESETTLEMENT TRUST?	40
ISSUE 3 – REPAYMENT OF THE MORTGAGE	40
ISSUE 4 - SUBSEQUENT TRANSFER OF HOUSE TO TRUST	41
ISSUE 5 – GIFTING	41
ISSUE 6 – THE SECOND TRUST AND THE PROFESSIONAL TRUSTEE TRAP	41
ISSUE 7 - PAYMENT TO MARK'S TRUST BY PARENT'S TRUST	42
ISSUE 8 – REMOVAL OF TRUSTEES	43
ISSUE 9 – GIFTS OR LOANS BY MARK AND JANE TO THE SECOND TRUST	44
ISSUE 10 - SECTION 21 AGREEMENT	44
ISSUE 11 – RECONSTRUCTION	45
ISSUE 12 - FORM OF TRUST DEEDS REVISITED	45
3B. NEW RELATIONSHIP – SAME OLD TRUST ISSUES	47
HAVE I GOT A TRUST FOR YOU	47
<i>Don't forget the will!</i>	48
<i>Held on "like" trusts</i>	49

<i>Keeping up with the paperwork</i>	49
<i>Are you a puppet?</i>	51
<i>How to avoid these problems</i>	53
CHILDREN V SURVIVING SPOUSE / PARTNER.....	55
<i>To resettle or not to resettle</i>	56
PLANNING AHEAD	59
4. ESTATE PLANNING – DEATH	61
WILLS	61
<i>Trustees</i>	61
<i>Life interests</i>	62
<i>Balancing competing claimants</i>	63
<i>Inheritances</i>	63
<i>Mirror or mutual wills</i>	64
ENDURING POWERS OF ATTORNEY (“EPAS”),.....	65
TRUSTS	66
<i>Businesses</i>	68
<i>Joint tenancies</i>	68
APPENDIX A.....	71
CO-OWNER – RIGHT OF PERSONAL RESIDENCE – LEXIS NEXIS	71
LIFE INTEREST - ADLS.....	72
RESIDUE.....	73
APPENDIX B.....	75
ALL ENGLAND LAW REPORTS [1989] 2 ALL ER 84 PRACTICE DIRECTION.....	75
APPENDIX C.....	77
ENDURING POWER OF ATTORNEY IN RELATION TO PROPERTY	77