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Fiduciary duties — parents to adult children

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The High Court in *A v D* [2021] NZHC 2997 per Gwyn J held that a father was in a fiduciary relationship, and so owed corresponding fiduciary duties, to his estranged adult children. My earlier article, "Do parents owe fiduciary duties to their adult children?" [2019] NZLJ 315 ventured the view that such a fiduciary duty did not, in general, subsist. This article explores the High Court's reasoning.

THE FACTS

The plaintiffs suffered what the Judge described as egregious verbal and physical (and, for one of the plaintiffs, sexual) abuse from their father (Mr Z) when they were young and under his care.

The plaintiffs were born in 1961, 1963 and 1971, so when the father left the family home in around 1981, they were respectively 20, 18 and 10 years old.

From the early 1980s up to the father's death in April 2016, the plaintiffs were estranged from him. Nevertheless, and despite the absence of direct contact or communication between them, the plaintiffs continued to suffer from the earlier abuse including financially, via their employment opportunities, and mentally by way of a lack of self-confidence/self-belief.

In December 2014 (16 months before he died), the father settled property into a trust in part to thwart a possible claim against his estate by the plaintiffs. This took place when the plaintiffs were respectively 53, 51 and 43 years old. On death, the father's estate had around $47,000 and the trust around $700,000.

The plaintiffs sued the father's estate for:

(a) breach of fiduciary duty;
(b) fraud on a power;
(c) knowing receipt; and
(d) unjust enrichment.

This article focuses on the 'breach of fiduciary duty' aspect of the claim and the Court's determination that the father's alienation of his property in 2014 constituted a breach of fiduciary duty arising out of a fiduciary relationship with his adult children.

FIDUCIARY RELATIONSHIPS IN THE FAMILY CONTEXT

Her Honour's analysis of fiduciary relationships notes that New Zealand courts have on a number of occasions indicated that in certain circumstances (usually involving sexual abuse) a fiduciary relationship exists between a parent or caregiver and a child (at [99]).

At [107], her Honour concluded that the father's relationship with the plaintiffs when they were children in his 'care' was inherently fiduciary, and (at [113]), that the abuse inflicted was a breach of the fiduciary duty he owed to them. These findings are consistent with the Court's analysis of the authorities and seem uncontentious.

The curious part of the judgment comes with the Court's answer to its own question: was there a fiduciary relationship between Mr Z and each of the plaintiffs at the time of the transfer of the property to the Trust?

Her Honour stated (at [133], emphasis added, footnotes omitted):

> *Although I have recognised that Mr Z's relationship with the plaintiffs while they were children was inherently fiduciary, in my view, that cannot be so once they became adults. Generally, the relationship of an adult child to their parent is of a non-fiduciary kind.* Nevertheless, there may be aspects of a relationship which do engage fiduciary obligations. The alleged fiduciary relationship here therefore falls to be considered within the second category in *Chirnside*, as a particular fiduciary relationship, 'subject to careful scrutiny of the context and the facts, on a case-by-case basis'.

The emphasised part of the extract apparently sets a firm general principle for parent/adult-child relationships, namely, that they are non-fiduciary. The use of the word "generally" in the second sentence is a harbinger for the exception that ensues.

It is apposite to consider what sets the 'general' non-fiduciary parent/adult-child relationship apart from the 'exceptional' *fiduciary* parent/adult-child relationship in *A v D*. Clearly, there is only one sole distinguishing feature, namely the abuse suffered by the plaintiffs when they were children coupled with the subsequent 'mental/emotional' and other effects of that abuse during the estrangement.

So, the distinction is the initial breach and its effects and not anything directly connected with an ongoing relationship of any sort. I suggest that this is pivotal in significance.

GENERAL NATURE OF FIDUCIARY RELATIONSHIPS

In all of the case authorities referred to in the *A v D* judgment to discern and frame the nature of the fiduciary relationship ([133]–[148]), the fiduciary duty at issue arose out of and is imposed during a subsisting relationship between parties. It is the existence and nature of the relationship that gives rise to the existence and nature of the equitable duties by one party to another.

Once a qualifying relationship is found to subsist, the duties arising are cast variously as including:

- An expectation that the party who owes the duty would act or refrain from acting in a way contrary to the interests of the other party (*Lac Minerals Ltd v International Corona Resources* [1989] 2 SCR 574 per La Forest J at [171]).

- A trust and confidence of one party in the other (*Jay v Jay* [2014] NZCA 445 at [65]; *Chirnside v Fay* [2006] NZSC 68 at [80]).
- A restraint on the exercise of a discretion or power (*Frame v Smith* [1987] 2 SCR 99).
- The duty to act in the other's best interests and with the utmost good faith (*Attorney-General v Prince* [1998] 1 NZLR 262 at 285).
- An obligation to care and protect a vulnerable party (*Norberg v Wynrib* [1992] 2 SCR 226 at [65]).
- An obligation not to exploit one party's reliance and vulnerability (*Norberg v Wynrib* [1992] 2 SCR 226 at [74]).

This list of obligations/duties are not disparate. Instead, they overlap and complement each other, together reflecting the essence of the fiduciary relationship. The cases variously refer to and focus on several of the duties while not always referring to the others. As the majority in *Chirnside v Fay* [2006] NZSC 68, (2006) 3 NZCCLR 176, [2007] 1 NZLR 433 stated (at [75]): "[n]o single formula or test has received universal acceptance in deciding whether a relationship outside the recognised categories is such that the parties owe each other obligations of a fiduciary kind".

There is a commonality in all these cases however, namely, that the duties subsist during the relationship.

Writing extra-judicially for the Society of Trust & Estate Practitioners New Zealand 2021 Conference, his Honour Justice Stephen Kós, President of the New Zealand Court of Appeal suggested (at [50]) that fiduciary law's modern form focuses on the following three indicia, these being the essence of a fiduciary relationship:

(a) the possession of powers, either agreed, assumed or imposed;

(b) reliance, via a relationship of trust and confidence (or vulnerability) and;

(c) assumption of responsibility, actual, inferred or imposed: —

resulting, in these three general requirements:

(d) the active promotion of the principal's interests by the fiduciary;

(e) priority to be given to the beneficiary over the interests of third parties; and

(f) subordination (although not entire elimination) of the fiduciary's self-interests.

These indicia neatly traverse and draw together the numerous authorities on the subject. They assist one's understanding not just of the traditional 'inherently fiduciary' relationships but, and perhaps more importantly, they help to identify what the majority in the Supreme Court in *Chirnside v Fay* at [75] described as "the second situation in which a relationship will be classed as fiduciary" which depends not on the inherent nature of the relationship but upon an examination of whether its particular aspects justify it being so classified.

If one applies the indicia identified by Justice Kós to the facts of *A v D*, one discovers that depending on one's perspective, there is an argument that the indicia are satisfied whether or not there is a relationship between the father and the children at any point in time. For instance, after decades of estrangement the father no longer had any direct power over or in relation to his children, yet he did have power over his own assets which, in alienating them, might be argued to affect their existing (damages) or future legal rights (FPA claim). Is the father's 'power' over his assets the kind of power that Justice Kós has in mind in the first of his indicia?

After over three decades of contactless estrangement, is there really any commonality in nature or substance between:

- A father's direct 'power' over or in relation to his young children in his care as compared with the 'power' he has to alienate his property when the children are adults and long since lost contact.
- The reliance, trust and confidence a young child has to their parent or caregiver as opposed to an unvoiced hope that the parent will atone for this past conduct by securing assets for them, so *if* they make a claim of some sort, then it will sound against valuable property.
- The assumed responsibility that a parent bears towards their young vulnerable children, who like the proverbial 'Babes in the Woods' are perhaps the supreme archetype of vulnerability, to be contrasted with the responsibility of an abusive parent to adult children damaged by abuse occurring decades earlier?

Do breaches of fiduciary duty during an unarguable fiduciary relationship give rise to open-ended relationship for evermore — whether, in fact, there is any ongoing relationship or not?

If so, then perhaps the existence of ongoing damage ought to be a new fourth limb of the indicia — necessary to capture those relationships that have ended, but in the eyes of the law are deemed to continue. Has the goal of giving relief in relief-worthy cases, generated a new form of fiduciary relationship — is the tail to wag the dog?

A TEMPORAL QUESTION

The *A v D* judgment raises the following questions:

- Can a party to a fiduciary relationship continue to owe fiduciary duties after the relationship has ended?
- Does a breach of a fiduciary duty in of itself extend a fiduciary relationship until the breach is remedied?

Apparently, the answer to both questions is "yes".

But there is precedent in other areas of equity. Estoppel for instance recognises endlessly continuing obligations that may result in constructive trusts or voidance of transactions. The Court of Appeal decisions in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1984] 1 NZLR 641 and *Gillies v Keogh* [1989] 2 NZLR 327 emphasise a rationale that prevents a party from going back on their express or implied promise when it would be unconscionable to do so. The obligation is necessarily a continuing one.

The Court of Appeal in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 at [78] approved the following judicial description of the test for the appropriate remedy in such cases: "the minimum equity to do justice" and "that which is necessary to cure the unconscionable conduct: nothing more, nothing less". This requires proportionality between the expectation, the detriment and the remedy.

In *Hamilton v Kirwin* [2020] NZHC 2149, Woolford J applied the principle of proprietary estoppel allowing him to choose between reliance-based or expectation-based remedies. The Court voided the father's transfer of land to a trust

because it constituted an unconscionable resiling of an expectation he had excited in his daughter. In the result, the land fell back into the father's estate, so the terms of the will effected an equitable result.

But the key elements of estoppel: encouragement of an expectation or belief, reliance on this, resulting detriment and the unconscionability connected with any resiling from the belief or expectation created, share little with the indicia of a fiduciary relationship.

At [144], Her Honour referred to Tipping J's statement in *Chirnside* at [80] that:

> ... all fiduciary relationships, whether inherent or particular, are marked by the entitlement (rendered in *Arklow* as a legitimate expectation) of one party to place trust and confidence in the other

While 'expectation' is used in both contexts, what is 'expected' between the parties fundamentally differs. In a fiduciary relationship the expectation is directed towards compliance with the fiduciary duties, whereas in estoppel the expectation is of adherence by another on an implied or express promise or representation.

The temporal nature of Tipping J's 'expectation' was not analysed because the context was a subsisting relationship. There is no apparent basis upon which it could be maintained that when His Honour referred to an 'expectation' he meant one that lasted indefinitely like, say, the kind arising in *Lankow v Rose* [1995] 1 NZLR 277 where the 'expectation' gives rise to a proprietary interest that time cannot diminish.

It is the continuing reliance/detriment which sustains the estoppel claim often against property. But what sustains a fiduciary relationship after the relationship ends? I suggest that a breach of a fiduciary duty during a fiduciary relationship crystallises the right to an equitable remedy, but it has no bearing on the continuation of the relationship nor therefore on the attendant duties arising from the former relationship.

A FIDUCIARY RELATIONSHIP OF A DIFFERENT KIND?

Her Honour stated, at [133], that the fiduciary relationship that exists when children are young cannot continue when they become adults, but then qualifies this by adding that there may be aspects of a relationship which do engage fiduciary obligations.

The Court noted at [124], hence was apparently influenced by, the plaintiffs' argument that although the plaintiffs ceased communications with their father, they nevertheless retained trust and an expectation that he would "make amends" and "do the right thing". They claimed an analogy with fiduciary cases arising in the employment context where the employment relationship may come to an end, but the fiduciary obligation continues.

Notwithstanding the existence of implied duties of trust, confidence, fidelity and now, by statute, good faith, I do not understand there to be general acceptance that employment relationships are fiduciary relationships. Secondly, in the absence of a contractual restraint it is understood that any such implied or legislative duties and obligations end when the employment relationship ends.

An equitable obligation to maintain the confidentiality of information proprietary to the employer may continue, but otherwise the employee is free to compete against their former employer exploiting the skills and experiences learned while in their employ and they may even market themselves by reference to their former employment. The plaintiffs' analogy does not seem sound.

When the abuse took place, there was a clear breach of fiduciary duty. This gave rise to a right to a remedy in favour of the plaintiffs — a right to seek equitable damages. The property that was transferred to the father's trust did not exist when the breaches took place, so no rights, such as a constructive trust, equitable lien or charge, could have attached to the property at the time.

Yet *A v D* is authority for the proposition that by earlier breach of a fiduciary duty, all assets acquired by the duty-breacher from the date of the breach going forward for the rest of the breacher's life is subject to an obligation to preserve their assets as a fund for the possible remediation of the breach, that is, by claim for equitable damages or FPA claim. And any disposition, transfer or diminution of that property is a breach of fiduciary duty.

In *Chirnside v Fay*, Mr Chirnside's breach of fiduciary duty to Mr Fay sounded in equitable damages. I suspect it would surprise legal practitioners to understand that Mr Chirnside was also impressed with an equitable obligation to retain his personal assets, so that if Mr Fay brought a claim on some distant later date that claim would be effective against valuable property. And up to that later date, the fiduciary relationship is deemed to have continued such that a disposition of assets by Mr Chirnside in the interim would constitute a breach of fiduciary duty.

It might be argued that the mental and emotional damage suffered by the plaintiffs is different in nature to the damage suffered by Mr Fay. But Mr Fay trusted Mr Chirnside who intentionally exploited Mr Fay's reliance and vulnerability. Mr Fay may well have been affected mentally and emotionally such as to warrant an award in the nature of general damages. If that be the case, then the distinction with *A v D* falls away.

THE ANSWER TO THE TEMPORAL QUESTION?

The defendant was alive to the 'temporal issue' and submitted that there was no relationship between the father and the plaintiffs at the time of the transfer of the property — no contact between them and no communications. It was contended that there was "no actual relationship involving expectation, trust, or confidence for all the adult lives of the plaintiffs. Rather, the actual relationship involved no expectation, no trust, no confidence, and no contact" (at [145]).

The plaintiffs on the other hand argued that the fiduciary relationship with their father endured into their adulthood because of the continuing effects on them of the earlier abuse occurring during the accepted fiduciary relationship (at [120]). From this, it was claimed, sprung such obligations/duties as a 'trust and confidence' in their father to provide economically for them and an obligation on him to not act in a way that was adverse to their interests (at [119]).

The difficulty with the plaintiffs' argument is that it conflates the duties pertaining during the fiduciary relationship and the remedies arising from a breach of those duties with the unrelated objective of preserving property in the hands/estate of the father so that any subsequent damages award is financially effective. While pragmatic, the connection provides a suspect basis to support the existence of a fiduciary relationship.

The continuing damage suffered by the plaintiffs does not mark their claim as distinctive in law. Claims for general damages for distress is a common feature of leaky building cases and occurs in both contract cases and in tort. That the emotional and or mental damage continues and is difficult to quantify does not mean it cannot be the subject of an award of damages.

THE COURT'S CONCLUSION

At [146], in response to the defendant's submission about the absence of a relationship at the critical time when the property was transferred, her Honour countered: "[h]owever, the existence of a fiduciary relationship does not require a mutual relationship in the usual sense, with reciprocal obligations".

With respect, this misses the point of counsel's submission which was not directed to whether the fiduciary relationship was unilateral or mutual nor whether it involved reciprocal obligations, but was focused on whether there was a relationship at all at the critical time.

At [148], her Honour adds "[n]or is it necessary for a fiduciary to have been conscious of wrongdoing", but again this fails, with respect, to address the temporal issue of whether there can be a fiduciary obligation outside of a relationship.

It is respectfully suggested that the temporal issue is not addressed in a convincing way in the judgment.

POWER AND DISCRETION

At [136] and [149], her Honour referred to Justice Wilson's influential dissenting judgment in the Canadian case *Frame v Smith* [1987] 2 SCR 99 where the characteristics of a fiduciary relationship were stated as follows:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.
(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiaries' legal or practical interests.
(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

There are marked differences between Justice Wilson's 'three general characteristics' and Justice Kós's 'three indicia'. One would be cautious to adopt the Canadian authority in preference to the views of our own President of the Court of Appeal. Although Justice Kós's views were extra-judicial, they were clearly the product of careful consideration and (per n 46) evolved from a formulation reached after "lengthy discussion" with Professor Matthew Harding of Melbourne Law School.

Nevertheless, at [149], her Honour said that, applying the *Frame v Smith* criteria, the father had scope for the exercise of a power and discretion with respect to the plaintiffs when he alienated his assets to the trust.

I observe that the case before Justice Wilson required her to consider whether the relationship between a custodial parent and a non-custodial parent could be considered a category to which fiduciary obligations could attach. It was not focused on whether the fiduciary obligations that existed in that context remained enforceable many years after the relationship from which they arose had ceased.

The only remaining 'power and discretion' the father had in respect to the plaintiffs was indirect and remote. It was limited to one thing, the ability to alienate his assets, by dissipation or transfer, so that his children could not bring a claim against him or his estate because there would be nothing valuable against which the claims could be brought.

Putting aside the moral turpitude of the father's conduct, the transfer of his assets to a trust did not involve any direct abuse of a subsisting relationship with the plaintiffs because there was none. The plaintiffs had not relied on the father's trust and confidence for decades and the father's ability to take advantage of or abuse their vulnerabilities was non-existent. The relationship was over and all the father could do was attempt to thwart any FPA or equitable claim the plaintiffs might bring.

The father's actions are the antithesis of the 'wise and just' testator, but does this shortcoming have anything to do with whether or not the 'relationship' between him and his now adult children is a subsisting fiduciary relationship?

The father's actions are more closely analogous with the creditor who divests him/herself of assets to thwart creditors — actual, contingent or feared — who would otherwise claim against them when enforcing their judgments.

Part 6, subpt 6 of the Property Law Act 2007 empowers the court to unwind dispositions (which includes the creation of a trust) where a debtor makes the disposition with intent to prejudice a creditor (s 346(1)(b)) and at a time "when it was intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay them" (s 346(2)(c)). In that instance, the prejudiced creditor can seek relief from the Court even where the disposition was made before or after the debtor became indebted to the creditor (s 347(1)(a)).

The plaintiffs in the present case have a powerful claim for equitable damages relating to the earlier abuse and undeniable breach of fiduciary duties involved (time limitation and laches aside). The same circumstances, arguably, also give rise to a powerful claim under the FPA. The father was conscious of the possibility of one or other of these claims being brought against him (or more accurately his estate following his death). In such circumstances, perhaps the plaintiffs' remedy might more properly have been found via the Property Law Act.

A NEW DUTY?

At [150], her Honour held that the father's abuse of the plaintiffs as children, in breach of the fiduciary duties he owed to them at that time, rendered them (especially Ms A) vulnerable and at his mercy. This determination seems uncontentious while that relationship subsisted.

But her Honour added that the plaintiffs, especially Ms A, were without doubt peculiarly vulnerable as adults, as a result of Mr Z's abuse of them as children. I suggest that this determination is contentious. Arguably, the now adult children were not vulnerable in the sense that they looked, consciously or unconsciously, to their father for anything. Their relationship as parent and child was well and truly at an end by December 2014. What her Honour described as 'vulnerability' was, in fact, no more nor less than the resulting ongoing damage caused by a breach of duty occurring decades earlier in the 1960s, 1970s and early 1980s.

At [151], her Honour holds that the earlier fiduciary relationship gives rise to an actual and enforceable expectation by the plaintiffs subsisting outside any ongoing relationship that, when the father came to consider the disposition of his property, he would make amends for the damage caused to them through his earlier breaches of fiduciary duty.

This determination conjoins the existence of a fiduciary relationship and breach of duty in one time period with preservation of assets to pay/satisfy damages or an award in a much later and completely different time period when any relationship had long since ended and the 'classic characteristics of a fiduciary relationship' were no longer present.

It is suggested that identifying a 'fiduciary relationship' simply to protect or restore the father's pool of property in order to enable the plaintiffs' obviously strong FPA or equitable claim to be met is an unwarranted extension of the notion of what constitutes a 'fiduciary relationship'.

At [153], her Honour notes that the authorities support the stance that categories of fiduciary relationship are never closed. No doubt that is correct, but with respect there is a material difference between finding a relationship is fiduciary in varying scenarios so long as the requisite indicia are present and the situation where there is no subsisting relationship at all.

A FOOTNOTE

In *Vervoort v Forrest* [2016] NZCA 375 the Court of Appeal rejected application of the traditional trust principles of unanimity of trustee decision-making and prohibition on trustee delegation saying that in the New Zealand discretionary family trust context, those principles had to "bend to practical realities" (at [62]) and "could not be allowed to operate as a weapon for inequity" (at [64]).

Few would disagree that Gwyn J's judgment in *A v D* is a compassionate and just result from the plaintiffs' perspective. But is the premise upon which this result derived a welcome bending of traditional principles to secure a humane and equitable result or is the apparent extension to what constitutes a fiduciary relationship gone too far such that it introduces uncertainty regarding when such relationships subsist and what the consequences of a breach of a fiduciary duty will be. ❐

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promotion of its purposes and principles and with s 12. Section 12 says that if a particular matter is not addressed by the Act, or is so only in part, then to the extent it is consistent with the purpose of the Act and the principles in ss 6 to 8 thereof, decisions regarding the admissibility of certain evidence may be made having regard to the common law.

Relevantly the purposes of the Evidence Act include:

(a) Providing for facts to be established by the application of logical rules (s 6(a));
(b) Providing rules of evidence that are consistent with the rights affirmed by the New Zealand Bill of Rights Act 1990 (s 6(b));
(c) Protecting rights of confidentiality and other important public interests (s 6(d)).

Taking those in turn:

(a) The "related litigation" rule might be difficult to apply in practice — but not necessarily so much as to render it illogical and, in any case, it might not apply in New Zealand at all. Were that the case, then it is difficult to say there is any illogicality in litigation privilege expiring once its purpose is spent;
(b) Section 25(e) of the New Zealand Bill of Rights Act affirms the right of a person charged to present a defence. Arguably denying the use of a document relevant to that defence, due to a claim to a privilege that no longer serves a particular purpose, would be inconsistent with that right; and
(c) Rights of confidentiality are important. However, there is an acknowledged public interest in relevant evidence being available to the parties and to the court. Once again, competing public interests must be balanced. That is the very process engaged with by the Supreme Court in *Blank*.

That brings us, then, to s 7(1) of the Act that confirms that all relevant evidence is admissible unless inadmissible under the Act, or any other enactment, or is excluded under the Act or any other enactment.

It is submitted then that the Act, just as the Supreme Court felt was the prevailing mood in *Blank*, favours more disclosure rather than less. That being the case, it is respectfully submitted that Dobson J and Colgan CJ were right to carefully consider the distinct purposes of legal advice and litigation privilege and ask if the latter could truly be justified after the relevant litigation had ended. It is submitted that their Honours respective conclusions are consistent with the Evidence Act 2006.

CONCLUSION

The reasoning of the Canadian courts is compelling — as adopted by both the High Court and the Employment Court here. It is difficult to justify the continuation of a privilege once its definite purpose is spent. Clearly that is not the case with legal advice privilege, which is only effective if absolute, but it is not so clear there is any reason why litigation privilege should be thought of in the same way. All privileges are just that and do encroach upon the public interest in all relevant material being available to the parties and to the court. The matter is certainly not beyond argument, but it is submitted that the present, prevailing, view of the High Court (and, for that matter, the Employment Court) is that litigation privilege does come to an end when the proceedings giving rise to it terminate. There are persuasive reasons why the Court of Appeal may well confirm that if and when the matter comes before it. ❐