

TRUST LAW

A new tort: breaching a fiduciary duty to a child

The father, knowing they might make a claim against his estate after he died, resolved to settle his assets on a trust to defeat them

Anthony Grant

This article is based on the much-awaited decision that Gwyn J delivered on 5 November 2021 in *AB & C v D & E* [2021] NZHC 2997.

The plaintiffs were three children of Mr Z. Mr Z was a violent and cruel man who caused his children great suffering during their youth. He inflicted harms that have caused them to be disadvantaged in various ways as adults. They have been harmed for life.

The father, knowing they might make a claim against his estate after he died, resolved to settle his assets on a trust to defeat them. In this proceeding, the children sought orders that the transfer of his assets to the trust should be set aside and for the assets to fall into the father's estate where they could be awarded to the children for breach of his fiduciary duties to them.

The notion that a parent can be sued by a child for breach of fiduciary duty has sat on the perimeter of the law in New Zealand. It is not a new notion: the Supreme Court of Canada discussed it at length in a case that was reported in 1992.

Gwyn J documented in 11 pages of her judgment the appalling brutality of Mr Z and the harms he inflicted on his children. A dispassionate reader of this account will conclude that the father ought not to be allowed to cause such harm and leave his children with no remedy.

While it is accepted that parents of infants owe fiduciary duties to them, it is not accepted that parents generally owe fiduciary duties to adult children.

Transferred assets

The main act the adult children complained of was



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that their father breached his fiduciary duty to them when he transferred assets to a trust for the purpose of avoiding his obligations to them. The transfer had taken place many years after they had left home and many years after their father's cruelty and abuse of them had taken place.

Gwyn J held that the fiduciary duty Mr Z owed to his children was limited to an obligation to "refrain from sexually

or physically assaulting them". This is important as it indicates that the tort will not extend to lesser conduct.

While the relationship between an infant and a parent is inherently fiduciary, she said that "the relationship with an adult child to their parent is of a

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non-fiduciary kind". [133]

How then could the disposition of the father's assets to the trust be set aside?

Gwyn J held that:

"At the time he gifted the property [to the trust] Mr Z owed each of the plaintiffs a duty to recognise them as members of his family and to provide for them from his wealth, due to the vulnerability [that] his earlier breach of fiduciary

duties had caused them." [173]

She held that the transfer of the assets to the trust in these circumstances "was in breach of the fiduciary duties I have found Mr Z owed to the plaintiffs". [174]

The judge went out of her way to distinguish this case from other cases where a child might want to sue a parent. She said it was appropriate:

"to be cautious in concluding that a fiduciary relationship exists ... for what may be seen as illegitimate intrusions on parental authority and decision-making." [159]

She held that even though Mr Z may not have understood his parental obligations as a fiduciary:

"his knowledge of his treatment of his children together with his desire to ensure they were not able to make any legal claim against his estate constitutes knowledge he was transferring the property in breach of his fiduciary obligations". [178]

And even though the remaining trustees lacked knowledge of the father's mis-deeds, the knowledge of the father was to be imputed to them. [191]

Takeaways

Two lessons can be taken from this case:

- It would have been a grave injustice if the children had not been able to set aside the transfer of assets to the trust and gain access to assets that could give them some recompense for the harms the father had inflicted on them; and
- Gwyn J has been careful in confining to extreme circumstances the ambit of a claim for breach of a parent's fiduciary duties to a child. Hopefully that will be rare. ■

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