

# Can a trust lawfully be used to thwart a claim under the Family Protection Act?

Counsel for the daughter said the court should decide whether it is acceptable in 2023 for people to use trusts to avoid the Family Protection Act

## Anthony Grant

The Supreme Court heard the appeal in *ABC v D&E* on 13 and 14 June and this article is based on the transcript of the hearing.

As most readers will know, the case asks whether a father who sexually abused his daughter and harmed her terribly had a fiduciary obligation to make financial compensation to her.

It can be important to read the transcript of what the judges said during the course of such a hearing. Several years ago, it was held in Australia that senior counsel were liable in negligence for not reading the transcript of a High Court hearing and thereby failing to learn of a new legal development that was underway.

I suspect the Supreme Court may take several months to deliver its decision in *ABC v D&E* and I won't speculate on whether the court will find the father had a fiduciary obligation to make financial recompense to his daughter.

Instead, I will confine this article to a separate topic – namely, whether the father could lawfully dispose of all his assets so as to defeat his daughter's claim under the Family Protection Act. It is a practical question that I suspect arises in many less significant cases on an almost daily basis.

During the hearing, Glazebrook J asked whether there had been a breach of fiduciary duty in the daughter's childhood "that has not been remedied, and an argument that there is a continued obligation [on the father] to remedy it and by putting the assets out of [his] power he [has] further breached the requirement to remedy" his unlawful conduct [63].

She said there may be "a formulation that you can't use a trust to effectively have equitable fraud [query: whether this should read "inequitable fraud"]. Inequitable fraud would include putting yourself in a position where there can be no family protection claim. [The] issue there is whether you actually need a statutory provision for that, or whether equity would have done that, absent those statutory provisions that we have in the Insolvency Act and



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the Relationship Property Act." [63].

Glazebrook J said she understood the argument for the daughter to be that the father had a duty "not to get in the way of a Family Protection Act claim" so that "there would be an ability to undo what he had done in breach of that duty" [133].

In this context, O'Regan J asked counsel for the daughter "but you're not questioning the finding of fact that one of the reasons for the trust was to deprive [the children] of access to a Family Protection Act claim?" to which the answer was "no, we're not contesting it." [151]

Glazebrook J returned to her theme :

*Maybe the more productive line is to say 'well, you were not allowed in equity to use a trust for what are essential dishonest purposes and if your intention is to defeat a family protection claim, then equity would step in, in the same way that statutorily it would step in with issues in relation to creditors and issues in relation to relationship property'. [171]*

She said counsel for the father's executors would say any prohibition on disposing of assets to defeat a claim under the Family Protection Act should be made by Parliament but "normally equity would not allow you to come [with] unclean hands and use it for what would be seen as fraudulent purposes. I am talking about fraud in an equitable sense, not in a common law sense." [171]

Winkelmann CJ summarised Justice Glazebrook's position as being "whether defeating a claim under the Family Protection Act might be said to be a sufficiently dishonest purpose" to justify setting a transaction aside. [189]

Counsel for the daughter said the court should decide whether it is acceptable in 2023 for people to use trusts to avoid the Family Protection Act. [195] She said courts "should

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not allow [the father] to use a trust for the equitably fraudulent purpose [of] avoid[ing] the Family Protection Act.” [196]

I write about this because people who advise a parent to dispose of their property to defeat a claim under the Family Protection Act should be aware of the possibility that the action may be potentially

unlawful.

And if it is unlawful, the lawyer who advises the person to engage in that conduct may have a tortious liability for counselling the person to engage in the conduct.

It can, of course, be argued in defence of such a claim that Parliament has not enacted any anti-avoidance prohibitions in the Family Protection Act to prevent a parent from removing all their assets to defeat a claim that a child may make under the Act.

But that is probably because it wouldn't have crossed the mind of the politicians who enacted the legislation that a parent, like the father in *ABC v D&E*, would have behaved so appallingly to his daughter and then manipulated his assets so as to prevent her from making a claim against his estate after he had died. ■

**Anthony Grant is an Auckland barrister and trustee who specialises in trusts and estates** ■  
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