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Do parents owe fiduciary duties to their adult children?

In 2017[1] and in a different proceeding in 2019[2] the High Court dismissed applications seeking to strike out claims made by adult children against parents who had settled property into trusts, effectively, thwarting potential claims against the parents' estates under the Family Protection Act 1955. For ease of reference, I will refer to these 2 proceedings as the "Fiduciary Claims".

In both of the Fiduciary Claims, the claimants contended that their parents stood in a fiduciary relationship to them and consequently owed them fiduciary obligations. They argued those obligations had been breached by the property settlements (transfers) by their parents to their discretionary family trusts.

This article considers whether a 'fiduciary relationship' basis of claim by an adult child against their parents' property is likely to become another part of New Zealand's ever expanding family law jurisprudence.

An incursion into property rights

The practical ramifications of imposing a fiduciary duty on parents to retain property in favour of their adult children would be profound. For example:

- Where would the limits be drawn? Would the duty prevent a parent going on holiday or buying a car or a unit in a retirement village?
- Would parents be obliged to consult with their children before dealing with their property?
- Would a legally enforceable obligation of reasonableness be imposed on parents who wish to deal with their property?

The Family Protection Act 1955 empowers a court to review and adjust the testamentary provisions (or lack of them) of a deceased person where they fall short of discharging the deceased's moral obligations to their family. Put crudely, the deceased's need for their property has ceased, so it seems uncontentious that a court may apply their estate to support and maintain the deceased's family if the deceased himself or herself failed to do so.

Entirely different and more contentious considerations apply to the prospect of the court being empowered to apply the property of a living person (the parent) to support and maintain another. Legislation already empowers the court to 'step in' in some circumstances.

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[1] Rule v Simpson & ors [2017] NZHC 2154

[2] A, B & C v D & E Ltd [2019] NZHC

The Family Proceedings Act 1980 empowers a court to order spousal maintenance. The justification here is that such maintenance arises from the fact that one spouse has been left in financial need as a consequence of the relationship separation. Typically this arises because one spouse may have been disadvantaged by the division of functions within the relationship or because they were primarily responsible for the ongoing daily care of the dependent children of the relationship. But the maintenance is not of indefinite duration and the supported spouse must ultimately support themselves. No property interest is conveyed however.

Also the Child Support Act 1991 obliges the payment of child support for dependant children. But here too the need for such support arises from the fact that one separated spouse or partner has ended up bearing the bulk of the financial burden for the continued care of the children of the relationship. It may be noted that the support obligation ceases once the children become adults. Again, no property interest is conveyed.

The underlying justification for these incursions into the general freedom to do what one wants with one's property are justified by the fact that a person has continuing direct responsibilities arising out of their relationship with another. Is there a similar responsibility by a parent to their adult children? At present, the legislature does not recognise such a responsibility, except upon the parent's death via the Family Protection Act 1955. And the common law does not recognise one at all.

Imposing a fiduciary duty on a parent in the nature claimed in the Fiduciary Claims would put discretionary family trusts and trustees in turmoil. Property settled inter vivos into such trusts would, arguably, be impressed with a constructive trust in favour of the settlor's children. And the trustees would be accessories and potentially liable for distributions from such settlements. This is what was argued in the Fiduciary Claims.

Is there a fiduciary relationship?

Any discussion about the identification of a fiduciary relationship in New Zealand must begin with the Supreme Court's Judgment in *Chirnside v Fay*[3]. The Court said that, in essence, there are two situations in which such a relationship will arise[4]:

- In the first, the relationship is of a kind which, by its very nature, is recognised as being inherently fiduciary. Most cases involving a breach of fiduciary duty are of this kind. They fall into one of the recognised categories of relationships which are inherently fiduciary. These include the relationships of solicitor and client, trustee and beneficiary, principal and agent, and doctor and patient.

- The second situation in which a relationship will be classed as fiduciary depends not on the inherent nature of the relationship but upon an examination of whether its particular aspects justify it being so classified. No single formula or test has received universal acceptance in deciding whether a relationship outside the recognised categories is such that the parties owe

[3] [2006] NZSC 68
[4] at [73]

> each other obligations of a fiduciary kind. The literature in this field is voluminous. No useful purpose would be served by an attempt at a general survey.

At [77], the Court referred to *Day v Mead*[5] which was referred to by the High Court in *Estate Realties Ltd v Wignall*[6]. The Judge in the latter case stating:

> *The word "fiduciary" derives from the Latin word "fiducia" the primary meaning of which is trust. Important secondary meanings are confidence and reliance. The cases demonstrate that a fiduciary relationship will arise where one party is reasonably entitled to repose and does repose trust and confidence in the other, either generally or in the particular transaction: see per Casey, J in Day v Mead where His Honour said that the relationship in question in that case "generated that degree of confidence and trust which in my view justifies the intervention of equity".*

So does the relationship between parent and adult child involve a reposing of trust and confidence by the latter in the former. I suggest that one should not conflate 'love and affection' for the formal legal terms 'trust and confidence'.

Of course, in every functional relationship between a parent and their adult child there will be 'trust and confidence' in each other. But the 'trust and confidence' used in a legal context has a different meaning to that used as between family and friends. The 'trust and confidence' imposed on a trustee is an equitable legal enforceable obligation whereas the 'trust and confidence' ascribe to everyday relationships between friends and family has only moral force.

I also suggest that the requirement or necessity for 'trust and confidence' arises from the fact that one party to the relationship is vulnerable to the other not simply because one is a parent and the other their adult child where vulnerability is not presumed or automatically implied.

At [78], the Court referred with approval to decision of the Privy Council in *Arklow Investments Ltd v MacLean*[7]. The judgment of their Lordships was delivered by Henry J. who said that the duty of loyalty[8]:

> *…encapsulates a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal.*

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[5] [1987] 2 NZLR 443

[6] [1991] 3 NZLR 482 at 492 per Tipping J

[7] [2000] 2 NZLR 1

[8] At 4

The final passage, of particular note in the current context, is the Court's statement at para. [80] that:

> *It is clear from the authorities that relationships which are inherently fiduciary all possess the feature which justifies the imposition of fiduciary duties in a case which falls outside the traditional categories; 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. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.*

Parent/adult child relationships

Drawing the threads of legal principle together one may then consider the nature of the parent/adult child relationship to ascertain whether it is fiduciary in nature.

First, does an adult child have legitimate expectation that their parent will deal with the property to preserve it for them? It is easy to justify laws that oblige parents to feed, clothe and care for their children when those children are incapable of doing so themselves. But that ease of justification dissipates once a child becomes an adult and becomes or is expected to become responsible for themselves.

As an adult, it is arguable that a child may be expected to amass their own property not rely on receiving it by gift or inheriting it from their parents or others.

Secondly, how is an adult child vulnerable to their parent such that they may expect and, indeed are entitled by equity to expect, their parent not to act in a way which is contrary to their child's interests?

A parent has no direct control or power over their adult child. Some might say that at an emotional level the control and power in the relationship may be balanced and in some cases weighted in favour of the child especially when the parent becomes elderly. In short, there is no innate vulnerability as between a parent and their adult child.

A constructive trust?

In the Fiduciary Claims, the children sought a proprietary interest in their parents' property, yet the parents did not purport to hold that property for them and the children did not contribute to the property in any way. Some might argue that amassing property and having children are incompatible i.e. the costs attendant on raising children undermines rather than enhances the parents' ability to generate wealth and amass property.

If a child could demonstrate direct or indirect contributions to a parent's property such as to generate an expectation of an interest in that property, then authorities such as *Lankow v Rose*[9] provide a sound equitable basis upon which their claim may be established. *Lankow* and the many cases that have applied its principles

[9] [1995] 1 NZLR 277

since all rest on the unconscionability of one person being unjustly enriched by the contributions of another. Unconscionability can play no part in the claim by an adult child to the property of their parent in respect to which they have made no contributions.

Successful claims based on the principles of *Lankow v Rose* give rise to a constructive proprietary interest in the property that was directly or indirectly contributed to. This is because the owner of the property is deemed to be a constructive trustee for the value received and, being bound by good conscience, reasonableness and fairness, must give up an interest in that property accordingly. In short, the defendant must give back (or may not retain) what they took/received from the plaintiff.

Arguably, the present high-water mark for an equitable proprietary interest claim based on contributions is the Court of Appeal's Judgment in *Hawke's Bay Trustee Company Ltd v Judd*[10] where the claiming spouse succeeded in securing an interest by having made 'indirect' house care type contributions that did not increase the value of the 'family home' property, a property that was held in a trust of which she was neither a trustee nor beneficiary.

In finding for the claimant, the Court overcame the potential impediments posed by traditional trust principles by reference to what it had earlier said in *Vervoort v Forrest*[11] that:

> "..the traditional trust principles of unanimity and non-delegation … must bend to the practical realities when one trustee is in absolute control of all trust activities and the other trustees have effectively abdicated their trustee responsibilities".

It might be wondered if this sort of flexing of traditional principles in the 'family' context has encouraged the novel and bold assertions of the claimants in the Fiduciary Claims, which arguably seek to 'flex' the existing principles of fiduciary relationships to accommodate their claims.

Returning to proprietary claim aspect of the Fiduciary Claims – I note that there was no suggestion that the adult children had made contributions of any kind to the parent's property. And it was not suggested that anything was taken or retained by the parent that ever belonged to the adult children. In such circumstances, I do not apprehend a principle of equity that would require a parent to surrender a property interest to their adult child. Underlying *Lankow v Rose* and all of the cases that have adopted and applied it is the notion of unjust enrichment, that one party should not unconscionably retain what another has contributed. The parents in the Fiduciary Claims have not been unjustly enriched by their adult children, so in principle a claim ought not to lie on this basis.

Necessity being the mother of invention: perhaps the Fiduciary Claims sought a proprietary interest in their parent's property, rather than equitable damages for

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[10] [2016] NZCA 397
[11] [2016] NZCA 375

breach of duty, because the parents had denuded themselves of property from which damages could be paid. If so, then the impecuniosity of a defendant provides no principled basis to transform what is properly a damages claim into a constructive proprietary interest claim.

Chirnside v Fay

The facts in *Chirnside* have little in common with the typical parent/adult child relationship. It involved co-venturers who threw their lot in together to develop commercial property. They were effectively partners in a common business enterprise and, like partnerships more generally, equity imposed the necessary fiduciary relationship and attendant duties on the parties to act in good faith, fairly and reasonably towards each other.

The Court held that equity, as the 'keeper of consciences', constrained and obliged Mr Chirnside to act conscientiously towards his co-venturer. The need for imputed mutual trust and confidence was compelling. Mr Fay was vulnerable to Mr Chirnside because he had by the nature of the relations reposed trust and confidence in him not to act against his interests.

There is no trace of a common enterprise 'partnership' in a parent/adult child relationship. Certainly, in terms of trust, confidence and vulnerability, the position is different when a child is young. There a parent is obligated to feed, clothe and care for their child. It has been said that the relationship between an infant child and his or her parents represents the paradigm example of one who is vulnerable to another. The young child is obliged to repose trust and confidence in their parent not to act against their interests. Equity and the legislature support each other in the child's unspoken expectation. Where the legislature contains a lacuna, equity and the fiduciary obligations of a parent to their young child will fill the void.

There have been a number of cases in New Zealand where the breach of an interfamilial fiduciary duty has been accepted[12]. Invariably, the cases involve abuse, often sexual, of a child in the care of adults under a duty to care for them. Unsurprisingly, the duty is not the subject of detailed judicial analysis, instead its existence is simply accepted.

Importantly, these cases all involve claims for damages against the offending parents not claims to an interest in the parent's property.

It would be a startling notion to understand that equity will step in and extend the parent's initial legal obligations even after their children became adults and are no longer vulnerable, and notwithstanding that the children may have left home and even had children of their own.

While the authorities focus on the need in every case where a fiduciary relationship is claimed for there to be a requirement for trust and confidence, this is always linked to an additional requirement that a fiduciary was someone who had undertaken,

[12] See: Jay v Jay [2014] NZCA 445, [2015] NZAR 861, H v R [1996] 1 NZLR 299, S v G [1995] 3 NZLR 681 (CA), B v R (1996) 10 PRNZ 73, S v Attorney-General [2003] 3 NZLR 450 (CA), M v H (1999) 13 PRNZ 465 (CA) - all sexual abuse cases.

whether expressly or not[13], to act for or on behalf of another[14]. This is an element that in typical family relations is missing in parent/adult child relationship. In general and notwithstanding the normal love, affection and concern a parent may have for their adult children, it would not be typical that the parent would undertake to act for and on behalf of their adult child in any formal legal manner.

In the context of considering the essence of a fiduciary relationship, the Supreme Court in *Chirnside* referred with approval[15] to the following statement by Gault in *Liggett v Kensington*[16]*:*

> *There are elements of reliance, confidence or trust between them often arising out of an imbalance in strength or vulnerability in relation to the exercise of rights, powers or the use of information affecting their interests. Telling indications may be that persons having taken, or been entrusted with, opportunity to protect or benefit others stand in a position also to prefer their own interests. Assistance is to be gained by way of analogy from relationships generally regarded as giving rise to fiduciary obligations such as those of trustees, partners, solicitors, investment advisers, stockbrokers and the like.*

Considering the parent/adult child relationship, one immediately sees the absence of an imbalance in strength or vulnerability in relation to the exercise of rights, powers or the use of information affecting their interests. As adults, parents and children typically become equals neither being stronger nor more vulnerable than the other.

Summary

While the court was no doubt sensible in its cautious approach to deny the applications to strike out the Fiduciary Claims at a summary stage, I believe that ultimately the claims will not succeed because the typical parent/adult child relationship does not contain the following elements of a fiduciary relationship:

- There is nothing in the relationship that requires the adult child to repose equitable, that is enforceable, trust and confidence in their parent.

- There is no inherent imbalance in strength or vulnerability as between the parent and adult child in relation to the exercise of rights, powers or the use of information.

- The parent, in usual circumstances, does not take on, nor are they entrusted with, the opportunity to protect or benefit their adult child such that they would be in conflict if they preferred their own interests i.e. Equity is not required to keep the parent's conscience in relation to the adult child.

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[13] In *Chirnside,* the Supreme Court rejected the notion that the fiduciary undertakings needed to be expressed – see para.s [82], [85] to [89]

[14] See Chirnside at para [79]

[15] At para [83]

[16] [1993] 1 NZLR 257 at 281 (CA).

- There is an absence of the presently accepted grounds by which one person may claim an equitable interest in the property of another, namely, those causes of action premised on unjust enrichment i.e. *Lankow v Rose*.

Apart from the technical arguments why a fiduciary relationship does not subsist, there is a powerful policy reason against extending fiduciary obligations to parent/adult child relationships; namely that such an extension will involve a profound incursion in the hitherto understanding that a person is generally free to deal with and enjoy their property as they wish.

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