

ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF ANY PERSONS OR ENTITIES CONNECTED TO THIS PROCEEDING.

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF APPELLANTS AND RESPONDENTS REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA701/2021
[2022] NZCA 430**

BETWEEN D AND E LIMITED AS TRUSTEES OF
THE Z TRUST
Appellants

AND A, B AND C
Respondents

Hearing: 15 March 2022
Court: Kós P, Gilbert and Collins JJ
Counsel: M J Wenley for Appellants
M I S Phillipps for Respondents
Judgment: 14 September 2022 at 9.30 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
 - B The respondents must pay the appellants costs for a standard appeal on a band A basis and usual disbursements.**
 - C The order for costs made in the High Court is quashed.**
 - D We make an order prohibiting publication of the names, addresses or identifying particulars of any persons or entities connected to this proceeding.**
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REASONS

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| Collins J (dissenting) | [1] |
| Gilbert J | [120] |
| Kós P | [152] |

COLLINS J

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Introduction

[1] This appeal arises from a judgment in which the High Court granted a claim by the respondents against the trustees of a trust (the Trust) that the respondents' late

father settled.¹ At the heart of the dispute is whether the respondents' father owed them fiduciary duties not to transfer the bulk of his assets to the Trust.

[2] In the High Court, the respondents successfully argued that:

- (a) Their father abused them egregiously when they were children, thereby breaching fiduciary duties he owed them at the time.
- (b) The abuse had an enduring adverse impact on the children when they became adults.
- (c) The father committed a further breach of fiduciary duty when, approximately 30 years after his children ceased to have contact with him, he established the Trust for the benefit of another family and gifted his principal assets to the Trust, thereby depriving the children of any meaningful claim against their father's estate.
- (d) The trustees received the father's principal assets knowing that the transfers breached the father's fiduciary duties to his children.
- (e) The trustees were deemed to hold the father's principal assets as constructive trustees for the benefit of the father's estate, thereby exposing those assets to a related claim that the children have brought against the father's estate under the Family Protection Act 1955.

[3] The following key facts are now beyond dispute:

- (a) The father repeatedly raped and sexually abused his daughter when she was between seven and 13 years of age. He also emotionally abused his daughter during her childhood and teenage years.
- (b) The father physically and emotionally abused his sons up until they left home when they were approximately 16 years of age.

¹ *A v D* [2021] NZHC 2997 [High Court judgment].

- (c) The father had virtually no contact with his children after they left home.
- (d) The children elected not to lay complaints with the police or commence civil proceedings against their father.
- (e) Approximately 30 years after the children ceased to have contact with their father, the father gifted to the Trust his home and some shares worth approximately \$700,000 in total. The beneficiaries of that Trust are the children and grandchildren of a friend of the father.
- (f) The children were not named as beneficiaries in the father's will.
- (g) The father's remaining estate is worth approximately \$47,000.
- (h) The children's claim under the Family Protection Act will be rendered meaningless unless the property gifted to the Trust reverts back to the father's estate.

[4] In their appeal, the trustees now accept that the father owed fiduciary duties to his children not to abuse them when they were children. The submissions before us focused upon the following questions:

- (a) Did the father owe fiduciary duties to his adult children at the time he gifted his principal assets to the Trust?
- (b) If so, what were the nature and scope of those duties?
- (c) Did the father breach any fiduciary duties he owed his adult children when he gifted his principal assets to the Trust?
- (d) Did the High Court err when it decided the trustees held the father's principal assets as constructive trustees on behalf of the father's estate?

[5] In the High Court the names of the parties and the beneficiaries of the Trust were anonymised. I can understand why the daughter should have the benefit of name suppression. As I shall explain, she has endured significant psychological trauma as a result of the abuse she suffered as a child. Identifying her in this judgment is likely to exacerbate her already fragile health. The High Court suppressed the names of the appellants and respondents in order to protect the identity of the daughter. I will continue to suppress the names of the parties and the beneficiaries of the Trust as well as other persons and entities connected to the proceedings in order to protect the interests of the daughter.

[6] Rather than use alphabet letters when referring to those involved in this proceeding, I shall use the following fictitious names. I place in parentheses the letters that were used to refer to the same people in the High Court judgment:

Robert (Z) — the father;

Rose (J) — Robert's former wife and mother of the respondents;

Greg (G) — the eldest son of Robert and Rose;

Alice (A) — the daughter of Robert and Rose;

Barry (B) — the second son of Robert and Rose;

Cliff (C) — the third son of Robert and Rose;

Phillipa (Y) — a long-term friend of Robert and the mother of the principal beneficiaries of the Trust established by Robert;

Louise (L), Sally (S) and Mark (M) — the children of Phillipa and the principal beneficiaries of the Trust;

Don (D) — the husband of Louise and a trustee of the Trust; and

Karen (K) — the child of Don and Louise and final beneficiary of the Trust.

Background

[7] Robert and Rose married in December 1958. They subsequently had four children, namely Greg, born in 1960; Alice, born in 1961; Barry, born in 1963; and Cliff, who was born in 1971. Greg died in 2015. His estate is not involved in this litigation.

[8] Robert and Rose separated in 1981, and although they made an attempt at reconciliation, their marriage ended in 1983. At about the time Robert and Rose's marriage came to an end, Robert commenced a relationship with Phillipa, a widow who had three children, namely Louise, Sally and Mark. Robert and Phillipa remained close friends until he succumbed to cancer in 2016.

[9] During the period of the marriage Robert frequently abused Rose and their children. Although Rose was made aware of the abuse that Robert inflicted on his children, they decided not to ask their mother to give evidence because of her age and poor health.

Alice

[10] In the High Court, Gwyn J accepted that Robert had started to rape Alice when she was seven years old and that the sexual abuse continued until she was 13 years old, when she and her family moved to a house in which there was a lock on the bedroom door that prevented Robert from entering her room at night.²

[11] By the time she was nine years old, Alice was frequently soiling herself and she suffered urinary tract infections. By the time she was 11, Alice's self-esteem was so low that she made attempts to end her own life.

[12] In 1979, when she was about 18 years old, Alice left home to undertake tertiary education. Even after she ceased living in the same house as her father, Alice continued to suffer emotionally and physically from the adverse influences of Robert. Alice explained that during this period she was bulimic and suffered depression.

² High Court judgment, above n 1, at [91].

[13] After she completed tertiary training, Alice found it very difficult to maintain steady employment and relationships. She attributed her challenges, including her profound depression, suicidal thoughts and lack of self-esteem, to the abuse she had suffered from her father. Alice explained that she was never able to properly settle and “lived a transient lifestyle”. She sought counselling for the first time in late 1985 but was unable to achieve much progress. She moved overseas before returning to New Zealand in 1987. On her return, Alice continued to live an impoverished and nomadic life.

[14] In 1990, Alice sought assistance from the ACC Sensitive Claim Unit, which accepted her claim that she had been sexually abused by Robert, thereby enabling her to obtain financial and counselling support from ACC. It was at about this time Alice confided in her three brothers that their father had sexually abused her. Alice also told her mother about the sexual abuse that she had endured. Rose wrote a letter to Robert in early 1992 saying that what he had done to their daughter was unforgiveable. Robert’s response to Rose was a letter from a lawyer, saying that the allegations were false and defamatory, and that if the statements were repeated legal action would be taken. Alice also wrote to her father in 1992, reminding him of the abuse she had suffered. She received no response.

[15] Between late 1992 and 1994, Alice and her brothers resolved not to initiate criminal or civil proceedings against Robert. Instead, Alice explained “[w]e all agreed that we would continue to have no contact with him, and we didn’t”.

[16] In 1996, Alice gave birth to a child. She relied on the domestic purposes benefit from 1996 to 2013, supplemented with income from childcare arrangements, part-time teaching and cleaning jobs. Towards the later stage of this period, Alice was able to attend university. She obtained a bachelor’s degree in 2014.

[17] Alice explained in her evidence in the High Court that Robert knew about the birth of her son and her very difficult circumstances. She said “family members shared with [Robert] news of [her] struggles” and that Robert knew Alice needed financial and emotional support. Alice’s belief was reaffirmed when she became aware of the

details of the seven wills executed by Robert between 2001 and 2015. As I explain at [45]–[47], apart from one exception, Alice was a beneficiary under those wills.

[18] Alice has continued to suffer depression and stress, which she traces to the abuse and mistreatment inflicted on her by Robert. She continued to have no contact with her father, although family members told him that his daughter and grandchild were struggling financially.

[19] When Alice learned in early 2016 that her father was dying, she wrote him a letter but she did not visit her father before he died.

[20] When Alice discovered her father had deliberately structured his affairs so as to ensure that she and her siblings would not inherit anything from his estate or benefit from his Trust, her depression intensified. She was again granted cover by ACC to assist with her post-traumatic stress disorder (PTSD) and depression.

[21] Alice left New Zealand in 2017 to try to work overseas. She returned to this country in 2020.

[22] After she returned to New Zealand, Alice has struggled to find accommodation. She has been “house-sitting” and staying with friends. Occasionally, she has been forced to live in her car. She has had no fixed abode or permanent work. In her evidence, Alice said she continues to live in poverty and that she suffers from poor health associated with PTSD.

Barry

[23] In his evidence, Barry explained that his childhood revolved around the abuse perpetrated by his father. He said his father used to beat him “repeatedly and sadistically with the buckle end of a belt for even the most minor things”. Barry developed a tremor for which he was referred for medical care when he was about 11 or 12.

[24] Barry told the High Court that Robert would become most abusive after he had been drinking and that he enjoyed humiliating Barry in front of other people. Barry

left home in 1980 after a physical fight with his father in which, for the first time, Barry defended himself by punching his father in the face. Robert told Barry to leave the house, which he did. Barry never saw his father again.

[25] Barry did not perform well at school. He started working when he was 16, and when he was 17, Barry became involved in a dispute with gang members which resulted in him being stabbed and admitted to hospital with life threatening injuries. While his mother visited him, Robert never came to see his son in hospital.

[26] Later in 1981, Barry went to Australia with his girlfriend. He got low-level employment. When Barry's girlfriend gave birth to their child, he "abandoned" them.

[27] Barry moved to the United Kingdom in November 1985. There, he settled down with the woman to whom he is now married. Together they established a family.

[28] When he was 33, Barry started to work in England for a small company. He is now the managing director of that company and has a steady income. Barry and his wife also own a house in New Zealand and have a share in another property in which Rose lives rent-free.

[29] Although Barry has enjoyed success in later life, he believes that the abuse and torment he suffered when growing up resulted in him having a poor education and that he never developed proper self-confidence or self-belief. He said that Robert was instrumental in causing him to waste his teenage years and to nearly lose his life as a result of the gang stabbing. Barry also said that Robert's complete lack of moral and financial guidance played a role in him abandoning his girlfriend and their child in Australia.

[30] Barry confirmed that Alice told him and Cliff about the sexual abuse she had suffered at Robert's hands and that he agreed with her decision not to initiate court proceedings against Robert.

[31] Barry explained that he is aware of the effect of Robert's mistreatment on his siblings and himself:

The abuse [Alice] endured ruined her life. Despite being a beautiful young woman, she was unable to sustain any real relationships or maintain a career. ... [Alice] has neither house nor savings. She has many health problems.

Cliff

[32] Cliff, the youngest of Robert and Rose's children, suffered from and witnessed Robert's violence. Cliff was particularly disturbed by the way he saw Robert mistreat Rose.

[33] Cliff left home at 15 and effectively had no contact with his father from then onwards.

[34] Cliff lived for a period in Australia and in the United Kingdom from around 1992 to 2011.

[35] Cliff resorted to illicit drugs. While he was in the United Kingdom, Cliff's "drug use developed into a severe and prolonged drug addiction, resulting in a number of near-death experiences from complications relating to [his extreme] drug use". Cliff attributed his abuse of drugs to the torment inflicted on him by Robert when he was living at home.

[36] Cliff returned to New Zealand in 2011 and endeavoured to sort his life out. He found employment and was able to purchase a modest home.

[37] Cliff has continued to suffer serious depression and struggled to maintain meaningful relationships, which he also attributes to the violence and emotional torment inflicted upon him by Robert.

[38] When explaining his motives for commencing the proceeding, Cliff said that Robert was aware of his obligations to his children and the effect his behaviour and mistreatment had on them. Cliff always expected that Robert would do something about his appalling behaviour and make provision for his own children, particularly Alice, "who[m] he treated horrifically". Cliff said that he has been:

... especially sad to see the impact [Robert's] mistreatment of us has had on [Alice]. The abuse has had a massive effect on her ability to form relationships. The abuse we all suffered was bad enough, but [Alice's] was far, far worse. ... She has struggled in life with many ongoing health issues, some of which are attributable to the abuse she suffered.

Rose

[39] Although Rose was not a witness in the proceeding, the experiences that she endured had an impact upon her children.

[40] Alice detailed in her evidence how Robert physically abused and emotionally tormented Rose. The abuse of Rose would normally occur after Robert had returned home drunk. Alice said she saw Robert hitting Rose and that he threatened to shoot his wife and children. On one occasion, towards the end of their marriage, Robert "tried to pull [Rose's] finger nails out, and he gave her tablets which led to an overdose then refused to take her to the hospital".

[41] In her evidence, Alice said that, following his separation from Rose, Robert "sometimes stood outside and pointed his guns at the house knowing that [Rose], [Cliff] and [Alice] were inside. He would make threatening phone calls during the night".

[42] Barry and Cliff also described in their evidence how they witnessed their father inflicting physical and emotional abuse on their mother.

Phillipa

[43] Phillipa gave evidence in the High Court. She described the close bonds of friendship that developed between Robert and her daughter Louise, and Don, who is the husband of Louise. Phillipa explained how Robert and her started their relationship in 1981 and that Robert lived with her for three years before he moved into another home by himself. They remained close friends until Robert passed away.

[44] Phillipa's three children lived in the same home as Robert and Phillipa from 1981 till 1984. Phillipa said that although she was aware Robert was estranged from his children, she only became aware of Alice's allegations of sexual abuse after Robert

died. Phillipa said that Robert had tried to reconnect with his children, but his efforts were rebuffed. Phillipa also said that Robert was a caring friend and that she never had any concerns about Robert's association with her own children and her grandchildren.

Estate planning

[45] Robert instructed his lawyers to prepare seven wills that were executed between 21 December 2001 and 21 December 2015. In the first of those wills, Robert bequeathed \$25,000 to each of his children. He also made specific provisions for Alice, who was to have the option to live in Robert's home for the balance of her life. The trustees were also given the discretion to pay any of Alice's debts. This was approximately nine years after the issue of the sexual abuse of Alice had been raised by Rose and Alice, and denied by Robert.

[46] A change was made in the second will (executed on 12 September 2003) in which Robert provided that Alice's son was to receive Robert's home subject to a life interest to a third party. Alice and her siblings were not included in Robert's third will (executed on 11 October 2004) but their children were named as beneficiaries.

[47] Alice and her three brothers were included in wills that Robert executed on 23 June 2009, 10 August 2010 and 21 June 2012.

[48] On 22 October 2014, Robert instructed his lawyer that he wished to set up the Trust. Two reasons were given by Robert for this decision, namely, to protect his assets in the event he became ill and to "prevent any of his family [from] chasing" his assets.

[49] The Trust was settled on 22 December 2014. Robert was appointed as a trustee as was Don. A trustee company was appointed an additional trustee on 27 January 2016.

[50] The beneficiaries of the Trust included Robert, Louise, Sally and Mark. As I have already explained, the latter three beneficiaries are the adult children of Phillipa. Also named as a beneficiary is Karen, the daughter of Don and Louise (Phillipa's

eldest daughter). Any children or grandchildren of Louise, Sally, Mark and Karen are secondary beneficiaries. If Karen is still alive when the Trust expires, then she is to be the final beneficiary. If, however, Karen dies before the Trust concludes then any of her children will be the final beneficiaries.

[51] Robert gifted his home to the Trust on 22 December 2014. Robert also gifted some shares to the Trust on 27 January 2016. It is accepted that at the time of the High Court hearing the assets transferred to the Trust were worth about \$700,000.

[52] After he established the Trust, Robert executed his final will. Alice and her brothers were not named as beneficiaries under that will. Robert instructed his executors, who included Don, to distribute Robert's furniture, books and photographs at their discretion with the residue of Robert's estate going to Phillipa's three adult children. Robert also instructed that a rocking horse, that was previously to be bequeathed to Alice's son, was to go to Karen. The estate was worth approximately \$47,000 at the time Robert passed away.

Litigation

[53] In December 2016, Alice and her siblings commenced proceedings under the Family Protection Act against the executors of Robert's estate. Those proceedings have been placed in abeyance pending the determination of the current proceeding in which Alice and her brothers are endeavouring to unwind the gifting by Robert of his home and shares to the Trust.

[54] The essence of the claim which is the focus of this appeal is that Robert owed Alice and her brothers fiduciary duties, which he breached when he gifted his home and shares to the Trust in order to prevent his children from making any claim to those assets under the Family Protection Act.

[55] It is argued by Alice and her brothers that, as Robert was a trustee of the Trust, his breaches of fiduciary duty are visited upon the remaining trustees. The pleadings allege that the breaches of fiduciary duty by Robert vitiated the express trust and that the trustees hold the gifted assets as constructive trustees for the executors of Robert's estate.

[56] The claims were initially brought against the trustees as first defendants and Robert’s former solicitors as second defendants. The claims against the former solicitors were struck out in a summary judgment delivered by Associate Judge Johnston.³ The trustees also endeavoured to obtain summary judgment in their strike-out application. The Associate Judge held, however, that although the fiduciary duty asserted by the children was novel, it did not mean that such a duty would never be recognised. In the context of a summary judgment application, the trustees were unable to satisfy the Court that the claim by Alice and her brothers was bound to fail.⁴ The trustees’ application for leave to appeal from the Associate Judge’s decision was declined by this Court.⁵

High Court judgment

[57] After assessing Alice, Barry and Cliff when they gave their evidence, Gwyn J concluded they had honestly and accurately recalled the abuses that Robert had inflicted upon each of them. The Judge was satisfied that Robert had behaved egregiously when assaulting and tormenting his children and that Alice had suffered terribly from the sexual abuse that she had endured between the ages of seven and 13.⁶

[58] When considering the claim for breach of fiduciary duty, Gwyn J adopted the following analysis:

- (a) Robert’s relationship with his children was “inherently fiduciary” when they were in his care.⁷
- (b) The abuse that Robert inflicted on each of his children was a breach of the fiduciary duty he owed them.⁸
- (c) Once Alice, Barry and Cliff became adults Robert ceased to have an “inherently fiduciary” relationship with them.⁹

³ *A v D* [2019] NZHC 992, [2019] NZFLR 105.

⁴ At [40].

⁵ *D v A* [2019] NZCA 585.

⁶ High Court judgment, above n 1, at [91]–[92].

⁷ At [107].

⁸ At [113].

⁹ At [133].

- (d) Nevertheless, the relationship between Robert and his children carried particular fiduciary obligations at the time he transferred most of his assets to the Trust.¹⁰
- (e) Robert breached the fiduciary obligations he owed each of his children when he transferred his house and shares to the Trust.¹¹
- (f) The trustees are liable for knowingly receiving the property gifted by Robert because his knowledge is imputed to the Trust.¹²
- (g) The assets held by the Trust are held on a constructive trust for the estate of Robert.¹³

Gwyn J said:¹⁴

... at the time he gifted the property [to the Trust], [Robert] owed each of the [children] a duty to recognise them as members of his family and to provide for them from his wealth, due to the vulnerability his earlier breach of fiduciary duties had caused them.

The evidence showed that at least one of [Robert's] reasons for transferring the property to the Trust was to prevent the [children] receiving his assets. It was a deliberate step to ensure that his estate would not be available to meet the [children's] needs. I find the transfer was in breach of the fiduciary duties I have found [Robert] owed to the [children].

Options available in relation to civil proceedings

[59] When the Accident Compensation Act 1972 came into force on 1 April 1974, civil claims for compensatory damages arising out of personal injury were abolished in New Zealand in exchange for injured persons receiving cover from the accident compensation regime.¹⁵ Similar provisions were enacted in the four subsequent iterations of the legislation governing accident compensation in New Zealand.¹⁶

¹⁰ At [163]–[164].

¹¹ At [174].

¹² At [182].

¹³ At [182].

¹⁴ At [173]–[174].

¹⁵ Accident Compensation Act 1972, s 5(1).

¹⁶ Accident Compensation Act 1982, s 27(1); Accident Rehabilitation and Compensation Insurance Act 1992, s 14(1); Accident Insurance Act 1998, s 394(1); and Accident Compensation Act 2001, s 317(1).

Physical injuries arising from assaults have always been covered by the accident compensation scheme.

[60] In 1982, this Court confirmed that the bar in the accident compensation legislation to civil claims for personal injury did not prevent a plaintiff from suing for exemplary damages where they were the victim of an assault.¹⁷ The same principle was subsequently held to apply for an exemplary damages claim based upon breach of fiduciary duty that gave rise to physical and emotional harm in a doctor/patient relationship in which a doctor conducted medical research on patients without their consent.¹⁸ The ability of plaintiffs to sue for exemplary damages arising from physical and mental injuries was affirmed by the Supreme Court in *Couch v Attorney-General (No 2)*.¹⁹

[61] Thus, had they wished to do so, each of the children could have sued Robert in tort for the assaults they suffered and, in the case of Alice, for the sexual abuse she endured. Such a claim could have been for both compensatory and exemplary damages for injuries suffered before 1 April 1974. Any civil claim for assaults inflicted after 1 April 1974 would need to have been confined to a claim for exemplary damages. As I demonstrate at [73]–[78], it is also possible Alice could have based a claim upon breach of fiduciary duty in relation to the sexual assaults she suffered. Any such claim would have been for compensatory and exemplary damages for events before 1 April 1974.

[62] There are two qualifications to my summary of the options for civil proceedings to have been brought by the children against their father:

- (a) First, any proceedings would have had to comply with the time limits set out in the Limitation Act 1950.
- (b) Second, had criminal proceedings been initiated against Robert then, prior to the passing of the Accident Insurance Act 1998, it would not have been possible for exemplary damages to have been sought from

¹⁷ *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA).

¹⁸ *Green v Matheson* [1989] 3 NZLR 564 (CA).

¹⁹ *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

him in relation to conduct that formed the basis of any criminal prosecution.²⁰

Criminal proceedings

[63] Robert’s children could have complained to the police at any time before he died. I can understand, however, why they preferred not to take this very public course of action at that time. In particular, it would have been very difficult for Alice to have confronted the man who abused her in such an appalling manner.

Legal principles relevant to this appeal

[64] I will now consider the legal principles relevant to the present appeal. I will begin by providing an overview of fiduciary duties, before considering fiduciary duties in the family context and between parents and adult children.

Fiduciary duties

[65] The word “fiduciary” is said to have the following origins:²¹

[It] derives from the Latin word “fiducia” the primary meaning of which is trust. Important secondary meanings are confidence and reliance.

[66] The authors of *Snell’s Equity* record:²²

The categories of fiduciary relationship are not closed. Fiduciary duties may be owed despite the fact that the relationship does not fall within one of the settled categories of fiduciary relationships, provided the circumstances justify the imposition of such duties. Identifying the kind of circumstances that justify the imposition of fiduciary duties is difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship, preferring to preserve flexibility in the concept.

²⁰ Accident Insurance Act 1998, s 396, now Accident Compensation Act 2001, s 319. See *Daniels v Thompson* [1998] 3 NZLR 22 (CA) at 50; and *W v W* [1999] 2 NZLR 1 (PC).

²¹ *Estate Realties Ltd v Wignall* [1991] 3 NZLR 482 (HC) at 492 per Tipping J.

²² John McGhee and Steven Elliott *Snell’s Equity* (34th ed, Sweet & Maxwell, London, 2020) at [7-005] (footnotes omitted).

[67] In *Dold v Murphy*,²³ this Court analysed three decisions of the Supreme Court concerning the nature and scope of fiduciary duties.²⁴ Those cases concerned fiduciary relationships in a commercial context. Not all the principles that emerge from those cases are able to be grafted onto other situations in which a fiduciary relationship may exist, such as between a doctor and patient and where the fiduciary does not benefit financially or economically at the expense of the person to whom fiduciary duties are owed.²⁵ Nevertheless, the three cases decided by the Supreme Court concerning the nature of fiduciary duties in a commercial context provide a starting point to examine the law concerning fiduciary relationships and duties as it has evolved hitherto in New Zealand. We shall refer to three observations about those cases that were noted by this Court in *Dold v Murphy*.

[68] First, “fiduciary duties are assumed responsibilities. Fiduciary responsibility *may* be inferred where the relationship is one of assumed trust, confidence and loyalty”.²⁶

[69] Second, in *Chirnside v Fay*, Tipping J explained that a relationship may give rise to fiduciary duties in two situations:²⁷

- (a) where there is an inherently fiduciary relationship between the parties;
or
- (b) when particular aspects of a relationship that is not inherently fiduciary nonetheless justify it being classified as such.

²³ *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 at [51]–[59].

²⁴ *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433; *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169; and *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192.

²⁵ Right 2 in the Code of Health and Disability Services Consumers’ Rights proscribes “exploitation” of a patient by a health care provider. Exploitation is defined to include “breach of a fiduciary duty” by a health care provider. See Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996. See also *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 (CA) (disclosure of patient information); *L v Robinson* [2000] 3 NZLR 499 (HC) (sexual misconduct with a patient); *Norberg v Wynrib* [1992] 2 SCR 226 (sexual abuse of a patient by a doctor); and Peter Skegg and Ron Paterson (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) at [6.2.6(2)].

²⁶ *Dold v Murphy*, above n 23, at [52].

²⁷ *Chirnside v Fay*, above n 24, at [73] and [75].

[70] Tipping J observed:²⁸

No 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.

But that:²⁹

[A]ll fiduciary relationships, whether inherent or particular, are marked by the entitlement ... 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.

[71] The same point was expressed in a slightly different way by Blanchard J in *Paper Reclaim Ltd v Aotearoa International Ltd*:³⁰

A fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement, express or implied, to act on behalf of another and thus to put the interests of the other before one's own is a frequent manifestation of a situation in which fiduciary obligations are owed. Partners are the classic example of parties in that situation. Their position is different from that of parties to a contract who may have to cooperate but are doing so for their separate advantages.

[72] Third, in summary:³¹

Some relationships are inherently fiduciary in nature, involving trust, confidence and a degree of dependence, such as solicitor and client and trustee and beneficiary. In other cases a fiduciary relationship is only likely to be inferred when the legal relationship between parties involves: (1) the conferral of powers in favour of the alleged fiduciary, which may be used to affect the proprietary rights of the beneficiary; (2) the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary (for example, to promote the beneficiary's interests, or to prefer the interests of the beneficiary over those of third parties); and (3) the implied subordination (although, not necessarily, elimination) of the alleged fiduciary's own self-interest.

Fiduciary duties in a family context

[73] The relationship between a parent and child has, in New Zealand and Canada, been recognised as having the hallmarks of a fiduciary relationship.³²

²⁸ At [75].

²⁹ At [80].

³⁰ *Paper Reclaim Ltd v Aotearoa International Ltd*, above n 24, at [31] (footnote omitted).

³¹ *Dold v Murphy*, above n 23, at [55].

³² See Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [17.3.13].

[74] Those hallmarks include the actual or implied responsibility of a parent not to act in a way that is contrary to the child's interests and, conversely, the actual or implied trust and confidence that a child has in a parent to not act contrary to the child's interests. These hallmarks mirror the statements of Tipping J in *Chirnside v Fay*, which I have cited at [70].

[75] It has also been accepted in Canada that an action for breach of fiduciary duty can arise in circumstances where a parent abuses their child. In *M (K) v M (H)*,³³ an adult daughter sued her father for sexual abuse he inflicted on her when she was a child. The plaintiff's claims for assault and breaches of fiduciary duty were upheld by the Supreme Court. Writing the principal judgment for the Court, La Forest J said:³⁴

It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship. Indeed, I can think of few cases that are clearer than this. For obvious reasons society has imposed upon parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation. Equity has imposed fiduciary obligations on parents in contexts other than incest, and I see no barrier to the extension of a father's fiduciary obligation to include a duty to refrain from incestuous assaults on his daughter.

[76] It has been explained that, in Canada, the fiduciary relationship between a parent and child arises from the vulnerability of the child and the power and authority of the parent.³⁵ Accordingly, when identifying fiduciary duties in a family context, Canadian courts have adopted an approach that is wider than that followed in New Zealand in relation to fiduciary duties in a commercial context. For example, in *Frame v Smith*, Wilson J said that fiduciary duties generally arose where:³⁶

- (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 beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

³³ *M (K) v M (H)* [1992] 3 SCR 6.

³⁴ At 61–62. See also *DM v RL* 2014 BCSC 1061, [2014] BCJ 1186, where this fiduciary duty was extended to a mother for failing to protect her daughter from a step-father's sexual abuse.

³⁵ *Brooks v British Columbia* 2000 BCSC 735, [2000] BCJ 909 at [108]–[109].

³⁶ *Frame v Smith* [1987] 2 SCR 99 at 136.

Although Wilson J was in the minority in that case, her observations about the scope of fiduciary duties in Canada were adopted with approval by La Forest J when he wrote the leading judgment for the Supreme Court in *M (K) v M (H)*.³⁷

[77] There is no prior authority in New Zealand concerning the scope of a fiduciary relationship between a parent and child. The same principles identified by the Supreme Court of Canada in *M (K) v M (H)* were, however, applied by the High Court in *B v R*, the case of an uncle sued for breaching the fiduciary duties he owed his niece when he sexually abused her when she was a child.³⁸ The niece frequently stayed at her uncle's home while her mother was at work, and she was in her uncle's care and control when the abuse occurred. It was not disputed in that case that B's uncle owed her a fiduciary duty "not to take advantage of her and exploit her for his own gratification".³⁹ That case was distinguished by this Court in *Jay v Jay*, where the relationship between niece and abusing uncle was far more intermittent and did not give rise to a fiduciary duty.⁴⁰

[78] As we have noted, Gwyn J held Robert's relationship with each of his children, while they were living in his home, was inherently fiduciary and that "[Robert's] proven sexual abuse of [Alice] and his proven physical abuse of [Barry] and [Cliff] was a breach of the fiduciary duty he owed to each of them as children".⁴¹ Mr Wenley, counsel for the appellants, has not challenged those aspects of Gwyn J's reasoning.

Parents and adult children

[79] Mr Wenley submitted that once a child becomes an adult, then the relationship between the parent and the child ceases to be inherently fiduciary. Gwyn J accepted that proposition. It is my view, however, that in some circumstances, the inherently fiduciary relationship between a parent and a child may continue after a child becomes an adult. For example, it could not be disputed that a severely disabled child who is dependent upon their parents for care and support as a child may continue to be the beneficiary of an inherently fiduciary relationship after the child becomes an adult.

³⁷ *M (K) v M (H)*, above n 33, at 63.

³⁸ *B v R* (1996) 10 PRNZ 73 (HC).

³⁹ At 75.

⁴⁰ *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [67].

⁴¹ High Court judgment, above n 1, at [113].

Such cases are best thought of as instances of a continuous relationship that is inherently fiduciary.

[80] Two cases have indirectly touched upon the central issue in this appeal, namely whether a parent can owe a fiduciary duty to an adult child to provide for the economic interests of the adult child.

[81] In *Rule v Simpson*, the High Court declined to strike out a claim by an adult illegitimate child of the deceased when the latter settled his assets in a trust for the benefit of persons other than the plaintiff.⁴² The High Court said that it was not prepared to strike out the claim without hearing the evidence.⁴³ As this was only a strike-out application and did not involve any positive finding of a fiduciary relationship, it provides little meaningful guidance to the questions we have to answer.

[82] In *Louie v Lastman (No 1)*,⁴⁴ two adult plaintiffs claimed to be the illegitimate children of Mr Lastman, the Mayor of Toronto. It was alleged Mr Lastman had an affair with the plaintiffs' mother and that he failed to care and provide for the plaintiffs as children. The Ontario Court of Appeal held Mr Lastman did not owe any fiduciary duties to the plaintiffs when they were children because he never acted as a parent to the plaintiffs during their childhood. In the present case, Robert also ceased to play any role as parent in the lives of Alice, Barry and Cliff once they left home. Robert did, however, play a role as parent while Alice, Barry and Cliff were children, and it is accepted that he breached his fiduciary duties during that time. The facts of *Louie v Lastman* are therefore different from those before us.

[83] The absence of any authority that is directly on point means I must consider the issues posed at [4(a), (b) and (c)] by assessing whether the recognised indicia of a

⁴² *Rule v Simpson* [2017] NZHC 2154, (2017) 4 NZTR 27-017.

⁴³ At [74].

⁴⁴ *Louie v Lastman (No 1)* (2002) 61 OR (3d) 459 (ONCA).

fiduciary relationship apply in the circumstances of this case. In my view, those indicia exist when:

- (a) the fiduciary had actual or inferred responsibilities to the beneficiary;
- (b) the fiduciary had a discretion to exercise their powers so as to affect the interests of the beneficiary;
- (c) the beneficiary was entitled to and did have trust and confidence in the fiduciary not to adversely affect the beneficiary's interests; and
- (d) the beneficiary was particularly vulnerable and dependent upon the fiduciary to exercise their discretion in a way that did not undermine the interests of the beneficiary.

Analysis

[84] I will analyse the indicia of a fiduciary relationship in the circumstances of this case by focusing upon the following topics:

- (a) the nature of Robert's powers and responsibilities at the time he gifted his principal assets to the Trust;
- (b) whether Alice, Barry and Cliff were entitled to repose and did repose trust and confidence in Robert to protect their interests when he gifted his principal assets to the Trust; and
- (c) whether Robert was required to protect the interests of Alice, Barry and Cliff when he gifted his principal assets to the Trust.

The nature of Robert's powers and responsibilities at the time he gifted his principal assets to the Trust

[85] At the time Robert gifted his principal assets to the Trust, he and his children had been estranged for approximately 30 years. The assets that Robert gifted to

the Trust were solely his and had been acquired by him long after Alice, Barry and Cliff ceased to have any contact with Robert.

[86] However, when he decided to transfer his principal assets to the Trust in late 2014, Robert was, in part, exercising his powers so as to frustrate any claims his children might have under the Family Protection Act. To this extent Robert was deliberately exercising his discretion so as to adversely affect the interests of Alice, Barry and Cliff. Robert was effectively depriving his children of any meaningful opportunity to have the courts determine their rights under the Family Protection Act.

Whether Alice, Barry and Cliff were entitled to repose and did repose trust and confidence in Robert to protect their interests when he gifted his principal assets to the Trust

[87] Alice and her two brothers appear to have had different subjective expectations as to whether they would benefit from their father's estate.

[88] The evidence shows that, during Robert's lifetime, neither Barry nor Cliff thought that they would be beneficiaries of their father's estate. They hoped that he would recognise them in his estate but realised he was unlikely to do so. Barry and Cliff were, however, concerned that Alice benefit in a meaningful way from their father's estate.

[89] Alice thought she would benefit from Robert's estate. Although Alice accepted that Robert was not willing, during his lifetime, to acknowledge the harm he caused her, Alice believed that Robert would likely atone for his wrongdoing by providing for her in his will. The contents of most of Robert's wills executed between 2001 and 2015 showed that Alice's expectation was realistic.

[90] The assessment as to whether or not an alleged beneficiary has the requisite degree of trust and confidence so as to satisfy the indicia of a fiduciary relationship must, however, be undertaken objectively and not on the basis of the claimant's subjective expectations.

[91] In the present case, I am far from satisfied Barry and Cliff had the requisite trust and confidence in Robert to advance their interests when he transferred his principal assets to the Trust.

[92] Barry and Cliff ceased to rely on their father for anything once they left home. Nor did they have any basis for assuming that their father would provide any support for his sons. Although both had difficult and challenging lives in the years after they ceased to live under the direct control of their father, both matured into relatively successful and independent men. When assessed objectively, neither Barry nor Cliff could have trusted their father to provide for them in his estate or had confidence that he would do so.

[93] Unlike her brothers, Alice has not enjoyed any degree of economic or personal success since leaving home and her life to date has been ruined because of the egregious nature of the abuse that Robert inflicted on her during her younger years.

[94] While Barry and Cliff have enjoyed far better adult lives than Alice, I do not think this fact in itself determines whether Robert owed Alice fiduciary duties when he transferred his principal assets to the Trust.

[95] Robert's abuse of Alice has caused her profound and enduring psychological trauma throughout her life. Although Alice did not directly depend on Robert after she became an adult, Alice's trauma meant that it was impossible for her to live anything remotely resembling a normal and independent life. In principle, I consider Alice's situation to have strong similarities with the example of a disabled adult child I have set out at [79].

[96] For Alice to have any semblance of a normal and independent life, she required economic and emotional support from Robert. I am satisfied that, when assessed objectively, Alice was entitled to expect Robert to atone for his abuse and to provide her with the economic and emotional support that she needed to live a normal and independent life, including by providing for Alice in his will. Robert's egregious abuses of the trust and confidence that Alice was entitled to have in her father to "do

the right thing” were compounded when Robert deliberately chose to deprive Alice of any meaningful claim against his estate.

[97] The majority have used the absence of contact between Robert and Alice to reason that Robert could not have owed fiduciary duties to Alice. I do not, however, consider the absence of contact between Alice and Robert to be a barrier to Alice’s expectation that Robert would provide for her. The absence of contact between Alice and Robert was the direct consequence of Robert’s abuse. Alice could not have been expected to continue contact with Robert, but Alice could expect Robert to provide her with the support that she needed as a result of the abuse. It would, in any event, be perverse if Robert could avoid being held to be a fiduciary by relying on his earlier breaches of fiduciary duty.

[98] I am therefore satisfied that, notwithstanding the absence of contact between Alice and Robert, Alice was entitled to expect Robert:

- (a) to provide for her during her adult years, including by providing for her in his will; and
- (b) not to deprive her of any meaningful claim against his estate.

Whether Robert was required to protect the interests of Alice, Barry and Cliff when he gifted his principal assets to the Trust

[99] The assessment of Robert’s duties is also to be undertaken objectively. This assessment asks whether a father, who abuses his children when they are living in his care, and then ceases to have any relationship or contact with his children for 30 years, assumes a responsibility 30 years later to provide for his children in his estate or to not deplete his estate so as to frustrate any claim his children may make against the estate.

[100] The nature of the relationship between Robert and Barry and Cliff weighs heavily against a conclusion that Robert assumed the duties they have pleaded. The imposition of fiduciary duties on Robert at the time he transferred his principal

assets to the Trust would be the antithesis of the very independent and autonomous lives they have lived.

[101] As I have explained at [95]–[98], Alice’s case is significantly different from that of her brothers. In her case, Robert should be held to have had a continuing duty to take steps to remedy, as best he could, the enormous harm he inflicted on Alice, not just when she was living in his care, but during her adult life.

[102] Alice’s case is one in which the profound and egregious harm she has suffered in her adult life, which was compounded when Robert resolved to deprive her of any meaningful claim against his estate, was a continuation of the harm she suffered because of Robert’s conduct when she lived at home. Alice was and always has been particularly vulnerable and at the mercy of Robert to atone for his offending against her. I would therefore have found that, throughout her adult life, Alice was owed fiduciary duties by Robert.

[103] I acknowledge that this would have recognised a fiduciary relationship in novel circumstances. However, as previously stated, the categories of fiduciary relationships are not closed, and it is a strength of equity that it can respond flexibly to the needs of justice. It is not an adequate response to argue that finding a fiduciary duty in the circumstances of this case is unprincipled and outcome driven. Rather, it is an example of equity responding to an unprecedented situation by applying the established indicia of a fiduciary relationship. In the exceptional circumstances of this case, I consider the needs of justice require the recognition of a fiduciary relationship between Robert and Alice, and that Alice was the beneficiary of an inherently fiduciary relationship with Robert that continued throughout Robert’s life.

[104] The fiduciary obligations Robert owed Alice would have included taking reasonable steps to provide a modicum of economic security for her. This duty would have been discharged if Robert had, at the very least, provided for Alice in his will or left sufficient funds in his estate for Alice to make a claim against the estate. The adequacy of any economic assistance that Robert might have provided Alice during his lifetime could have been assessed in the Family Protection Act proceedings. For these reasons, I am satisfied Robert’s transfer of his principal assets to the Trust to

deprive Alice of any meaningful claim against his estate was a breach of this fiduciary duty.

Remedy

[105] I now proceed to consider what remedy would have been appropriate if Robert had breached his fiduciary duties to Alice in the way I have suggested. As noted at [58], Gwyn J held:

- (a) The trustees were liable for knowingly receiving the property gifted by Robert because his knowledge that he was breaching his fiduciary duties to his children was able to be imputed to the Trust.
- (b) Consequently, the assets held by the Trust were held on a constructive trust for the estate of Robert.

[106] There are difficulties with the approach taken by the Judge when she held the trustees were liable for knowingly receiving the gift from Robert to the Trust.

[107] First, the High Court did not find that Robert held his own property on trust for the children before he gifted that property to the Trust. Although there is authority for the proposition that a claim in knowing receipt may arise when a third party receives property that is the subject of fiduciary obligations (as opposed to property held on trust), the law on this point is far from certain.⁴⁵ As I shall explain, however, it is not necessary to resolve this particular challenge.

[108] Second, the doctrine of knowing receipt only gives rise to a personal and not a proprietary remedy, such as a constructive trust:⁴⁶

Defendants [liable for knowingly receiving] are required to hold property *as if* they were constructive trustees and not actually as constructive trustees – the point being merely that they are personally liable to account for the value

⁴⁵ See Butler, above n 32, at [18.1.1] and the authorities cited therein. See also *Sandman v McKay* [2019] NZSC 41, [2019] 1 NZLR 519 at [100] n 67, where the Supreme Court declined to decide whether a breach of fiduciary duty (as opposed to a breach of trust) could be the basis for a claim in dishonest assistance.

⁴⁶ Butler, above n 32, at [13.4.4] (footnote omitted).

of the receipt and make good any loss suffered by the beneficiaries; not that the property received is held on trust by the defendant for the plaintiff.

[109] Third, the logical consequence of knowing receipt being a personal claim is that any payment would go to Alice rather than be transferred to Robert's estate. As is implicit in my judgment, I am in no doubt Alice should ultimately receive a significant portion of the property owned by Robert before he transferred his principal assets to the Trust. I am equally satisfied, however, that it would be wrong for Alice to receive all of the property that Robert transferred to the Trust. In principle, the extent of Alice's entitlement should be resolved under the Family Protection Act proceeding.

[110] My conclusion that Gwyn J erred in her approach to the concept of knowingly receiving is, however, not fatal to Alice's position because the equitable principles governing rescission are available where property is transferred in breach of the transferor's fiduciary obligations.

[111] At common law, rescission was treated as a narrow remedy that was only available where it was possible to return the parties to their original position (*restitutio in integrum*). Equity, however, views rescission through a broader lens than the common law:⁴⁷

Equity provided additional relief in cases of undue influence, innocent misrepresentation, *breach of fiduciary duty*, some cases of mistake, and that class of transactions known as unconscionable bargains. Equity's approach to restitution is more flexible, so that relief will not be denied if *restitutio in integrum* is not possible, provided such a result can be more or less achieved with compensation and account of profits or the like.

[112] Where the transaction was between a fiduciary and a third party, it appears that the transaction could either be rescinded or would simply be ineffective in equity. As the authors of *The Law of Rescission* note:⁴⁸

Where the fiduciary's contract [with a third party] is ... unauthorized because it involves a breach of his duty of loyalty, the contract may be valid and binding at common law, but any disposition of assets made under it will be ineffective in equity.

⁴⁷ Butler, above n 32, at [28.1.3] (emphasis added). Rescission for misrepresentation and mistake has now been superseded by the Contract and Commercial Law Act 2017.

⁴⁸ Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski *The Law of Rescission* (2nd ed, Oxford University Press, Oxford, 2014) at [1.68].

[113] The authorities I have cited at [111] and [112] lend support for my conclusion that, once it is recognised Robert's transfer of his principal assets to the Trust constituted a breach of the fiduciary obligations he owed Alice, the transfer is able to be rescinded.

[114] I consider rescission to be available against the Trust because the trustees and beneficiaries received the property as volunteers. Furthermore, while the other trustees were likely unaware of Robert's breaches of his fiduciary obligations to Alice when he transferred his principal assets to the Trust, Robert's knowledge can be imputed to the other trustees. I draw support for this conclusion from the judgment of the Supreme Court in *Regal Castings Ltd v Lightbody*, in which one trustee, Mr Horrocks, was unaware of the intention of another trustee, Mr Lightbody, to defraud a creditor when transferring assets to the Trust.⁴⁹

[70] It is contended for the trustees that the trust acted in good faith in receiving the transfer of the property as the trustees collectively did not have, at that time, notice of Mr Lightbody's intention to defraud any creditor. That is no doubt true in respect of Mr Horrocks who was not aware of the Regal debt until some years later. But his unawareness of the intent of Mr Lightbody cannot immunise the trust when Mr Lightbody himself was also a trustee and, of course, was the very person who was alienating the property with that intent. Mr Lightbody's knowledge taints the receipt by the trustees of the property. They received it as a unity. They did not have separate interests in it. ...

[115] By rescinding the transfer by Robert of his principal assets to the Trust, the transfer is treated as having never been effected. As has been explained, "a constructive trust arises [in relation to the transferred property] as a consequence of effective avoidance or rescission of the transaction".⁵⁰ This means the assets would be held on constructive trust for the transferor, which is now Robert's estate.

[116] The consequence of this conclusion is that all of the assets transferred by Robert to the Trust would be available to be contested under the Family Protection Act proceedings. A collateral consequence of Alice's success would be that Barry and Cliff could, if they wish, continue their claim under the Family Protection Act against

⁴⁹ *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

⁵⁰ Malcom Cope *Equitable Obligations: Duties, Defence and Remedies* (Thomson Legal and Regulatory, Sydney, 2007) at [8.300].

those assets because all of the assets that Robert gifted to the Trust would vest in his estate, and therefore be subject to all extant Family Protection Act claims.

[117] I also prefer this outcome because I am satisfied that allowing all of the assets transferred to the Trust to be contested under the Family Protection Act proceedings would be the most equitable solution to this difficult case. The Family Protection Act proceedings would provide the best forum for determining what benefit Alice, Barry and Cliff should receive from Robert's estate.

[118] Furthermore, if, following the determination of Alice, Barry and Cliff's Family Protection Act claims, any of those assets were still remaining in Robert's estate, those assets could revert back to the Trust for the benefit of the beneficiaries of the Trust.

[119] For these reasons, I would have found that Robert owed fiduciary duties to Alice after she left home, and that Robert breached his duties when he transferred his assets to the Trust. Furthermore, I would have found the appropriate remedy to be rescission, which would have allowed the assets to revert back to Robert's estate to be contested in the Family Protection Act proceedings.

GILBERT J

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Summary

[120] I agree with Kós P and Collins J that the appeal in respect of the claims brought by Barry and Cliff must be allowed. I also agree with Kós P that the appeal should be allowed in respect of the claim brought by Alice. My reasons can be explained by focusing primarily on Alice's claim.

[121] While no one would quarrel with the desire to provide redress for the incalculable and ongoing harm Robert caused Alice by sexually abusing her when

she was a child, I cannot agree that equity can supply the remedy sought in this case following Robert’s death. In particular, I do not consider there was any fiduciary relationship between Robert and his adult children at the time he gifted his assets to the Trust, more than 30 years after all contact between them had ceased. Robert did not in any sense undertake to act for or on behalf of his adult children when dealing with his assets. The central and distinguishing obligation of a fiduciary — to act with undivided loyalty in the interests of the beneficiary in a particular matter — was absent. The respondents had no proprietary claim to Robert’s assets, and he was free to deal with them as he wished.

[122] I also consider the fiduciary duty proposed by Collins J — to take “reasonable steps to provide a modicum of economic security for [Alice]”⁵¹ — is not only novel, but unprincipled. This asserted duty finds no support in the authorities and does not provide a justiciable standard against which performance of fiduciary duties can be measured and strictly enforced. I disagree with the results-based approach taken of identifying “the needs of justice” and calling on equity through the law of fiduciary obligation to “respond flexibly” to meet these needs.⁵² Such an approach opens up the possibility of a vast expansion of the circumstances in which claims for breach of fiduciary duty can be advanced, without a sound foundation in principle.

The pleaded claim

[123] The pleaded claim was that Robert owed life-long fiduciary duties to his children. These duties commenced from the time he had care and responsibility for them and continued until the relationship was terminated by his death. We were referred to no authority to support the proposition that parents owe their children lifelong fiduciary duties of any kind.

[124] The fiduciary duties allegedly owed by Robert were to:

- (a) care for, protect and rear his children;
- (b) refrain from sexually or physically assaulting them;

⁵¹ At [104].

⁵² At [103].

- (c) protect their economic interests; and
- (d) recognise them as members of his family and provide for them from his wealth.

[125] Robert was alleged to have breached his fiduciary duties in three respects:

- (a) by sexually and/or physically assaulting his children;
- (b) by failing to make any provision for them under his will; and
- (c) by gifting the assets to the Trust to ensure that his assets would go to the beneficiaries he had chosen and not to them.

[126] As a result of these breaches, the respondents claimed to have suffered loss, “being the opportunity to make a claim under the Family Protection Act against [the assets]”. They sought an order that the appellant trustees hold these assets as constructive trustees for Robert’s estate.

[127] It can be seen that the alleged breach of fiduciary duty causing the loss claimed was that set out in [125(c)], not (a) or (b). A critical issue on the pleadings was therefore whether, given the unremedied harm caused by the alleged breach of fiduciary duty in (a), Robert owed a fiduciary duty to the respondents not to gift his assets to the Trust.

High Court judgment

[128] Gwyn J found that an inherently fiduciary relationship existed between Robert and his children, while they were children. This gave rise to a fiduciary duty not to sexually or physically assault them, but the Judge found that none of the other pleaded fiduciary duties existed.⁵³ The Judge was satisfied that Robert breached his fiduciary

⁵³ High Court judgment, above n 1, at [107].

duty by sexually and/or physically assaulting the respondents when they were children.⁵⁴ In Alice’s case, the abuse occurred between 1968 and 1973.⁵⁵

[129] The Judge then turned to consider whether there was a fiduciary relationship between Robert and the respondents at the time he gifted most of his assets to the Trust some 40 years later, in December 2014 and January 2016. While recognising that the relationship of an adult child to their parent is generally of a non-fiduciary kind, the Judge considered aspects of the relationship could engage fiduciary obligations depending on the circumstances.⁵⁶

[130] The Judge applied Wilson J’s dissenting judgment in *Frame v Smith* in which three general characteristics of a fiduciary relationship were identified:⁵⁷

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 beneficiary’s legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[131] The Judge found that “[a]ll the classic characteristics of a fiduciary relationship were present” at the time Robert gifted his assets to the Trust.⁵⁸ In particular, when exercising his right to gift his house and shares, she considered that Robert was unilaterally exercising a discretion or power.⁵⁹ The exercise of that discretion or power affected the respondents’ interests by removing the prospect of a meaningful claim being made under the Family Protection Act following his death.⁶⁰ The respondents, especially Alice, were “peculiarly vulnerable as adults, as a result of [Robert’s] abuse of them as children”.⁶¹

⁵⁴ At [113].

⁵⁵ At [18].

⁵⁶ At [133].

⁵⁷ At [136], citing *Frame v Smith*, above n 36, at [60].

⁵⁸ At [150].

⁵⁹ At [149].

⁶⁰ At [149].

⁶¹ At [150].

[132] Alternatively, the Judge considered the matter from the perspective of whether there was a legitimate expectation:⁶²

[151] Framed another way, the [respondents] had an actual expectation that, when [Robert] 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. Their expectation that he would act in a way that was not contrary to their interests was reasonable and legitimate.

[133] The Judge considered there was no reason in principle why fiduciary principles should not be extended to cover the present circumstances.⁶³ Nor were there any policy reasons pointing against a finding that a fiduciary relationship existed between Robert and his adult children.⁶⁴ The Judge did not consider the case concerned testamentary freedom, rather, “it is about property rights and the ability to deal with property during one’s lifetime, subject only to pre-existing legal constraints”.⁶⁵

[134] The Judge concluded that there was a fiduciary relationship between Robert and the respondents at the time he gifted the assets to the Trust.⁶⁶ As a consequence of this fiduciary relationship, Robert was obliged to act in their interests.⁶⁷ The specific fiduciary duties were to recognise the respondents as members of his family and to provide for them from his wealth:

[173] Although the [respondents] had hoped for some acknowledgement from [Robert] of what he had done to them and their resulting situation, realistically, by the time [Robert] gifted the property to the Trust, the only way in which he could have addressed the vulnerability he had created was by providing for them financially, and in that way acknowledging them. I conclude that, at the time he gifted the property, [Robert] owed each of the [respondents] a duty to recognise them as members of his family and to provide for them from his wealth, due to the vulnerability his earlier breach of fiduciary duties had caused them.

[135] The Judge found that Robert’s knowledge — that he was gifting his assets in breach of his fiduciary duties to the respondents — was imputed to the other trustees. The Judge concluded that the assets were held by the trustees on constructive trust for

⁶² Citing *Chirnside v Fay*, above n 24, at [80].

⁶³ High Court judgment, above n 1, at [155].

⁶⁴ At [156]–[163].

⁶⁵ At [158].

⁶⁶ At [164].

⁶⁷ At [165].

the respondents.⁶⁸ However, in the result, the Judge made an order that the assets were held by the trustees on constructive trust for Robert's estate.⁶⁹

My assessment

[136] There is no challenge on this appeal to the Judge's findings that there was a fiduciary relationship between Robert and the respondents while they were children and that he owed a fiduciary duty not to physically or sexually abuse them. For this reason, and because the issue does not need to be resolved on my analysis of this case, I make no comment on whether this is a correct statement of the law in New Zealand. I simply note that no such fiduciary relationship or fiduciary duty has been recognised in Australia⁷⁰ or in England.⁷¹ Having expressed that reservation, I proceed on the assumption that the Judge was correct in finding that Robert owed a *fiduciary duty* to his children not to physically or sexually assault them.

[137] There is also no challenge on this appeal to the Judge's findings as to the sexual and other physical abuse Robert inflicted on the respondents as children and the consequences of that for them. There is no reason to doubt these findings and, of course, Robert was not able to contest them.

[138] It follows from the Judge's findings that the respondents could have successfully pursued claims against Robert in tort for assault and battery and for breach of fiduciary duty. Because these causes of action arose prior to 1 April 1974, the date the Accident Compensation Act 1972 came into force, the respondents could have sued Robert for both compensatory and exemplary damages in respect of his egregious breaches of obligation. However, for their own understandable reasons, the respondents chose not to pursue any claim against Robert and agreed in about 1990 that they would continue to have no contact with him. Any claim in tort was long since statute-barred by the time Robert gifted his assets to the Trust in 2014 and 2016.

⁶⁸ At [182].

⁶⁹ At [201].

⁷⁰ *Paramasivam v Flynn* (1998) 90 FCR 489 at 504–508.

⁷¹ We were not referred to any English authorities by the parties, and our own research also disclosed no relevant authorities.

Similarly, any claim for breach of fiduciary duty arising out of Robert's abuse would by then have been precluded by analogy or, perhaps, by the doctrine of laches.⁷²

[139] It is clear that the present claim seeks redress for the harm stemming from the pre-1974 breaches of fiduciary obligation. I do not consider the legal and practical problems that would now be faced by such a claim — delay and divestment of assets — can be overcome by asserting that the fiduciary relationship continued (despite the cessation of all contact for some 30 years) and that a new fiduciary duty arose requiring Robert to provide redress for the harm caused by his breaches of fiduciary duty decades earlier. To illustrate, a tortfeasor is liable for the foreseeable loss caused by the breach of tortious duty but does not commit a new tort by failing to compensate for the loss caused by the earlier breach. There is no such tort. I consider the same applies to the tortfeasor who, as here, is liable in tort and for breach of fiduciary duty arising out of the same acts. The breaches of fiduciary duty causing the loss were the acts of physical and sexual abuse. The subsequent failure to provide compensation for that loss did not amount to a new breach of fiduciary duty.

[140] Contrary to the Judge's view, I do not accept that all the classic characteristics of a fiduciary relationship existed between Robert and his adult children. With respect, I consider the Judge misinterpreted the three characteristics or indicia she purported to apply.

[141] A fiduciary stands in a relationship of trust and owes a strict duty to act with undivided loyalty to the beneficiary in respect of a particular matter. The fiduciary is disabled from acting in situations of conflict of interest and must not gain unauthorised profits, such as by exploiting an opportunity arising out of the fiduciary position. A "power or discretion" in this context is therefore one conferred on or held by the fiduciary for the benefit of the beneficiary. Such a power can only be used for the purpose for which it was conferred. The proper exercise of the power is strictly enforced in equity. It is therefore vitally important to identify the particular power or discretion conferred, the purpose for which it was conferred, and the person or persons on whose behalf it is held and for whose benefit it may be exercised.

⁷² *Johns v Johns* [2004] 3 NZLR 202 (CA) at [78]–[85]; and *No 68 Ltd v Eastern Services Ltd* [2006] 2 NZLR 43 (CA) at [61].

[142] At issue in this case was Robert’s “power or discretion” to deal with his own assets in December 2014 and January 2016. I do not consider this was a power or discretion in the relevant sense. These were his assets, accumulated over the course of his life, and he was entitled to deal with them as he pleased. Robert did not acquire or hold the assets for the benefit of his adult children. They did not contribute to the assets and they had no proprietary claim in respect of them. Robert did not undertake or assume any obligation by contract, agreement, unilateral undertaking or otherwise to deal with his assets for their benefit. I do not see how it can be suggested that Robert was entrusted to hold his assets on behalf of his adult children and “empowered” to act for and on their behalf in respect of them. He did not, and was not required to, relinquish his self-interest in respect of these assets or exclude consideration of the interests of others, including any creditors and his second family, when dealing with them. In my view, the legal power Robert exercised when dealing with his personal assets was the very antithesis of the other-regarding fiduciary power or discretion exercised in the classic fiduciary relationship between trustee and beneficiary. The essential underpinning of a fiduciary duty in respect of these assets was absent.

[143] The second characteristic referred to by the Judge was the legal or practical interests of the beneficiary that may be affected by the fiduciary’s unilateral exercise of the power. The legal or practical interest at issue must link to the fiduciary power. It is therefore necessary to identify the purpose for which the power was conferred and consider the legal or practical interest of the beneficiary to be protected or furthered by the exercise of that power. Here, the relevant interest was an economic interest — the enhancement of the value of a moral claim under the Family Protection Act that would be realised by Robert retaining all his assets to maximise the value of his estate. However, when Robert dealt with his own assets, he was not exercising a power conferred for the purpose of protecting or furthering the respondents’ interests generally, let alone for the purpose of facilitating claims they might make against his estate for breach of his moral duty. That the respondents’ practical interests may have been affected is not sufficient to satisfy this characteristic without these interests being related to the purpose for which the alleged power was conferred.

[144] As to the third characteristic, the element of vulnerability, this too must link to the relevant discretion or power. It is the beneficiary's vulnerability to the wrongful exercise of the power that is relevant. Absent a fiduciary power, the question of vulnerability does not arise. Robert was not entrusted to exercise a power on behalf of the respondents with respect to his assets and they were accordingly not vulnerable to the wrongful exercise or abuse of that power.

[145] Collins J finds that the element of vulnerability is made out because Alice has always been "particularly vulnerable and at the mercy of Robert to atone for his offending".⁷³ This is not a vulnerability indicative of a continuing fiduciary relationship, namely vulnerability to an abuse of fiduciary power. The respondents could have pursued Robert before the expiry of the limitation period but chose not to. They were only "vulnerable" and "at his mercy" in terms of any atonement for his offending because of their freely informed decision not to pursue any remedy against him until after his death.

[146] For these reasons, I conclude that there was no fiduciary relationship between Robert and the respondents in December 2014 or January 2016 when he gifted his assets to the Trust. I turn now to consider the particular fiduciary duty found to exist by the High Court Judge and which Collins J would have recognised.

[147] The fiduciary's central obligation of loyalty to the beneficiary is strictly enforced by the court of equity. Some precision is therefore required. What is demanded of the fiduciary in the given circumstances in complying with the duty of loyalty must be clear. It is the discretion inherent in a power which the duty of undivided loyalty seeks to control. In my view, this is not present in the duty as conceptualised by the Judge or Collins J.

[148] The fiduciary duty propounded by the Judge — "to recognise [the respondents] as members of his family and to provide for them from his wealth" — does not pay sufficiently close attention to the fundamental obligation of loyalty in play. The formulated duty does not respond to an obligation of loyalty at all; if there was such a duty, the question of loyalty would be irrelevant. Further, it is implicit in the

⁷³ At [102].

imprecise formulation of the proposed duty that Robert was not required to act selflessly when dealing with his assets and without regard to any interests other than those of the respondents. The fiduciary duty found to exist manifestly did not require Robert to deal with his assets solely for their benefit, only that he was required to make some provision for them from his overall wealth. The fiduciary duty found by Collins J — “to provide a modicum of economic security for [Alice]” — demonstrates the point even more acutely.

[149] For these reasons, I would allow the appeal in full.

[150] Costs should follow the event. The respondents must pay the appellants costs for a standard appeal on a band A basis and usual disbursements. The costs order made in the High Court is quashed. If the parties are unable to agree on costs in the High Court, then the issue of costs in that Court should be determined by the High Court.

[151] I agree with Collins J in suppressing the names of the persons and entities connected to this proceeding.

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[152] I agree with Collins J that the relationship between the children and their father was fiduciary in nature, at least for so long as they lived with him or were cared for by him. I agree also that sexual and violent physical abuse amounted to a breach of that fiduciary duty. Assuming their claims for breach are not barred by limitation or laches, the appropriate remedy is, and remains, equitable compensation. No property of the children being held by the father, there is no basis for a proprietary remedy. But, agreeing with Gilbert J, the fiduciary duty ceased when the father no longer lived with, or cared for, the children. It follows that his transfer of personal assets to

the Trust to defeat a future claim by the children does not involve a further breach of fiduciary duty.

1. The father owed a fiduciary duty

[153] I agree with Collins J’s analysis at [73] to [78] above. The relationship between parent and child is — or should be regarded as — inherently fiduciary in nature, at least for so long as the parent undertakes care of the child.⁷⁴ It is difficult to imagine a context in which greater trust and confidence is reposed. That the relationship is not primarily economic does not alter that reality or analysis. And even if not inherently fiduciary, it would meet the general tripartite criteria expounded by this Court in *Dold v Murphy* — and evolving from *Chirnside v Fay, Paper Reclaim Ltd v Aotearoa International Ltd* and *Amaltal Corp Ltd v Maruha Corp*⁷⁵ — for the recognition of a fiduciary relationship:⁷⁶

(1) the conferral of powers in favour of the alleged fiduciary, which may be used to affect the proprietary rights of the beneficiary; (2) the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary (for example, to promote the beneficiary’s interests, or to prefer the interests of the beneficiary over those of third parties); and (3) the implied subordination (although, not necessarily, elimination) of the alleged fiduciary’s own self-interest.

[154] Those criteria coordinate well enough with those set out by Wilson J in *Frame v Smith*, cited at [76] above, and approved by the Supreme Court of Canada in *M (K) v M (H)*.⁷⁷ The reference in the first criterion to “which may be used to affect the proprietary rights of the beneficiary” does not of course mean that an economic relationship is a sine qua non for the inference; rather that the power may be used in a proprietary sense if it has that dimension. Vulnerability is stated expressly in the Canadian formulation, but is inherent in its New Zealand counterpart. It is not to be over-emphasised, however; it refers to vulnerability arising from the relationship itself, rather than existing apart from it. For instance, in many principal/agent

⁷⁴ By “child” I refer to a person less than 20 years of age: Age of Majority Act 1970, s 4(1).

⁷⁵ *Chirnside v Fay*, above n 24; *Paper Reclaim Ltd v Aotearoa International Ltd*, above n 24; and *Amaltal Corp Ltd v Maruha Corp*, above n 24.

⁷⁶ *Dold v Murphy*, above n 23, at [55].

⁷⁷ *Frame v Smith*, above n 36, at 136; and *M (K) v M (H)*, above n 33, at 63.

relationships, the principal will be the far stronger party economically; the principal's vulnerability arises from the act of empowering the agent to manage its affairs.

[155] It follows that in reaching this conclusion I prefer the reasoning of the Supreme Court of Canada in *M (K) v M (H)* and in *EDG v Hammer* to that of the Full Court of the Federal Court of Australia in *Paramasivam v Flynn*.⁷⁸ In particular, I do not consider the potential availability of a tortious remedy justifies excluding fiduciary liability, when the interests protected, and remedies allowed, may differ.⁷⁹ Rather, the better course is to proceed with caution in defining what will amount to an actionable breach of fiduciary duty in this particular context.

[156] That a fiduciary duty should be recognised in a parent/child context is supportable by reference to cases involving more conventional fiduciary relationships: doctor and patient, and priest and penitent. I refer to these cases because they have two points in parallel with the present appeal. First, the relationship is often purely personal in nature, rather than proprietary. Secondly, the nature of the abuse at issue in a claim for breach of duty may be similar in nature, being sexual or other physical abuse.

[157] It has long been accepted that a doctor is in a fiduciary relationship with a patient when dealing with their *property*. This acceptance comes through in a line of case law where doctors accept gifts from their patients in breach of their fiduciary obligations.⁸⁰ The remedy in these instances will ordinarily be proprietary (setting aside the transfer).⁸¹ Professor Grubb summarises the case law in this way:⁸²

Sometimes, however, the doctor will be dealing with the patient's property. When this has been so English law has long recognised that the doctor will be in a fiduciary position *vis-à-vis* her patient. Hence, a doctor who receives property from a patient as an *inter vivos* gift will be held to do so in a fiduciary capacity.

As a consequence, a presumption of undue influence will be made against the doctor because of the nature of the relationship being one of trust and

⁷⁸ *M (K) v M (H)* above n 33; *EDG v Hammer* 2003 SCC 52, [2003] 2 SCR 459; and *Paramasivam v Flynn*, above n 70.

⁷⁹ *EDG v Hammer*, above n 78, at [23].

⁸⁰ See, for example, *Dent v Bennett* (1835) 7 Sim 539, 58 ER 944 (Ch); and *Mitchell v Homfray* (1881) 8 QBD 587 (CA).

⁸¹ See, for example, *Billage v Southee* (1852) 9 Hare 534, 68 ER 623 at 541.

⁸² Andrew Grubb "The Doctor as Fiduciary" (1994) 47 CLP 311 at 314–315 (footnotes omitted).

confidence. The court will set aside the gift unless the doctor can rebut the presumption by, for example, proving that the gift was freely made after ‘full, free and informed thought about it’. ...

[158] A more contested issue is whether the doctor-patient fiduciary relationship extends beyond these proprietary grounds. The proposition that it does has been effectively rejected in England and Wales and in Australia.⁸³ But a different position has been reached in Canada. In *Norberg v Wynrib*, McLachlin J (as she then was) — in a judgment described by Professor Grubb as a “veritable tour de force” — recognised that fiduciary duties are capable of “protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests, as recognised by Wilson J in *Frame v Smith*”.⁸⁴ The case concerned a doctor who prescribed and then gave an addict patient pain killers in exchange for sexual favours. McLachlin J held that breached the doctor’s fiduciary obligations.⁸⁵ L’Heureux-Dubé J agreed with McLachlin J; the remaining members of the Court reasoned by reference to contractual principles. As in many instances, it is the minority position that has come to hold sway.⁸⁶

[159] In New Zealand, there are dicta that indicate that the doctor-patient relationship is a fiduciary one.⁸⁷ There is also a line of case law that deals with a doctor’s use of their patient’s confidential information. In these circumstances, a doctor’s fiduciary obligations have been held to extend to keeping the patient’s medical confidences.⁸⁸

⁸³ In the English and Welsh context, see *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871 (HL) at 884, where Lord Scarman remarked that “there is no comparison to be made between the relationship of doctor and patient with that of solicitor and client, trustee and cestui que trust or other relationships treated in equity as of a fiduciary character”. In the Australian context, see *Breen v Williams* (1996) 186 CLR 71 (HCA) at 93, where Dawson and Toohey JJ commented that “it is the law of negligence and contract which governs the duty of a doctor towards a patient”, leaving “no need, or even room, for the imposition of fiduciary obligations”.

⁸⁴ *Norberg v Wynrib*, above n 25, at 289; and Grubb, above n 82, at 322.

⁸⁵ *Norberg v Wynrib*, above n 25, at 293.

⁸⁶ See, for example, Butler, above n 32, at 550.

⁸⁷ See, for example, *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [26], where Gendall J remarked that “[t]he relationship between doctor and patient is clearly a fiduciary relationship”. This comment was made in the context of a proprietary dispute (the gifting of \$25,000 by an elderly couple to a nurse). See also *Patient A v Health Board X* HC Blenheim CIV-2003-406-14, 15 March 2005 at [39], where Baragwanath J weighed the Australian approach with the Canadian approach and commented that “[i]n the light of the New Zealand authorities and the powerful judgment of McLachlin J the case for recognition in New Zealand of a doctor’s general fiduciary duty to a patient is in my view overwhelming”. These comments were made in the context of a failed sterilisation operation (i.e. a purely personal, rather than proprietary, issue).

⁸⁸ See, for example, *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 (HC) at 520–521, where Jeffries J observed, per obiter, that “[t]he platform support of a description

[160] The priest-parishioner relationship has been accepted as fiduciary in some common law jurisdictions.⁸⁹ This proposition is captured in a judgment of the Nova Scotia Supreme Court: “[a] fiduciary relationship exists between the Diocese by its servant or agent, the parish priest and the parishioners”.⁹⁰ Unsurprisingly that is particularly so when the priest undertakes to advise on property matters.⁹¹ But there is also a branch of cases that deals with child abuse by priests in breach of their fiduciary obligations. These claims are generally brought by adult claimants and have often been found to be time-barred.⁹²

[161] Turning now to content, and bearing in mind the cautionary note entered at [155] above, I would prefer to cast the relevant fiduciary duty in a familial environment in negative terms. Here the fiduciary responsibility is not a duty to act generally in the best interests of the child, in disregard of the parent’s personal interests. To cast it in such terms would be to invite claims based on contested exercises of parental discretion where reasonable minds would disagree, such as on housing, location, education, medical care and diet. Instead, as I see it, the fiduciary duty is to refrain from acts that fundamentally violate the relationship of trust inherent in a parent-child relationship. Foremost within a duty expressed in such terms is to refrain from sexually and physically abusing the child.⁹³

of medical confidence is to identify the doctor/patient relationship as a fiduciary one.” In that case the doctor had breached medical confidence because of concerns as to the fitness of his patient to drive a bus.

⁸⁹ See, for example, *Illuzzi v Edwards* (1997) 1 Q ConvR 54-490 (QCA) at 8–9; and *FWM v Mombourquette* (1996) 145 NSR (2d) 360 (NSSC) at [65] [*Mombourquette* SC].

⁹⁰ *Mombourquette* SC, above n 89, at [65]. This judgment was overturned on appeal for limitation period reasons: *FWM v Mombourquette* (1996) 152 NSR (2d) 109 (NSCA) [*Mombourquette* CA].

⁹¹ *Clark v Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* [1998] 1 Qd R 26 (QSC) at 31, where Williams J said “[i]n light of that [the emphasis on vulnerability in fiduciary relationships] it is obvious why a spiritual adviser is deemed to be in a fiduciary relationship to those who seek advice – particularly as to property matters”.

⁹² See, for example, *Mombourquette* CA, above n 90, which upheld the trial Judge’s finding that the limitation period only started to run when the plaintiff had “awareness and appreciation” of the offences (at 5–7).

⁹³ This approach replicates that of the Supreme Court of Canada in *EDG v Hammer*, above at 78, at [23].

2. The father breached that duty

[162] The Judge's findings on sexual and other physical abuse the father inflicted on the children were unchallenged. As Gilbert J says — at [137] above — there is no reason to doubt these findings.

3. The remedy is equitable compensation

[163] In my view the ordinary remedy applicable for fiduciary's breach of duty via sexual or other physical abuse must be equitable compensation. In *Norberg v Wynrib* — the Canadian case where the doctor sexually abused his patient by procuring sexual favours in exchange for drugs — McLachlin and L'Heureux-Dubé JJ considered that to be the appropriate remedy.⁹⁴ Likewise that remedy has been applied in priest/penitent cases, not time-barred, involving sexual abuse.⁹⁵

[164] The breach of duty here involved no misapplied stewardship of property of the beneficiaries, or diversion of property that ought to be theirs in equity.⁹⁶ There is no basis here to invoke constructive trust principles. Equitable compensation is the appropriate remedy, calculated as far as possible to restore the plaintiff to the position she or he would have been in had the breach not occurred.⁹⁷

[165] It is unnecessary to consider here whether exemplary damages might also be awarded.⁹⁸ But the consequence of this reasoning is that Alice, and probably the boys, had a personal claim for equitable compensation relating to the period prior to commencement of the accident compensation legislation. I agree with Gilbert J that any such claim is now long extinguished by laches.⁹⁹

4. The duty ended when the father ceased to care for the children

[166] On the view I take of the scope and content of the duty, it ended when the father ceased to care for the children. Issues of majority do not arise on the facts; the children

⁹⁴ *Norberg v Wynrib*, above n 25, at 293–295.

⁹⁵ See, for example, *WK v Pornbacher* (1997) 32 BCLR (3d) 360 (BCSC).

⁹⁶ Such as in *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1 (PC).

⁹⁷ *Norberg v Wynrib*, above n 25, at 295 per McLachlin J.

⁹⁸ *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA) at 301.

⁹⁹ At [138] above.

ceased to live with the father before then — leaving home at ages 18, 17 and 15 respectively. The duty here was to refrain from acts that fundamentally violated the relationship of trust inherent in a parent-child relationship. That duty ended when the responsibilities of parental care ended, on the children leaving home.

5. The transfer to the Trust is not a breach of fiduciary duty and cannot be rescinded

[167] I agree with Gilbert J that the residual personal claim for equitable compensation held by the children cannot be converted to, and preserved by, a continuing proprietary claim to the father's property. The correct analysis is that the children were at best unsecured creditors of the father, subject to sustaining claims against him. That Alice in particular suffered enduring vulnerability and disadvantage as a result of the breaches of duty when living with her father sounds in enlarged damages, but it does not — for the reasons Gilbert J gives — sound in a new or sustained fiduciary duty to make proprietary provision during the long years in which Alice and her father no longer lived together. To reach such a conclusion is to overreach, and to make a purely personal claim into a proprietary one where proprietary remedies have no place.

[168] I agree with Gilbert J on costs. I agree with Collins J that the names of the persons and entities connected to this proceeding should be suppressed.

Result

[169] The appeal is allowed.

[170] The respondents must pay the appellants costs for a standard appeal on a band A basis and usual disbursements.

[171] The costs order made in the High Court is quashed. If the parties are unable to agree upon costs in the High Court, then that issue should be remitted to the High Court for determination.

[172] We make an order prohibiting publication of the names, addresses or identifying particulars of any persons or entities connected to this proceeding.

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