

No remedy for abuse?

POLINA KOZLOVA UNPACKS A RECENT NEW ZEALAND CASE CONCERNING A BREACH OF FIDUCIARY DUTY TO AN ADULT CHILD

In November 2021, the High Court of New Zealand (the Court) issued a judgment in *A v D*,¹ which broke new legal ground as it introduced a new tort: breaching a fiduciary duty to an adult child.

The plaintiffs were the three children of Z, a violent man who abused his children when they were young. The harm he inflicted, in various ways, affected each child for life. Z repeatedly sexually abused one of his children and physically abused his other two children. After the children left home, they had no contact with their father until he died.

Z did not leave the children anything in his will and gifted most of his assets to a trust to prevent the children from making a claim against those assets. The children sought orders that the transfer of assets to the trust should be set aside so that the assets could fall into their father's estate and, therefore, an award could be made to them.

THE JUDGMENT

The Court held that although the relationship between an infant and a parent is inherently fiduciary, the relationship of an adult child to their parent is of a non-fiduciary kind. However, it ruled that, in the present case, the fiduciary relationship continued into the children's adulthood because the father's abuse left the children vulnerable. The Court held that the transfer of the assets to the trust in these circumstances was in breach of the fiduciary duties that Z owed to his children. It held that Z's knowledge was imputed onto the trustees and that the trustees held the assets on constructive trust for Z's estate,

therefore exposing the assets to a claim under the *Family Protection Act 1955* (the Act).

The Court effectively distinguished this case from other cases where a child may wish to sue a parent. The judge was cautious in confining the ambit of the claim to extreme circumstances.

It is important to note that the options in respect of a civil claim by the children were limited due to the size of Z's estate and the fact that actions were not brought by the children during his lifetime.

THE APPEAL

The trustees appealed against the finding of a fiduciary relationship and the imposition of a constructive trust. In October 2022, the Court of Appeal of New Zealand's decision came out in *D and E Ltd v A, B and C* and reversed the decision of the Court.²

The majority held that:

- The relationship between a parent and young child is inherently fiduciary. However, the fiduciary relationship between the father and the respondents did not continue into adulthood because there

was no longer any relationship of trust. The Court of Appeal further held that if there was a fiduciary relationship between the father and the respondents it did not continue into adulthood, because the father held no power for the respondents' benefit and there was no duty of undivided loyalty.

- There was no breach of fiduciary duty when Z gifted his assets to the trust and, therefore, the respondents could have no proprietary claim to the assets.

The dissenting judgment of Justice Collins has been subject to contentious debate among legal professionals.

Collins J held that the fiduciary relationship between a parent and child can continue into adulthood in certain cases, such as when a parent undertakes to care for an adult child with disabilities. Collins J would have found that the fiduciary relationship between the father and the first respondent continued into adulthood because her father's abuse left her unable to live a normal and independent life. The father's fiduciary duty would have involved providing economic security to the first respondent and this would have been breached when he gifted his assets to the trust.

Collins J also considered the appropriate remedy if there had been a breach of fiduciary duty. He said that knowing receipt is inappropriate as it is a personal claim and does not give rise to a constructive trust. However, the father's gift could be rescinded, which would allow the assets to be held on constructive trust for the father's estate where they could be contested under the Act.

At the time of writing, leave for appeal to the Supreme Court of New Zealand has been granted and the appeal will be heard in June 2023.

#CONTENTIOUS TRUSTS AND ESTATES
#NEW ZEALAND #TRUSTS
#VULNERABLE CLIENT

1 [2021] NZHC 2997 2 [2022] NZCA 430



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