NOTE: ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF ANY PERSONS OR ENTITIES CONNECTED TO THIS PROCEEDING REMAINS IN FORCE.

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

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 106/2022
[2024] NZSC 161

BETWEEN	A, B AND C Appellants
AND	D AND E LIMITED AS TRUSTEES OF THE Z TRUST Respondents

Hearing:	13–14 June 2023
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	D A T Chambers KC, I T K T R F Hikaka, J L Beverwijk and M I S Phillipps for Appellants A J Steele, M J Wenley and M A B Black for Respondents V T M Bruton KC as counsel assisting the Court
Judgment:	28 November 2024

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS
(Given by Winkelmann CJ and Ellen France J)

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Introduction

[1] The appellants were abused in a most shocking way by their father when they were children. They have suffered as a result of this abuse on an ongoing basis. Their appeal to this Court raises issues about whether they are entitled to a remedy in equity to obtain some recompense for the harm caused by his conduct. The issues arise in this way.

[2] The appellants all left the family home while they were teenagers. After leaving home, they had virtually no contact with their father. They did not lay complaints with the police about his conduct or bring civil proceedings against him. As we shall discuss, while the father's earlier wills did make some provision for the appellants, his final will did not. Further, some 30 years after contact between the appellants and their father ceased, the father gifted to the Z Trust (the Trust) his home and some shares — assets that, at the date of the High Court hearing, were worth about $700,000 in total. The appellants are not beneficiaries of the Trust.

[3] The appellants' father died in April 2016. Later that year, the appellants made a claim against their father's estate under the Family Protection Act 1955. But that claim will be meaningless unless the assets gifted to the Trust revert back to the estate. The father's estate, after deduction of the assets transferred, is worth about $47,000.

[4] The Family Protection Act claim has been put on hold pending determination of the present proceedings. These proceedings were filed in the High Court in mid-2018. They essentially seek to unwind the transfer of the assets to the Trust. The appellants claim they are owed fiduciary duties, which their father breached when he gifted the assets to the Trust so as to prevent a claim to the assets under the Family Protection Act. They claim that the surviving trustees hold the gifted assets as constructive trustees for the executors of their father's estate.

[5] The appellants' claim succeeded in the High Court.[1] That decision was reversed on appeal to the Court of Appeal.[2] The appellants have leave to challenge in this Court the correctness of the Court of Appeal decision.[3] That question raises the issue of whether the appellants' father owed them fiduciary duties at the time he transferred the bulk of his estate into the Trust. If so, the question is whether the transfer of the assets was a breach of those duties for which the appellants are entitled to equitable relief.

Background

The parties

[6] We will follow the approach taken in the Court of Appeal of using fictitious names for the various parties and others referred to in the judgment. For consistency we use the names adopted by the Court of Appeal. At first reference we put in brackets the letter used in the High Court to refer to that person.

[7] The appellants, Alice (A), Barry (B) and Cliff (C), are the three living children of Robert (the father, Z) and his former wife, Rose (J). A brother, Greg (G), died in 2015. The respondents are the trustees of the Trust, which was settled by Robert on 22 December 2014. The primary beneficiaries of the Trust include Louise, Sally and Mark. They are the adult children of Phillipa (Y), a long-term friend of Robert. The respondent referred to as Don (D) is Louise's husband. Their child, Karen, is also a beneficiary of the Trust.[4]

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1 *A v D* [2021] NZHC 2997, [2021] NZFLR 772 (Gwyn J) [HC judgment].
2 *D v A* [2022] NZCA 430, [2022] 3 NZLR 566 (Kós P, Gilbert and Collins JJ) [CA judgment].
3 *A v D* [2022] NZSC 151 (Glazebrook, O'Regan and Ellen France JJ).
4 See below at [16].

[8] We add that a suppression order was made in the High Court primarily to protect Alice. Another suppression order was made in the Court of Appeal, extending the scope of suppression to all persons or entities connected to the proceedings, and this Court made the same order in our judgment granting leave. We consider ongoing suppression is necessary to protect Alice's health. The order prohibiting publication of the names, addresses or identifying particulars of any persons or entities connected to the proceedings accordingly remains in force.

Factual narrative

[9] We do not repeat the detail of the abuse suffered by the appellants and their mother. That is set out in detail in the reasons of Collins J in the Court of Appeal and is not now contested.[5] There is no dispute that Alice was repeatedly raped and sexually abused by Robert when she was aged between seven and 13 years. There is also no dispute that she was emotionally abused by Robert during her childhood and her teenage years. Robert physically and emotionally abused his sons up until the time they left home when they were about 16 years old. Robert also abused the appellants' mother, Rose, physically and emotionally.

[10] It is not possible to overstate the adverse impact Robert's abuse has had on the appellants both during their childhood and as adults.

[11] The other aspect that forms the necessary part of the factual narrative relates to Robert's estate planning. We take the summary which follows from that set out in the reasons of Collins J.[6] We note first the observation that Alice and her two brothers appeared "to have had different subjective expectations as to whether they would benefit" from Robert's estate.[7] In short, Collins J said the evidence indicated Alice thought she would receive some benefit from the estate; Barry and Cliff did not share that expectation although they hoped their father would recognise them in some way. Barry and Cliff both wanted Alice to receive some meaningful benefit from the estate. As we now discuss, while there was initially some support for Alice's expectation, that expectation was not ultimately realised.

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5 CA judgment, above n 2, at [9]–[42].
6 At [45]–[52].
7 At [87].

[12] Over a period from December 2001 to December 2015, Robert's lawyers were instructed to prepare the seven wills executed within that period. Initially, Robert made bequests to the appellants. In the first will, for example, each of the appellants was bequeathed $25,000. In that will, specific provisions were also made for Alice. She was to have the option to live in Robert's home for the rest of her life, and the trustees had a discretion to pay any of her debts.

[13] In the second will, which was executed on 12 September 2003, Robert provided that Alice's son was to receive Robert's home subject to a life interest to a third party. By the time of Robert's third will, which was executed on 11 October 2004, no reference was made to the appellants, but their children were named as beneficiaries.

[14] The appellants and Greg were included in the three wills executed on 23 June 2009, 10 August 2010 and 21 June 2012. However, on 22 October 2014, Robert instructed his lawyer that he wanted to set up the Trust. He gave two reasons for doing so: to protect his assets in case he became ill and to "[prevent] any of his family [from] chasing" his assets.

[15] When the Trust was settled on 22 December 2014, Robert and Don were the trustees. Subsequently, a trustee company was appointed as an additional trustee on 27 January 2016.[8]

[16] Robert was included as a beneficiary of the Trust in addition to Phillipa's children, Louise, Sally and Mark, and Louise's daughter, Karen. The children or grandchildren of Louise, Sally, Mark and Karen are also beneficiaries. If Karen is still alive at the point the Trust expires, she is the final beneficiary. If Karen dies before the Trust concludes, then her children take her place as final beneficiaries.

[17] Robert's home was gifted to the Trust on 22 December 2014. A further gift of some shares was made on 27 January 2016. There is no dispute that at the time of the

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[8] This company retired as trustee and was replaced by E Ltd, one of the respondents in this appeal, on 12 February 2020.

High Court hearing the assets transferred to the Trust were worth approximately $700,000.

[18] After establishing the Trust, Robert executed his final will dated 21 December 2015. None of the appellants were named as beneficiaries under that will. The will included instructions to distribute Robert's furniture, books and photographs at the executors' discretion, with the residue of the estate going to Phillipa's three adult children. There was also an instruction that a rocking horse, previously to be bequeathed to Alice's son, was to go to Louise for her daughter. As we have said, the estate was worth about $47,000 when Robert passed away.

Nature of the claim

[19] In the High Court, the appellants pleaded four causes of action: namely, breach of fiduciary duty, fraud on a power, knowing receipt and unjust enrichment. As we have indicated, the focus in terms of the appeal to this Court is on the claim based on breach of fiduciary duty. That claim was put on the basis that Robert owed the appellants fiduciary duties which he breached when transferring the assets to the Trust. He did so deliberately, putting himself in the position where he could not meet their economic needs that had arisen because of the way in which he had abused them. The claim was advanced on the basis that the abuse gave rise to this fiduciary obligation. The resulting vulnerability meant Robert had a continuing obligation, and the appellants reposed trust and confidence in him to provide for them economically and not to act adversely to their interests.

[20] As the High Court Judge explained, because Robert was also a trustee of the Trust, the claim was that the other trustees were visited with his knowledge of the breach of fiduciary duties. An order was sought that the trustees hold the assets as constructive trustees for the executors of Robert's estate.

The decision of the High Court

[21] The High Court Judge reviewed New Zealand and Canadian authorities, finding that Robert's relationship with the appellants as their parent and caregiver

while they were children was "inherently fiduciary".[9] However, the Judge did not consider the fiduciary duties arising from that relationship extended as far as the appellants claimed. Instead, the Judge found that the fiduciary duty owed to the appellants as children was limited to the requirement that Robert refrain from sexually or physically assaulting them.

[22] The next step in the Judge's analysis was that Robert's proven sexual abuse of Alice and his proven physical abuse of Barry and Cliff were breaches of the fiduciary duty he owed to each of them as children.

[23] The Judge then addressed the situation at the time of the transfer of the assets to the Trust. In that respect, the Judge said that while Robert's relationship with the appellants as children was inherently fiduciary, that could not be the case once they became adults. That was because, in general, the relationship of an adult child to their parent is of a non-fiduciary kind. However, the Judge considered that there might be "aspects of [that] relationship which do engage fiduciary obligations".[10] That meant that the alleged fiduciary relationship in this case had to be considered within the second category, as discussed below, in *Chirnside v Fay*; that is, as a particular fiduciary relationship. As summarised in *Jay v Jay*, the assessment of whether such a relationship exists requires "careful scrutiny of the context and the facts, on a case-by-case basis".[11]

[24] In undertaking the latter analysis, the High Court Judge applied the approach adopted in the dissenting reasons of Wilson J in the decision of the Supreme Court of Canada in *Frame v Smith*.[12] In that case, Wilson J said that relationships concerning which fiduciary obligations have been imposed seemed to possess these three general characteristics:[13]

> (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.

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9 HC judgment, above n 1, at [107].
10 At [133].
11 *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [64]. See also *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [73]–[75] per Blanchard and Tipping JJ. See below at [43].
12 *Frame v Smith* [1987] 2 SCR 99.
13 At 136.

> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[25] Applying this analysis, the High Court Judge reasoned that Robert had scope for the exercise of power and discretion in relation to the appellants, as the exercise of Robert's right to alienate his assets was the exercise of a discretion or power. Moreover, his unilateral exercise of that discretion or power had the potential to, and did in fact, affect the appellants' interests. Next, the Judge said that Robert's abuse of the appellants as children made them — and particularly Alice — "vulnerable and at his mercy".[14] On this basis, the "classic characteristics" of a fiduciary relationship were in place.[15] The Judge continued:

> [151] Framed another way, the plaintiffs had an actual expectation that, when [Robert] came to consider the disposition of his [assets], 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.

[26] Where the appellants' vulnerability was a direct outcome of Robert's own actions, and the abuse was egregious, the Judge took the view that finding the existence of a fiduciary relationship did not give rise to a floodgates risk. The conclusion reached was that there was a fiduciary relationship between Robert and the appellants at the time he gifted the assets to the Trust.

[27] As to whether there was a breach of that duty, the Judge addressed first the specific duties owed to the appellants. The finding was that when Robert transferred the assets to the Trust he owed:[16]

> … each of the plaintiffs a duty to recognise them as members of his family and to provide for them from his wealth, due to the vulnerability his earlier breach of fiduciary duties had caused them.

[28] Where the evidence showed that at least one of Robert's reasons for gifting the assets to the Trust was to prevent the appellants receiving them, the Judge concluded the transfer was in breach of the fiduciary duties owed.

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14 HC judgment, above n 1, at [150].
15 At [150].
16 At [173].

[29] In terms of knowing receipt, the Judge also found the Trust was imputed with Robert's knowledge and received the gifts knowing they were in breach of his fiduciary duties to the appellants. The trustees accordingly held the assets on constructive trust for the appellants.

[30] On the Judge's analysis it was not necessary to grant the remedies sought by the appellants relating to fraud on a power. But for completeness, the Judge found that the trustees exercised their discretion to accept the gifts with the improper purpose or intention of putting the assets beyond the reach of the appellants.

The decision of the Court of Appeal

[31] The Court of Appeal was divided on the question of whether fiduciary duties were owed to Alice when the assets were transferred to the Trust. Kós P and Gilbert J said that the High Court was wrong to hold in favour of the claim of breach of fiduciary duty. Collins J agreed that the appeal in respect of the claims brought by Barry and Cliff must be allowed. However, Collins J would have found that Robert owed fiduciary duties to Alice after she left home, and that Robert was in breach of those duties when he transferred the assets to the Trust.

[32] To explain the approach taken, it is helpful to begin with the reasons of Gilbert J. The Judge concluded that there was no fiduciary duty owing at the time of the transfer of the assets. Robert did not undertake to act for or on behalf of the appellants as adults when dealing with those assets. Gilbert J said that the "central and distinguishing obligation of a fiduciary" — that is, to act with undivided loyalty in the interests of the beneficiary in a particular matter — was not present.[17] Further, Gilbert J considered that the approach adopted by Collins J was both novel and could give rise to the "possibility of a vast expansion" of situations in which claims for breach of fiduciary duty could be advanced "without a sound foundation in principle".[18]

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17 CA judgment, above n 2, at [121].
18 At [122].

[33] Gilbert J noted that there was no challenge on appeal to the High Court Judge's finding that Robert owed a fiduciary duty to the appellants as children not to physically or sexually assault them. In Gilbert J's view, the appellants could have sued Robert for both compensatory and exemplary damages in respect of his breaches of obligation.[19] However, for understandable reasons, the appellants had chosen not to pursue any claim against Robert and agreed in about 1990 that they would continue not to have any contact with him. Gilbert J considered that any claim in tort was statute-barred by the time the assets were gifted to the Trust in 2014 and 2016, and any claim for breach of fiduciary duty arising from the abuse was precluded either by analogy or by the doctrine of laches.

[34] Gilbert J characterised the present claim as seeking redress for harms stemming from these pre-1974 breaches. The breaches were the acts of physical and sexual abuse. The subsequent failure to provide compensation for the loss caused by the acts of physical and sexual abuse did not amount to a new breach of fiduciary duty.

[35] Gilbert J considered that the three characteristics or indicia of a fiduciary relationship referred to by Wilson J in *Frame v Smith* were misinterpreted by the High Court.[20] Essentially, Gilbert J decided that the High Court erred in treating the transfer of assets to the Trust as involving a power or discretion which is a feature of a fiduciary duty. Gilbert J noted that a fiduciary is in a relationship of trust and owes a strict duty to act with undivided loyalty to the beneficiary in relation to a particular matter. A power or discretion in this setting is one conferred on or held by the fiduciary for the benefit of the beneficiary. The power can only be used for the purpose for which it was conferred. And the proper exercise of the power is strictly enforced in equity. Accordingly, it is:[21]

> … 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.

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19 The Judge noted that these causes of action arose prior to 1 April 1974, the date on which the relevant provisions of the Accident Compensation Act 1972 came into force.

20 See above at [24].

21 CA judgment, above n 2, at [141].

[36] In the present case, the ability of Robert to deal with his own assets was not a power or discretion in the relevant sense.

[37] Nor, Gilbert J said, was there any relevant interest that may be affected by the fiduciary's exercise of the power. Such an interest must "link to the fiduciary power".[22] In the present case the relevant interest was an economic one: namely, improving the value of a moral claim under the Family Protection Act. But when Robert dealt with his own assets, he was not exercising a power given for the purpose of protecting or furthering the appellants' interests generally, and certainly not for the purpose of helping claims they might make against his estate for breach of moral duty.

[38] As to the element of vulnerability, the third of the characteristics referred to by Wilson J in *Frame v Smith*, Gilbert J said this too must be linked to the relevant discretion or power. It is the beneficiary's vulnerability to the wrongful exercise of the power that is critical in this context. In the absence of a fiduciary power, there is no question of vulnerability. Here, Robert was not given a power to exercise on behalf of the appellants in relation to his assets, so they were not vulnerable to the wrongful exercise or abuse of that power.

[39] Gilbert J took the view that the discretion inherent in a power which the duty of undivided loyalty seeks to control was not present in the duty conceptualised by either the High Court or Collins J. Gilbert J said this:

> [148] The fiduciary duty propounded by the [High Court] Judge — "to recognise [the appellants] 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 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 [appellants]. 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.

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22 At [143].

[40] Kós P agreed with Gilbert J that the fiduciary duty ceased when Robert no longer lived with or cared for the children. The position of Kós P was that the ordinary remedy applying to a fiduciary's breach of duty for sexual or other physical abuse is equitable compensation — that is, an award of money by way of compensation for loss suffered by them by reason of the breach of fiduciary duty. In this case Alice, and probably Barry and Cliff, would have had a personal claim for equitable compensation relating to the period before the commencement of the Accident Compensation Act 1972. In agreement with Gilbert J, Kós P said that claim was now "long extinguished by laches".[23]

[41] On the view Kós P took of the scope and content of the duty, the fiduciary relationship between parent and child ended when the father ceased to care for the children. The transfer to the Trust was not a breach of fiduciary duty. In conclusion Kós P observed:

> [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 [assets]. 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.

[42] In his dissenting reasons, Collins J considered Alice was entitled to expect her father to make good for his abuse and give her the economic and emotional support she needed. The absence of contact between father and daughter did not alter the position where it was "the direct consequence" of his abuse of Alice.[24] Collins J saw Alice's case as very different from that of Barry and Cliff. The depth and extent of the harm she had suffered meant she was always vulnerable and at the mercy of Robert to atone for what he did. On this basis, Collins J would have found that Robert continued to owe Alice fiduciary duties throughout her adult life. The obligations owed would have included "taking reasonable steps to provide a modicum of economic security

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23 At [165].
24 At [97].

for her".[25] Collins J would have found rescission of the gifting of the assets to the Trust was the appropriate remedy so that those assets could revert to Robert's estate and be contested under the Family Protection Act.

Relevant legal principles

Was there a fiduciary relationship?

[43] The indicia as to when fiduciary duties arise are those set out by this Court in *Chirnside v Fay*.[26] In *Chirnside v Fay* Blanchard and Tipping JJ (with whom Gault J agreed on this point) described two situations in which the courts will find that a relationship gives rise to fiduciary duties. The first of these situations encompassed relationships which by their nature were "recognised as being inherently fiduciary".[27] The suggestion was that most cases involving a breach of fiduciary duty were of this nature. These situations fell into "one of the recognised categories of relationships which are inherently fiduciary … [including] the relationships of solicitor and client, trustee and beneficiary, principal and agent, and doctor and patient".[28]

[44] The second situation identified as one in which the relationship will be treated as fiduciary was said to depend "not on the inherent nature of the relationship but upon an examination of whether its particular aspects justify it being so classified".[29] Blanchard and Tipping JJ continued by noting there was "[n]o single formula or test" which had obtained "universal acceptance in deciding whether a relationship outside the recognised categories is such that the parties owe each other obligations of a fiduciary kind".[30]

[45] Blanchard and Tipping JJ then traversed the relevant authorities. In this context, the Judges referred to the judgment of Millett LJ in *Bristol and West Building Society v Mothew.*[31] Blanchard and Tipping JJ noted that in that judgment Millett LJ "focused on the need for the circumstances to give rise to a relationship of trust and

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25 At [104].
26 *Chirnside v Fay*, above n 11.
27 At [73].
28 At [73].
29 At [75].
30 At [75].
31 *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA).

confidence", and that "[t]his observation was linked with the idea that a fiduciary was someone who had undertaken to act for or on behalf of another".[32] Blanchard and Tipping JJ continued:[33]

> [80] It is clear from the authorities that relationships which are inherently fiduciary all possess the feature which justifies the imposition of fiduciary duties in a case which falls outside the traditional categories; all fiduciary relationships, whether inherent or particular, are marked by the entitlement (rendered in [*Arklow Investments Ltd v Maclean*] as a legitimate expectation) of one party to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests. …

[46] Finally, it is relevant to note the observation of Blanchard and Tipping JJ that fiduciary relationships were not confined to cases where there was an express undertaking or agreement. The Judges said:[34]

> At the very least the undertaking can be implicit from the circumstances, and the true principle, in our view, resides in the idea that the circumstances must be such that one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement or undertaking is no more than a frequent manifestation of such a circumstance.

[47] This Court further considered fiduciary relationships in *Paper Reclaim Ltd v Aotearoa International Ltd*.[35] The Court similarly reiterated that "[a] fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other."[36]

[48] The Court returned to consider fiduciary relationships in *Amaltal Corp Ltd v Maruha Corp*.[37] In that case, the Court accepted that Amaltal owed Maruha an obligation of loyalty at least in relation to accounting and tax functions for which Amaltal's staff were responsible. The Court made the point that it was "well settled that, even in a commercial relationship of a generally non-fiduciary kind, there may be aspects which engage fiduciary obligations of loyalty".[38] That was because the

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32 *Chirnside v Fay*, above n 11, at [79].
33 Citing *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1 (PC).
34 *Chirnside v Fay*, above n 11, at [85].
35 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169.
36 At [31].
37 *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192.
38 At [21] citing *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC) at 166.

nature of the particular aspects of the relationship may be such that a party is entitled to rely upon the other:[39]

> … not just for adherence to contractual arrangements between them, but also for loyal performance of some function which the latter has either agreed to perform for the other or for both or has, perhaps less formally, even by conduct, assumed.

[49] There are some points we wish to highlight or draw from this discussion in relation to the circumstances in which a fiduciary relationship will be recognised. First, as this discussion makes clear, fiduciary duties flow out of, and reflect, the nature of the relationship — the point made by Millett LJ in *Bristol and West Building Society* referred to above. In *Lac Minerals Ltd v International Corona Resources Ltd* La Forest J dismissed as unprincipled the approach whereby a fiduciary relationship is found to exist simply to provide a basis for relief when any other principled basis is lacking.[40] He said that the "use of the term fiduciary, used as a conclusion to justify a result, reads equity backwards".[41]

[50] Secondly, both the High Court and Collins J referred to the indicia in *Frame v Smith* as supporting the conclusion that a fiduciary relationship persisted. For our part we prefer the principles identified in *Chirnside v Fay* as providing greater clarity as to the circumstances in which a fiduciary relationship will be found to exist, and in particular as focusing attention upon the nature of the relationship in question. The open-ended nature of the principles as expressed in Wilson J's dissenting reasons in *Frame v Smith* could lead to a loss of focus upon, and examination of, the relationship in issue.

[51] This is particularly so in respect of the third characteristic — peculiar vulnerability. Vulnerability typically arises because the fiduciary is exercising the power or duty for the beneficiary. Subsequent cases in the Supreme Court of Canada have recognised that vulnerability is not sufficient on its own to support a fiduciary

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39 At [21].
40 *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574.
41 At 652.

claim. In *Galambos v Perez*, for example, in delivering the judgment of the Court, Cromwell J said this:[42]

> [67] An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. …
>
> [68] The first [point] is that fiduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship. … Thus, while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship.
>
> [69] The second is that a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party. This was put succinctly by McLachlin J in [*Norberg v Wynrib*], at p 273, when she said that "fiduciary relationships … are always dependent on the fiduciary's undertaking to act in the beneficiary's interests". …
>
> [70] Underpinning all of this is the focus of fiduciary law on relationships. As Dickson J (as he then was) put it in [*Guerin v Her Majesty The Queen*], at p 384: "It is the nature of the relationship … that gives rise to the fiduciary duty. …" The underlying purpose of fiduciary law may be seen as protecting and reinforcing "the integrity of social institutions and enterprises", recognizing that "not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules": [*Hodgkinson v Simms*], at p 422 (*per* La Forest J). The particular relationships on which fiduciary law focusses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other.

[52] Finally, in *Dold v Murphy* the Court of Appeal proposed further elucidation of the second category of relationships referred to in *Chirnside v Fay* which might give rise to fiduciary duties as follows:[43]

> 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

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42 *Galambos v Perez* 2009 SCC 48, [2009] 3 SCR 247 (some citations omitted and emphasis in original) citing *Norberg v Wynrib* [1992] 2 SCR 226, *Guerin v Her Majesty The Queen* [1984] 2 SCR 335 and *Hodgkinson v Simms* [1994] 3 SCR 377. See also *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 at [28].

43 *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 at [55], discussed in CA judgment, above n 2, at [153]–[154] per Kós P.

> (although, not necessarily, elimination) of the alleged fiduciary's own self-interest.

[53] For our part we do not see it as helpful to try to spell out, and in that way potentially confine, the situations where a fiduciary relationship will be found to exist in this second category of cases. Again, we are satisfied that the approach in *Chirnside v Fay* suffices.

The parent/child relationship

[54] The next issue is whether the relationship between a parent and a minor child is a fiduciary relationship.[44] It was common ground between the parties that a fiduciary relationship existed between Robert and the appellants when the appellants were children in his care, but the respondents assert that the relationship terminated with the end of Robert's caregiving relationship with the children and, in any case, did not continue into their adulthood.

[55] The law in relation to the coincidence of fiduciary and family relationships is not settled in New Zealand. We heard limited argument on the topic because it was common ground between the parties that the relationship between parent and child is fiduciary in some circumstances. However, in order to isolate the issues that determine this appeal, it is necessary to address whether and when the parent/child relationship should be recognised as fiduciary, and the likely content of the fiduciary duty arising.

[56] The starting point for this consideration is that the paradigm fiduciary relationship is one in which the fiduciary has powers and rights in respect of property which it must exercise in the best interests of another — a relationship which primarily serves economic interests.[45] However, in New Zealand fiduciary relationships have been recognised outside that strict model; for example, in respect of the solicitor/client

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44 In the Court of Appeal Kós P used the descriptor "child" to refer to a person under 20 years of age, citing the Age of Majority Act 1970, s 4(1): see CA judgment, above n 2, at [153], n 74. We do not need to decide the age of majority for the purposes of determining when a fiduciary relationship exists between a parent and child, noting as we must that different age thresholds apply under different statutory frameworks: see, for example, Care of Children Act 2004, s 8 definition of "child"; and Contract and Commercial Law Act 2017, s 85 definition of "minor".

45 See Andrew S Butler "Fiduciary Law" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 471 at 486; and Leonard I Rotman *Fiduciary Law* (Carswell, Toronto, 2005) at 86–93.

relationship where there are no such powers and rights (although, of course, a solicitor's advice may affect a client's economic interests).[46] There are also dicta supporting the proposition that the doctor/patient relationship is fiduciary — even where the patient's economic interests are not in play.[47]

[57] As to the extension of the fiduciary model to caregiving relationships, that has been discussed in several cases in New Zealand.[48]

[58] In *S v Attorney-General* it was alleged, first, that the Superintendent of Child Welfare was negligent in placing S in a foster home where S was subsequently abused and, secondly, that the Superintendent owed a fiduciary duty to S in relation to that decision, which was breached.[49] The Court of Appeal was content to proceed on the basis that a fiduciary relationship existed as pleaded but found the appellant had failed to prove that any breach of fiduciary duty had been committed.

[59] In *Jay v Jay* the allegation was that a close family member, who was alleged to have committed sexual assault and battery of a child during family holidays at Easter and Christmas, was in a fiduciary relationship with the child.[50] While acknowledging that a familial relationship can give rise to fiduciary obligations, depending on the circumstances, the Court of Appeal found no such relationship arose on the facts of the case. The intermittent nature of the contact did not establish sufficient control or influence.

[60] In *B v R*, by contrast, the plaintiff successfully sued for breach of fiduciary duty an uncle, in whose care she had been left regularly as a child, on the grounds that he

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46 See Lawyers and Conveyancers Act 2006, s 4(c).

47 See, for example, *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [26] (where the patients' economic interests were affected); and *Patient A v Health Board X* HC Blenheim CIV-2003-406-14, 15 March 2005 at [39] (where the patient's non-economic interests were affected). Canadian courts have recognised such a relationship: see, for example, *Norberg v Wynrib*, above n 42, at 271–272 per L'Heureux-Dubé and McLachlin JJ; and *McInerney v MacDonald* [1992] 2 SCR 138 at 148–149.

48 See, in addition to the cases discussed below, *S v G* [1995] 3 NZLR 681 (CA); *Attorney-General v Prince* [1998] 1 NZLR 262 (CA); *M v H* (1999) 18 FRNZ 359 (CA); *Parkinson v Attorney-General* [2000] NZFLR 552 (HC); *Surrey v Speedy* [2000] NZFLR 899 (HC); *W v Attorney-General* CA227/02, 15 July 2003; and *Rule v Simpson* [2017] NZHC 2154, (2017) 4 NZTR ¶27-017.

49 *S v Attorney-General* [2003] 3 NZLR 450 (CA).

50 *Jay v Jay*, above n 11.

had physically, sexually and emotionally abused her.[51] It was conceded in argument that the uncle owed her a fiduciary duty. Morris J noted it had not been suggested and indeed "could not be suggested" that the uncle was other than under an obligation "to treat [the plaintiff] properly and certainly not to abuse her".[52]

[61] *H v R* was another case involving the sexual abuse of a child, this time by a family acquaintance.[53] The defendant was unrelated to the plaintiff, but the plaintiff's family and the defendant had nearby holiday homes. Hammond J found for the plaintiff in tort and so did not need to address the allegation of fiduciary duty. Nevertheless, the Judge described the relationship between parent and child as an "obvious category" of fiduciary relationship.[54]

[62] There are several Canadian cases in which the relationship between parent and child has been recognised as being fiduciary in some circumstances.[55] The three indicia described by Wilson J in her dissenting reasons in *Frame v Smith* have been cited with approval in some of these Canadian decisions, including in *M (K) v M (H)*.[56] *M (K) v M (H)* concerned the sexual assault of a child by a parent. La Forest J, writing the leading judgment for the Supreme Court of Canada, stated:[57]

> 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.

[63] Although we do not adopt the *Frame v Smith* indicia, we are nevertheless content to proceed on the basis, applying the approach set out in *Chirnside v Fay*, that a fiduciary relationship exists between a parent and a minor child while that child is in the parent's care. Such a relationship has the characteristics of trust and confidence identified in *Chirnside v Fay* as indicia of a fiduciary relationship. In the case of the

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51 *B v R* (1996) 10 PRNZ 73 (HC).
52 At 81.
53 *H v R* [1996] 1 NZLR 299 (HC).
54 At 307.
55 Compare the position in Australia: *Paramasivam v Flynn* (1998) 90 FCR 489 (FCAFC); and *Pope v Madsen* [2015] QCA 36, [2016] 1 Qd R 201.
56 See *M (K) v M (H)* [1992] 3 SCR 6 at 63–64 per La Forest, Gonthier, Cory and Iacobucci JJ, setting out the *Frame v Smith* indicia and concluding that "[e]ven a cursory examination of these *indicia* establishes that a parent must owe fiduciary obligations to his or her child" (emphasis in original).
57 At 61–62 per La Forest, Gonthier, Cory and Iacobucci JJ.

parent and child, the relationship has a fiduciary character by virtue of the parent's caregiving responsibility, and by reason of the power and control that a parent has in respect of a minor child, which means that the child is entitled to (indeed must) repose trust and confidence in the parent.

[64] We leave open the possibility of the fiduciary relationship continuing in certain circumstances beyond the child's minority; for example, the situation referred to by Collins J of an adult child with disabilities.[58] However, we do not consider that the relationship between parent and adult child, absent some ongoing caregiving or decision-making responsibility on the part of the parent, does give rise to a fiduciary relationship. The simple point is that, at least as a general rule, the parent no longer has caregiving responsibility nor exercises control over or makes decisions for their child once they reach adulthood.

[65] In terms of the extent of the duties to be imposed upon a parent, there are considerations which weigh against a broad formulation of the duties to be imposed. First, Parliament has legislated to allow for the regulation of the parent/child relationship where appropriate and in limited circumstances — there are broad and complex issues of social policy to be weighed in determining just where such regulation is appropriate.[59] Secondly, there must be some delineation as to where the duties arise, and where they are breached. A relationship based upon the management of assets, or even a solicitor/client relationship, has at least some clarity as to where the relationship and related obligations begin and end. This can be contrasted with a relationship as extensive and complex as that which a parent has with their dependent child. It is important that the law not intrude unnecessarily upon a relationship which is primarily based upon natural love and affection, and which is so multifaceted.

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58 CA judgment, above n 2, at [79].

59 See, for example, Care of Children Act; Oranga Tamariki Act 1989; Family Violence Act 2018; Child Support Act 1991; Family Proceedings Act 1980; Family Protection Act 1955; and Crimes Act 1961.

[66] For these reasons we see merit in the formulation adopted by Kós P, in his reasons in the Court of Appeal in this case, for fiduciary duties arising in the familial context. The approach he formulated was as follows:[60]

> … 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.

The case for the parties

[67] Matters have moved on since the decision of the High Court. It is now common ground that there was a fiduciary relationship between the appellants and Robert while they were minors and in his care. It is also agreed there was sexual, physical and psychological abuse. The question is whether Robert owed the appellants fiduciary obligations at the time he disposed of his assets, and if he did whether there is an equitable remedy available in relation to the asset transfer.

[68] As to the existence of a fiduciary relationship between Robert and his adult children, the appellants advance alternatives, but in each case relying upon the *Frame v Smith* indicia. First, they say that there is an inherent fiduciary relationship between parent and child which here continued because of the appellants' vulnerability. That vulnerability is expressed in various ways; for example, as arising from the abuse the appellants suffered as children, as a legitimate expectation that the appellants would benefit from Robert's estate and as arising through Robert's ability to deny the appellants any chance to restore themselves. Secondly, as an alternative, the appellants say that there was a particular fiduciary relationship which arose when Robert walked into his lawyer's office in 2014 and disposed of his assets to the Trust.

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[60] CA judgment, above n 2, at [161] (footnote omitted). As Kós P noted at [161], n 93, this approach to the content of the parental fiduciary duty reflects that adopted by the Supreme Court of Canada: see *M (K) v M (H)*, above n 56, at 62 per La Forest, Gonthier, Cory and Iacobucci JJ, as later refined by the Court in *EDG v Hammer* 2003 SCC 52, [2003] 2 SCR 459 at [23] per McLachlin CJ, Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ; and *KLB v British Columbia* 2003 SCC 51, [2003] 2 SCR 403 at [44]–[49] per McLachlin CJ, Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ.

[69] The appellants also advanced differing versions of what Robert had to do to meet his fiduciary obligations. In one iteration, the argument is that he had to refrain from acts that would cause harm to the appellants' practical interests in a manner involving disloyalty, self-interest or abuse of power when exercising his powers and discretions. On this analysis, he could not use his property to act abusively toward the appellants. The alternative formulation is that he had to act loyally and not put his own or others' interests ahead of the appellants' interests in a manner that abuses their trust.

[70] The respondents say that the fiduciary relationship ended when Robert no longer lived with the appellants, and so ceased to be directly responsible for their care and welfare, and the appellants became adults.

[71] Counsel assisting, Ms Bruton KC, submitted that there was no principled basis upon which an ongoing fiduciary relationship between Robert and the appellants could be constructed in this case. In her submissions she proposed an alternative pathway for the appellants based on the fact that, first, part of the motivation for the transfer of the assets to the Trust was to defeat potential claims against Robert's estate by the appellants and, secondly, Robert had not parted with beneficial ownership of the assets transferred — he continued to enjoy them as if he was an owner, and indeed he was a trustee and beneficiary.

Application to this case

[72] The starting point, and the end point, of this analysis is that there was no fiduciary relationship between Robert and the appellants at the time of the transfer of the assets, and nor was there a fiduciary relationship which bore in any way upon that transfer.

[73] There was a fiduciary relationship between Robert and the appellants during their childhood and while he lived with them. This relationship was fiduciary in nature due to the extent of control and decision-making power Robert had in respect of the appellants — they were entitled to, indeed had to, repose trust and confidence in him. He was for that reason required to refrain from using that control in a way which fundamentally violated the relationship of parent and child. As is common ground, by

his actions in physically abusing Barry and Cliff, and in sexually abusing Alice, Robert was in breach of his fiduciary duties. The appellants would have been able to bring claims against Robert in respect of that abuse — claims which could have been pleaded as tortious actions or as acts in breach of fiduciary duty. Although the enactment of the Accident Compensation Act would have impacted upon the claims from 1974 onwards, much of the abuse pre-dated the commencement of that Act, and in any event claims for exemplary damages continued to be available.[61] It appears that Alice understood that such claims were available to her but decided not to pursue them. We note that the Court of Appeal took the view that those claims, arising out of breaches of obligation during childhood, are now time-barred.[62] However, because of the way in which the appeal was argued, there is no need for us to address the correctness of that finding and we say no more about it.

[74] This fiduciary relationship ended when Robert ceased having caregiving responsibilities in respect of his children (most likely on these facts when they each left home) and certainly by the time the appellants became adults. By this time Robert had ceased to exercise power and control over his children.

[75] Is there some other basis upon which the fiduciary relationship could be extended through the intervening 30 years, or revived when Robert transferred his assets into the Trust to defeat any claim they might bring against his estate?

[76] The appellants argue that, because of his earlier abuse of them, the appellants remained vulnerable to Robert throughout their adulthood, and he abused that vulnerability and breached his fiduciary duties when transferring his assets into the Trust. This is a reformulation of the concept of a fiduciary relationship. As set out above, it was the power and control existing within the relationship which entitled (or, as we have said, required) the appellants as children to repose trust and confidence in Robert, and which justified the imposition of fiduciary duties. But on the appellants'

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61 The jurisdiction to award exemplary damages in respect of actions in tort, notwithstanding the accident compensation scheme, is well established: see *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA). We acknowledge that the existence of a general jurisdiction to award exemplary damages for breach of fiduciary duty is less settled. But see *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA) at 301–302 per Cooke P, Richardson, Bisson and Hardie Boys JJ.

62 CA judgment, above n 2, at [138] per Gilbert J and [165] per Kós P.

model, perhaps encouraged by a misunderstanding of the third characteristic in *Frame v Smith*, it is the vulnerability which creates the fiduciary relationship. On this analysis there need be no ongoing relationship which imposes obligations of loyalty; instead, the imposition of a fiduciary relationship, and the duties that come with that, is justified on the basis of past wrongs. This is, as La Forest J cautioned against in *Lac Minerals Ltd*, to read equity backwards, and it does not represent the law in New Zealand.[63] Fiduciary duties cannot be imposed as a remedial response to wrongdoing. In other words, a fiduciary relationship cannot be reverse engineered into a situation to provide the court with a remedial response.

[77] Furthermore, the appellants rely upon the transfer of the assets as a breach of fiduciary duty on the basis that they were particularly vulnerable when Robert decided to transfer those assets to defeat any claim the appellants might bring. But those assets were, in law, Robert's to dispose of as he pleased. Whatever moral claims the appellants had to those assets, Robert did not hold them as a fiduciary for them. Not only had the fiduciary relationship between Robert and the appellants ceased many decades earlier, but the fiduciary obligations that flowed out of that relationship also did not extend to retaining assets for the appellants. Again, this argument entails constructing a fiduciary relationship, and the content of fiduciary duties, to achieve a remedial response. As formulated, this fiduciary relationship and its obligations are open-ended — Robert's duty would only be fulfilled through some remedy being delivered to the appellants.

[78] The imposition of fiduciary obligations based on peculiar vulnerability alone, untied from the analysis of, or even need for, a subsisting relationship, is inconsistent with the relationship-based analysis contemplated in *Chirnside v Fay*. We accept the submissions of counsel assisting that such a principle, if recognised, could lead to great uncertainty in the law. It would mean that those who have not taken on obligations to act in another's interest, nor entered into a relationship which the law treats as presumptively fiduciary, could nevertheless find the exercise of their property rights subject to fiduciary obligations. As Ms Bruton submits, the case as advanced for the appellants seeks the imposition of fiduciary obligations upon a parent in respect of his

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63 See above at [49].

adult children, restricting his ability to deal with his own assets and cutting across third-party interests.

[79] Ms Bruton suggested as a way to meet the claims of the appellants that the assets to which they seek to have resort should be treated as having remained a part of Robert's estate. This is on the basis that, although he transferred the assets to the Trust, he remained a trustee and a beneficiary and continued to live in the house and enjoy many of the normal incidents of ownership. She suggests it may be inferred that, if Robert had asked the trustees to give the house back to him, they would have. This, she submits, must be combined with the evidence that part of his motivation for the transfer was to defeat any claim the appellants might bring after his death. She submits that the Trust was therefore used to avoid the reach of Family Protection Act claims, and the beneficial ownership of the assets was never transferred. Therefore, the Court should treat those assets as remaining part of Robert's estate — effectively creating an anti-avoidance remedy at common law in respect of claims under the Family Protection Act.

[80] There is no anti-avoidance provision in the Family Protection Act. As we understand the argument advanced, however, it is that the Court should draw upon the law as to fraudulent conveyances as it stood at common law and in equity, prior to its enactment in statutory form.[64] New Zealand's law in the area began with the adoption of the Fraudulent Conveyances Act 1571 (Eng),[65] the substance of which has now been adopted in New Zealand in legislation, most recently in ss 344–350 of the Property Law Act 2007.[66] As it was put in the case of *Freeman v Pope*, "[t]he principle on which the [Fraudulent Conveyances Act] proceeds is this, that persons must be just before they are generous".[67]

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64 See, for example, Dewitt C Moore *A Treatise on Fraudulent Conveyances and Creditors' Remedies at Law and in Equity* (Matthew Bender & Co, Albany, 1908) vol 1 at 13–14; HW May and W Douglas Edwards *The Law of Fraudulent and Voluntary Conveyances; Being a Treatise on the Statutes of Elizabeth Against Fraudulent Alienations, and on the Law of Voluntary Dispositions of Property* (3rd ed, Stevens and Haynes, London, 1908) at 3–4 and 6–8; Glenn Garrard *Fraudulent Conveyances and Preferences* (Baker, Voorhis & Co, New York, 1940) at 81–82; and *Twyne's Case* (1601) 3 Co 80b at 82b, 76 ER 809 (Star Chamber) at 817.

65 Fraudulent Conveyances Act 1571 (Eng) 13 Eliz I c 5.

66 See discussion in *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 at [211]–[216] per William Young J.

67 *Freeman v Pope* (1870) LR 5 Ch App 538 (Court of Appeal in Chancery) at 540 per Lord Hatherley LC.

[81] We are unable to make findings in respect of this argument because it was not pleaded and has not been the subject of evidence or argument in any of the Courts below.[68] Nor was it engaged with, to any significant extent, by the parties before us. We can say, however, that this proceeding illustrates a case for including an anti-avoidance provision in the replacement for the Family Protection Act if Parliament decides to retain a Family Protection Act-type regime.[69]

[82] We also heard argument in respect of the relevance of tikanga to the recognition of fiduciary duties in this case. The argument that the common law should develop to respond to the facts of this case is supported, the appellants submit, by the values in our society, including tikanga values and concepts of mana, whanaungatanga, whakapapa, ea, hara/tūkino and utu. It is said the harm (hara/tūkino) committed by Robert when he abused his young children created an imbalance. There was a further wrong when he transferred his assets to the Trust in order to defeat any claim the appellants might bring. There is a need to restore balance (ea) for all involved. Ms Bruton, as counsel assisting, submitted that there was nothing tika about a man who had done so much harm to his children leaving his assets for the benefit of another family, to defeat the interests of his natural children.

[83] We do not deny the great wrong which was done to the appellants by their father. We accept that tikanga provides another framework for explaining and understanding the harm done to the appellants. But this is not a case where the law had no ability to respond to the justice of the appellants' claims — there were claims available to them which were not pursued at the time, albeit for understandable reasons. The developments the appellants seek in the law would require a reworking of the fundamental concepts of fiduciary relationships which is disconnected from their doctrinal underpinnings and would be incautious, creating great uncertainty in the law.

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68 We note that a similar argument was rejected by the Court of Appeal in *Pollock v Pollock* [2022] NZCA 331, (2022) 34 FRNZ 242 at [86]–[88].

69 See Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 247–248 and [8.56]–[8.77].

Result

[84] For these reasons, the appeal is dismissed.

[85] We reserve costs. If the parties cannot agree on costs, counsel are to file memoranda (maximum of five pages) on costs, the respondents by 7 February 2025 and the appellants by 21 February 2025.

Solicitors:
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