

# Are there fiduciary constraints on removing a child as a beneficiary?

## Anthony Grant

An untidy aspect of the law of trusts is knowing whether a proposed action is subject to a fiduciary constraint and, if so, to what extent.

The Court of Appeal recently dealt with this question in *Pollock v Pollock* [2022] NZCA 331, 25.7.22

A successful businessman established a family trust. His son Steven was originally a discretionary beneficiary and a final beneficiary.

As time went on, the father and son fell out. In accordance with the father's wishes, Steven was removed as a beneficiary. The father arranged to dispose of all his assets so after his death, if Steven decided to sue, he would find the cupboard was bare.

Steven was not put off by this and he sued. He claimed that his father's gifting of monies to deplete his estate was made as a result of undue influence, that the trust had been unduly enriched by reason of the gifts and that his removal as a beneficiary was in breach of a fiduciary duty the trustees owed to him. All of these claims failed.

This article is confined to Steven's claim that the trustees acted in breach of fiduciary duty when they removed him as a beneficiary. There were three trustees: the father, his second wife (Steven's stepmother) and a professional trustee.

The power to remove beneficiaries was very wide. The trustees were given an "absolute and uncontrolled discretion to remove any beneficiary".

In a conventional analysis, it would probably be said that the father was not subject to fiduciary constraints when removing his son as a beneficiary. That is because the father was the settlor, a trustee and the funder of the trust and he was intended to have the right to determine who might benefit from it, with an "absolute" discretion to remove a beneficiary.

His second wife and the professional trustee were in a similar position in that they had been appointed

trustees by the father at the time of settlement and he had given them an "absolute" discretion to remove beneficiaries.

Although the discretion was described as being absolute, the court said it was not. It said the trustees had an "obligation... of a fiduciary nature". [100] What is the difference between a "fiduciary duty" and a "duty of a fiduciary nature?" If there is one, the Court of Appeal did not say what it is.

Steven was removed for several reasons. When he wasn't given a promotion in his father's business, which he thought he deserved, his response was to resign and threaten to set up in competition with his father. The father's business was called Pollock & Sons Crane Hire Ltd – or Pollock & Sons for short – and Steven threatened to open a competing business with the name "Pollock" in it. This had the potential to harm the father's company.

The father signed a memorandum in which he said he had not made any provision for Steven in his will or his trust because Steven no longer wished to work in the family business.

There had been earlier disappointments with Steven and in a subsequent document the father wrote that his son had "never been there for [him] in his hard or bad times" and that "because of the heartache, stress and... selfish ways" his intentions were that Steven should receive nothing from the father's estate "because in the past he has had plenty and got nothing to show for it". [26]

Steven's counsel argued that Steven had suffered a mental breakdown. He had been removed from the company "effectively because of his mental illness" and no rational trustee could have reached the decision in those circumstances.

The Court of Appeal was not persuaded by this. It held that the trustees were justified in believing that Steven was threatening to set up in competition with the family business. They were entitled to

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conclude that it was "untenable" for Steven to remain a beneficiary of the [family] business when he had become a competitor whose actions were putting the success of the family business at risk.

Other factors supporting the trustees' decision were that the father had established the trust with assets from his labours and Steven had not contributed anything to the value of the trust.

Although the power to remove the beneficiary "imposed some obligations on the trustees of a fiduciary nature," the obligations were said to fall well short of the standard urged by Steven.

In a recent article in *LawNews*, I wrote that it was desirable from a trustee's perspective for discretions to be given to trustees with very wide wording. I said it was desirable that trustees should generally be given "an absolute and uncontrolled discretion" since this ought to make courts more reluctant to interfere with their decisions. The *Pollock* decision may give some support to this recommendation.

Readers who take an interest in the law concerning fiduciary accountability may want to read Professor Flannigan's recent denunciation of the English Supreme Court's decision in *Lettimaki v Cooper* [2020] UKSC 33, in an article in *Trusts & Trustees* entitled *Fiduciary Accountability Shattered*. It's at [2021] pp 889 – 912.

Although it is customary for commentators on decisions of senior courts to cloak their criticisms with deferential wording, Flannigan's criticisms are not like that. They can fairly be described as savage.

Readers who may be interested to read some recent academic writing about the difficulties in removing children as beneficiaries are directed to another article in *Trusts & Trustees, Excluding Beneficiaries: a decision not to be taken lightly* [2021] page 858. ■

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