

The Court of Appeal divides 2:1 on creating a new fiduciary duty



Anthony Grant

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Whether a fiduciary duty exists and if so, the extent of it, are two questions that are becoming more important as the courts expand the scope of fiduciary accountability.

The growth in this area of the law was the subject of a recent paper by Kós P. Speaking extra-judicially, he said: "The types and forms of private relationships recognised as fiduciary are likely to grow as equity faces up to a changing New Zealand. The types of relationships recognised as fiduciary may also grow."

He instanced the case of *A v D* [2019] NZHC 992 as an illustration of a potential expansion of the law concerning fiduciary relationships.

That case has since gone to the Court of Appeal. Kós P sat on the appeal but decided not to create a new fiduciary duty in which it would be declared that a parent owes fiduciary duties to adult children who have left home and who live independently. The case is reported as *D & E Limited v A, B & C* [2022] NZCA 430.

Before I discuss the facts of the case, I will refer to Kós P's interest in this area of the law. Amongst other things, he delivered an address in 2018 entitled *Aristotle & all that: finding the foundations of fiduciary law* and a follow-up paper in 2021 entitled: *This may seem hard: temporal and personal perspectives on fiduciary law*. He also delivered the Court of Appeal's decision on fiduciary duties in *Dold v Murphy* [2020] NZCA 313 which dealt with the question of whether shareholders should owe fiduciary duties to each other.

The expansion of fiduciary obligations is only one of the ways the laws relating to trusts are likely to change. In a 2019 paper entitled *A short history of the trust*, Kós P suggested tikanga Māori concepts "would increasingly influence equity in New Zealand, even in relation to trusts involving non-Māori".

I give this background as I consider we are fortunate to have a judge in our highest court who takes such a personal interest in the academic origins of equity and fiduciary law.

I refer now to the facts in the Court of Appeal's recent decision.

The case concerned a father who seriously maltreated his three children. The worst treatment was meted out to his daughter whom he repeatedly raped throughout much of her childhood and who has, for all practical purposes, been destroyed for life.

The three Court of Appeal judges accepted that parents owe fiduciary obligations to their children while they live at home in their youth but two of the judges (Gilbert J and Kós P) said the duty ends when the children leave home.

Thirty years after the children had left home, during which there had been no communication with their father, he decided to complete his rejection of them by disposing of all his assets so they couldn't make a monetary claim against his estate after he died.

This is how Collins J described the daughter's current plight:

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"[She] "has struggled to find accommodation... Occasionally, she has been forced to live in her car. She has had no fixed abode or permanent work. [she] said she continues to live in poverty and that she suffers from poor health associated with post-traumatic stress disorder."

The judge went on to say: "In some circumstances, the inherently fiduciary relationship between a parent and a child may continue after the 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." [79]

He held that the daughter "was entitled to expect [the father] 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 [the daughter] in his will." [96]

Gilbert J and Kós P disagreed. The three children have accordingly been given nothing and despite her poverty, the daughter and her two brothers have been ordered to pay the

costs of the trustees who shelter the assets that the father settled on them.

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The case of *D v G* was obviously a difficult decision. Three traumatised children left home when they could and 30 years passed with no communication with their father. At that point, there was still no communication but the father arranged to cut them off completely.

I suspect that notwithstanding the novelty of the proposed fiduciary duty and its inherent complexities, many people would side with Collins J.

Following Lord Denning's principle of judicial decision-making, I think I would, and as time goes by it would not surprise me if the courts agreed that a father should have an ongoing fiduciary obligation to an adult child whose life he has brutally and comprehensively destroyed. ■

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