IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC106/2022

BETWEEN	**A, B and C**
	Applicants
AND	**D and E LIMITED** a duly incorporated company as trustees of the Z Trust
	Respondents

SUBMISSIONS OF COUNSEL TO ASSIST, VANESSA BRUTON KC

Dated: Monday, 3 April 2023

COUNSEL
Vanessa Bruton KC
'Sans Souci'
14 King Edward Parade
Devonport
Ph: 021 887 587
Email: vanessa.bruton@trust-litigation.co.nz

MAY IT PLEASE THE COURT, TĒNĀ, E TE KŌTI:

Introduction

1. There is something not right, or "tika" about a man who has abused his children being able to leave all his worldly wealth to volunteer beneficiaries, who did not suffer at his hands like his own children (recognising the evidence that the deceased considered that their mother had helped him acquire that wealth).

2. But for the disposition of his home to a trust some 16 months before his death, deliberately to avoid claims by his children, the man's children would have had compelling claims under the Family Protection Act 1955. This is legislation which has given the Court power to do what is morally right, notwithstanding core, important principles of testamentary freedom and respect for property ownership. As Hardie Boys J said in *Cresswell v Jenkins*[1]

> The claim of a child from whom the deceased had a long estrangement cannot be as strong as that of one with whom he has had a close relationship. On the other hand where the estrangement is of the deceased's making, either because he has actively brought it about, or because he has not exercised his particular ability and responsibility to heal it, the need and the moral duty are compelling. What the deceased has failed to do in his lifetime to accord recognition to his own family he ought to do in his will. And if he does not, the Court ought to do it for him.

3. The increasing use of "trusts" in New Zealand from the 1990s, where the settlors nevertheless retained effective control (a big driver was avoiding paying the costs of residential care) and the abolition of gift duty in 2011 had meant estates can now avoid the reach of the Family Protection Act, and moral adjustments by the Court to reflect what is "tika" or human decency.

4. Can this Court fix this, on the particular facts of this case, with the legal tools available to it? Or is it a matter best left to Parliament, noting that in its Review of Succession Law, the Law Commission has recommended that the Court should have power to recover property to an estate where it had been disposed or with intent to defeat an entitlement or claim under the legislation (noting that the

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[1] *Cresswell v Jenkins* (1985) 3 NZFLR 570 (HC)

Commission was undecided as to whether or not the current Family Protection Act regime should remain, or be limited to disabled claimants, and those under 25)?[2]

5. Among the attributes of good succession law recognised by the Law Commission are that it should be:

   (a) Simple, clear and accessible law that meets the reasonable expectations of New Zealanders.

   (b) Appropriately balance sustaining mana and property rights (including testamentary freedom) with obligations to family and whānau, in order to promote whanaungatanga and other positive outcomes for families, whānau and wider society.

   (c) Promote efficient estate administration and dispute resolution.[3]

6. It is submitted that these principles also are useful, relevant factors for this Court.

Summary of submissions

7. In my submission:

   (a) Any finding that the deceased was in an ongoing fiduciary relationship with his children and owed them a fiduciary duty to provide for them from his estate is conceptually unsound, and will be difficult to apply in future cases, making for uncertainty and spurious claims by disgruntled adult children, in circumstances where the deceased cannot defend themselves or tell their side of story. These concerns are not alleviated by the application of tikanga.

   (b) It is open to this Court to find that the deceased did not part with beneficial ownership of his home to the trustees of the

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2 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 145, pp 156 – 158; 247

3 Ibid at p 23

trust just 16 months before his death, the home remained part of his estate on his death, and the claimants' Family Protection Act claims can bite against that (or remit these issues to the High Court for determination, given that they were not pleaded).

(c) The finding at (b) can be confined to the facts of this case, allows the Court determining the FPA claim to balance whanaunataga, whakapapa, manaakitangi, mana, aroha, utu / human decency / moral obligations to the deceased's own children, with his testamentary freedom and wishes and the place of Phillipa's family in his life.

(d) The finding at (b) would meet the reasonable expectations of New Zealanders and promote efficient estate administration and dispute resolution. Morally, on the facts of this case, it is clear that both families should benefit from Robert's estate – it is a question of how much for each, and the relative split between the members of each family. There is scope here for this Court to develop the law in a way that is principled, reflects our system of precedent and case-by-case findings, yet is decent and respects principles of human decency / tikanga that should apply in a civilised society. If this Court promotes human decency /what is tika (as it did in *Preston v Preston)* [4] that will pave the way for sensible, decent settlements to be reached (as has increasingly happened post *Preston* in the nuptial trust / s182 Family Proceedings Act 1980 arena).

(e) The finding at (b) would respect our asset planning and property ownership regime. Trusts settled and dispositions of property made years earlier, not for deliberate avoidance purposes as here, would not be at risk (if the settlor has genuinely relinquished beneficial ownership) – there will always be cases at the margins, and that is something we

[4] *Preston v Preston* [2021] NZSC 154

factor into our assessment of trial risk and settlement parameters.

(f) I have also considered whether principles of tikanga could provide the claimants with an independent cause of action. I consider that is unnecessary given the remedy available at (b), the infancy of our tikanga jurisprudence, and the need for informed debate / consideration of all the implications of tikanga principles determining property rights of non-Maori families, which thus far have been determined and structured on advice based on centuries of common law (not including tikanga).

Structure of submissions

8. In the following sections of these submissions I consider:

(a) The fiduciary duty approach applied by the learned High Court Judge, and Collins J in the Court of Appeal, and what I consider to be the conceptual problems with that approach.

(b) An alternative route to relief for the claimants, that Robert did not part with beneficial ownership of his home and it remains part of his estate, including against the background of the Law Commission Review of succession law.

(c) The possibility of tikanga as an independent cause of action.

A fiduciary relationship, fiduciary duty and breach?

9. Unquestionably, hearts must go out to the appellants for the abuse inflicted on them by their father.

10. Understandably, the learned High Court Judge and Collins J in the Court of Appeal (at least in relation to Alice) wanted to provide a remedy for them. Broadly, they found that in the particular circumstances of the case:

(a) Alice and her father Robert were in a fiduciary relationship throughout Alice's life.

(b) As a consequence, he owed her fiduciary duties even in adulthood to provide for her economic security.

(c) He breached those duties by transferring his wealth to the trust.

11. In this section of my submissions I have approached my role as counsel to assist the Court by considering these matters:

(a) How does the reasoning of Gwyn and Collins JJ "fit" with the general approach in our law of obligations (including limitation) and the approach to establishing whether a fiduciary relationship exists, and the scope of any fiduciary duties arising out of that relationship.

(b) The impact a general finding that parents owe their adult children a duty to provide for their economic security would have on general property rights, and testamentary freedom, and relevant aspects of the Law Commission Succession Law review.

(c) The extent to which a finding that Robert owed Alice a duty to provide for her economic security can be confined to the particular (egregious) facts of this case. Or, would such a finding open the litigation floodgates?

(d) Whether there might be any relevant *tikanga* principles that apply.

General Approach to Obligations

12. Back to first principles, and the elements of our causes of action/ defences. To take four examples:

(a) Contract:

(i) Obligation

(ii) Breach

(iii) Loss / Causation

(iv) Defences, including limitation.

(b) Tort:

(i) Duty of care / Policy reasons for not imposing duty

(ii) Breach

(iii) Loss/ Causation / Foreseeability

(iv) Defences, including limitation / contributory negligence.

(c) Breach of Trust

(i) Trustee and beneficiary relationship

(ii) Duties of trustee to beneficiary

(iii) Breach

(iv) Remedy

(v) Defences- laches etc

(d) Unjust Enrichment:

(i) Enrichment

(ii) At plaintiff's expense

(iii) Unconscionable to allow defendant to retain.

(iv) Defences - laches

13. At the outset (in the first three causes of action), the relationship is defined. Next, the obligations or duties that flow from that relationship. The relationship and the associated duties are not

determined by the desire to find a remedy for the plaintiff. Arguably, that is the approach taken by Gwyn and Collins JJ.

14. The reasoning of Collins J, in relation to Alice, was:

    (a) In the particular circumstances of this case, Robert was in a fiduciary relationship with Alice, and owed fiduciary duties to Alice throughout her life.[5]

    (b) Robert's fiduciary duties including taking reasonable steps to provide a modicum of economic security for her by providing for Alice in his will, or leaving sufficient funds in his estate to enable her to make a claim against his estate.[6]

    (c) The disposition of Robert's assets to the trust was a breach of fiduciary duty.[7]

    (d) The transfer of Robert's assets to the trust can be rescinded.[8] They could therefore be the subject of a Family Protection Act claim by Alice (or any other eligible claimant).[9]

15. In my submission, fiduciary relationships should not be imposed to try and find a remedy for wrong the stronger party has effected on the more vulnerable party. They should be imposed / found to exist because of the characteristics of the relationship itself:

    (a) The vulnerable party is at the mercy of the more powerful (eg a beneficiary does not legally own the trust property – the trustee does, and has complete legal control over it).

    (b) The powerful party must act in the interests of the vulnerable party – not in their own self-interest – the duty of loyalty.

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[5] COA [102], [103] 101.0036
[6] COA [104]
[7] COA [104]
[8] COA [113]
[9] COA [116]

(c) The vulnerable party is entitled to expect the more powerful to act in the interests of the vulnerable and may sue if they do not do so.

16. None of these characteristics are indicia of the relationship between parents and adult children, generally. Once adults, children make their own way in the world. Parents can do whatever they like with their property, they can gamble it, spend it, or give it all away before they die.

17. If there is anything left that they own personally before they die, they have a moral obligation to provide for close family members, who qualify as Family Protection Act claimants.

18. Gwyn J found that the exercise of Robert's right to alienate his property was a discretion or power, which formed the basis of her finding of a fiduciary relationship. In my submission that is a wrong approach. The power being exercised must be a power that arises within the context of a fiduciary relationship. As mentioned, parents can do whatever they like with their wealth – they do not hold it for the benefit of their children – whether minors or adults. It is illogical then to say that the exercise of a personal power can found the basis of a fiduciary relationship, just because there is not enough left in the estate for a child claimant under the Family Protection Act (in order to find a remedy). Logically, that reasoning could extend to creditors and all other claimants so as to found proprietary claims against third parties where a defendant or deceased person's estate is bare.

Impacts of a finding that parents have a duty to provide for the economic wellbeing of their adult children

19. A finding that parents have a duty to provide for economic wellbeing of their adult children would curtail parental inter vivos financial freedom, and testamentary freedom. All property decisions made by a parent would be at risk of being rescinded whenever a child was successful in establishing egregious parental harm.

20. And this case illustrates the difficulty of deciding where the lines are to be drawn. Gwyn J found an ongoing fiduciary duty to all three children as adults, in the particular circumstances. It appears that Collins J would have found an ongoing fiduciary duty only to Alice.

21. In *Rule v Simpson*[10] the plaintiff Mervyn Rule was the illegitimate, adult child of George Gerbic (deceased) – born at a time when illegitimate children had no status or rights. Mr Gerbic had not had any relationship with Mervyn growing up, nor had he provided any financial support to him. Mr Gerbic's wealth was held in trusts, for the benefit of his two, younger legitimate adult children.

22. Mr Rule pleaded that Mr Gerbic owed him legal and fiduciary duties as his parent to care for and protect him and his economic interests and to recognise him as a member of his family from his wealth [at [63]]. Part of the background pleading was that Mervyn had been conceived as a result of a violent rape of his mother by Mr Gerbic. It was argued that this was relevant to the imposition of the alleged fiduciary duty.

23. The trustees of the Gerbic trusts sought to strike out this cause of action, noting that no case had found parent/ child fiduciary relationships, other than in the case of child sexual abuse cases.

24. Matthews AJ refused to strike out the cause of action, finding that the Court was not in a position to decide on a summary basis whether a fiduciary duty as alleged would be found to have existed.[11]

25. So it can be seen that if this Court holds that in particular circumstances, parents can owe fiduciary duties to their adult children to provide for their economic wellbeing:

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[10] *Rule v Simpson* [2017] NZHC 2154
[11] ibid at [74]

(a) They may well be allegations by plaintiffs that their "particular circumstances" qualify, which will have to be determined at trial.

(b) There is room for concern about fairness when a deceased parent is not alive to defend the allegations, particularly when they have never been put to them during their lifetime.

(c) There is room for concern about side-stepping of other available causes of action – assault, tort or criminal charges – and any applicable limitation periods.

Can this case be confined to its own particular facts?

26. On the other hand, one might say that this case, insofar as Alice is concerned is so egregious that a finding of a fiduciary relationship and breach of fiduciary duty can be confined to its facts. Of course she should have a remedy, given her tough life, as a direct result of the criminal harm her father subjected her to. Equity is there to provide a remedy in cases such as this.

27. In response one might say that any remedy must be based on a cause of action that accords with legal principle, not a desire for atonement or punishment (which as hard as they may have been for Alice and her siblings to pursue during Robert's lifetime, were avenues available to them).

28. There can be little doubt that if the Supreme Court finds a parental fiduciary duty to provide for adult children on death, even limited to "egregious" circumstances and resulting vulnerability, there will be attempts by many disgruntled adult children to say aspects of their upbringing (or in the case of Mr Rule, conception) were also egregious and they ought to have been provided for on death, to get around the deceased's wealth being held in trust (of which they are not a beneficiary, or where the trustees are not well-disposed to their claims / the quantum of them).

29. Attempts will be made to extend the duty by surviving de facto partners who have had the benefit of assistance from a family trust (of which they are not a named beneficiary) during the lifetime of their (now deceased) partner. They do not have a claim to vary the trust under s182 of the Family Proceedings Act 1980[12] because they were not married. Had they been, at least during their partner's lifetime, they would have been in the s182 nuptial settlement door.[13]

30. At present, if acting for the claimant de facto spouse, one of the few tools in our toolbox is a constructive trust claim. These are complicated, expensive and usually provide limited success – but they are often the best course to achieve some justice / a settlement. As in this case, they often require counsel who will work at low or no cost.[14]

31. If a fiduciary duty to provide for an adult child is found on the facts of this case, there will undoubtedly be claims by bereaved de facto partners that the deceased/ trustees of any trust which provided material benefits to the relationship owed a fiduciary duty to provide for the continued economic well-being of the (non (named) beneficiary) de facto spouse. This will place trustees in an uncertain and invidious position – their duty is to act in accordance with the terms of the trust deed, in the interests of the named beneficiaries / those within the stated classes of beneficiaries.

32. The appellants submit[15] that the litmus test for finding a fiduciary relationship should be "peculiar vulnerability." "It is that peculiar vulnerability that entitles the beneficiary to repose trust and confidence" / founds a "legitimate expectation that the fiduciary will not utilise their position in such a way which is adverse to their interests."

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12 eg *Preston v Preston* [2021] NZSC 154

13 The law is not yet clear whether a s182 claim might be able to be made following death of a spouse – traditionally it was thought not, but there might be a way – apply for a declaration of validity of marriage and obtain a gateway order (instead of a dissolution) under Part 4 (section 27) of the Act which provides the jurisdictional basis.

14 See eg *Beric v Eady* [2019] NZHC 3238

15 Appellant's submissions, para 46

33. If this was the case, it would lead to the odd result that those who never took on obligations to act in another's interests could find the exercise of their personal property rights saddled with fiduciary duties. It is submitted that the appellants' reliance on *Chirnside v Fay*[16] to assert that fiduciary obligations can be imposed without the obligor's agreement is misplaced. In that case, the parties were working on a property development together. It was found that they had proceeded to a point, pursuant to an agreement or understanding where they were depending on each other to make progress to a common objective to share the profits derived. (A bit like in a domestic relationship, sometimes co-habitating can lead to a finding of a de facto relationship – the parties are in a consensual relationship but the parameters / consequences of that are disputed).

34. The *Chirnside* situation is in stark contrast to imposition of fiduciary duties which would cut across parents' rights to deal with their property as they please, pursuant to unknown fiduciary obligations which may only be imposed years later, and cut across long-standing arrangements, with potential adverse effects on third parties who had no reason to doubt the validity of those arrangements.

35. In my submission, imposition of a fiduciary relationship here is not conceptually sound. Doing so will result in problems with its application and result in creative claims by disgruntled adult children and bereaved de facto partners. I note the submission on behalf of the appellants that the application of tikanga supports the finding of a fiduciary relationship and duties. In my submission, a tikanga overlay does not overcome the conceptual problems with imposition of a fiduciary relationship and duties here (and in future cases that such a finding will open the door to).

Alternative approach – trust assets form part of the estate?

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[16] *Chirnside v Fay* [2007] 1 NZLR 433

36. Is it open for the Court to extend the reach of the FPA to the Trust assets? Can that be done on a principled basis? What would the ramifications be more generally? Or, is the better approach, as tough as it would be on the claimants, to leave reform to Parliament? Or could tikanga operate as an independent cause of action to provide the claimants with a remedy, confined to the facts of this case?

37. Undoubtedly, one of the challenges of achieving “justice” in the estate and relationship property area is the use of “trusts”. Here, objectively assessed, on the basis of the trust deed, the settlor has parted with beneficial ownership of the trust assets.[17] The trustees can self-benefit (cl 11), and the settlor has the power to add and remove Primary Beneficiaries (cl 9). But he did not have the power to remove the Final Beneficiary, or appoint and remove trustees – that power rested with the trustees (cls 5 and 6).

38. Therefore, objectively assessed the Trust is valid – the trustees must act in the interests of all the beneficiaries, owe them fiduciary duties and can be held to account by them (cf the Vaughan Road trust deed in *Clayton v Clayton [Vaughan Road Property Trust]*[18] Here, the settlor could not remove all beneficiaries (because he does not have power to remove the Final Beneficiaries) and could not direct the trustees to then distribute all the trust capital to himself. So, on the face of the trust deed, the assets are trust assets not part of the settlor’s personal estate.

39. However, even where the trust deed, on the face of it, evinces a valid trust, the trust may be a sham. The bar to establish sham is very high. For a bilateral trust between a settlor and a separate trustee, there must be a common intention on the part of the settlor and trustees that the trust is a façade to hide an agreement that the trust is in fact the personally owned property of the settlor spouse / someone else.[19] Such claims are difficult and rarely successful at

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[17] CB 301.0054
[18] *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551
[19] *Official Assignee v Wilson* [2008] 3 NZLR 45

the substantive trial. A lawyer or accountant trustee will never agree under cross-examination that they were a party to a deception, presenting the façade that the assets were owned by the trustees, when the reality was that they were remained beneficially owned by the settlor.[20]

40. Is it time for this Court to consider that there might be some middle-ground approach, which reflects practical reality? Is there a need to reconsider the approach in *Official Assignee v Wilson*? There, the Court of Appeal was concerned to ensure that the OA not be able to place himself (for the benefit of creditors) in a better position than Mr Reynolds personally – it would be wrong if Mr Reynolds were able to say, "I have settled these assets on trust, but they are still mine." But, that is exactly how trusts are so frequently used in this country. The practical reality is that the settlor treats the trust assets as his/ her own, during their life or while all is happy in the marriage. The trustees go along with that approach, during that life phase. However, when the marriage ends, or the settlor dies, the approach changes to "No, those are not and never were the settlor's assets, we hold them for the benefit of the beneficiaries."

41. There were obiter indications of an approach that recognises practical reality in a 2017 decision of the England and Wales High Court in *JSC Mezhdurarodniy Promsyhlenniy Bank v Pugachev*[21] Although not necessary to the decision (because on the face of the trust deed, Mr Pugachev remained the beneficial owner of the assets), Birss J found that at all material times the settlor regarded all the assets in the trusts as belonging to him and intended to retain ultimate control. The point of the trusts was not to cede control of his assets to someone else, it was to hide his control of them. In other words, Mr Pugachev intended to use the trusts as a pretence to mislead other people by creating the appearance that the property did not belong to him, when really it did.[22] Had it been

[20] For a rare, successful claim see *Rosebud Corporate Trustee Ltd v Bublitz* [2014] NZHC 2018.
[21] *JSC Mezhdurarodniy Promsyhlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch)
[22] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) at [424].

necessary to make a finding of sham, the Court would have found sham on the basis that the trustees simply and recklessly went along with the settlor's shamming intention, and had no intention independent of Mr Pugachev.[23]

42. In *Prest v Petrodel Resources Limited*[24] the UK Supreme Court held that Mr Prest still beneficially owned real properties legally owned by seven companies within his empire. Thus, orders could be made directing the transfer of those properties to his ex-wife in their matrimonial property litigation. This decision was driven by the fact that the companies and the husband did not participate in the litigation, or provide disclosure. It does not grapple with how a finding of the husband retaining beneficial ownership sat with the fact that the properties were owned by the companies, and the Court had held that the corporate veil should *not* be pierced.

43. Here, there is little doubt that for all practical purposes, the Trust assets were part of Robert's estate while he was alive. He was a trustee and a beneficiary.[25] The evidence is clear that the purpose of the Trust and the transfer of his assets to it were to render FPA claims by Robert's children futile.[26]

44. Robert remained living in his home, notwithstanding his transfer of it to trustees in December 2014. The trustees accepted the transfer of the home to them on the basis that Robert could keep living there provided he paid the rates, insurance and carried out the maintenance.[27] From Robert's perspective, nothing changed.

45. It may be inferred (or this might need to be the subject of cross-examination) that if Robert had said to the trustees (one of whom was himself), "I want my house transferred back to me", or "I want

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[23] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) at [434], [437].
[24] *Prest v Petrodel Resources Limited* [2013] UKSC 34
[25] CB301.0054
[26] CB301.0033; CB301.0039
[27] CB301.0073; CB301.0072

you to sell this house so I can live in a rest home", they would have complied.

46. It is open for this Court to find that Robert had not parted with beneficial ownership of the trust assets, or at least the house. (The shares may be different, as they were transferred 3 months before Robert died, and may have been transferred with the knowledge he did not have long to live, and that he was giving away all ownership and control of the shares to the trustees). If that is the case and the house, in reality, remained part of his personal estate during life, they must have remained part of his estate on his death.

47. The counter-argument is that, while there was no practical change to Robert's living arrangements and obligations to pay rates and insurance and maintain his house, there was a legal change. The house was no longer Robert's to deal with as he pleased. It was owned by the trustees, who were constrained by fiduciary duties to act in the best interests of the beneficiaries as a whole.

48. Further, if the trust assets in this case are treated as part of Robert's estate, that will open the floodgates for all trust assets to be treated as personal assets for estate, relationship property and creditor claims. That will turn asset planning on which lawyers have advised and clients have structured their affairs on its head. Indeed, as the respondents point out, the New Zealand Law Society itself has published seven reasons for having a trust, one of which is to prevent Family Protection Act claims.[28] It would mean the rights and interests of legitimate beneficiaries are trampled over.

49. In response, if the finding that Robert had not parted with beneficial ownership is confined to the facts of this case (or sent back to the High Court for determination) the alarm bells need not ring so loud. There are four points in particular.

[28] CB 701.0268

50. First, as set out above, the very purpose of the trust and the transfer of Robert's assets to it was to avoid FPA claims by his children. The trust was settled and the house transferred within 16 months of his death. For all practical purposes nothing changed for Robert – he was living in the same house, paying the same bills and would have continued to call it "my house". Similarly, the other "trustee" no doubt regarded it as Robert's house during his lifetime.

51. Secondly, the position will be very different in respect of trusts which were settled years earlier, and as part of a coherent, structured asset plan, that goes beyond a purpose of depriving claimants of what would otherwise be their legal claims or entitlements. Granted, where the purpose is avoidance, such a finding may have more general application to other estate cases, and to relationship property cases.

52. But the outcome and any avoidance/ no transfer of beneficial ownership finding will depend on the particular facts of each case. If the settlor genuinely intends to part with beneficial ownership of his/ her assets, and understands that is the effect of their transfer to the trust, and the trustees accept the assets on that basis (rather than going along recklessly with the intent of the settlor), the trust and the property transfer will be effective.

53. Thirdly, a finding in this case that avoidance trusts (or asset transfers) – at least to avoid FPA claims – are at risk, unless beneficial ownership is in fact divested, will encourage transparency, human decency and "tika". That will a good thing in the development of our law. (Similarly, in the relationship property context, if people want to use trusts (particularly those used for the benefit of the relationship) to avoid PRA claims, they should be upfront about that and address it in a negotiated section 21 agreement.)

54. Fourthly, a finding here that the avoidance trusts (or asset transfers) mean the trust assets form part of the estate reflects the practical

realities on the present facts (subject to consideration of whether the co-trustee had any intention independent of Robert). It avoids contortions trying to find a fiduciary relationship, fiduciary duty and breach where, as a matter of principle, they are hard to find. It avoids the precedent effect and conceptual problems of a finding that parents have an ongoing duty to provide economically for their vulnerable adult children where they created the vulnerability – and how does the Court determine that allegation in less obvious cases where the deceased is not around to tell their side of the story? It avoids the problems of remedy and imposition of a constructive trust contrary to principles of asset ownership and autonomy. It enables the Judge deciding the FPA claim to strike the appropriate balance between the deceased's testamentary wishes, the needs and interests of his children, and Phillipa's family, who were part of his life. It will encourage settlement of these sorts of claims, where clearly the claimants and Phillipa's family should all receive benefit from Robert's wealth.

55. It provides an outcome that respects the deceased's testamentary freedom (subject to the constraints of the FPA), and his wish to provide for Phillipa's family. Most New Zealanders would consider it fair that both families benefit.

Tikanga principles

56. Such an outcome is also consistent with tikanga principles. They are helpfully set out in the Law Commission Review of Succession Law:[29]

(a) Tika – "right and proper, true, honest, just, personally and culturally correct, upright".

(b) Whanaunatanga – relationships among people and with the natural and spiritual worlds are fundamental to communal well-being. The relationships carry rights and responsibilities.

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[29] Above, fn 2 pp 53 – 64, paras 2.18 – 2.43

(c) Whakapapa – connections to whānau, tribal groups, whenua, tupuna and atua.

(d) Mana – integrity of a person or object.

(e) Tapu and noa - tapu is sacredness, noa, the ordinary, everyday human activity, or state of balance following an incursion on tapu.

(f) Utu – compensation, revenge or reciprocity – a means of seeking, maintaining and restoring harmony or ea (fulfilment, resolution).

(g) Kaitiakitanga – obligation on those who have mana to act unselfishly, with right mind and heart and proper procedure.

(h) Aroha and manaakitanga – compassion, love, concern, sorrow and care for a person's mana.

57. Tikanga has been and will continue to be recognised in the development of the common law of Aotearoa / New Zealand in cases where it is relevant.[30] It is tika that a parent provides for his children on death, where they have been grievously damaged by that parent during his life, before providing for others. Such an obligation is consistent with every tikanga principle set out above.

Tikanga as an independent cause of action?

58. I consider that the imposition of tikanga as an independent cause of action is unnecessary in this case, particularly given the other findings available to the Court to achieve justice and balance the interests of all involved.

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[30] *Ellis v R* [2022] NZSC 114

59. This is particularly so given this is a non-Māori estate and the infancy or our tikanga jurisprudence.

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Vanessa Bruton KC
Counsel to Assist

Monday, 3 April 2023

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC106/2022

BETWEEN	**A, B and C**
	Applicants
AND	**D and E LIMITED** a duly incorporated company as trustees of the Z Trust
	Respondents

CERTIFICATION AS TO PUBLICATION (COUNSEL TO ASSIST SUBMISSIONS)

Dated: 3 April 2023

COUNSEL
Vanessa Bruton KC
'Sans Souci'
14 King Edward Parade
Devonport
Ph: 021 887 587
Email: vanessa.bruton@trust-litigation.co.nz

CERTIFICATION AS TO PUBLICATION

I CERTIFY that the accompanying submissions are suitable for publication and do not contain any information that is suppressed.

Dated this 3rd day of April 2023

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Vanessa Bruton KC
Counsel to assist