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

**SC106/2022**

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| **BETWEEN** | **A, B** and **C** |
| | Appellants |
| **AND** | **D** and **E LIMITED** a duly incorporated company as Trustees of the **Z TRUST** |
| | Respondents |

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# SUBMISSIONS OF RESPONDENTS IN OPPOSITION TO APPEAL

DATED this 29th day of March 2023

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**MAY IT PLEASE THE COURT:**

**Summary of the respondents' argument**

1. The High Court determined the Appellants' father sexually and physically abused the Appellants when they were minors and in their father's care.[1] The Appellants maintain that a fiduciary relationship (**FR**) subsisted while in their father's care and that it continued throughout his lifetime. The High Court agreed, finding the father breached his fiduciary duties (**FD**) when he transferred his assets to a trust (after the Appellants had become adults).

2. The majority of the Court of Appeal disagreed.[2] The Appellants appeal that decision.

3. The Appellants rely, firstly, on the breach of FD while they were in their father's care. Secondly, they make the unique assertion that their father owed them continuing FDs (after they were no longer in their father's care and after they became adults). Namely:

   a. to protect their economic interests;

   b. to recognise them as members of his family and to provide for them from his wealth; and

   c. not to alienate property to a trust with the object of favouring other persons and to avoid the operation of the Family Protection Act 1955.

4. The Respondents accept there was a FR between the Appellants and their father while they were minors and in his care. Further, that the findings as to the sexual, physical and psychological abuse cannot be challenged. However, the Respondents' position is:

   a. The FR ended when:

      i. the father left the family home and was no longer directly responsible for the Appellants' care and welfare; and

[1] *A, B and C v D and E Ltd as Trustees of the Z Trust* [2021] NZHC 2997 (**HC decision**).
[2] *D and E Ltd as Trustees of the Z Trust v A, B and C* [2022] NZCA 430 (**CA decision**).

ii. the Appellants became adults.[3]

b. During the 30 plus years of estrangement between the Appellants and their father, the Appellants had the opportunity to bring an action for breach of FD, but they elected not to.[4] Accordingly, any claim they may have had is barred by the doctrine of laches or under the Limitation Act 2010,[5] and/or Limitation Act 1950.[6]

c. The FDs advocated for by the Appellants are entirely novel in the law of fiduciary obligations.

5. The Respondents agree with Gwyn J that a relationship between a parent and child is inherently fiduciary, but that this cannot be so once the child becomes an adult.[7]

**The Law**

6. *Chirnside v Fay*[8] is the leading authority on FRs and FDs in Aotearoa.[9] It is submitted the following principles can be extracted:

a. There are two situations where a relationship gives rise to FDs.

i. Inherently fiduciary relationships. These include solicitor and client, trustee and beneficiary, principal and agent, and doctor and patient.[10] Here, not every breach by the fiduciary is a breach of a FD.[11]

ii. Non-inherent fiduciary relationships that require examination of the particular aspects to ascertain whether it justifies being so classified.[12]

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[3] There is no statutory obligation to support a child beyond the age of 18 years. See Child Support Act 1991, s 5.
[4] HC decision, above n 1, at [35] **CB101.0095**.
[5] Limitation Act 2010, s 9.
[6] Limitation Act 1950, s 4(9).
[7] HC decision, above n 1, at [133]. **CB101.0126**.
[8] *Chirnside v Fay* [2006] NZSC 68; [2007] 1 NZLR 433. **CB601.0041**.
[9] The Supreme Court considered FRs in *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26; [2007] 3 NZLR 169; *Maruha Corp v Amaltal Corp Ltd* [2007] NZSC 40; [2007] 3 NZLR 192 and *Paki v A-G* [2014] NZSC 118; [2015] 1 NZLR 67. However, no new principles were espoused to undermine or affect the judgment in *Chirnside*.
[10] *Chirnside v Fay,* above n 8, at [73]. **CB601.0062.** A point of distinction arises as between Australian and Canadian jurisprudence. In Australian law, the High Court disavowed an inherently FR between doctor and patient in *Breen v Williams* [1996] HCA 57, (1996) CLR 71. **CB701.0055.** In Canadian Law, the Supreme Court came to the opposite conclusion in *McInerney v MacDonald* [1992] 2 SCR 138; (1992) 93 DLR (4th) 415 **CB701.0518**.
[11] **CB601.0049** at [15], per Elias CJ and **CB601.0062** at [76] per Tipping J.
[12] **CB601.0062** at [75].

b. There was no single formula or test that has received universal acceptance in classifying non inherent FRs.[13]

c. The distinguishing obligation of the fiduciary is loyalty.[14] Loyalty encapsulates a circumstance where one party is in a relationship with another which "gives rise to a legitimate expectation, recognised by equity, that the fiduciary will not utilise their position in a way adverse to the interests of the principal."[15]

d. A fiduciary is someone who has undertaken to act for or on behalf of another.[16] That undertaking may be express or implied[17] – equity will impose the "obligation to eschew self-interest where the circumstances require".[18]

e. Elements of reliance, confidence or trust often arise out of "an imbalance in strength or vulnerability in relation to the exercise of rights, powers or the use of information affecting" the principal's interests.[19]

f. FRs are marked by the entitlement, a legitimate expectation, of one party to place trust and confidence in the other – to rely on the other party not to act in a way that is contrary to the first party's interests.[20] One party is entitled to, and does, repose trust and confidence in the other.[21]

**FRs in the context of assault – Court of Appeal**

7. The Court of Appeal decisions in *S v G*,[22] *M v H*,[23] *S v Attorney-General*[24] and *Jay v Jay*[25] are relevant.

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[13] **CB601.0062** at [75].
[14] **CB601.0049** at [15].
[15] **CB601.0063** at [78] and [79], quoting *Arklow Investments Ltd v MacLean* [2000] 2 NZLR 1 at 4 (PC).
[16] **CB601.0063** at [79].
[17] **CB601.0065** at [89], Referring to *K M v H M* (1992) 96 DLR (4th) 289 at 324 per La Forest J. See also, *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC) at 166 per Lord Wilberforce. **CB701.1073**. A FR exists has different applications in different contexts. The precise scope must be moulded to the circumstances (at line 20). A consideration is required of the nature of the relationship (from line 40).
[18] **CB601.0063** at [82], **CB601.0064** at [85] and [87].
[19] **CB601.0063** at [83], quoting *Liggett v Kensington* [1995] 1 NZLR 257 (CA) at 281-282.
[20] **CB601.0063** at [80].
[21] **CB601.0063** at [85].
[22] *S v G* [1995] 3 NZLR 681 (CA). **CB601.0703**.
[23] *M v H* (1999) 18 FRNZ 359 (CA). **CB701.0555**.
[24] *S v Attorney-General* [2003] 3 NZLR 450 (CA). **CB701.0938**.
[25] *Jay v Jay* [2015] NZAR 861 (CA). **CB701.0358**.

8. ***S v G*** involved an alleged breach of FD (sexual assault) by a doctor who occasionally treated S.[26] The offending occurred within a "free-sex" community. On appeal the focus was time limitation. The claim was held to be out-of-time. Relevantly, the Court:

   a. Referred to an extract from *Henderson v Merrett Syndicates Ltd* where the House of Lords noted the duty imposed within a FR depends on the circumstances and not the status or description of the fiduciary.[27]

   b. Concluded the particulars of the assault were identical to the alleged breaches of FD.[28] His Honour stated where the pleaded claims are really alternatives in relation to essentially the same conduct – equity follows the law.[29]

   c. The Court held the leader of the community and the mother of S were undoubted fiduciaries.[30]

9. ***M v H*** involved sexual abuse of a child by a stepfather.[31] The appeal focused on the limitation period. Gault J, for the majority, held where separate causes of action allege the same conduct, equity follows the law.[32]. To apply the same limitation period "by analogy" was consistent with the approach adopted in England.[33] The approach in *S v G* was affirmed by the majority.[34]

10. ***S v Attorney-General*** involved child sex abuse.[35] It was claimed the Superintendent of Child Welfare was in a FR with S when placing S into a foster home where he was subsequently abused. Blanchard J for the court held that foster parents were agents of the Department of Social Welfare, accordingly the Department was vicariously liable.[36] Following a brief analysis

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[26] *S v G,* above n 22. **CB601.0703**.
[27] **CB601.0710** at line 40, citing *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, 543 (HL).
[28] **CB601.0707** at line 46.
[29] **CB601.0711** at line 15. See from **CB601.0710** line 29 for the full analysis of the FD.
[30] **CB601.0713** at line 7.
[31] *M v H,* above n 23.
[32] **CB701.565** at [46], referring to conduct of assault and breach of FD. But note s 180 of the Senior Courts Act 2016 states: "If there is any conflict or variance between the rules of equity and the rules of the common law in relation to the same matter, the rules of equity prevail."
[33] **CB701.565** at [47].
[34] **CB701.0564** at [39] and **CB701.0565** at [46] per Gault J, and **CB701.0566** at [52] per Henry J. See **CB701.0579** at [132], where Thomas J accepted that the Limitation Act applied, but disagreeing about when time should begin to run.
[35] *S v Attorney-General*, above n 24.
[36] **CB701.0953** at [70] and **CB701.0957** at [101].

of FRs,[37] the Court stated it was "content" to proceed on the basis that a FR subsisted.[38] Ultimately, the Court found no duty had been breached in negligence. If followed, no breach was possible in the FR.

11. ***Jay v Jay*** involved sexual assault/battery of a child by a "close family member".[39] The parties lived in separate houses, but on occasions the appellant visited the child's home. Battery was upheld on appeal and Stevens J offered obiter observations on the FR claim.[40] The Court held the relationship was not inherently fiduciary.[41]

12. *Chirnside* was recognised as the leading authority[42]. The Court noted the Canadian approach to assessing a FR in unorthodox contexts broadly reflects *Chirnside* – and the existence of vulnerability by the beneficiary is relevant, but more important was whether the vulnerability arose from the relationship.[43] The Court opined that in cases where such duties have been found to exist, there had been a relationship directly analogous to the inherently fiduciary role of guardian or parent.[44]

13. The Court held the intermittent nature of the contact did not establish sufficient control or influence.[45] A certain degree of trust was placed in the appellant, but trust arising from shared bonds does not establish a FD – that would be an "unwarranted expansion of the concept of [FR]".[46] A familial relationship could give rise to fiduciary obligations depending on the circumstances.[47]

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[37] **CB701.0953** at [75].
[38] **CB701.0954** at [77].
[39] *Jay v Jay,* above n 25.
[40] The analysis of FR starts at **CB701.0376** at [61].
[41] **CB701.0377** at [64] and **CB701.0378** at [67].
[42] **CB701.0377** at [64].
[43] **CB701.0377** at [66].
[44] **CB701.0378** at [67].
[45] **CB701.0378** at [67].
[46] **CB701.0378** at [69].
[47] **CB701.0378** at [70], referring to *B v R* (1996) 10 PRNZ 73 (HC).

**FRs in the context of assault – High Court**

14. ***L v Robinson*** involved sexual abuse by a physiotherapist.[48] Chisholm J noted the disagreement about the correct categorisation of that type of relationship[49] in the Canadian decisions *Norberg v Wynrib*[50] and *K M v H M*.[51] His Honour observed it is the obligations and duty that makes the obligor a fiduciary.[52] Having already awarded compensation in negligence, His Honour concluded it was unnecessary to determine whether a FR subsisted or whether FDs were breached.[53]

15. ***H v R*** involved sexual abuse of a child.[54] The parties were unrelated but went to separate nearby holiday homes during school holidays. Hammond J stated he did not need to consider the FD claim having found for the plaintiff in tort.[55] However, His Honour referred to the *K M v H M,*[56] upholding a FR between parent and child, and stated the moral force of the decision was undeniable.[57] His Honour described the relationship between parent and child as an "obvious category" of a FR.[58] The judgment cautioned that intermittent relationships would face problems and could not apply without watering down the FR concept.[59] His Honour stated "… *principle is principle: if the claims can be properly made, then the Courts must properly respond, regardless of burden.*"[60]

**The Canadian position on FRs**

16. The minority decision in the Supreme Court of Canada in *Frame v Smith* has become an important guide for ascertaining the existence of non-inherent

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[48] *L v Robinson* [2000] 4 NZLR 499 (HC).
[49] **CB701.0428** at [27].
[50] *Norberg v Wynrib* [1992] 2 SCR 226.
[51] *K M v H M* [1992] 3 SCR 6; (1992) 96 DLR (4th) 289.
[52] **CB701.0429** at [30], referring to *Arklow Investments Ltd v McLean*, above n 15, at 6.
[53] **CB701.0430** at [31].
[54] *H v R* [1996] 1 NZLR 299 (HC). **CB601.0381**.
[55] But see *Mouat v Boyce* CA265/91, 11 March 1992; [1992] 2 NZLR 559 at 566 (CA) **CB701.0545**. where Cooke P stated that for breach of these duties common law and equity are mingled.
[56] *K M v H M*, above n 51.
[57] **CB601.0387** at 306, line 51.
[58] **CB601.0387** at 306, line 15.
[59] **CB601.0308** at 307 line 15.
[60] **CB601.0308** at 307, line 44. This sentiment is echoed by McLachlin J in *Norberg v Wynrib*, above n 50, at 291 at e-j. **CB701.0657**.

FRs.[61] The facts involved the denial of access to a child by a custodial parent to the non-custodial parent. The non-custodial parent contended a FR subsisted between the separated parents and the denial of access constituted a breach of FD. The majority of the Court[62] disposed of the case on the basis there was legislation available to address the issues raised; namely, by obtaining of orders for custody and access.[63]

17. In the dissenting judgment, Wilson J held a FR arose.[64] Despite the reluctance throughout the common law jurisdictions to affirm the existence of and give content to a general fiduciary principle,[65] the following self-described "rough and ready guide" was detailed:[66]

> *Relationships in which a fiduciary obligation seem to possess three general characteristics:*
> *(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.*
> *(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.*

18. The Judge applied these principles and determined the custodial parent had been placed in a position of power and authority over the child by the Court's custody order. That included the power to destroy the relationship between the child and non-custodial parent through improper use of the power. Her Honour considered the non-custodial parent was vulnerable because there was little they could do by way of redress. The inclusion of "practical interests" was intentional.[67]

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[61] *Frame v Smith* [1987] 2 SCR 99. See CA decision, above n 2. It is noted that *Frame v Smith* is referred to with approval by Collins J at **CB101.0029** at [76] and by Kós P **CB101.0055** at [154]. The judgment is also referenced by Gilbert J at **CB101.0043** at [130].
[62] A majority of 5 out of 6 judges.
[63] **CB601.0372** at 145 line (f) and **CB601.0374** at 147 line (j): Wilson J by contrast discusses how a FR/FD does not damage to the statutory framework.
[64] Her Honour's analysis begins at **CB601.0361** at 134, line e.
[65] See *Chirnside v Fay*, above n 8. **CB601.0362** at 135**.** This point is adverted to by Tipping J.
[66] *Frame v Smith,* above n 61, **CB601.0362** at 135 line (i). Her Honour refers with approval to the formulations adopted by the Australian High Court in *Hospital Products Ltd v United States Surgical Corp* (1984) 55 ALR 417 at 136 line (c).
[67] **CB601.0363** at 136 line (g).

19. Her Honour noted the family context involved non-economic interests, but stated:[68]

> *…I believe that this distinction should not be determinative… To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, to be arbitrary in the extreme.*

20. The remedy was compensation.[69] A constructive trust, or account of profits had no application.

21. Sopinka J in *LAC Minerals v International Corona Resources* referred to Wilson J's formulation with approval.[70] La Forest J referred to the formulation as "helpful".[71]

22. Sopinka J cautioned "*it is possible for a [FR] to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a [FR]*".[72] His Honour considered dependency or vulnerability to be an essential additional feature.[73]

23. La Forest J dismissed as unprincipled the approach whereby a FR is found simply to provide a basis to give relief when any other principled basis was lacking.[74] His Honour summarised the position:: "… *use of the term fiduciary, used as a conclusion to justify a result, reads equity backwards*".[75]

24. *Norberg v Wynrib* involved a doctor who prescribed drugs to a patient in exchange for sexual favours.[76] The majority found there was a breach of

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[68] **CB601.0369** at 142 line (f). Note at **CB601.0370** at 143 line (a) the expressed advantage of a FR and FD within the family context.
[69] **CB601.0375** at 148 line (j).
[70] *LAC Minerals v International Corona Resources* [1989] 2 SCR 574 at 599. **CB601.0527**.
[71] **CB601.0574.**
[72] **CB601.0527**.
[73] **CB601.0527.** His Honour refers with approval to Dawson J at of the Australian High Court in *Hospital Products Ltd v United States Surgical Corp* (1984) 55 ALR 417 at 493-94.
[74] **CB601.0577** and **CB601.0581**.
[75] **CB601.0580** at line g.
[76] *Norberg v Wynrib,* above n 50. **CB701.0592.**

contract and an assault. But McLachlin J stated only the principles of FRs encompassed the relationship in its totality,[77] stating:[78]

"*I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the [*FR*] – trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests*".

25. Her Honour referred to the "all-encompassing and pervasive" relationship between parent and child as the archetypal status relationship as compared with contract relationships such as lawyer and client or doctor and patient.[79] Her Honour noted the consent of a child to his or her parents acting as a fiduciary is not required.[80]

26. McLachlin J stated FDs:[81]

"*… are principles of general application, translatable to different situations and the protection of different interests than those hitherto recognized. They are capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests…*"

**FRs in the context of sexual assault in Canada**

27. *K M v H M* involved child sexual assault.[82] La Forest J stated:[83]

"*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 from that relationship.*"

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[77] **CB701.0635** at 269, line b.
[78] **CB701.0638** at 272, line a. McLachlin J refers to the criteria for the imposition of a FD in *Frame v Smith,* above n 61, *LAC Minerals*, above n 70, and *Guerin v The Queen* [1984] 2 SCR 335 as a good starting point for defining the general principles.
[79] **CB701.0638** at 727 line j.
[80] **CB701.0639** at 723 line b. McLachlin J suggests a fiduciary relationship avoids forcing the relationship into "ill-fitting molds of contract or tort" **CB701.0657** at 291 line a. It allows the wrong to be fully comprehended and compensated.
[81] **CB701.0655** at line (e).
[82] *K M v H M*, above n 51. **CB601.0622**.
[83] **CB601.0677.**

28. His Honour noted parents exercise great power over their children's lives and make daily decisions that affect their welfare. The child is at the mercy of the parent.[84] His Honour stated the non-economic interests of an incest victim are particularly susceptible to protection from the law of equity.[85] Further, the inherent purpose of the family relationship imposes certain obligations on a parent to act in the child's best interests.[86] His Honour noted fiduciary obligations had not been raised in previous incest cases as an independent head of liability. But this was clearly an option subject to statutory and other limitation defences.[87]

29. In *E D G v Hammer* McLachlin CJ stated:[88]

> "*Fiduciary obligations are not obligations to guarantee a certain outcome for a vulnerable party, regardless of fault… Rather, they hold the fiduciary to a certain type of conduct. … A fiduciary "does not breach his or her duties by simply failing to obtain the best result for the beneficiary.*"

**Australian position on FRs**

30. In *Breen v Williams* at issue was whether a doctor owed a patient a FD to disclose medical records.[89] The High Court of Australia unanimously rejected such a duty. Dawson and Toohey JJ noted while duties of a fiduciary nature may be imposed on a doctor they are confined and do not cover the entire relationship.[90] The duties were described as arising in contract and tort. Their Honour's stated the law of FRs is unconcerned about negligence or breach of contract.[91] They noted Canadian authority viewed FRs as imposing obligations which go beyond the exaction of loyalty so as to become an independent source of obligations creating new forms of civil wrong. Their Honours stated this was achieved by assertion rather than analysis and, while it may effectuate

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[84] **CB601.0680** at line (a).
[85] **CB601.0680** at line (i).
[86] **CB601.0681** at line (h).
[87] **CB601.0684** at line (j).
[88] *E D G v Hammer* [2003] 2 SCR 459 at 471. **CB601.1040**.
[89] *Breen v Williams* [1996] HCA 57; (1996) CLR 71. **CB701.0055**.
[90] **CB701.0076**.
[91] **CB701.0068**.

a preference for a particular result, there is no principle or authority for it in Australia.[92]

31. Gaudron and McHugh JJ noted FDs rest not on morality or conscience but on the premise that "no man can serve two masters".[93] Equity solves the problem by insisting that fiduciaries give undivided loyalty to persons whom they serve.[94] The Court noted the law of FDs between Australia and Canada was "very different".[95] One difference being that Canadian cases "*reveal a tendency to view fiduciary obligations as both proscriptive and prescriptive. However Australian courts only recognise proscriptive fiduciary duties"* and not a duty to act in another's best interests.[96]

32. Gummow J held a FR and accompanying FD arises where one person is under an obligation to act in the interests of another, but that "*it would be to stand established principle on its head to reason that because equity considers [a person] to be a fiduciary, therefore [they have] a legal obligation to act in the best interests of [the other party] so a failure to fulfil that positive obligation represents a breach of [FD]"*.[97]

**FRs in the context of sexual assault in Australia**

33. *Paramasivam v Flynn* involved an appeal to the Federal Court of Australia regarding sexual assault of a child.[98] The Full Court acknowledged the relationship of guardian and ward could give rise to FDs but the instant claim was novel under Australian law because the equitable doctrines protected only economic interests.[99]

34. The Court acknowledged the conduct could be described in terms of an abuse of trust or confidence or the taking on of a representative role and allowing personal interest (self-gratification) to displace the duty to the appellant's interests, but it should not therefore be assumed that a breach of FD could be

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[92] **CB701.0076**.
[93] **CB701.0068**.
[94] **CB701.0076**.
[95] **CB701.0079**.
[96] **CB701.0079** (footnote omitted).
[97] **CB701.0095**.
[98] *Paramasivam v Flynn* [1998] 90 FCR 489 (ACT). The Court's analysis of the FR begins at **CB701.1060** at D.
[99] **CB701.1060**. For example, not allowing conflicts of interest or to make unauthorised profits within the relationship.

established.[100] The Court held the conduct in question was already within the purview of tort, accordingly there was no obvious advantage or need for equity to enter upon it.[101]

35. The Court noted *M K v M H*,[102] but did not see that judgment as justifying the application of equity.[103] The Court referred to *Breen,*[104] and the observation that there was no room for FRs when contractual and tortious obligations governed the duties of a doctor.[105] These considerations led the Court "firmly to the conclusion" that a fiduciary claim would be "most unlikely" to succeed in the Australian courts.[106]

36. In *Pilmer v Duke Group Ltd* involved a claimed FR in a commercial context.[107] There, a FD duty was rejected. However, it is submitted the analysis of FRs and the explanation of Kirby J's reasoning in *Breen* is informative.[108] His Honour refers to the established FRs and noted they differ between jurisdictions depending on different social circumstances; further noting in Canada, medical practitioner-patient and parent-child had been added.[109] His Honour considered *Breen* illustrated a disinclination in Australia to expand fiduciary obligations beyond proprietary interests "into the more nebulous field of personal rights", but conceded that FDs had not historically been limited to purely property interests.[110]

37. The Court affirmed *Breen* in terms of the principle that fiduciary obligations are proscriptive not prescriptive, but His Honour noted how the dichotomy was questionable in the sense that omissions quite frequently shade into commissions.[111]

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[100] **CB701.1062** at D-E.
[101] **CB701.1062** at F.
[102] *M K v M H* [1992] 3 RCS 6. **CB601.0622**.
[103] **CB701.1119** at B-C.
[104] *Breen v Williams,* above n 89.
[105] **CB701.1120** at B.
[106] **CB701.1120** at G. Affirmed by the Full Court of the Federal Court in *Cubillo v Commonwealth* [2001] 112 FCR 455 at 577. **CB701.0226**.
[107] *Pilmer v Duke Group Ltd* [2001] 207 CLR 165. **CB701.07786**.
[108] **CB701.0831** at 116 onwards.
[109] **CB701.0832** at 121.
[110] **CB701.0834** at 126.
[111] **CB701.0834** at127-8.

38. *Pope v Madsen* involved sexual assault by a father.[112] The Queensland Court of Appeal referred to *Paramasivam,*[113] and noted a trend in Australian authorities against extending the law relating to fiduciaries to protect other than economic interests; namely, where those interests involved the relationship of parent or child.[114] The Court held the principles from *Breen, Paranasivam and Cubillo* led it to the "definitive" conclusion that the state of Australian law was that the was no cause of action available to impose a FD to vindicate a non-economic interests which are already covered by the law of torts.[115]

**Proscriptive v Prescriptive**

39. The view that fiduciary duties are only proscriptive duties seems to have its source in Professor Paul Finn's 1989 paper,[116] "The Fiduciary Principle" which was given the High Court's imprimatur in *Breen.*[117]

40. "Proscriptive" may be taken as the forbidding or restricting of something; that is, not to act in conflict, not to make a secret profit. Whereas the antonym "prescriptive" relates to the positive imposition or enforcement of a rule or method; that is, to act in a beneficiary's best interests. The difficulty with such a dichotomy is a duty may be cast in either proscriptive or prescriptive terms.

41. Professor Finn uses prescriptive terminology when he repeatedly states that a fiduciary's office:[118]

> *…exists for the benefit of its beneficiaries, and given that he is obliged to act in their interests, he is first and foremost debarred from exercising his powers in his own interests or the interests of non-beneficiaries.*

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[112] *Pope v Madsen* [2015] QCA 36. **CB701.0899**.
[113] **CB701.0905** at [25], citing *Paramasivam v Flynn*, above n 98.
[114] **CB701.0906** at [28].
[115] **CB701.0907** at [33].
[116] Paul Finn "The Fiduciary Principle" in Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at 695 to 697. **CB701.0289**.
[117] *Breen v Williams,* above n 89, per Gaudron and McHugh JJ. **CB701.0079**. See also *Pilmer v Duke*, above n 107, at 74. **CB701.0819**.
[118] Paul Finn "The Requirements of the Fiduciary Obligation in Exercising a Discretion" in Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at **CB701.0278** at [93]. See also "Conflict of Duty and Interest" at **CB701.0280** at [165] and "A fiduciary" at **CB701.0283** at 467 a fiduciary is "… someone who undertakes to act for or on behalf of another …".

42. Lionel Smith in "Prescriptive Fiduciary Duties" states:[119]

> *… it is a little odd that we would define or describe a FR as one in which one person is obliged — that must mean legally obliged — to act in another's interests, and then turn around and say, however, that fiduciary obligations do not involve any legal obligations to act at all, but only proscriptive obligations?*

43. Here, the Court of Appeal held the relevant FD was proscriptive; namely, a duty not to "physically or sexually abuse" the children.[120] Collins J cast the duty as a prescriptive; namely, to take "reasonable steps to provide a modicum of economic security for [Alice].[121]

44. It is submitted the proscriptive versus prescriptive dichotomy ought not to be adopted. Rather *Chirnside* ought to be adhered to, so the duty is cast in such terms as equity requires to restrain the fiduciary in the circumstances that subsist.

**Economic v non-economic interests**

45. The Australian Courts in *Paramasivam v Flynn*, *Pilmer v Duke Group Ltd* and *Pope v Madsen* rejected protection of non-economic interests by application of FDs. Professor Finn did not consider FR principles in the family context stating:[122]

> *… in this survey of the law the writer all but totally disregarded the fiduciary aspects of the family relationship, and of guardianship. These branches of the law have moved largely out of the realms of the rules of common law and Equity, and are increasingly being regulated by legislation.*

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[119] Lionel Smith "Prescriptive Fiduciary duties" (2018) 37(2) QLJ 261 at 274. **CB701.407**.
[120] CA decision, above n 2, **CB101.0044** at [136] per Gilbert J and **CB101.0049** at [152] per Kós P. Finn, at least in a commercial setting, recognised a duty not to harm the very business a person was expected to manage and control: Paul Finn "Harming an Employer's Business" in Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at **CB701.0285** at 612.
[121] **CB101.0036 a**t [104].
[122] Paul Finn "Fiduciaries" in Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at [9]. **CB701.0278**. See criticism by Richard Joyce "Fiduciary and Non-Economic Interests" (2002) (28(2) Mon LR 239 at 247-8. **CB701.0917**.

**The Aotearoa/New Zealand position**

46. This jurisdiction has followed the course charted by Canadian case law protecting non-monetary interests. Counsel notes distress and anxiety that affects one's ability to work is an economic consequence. Where non-economic consequences arise, it is settled law that our courts may award damages for claims brought in tort.

47. The focus of FRs is loyalty, trust and selflessness. It is submitted the question of whether economic interests may be protected is unrelated and seems to be directed at restricting the development of FRs. This approach lacks principled justification. Nathalie Des Rosiers states:[123]

*For a child, there may be a difference between being molested by a stranger and being abused at the hands of one's parent or guardian… It is often the injury to that relationship of dependency that is particularly damaging to the child.*

48. The theme that a tort can simultaneously be a breach of FD is repeated by Robert Flannigan who states:[124]

*A sexual assault by a fiduciary, for example, might only be a criminal (or tortious) breach. It will amount to a concurrent fiduciary breach only where the fiduciary relationship is implicated in the commission of the assault. … Fiduciary regulation is concerned with only one failing – succumbing to the self-regarding impulse while acting in the interests of another.*

49. The Respondents' concession a FD subsisted between the father and the Appellants as infants is consistent with existing Aotearoa/New Zealand authorities.[125] The Respondents dispute the FR subsisted after the parent-infant child relationship ended. That is, when the father left the family home and no longer assumed a responsibility to care and provide for the Appellants.

50. The cases in all jurisdictions involving claims for assault/battery and/or breach of FD seek relief in the form of damages/compensation. There is no authority

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[123] Nathalie Des Rosiers "Childhood sexual abuse and the civil courts" (1999) 7 Tort L Rev 201 at 203. **CB701.0589**.
[124] Robert Flannigan "Fiduciary Regulation of sexual exploitation" (2000) Can Bar Rev 79(3) 301 at 306-7. **CB701.1081**.
[125] See CA decision, above n 2. This was the determination of Kós P at **CB101.0049** at [152]. Gilbert J at **CB101.0044** [136] found precedent lacking in existing Australian and English authorities.

for the relief (an institutional constructive trust) advocated for by the Appellants[126] and which found favour in the High Court.[127]

51. In *Avondale Printers v Haggie* Mahon J quoted *Jacob's Law of Trust*:[128] "*On no conceivable view would any constructive trust arise, unless one accepts that such a trust may be invented whenever such a trust would appeal to judicial caprice*". His Honour went on to decry the tendency:[129]

> *…to create a constructive trust by the process of imputing to the parties an intention not proved to have existed, a process that is not permissible under the law of trusts as applied and administered in England, Australia and New Zealand.*

52. The following submissions in response follow the format of the submissions of counsel for the Appellants.

**Decisions of the High Court and Court of Appeal**

***High Court***

53. Gwyn J determined the relationship between the father and the Appellants fell into a non-inherently fiduciary class.[130] Her Honour referred to the characteristics of a FR in *Frame v Smith*.[131] It is respectfully submitted Her Honour did so incorrectly.

54. Gwyn J considered it was possible to view the father's "*right to alienate his house and shares as the exercise of a discretion or power*."[132] The Respondents contend the father's power or discretion over his own property has no connection with the relationship with the Appellants. The father was estranged from his adult children for over 30 years. Accordingly, there was no relationship, no assumption of responsibility, care nor agency. The Appellants had no beneficial interest in the house, so no issues akin to trusteeship arise.[133] The property was acquired by the father after his children became adult. There is no link between the property and the children.

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[126] HC decision, above n 1, at [3], [74], [75], [76], [126] and [175].
[127] At [182] and [201].
[128] *Avondale Printers v Haggie* [1979] 2 NZLR 124 at 145 (HC), quoting *Jacob's Law of Trust in Australia* (4th ed, 1977) at 256. **CB701.034**.
[129] **CB701.034**.
[130] HC decision, above n 1, at [133]. **CB100.0131.**
[131] **CB100.0127** at [35].
[132] **CB100.0131** at [149].
[133] This is consistent with the determination of Gilbert J in the Court of Appeal, above n 2, at [142].**CB101.0047**.

55. Regarding the second characteristic in *Frame*, Gwyn J held the father's unilateral exercise of his power or discretion affected the Appellants' legal or practical interests.[134] It is submitted the "power or discretion" did not arise in a relationship of assumed responsibility to care for the Appellants. It is further submitted disposal of the assets is irrelevant, notwithstanding that it may have affected the Appellants' interests in an indirect manner by thwarting a claim under the Family Protection Act. The father exercised his right to transfer his property in any manner he wished. The "disposal" benefitted the father's new "adopted" family with whom he had a genuine and long-standing relationship.[135]

56. Regarding the third characteristic in *Frame*, Gwyn J considered the father's abuse of the Appellants as children rendered them (especially the daughter) vulnerable and at "his mercy" both as minors and adults.[136] The Respondents submit what Her Honour describes as vulnerability is, in fact, the consequence of the initial breach of FD when the Appellants were minors. The remedy for such breaches accrued when the breach occurred or was reasonably discovered (in accordance with *S v G*[137]). It is submitted vulnerability was improperly detached from any actual relationship between the father and the Appellants. It was applied in isolation, so "vulnerability to the world at large" became improperly substituted for "vulnerable to a fiduciary" within a specific relationship.

57. At [37], counsel for the Appellants refers to rejection by Her Honour of any possibility of a floodgate of litigation. The Respondents observe that granting the appeal would result in a new class of claim against parents and trusts.

***Court of Appeal***

58. The Respondents accept and adopt the determinations of the majority in the Court of Appeal. The Respondents respectfully agree with Kós P's formulation of the relevant FD in the parent-child context. Namely, as one to refrain from acts that fundamentally violate the relationship of trust inherent

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[134] **CB100.0131** at [149].
[135] See evidence of Phillipa at **CB201.0056**.
[136] HC decision, above n 1, at [150]. **CB100.0131**.
[137] *S v G*, above n 22. **CB601.0703**.

in a parent-child relationship.[138] In simple terms, not to harm the child in one's care.

**SUBMISSION ONE**

59. At [44], counsel for the Appellants argue the non-commercial nature of the relationship between the father and the Appellants is of "huge relevance" to the imposition of fiduciary duties. The Respondents disagree. Once it is accepted that non-economic interests (practical and personal interests) are both entitled to the protection of equity and the law of fiduciary obligations - all that is required is to analyse the alleged relationship to determine if the required indicia of a FR subsists.

60. The Respondents contend any distinction between non-commercial and commercial interests is inconsistent with the Aotearoa/New Zealand authorities.[139] It is submitted *Chirnside*, as the leading authority, makes no such distinction.

61. Counsel for the Appellants argue the "indicia ought to be wider than those generally followed in a commercial context such as *Dold v Murphy"*.[140] The Respondents disagree. The formulae in *Chirnside* comprehensively explain the necessary ingredients of a FR. To the extent the three characteristics in *Frame* are consistent with *Chirnside*, then they assist without any widening.

62. That the categories of FR are not closed, does not mean the jurisprudential principles of FRs may or should be altered. Rather, the types of relationships where fiduciary obligations may arise are not closed; that is, where loyalty is expected at law. There is room for other relationships to enter the arena – a parent-child relationship is such an example.

63. The Respondents dispute "peculiar" vulnerability should be adopted as a new test or principle. In *Chirnside,* vulnerability is implicit in the descriptions contained in the judgments of Elias CJ and Tipping J.[141] "Peculiar" vulnerability is not. The suggested principle, it is submitted, sets the bar too high.

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[138] CA decision, above n 2, at [161]. **CB 101.0053**.
[139] See *Jay v Jay,* above n 25, at fn 45. **CB701.0377**.
[140] Appellant's submissions at [44].
[141] See *Chirnside v* Fay, above n 8, at [83], where vulnerability is express. **CB601.0063**.

64. At [44], counsel for the Appellants argues, without reference to authority, that while the "peculiar" vulnerability subsists, so too does the FR. And so, the relationship only ends when the "peculiar" vulnerability ceases. The Respondents refute this argument. Person A cannot be vulnerable to person B, when:

    a. Person A places no reliance on person B to act for them; and

    b. Person B has not assumed any responsibility, in any way, to act for Person A.

65. The vulnerability referred to by the Appellants is, in fact, connected to the Appellants' unremedied breach of duty when they were minors. That claim sounds in damages. On the Appellants' argument, notwithstanding an award of damages, the Appellants' vulnerability continues along with the FR. This is illogical.

66. There appears to be no authority in any jurisdiction to support the Appellants' contention that a FR can be deemed to continue despite the relationship having ended.[142] Obligations of confidentiality may continue, but the relevant principles do not rest on any continuing relationship. Rather, on the continuing promise/undertaking and reliance on that promise that the confidence will be maintained.

67. In the Court of Appeal, Collins J held the inherent FR between a parent and a child may continue after a child becomes an adult. His Honour gave the example of a severely disabled child who was dependent upon their parents for care and support not just as a child but continuing once they become an adult.[143]

68. It is submitted there is a fundamental difference between:

    a. Scenario A – the situation where a severely disabled adult child is dependent upon their parent for care and support, and where that parent

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[142] See **CB601.006** at [92]. Tipping J stated the fiduciary obligations ended with the relationship, which itself could be ended by the giving of notice. See also *Pilmer v Duke Group Ltd,* above n 107, **CB701.0821** at 83; the High Court of Australia stated the fact that dealings are complete will ordinarily demonstrate that any interest or duty associated with those dealings is at an end. See also *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680 at 690, line 47, **CB701.0445**; the Court of Appeal stated the obligations arising only continue as long as the relationship itself.

[143] CA decision, above n 2, at [79]. **CB101.0030**.

has expressly or impliedly assumed responsibility for the child's care and support; and

b. Scenario B – the situation where a severely disabled adult child is cared for and supported by some person or entity (other than the parent) has taken on that responsibility, but as between the child and parent there is no existing and continuing relationship, much less one involving provision and acceptance of care and support.

69. In both scenarios the only constant is the blood relationship. Nothing turns on the "character" or nature of the "actor" of the persons involved. The relationship in terms of dependency on and assumption for the provision of care and support is completely different. In Scenario A, the parent entered into a relationship with and assumed a responsibility for the adult child, in Scenario B they did not.

70. Collins J likened the daughter's enduring psychological trauma as "strongly similar" to the analogy with the disabled adult child.[144] It is submitted the analogy fails because it ignores the requirement that the father must have assumed an obligation or responsibility to care for the daughter within a subsisting relationship.

**Powers – Appellants' submissions – [47] to [50]**

71. The law has been unwavering and universal in stating that the nature of the relationship will dictate the nature of the obligations imposed upon the fiduciary. Consequently, the authorities first direct an inquiry of the characteristics of the relationship, rather than categorising a party as a fiduciary and then grafting on FDs.

72. At [50], counsel for the Appellants submit Gilbert J improperly narrowed the "power or discretion" because the nature of the interest involved human and personal interests as opposed to material interests. The Respondents disagree. Gilbert J makes no such distinction and instead assuming the FD arose, despite a lack of precedent.[145]

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[144] **CB101.0034** at [95].
[145] **CB101.0045** at [136].

73. Gilbert J held the relevant "power or discretion" controlled by the law of fiduciary obligations was one conferred on or held by the fiduciary for the benefit of the beneficiary.[146] His Honour held at the nub of the case was what the father did with his own assets. The assets were never acquired for nor held for the benefit of the Appellants. The Appellants had no proprietary claim in respect to them and the father did not undertake or assume any obligation by contract, agreement, unilateral undertaking or otherwise to deal with his assets for the Appellants' benefit.[147] His Honour concluded the "essential underpinning" of a FD in relation to the assets was absent.[148]

74. It is submitted His Honour's observations are patently correct.

**Inherent versus particular fiduciary relationships**

75. At [51] to [63], counsel for the Appellants argues the relationship between the Appellants and their father was an inherent FR,[149] or, **alternatively**, a particular FR.[150]

76. It is submitted the dichotomy is illusory. There are no alternative forms of FR. A trustee may act negligently, but not breach a FD. Non-inherent FRs may also contain both fiduciary and non-fiduciary duties. In either case, the analysis for ascertaining the existence of fiduciary obligations is the same.

77. At [54], counsel for the Appellants focuses on the daughter's "profound emotional damage" consequent on the father's earlier breach of FD and argues this resulted in her being "*particularly vulnerable to the exercise of her father's powers and discretions which directly affect her interests*".

78. It is submitted the profoundness of damage is irrelevant to the existence of a FR or the continuation of a FR and any attendant duties.

**Harm**

79. At [51] to [63], counsel for the Appellants argue the father inflicted harm on the Appellants when he exercised his powers in relation to his house and shares. The Respondents disagree.

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[146] **CB101.0046** at [141].
[147] **CB101.0047** at [142].
[148] **CB101.0047** at [142].
[149] Appellant's submissions at [51] to [54].
[150] Appellant's submissions at [55] onwards.

80. It is submitted no relevant harm was inflicted on the Appellants once the relationship between them and their father ended. The father's conduct in transferring his assets to a trust for the benefit of his "adopted family" may, some would argue, constitute a breach of the wise and just testator as that description is used in the context of Family Protection Act claims. But such a "failure" does not constitute a cause of action nor a consideration outside the Family Protection Act context.[151] The submission by the Appellants at [81], to simply not recognising the trust, is untenable. To do so would disrupt the law of trusts in a profound and unprincipled way.

**Atonement**

81. At [57] and [62(b)], counsel for the Appellants argue the father had a duty to atone to the Appellants for his past breaches of trust. It is submitted there is no such duty in the law of fiduciaries. Collins J in the Court of Appeal referred to atonement, saying that for the daughter to have any semblance of a normal and independent life, she required economic and emotional support from her father including by providing for her in his will.[152]

82. Atonement is to make amends or reparation for something done in the past. It is backwards looking and exists independently of any subsisting relationship. It is submitted, in this context, atonement is damages by another name.

83. In the present context, the asserted FD is the avoidance of doing harm which is an active positive ongoing obligation inseparable from the relationship that exists between those family members.

84. Atonement is not a separate and self-standing principle of equity actionable as a discrete cause of action.

**SUBMISSION TWO**

85. It is common ground that tikanga is recognised in the development of the common law of Aotearoa in cases where it is relevant[153]. Paragraph [65] of submission of counsel for the Appellants' submissions is agreed, but [66] is not.

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[151] See fn 194 below.
[152] CA decision, above n 2, at [96]. **CB101.0034**.
[153] *Ellis v R* [2022] NZSC 114 at [19] and fn 23. **CB601.0205**.

86. The Supreme Court in *Ellis v R* held the method of ascertaining tikanga (where it is relevant) depends on the circumstances of the case.[154] The following considerations derive from *Ellis*:

a. Tikanga may be limited by statute,[155] and will not be considered in cases where it is not relevant, is contrary to statute or binding precedent.[156]

b. In some cases, tikanga may be controlling i.e. where Treaty principles and/or tikanga have been incorporated into statute in a manner that makes them so, or where the factual context justifies it. In other cases, tikanga principles or values may be relevant considerations alongside other relevant factors.[157]

c. In general, the sources of tikanga and those vested with the expertise to expound on it, will be external to the courts.[158] In simple cases where tikanga is relevant and uncontroversial, submissions may suffice. In other cases, a statement of tikanga from a tikanga expert may be appropriate.[159]

d. There is no test for the inclusion and application of tikanga in the common law. It will need to be worked out on a case by case basis in accordance with the usual common law method.[160]

e. Sometimes statute or case law will not provide all the answers — there will be gaps. A judge may look to customary practices[161] including tikanga.[162]

f. It is not relevant that all parties in the proceeding are not Māori.[163]

g. The following questions may be asked:[164]

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[154] **CB601.0206** at [23] and fn 32.
[155] **CB601.0230** at [98].
[156] **CB601.0205** at [117]. Glazebrook J added that "Certainty, consistency and accessibility are strong values in our legal system. Precedent will still bind as it does conventionally, unless distinguishable." **CB601.0241** at [127].
[157] **CB601.0238** at [118].
[158] **CB601.0239** at [123] and [124].
[159] **CB601.0239** at [125].
[160] **CB601.0237** at [116] and **CB601.0257** [182].
[161] **CB601.0252** [165].
[162] **CB601.0254** [171] and [173] and **CB601.0255** [176].
[163] **CB601.0279** [246] and **CB601.0303** [313].
[164] **CB601.0286 at** [263]-[264].

i. is there a tikanga context to the dispute — whether due to the identity or expectations of the parties, the dispute's particular setting or for some other reason?

ii. Alternatively, does the nature of the dispute give rise to considerations of broad policy import for which a tikanga perspective may assist in resolving the dispute?

iii. Is there room among the relevant common law rules or principles for tikanga to play a part or are there binding authorities or principles of long-standing that leave no room for tikanga principles to operate?

h. A state of ea may be reached even where parties involved remain disgruntled with an outcome. In some cases, to achieve a state of ea, the Rangatira should pronounce what the outcome should be in accordance with its own principles and rules.[165]

87. Here, as in *Ellis*:

a. The issue of tikanga comes before the Court in an uncontested environment and in circumstances where the Court has not had to address a number of difficult issues of both legal and constitutional significance.[166] Including; how the Court can identify when tikanga is relevant to the case at hand; if it is relevant, how it should be addressed.

b. The Court does not have the benefit of decisions from lower courts because the issue of tikanga has come up for consideration for the first time on this appeal.[167]

88. The Respondents acknowledge in determining whether in general terms an inherent FR exists between a parent and their infant children, tikanga may be a relevant but not controlling factor.

**Application of tikanga in the present case**

89. Here, the actions of the father can be framed in the manner described by counsel for the Appellants at [71] to [76]. That does not mean that tikanga "must" apply. The principles relating to fiduciaries, most importantly by this

[165] **CB601.0304** at [316].
[166] **CB601.0294** at [285].
[167] **CB601.0294** at [284].

Court in *Chirnside*, impose binding precedent regarding the circumstances when FRs and FDs arise. This law completely addresses the Appellants' claim. There are no gaps in the law that need to be filled by tikanga.

90. Further, neither tikanga nor the fact that ea may not have been reached cannot override the clear provisions of the Limitation Act. None of Law Commission's papers and reports preceding the enactment of the Limitation Act 2010 refer to tikanga.

91. The opportunity to achieve ea existed when the Appellants were "in time" within the Limitation Acts to bring proceedings.

92. In a tikanga process, the Appellants and the father and their whānau would play an active part in the process of achieving ea.[168] That cannot occur here because the father, who denied the offending,[169] cannot defend the Appellants' allegations.

93. At [79], Counsel for the Appellants argue tikanga is a "mandatory" consideration in this particular whanaungatanga context. That submission is not supported by *Ellis*.

**Common law should be developed**

94. At [80], Counsel for the Appellants submit the Respondents contend there should be no remedy for the Appellants. The Respondents say no such thing. The Respondents say the remedy that existed against the father was not pursued. It is material that at the time the property was gifted to the Trust, the available remedies against the father were time-barred.

95. The Appellants attempt to create a wholly new cause of action against the trustees of a lawfully constituted express trust, fitting their case into a contrived breach of FD,[170] to compensate for their decision not to issue proceedings against their father and to revive a time-barred remedy against a separate legal entity and trust.

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[168] **CB601.0303** at [314].
[169] CA decision, above n 2, at [45] **CB101.0021.** This was noted by Collins J. See also **CB301.0008** for solicitor's letter conveying the father's denial.
[170] **CB101.0045** at [138] and [139]. This was the determination of Gilbert J in the Court of Appeal.

## 1. Common law does not and should not permit the use of trust structures to avoid legitimate claims

96. At [81] and [82], counsel for the Appellants appears to advocate the dismantling of trusts where they prevent a claim under the Family Protection Act. No authority is offered to support the proposition. Misuse of trusts is not a barrier to the reach of equity or the law. Trusts created as a pretence are struck down as a sham. Gifts or transfers at undervalue to a trust may be clawed back by the Property Law Act 2007 and Insolvency Act 2006. Where a fiduciary misuses trust property or otherwise takes unlawful advantage of a FR, then the courts may and do use fiduciary law to reach into any trust to retrieve property, if that is the appropriate remedy.

97. No court has hitherto defeated a transfer of property to a trust even if it is done to thwart a potential Family Protection Act claim.[171] If claims under the Act are to be protected in this manner, it is submitted that this is a matter for Parliament.[172]

98. At [82], counsel for the Appellants refers to the father's trust as a "legal shibboleth". Discretionary family trusts have legal force, are recognised as legitimate by the New Zealand Law Society,[173] and the Law Commission.[174]

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[171] As recently affirmed by the Court of Appeal in *Pollock v Pollock* [2022] NZCA 331. There, a plaintiff failed in his claim against his father's estate because the father had intentionally gifted assets to his wife and family trust prior to his death. The Court observed the gifts may have reflected poorly on deceased, but they were not unlawful. **CB701.0866** at [34]-[35].
The Court stated "Finally on this point it is appropriate to acknowledge the caution sounded by Mr Scott. He asked rhetorically whether, if testators are intent on denuding themselves of all their assets, will the Court contemplate a remedy to prevent them so doing during their lifetime? Are such persons to be injuncted from spending their own money? In short, his point was that the Family Protection Act, while imperfect, is preferable to the impracticable consequence which is a logical extension of Mr Stevens' argument." **CB701.0890** at [88].

[172] 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) The Law Commission's website refers to a review succession law commenced in July 2019. At **CB701.0231** at [8.23] the report states: "If the estate has insufficient property to meet an award, we proposed a court could make awards from the property it recovers through its clawback powers. This would depend on what anti-avoidance mechanisms are included in the new Act…" New South Wales has legislated a clawback regime via the by the Succession Act 2006 at **CB701.1012**.

[173] The NZLS lists 7 cogent reasons for establishing a family trust. New Zealand Law Society "The Family Trust" (27 March 2023) <https://www.lawsociety.org.nz/for-the-public/common-legal-issues/the-family-trust/> **CB701.0268.**

[174] Law Commission *Review of the Law of Trusts* (NZLC R130, 2013) at **CB701.0239**. Sir Grant Hammond, in writing the forward for the Report, stated: "Trusts play a central role in New Zealand society." It was estimated the number of trusts in Aotearoa/New Zealand was between 300,000 to 500,000. **CB701.0241** at 5.

99. At [85], counsel for the Appellants notes there are statutory restrictions on certain persons from dealing with their own assets. None of these are included in the case brought by the Appellants, and so, have no relevance.

100. At [87], counsel for the Appellants generalises from this Court's decisions in *Regal Castings v Lightbody*[175] and *Clayton v Clayton*[176] that the Court will not permit trusts to be used as a structure to avoid the application of legislation, in particular, social legislation. The Respondents dispute this argument. If counsel seeks to rely on these cases as precedent, then reference should be made to specific passages reflecting the ratio decidendi of those decisions and then apply them to the facts of the present case.

101. At [88], counsel for the Appellants refers to the maxim that equity will not permit a statute to be used as an instrument of fraud. The Respondents submit the father committed no fraud. It is submitted the Courts do not enforce moral correctness.

**2. Common law should extend length of fiduciary duty in these circumstances**

102. Appellants' counsel advocates that the law of fiduciaries be applied in order to defeat a lawful trust. The law of fiduciaries is directed towards enforcing the fiduciary obligations arising from the nature of the relationship between two parties where trust and confidence has been reposed. It is not an instrument to be used to achieve a remedy for its own sake.[177]

103. At [92], counsel for the Appellants argue the premise that fiduciary duties cease when a child leaves home is inconsistent with tikanga and the values of Aotearoa/New Zealand. It is contended that Counsel is unable to speak to the values of Aotearoa/New Zealand or tikanga from the Bar without precedent.

104. Leaving home is significant only in the sense that it brings the relationship of "reliance, confidence or trust" to an end. It is irrelevant how the relationship came to an end; namely, whether the Appellants were "driven from their home

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[175] *Regal Castings v Lightbody* [2008] NZSC 87. **CB701.0962.**
[176] *Clayton v Clayton* [2016] NZSC 29.
[177] This was disavowed by the Court of Appeal in *MacLean v Arklow Investments Ltd,* above n 142, where the Court stated that the FD is to be found in the relationship – the obligations are not remedy led; **CB701.0445** at line 40. Fiduciary is not a label to ensure a desired remedy; **CB701.0478** at line 15.

by abuse" or the father left of his own accord or by compulsion of a court order.

105. At [96], counsel for the Appellants say the significance given by the Court of Appeal to the Appellants' election not to pursue a remedy until after the father's death shows "a complete misunderstanding and indeed disregard for the impact repeated, prolonged, extensive trauma has upon any person…"

106. The Respondents dispute this submission. The Law Commission states there is a public interest in protecting potential defendants from stale claims. Limitations law balances what is fair to intending plaintiffs, and what is fair to intended defendants. The balance takes care of the public interest.[178]

107. At [98], counsel for the Appellants submit damage as a result of childhood abuse is ongoing. This does not alter the fact that the Appellants' claim in tort or for breach of FD crystallises at the time of the breach (discoverability aside). The assessment of damages or compensation considers existing and future likely damage. Future damage does not create a cause of action in tort or equity.

108. At [102], counsel for the Appellants argue, within claims under the Family Protection Act, there has been no suggestion by the Courts that childhood abuse actions should not be available because of the length of time between the abuse and the death of the alleged perpetrator. The Family Protection Act introduces its own considerations and requires claims to be brought within 12 months of probate, unless leave is granted of the Court.[179]

**3. Floodgates are no issue**

109. At [103], counsel for the Appellants argues that "a decision in favour of the appellants would mean parents could no longer go on holidays" as hyperbolic. If, as contended by the Appellants, the father's assets are subject to an equitable interest, then he would necessarily have equitable duties imposed on him which would constrain his use of those assets.

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[178] Law Commission *Tidying the Limitation Act* (NZLC R61, 2000) at [1]. **CB.701.0249**.
[179] Family Protection Act, s 9.

**SUBMISSION THREE:**

110. At [107], counsel for the Appellants suggest their father was no longer entitled to deal with his assets as he liked during his lifetime, if in dealing with his assets, he would breach the duties owed to his children. This proposition is unsupported by any case authority.

111. At [108], counsel for the Appellants states the above duty should not be viewed as impinging on property rights or testamentary freedom, as it does neither. This submission is startling, because it does precisely what it purports not to do.

**CONCLUSION**

112. At [110], counsel for the Appellants submit because the father's abuse was "so egregious", the Court should create a new limb of fiduciary obligations that last for ever. This is unconnected to any recognised legal principle in relation to fiduciary obligations.

113. The Respondents' position is reflected in the statement by Kós P that the Appellants are at best unsecured creditors of their father whose purely personal claim cannot be turned into a proprietary one where proprietary remedies have no place.[180]

114. It is submitted established legal principles lead to the following conclusions:

a. There existed a FR between the father and his children when they were minors and in his care. This duty defined by Kós P is consistent with tikanga principles. That the father breached the duty by his conduct. The Appellants had remedies that were consistent with Tikanga, capable of achieving utu and ea, but they elected not to pursue them.

b. The transfer of property to the Respondent trustees was effective in law and in equity.

Dated this 29th day of March 2023

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**Andrew J. Steele / Michael J. Wenley / Marta A. Black**
Counsel for the Respondents

[180] CA decision, above n 2, at [167]. **CB101.0055**.

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

**SC106/2022**

| | |
|---|---|
| **BETWEEN** | **A, B** and **C** |
| | Appellants |
| **AND** | **D** and **E LIMITED** a duly incorporated company as Trustees of the **Z TRUST** |
| | Respondents |

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**CERTIFICATION AS TO PUBLICATION**
**(RESPONDENTS' SUBMISSIONS)**

**DATED this 29th day of March 2023**

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## CERTIFICATION AS TO PUBLICATION

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

**Dated** this 29th day of March 2023

…….

**M J Wenley**

Solicitor for the Respondents