NOVEL REMEDIES FOR DISSIPATION, ABSENT NOTIONAL ESTATE

Does a parent owe their child a fiduciary duty, to protect the child's economic interests, even into adulthood?

For a claimant, a factor in the worth of a family provision action is the extent of the estate available. Where a parent denudes the estate of worth, the claimant is driven to restore assets to the estate after death, absent the assets being available as "notional estate".

An innovation in New Zealand indicates the lengths to which a claimant may be driven, by a deceased's single-minded structuring to denude an estate. The claimant child of the deceased makes a claim based on an alleged fiduciary obligation of the parent owed to the adult claimant at the time the deceased transferred the wealth.

The basis for the claimed fiduciary relationship is still being explored, cases having survived summary termination, and indeed recently having been allowed to proceed by the New Zealand Court of Appeal.

Current patterns

In Australasia, only New South Wales has wide rules to swell the pool, by clawing back, into the estate, property passing outside the estate or before death (such property being "notional estate").

Outside New South Wales, someone discontent with manoeuvres that denuded an estate must set aside an *inter vivos* transaction, as occurred in *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66. The actions of attorneys are especially brought into question nowadays: *Baker v Affoo* [2014] QSC 46.

These actions target the actions of those dealing with the deceased. The intent is usually to swell the estate.

Or the claimant will allege a proprietary interest in the deceased's property. Alleged promises concerning rural properties remain prevalent, as in *McDonald v Dunscombe* [2018] VSC 283 and *Lai v Huang* [2019] NZHC 1822. The property may by-pass the deceased estate, in favour of the claimant.

And I have seen combinations of approaches pleaded, where there are alleged promises by the deceased as well as alleged untoward behaviour of a relative as the deceased became frail and dependent.

A frequent feature of those kinds of claims is that the claimant will advance representations by, or conduct of, the deceased. Or the claimant must allege equitable fraud by a family member. In short, the litigation is difficult and emotional for the parties.

Notional estate is not a complete panacea. Equitable claims, as described above, are also advanced in New South Wales. But a disappointed family member may have a simpler way of proceeding in New South Wales.

Despite this, "notional estate" has not been accepted more widely in Australasia. The matter has been reviewed from time to time. The terms of reference for the recently commenced

"Review of Succession Law", by the New Zealand Law Commission, are wide enough to embrace consideration of notional estate.

Tasmania recently completed a specific enquiry into whether notional estate rules were suitable for its conditions. The Tasmanian Law Reform Institute's final report in September 2019 recommended that notional estate laws "not be introduced in Tasmania in the absence of nationally uniform family provision laws": page viii.

As discussion of "notional estate" has a polarising effect, I cravenly avoid comment on the New Zealand and Tasmanian reviews. Instead, I point to another development, in New Zealand.

There is no notional estate rule under existing New Zealand family provision laws. We see the same issues emerging. Relevantly, these include structured divestiture of property, frustrating claims under the *Family Protection Act 1955 (NZ)*.

But a new solution has been tested by claimants.

NZ developments

Whoever first said that 'the law advances one failed strike-out at a time' was doubtless thinking of a snail in a bottle.

Two recent failed applications, for strike-out and for summary judgment, are noteworthy as attempts to expand fiduciary obligations to the role of a parent, as against an adult child.

The second matter recently led to an unsuccessful application for leave to appeal to the New Zealand Court of Appeal.

In *Rule v Simpson* [2017] NZHC 2154; BC 201761864 the short point of interest was whether the deceased owed a fiduciary duty to Mr Rule purely by dint of having been his parent. The particularised circumstances were [63]:

> a. *[the deceased] is the plaintiff's parent.*
>
> b. *[the deceased] was obliged to care for and protect the plaintiff and his economic interests.*
>
> c. *[the deceased] was obliged to recognise the plaintiff as a member of his family from his wealth.*
>
> d. *The actions of [the deceased] were unconscionable … [as then pleaded].*

The plaintiff said he was the natural child of the deceased. The defendants said that the deceased had not acted in any sense as the plaintiff's parent, and that the two had only met once when the plaintiff was 65 years old. Other approaches by the plaintiff were rebuffed: [65].

The defendants acknowledged that parent/child fiduciary relationships "have been recognised in the context of child sexual abuse cases", but not beyond that: [66]. The defendants also accepted that a parent owed obligations to a minor child, but said that "there are no financial obligations that extend beyond the age of 19, and the only duty owed by a parent after that age is the moral duty recognised" in the family provision legislation, an Act that only entitles the child to claim against a parent's estate.

Hence, *Rule v Simpson* was a claim where, as one step towards success, the plaintiff had to show that the deceased owed him - as his adult child, and on no other basis - a fiduciary obligation to see to his financial welfare.

Matthews AJ refused to strike out the causes of action which depended upon that proposition.

Rule v Simpson was cited in *A, B & C v D & E Ltd* [2019] NZHC 992, a summary judgment application, where the claim again alleged the estate had been denuded by the parent's actions. The claimants contended, in favour of the cause of action, that the deceased "owed fiduciary obligations to his children that effectively prevented him from alienating the assets that he transferred to the trustees in order to defeat their interests": [26].

Johnston AJ dismissed the application for summary judgment brought by the surviving trustees of a trust settled by the late father of the claimants. (Solicitors, also named as defendants, were however successful, for reasons not presently material.)

In that case, the key contention for the claimants was that the father "owed fiduciary duties to his children that he breached when he settled the trust and transferred property to the trustees for the purpose of avoiding his obligations to them": paragraph [20].

There has been Canadian authority, in the case of sexual assault by a parent against a child, that the parent might owe the child obligations of a fiduciary character: *M (K) v M (H)* [1992] 3 SCR 6, pp. 24, 59–69.. The case of a guardian, *vis a vis* a ward, has also been described as fiduciary: *Clay v Clay* (2001) 202 CLR 410; [2001] HCA 9, [40].

But these two recent New Zealand High Court decisions contemplate extending the law.

This much is acknowledged by the New Zealand Court of Appeal (Kós P & Collins J) in denying leave to appeal Johnston AJ's 2019 decision, above.

The Court of Appeal cited authority cautioning against denying a party "the opportunity to pursue claims that may not have been previously tested".

The Court pointed to the sensitivity of such a case, outside the settled classes of relationship of fiduciaries, to the facts that might be found to have existed when the father transferred most of his property away.

The Court said that, while the claims "may be novel, they are very dependent upon whether or not they are able to establish the facts necessary to underpin their claim that [the father] owed them fiduciary duties": [2019] NZCA 585. The classes of fiduciary are not closed: Finn, *Fiduciary Obligations*, [11]. But Finn says that a fiduciary must "first and foremost have bound himself in some way to protect and/or to advance the interests of another": [15].

It appears a stretch, under Australian conditions, to argue that a parent of an adult child must consider the interests of the adult child in all the parent's property dealings.

There has not been universal acclamation in New Zealand, either. In an address to the *Society of Trust and Estate Practitioners*, in Auckland, at STEP's monthly update in September 2019, Mr Andrew Steele of Martelli McKegg ventured that this type of claim raised practical issues, if it be true that parents owed duties to adult children regarding the parents' assets. He exampled a decision by a parent to go on holidays, purchase a car, or buy into a retirement village. He wrote:

> *While the authorities focus on the need in every case where a fiduciary relationship is claimed for there to be a requirement for trust and confidence, this is always linked to an additional requirement that a fiduciary was someone who had undertaken, whether expressly or not ... to act for or on behalf of another ... This is an element that in typical family relations is missing in a parent/adult child relationship.*

Moreover, a person suspecting another person had children may be put on enquiry, in any property dealing.

Leaving to one side the practical difficulties, this recent push is symptomatic of the absence of effective remedy in those occasional cases where a parent denudes their prospective estate. Outside New South Wales, an Australasian claimant is left with no workable claim for family provision, especially in the kind of single-minded cases exampled by these New Zealand fact-patterns. These New Zealand cases are attempts to address that problem.

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