RESEARCH ARTICLE

Eben Nel

Adjunct Professor, Department of Mercantile Law, Nelson Mandela University
ORCID: https://orcid.org/0000-0003-1386-007X

DOI: https://doi.org/10.38140/jjs.v49i1.7556

ISSN 2415-0517 (Online)

Journal for Juridical Science 2024:49(1):53-76

Date Published: 28 June 2024

FIDUCIARY LAW IN SOUTH AFRICA: A GOOD TIME TO COME OF AGE

SUMMARY

Fiduciary law as a separate legal discipline has not been under the spotlight within a South African context. As it is often limited to its association with trustees and company directors, fiduciary law has been under-analysed and not recognised as a distinctive body of law. In this article, the position of fiduciary law is regarded as within the broader context of the private-law landscape, considering both contractual and relationship theories. Its application within a trust-law context is used to illustrate the practical value of fiduciary law. The potential role of public policy as well as the impact of the mixed-law tradition are discussed, emphasising the importance of the responsible development of fiduciary law. This development relies on a sound theoretical understanding of the objectives and intended results of fiduciary law. In addition, it necessitates the identification and application of an officially recognised normative assessment for determining the parameters of the fiduciary relationship. A few potential common factors for determining the nature, origin, and reach of fiduciary law are identified, with the intention of stimulating the debate and further research. These factors include the purpose of the fiduciary concept, the undertaking by the functionary, the legal source of the individual's appointment, and aspects such as independence, discretion, duties, capacity, and assessment.

Published by the UFS
http://journals.ufs.ac.za/index.php/jjs

1. INTRODUCTION

The roots of fiduciary law are ancient,[1] although it is not necessarily acknowledged in all legal systems as an independent field of law.[2] In the common-law tradition, the law-equity distinction resulted in the development of fiduciary law as a separate field.[3] The theory of fiduciary law has been described as "elusive" and has only been researched and properly analysed in a few jurisdictions.[4] Although the theory of fiduciary law is, as all law, shaped by the society which it governs, the legally sound and responsible development of the concept may be lacking without a thorough understanding of its building blocks and origins. Some call it "incoherent", while others defend it as a "crucial and powerful branch of the law".[5]

Fiduciary law may be viewed from a variety of perspectives such as relationships, rights and duties, or wrongs and remedies.[6] The question is not whether fiduciary relationships and the resultant duties exist, but what the source and contents of the law applicable to such relationships and duties are.[7] The duty itself is dynamic and in a constant process of evolvement.[8] Fiduciary law is not limited to its incidence within a trust-law context, although it is used in this article to illustrate the practical application of fiduciary-law principles. It has been submitted that the core source of the fiduciary duty of the trustee cannot be explained by way of the "settlor's intent, the virtue

---

1 *I am grateful to Dr Susandra Van Wyk for her guidance in respect of the final draft of this article.
For examples of the presence of fiduciary principles in Roman-law institutions such as *fideicommissa* and *tutela*, see Johnston 2019:522-523. He is of the opinion that Roman jurists "did much to develop and refine sophisticated principles of fiduciary law".

2 Frankel 2011a:80. Gelter & Helleringer 2019:585 state that, although fiduciary relationships and fiduciary duties have energised the law of civil-law jurisdictions for a long time, "they have often not been named and have remained inchoate and implicit". Gelter and Helleringer are of the opinion that there is often more fiduciary law in civilian jurisdictions than local lawyers would think.

3 Gelter & Helleringer 2019:585; Graziadei 2016:287-301.

4 See Kuntz 2020:48; Shepherd 1951:3.

5 Frankel 2011b:1290.

6 Gold & Miller 2016:1 declare that fiduciary law is a distinctive body of law irrespective of the preferred perspective but has been "woefully under-analyzed by legal theorists". In *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA):par. 27, Heher JA states that the existence of a fiduciary duty "and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship". For more on the trustee's fiduciary duty, see, in general, Du Toit *et al.* 2023:99-101; Pace & Van der Westhuizen 2022:B14.2.

7 Gold & Miller 2016:1. Compare the remark by Murphy J in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* [2006] ZAGPHC 132:par. 19, referring to sec. 24 of the *Constitution*, which confers upon the authorities "a stewardship" towards future generations as the "custodian or trustee of the environment". This stewardship role clearly results in a fiduciary responsibility, as Van der Schyff 2013:373 described in the public-trust context.

8 In *Aequitas v AEFC* [2001] NSWSC 14, 283, (2001) 19 ACLC 1,006, Austin J remarks that "judicial thinking about the content of fiduciary duties has changed significantly over the last decade".

of loyalty, or contract".[9] In *Crookes v Watson*, Steyn JA stated that the trust differs from the ordinary contract for the benefit of a third party and cannot "entirely be governed by the principles of contract".[10] In *Hofer v Kevitt*, on the other hand, the court not only rejected the existence of a fiduciary obligation outside the contractual position, but also opined that the office occupied by a trustee could serve as "source of a fiduciary duty".[11]

In seeking the origin of fiduciary law, various possibilities are tendered, such as a relationship-based versus a duty-based focus. In its most basic form, it is accepted that a fiduciary relationship between parties will usually give rise to "reciprocal fiduciary duties".[12] Although both common law and civil law encourage trusting relationships, their approaches differ: fiduciary law in common-law jurisdictions is usually based on property-law principles and the civil-law roots found in law of contract.[13] Although South African law is based on a civil-law tradition,[14] it has been influenced by common-law principles to develop into a true hybrid or mixed-law jurisdiction.[15] The source of fiduciary law in this legal environment may be more elusive than expected at first glance.

This article considers the origin and reach of fiduciary law as a distinctive element in South African jurisprudence – not only in a trust-law environment, but also within the broader context of the private-law landscape.[16] The article will focus mainly on three aspects of fiduciary law within an environment of hybridity,[17] namely the contractual nature, the well-established relationship theory, and the potential role of public policy in true South African legal tradition. In this process, an attempt is made to identify the true nature of fiduciary law.[18]

---

9 Dorfman 2014:339. Compare the emphasis placed in English law on the fiduciary's obligation of loyalty as the distinguishing factor. See *Bristol and West Building Society v Mothew* [1996] 4 All ER 698 (CA) 711 and *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) 1320.

10 *Crookes NO v Watson* 1956 (1) SA 277(A) 304F-G and 306A.

11 *Hofer and Others v Kevitt NO and Others* 1998 (1) SA 382 (SCA):paras. 9-11. Contra Cameron *et al.* 2018:428.

12 On the essence of the fiduciary duty in a partnership context, see Ribbens 1988:1-2, 16, and 20. Compare Hillard 2009:119-129.

13 Frankel 2014:394-396 encourages a process that might lead to a dual system or universal system of fiduciary law. Compare Dorfman 2014:339-359.

14 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020):par. 61.

15 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020):par. 66. For a discussion on the origin, development, and survival of mixed-law jurisdictions, see Tetley 1999:877-907. Compare Du Toit 2018:1-39.

16 An illustration of the lack of development of, and a serious search for content can be found in the remark by the court in *Hofer v Kevitt* 1996 2 SA 402 (K) 407B that the fiduciary duty has "no clearly defined meaning". Compare *Phillips v Fieldstone Africa (Pty) Ltd*:par. 27.

17 For the characteristics of a mixed-law jurisdiction, see Palmer 2012:7-11.

18 Rotman 2008:361 submits that the pursuit for legal certainty can cause more harm than good when it becomes a goal unto itself.

2. A NORMATIVE APPROACH TO FIDUCIARY LAW

On a purely philosophical level, it can be asked whether fiduciary law is based on positive law coloured by normative principles, or normative law directed by positivism.[19] When authors and judges explain legal principles with reference to a relationship or duty, positive law is used as peg.[20] When, however, the law is underpinned by the values of good faith, fairness, and reasonableness, its normative character comes to the fore.[21] Positive legal theory questions the "what", "why" and "how" of law – the principles and theory. A normative approach examines the value system underlying the answers acquired by positive law – an evaluation of the desirability and justification thereof. Law's impact is often based on status or standing, such as the freedom and equality of the individual, and not necessarily on morality.[22] Normativism should allow the legal theorist seeing the legal order as part of a normative order to assess how positive law is implemented in practice. Savaneli submits that the evolutionary interaction between positive law and normative order shall result in "just law", based on universal human rights.[23] Dworkin is less optimistic and warns that positivism negates the important role that principles and policies fulfil when complicated disputes about legal rights and obligations arise.[24] Fitzgibbon argues that fiduciary law is "relational semi-positivism" in that, although the wills of the parties are important, the law also applies its own views of what is appropriate under the circumstances. He further suggests that relational semi-positivism is not entirely subjective or limited to the parties involved.[25]

It is submitted that the evaluative and critical approach of normative law, based on moral and ethical yardsticks, is more suitable for the development of fiduciary law than a purely doctrinal approach. The normative order is, however, dependent upon positive law for direction and legal certainty.

19 For an explanation of the basic difference between positive and normative law, see Nel 2015:600-601.

20 Hutchison A 2019:263 uses the concept of a "doctrinal peg".

21 See *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC):paras. 51 and 73. Vermeule submits that the disconnect between positive and normative legal theory is created by two conceptual problems, namely the gap between fact and value and the gap between internal and external perspectives on law. For potential solutions to bridging these disconnecting theories, see Vermeule 2007:389.

22 Dorfman & Harel 2021:2 submit that, because people cannot create binding directives on one another, "public entities (have) to form the requisite standing".

23 Savaneli 2010:252-253. Compare Ligon 2012. For more on the normative nature of law and the incoherency of neutrality in law, see Green & Adams 2019. For a discussion on positivist theories versus natural law theories within a *jus cogens* context, see Criddle & Fox-Decent 2009:339-343.

24 Dworkin 2010:99.

25 Fitzgibbon 1999:352.

3. THE CONTRACTUAL NATURE OF FIDUCIARY LAW

The concept of *obligatio* historically indicated that something or somebody is bound – from one end to claim and from the other to deliver a certain performance.[26] Although Roman law did not recognise contracts in favour of third parties,[27] the concept was familiar within indirect representation. Roman law acknowledged the agent-principal relationship as well as the concept of trusteeship – acting in one's own right but in someone else's interest.[28] With the principle of *fides* being the duty to keep one's promise, the *bonae fidei iudicia* included certain transactions outside the usual commercial transaction, such as tutelage, *fiducia* and the unauthorised management of the affairs of another.[29] Another manifestation was the *mandatum* in terms whereof the *mandatarius* agreed to perform a service gratuitously for the *mandator*, at the individual's request. The mandate was bilateral with the one being bound to perform the services and the other being contingently bound to indemnify any expenses incurred in the exercise of such services.[30]

The instrument in terms of which the living trust is established is regarded as a species of *stipulatio alteri*, which, in the words of Van Zyl, "serves as (an artificial) framework to explain the functioning of the *inter vivos* trust with reference to Roman-Dutch law".[31] She advocates a "careful balance between, on the one hand, the fiduciary duty in terms of the law of trusts and, on the other, the contractual aspects".[32] The nature of the relationship between a fiduciary and a beneficiary is often very different from a standard contractual relationship with reciprocal rights and duties.[33] This is illustrated by the fiduciary duty of a trustee towards the trust beneficiary who has no reciprocal duty or even knowledge of their position as beneficiary. This is confirmed by Dorfman when he refers to the passive role of the trust beneficiary in the trustee/beneficiary relationship, which flies in the face of what one would expect from a contractual relationship.[34] The level of morality and integrity

26 Dorfman 2014:342 submits that the content of the fiduciary obligation is not necessarily identical where the fiduciary relationship has arisen in different legal forms such as the trust and the corporation. In this context, compare Jennings 2015:54-81.

27 Zimmerman 1990:1, 34. The *vinculum iuris* looked at the obligation from both the creditors and the debtor's perspective. For the history and development of the *alteri stipulatio nemo potest*, see Zimmerman 1990:35-45.

28 Zimmerman 1990:49-51. Examples of this are the offices of *fiducia* and *procurator ad litem*.

29 Kaser 1968:142.

30 Nicholas 1962:187-189. See also Van Warmelo 1980:192-193. The strictly personal character of the *mandatum* differs from the modern agency contract in which a direct relationship is created between the principal and a third party.

31 Van Zyl 2017:vi.

32 Van Zyl 2017:vi.

33 See Hutchison A 2013:3-29. See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

34 See Dorfman 2014:339, referring metaphorically to this role of the trustee, "constituting the personhood of the beneficiary and thus acting as his alter ego in relation to the trust property", as transubstantiation.

that is automatically expected of the fiduciary is distinctive from and more demanding than that which is expected of the parties in most other contractual relationships. The associated terminology raises images of trust, power, and vulnerability, which are not to be found to the same extent in other contractual relationships.[35] In the case of contract law, individuals are usually only pursuing their own respective interests independently of one another. Fiduciary law, however, supports both the individual and common interests of the parties, who act simultaneously in a dependent and independent way.[36]

The fiduciary duty of the trustee should not be confused with his other duties such as the regulatory requirements of care and skill.[37] The fiduciary must act not only with the necessary care and diligence,[38] but also with accountability towards beneficiaries, while acting independently as trustee and at the same time collectively with co-trustees, refraining from any form of personal conflict of interest.[39] It is submitted that the basis of fiduciary law is the existence of a duty to act in the best interest of someone or something else.[40] All other duties or liabilities flow from this one point of departure.[41] However, the duty

35 The fiduciary should promote exclusively the beneficiary's interests. Miller 2019:374 submits that the commonly cited characteristics of fiduciary relationships include discretion, power, inequality, vulnerability, trust, and confidence.

36 Miller & Gold 2016:1. Fitzgibbon's 1999:1 quote from the Decree of Delphi, 125 B.C. is applicable: "The greatest good for humans consists in relations of mutual good faith."

37 See sec. 9 of the *Trust Property Control Act* 57/1988. Compare the context of directors of a company in *Fisheries Development Corporation of SA Ltd v Jorgenson* 1980 (4) SA 156 (W) 166F, in that a breach of the duty of care and skill must be at least negligent. For the difference in character between the common-law duty of care and skill of executive directors versus non-executive directors, see Steven 2017:73. See the application of the duty of care and the degree of skill required in *Van Wyk v Lewis* 1924 AD 438 and *Durr v Absa Bank* Ltd [1997] 3 All SA 1 (A).

38 *Sackville West v Nourse and Another* 1925 AD 516; *Administrators, Estate Richards v Nichol and Another* 1999 (1) SA 551 (SCA).

39 See *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) 85A-C (collective action); *Steyn and Others NNO v Blockpave (Pty) Ltd* 2011 (3) SA 528F (acting jointly); *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union* 2008 (2) SA 351 (W) (independence); *Dorbyl Ltd v Vorster* 2011 (5) SA 575 (GSJ):par. 25 (avoiding conflicts of interest). Compare *Kuttel v Master of the High Court and Others* [2023] 1 All SA 17 (SCA) (16 November 2022).

40 La Forest J, on appeal from the court of appeal for British Colombia, submitted in *Hodgkinson v Simms* [1994] 3 SCR 377 (SCC) (1995) 117 DLR (4th) 161 176f-177b that, if the fiduciary duty is not the result of a fiduciary relationship, it can also exist where there is "evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party". Rotman 2008:391 submits that fiduciaries are compelled to serve beneficiaries' interests "single-mindedly".

41 See Alkema J in *Law Society of the Cape of Good Hope v Randall* [2015] 4 All SA 173 (ECG):par. 44, submitting that a "fiduciary duty can only arise in circumstances where the legal convictions of society recognize and give legal protection to a relationship between two or more persons in which one or more persons stand in a position of trust to another person or class of persons".

to act in the best interest of someone else is not necessarily the result of a fiduciary relationship, nor are all relationships with an embedded element of trust, fiduciary in nature.[42] In the event of a fiduciary acting with disregard towards its fiduciary responsibility, the contract from which the duty flows may remain intact.[43]

The fiduciary's position may remind one of that of an agent. Fiduciary law can, however, not be equated to agency law, due to the lack of consensus between the parties and control by the beneficiary.[44] The powers held by fiduciaries are ordinarily of a discretionary nature, entailing freedom of choice in the exercise thereof.[45] The trustee is not bound by any duty of obedience but is usually expected to exercise discretionary judgment.[46] Some aspects of the rules of agency are of a residual nature and the parties may agree otherwise.[47] Although the agent must show the utmost good faith toward the principal,[48] the relationship represents nothing more than a distinguishable specie of fiduciary. Although both relationships are fiduciary in nature, the trust relationship is not revocable at the will of the beneficiary.[49]

Although the fiduciary must commit to fulfil such a role of trust, he does not necessarily conclude a contract, but may be charged with a fiduciary role in terms of statute or being appointed by a public functionary. Although some fiduciary roles are based on contractual relationships, others may not be. It is submitted that the real nature of fiduciary law is not satisfactorily addressed by the tenets of contract law, nor can fiduciary law be moulded into any specific type of contract.

42 Penner 2016:160-162 submits that it is a misconception to understand loyalty as "something of value in its own right". Keller 2007:21 describes loyalty as a form of "emotional commitment" and "an attitude and associated pattern of conduct" that manifests in the "taking of someone's or something's side".

43 In *Van Zyl and Another NNO v Kaye NO and Other* 2014 4 SA 452 (WCC):par. 29, it was stated that, even if the trustee administered the trust "without proper regard to his fiduciary duties", … "that does not, in itself, make the trust a sham".

44 See Frankel 2011a:5. Agency is a fiduciary relationship resulting from "the joint manifestation of consent by one person that another shall act on his behalf".

45 Weinrib 1975:5 submits that, "if the fiduciary has no discretion to advise or negotiate and if their instructions are narrow and precise, there is nothing on which the fiduciary obligation can bite."

46 Villanueva 2011:302.

47 See *Union Government v Chappell* 1918 CPD 462:479.

48 See *Transvaal Cold Storage Bloom's Woollens (Pty) Ltd v Taylor* 1961(3) SA 248 (N) 253-4; *S v Heller* 1971(2) SA 29 (AD) 44. The requirement of good faith is not unique to agency. Hutchison A 2019:263 states that, due to the Roman-Dutch law origins of South African law, all contracts are historically based on good faith.

49 Villanueva 2011:303.

4. THE RELATIONAL ASPECT OF FIDUCIARY LAW

Frankel submits that the purpose of fiduciary law is threefold, namely to encourage the public to seek expert services, to entice experts to offer such socially beneficial services, and to protect the public against abuse by fiduciaries.[50] In this sense, the need for fiduciary law is directly related to the existence in a particular society of inequality of knowledge, which leads to an inequality in power relationships between those who need expert services and those who render such services.[51] Miller refers to the fiduciary relationship as "the central organizing construct in fiduciary law", the "lynchpin of fiduciary liability".[52]

If Frankel's proposition that fiduciaries serve a particular public need for specialised services[53] is accepted, the purpose of fiduciary law can be described as the regulation of the fiduciary relationship it governs.[54] Due to this inherent relational nature, fiduciary law not only reflects the values of society but often also its contradictions.[55] Due to the complex and specialised world we live in, more individuals and entities have a need for expertise in their midst and fiduciary law attempts to provide a mechanism for regulating some of these relationships.[56] The dynamics between the parties involved are influenced largely by themselves, the nature of their interaction and the societal environment within which that interaction takes place.[57]

The ideal is for fiduciary law to counter any asymmetrical power relationship that may exist between fiduciaries and beneficiaries and to protect the beneficiary[58] against potential opportunism by the fiduciary.[59] The most likely cause of the need for such legal ordering in a highly specialised, interdependent, and interconnected society is the dependence upon third

50 Frankel 2018:4. De Waal 1999:31 submits that the *ratio* for the office of trustee is the advantage and protection afforded thereby to the beneficiaries of the trust.

51 Frankel 2018:9. Not all unequal relationships are indicative of a fiduciary duty. Rotman 2011:931; Finn 1989:46.

52 Miller 2019:368.

53 Frankel 2018:3.

54 Frankel 2020:18. Criddle 2017:994 submits that, in American law, it is accepted that the fiduciary duty of loyalty is triggered when the principal has "reposed special trust and confidence" in the fiduciary and thereby exposed the beneficiaries to the risk to be prejudiced by the actions of the fiduciary. However, the exact extent of this duty of loyalty is still unknown in many fiduciary relationships.

55 Frankel 2011a:xvi.

56 In *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177, Innes CJ referred to the fiduciary relationship as "a position of confidence".

57 Frankel 2011a:xvi. Factors such as equal or unequal bargaining power, cultural strengths or weaknesses and their particular interest in a transaction will all have an impact on the fiduciary relationship.

58 The term 'beneficiary' is used in this article in the context of the party or parties engaged in a particular relationship with the fiduciary. Frankel often uses the term 'entrusters' in a similar context.

59 Licht 2017:6 highlights the risks of information asymmetries, arguing that these provide compelling justification for a strict, full-disclosure accountability regime in fiduciary law.

parties versus the potential lack of trustworthiness of those same parties. Although all relationships have the potential to present the parties with both benefits and risks, human beings need others for their long-term survival. Miller defines the fiduciary relationship as one in which one party exercises discretionary power over "the significant practical interests of another".[60] He identifies three particular structural properties of the fiduciary relationship, namely inequality, dependence, and vulnerability.[61] Because of the individual's fiduciary power and discretion, the fiduciary is in a dominant position relative to the beneficiary.[62] However, not all relationships with such imbalances can claim to be of a fiduciary nature. In a recent majority judgment in a New Zealand case, it was decided that the relationship between a parent and his child loses its fiduciary nature in adulthood, as the parent no longer occupies a position of power for the benefit of the child and is, therefore, no longer bound by a duty of undivided loyalty.[63] It is common cause in the vast majority of jurisdictions that the parent/minor child relationship is inherently fiduciary in nature, due to the vulnerability of the child and the legal duty of the parent to care for the child.[64]

Fiduciary law acts as a societal mechanism to maintain the benefits for the beneficiary, while simultaneously reducing the risks.[65] Frankel submits that the balance between "trust and mistrust; trustworthiness and abuse of trust" is shaped by relationships, culture, and social mores.[66] Bennet refers to the fiduciary duty as "a legal relationship suffused with the principle of equity".[67] However, the requirement that someone is precluded from acting in a selfish manner is not limited to fiduciary relationships and such requirement is not unique to fiduciaries.[68]

60 Miller 2016:69.

61 Beatson & Friedman 1997:91 submit that "it is superfluous to characterize the relationship in which one is unduly dependent on another as fiduciary", as this causes confusion between aspects such as undue influence, unconscionable conduct, and fiduciary obligations with one another. In *Volvo (SA) (Pty) Ltd v Yssel* 2009 (6) SA (SCA) 531:par. 16, the court stated that the presence of a fiduciary relationship "will depend upon the facts of the particular case".

62 Beatson & Friedman 1997:73.

63 *D and E Ltd v A, B and C* [2022] NZCA 430, on appeal from *A v D* [2021] NZHC 2997, with Collins J in a minority judgment arguing that the fiduciary relationship shall continue when the adult child has been left economically vulnerable as a direct result of the parents' abuse.

64 See Scott & Chen 2019:228; *Chirnside v Fay* [2006] NZSC 68, [73].

65 The South African Law Commission Report titled *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (April 1998) 56 refers to the community as the ultimate "creators and users of law in regard to the moral and ethical values of justice, fairness and decency".

66 Frankel 2011a:78-79 states that "fiduciary relationships are the foundations of people's reliance and trust on which social systems are built". Bennett 2018:112 also refers to the fiduciary duty as a "legal relationship" suffused with the principle of equity. See below for more on the aspect of equity.

67 Bennett 2018:112.

68 See Beatson & Friedman 1997:269.

It may be asked whether fiduciary relationships form a coherent category of legal relationship, distinctive from other categories of private-law relationships. If the fiduciary relationship is merely an expression of an existing well-defined private-law relationship such as contract, there is no need for a separate field of fiduciary law. However, as indicated earlier, the nature of the relationship between a fiduciary and beneficiary is often very different from a standard contractual relationship.[69] When a particular relationship is referred to as "of a fiduciary nature" or a person is described as a "fiduciary", very specific expectations are created in the minds of both the speaker and the hearer. Inherent to this high level of expectancy is the need to protect the vulnerable party in the fiduciary relationship, namely the beneficiary.[70] This reaction is not detectable in most of the other contractual relationships.

Frankel submits that all fiduciary relationships require a person who is entrusted with property or power, due to the socially desirable services offered by the fiduciary who acts as some kind of expert in the field.[71] Due to the inherent risks underlying such a relationship of trust and the vulnerability of the beneficiary, fiduciary law often aims to "reduce the costs of the relationship to both parties."[72] If the law does not protect these relationships effectively, the cost may outweigh the value proposition, which will result in a lose-lose situation. While some submit that the trust relationship has a property relationship as basis,[73] others suggest that it manifests sometimes as a fiction founded upon agreement.[74] Without legal certainty, fiduciaries may become reluctant to commit themselves, in which case society would be deprived of a much-needed service.

It is submitted that the *relationship* between the functionary and the subject, for whose benefit he or she acts, is not the basis of the office or the foundation of the law regulating such office. Finn is supported when he submits that a person becomes a fiduciary through occupational independence.[75] Not every single duty of a fiduciary is necessarily of a fiduciary nature, nor is the existence of a fiduciary relationship between two parties an indication that all aspects of their relationship are fiduciary in nature.[76] In its most basic form, the fiduciary relationship rests on one principle only, namely the obligation not only to act in the best interest of the beneficiary, but also to do so independently and without fear or favour.[77] The facts in *Griessel v De Kock* illustrate this

69 Compare the earlier reference to the passivity of the beneficiary within the trust-law context. In this article, the party toward whom the fiduciary has a duty shall be referred to as a "beneficiary", but in a wider context than the trust beneficiary. Compare fn. 53.

70 See Miller 2016:67.

71 Frankel 2011a:6.

72 See Froneman J in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020):par. 121, in which concern is expressed about the inequality in power relations in the law of contract.

73 Villanueva 2011:302.

74 Finn 1977:13.

75 Finn 1977:13.

76 Conaglen 2011:17. See *Breen v Williams* (1996) 186 CLR 71, 92, 107-108.

77 See Olivier *et al.* 2021:3-74 to 3-75.

point as the trustees concerned removed a beneficiary due to his "obstructive and contrarian" behaviour.[78] The court decided that the trustees had acted arbitrarily, treated the beneficiary "less favourably", and discriminated unfairly against him.[79] In this matter, the duty of the trustees to protect the beneficiary was based on the worthiness of the right and not its nature or the relationship between the parties.[80]

It is submitted that the reliance on the duties of loyalty and care in identifying fiduciary relationships is misleading and has contributed to the unabated extension of the fiduciary concept to relationships that should not be regarded as fiduciary.[81] The use of the duty of loyalty as the basis of the fiduciary relationship does not fit within the South African legal context, although it has been applied by the courts.[82] It is submitted that fiduciary law, in general, should be limited to case-specific relationships originating within a very limited context or status.[83]

5. THE POTENTIAL ROLE OF PUBLIC POLICY IN FIDUCIARY LAW

In South African law, the concept of equity functions as a policy consideration in assessing contractual terms, encompassing notions of good faith, fairness, and reasonableness.[84] Good faith is a suitable mechanism to use in the development of legal concepts.[85] Bennett describes the fiduciary duty as "a legal relationship suffused with the principle of equity",[86] while Finn submits that, when the beneficiary may not regulate the fiduciary's actions, "equity steps in" to protect the beneficiary's interests.[87]

78 *Griessel NO and Others v De Kock and Others* 2019(5) SA 396 (SCA):par.19.
79 *Griessel NO and Others v De Kock and Others*:par.19.
80 *Griessel NO and Others v De Kock and Others*:par.16. Compare *Potgieter v Potgieter NO and Others* 2012 1 SA 637 (SCA):paras. 28 and 35.
81 Gold 2019:386 submits that "(l)oyalty is central to fiduciary law – it is part of what gives the field its distinctive qualities", and "loyalty is vital to fiduciary relationships".
82 See *Modise and Another v Tladi Holdings (Pty) Ltd* [2020] ZASCA 112; [2020] 4 All SA 670 (SCA):paras. 35-50. Compare Cassim 2017:513-534.
83 Contra Bennett 2018:114. Kelly 2019:4 illustrates this well with the example of a member of the clergy who provides marital counselling and then engages in an extramarital affair with one of the spouses – although not a status-based fiduciary, he or she may become a fiduciary based on the particular facts of the relationship.
84 In *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA):par. 27, it was stated that these principles do not constitute independent substantive rules that courts may deploy to intervene in contractual relationships. See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (CC). See *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*: paras. 58 and 80. For an historical analysis of the development of the concept of good faith in South African law of contract, see Hutchison A 2019:234-237.
85 Hutchison A 2019:263 refers to this as a "doctrinal peg on which to hang new legal developments".
86 Bennett 2018:112. *Barkhuizen v Napier* 2007:par. 51.
87 Finn 1977:13.

According to Theron J in *Beadica*, judicial control of contractual terms has mostly been exercised through the "prism" of public policy, which imports values of fairness, reasonableness, and justice[88] with the concept of *ubuntu*[89] being applied in the democratic constitutional dispensation to "inform" public policy.[90] Although *ubuntu* has not necessarily created an identifiable set of equity, it has been described as a "pervasive element" in the South African legal system.[91] The potential overlap between the concept of *ubuntu* and that of good faith is obvious, with the latter acting as the basic normative standard set for parties to a contract.[92]

The concept of public policy has been described as "historically convoluted" and one of "the most elusive concepts in law".[93] There are various uncertainties underlying the contents and application of the public policy concept within the contractual environment.[94] *Beadica* represents an attempt by the Constitutional Court to alleviate the tension between legal certainty (as represented by the maxim *pacta sunt servanda*) and constitutional values such as fairness, reasonableness, good faith, and *ubuntu*. Irrespective of its frequent application by the courts, even within a constitutional framework, it still lacks proper conceptualisation.[95] Like any other aspect of law, the concept of public policy, too, could not escape the confines of the constitutional values and unconscionability.[96] It is probable that with the infusion of *ubuntu*, public policy has developed into a more comprehensive concept.[97]

In *WT v KT*, it was decided that no legal basis existed for the contention that the trustees had a fiduciary responsibility towards the respondent as she did not qualify as a beneficiary of the trust. She, therefore, had no standing to impugn the management of the trust because no fiduciary duty was owned

88 See *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*: paras. 26, 28, and 72, in reference to *Barkhuizen v Napier*: par. 51.

89 Mokgoro 1998:2 defines "*ubuntu ngumuntu ngabantu*" as meaning that a human being can only be a human being through others, i.e., the individual's existence is relative to that of the group, based on "a humanistic orientation towards fellow beings". In *S v Makwanyane* 1995 3 SA 391 (CC):par. 307, Mokgoro states that *ubuntu* "carries in it" the ideas of humaneness, social justice, and fairness and emphasises respect for human dignity.

90 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC):paras. 71-72. See Hutchison A 2019:258.

91 Bennett 2018:110. For more on equitable discretion, see Hutchison D 2019:101-103. In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*: par. 80, equity is recognised as a factor in assessing the terms and enforcement of contracts.

92 Hutchison A 2019:266.

93 Ghodoosi 2016:686-687 argues that public policy consists of three distinct strands, namely public interest, public morality, and public security.

94 Hawthorne 2013:303.

95 See Kruger 2011:712. Ghodoosi 2016:689 submits that a lack of serious engagement by academics and intellectuals contributes to the poor conceptualisation of the public policy concept.

96 See Hutchison A 2019: 263; Nel 2014:81-93.

97 Hutchison A 2019:267.

to her.[98] The Supreme Court of Appeal was critical of this approach in *PAF v SCF*.[99] If the fiduciary responsibility is limited in this way, ignoring fairness and reasonableness, it may have unconscionable results.[100] In *Griessel v De Kock*, the court found that the trustees discriminated unfairly against the respondent, resulting in an unfair outcome.[101]

The inherent tension between the need for legal certainty in the application of the common law[102] and the "versatility, flexibility and adaptability of the notion of equity"[103] is transferred to fiduciary law. For this reason, fiduciary law cannot be conceptualised in the same manner as the law of contract. The fact that equity focuses on substance rather than form conflicts with the strict constraints of the common law.[104] Although the fiduciary only fulfils a position within the confines of the particular relationship and anything outside that is not subject to the fiduciary duty, the individual must be sure to avoid any conflict within the incidence thereof.[105] The need for such other-regarding behaviour is overwhelming in a highly specialised environment of social, legal, and economic interdependency.

It is submitted that public policy and the values it imports have important "creative, informative and controlling functions" in the formatting and development of substantive fiduciary law in South Africa.[106]

98 *WT and Others v KT* 2015 3 SA 574 (SCA):paras. 32-33. The court stated that only beneficiaries and third parties who transacted with the trust may invoke the fiduciary's duty.

99 *PAF v SCF* 2022 (6) SA 182 (SCA):par. 40. See also *REM v VM* 2017 (3) SA 371 (SCA).

100 Compare the facts in *Ras NO and Others v Van der Meulen and Another* 2011 4 SA 17 (SCA), in which case it may have resulted in trustees having a fiduciary duty towards a beneficiary who has not accepted any benefits, but the moment they remove her in an unconscionable way, their fiduciary duty towards her falls away.

101 *Griessel NO and Others v De Kock and Others* 2019(5) SA 396 (SCA):par. 19.

102 For an historical analysis of South African common law, see Du Bois 2004:1-53.

103 Cloete 2012:378, 391. See *Gcaba v Minister for Safety and Security and Others* (2009) 30 ILJ 2623 (CC) 2636.

104 Rotman 2011:959.

105 In *Noranda Austl. Ltd v Lachlan Res. NL* (1988) 14 NSWLR 1, 15 (Eq.Div) (Austl.), the court stated that the fiduciary is under such obligation "in relation to a defined area of conduct, and exempt from the obligation in all other respects". For more on the breach of the fiduciary duty, compare *Pinshaw v Nexus Securities (Pty) Ltd* [2001] 2 All SA 569; 2002(2) SA 510 (C); *Phillips v Fieldstone Africa (Pty) Ltd*:paras. 30 and 31.

106 See *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020):paras. 72-76.

6. THE IMPACT OF A MIXED-LAW TRADITION ON FIDUCIARY LAW

In the United States, 'fiduciaries' have been identified as one of four categories of institutions of corruption, largely due to their "incentive structures".[107] South African law is based on a civil-law tradition,[108] but has been influenced by common-law principles to develop into a true mixed-law jurisdiction.[109] To that the *Constitution* contributed an objective value system as well as African customary law and tradition.[110] Post-*Constitution*, all law "derives its force from the Constitution and is subject to constitutional control".[111] This is also true of the determination of public policy.[112]

In South Africa, the fiduciary duty did not develop through equity jurisprudence, but as an offshoot of Roman and Roman-Dutch law.[113] The courts unfortunately did not go out of their way to evaluate the true nature and origin of the fiduciary concept. The majority of case law dealing with the concept limit themselves to whether a fiduciary duty does exist, based on the facts presented in the specific matter. More often than not, the reasoning is limited to some elements of the fiduciary duty such as the prohibition against a conflict of interest, the making of a secret profit, or the duty to treat all

107 Newman 2014:569-572 argues on 594 that institutional corruption theory is a theory of "organizational fiduciary duty and breach" and that corporate relationships giving rise to fiduciary duties grant the fiduciary discretionary management over a critical resource belonging to a principal.

108 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020):par. 61.

109 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020):par. 66. For a discussion on the origin, development, and survival of mixed-law jurisdictions, see Tetley 1999:877-907. Du Bois 2004:3 states that, although South Africa is classified as a mixed-law jurisdiction, it is still closer to the common-law tradition than anything else.

110 Froneman J in *Beadica231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020):par. 110 calls customary law and tradition the "third grace of our legal heritage".

111 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC):par. 44.

112 *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC):par. 28.

113 See *Phillips v Fieldstone Africa (Pty) Ltd and Another*:par. 30.

beneficiaries fairly.[114] The right to be treated fairly by the fiduciary has been extended to equality and even-handedness.[115] Although these principles may be core elements of fiduciary law, the law is indifferent to the particular fiduciary's motives or reasons for action.[116]

The result-oriented approach of our courts prevents a pervasive investigation and understanding of fiduciary theory. Due to a total lack of appreciation of, and interest in the fundamental law underlying the fiduciary duty, no significant development has taken place.[117] Courts deal with the fiduciary phenomenon haphazardly, without applying the definitive underlying legal principles of fiduciary law. It is submitted that the slavish application of private-law concepts does not adequately consider the underlying normative foundations of fiduciary law.[118] Fiduciary law distinguishes itself from other parts of private law in that the fiduciary fulfils an extraordinary role of trust,[119] which is confined to the objective realm of the fiduciary office.

7. CONCLUSION

One may claim that "fiduciary law is dead, long live fiduciary law" to illustrate the necessity of fiduciary-like actors in any legal community.[120] Irrespective of the philosophical foundation of the fiduciary's obligation and whether its legal independence is accepted or not, the fiduciary office will continue to operate independently of the individual who occupies it.[121]

---

114 See *Kuttel v Master of the High Court* [2022] ZASCA 156:paras. 30 and 31, and the court's reference to *Peffers NO and Another v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control* 1965(2) SA 53 (C) 56B-H. In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020):par. 112, Froneman J submitted that fairness is "universally recognised as integral to any system of contract law", and is often found in unconscionability (common law) and good faith (civil law):par. 123. In South Africa's mixed legal system, cross-pollination is a given.

115 See the minority judgment in *Kuttel v Master of the High Court*:par. 71, and references to *Breetzke NNO and Others v Alexander* [2020] ZASCA 97; 2020(6) SA 360 (SCA):paras. 10 and 36, as well as *Griessel NO and Others v De Kock and Another* [2019] ZASCA 95; 2019(5) SA 396 (SCA):paras. 17-19, warning against arbitrary and discriminatory actions by fiduciaries.

116 See Criddle & Fox-Decent 2016:200-201.

117 Compare the reasoning of the court in *Kuttel v Master of the High Court* and the difference in approach between Plasket JA and Molemela JA.

118 See Criddle & Fox-Decent 2016:204. For more on the legal-ethics debate and Kant's theory of law and virtue, see Criddle & Fox-Decent 2016:212-213.

119 This special role is in some jurisdictions known as a duty of loyalty.

120 For more on the tradition of the announcement that 'the king is dead, long live the king', indicating the seamlessness with which sovereignty and the law perpetuates from one governing regime to the next, see Fox-Decent 2019:1. In *Phillips v Fieldstone Africa (Pty) Ltd*:par. 27, Heher JA stated that "(t)here is no magic in the term 'fiduciary duty'".

121 Fox-Decent 2019:1.

We submit that, although a fiduciary relationship will necessarily result in an element of inequality between the fiduciary and the beneficiary, this is not a requirement or determining factor for a fiduciary relationship to exist.[122] Rotman is correct when he states that "inequality between parties is a characteristic endemic to fiduciary relationships rather than a determining factor for their existence".[123]

Fiduciary law is based on relationships and the fiduciary relationship is triggered by a particular commitment made by one party in relation to another, either in terms of the common law, or regulated by statute – whether by virtue of a contract or not. Although contract law and fiduciary law are inherently intertwined, they are not the same.[124] The element in a particular relationship that may trigger a fiduciary duty is the obligation to act in the best interest of another.[125] However, not all relationships, in which one person has a duty to act in the best interest of a third party, is necessarily fiduciary in nature. In this regard, Kelly refers to categorical or status-based relationships versus *ad hoc* or fact-based relationships.[126] Certain relationships may not, in general, be regarded, from a status perspective, as categorically fiduciary, but may be regarded as such on a "fact-specific analysis" of the specific relationship or transaction.[127]

In identifying the parameters of the fiduciary relationship, the challenge is to determine which factors to consider in such a process of differentiation. A particular relationship may be regarded by a court as fiduciary in nature, if a beneficiary places confidence in another party, due to his or her own lack of expertise, knowledge, or experience. Another triggering factor may be a high level of discretion over the beneficiary or his or her property, exhibiting influence or dominance over the beneficiary.[128] It is submitted, however, that this broad approach by the courts is the main reason why the concept of

122 Weinrib 1975:6; Rotman 2008:390.

123 Rotman 2008:390. See McLachlin J in *Norberg v Wynrib* (1992), 92 D.L.R. (4th) 449 at 491 (S.C.C.).

124 Miller & Gold 2016:2.

125 In *Bristol and West Building Society v Mothew* [1996] 4 All ER 698 (CA) 711 711, the court held that the principal is "entitled to the single-minded loyalty" of the fiduciary.

126 Kelly 2019:3. Gold & Miller 2016:2-3 state that most fiduciary-like relationships are treated as such because of a particular status or convention. They submit that a relationship enjoys fiduciary status because it is "habitually treated as fiduciary" and therefore presumed to be fiduciary. Coetzee & Van Tonder 2014:309 suggest elements that are indicative of the existence of a fiduciary relationship in the context of company law.

127 Kelly 2019:4-5. Some relationships may involve multiple approaches to triggering fiduciary duties as illustrated by Kelly, suggesting that someone could be either a categorical fiduciary via a fact-based test or an *ad hoc* fiduciary via a test-based test.

128 See Kelly 2019:21.

fiduciary law remains elusive and in a constant battle for existence.[129] A lack of understanding and acknowledgement of the true nature of fiduciary law has resulted in an improper and sometimes haphazard application of fiduciary principles. Due to a lack of appreciation of the foundational values of fiduciary law, it has been relegated to a manifestation of the law of contract and delict.[130]

We support Criddle and Fox-Decent's submission that fiduciary law is largely concerned with the process of fiduciary decision-making.[131] This deliberative process[132] includes understanding of the terms and purposes of the mandate, identifying the issue or issues at hand, discerning the potential options or actions, evaluating each alternative, and developing "an objectively reasonable rationale" for the particular action to be taken.[133] The overarching focus of the fiduciary's decision-making process always remains the best interests of the beneficiaries and not the fiduciary's motivation or moral compass.[134] The duty of loyalty is, therefore, not a personal duty, but should refer to the office and its accompanying responsibilities.[135]

South Africa is not alone in its lack of well-developed fiduciary-law principles. Rotman argues that failed jurisprudence has reduced fiduciary law's effectiveness in protecting parties in circumstances where "the laws of contract, tort, and unjust enrichment are silent or insufficient".[136] He submits that the solution lies in the pairing of the role of fiduciary law within the law of obligations, and its foundational purpose or goal within the particular legal dispensation.[137] It is submitted that, if fiduciary theory is properly applied to practical situations, it will contribute to more appropriate outcomes in ways that the ordinary principles of the law of contract cannot offer.[138] This process can only be effective when the distinctive character of the perspective of fiduciary law versus that of contract law is understood.[139]

---

129 Webb 2019:705 submits that the most important role of fiduciary law is to serve other branches of law. Rotman 2008:388-389 submits that, in determining the fulfilment of the fiduciary's obligations, lies an objective assessment measuring his actions against the standards imposed by the fiduciary concept.

130 See Rotman 2011:924. The role of delict in fiduciary law falls outside the ambit of this article.

131 Criddle & Fox-Decent 2016:199.

132 A deliberative process prevents arbitrary or unilateral actions.

133 Criddle & Fox-Decent 2016:199.

134 Criddle & Fox-Decent 2016:204.

135 Criddle & Fox-Decent 2016:214.

136 Rotman 2011:922 submits on 924 that the improper application of fiduciary principles is the result of a lack of understanding of fiduciary law. The foundational values of fiduciary law such as equity and fairness go far beyond what is required in the law of contract. On tort law in South Africa, see Neethling 2019:476-506.

137 Rotman 2011:923. In this article, the broader context of the law of obligations is not addressed.

138 Rotman 2011:924-925.

139 Rotman 2011:932 refers to the proper understanding of what separates fiduciary law from other areas of civil obligation as the "holy grail". Criddle & Fox-Decent 2016:195 submit that, if a particular theory of fiduciary relationships does not satisfactorily explain the core aspects of fiduciary law, it fails as a theory of the law itself.

In the search for the foundations and contents of fiduciary law in the South African legal dispensation, we suggest a threefold approach. First, a common realisation and prioritisation of the need for the responsible development of fiduciary law; secondly, a sound theoretical understanding of the purposes and desired outcomes, and, thirdly, the identification and application of a legally accepted normative test.[140]

While Rotman[141] warns against a "rigid formulaic equation", which may lead to an unnecessary restriction of the scope of influence of the fiduciary concept, the following common factors may assist in demarcating the parameters of the fiduciary relationship: the purpose of the fiduciary concept is to protect particular relationships of trust and confidence;[142] the fiduciary undertakes to act in the best interest of someone else, either verbally, in writing or by implication;[143] the fiduciary comes into office by way of contract, appointment or nomination, or in any other way; the fiduciary is independent; the fiduciary's discretion is not unfettered but its obligations are determined by way of an acknowledged standard (i.e. public policy); the fiduciary has a decision-making capacity, and the performance of the fiduciary (compliance with his obligations) is objectively assessed.[144]

140 For more on Rawl's methodology of reflective equilibrium (also Rawlsian constructivism), which focuses on the relationship between judgments and moral principles, see Brandstedt & Brännmark 2020:355-359. This may be helpful.

141 Rotman 2008:393.

142 Rotman 2008:393.

143 See *Jowell v Bramwell-Jones* 1998(1) SA 836 (W) at 891 and 894. Compare the classical remark by Innes CJ in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177.

144 See Rotman 2008:388-389.

BIBLIOGRAPHY

BEATSON J & FRIEDMAN D
1997. *Good faith and fault in contract law*. London: Clarendon Press. https://doi.org/10.1093/acprof:oso/9780198265788.001.0001

BENNETT TW
2018. *Ubuntu: An African jurisprudence*. Cape Town: Juta.

BRANDSTEDT E & BRÄNNMARK J
2020. Rawlsian constructivism: A practical guide to reflective equilibrium. *The Journal of Ethics* 24(3):355-373. https://doi.org/10.1007/s10892-020-09333-3

CAMERON E, DE WAAL M & SOLOMON P
2018. *Honoré's South African law of trusts.* 6th edition. Cape Town: Juta.

CASSIM FHI (ED.)
2017. *Contemporary company law*. 2nd edition. Cape Town: Juta.

CLOETE N
2012. The equitable foundations of South African labour law: An historical and comparative study. Unpublished LLD thesis. University of the Free State.

COETZEE L & VAN TONDER J-L
2014. The fiduciary relationship between a company and its directors. *Obiter* 35(2):285-315. https://doi.org/10.17159/obiter.v35i2.11903

CONAGLEN M
2011. *Fiduciary loyalty: Protecting the due performance of non-fiduciary duties*. London: Oxford University Press.

CRIDDLE EJ
2017. Liberty in loyalty: A republican theory of fiduciary law. *Texas Law Review* 95:993-1060.

CRIDDLE EJ & FOX-DECENT E
2009. A fiduciary theory of *jus cogens*. *The Yale Journal of International Law* 34(33):331-387.

2016. Keeping the promise of public fiduciary theory: A reply to Leib and Galoob. *The Yale Law Journal Forum* 126:192-215.

CRIDDLE EJ, MILLER PB & SITKOFF RH (EDS)
2019. *The Oxford handbook of fiduciary law*. New York: Oxford University Press. https://doi.org/10.1093/oxfordhb/9780190634100.001.0001

DE WAAL MJ
1999. The liability of co-trustees for breach of trust. *Stellenbosch Law Review* 10(1):21-35.

DORFMAN A
2014. On rust and transubstantiation: Mitigating the excesses of ownership. In EJ Criddle, PB Miller & RH Sitkoff (eds) 2014:339-359. https://doi.org/10.1093/acprof:oso/9780198701729.003.0018

DORFMAN A & HAREL A
2021. Law as standing. In J Gardner, L Green & B Leiter (eds) 2021:2-24.

DU BOIS F
2004. Introduction: History, system and sources. In CG van der Merwe & JE du Plessis (eds) 2004:1-53.

DU TOIT F
2018. Trusts in mixed jurisdictions – Aspects of the Louisiana and South African trusts compared. *The Tulane European and Civil Law Forum* 33:1-39.

DU TOIT F, SMITH B & VAN DER LINDE A
2023. *Fundamentals of South African trust law*. 2nd edition. Durban: LexisNexis.

DWORKIN R
2010. The model of rules 1. In L May & J Brown (eds) 2010:99-107.

FINN PD
1977. *Fiduciary obligations*. Sydney: The Law Book Company.

1989. The fiduciary principle in equity, fiduciaries and trusts. In TG Youdan (ed.) 1989:46.

FITZGIBBON S
1999. Fiduciary relationships are not contracts. *Marguette Law Review* 82(2):303-353.

FOX-DECENT E
2019. Trust and authority. In PB Miller and M Harding (eds) 2019:1-40.

FRANKEL T
2011a. *Fiduciary law*. New York, Oxford University Press.

2011b. Fiduciary law in the twenty-first century. *Boston University Law Review* 91:1289-1299.

2014. Toward universal fiduciary principles. *Queen's Law Journal* 39(2):391-440.

2018. The rise of fiduciary law. *Boston University School of Law Public Law Research Paper* No.18-18:1-11. https://ssrn.com/abstract=3237023 (accessed on 20 June 2023).

2020. Transnational fiduciary law. *UC Irvine Journal of International, Transnational and Comparative Law* 5:15-46.

GARDNER J, GREEN L & LEITER B (EDS)
2021. *Oxford studies in philosophy of law.* Volume 4. New York: Oxford University Press. https://doi.org/10.1093/oso/9780192848871.001.0001

GELTER M & HELLERINGER G
2019. Fiduciary principles in European civil law. In EJ Criddle, PB Miller & RH Sitkoff (eds) 2019:583-602. https://doi.org/10.1093/oxfordhb/9780190634100.013.33

GHODOOSI F
2016. The concept of public policy in law: Revisiting the role of the public policy doctrine in the enforcement of private legal arrangements. *Nebraska Law Review* 94(3):685-736.

GOLD AS
2019. The fiduciary duty of loyalty. In EJ Criddle, PB Miller & RH Sitkoff (eds) 2019:385-403. https://doi.org/10.1093/oxfordhb/9780190634100.013.20

GOLD AS & MILLER PB (EDS)
2016. *Philosophical foundations of fiduciary law*. London: Oxford University Press.

GRAZIADEI M
2016. Virtue and utility: Fiduciary law in civil law and common law jurisdictions. In AS Gold & PB Miller (eds) 2016:287-301. https://doi.org/10.1093/acprof:oso/9780198701729.003.0015

GREEN L & ADAMS T
2019. Legal positivism. *The Stanford Encyclopedia of Philosophy*. https://plato.stanford.edu/archives/win2019/entries/legal-positivism/ (accessed on 22 May 2023).

HAWTHORNE L
2013. Public policy: The origin of a general clause in the South African law of contract. *Fundamina* 19(2):300-320.

HILLARD J
2009. The flexibility of fiduciary doctrine in trust law: How far does it stretch in practice? *Trust Law International* 23(3):119-129.

HUTCHISON A
2013. Reciprocity in contract law. *Stellenbosch Law Review* 24(1):3-30.

2019. Good faith in contract: A uniquely South African perspective. *Journal of Commonwealth Law* 1:227-271.

HUTCHISON D
2019. From *bona fides* to *ubuntu*: The quest for fairness in the South African law of contract. *Acta Juridica* 99-126.

JENNINGS BPL
2015. Are shareholders exclusive beneficiaries of fiduciary obligations in South Africa? The role of fiduciary obligation in the 21st century. *Journal of Corporate and Commercial Law and Practice* 1(2):54-81.

JOHNSTON D
2019. Fiduciary principles in Roman law. In EJ Criddle, PB Miller & RH Sitkoff (eds) 2019:505-523. https://doi.org/10.1093/oxfordhb/9780190634100.013.28

KASER M
1968. *Roman private law*. Translation of *Römisches Privatrecht*. 6th edition. Translated by R Dannenberg. Durban: Butterworths.

KELLER S
2007. *The limits of loyalty*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511487590

KELLY DB
2019. Fiduciary principles in fact-based fiduciary relationships. In EJ Criddle, PB Miller & RH Sitkoff (eds) 2019:3-22. https://doi.org/10.1093/oxfordhb/9780190634100.013.1

KRUGER M
2011. The role of public policy in the law of contract, revisited. *South African Law Journal* 128(4):712-740.

KUNTZ T
2020. Transnational fiduciary law: Spaces and elements. *UC Irvine Journal of International, Transnational and Comparative Law* 5:47-83.

LICHT AN
2017. Motivation, information, negotiation: Why fiduciary accountability cannot be negotiable. *EGCI Working Paper Series in Law*. (SSRN Scholarly Paper No. ID 2811237). 1-31. https://ssrn.com/abstract=2811237 (accessed on 13 February 2023).

LIGON JP
2012. Legal positivism, natural law and normativity. *University of Vermont Honors College Seniors Theses*. https://scholarworks.uvm.edu/hcoltheses/417 (accessed on 21 May 2023).

MARTIN-CASALS M (ED.)
2019. *The borderlines of tort law: Interactions with contract law*. London: Intersentia. https://doi.org/10.1017/9781780689135

MAY L & BROWN J (ED.)
2010. *Philosophy of law: Classic and contemporary readings*. London: Wiley-Blackwell.

MILLER PB
2016. The fiduciary relationship. In AS Gold & PB Miller (eds) 2016:63-90. https://doi.org/10.1093/acprof:oso/9780198701729.003.0004

2019. The identification of fiduciary relationships. In EJ Criddle, PB Miller & RH Sitkoff (eds) 2019:367-383. https://doi.org/10.1093/oxfordhb/9780190634100.013.19

MILLER PB & GOLD AS (EDS)
2016. *Contract, status, and fiduciary law*. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198779193.001.0001

MILLER PB & HARDING M
2019. *Fiduciaries and trust: Ethics, politics, economics, and law*. London: Cambridge University Press. https://doi.org/10.1017/9781108616225

MOKGORO Y
1998. *Ubuntu* and the law of South Africa. *Potchefstroom Electronic Law Journal* 1(1):1-11. https://doi.org/10.4314/pelj.v1i1.43567

NEETHLING J
2019. The borderlines of tort law in South Africa. In M Martin-Casals (ed.) 2019:476-506. https://doi.org/10.1017/9781780689135.015

NEL E
2014. An interpretive account of unconscionability in trust law. *Obiter* 35(1):81-93. https://doi.org/10.17159/obiter.v35i1.11941

2015. A case for normative content in South African trust law. *Obiter* 36(3):600-614. https://doi.org/10.17159/obiter.v36i3.11592

NEWMAN ME
2014. Institutional corruption: A fiduciary theory. *Cornell Journal of Law and Public Policy* 23:553-594.

NICHOLAS B
1962. *An introduction to Roman law*. London: Oxford University Press.

OLIVIER PA, STRYDOM S & VAN DEN BERG GPJ
2021. *Trust law and practice*. Johannesburg: LexisNexis.

PACE RP & VAN DER WESTHUIZEN WM
2022. *Wills and trusts*. Cape Town: LexisNexis.

PALMER VV
2012. *Mixed jurisdictions worldwide: The third legal family*. 2nd edition. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139028424

PENNER JE
2016. Is loyalty a virtue, and even if it is, does it really help explain fiduciary liability? In AS Gold and PB Miller (eds) 2016:159-175. https://doi.org/10.1093/acprof:oso/9780198701729.003.0008

RIBBENS DS
1988. *The personal fiduciary character of members'* inter se *relations in the incorporated partnership*. Johannesburg: Perskor Publishers.

ROTMAN LI
2008. The fiduciary concept and the subjective nature of legal certainty. *Revue du Notariat* 110(2):361-393. https://doi.org/10.7202/1045543ar

2011. Fiduciary law's 'holy grail': Reconciling theory and practice in fiduciary jurisprudence. *Boston University Law Review* 91:921-970.

SAVANELI B
2010. The co-existence of public positive law and the private normative order: The constant spiral of the developing interaction and mutual transition between positive law and normative order. *The Journal Jurisprudence: Contemporary Legal Theory* 6:247-259.

SCOTT ES & CHEN B
2019. Fiduciary principles in family law. In EJ Criddle, PB Miller & RH Sitkoff (eds) 2019:227-248. https://doi.org/10.1093/oxfordhb/9780190634100.013.11

SHEPHERD JC
1951. *The law of fiduciaries*. Toronto: Carswell Company.

STEVEN R
2017. The legal nature of the duty of care and skill: Contract or delict? *Potchefstroom Electronic Law Journal* 20:1-29. https://doi.org/10.17159/1727-3781/2017/v20i0a1202

TETLEY W
1999. Mixed jurisdictions: Common law vs civil law (codified and uncodified) (Part II). *Uniform Law Review* 4:877-907. https://doi.org/10.1093/ulr/4.4.877

VAN DER MERWE CG & DU PLESSIS JE (EDS)
2004. *Introduction to South African law*. 1st edition. The Hague: Kluwer Law International.

VAN DER SCHYFF E
2013. Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil? *South African Law Journal* 130:369-389.

VAN WARMELO P
1980. *An introduction to the principles of Roman civil law*. Cape Town: Juta.

VAN ZYL R
2017. Die invloed van die *stipulatio alteri* op die *inter vivos* trust in die Suid-Afrikaanse reg: Voorgestelde oplossings vir beter regulering. Unpublished LLD thesis. University of the Free State.

VERMEULE A
2007. Connecting positive and normative legal theory. *University of Pennsylvania Journal of Constitutional Law* 10:387-398.

VILLANUEVA CL
2011. *Non-corporate media of doing business: Agency, trusts, partnerships, and joint ventures*. Manilla: Rex Book Store.

WEBB C
2019. The philosophy of fiduciary law. In EJ Criddle, PB Miller & RH Sitkoff (eds) 2019:687-706. https://doi.org/10.1093/oxfordhb/9780190634100.013.37

WEINRIB EJ
1975. The fiduciary obligation. *University Toronto Law Journal* 25(1):5-22. https://doi.org/10.2307/824874

YOUDAN TD (ED.)
1989. *Equity, fiduciaries and trusts*. Toronto: The Carswell Company Limited.

ZIMMERMAN R
1990. *The law of obligations: Roman foundations of the civilian tradition*. Cape Town: Juta.