

CANADA / JUDGMENT

Fleischer v. Zoltan Elemer Fleischer Alter Ego Trust

2024 BCSC 2162

COURT

Supreme Court of British Columbia

DECIDED

28 November 2024

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2024 BCSC 2162 Fleischer v. Zoltan Elemer Fleischer Alter Ego Trust

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fleischer v. Zoltan Elemer Fleischer Alter Ego Trust,

2024 BCSC 2162

Date: 20241128

Docket: S224350

Registry: Vancouver

Between:

Ernest Gabriel Fleischer

Plaintiff

And

Zoltan Elemer Fleischer and Susanne Karolina Kierszenblat in their capacities as Co-Trustees of the Zoltan Elemer Fleischer Alter Ego Trust and the said Zoltan Elemer Fleischer Alter Ego Trust, Zoltan Elemer Fleischer in his personal capacity, Susanne Karolina Kierszenblat also known as Susanne Karolina Kerszenblat, also known as Suzie Fleischer, also known as Suzie Kierszenblat, also known as Suzanne Karolina Kierszenblat, also known as Suzanne Karolina Kerszenblat, also known as Susanne Karolina Fleischer Kierszenblat in her personal capacity, John/Jane Doe in his/her capacity as Executor of the Estate of Zoltan Elemer Fleischer, Deceased, Fleischer Holdings Ltd., and Scott Road Trading & Auto Wrecking Ltd.

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Plaintiff:

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D. McMurtry

Counsel for the Defendant, Susanne Karolina Kierszenblat, in her capacities as Trustee of the Zoltan Elemer Fleischer Alter Ego Trust, as the personal representative of the Estate of Zoltan Elemer Fleischer, and in her personal capacity:

T. M. Chan

N. Safarik

Counsel for the Defendants, Fleischer Holdings Ltd. and Scott Road Trading & Auto Wrecking Ltd.

A. Crabtree

Place and Date of Summary Trial and Hearing:

Vancouver, B.C.

October 8-9, 2024

Place and Date of Judgment:

Vancouver, B.C.

November 28, 2024

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INTRODUCTION

- [1] The plaintiff, Ernest Fleischer, and the defendant, Susanne Kierszenblat (née Fleischer), are brother and sister. In this action, Ernest Fleischer challenges and seeks to set aside various actions taken by their father, Zoltan Fleischer, to plan his estate. Through that planning, Susanne Kierszenblat is now entitled to the bulk of the family assets held by Zoltan Fleischer in his estate.
- [2] For ease of reference, and meaning no disrespect, I will refer to the various Fleischer family members by their first names.
- [3] Susanne brings this summary trial application to dismiss Ernest's claims against her in her various capacities as: 1) as Trustee of Zoltan's family trust; 2) the personal representative of Zoltan's estate; and 3) in her personal capacity. This application does not involve the relief sought by Ernest against the two corporate defendants, Fleischer Holdings Ltd. ("FH") and Scott Road Trading & Auto Wrecking Ltd. ("SRTAW") (collectively, the "Companies").
- [4] Ernest disputes that the issues relating to Susanne are currently suitable for summary trial or at all. He applies to dismiss or adjourn the summary trial, asserting that he wishes to pursue various further pre-trial procedures, and possibly seek a resolution at an ordinary trial. In the alternative, Ernest says that he should succeed on his claims against Susanne on the merits.

BRIEF BACKGROUND FACTS

- [5] Ernest was born to Erika Fleischer in 1957. He is now 66 years old.
- [6] After Ernest's birth, Zoltan married Erika. Later, Zoltan adopted Ernest.
- [7] Susanne was born to Erika and Zoltan in 1967. She is now 56 years old. Her husband is Mark Kierszenblat.
- [8] Ernest and Susanne each have two children.
- [9] In January 2005, Erika died, leaving a will.
- [10] In March 2022, Zoltan died at age 94. By that time, he had executed various wills throughout his lifetime. In addition, between 2009-2017, Zoltan undertook substantial estate planning. Significantly, in May 2009, this planning included the creation of the Zoltan Elemer Fleischer Alter Ego Trust (the "Trust"), which I will discuss in more detail below.

[11] The Fleischer family had and has various corporate interests:

a) FH:

- i. FH is a holding company. Zoltan was the sole director until his death. Susanne is now the sole director; and
- ii. FH's sole asset at this time is property located at 8775 Osler Street, Vancouver, BC, which is a rental property which generates income (the "Osler Property");

b) SRTAW:

- i. Until 1991, SRTAW owned and operated a scrap yard and recycling business on land it owned in Surrey. Zoltan was the manager until 1982, when Ernest took over. Ernest was SRTAW's manager of operations until 1989, when he left for a period of time due to ongoing conflict with Zoltan;
 - ii. After Erika's death in 2005, Zoltan became the sole director. After Zoltan's death, Susanne became the sole director; and
 - iii. SRTAW's major asset - the property in Surrey - was sold in 2019. The company currently manages various financial investments; and
- c) Scott Road Trading Ltd. ("SRT"): from 1991-2015, SRT was the operating company of the scrap and recycling business on SRTAW's premises. During that time, Ernest managed SRT. SRT remitted payments to SRTAW, which was SRTAW's sole source of income. Mark was employed by SRT for some time. In 2016, SRT ran into financial difficulty and ultimately assigned itself into bankruptcy. In August 2019, SRT was dissolved.

[12] At present, the shareholdings of FH and SRTAW are:

- a) FH: the Trust owns the Class A voting shares and certain preferred shares (previously held by Zoltan). Each of Ernest and Susanne hold 50 Class B non-voting shares. Susanne also holds one Class C non-voting share; and
- b) SRTAW: the Trust owns Class A voting shares and certain preferred shares. FH holds two Class A voting shares. Ernest holds 47 Class B non-voting shares (after he transferred three Class B shares in 1987 to Erika, which were inherited by Zoltan upon her death and later cancelled). Susanne holds 50 Class B non-voting shares.

[13] This action also involves various real estate which was owned or is now owned by various family members:

- a) "Selkirk Property": this was Erika and Zoltan's residence on Selkirk Street, Vancouver, BC. On Erika's death, it was transferred to Zoltan as the surviving joint tenant, who in turn transferred the property to himself and Susanne as joint tenants. Susanne received full ownership of this property upon Zoltan's death as joint tenant;

- b) "Montcalm Property": this property was owned by Erika and Zoltan as joint tenants. On Erika's death, it was transferred to Zoltan as the surviving joint tenant, who in turn transferred the property to the Trust;
- c) "Gilbert Property": in 1989, Susanne purchased a rental property on Gilbert Street in Richmond, BC, which was financed by Erika and Zoltan. It was sold in 2005; and
- d) "Palm Springs Property": in 1987, Susanne purchased property in Palm Springs, using funds provided by Erika and Zoltan. She understood it was a gift. That property was later sold in September 2013, and the proceeds were used by Susanne and Mark to purchase a property in Rancho Mirage, California.

[14] When Zoltan died, his estate only held modest assets. His will - dated in December 2016 - allocated half of the residue to Susanne and half to Ernest's children.

SUMMARY OF ERNEST'S CLAIMS

[15] On May 30, 2022, Ernest filed his notice of civil claim (the "NOCC").

[16] On March 1, 2024, Ernest amended his notice of civil claim (the "ANOCC").

[17] In the ANOCC, Ernest advances claims of oppression against the Companies.

[18] In the ANOCC, Ernest seeks the following relief as against Susanne in her various capacities:

- a) a declaration that the gratuitous transfers of assets from Zoltan are in breach of a mutual will agreement;
- b) a declaration that the Trust is not valid and that all of its assets be transferred to Zoltan's estate, or that the transfers to the Trust were fraudulent and void;
- c) in the alternative to a) and b), a declaration that the transfers of assets to the Trust and Susanne were unconscionably procured and void;
- d) a declaration that Zoltan lacked the capacity to dispose of his assets in 2016;
- e) a declaration that Zoltan, his estate, the Trust and/or Susanne were unjustly enriched by which he is entitled to a constructive trust over Susanne's assets (or a monetary award);
- f) accounting and/or tracing remedies with respect to various properties that were previously owned and later sold or transferred by Erika and Zoltan.

[19] Upon the filing of the NOCC, Ernest filed certificates of pending litigation ("CPLs") against various properties, including the Selkirk Property, the Montcalm Property and FH's Osler Property, which remain in place today.

SUITABILITY OF SUMMARY TRIAL

- [20] Ernest objects to this matter being decided at this summary trial. The majority of his submissions on this application were devoted to that issue, rather than the merits of his claims.
- [21] In my view, a review of the litigation history is necessary to consider this issue.
- [22] From the filing of the NOCC (May 2022) to November 2023 (some year-and-a-half), Ernest takes no steps in the litigation to advance his claims. No explanation has been proffered for that delay.
- [23] The only step in this litigation in that timeframe of which I'm aware is an application filed in May 2023, not by Ernest, but by the Companies, to obtain documents in the possession of their accountant. Ernest consented to the relief, although it appears that the application was never heard.
- [24] On November 16, 2023, Susanne filed this summary trial application, seeking to dismiss all claims against her. The application was scheduled for January 8, 2024. In support, Susanne's counsel served six affidavits, including her own and those of various other persons involved in Zoltan's estate planning (whose evidence is discussed below).
- [25] The filing of the summary trial application had some effect in prompting Ernest to finally actively advance his claims.
- [26] On December 11, 2023, Ernest hired new (and his present) counsel. That new representation was the basis upon which Ernest secured a three-month adjournment of the summary trial, which was then rescheduled for March 4, 2024.
- [27] On the eve of the hearing, on March 1, 2024, Ernest filed the ANOCC which included new claims, such as allegation of a mutual wills argument, that Zoltan lacked capacity in 2016/2017 and that Zoltan's transfers of assets constituted unconscionable procurement. On May 2, 2024, Ernest also applied for various relief, seeking such things as an order for inspection of a solicitor's legal file and leave to assert the mutual wills agreement on behalf of Zoltan's estate.
- [28] On March 4, 2024, the summary trial did not proceed. Instead, Justice Gomery adjourned Susanne's summary trial. In addition, Gomery J. granted various procedural orders, including ones that required the parties to exchange further lists of documents and allowed Ernest to schedule an examination for discovery of Susanne (by June 7, 2024) and allowed Ernest to file applications to cross-examine the various persons who had filed affidavits in support of Susanne's summary trial (to be filed by May 13, 2024) (the "Gomery Order").
- [29] Ernest's counsel took various steps following the Gomery Order.

- [30] His counsel examined Susanne for discovery on June 7, 2024. All document and information requests were answered. There were issues relating to Ernest's request that Susanne be examined as a representative of the Companies in that the Companies' counsel put forward Mark instead. Also, on May 13, 2024, Ernest's counsel filed an application to cross-examine the affiants of the affidavits filed by Susanne on the summary trial application, but for reasons not expressed set it for months later, on August 7, 2024.
- [31] In May 2024, Susanne's counsel scheduled July 31, 2024 for the hearing of the summary trial. Again, Ernest sought to adjourn that hearing, citing outstanding document requests and the need to obtain the file of a solicitor who Zoltan had retained.
- [32] On July 25, 2024, Justice Ross granted leave in favour of Ernest to advance claims on behalf of Zoltan's estate in accordance with the ANOCC and also granted an order for the solicitor to produce the legal file.
- [33] In the end, the summary trial did not proceed on July 31, 2024 due to a lack of any judge.
- [34] Post-July 2024, Ernest's counsel did not proceed with the application for an order allowing cross-examinations under the affidavits filed in November 2023. Indeed, Ernest knew since the beginning of 2024 that the persons he sought to cross-examine did not consent and that he had to obtain a court order.
- [35] In addition, Ernest did not seek to continue the examination for discovery of Susanne in her various capacities. Susanne's counsel made it quite clear to his counsel that she was available in the capacities in which she was sued, and not in any corporate capacity. The Companies' counsel also made it clear to Ernest's counsel that Susanne was not their choice for a representative. Despite being quite aware of that issue, Ernest did not seek to resolve which representative of the Companies should be examined before the Court as was seemingly required.
- [36] Yet again, Ernest's counsel now seeks to adjourn the summary trial.
- [37] Ernest says that there are many disputed facts. However, there are no disputed facts on the key events which are relevant to the legal issues that arise from his claims.
- [38] In my view, Ernest has taken a fairly dilatory approach to this litigation, even after he knew that Susanne intended to proceed with a summary trial application almost a year ago.
- [39] Ernest's approach appears to be one only of delay, accompanied by general assertions that he has suspicions about what actually happened, accompanied by his statement (if not hope) that other evidence or documents may turn up to assist his case (i.e., his reference to "unknown facts"). This is not a proper approach to a summary trial and will not defeat an application that otherwise presents sufficient evidence to decide the issues: *Basil v. Interior Health Authority*, 2012 BCSC 1158 at para. 60.

- [40] The issues of delay are exacerbated by the fact that Ernest's CPLs remain registered on the various real estate titles. As such, the CPLs are presumptively prejudicial and, as a result, Ernest was obliged to prosecute his claims diligently and without undue delay: *GMC Properties Inc. v. Rampart Estates Ltd.*, 2023 BCCA 172 at para. 43.
- [41] This is not a case where Ernest has not undertaken pre-trial procedures in advance of the summary trial, having been prevented from doing so despite best efforts. In such situations, the Court will often allow such procedures to take place before the summary trial proceeds; in fact, that is exactly what happened which led to the Gomery Order: *Basil* at para. 61.
- [42] Even accepting that Ernest may have undertaken more pre-trial procedures (beyond what was done after March 2024), he has not satisfied me that there is any reasonable prospect that it will generate more relevant evidence: *Lopez v. Villalobos*, 2004 BCSC 1817 at paras. 24-25; *Nykoryak v. Anderson*, 2017 BCSC 1800 at para. 21.
- [43] The evidentiary record before me was substantially complete by the end of July 2024. Around that time, the parties agreed to these October 2024 dates upon which to proceed.
- [44] I am more than satisfied that this matter is suitable for disposition by summary trial.
- [45] Most of the independent witnesses who were involved in Zoltan's life and his estate planning have presented their evidence. All of the relevant and substantial documents, particularly as to Zoltan's estate planning over the decades, have been produced and is before the Court. Contrary to the Ernest's counsel's submissions, there is an extensive evidentiary record.
- [46] Ernest has shown no inclination to take steps to test the evidence of those witnesses as might be relevant to the issues and there is no suggestion here that further enquiries will illicit further relevant evidence from these witnesses.
- [47] Ernest's counsel have tested the evidence of Susanne and they have the transcript available to them; yet, that counsel have seemingly not found any support for Ernest's claim via that means, since no mention is made of Susanne's responses from the transcript. No real effort has been made to examine Susanne further, and counsel make no mention of any particular lines of enquiry that she may be able to answer that had not already been answered and is relevant here.
- [48] No credibility issues arise based on the evidence before me.
- [49] This application is not intended to address Ernest's claims against the Companies, including what appear to be unjust enrichment claims against SRTAW. I am satisfied that it is appropriate to decide the issues relating to Susanne independently of those issues as they are quite distinct.

- [50] With an understanding of the principles surrounding summary trials, I am satisfied that I am able to find the necessary facts to decide the issues and that it is not unjust to proceed to decide the matter on the merits: Supreme Court Civil Rules, R. 9-7(15); Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 (C.A.).

ISSUES

- [51] I will discuss the issues and arguments advanced by Ernest, as follows:
- a) Did Erika and Zoltan have a mutual will agreement?
 - b) Did Zoltan have capacity in respect of his testamentary planning and/or was he subject to any undue influence?
 - c) Are the inter vivos transfers to Susanne valid or subject to a resulting trust or did Susanne obtain assets from Zoltan based on unconscionable procurement?

MUTUAL WILLS AGREEMENT

- [52] Ernest alleges that Zoltan and Erika executed mutual wills by which they agreed to a certain distribution of their respective estates, when one predeceased the other. Ernest alleges that Zoltan breached this mutual wills agreement when, after Erika's death, he transferred the various assets to Susanne and the Trust.
- [53] On November 11, 2003, Erika executed a will. In January 2005, when she died, Ernest renounced his right to probate, which was then obtained by Susanne.
- [54] Erika's will provided that the residue was to be transferred to Zoltan. Erika's will provided for certain distributions if Zoltan predeceased her (paras. 4.1-7). These provisions included a sharing of various assets - such as her FH shares and her interests in the Selkirk Property, the Montcalm Property and the Palm Springs Property. Paragraph 4.1 of Erika's will is odd in the sense that it is written as if intended by Zoltan upon his and Erika's death. These "alternate" provisions in Erika's will were initialled by Zoltan at the bottom of the pages.
- [55] As a result of Erika's earlier passing, none of these "alternate" provisions applied and Zoltan took title to all of her assets.
- [56] A mutual will agreement was described in *Edell v. Sitzler*, 2001 40 E.T.R. (2d) 10 (Ont. Sup. Ct.) (aff'd [2004] O.J. No. 2314 (C.A.) as follows:
- [57] The doctrine of mutual wills has traditionally been applied in cases where individuals have made separate wills pursuant to an agreement with respect to their terms. Most commonly, they have agreed that each will obtain a benefit under the other's will and that other specified individuals will receive the property of each of them on the death of the survivor. In some cases of this sort, the benefit obtained by the survivor under the other's will has been a life interest; in other cases, it has taken the form of an outright gift. Where the requirements for the application of the doctrine are satisfied, the survivor will not be

permitted to defeat the agreement by revoking his or her will after the death of the other. This result is achieved by the imposition of a constructive trust on the survivor's estate for the benefit of those who were intended to benefit under the agreement.

- [58] The most fundamental prerequisite for an application of the doctrine is that there be an agreement between the individuals who made the wills. It has been repeatedly insisted in the cases that: (a) the agreement must satisfy the requirements for a binding contract and not be "just some loose understanding or sense of moral obligation". It must be proven by clear and satisfactory evidence; and (c) it must include an agreement not to revoke the wills.
- [57] The mere existence of mutual wills cannot of itself be evidence of such an agreement: *Re Gillespie*, [1969] 1 O.R. 585, 1968 CanLII 281 (ON CA) at para. 5.
- [58] BC authorities are similarly to the effect that, to establish a valid mutual wills agreement, there must be clear and satisfactory evidence that such an agreement existed, including an agreement not to revoke their wills: *Brynelsen Estate v. Verdeck*, 2002 BCCA 187 at para. 29; *Huculak v. Kallenberger et al.*, 2005 BCSC 239 at paras. 14-16.
- [59] Ernest has failed to provide any evidence to suggest that Zoltan and Erika executed mirror wills on November 11, 2003 (i.e. on the same date). The files of the solicitor who handled the couple's affairs included very dated wills from December 1979, which contained only very general provisions by which Ernest and Susanne equally inherited. The file also contained Erika's later will from August 1981.
- [60] There is no evidence that Zoltan executed any will around the time of Erika's 2003 will that would mirror the specific provisions found in that will. Zoltan would later execute his first more specific will only later in March 2005, months after Erika's death in January 2005.
- [61] Ernest suggests that an agreement between Erika and Zoltan nevertheless existed.
- [62] Ernest argues that Zoltan's initials on Erika's will alone is sufficient evidence to support the existence of a mutual wills agreement, which contains interchangeable terms. I disagree. His argument is pure speculation as to why Zoltan has initialled his wife's will. It is entirely possible that Zoltan affixed his initials only as an "extra" witness beyond the two others.
- [63] Ernest also states in his evidence that, after Erika's death, his aunt gave him a handwritten document that he says appears to be an agreement between Zoltan and Erika regarding the distribution of their assets. Ernest states that, as best he recalls, this agreement was "substantially the same" as Erika's will. Ernest states that his aunt told him that Erika entrusted the document to her to ensure that Zoltan would "stick by" the terms of the agreed upon distribution. He alleges that the document was signed by both his parents and each initialled the provisions.

- [64] However, Ernest is unable to produce any such "agreement" as was allegedly given to him by his aunt. He says that it was lost in a house fire in 2018. No corroborating evidence, whether oral or documentary, to support this assertion has been provided beyond Ernest's bare statements.
- [65] In addition, as I will describe below, Zoltan took substantial steps over the years after Erika's death to deal with his assets (including those which he inherited from Erika) and plan his estate in very different ways beyond what Erika had set out in her will. Alan Farber, a lawyer who assisted Zoltan in his estate planning in the 2008/2009 timeframe (as below) says that Zoltan never mentioned any such agreement or that he was restricted in some fashion in respect of the distribution of his assets.
- [66] I agree with Susanne that Ernest's evidence is simply vague, unreliable and potentially self-interested such that it does not meet Ernest's evidentiary burden of providing clear and satisfactory evidence of such an agreement on a balance of probabilities. Leaving that aside, Ernest's own evidence does not even establish any agreement on the part of Zoltan not to revoke any will that allegedly contained this common distribution of assets.

CAPACITY OF ZOLTAN / UNDUE INFLUENCE

- [67] Ernest pleads that Zoltan was incapable in 2016/2017 when Zoltan had certain arrangements with his affairs. While this allegation refers to a certain timeframe that included later estate planning, it is useful to consider the capacity of Zoltan throughout his entire estate planning, since it is also relevant to Ernest's allegations of undue influence and unconscionable procurement.
- [68] A more detailed review of Zoltan's estate planning is required here.

2005-2008

- [69] During this timeframe, Zoltan hired Kornfeld & Company ("Kornfeld") to provide legal services. Kornfeld's files have been produced.
- [70] On March 20, 2005, Zoltan executed a will ("Will #1"). He bequeathed much of his assets to Susanne: his shares in FH, SRTAW and SRT, the Selkirk Property and 65% of the residue. The Montcalm Property was to be held in trust for his grandchildren. Ernest was to receive half of certain financial assets and 35% of the residue.
- [71] In December 2005, Susanne sold the Gilbert Property, which was subject to a mortgage in favour of Zoltan since Zoltan and Erika had funded its purchase. Susanne's uncontroverted evidence is that Zoltan told her all of the net sale proceeds were for her sole benefit and were a gift to her.

- [72] On December 15, 2006, Zoltan executed another will ("Will #2"). This will was substantially similar to Will #1, except it did not include a bequest of the Selkirk Property to Susanne. This presumably is because, on the same day, Zoltan transferred the Selkirk Property to himself and Susanne as joint tenants.
- [73] On November 30, 2007, Zoltan executed another will ("Will #3"). This will provided for: all of his shares in FH, SRTAW and SRT to Susanne; a discharge of a \$1 million mortgage that he held against Ernest's property at 6788 Hudson Street, Vancouver, BC ("Ernest's Residence"), but provided Ernest paid \$300,000 to Susanne; and, the residue to Susanne (65%) and Ernest (35%).
- [74] On February 8, 2008, Zoltan swore a statutory declaration prepared by Kornfeld. That document was to the effect that Zoltan had transferred to Susanne and Mark substantial amounts by way of gift (in excess of \$1.2 million and removed a mortgage from Susanne and Mark's residence that he held. In addition, Zoltan stated that he had transferred the Selkirk Property to himself and Susanne as joint tenants with right of survivorship by way of a gift.
- [75] As can be seen from the above events, even as early as 2005 (after Erika's death), Zoltan was considerably benefitting Susanne more than Ernest when dealing with his assets.

2008-2009

- [76] In 2008, Zoltan retained the law firm of Farber & Folk ("F&F") to provide legal services. Evidence from this timeframe has been provided by Mr. Farber in his four affidavits. The other lawyer at F&F who provided legal services to Zoltan was Mr. Farber's wife and law partner, Felicia Folk, who has since passed away.
- [77] In 2008, Zoltan sought advice from both partners at F&F and, as a result, they recommended many estate planning steps, including the creation of an alter ego trust.
- [78] On January 30, 2009, Zoltan executed numerous documents prepared by F&F, including:
- a) another will ("Will #4");
 - b) a letter for the purpose of explaining the reasons for his bequests to his children and grandchildren, particularly in light of potential wills variation legislation. Zoltan stated that he and Susanne (and her children) always maintained a close and loving relationship, whereas he and Ernest had experienced a strained relationship for many years, described as estrangement after Erika's death;
 - c) a second statutory declaration that Zoltan had gifted joint ownership of the Selkirk Property to Susanne, including the right of survivorship (the "Farber Declaration"; and
 - d) a third statutory declaration that the Palm Springs Property was a gift made to Susanne and that no part of that gift would be repayable to Zoltan or his estate; and.
 - e) Two deeds of gift to Susanne in respect of certain bank accounts at CIBC.

- [79] In accordance with Zoltan's instructions, F&F also later prepared the documents to create the "Zoltan Elemer Fleischer Alter Ego Trust" or the "Trust".
- [80] On May 6, 2009, Zoltan settled the Trust, appointing himself and Susanne as joint trustees. Zoltan transferred the following assets to the Trust:
- a) the Montcalm Property;
 - b) all of his shares in FH, SRT and SRTAW (including the three SRTAW shares that were originally owned by Ernest, but later transferred to Erika and inherited by Zoltan);
 - c) the mortgage against Ernest's Residence; and
 - d) personal effects set out in an appraisal attached to the Trust settlement deed.
- [81] On July 16, 2009, Zoltan executed further documents:
- a) An amendment to the Trust settlement deed to specify the legal titles for the Montcalm Property and the shareholdings transferred in FH, SRTAW and SRT;
 - b) freehold transfers of the legal titles for the Montcalm Property to himself and Susanne, as trustees of the Trust;
 - c) a bill of sale between himself, as vendor, and himself and Susanne, as trustees of the Trust, as purchaser, for the personal effects transferred to the Trust; and
 - d) a transfer of the mortgage against Ernest's Residence to himself and Susanne, as trustees of the Trust.
- [82] There is no evidence from Ernest as to whether he became aware of these real estate and share transfers (and therefore, the existence of the Trust) after July 2009. By that time, Ernest was a shareholder of FH and SRTAW.
- [83] On July 30, 2009, Zoltan swore a further statutory declaration to confirm his settlement of the Trust and his transfer of assets to the Trust by way of a complete and absolute rollover to himself and Susanne as trustees.
- [84] In 2009, Mr. Farber witnessed Zoltan's signatures on all of his estate planning documents. Mr. Farber's evidence is to the effect that Zoltan appeared to possess the requisite testamentary capacity to understand and execute his documents. Mr. Farber is of the view that Zoltan was acting freely and voluntarily without any influence from anyone else, and that Zoltan's documents properly reflected his testamentary intentions.
- [85] Mr. Farber is clear in stating that Zoltan did not want Ernest to receive any interest in the Selkirk Property when he died. Mr. Farber states that Zoltan wanted Susanne to inherit completely, including the Palm Springs Property.
- [86] Mr. Farber's assessment of Zoltan's testamentary capacity was not without other independent support.

- [87] Dr. Viktor Neumann was Zoltan's family doctor from September 2004 until Zoltan's death in early 2022. Dr. Neumann's evidence is that, between 2005-2018 Zoltan was not suffering any mental incapacity, delusions or paranoia.
- [88] In fact, on January 23, 2009, Dr. Neumann provided F&F with a letter stating that Zoltan was fully competent to make a will since he enjoyed sound mind, memory and understanding.
- 2013 and 2016/2017
- [89] In fall 2013, Susanne sold the Palm Springs Property, which she had purchased back in 1987. Consistent with Zoltan's January 2009 statutory declaration, he told Susanne that the proceeds had been gifted to her and were freely available for her to use to purchase the Rancho Mirage property.
- [90] As of 2016, Zoltan was a client of Richards Buell Sutton LLP ("RBS"). At the time, Zoltan and Susanne had retained Peter Spencer at RBS in respect of two litigation matters involving SRT, SRTAW, Ernest and the City of Surrey.
- [91] Mr. Spencer's evidence is that, throughout his retainer, he understood Zoltan and Ernest's relationship to be one of estrangement and only a business (and unfriendly) relationship.
- [92] One matter being handled by Mr. Spencer related to the wind-up of SRT. A bank debt needed to be paid, which was guaranteed by Ernest, Susanne and Mark. At the end of the day, Susanne settled the bank debt and assumed the bank's security position, leading to the bankruptcy, all without any cooperation or assistance from Ernest. Mr. Spencer described that Zoltan was very disappointed, if not angry, with Ernest as a result. Mr. Spencer also understood that Zoltan was frustrated with Ernest in relation to the City of Surrey litigation against SRT, SRTAW, Zoltan, Ernest and Susanne.
- [93] In August 2016, Zoltan advised Mr. Spencer that he wanted some legal advice with respect to his estate planning, because Mr. Farber was retiring and he needed a new lawyer. Mr. Spencer was told by Zoltan that he did not want to leave any part of his estate to Ernest. He was also told by Zoltan about the sale of Ernest's Residence, that led to Zoltan forgiving the mortgage, but only after Ernest paid Susanne \$300,000.
- [94] Subsequently, Mr. Spencer referred Zoltan to Rose Shawlee, then another lawyer at RBS, to handle Zoltan's estate matters.
- [95] According to Ms. Shawlee's evidence, during her retainer, Zoltan advised her that he intended to retain beneficial ownership of the Selkirk Property during his lifetime and that he intended to gift the Selkirk Property to Susanne only upon his death (contrary to the Farber Declaration), so that it would not form a part of his estate and Susanne would become the sole owner at that time.
- [96] As a result, on December 6, 2016, Zoltan executed:

- a) a Declaration of Bare Trust, Nominee and Agency in respect of the Selkirk Property transferring that property to Susanne as Nominee upon his death;
 - b) Declarations of Bare Trust, Nominee and Agency and Deeds of Gift in respect of CIBC bank accounts, investment accounts and/or safety deposit boxes; and
 - c) a new will ("Will #5") that: appointed Susanne as the executor and trustee; divided the residue of the estate into two equal shares, one to Susanne and the other to be split between Ernest's four grandchildren; and deeds of gift in respect of other assets owned jointly by Zoltan and Susanne.
- [97] Much like Mr. Spencer, Ms. Shawlee was aware that Zoltan felt that Ernest was causing him a tremendous amount of stress and costs in the litigation matters in which they were involved, and he did not want Ernest to receive any inheritance under his will or the Trust.
- [98] In addition, like Mr. Farber, Ms. Shawlee was of the view that Zoltan had the requisite testamentary capacity to understand and sign his testamentary documents. In addition, in order to satisfy herself on that point, Ms. Shawlee sought confirmation from Dr. Neumann. Similar to his earlier letter to F&F, on November 22, 2016, Dr. Neumann provided Ms. Shawlee with a letter stating that Zoltan had the mental capacity to make amendments to the Trust, revoke a will and make a power of attorney, since he understood his assets and who his family is.
- [99] In May 2017, Zoltan advised Ms. Shawlee that he wanted to revise the distributive provisions of the Trust upon his death.
- [100] On June 9, 2017, Zoltan further executed:
- a) a Deed of Appointment of Distribution of the Trust that directed Susanne, as sole trustee of the Trust to, upon Zoltan's death:
 - i. divide \$1.2 million into four equal shares, to be held in trust for each of Zoltan's grandchildren until he/she reaches the age of 30; and
 - ii. hold the balance for the benefit of Susanne, and her children and her grandchildren.
- [101] In addition, since Ms. Shawlee was aware of Zoltan's poor relationship with Ernest, she recommended a further statutory declaration to address any wills variation concerns.
- [102] On June 9, 2017, Zoltan executed a lengthy statutory declaration that set out his reasons for the distribution of his assets to Susanne and also, the reasons for the distributions under the Trust. Zoltan referred to his exclusively negative relationship with Ernest; he describes his unhappiness with how Ernest had acted in relation to him and the litigation as being unreasonable and that these actions had been extremely stressful and damaging to him. As a result, Zoltan stated in the declaration:

I feel it would be a moral and equitable injustice for him to receive any direct or indirect benefit from my estate or the Trust

Discussion re Capacity / Undue Influence

- [103] The above evidentiary record establishes conclusively that no capacity issues arise with respect to Zoltan's ability to understand his circumstances and make informed decisions as to the distribution of his assets, either when he was living or upon his death.
- [104] Mr. Farber's evidence, supported by Dr. Neumann's contemporaneous letter, fully supports that Zoltan was capable in 2008/2009 when he made arrangements then to move to substantially disinherit Ernest (although he had already moved in that direction earlier beginning in 2005).
- [105] Ernest objects to Mr. Farber's evidence to the extent that he refers to documents prepared by Ms. Folk before her death as to the circumstances in which Zoltan made those arrangements. I do not find it necessary to rely upon Ms. Folk's notes as Mr. Farber is able to give that evidence directly, evidence which fully supports that Zoltan was not suffering from any capacity issues at the 2008/2009 timeframe.
- [106] In my view, no capacity issues arise in relation to the later estate planning that Zoltan undertook in 2016/2017 with Ms. Shawlee, based on Ms. Shawlee's evidence, supported by that of Dr. Neumann. In that timeframe, Mr. Spencer also states that Zoltan had no difficulties understanding the complexities of the litigation which he was handling for the Companies and the family members and that Zoltan never appeared as delusional, paranoid or confused.
- [107] It appears that Ernest had no dealings with Zoltan after 2015 and therefore, he is not in a position to comment personally on Zoltan's capacity at that time.
- [108] Ernest argues - as asserted in the ANOCC - that Zoltan's animus against him was based on an "insane delusion" that Ernest was conducting hostile litigation against him (no doubt the litigation in which Mr. Spencer was acting). To some extent, this appears to be based on Ms. Shawlee's statement attributing Zoltan's antipathy toward Ernest as arising from "litigation between the two of them". Ernest interprets this phrase literally as referring to Ernest or Zoltan having directly sued the other.
- [109] When the evidence is considered in its entirety, Zoltan was not under any misunderstanding or "delusion" as to what litigation was taking place and by whom and against whom. This is confirmed by the evidence of both Ms. Shawlee and Mr. Spencer, but also conclusively addressed in the June 9, 2017 statutory declaration that Zoltan executed for the purpose of setting out lengthy reasons for his disinheriting Ernest. In that declaration, Zoltan's unhappiness with Ernest is said not to arise from Ernest having sued Zoltan, but from Ernest's actions and role within that litigation.

- [110] The arrangements made in 2016/2017 were not new. They were consistent with the earlier estate planning done through F&F in 2008/2009. In other words, Zoltan's reasons to disinherit Ernest were consistent across a longstanding period of estrangement stretching from at least 2008 until Zoltan's death in 2022. This estrangement was apparently aggravated by Zoltan's unfavourable view of Ernest's conduct during the litigation in which they were both defendants.
- [111] Ernest also alleges that Zoltan was unduly influenced by Susanne. He asserts that Zoltan's "false beliefs" against him regarding the "hostile litigation" was a result of deception on the part of Susanne and Mark.
- [112] However, again, there is no evidence to support that there was any undue influence toward Zoltan by either Susanne or Mark. Mr. Farber, Mr. Spencer and Ms. Shawlee all state that Zoltan was making his decisions independently and without undue influence from anyone. Ms. Shawlee in particular says that she met with Zoltan alone and discussed his wishes at that time. While Susanne may have travelled with Zoltan to RBS' offices, that alone does not amount to undue influence.
- [113] Ernest also argues that there is nothing in the evidence to indicate that Zoltan received independent legal advice. He argues that Ms. Shawlee was not independent because RBS was also acting for Susanne. I see no merit in this argument. Ms. Shawlee's retainer was very distinct from that of Mr. Spencer and she provided legal advice to Zoltan only in respect of the estate planning. Susanne had no role in it.
- [114] As arranged by Ms. Shawlee, Zoltan's June 2017 statutory declaration provided specifically:
- The distributions I have structured under my Will and the Trust, and the rights of survivorship that I have gifted, have been made independently of influence from any person, including without limitation Susanne and her family, and have been made freely by me.
- [115] Ernest's claims attacking Zoltan's estate planning steps, including the creation of the Trust, fail for lack of evidence as to any capacity issues or undue influence.
- [116] I also agree with Susanne's position that Ernest's claims regarding unjust enrichment as regards to the assets transferred to her or the Trust must also fail.
- [117] In his pleading and in his evidence, Ernest's claims for unjust enrichment are described as arising from his efforts in relation to FH and SRTAW. As I have said, those issues are not before me at this summary trial and I make no comment on the validity of those claims.
- [118] In the pleading, Ernest advances only a very general allegation that Zoltan, his estate, the Trust and Susanne were unlawfully enriched and that he suffered a corresponding detriment.

- [119] However, the assets transferred to the Trust and Susanne were assets that belonged to Zoltan and there is no evidence to support Ernest's claims that he made contributions directly towards those assets, or that he suffered from a corresponding detriment, which would otherwise give rise to unjust enrichment: *Lee v. Chau*, 2021 BCSC 70 at paras. 41-45.

INTER VIVOS GIFTS TO SUSANNE / RESULTING TRUST / UNCONSCIOUSABLE PROCUREMENT

- [120] Ernest also takes aim at the inter vivos transfers or gifts that Zoltan gave Susanne. These include the Selkirk Property, the Gilbert Property and the Palm Springs Property.
- [121] A gratuitous transfer of an asset from a parent to an adult child creates a rebuttable presumption that the adult child holds the property in trust for that parent or that parent's estate: *Pecore v. Pecore*, 2007 SCC 17 at para. 24-26; and *Di Giacomo v. Di Giacomo*, 2021 BCSC 2313 at para. 40.
- [122] Susanne bears the onus of rebutting that presumption: *Modonese v. Delac Estate*, 2011 BCSC 82 at paras. 136-137.
- [123] As I have set out above in relation to Zoltan's estate planning, supported by the substantial documentation he executed, I agree with Susanne that there is uncontroverted evidence that Zoltan intended to gift these assets to Susanne for her own use absolutely. Also again, Zoltan's intentions are supported by the substantial evidence from Zoltan's lawyers who were assisting him in recording his intentions in that respect.
- [124] In addition, these gifts of the Selkirk Property, the Gilbert Property and the Palm Springs Property were consistent with the overall estate planning undertaken by Zoltan in the decades leading to his death.
- [125] Ernest has not provided any evidence that would question this overwhelming evidence.
- [126] I conclude that Susanne has provided clear and uncontroverted evidence to rebut the presumption of resulting trust: *Franco v. Franco Estate*, 2023 BCSC 1015 at paras. 40-43.
- [127] Ernest also pleads the doctrine of unconscionable procurement.
- [128] This doctrine appears to have recently gained traction in Ontario arising from the decision in *Gefen v Gaertner*, 2019 ONSC 6015 (aff'd on other grounds, 2022 ONCA 174) at paras 158-161. The court stated that a "wealth transfer transaction" can be determined to be "voidable" if the person attacking the transfer can demonstrate that the transferee, who received a significant benefit, was actively involved in a transaction and the transferor did not understand the transaction. If that is shown, the transferee then bears the onus to show that the transferor understood what he was doing.

- [129] Despite the decision in *Gefen*, there appears to be considerable doubt as to whether the doctrine does indeed apply in Ontario. On appeal, the court stated that it neither approved nor rejected that the doctrine was part of Ontario law: *Gefen Estate v. Gefen*, 2022 ONCA 174 at para 61. This uncertainty was also highlighted in *The Estate of William Robert Waters v. Gillian Henry*, 2024 ONSC 4190 at paras. 357-359.
- [130] This doubt also exists in BC. In *Sandwell v. Sayers*, 2022 BCSC 605 (aff'd 2023 BCCA 147; leave to appeal to SCC ref'd, 40770 (2 November 2023)), Justice Betton extensively discussed the history of the doctrine in BC at paras. 29-48. At para. 48-61, he accepted that the doctrine could possibly apply in BC, but he had real doubt that it did. Similarly, the court of appeal expressed concerns about its application in this province and ultimately declined to rule on whether the doctrine exists in BC: *Sandwell v. Sayers*, 2023 BCCA 147 at paras. 67-72.
- [131] As did Betton J. in *Sandwell*, I do not find it necessary to decide whether this doctrine applies in BC or not. Even if the doctrine does apply, it does not assist Ernest.
- [132] While it is undoubted that Susanne received substantial benefits from Zoltan's gifting of assets to her, there is no evidence to support that Susanne was "actively involved" in obtaining these gifts.
- [133] In addition, as the above discussion shows, I have concluded that Susanne has very convincingly established that Zoltan freely and deliberately gave those gifts to Susanne as part of his estate planning efforts. The evidence is that Zoltan fully understood his own personal circumstances and the choices that were before him. He understood perfectly that he was significantly preferring Susanne to the detriment of Ernest, his son, and he freely chose to do so. Zoltan sought and obtained legal advice throughout his estate planning to ensure that it was done properly and legally. All of the lawyers confirm both Zoltan's capacity to do so and the lack of any influence by Susanne or Mark.
- [134] Zoltan's reasons for his choices for are well documented and, while Ernest may not agree with them, they are clear and unequivocal.

CONCLUSIONS

- [135] In light of my conclusions above, I do not find it necessary to address the limitation or laches arguments advanced by both parties.
- [136] Ernest's claims against Susanne in her various capacities, as listed in the style of cause, are dismissed.
- [137] I find that Ernest has failed to establish any mutual wills agreement between Zoltan and Erika. In addition, Zoltan was lawfully entitled to transfer, and mentally capable of transferring his assets to the Trust and to Susanne during his lifetime, which he did in order to disinherit Ernest from his estate.

- [138] I order the immediate removal of the CPLs that are registered against the Montcalm Property and the Selkirk Property.
- [139] Finally, I award the costs of this action in favour of Susanne as against Ernest on the usual scale. If either party seeks a different costs award for reasons not known to me, he or she may apply to address that matter, provided that such application is filed within 60 days of the release of these reasons.

"Fitzpatrick J."

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