

CANADA / JUDGMENT

Killam Alter Ego Trust (Re)

2023 BCSC 783

COURT

Supreme Court of British Columbia

DECIDED

9 May 2023

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2023 BCSC 783 Killam Alter Ego Trust (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Killam Alter Ego Trust (Re),

2023 BCSC 783

Date: 20230509

Docket: S220899

Registry: Vancouver

Re: The Eugene Killam Alter Ego Trust

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the Petitioners Zachary Killam and Kasley Killam as Trustees of The Eugene Killam Alter Ego Trust:

E.B. Clavier

Counsel for the Petition Respondent Kyly Killam:

R.D. Lee

Place and Date of Hearing:

Vancouver, B.C.

November 23, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 9, 2023

Introduction

- [1] On December 19, 2018, Eugene Humphrey Killam ("Eugene") executed a trust deed (the "Trust Deed") which created The Eugene Killam Alter Ego Trust (the "Trust"). On the same day, he also executed a general assignment agreement and a deed of gift which purported to assign his interest in two investment accounts, shares of a BC company, and two properties located in West Vancouver, BC (collectively, the "Assets") to the Trust.
- [2] Eugene has four adult children: Kyly Killam, Zachary Killam, Kasley Killam, and Kara Killam. The Trust Deed names Eugene, Zachary Killam, and Kasley Killam as the original trustees of the Trust.
- [3] In these reasons, I will be referring to the parties by their first names, not out of any disrespect but simply for clarity given the shared last name.
- [4] Acting in their capacity as trustees and relying on s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464, Zachary and Kasley, the petitioners in this petition (the "Petition"), seek an order declaring that Eugene's interest in the Assets belong to the Trust and authorizing the transfer of his interest in the Assets into the name of the Trust.
- [5] In addition, citing Eugene's incapacity due to a decline in his mental health and cognitive ability, Zachary and Kasley seek a declaration that Eugene has ceased to be a trustee and allowing them to appoint a replacement trustee[1].
- [6] On May 6, 2022, Kyly, the respondent in this Petition, filed a notice of civil claim (the "Action") in which she alleges that that Eugene had exhibited symptoms of cognitive decline and did not have the requisite capacity to settle the Trust Deed, make the general assignment, or effect the deed of gift when he executed those documents (collectively, the "Trust Documents") in December 2018.
- [7] In the Action, Kyly seeks declarations that:
 - a) the Trust Documents are invalid and the Trust is void ab initio - i.e., void from the start; and
 - b) Eugene, not the Trust, is the sole legal and beneficial owner of the Assets.
- [8] Although the notice of civil claim provides some specifics in support of Kyly's assertions regarding Eugene's capacity in late 2018, she has not filed any affidavit evidence in support of those assertions either in the Action or in this Petition. She has also not applied to have the proceedings heard at the same time. Kyly argues, nonetheless, that it would be premature to grant the relief sought in these Petition proceedings until the issues raised in the Action are determined.

[9] Moreover, Kyly notes that no litigation guardian has been appointed for Eugene. She maintains until that step is taken, Rule 20-2(2) of the Supreme Court Civil Rules precludes the Petition from proceeding. Finally, and, in any event, Kyly questions the jurisdiction of the Court to make the declarations sought pursuant to s. 86 of the Trustee Act.

[10] Prior to my consideration of the substantive relief sought in the Petition, I will consider those procedural issues.

Discussion and Analysis

Can the Petition be determined in advance of the Action?

[11] On this preliminary issue, Kyly argues that making the declaration that the Assets belong to the Trust and authorizing that transfer of the Assets to the Trust would effectively determine the validity of the Trust Documents, the validity being the same issue raised in the Action. Given that the validity is challenged in the Action, Kyly says it would be premature to make that determination now.

[12] Zachary and Kasley dispute that position. They argue that, until the contrary is demonstrated, it must be presumed that Eugene had the requisite capacity when he executed the Trust Deed. They say that the fact that the Trust Deed was prepared with the assistance of counsel buttresses that conclusion.

[13] Noting that Kyly did not file any affidavit evidence challenging that presumption or supporting the assertion that Eugene did not have the requisite capacity when he executed the Trust Deed, Zachary and Kasley argue that they are entitled to rely on that presumption of capacity and the clear terms of the Trust Documents.

[14] They also argue that if, after the trial of the Action, the Court determines that the Trust Documents are invalid, it can unwind the Trust and the Assets can be transferred back to Eugene. In that case, the trustees will be required to account for any transactions they may have conducted in respect of the Assets. In that way, they say that no prejudice will accrue to Kyly or Eugene by granting the relief they seek[2].

[15] By contrast, Zachary and Kasley say that if the declarations sought are not granted, they may be precluded from dealing with the Assets as expressly contemplated by the Trust Documents. In submissions, counsel advised that without the Court's declarations, third-party lenders have refused to acknowledge the trustees' authority to deal with the Assets[3]. No evidence was provided to support that submission.

[16] I do not accept Zachary's and Kasley's argument regarding prejudice for two reasons.

[17] First, pursuant to s. 87(1) of the Trustee Act, a trustee who acts on the opinion, advice, or direction of the court under s. 86 is deemed to have discharged their duty as trustee on that particular matter. That being the case, if the declarations sought under s. 86 are granted, it is not at all certain to me that the Court will be able to "undo" any transactions or order an accounting in respect of any transactions the trustees may make prior to the conclusion of

the Action. Having not heard argument on the impact of s. 87(1), I cannot conclude that the Court is able to undo transactions after providing an order that effectively authorizes them.

- [18] Second, even if the trustees can be subsequently compelled to account for their actions, that may not be enough to minimize or eliminate the risk of loss to Eugene if the trustees are not in a position to make him whole at the end of the trial of the Action. In reaching that conclusion, I do not suggest that the trustees will deliberately deal with the Assets in any improper or improvident manner. However, given the vagaries and uncertainties of the market, the possibility of financial losses cannot be discounted. There is no evidence regarding the financial capacity of the trustees to be able to compensate Eugene for any such losses if the Trust Documents are subsequently found to be invalid.
- [19] By contrast, adjourning the hearing of the Petition does not necessarily preclude the trustees from dealing with the Assets. Indeed, Zachary and Kasley concede that the terms of the Trust Deed allow them to do so even without a court order. Even accepting that the declarations sought may be required to satisfy third-party lenders, there is no evidence of any specific transaction or instance where Zachary and Kasley have been prevented from dealing with the Assets. Without that evidence, it is difficult to assess the potential prejudice to Zachary and Kasley.
- [20] Finally, on the assessment of prejudice, I acknowledge, as noted by Zachary and Kasley, that no affidavit evidence has been filed in support of Kyly's assertions that Eugene did not have the requisite capacity when he executed the Trust Documents. Those assertions have not been tested. However, for the purposes of this analysis, it is significant that the assertions, although unsupported, are not bare assertions of incapacity. Rather, the notice of civil claim includes some detail on which the allegations are based. Those details include the timing and outcome of cognitive testing that occurred prior to December 2018 as well as dates and details of interactions with Eugene which could be indication of his capacity in December 2018. While I do not purport to assess the strength of Kyly's claim in the Action, I am satisfied that, on the basis of the pleadings, it would not serve the interests of justice to have the Petition determined without a consideration of allegations made in the Action.
- [21] An assessment of the potential prejudice to the parties that may occur by hearing the Petition prior to the Action favours the adjournment Kyly seeks.
- [22] More fundamentally, however, the preliminary procedural issue can ultimately be determined on the basis of s. 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253. That section provides:

Avoidance of multiplicity of proceedings

10 In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

[Emphasis added.]

[23] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, the Supreme Court of Canada also emphasized the court's role in ensuring the final determination of issues between the parties, in that case, disallowing what amounted to the re-litigation of issues as an abuse of the court's process. The doctrine of abuse of process may be applied in circumstances "where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice": *Toronto (City)* at para. 37.

[24] While accepting that the doctrine of abuse of process extends beyond the strict parameters of res judicata or issue estoppel, the Supreme Court of Canada in *Toronto (City)* noted that the policy considerations for these doctrines are the same:

[38] [] The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[Emphasis added.]

[25] In my view, both s. 10 of the Law and Equity Act and the policy considerations that disallow the re-litigation of issues apply here and preclude the Petition from being determined until the Action has been heard on its merits.

[26] In this case, the issues raised and the relief sought in both this Petition and the Action require an assessment and determination of the validity of the Trust Documents, including the Trust Deed. I am satisfied that hearing the trial of the Action after the Petition has been determined would amount to re-litigation and would create a multiplicity of proceedings on the issue of validity of the Trust.

[27] In making that observation, I acknowledge that on its face, the Petition does not expressly seek a declaration regarding the validity of the Trust or the Trust Documents. However, the relief sought is based on the presumption that the Trust Documents are valid. Absent that presumption, there is no basis to grant the declaration sought or to authorize the transfer of

the Assets to the Trust. In effect, granting Zachary and Kasley the relief they seek would be an endorsement of the validity of the Trust and the Trust Documents, which is expressly challenged in the Action.

- [28] The overlap of issues is more directly apparent in that both proceedings expressly seek relief regarding ownership of the Assets: in the Petition, Zachary and Kasley seek a declaration that the Assets belong to the Trust; in the Action, Kyly seeks an order that Eugene be placed on title to the Assets. These are mutually exclusive.
- [29] Zachary's and Kasley's suggestion that the ownership of the Assets can be determined now and re-visited after the trial of the Action directly violates the principle of judicial economy and does nothing to preserve the litigants' or the court's resources. Moreover, it does nothing to promote finality for either the litigants or any third parties who may rely on a decision in these Petition proceedings in dealing with the Assets.
- [30] Finally, the mutually exclusive nature of the relief sought in the Petition and in the Action opens the possibility of inconsistent results, which implicates one of the policy concerns underlying abuse of process: *Toronto (City)* at paras. 38 and 44.
- [31] On the basis of the statutory and judicial authority set out above, the common issue to be determined (i.e., the validity of the Trust Documents) and common relief sought (i.e., regarding the ownership of the Assets) both in this Petition and the Action dictate that the Petition can not and should not be determined in advance of the Action.
- [32] To ensure the common issue is decided on the full merits and to avoid a multiplicity of proceedings, the Action must be adjudicated before or at the same time as the Petition.

Do the other procedural issues raised preclude the hearing of the Petition?

- [33] Having concluded as I have above, it is not necessary for the Court to determine the other procedural issues raised by Kyly.

Conclusion

- [34] I have concluded that the Action must be adjudicated before or at the same time as the Petition. Having heard no submissions regarding the specific timeline or manner in which the matters are to proceed, I do not make any orders or directions in that regard. The parties are at liberty, of course, to make further application to the Court if they are unable to agree to that process.

Costs

- [35] Costs of this application are in the cause.

"Ahmad J."

- [1] After the Petition was filed, relying on the terms of the Trust Deed, by deed of appointment and notice of change of trusteeship dated April 6, 2022, Zachary and Kasley have purported to appoint Kara as a replacement trustee. The declaration they seek is to confirm that they acted in accordance with the mechanisms set out in the Trust Deed in respect of that appointment.
- [2] The draft form of Order proposed by Zachary and Kasley includes a declaration that the Assets belong to the Trust and that an authorization of the transfer of the Assets to the Trust is made "without prejudice to the determination of whether there is a valid Trust pursuant to the [Action]".
- [3] In *Victoria Shipyards Co. Ltd. v Lockheed Martin Canada Inc.*, 2022 BCSC 790 at paras. 29-33, this Court recently reviewed the basis for the jurisdiction to grant a temporary stay of proceedings and laid out the well-known 3-part test for a stay set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311. Although neither party expressly referred to either decision, this argument seems to invoke the "irreparable harm" aspect of the RJR-MacDonald test.

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