

CANADA / JUDGMENT

Killam v. Killam

2025 BCSC 1987

COURT

Supreme Court of British Columbia

DECIDED

10 October 2025

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2025 BCSC 1987 Killam v. Killam IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Killam v. Killam, 2025 BCSC 1987 Date: 20251010 Docket: S223752 Registry: Vancouver Between: Kyly Erin Killam Plaintiff And: Zachary Lyle Killam, Kasley Malia Killam, and Kara Elana Killam, both personally and as Trustee of the Eugene Killam Alter Ego Trust, and Eugene Humphrey Killam by his litigation guardian, The Public Guardian and Trustee Defendants Before: The Honourable Justice G.C. Weatherill Reasons for Judgment Counsel for the Plaintiff: E.L. Hansen Counsel for the Defendants: E. Aitken Place and Date of Hearing: Vancouver, B.C. October 6, 2025 Place and Date of Judgment: Vancouver, B.C. October 10, 2025

Introduction

- [1] The plaintiff, Kyly Killam, is one of four beneficiaries of an alter ego trust (the "Trust") into which her father, Eugene Killam ("Eugene"), settled most of his assets on December 19, 2018. The other beneficiaries of the Trust are her siblings, Zachary Killam ("Zac"), Kasley Killam ("Kasley"), and Kara Killam ("Kara"), the individual defendants in this action (when referred to collectively, the "defendants"). The Trust provides for the income and capital to be solely available to Eugene during his lifetime and, upon his death, for an equal distribution of the capital of the Trust to his four children.
- [2] Initially, Eugene, Zac, and Kasley were named as trustees of the Trust. In November 2020, Eugene was diagnosed with dementia. On April 6, 2022, Zac and Kasley executed a deed of appointment and notice of change of trusteeship, appointing Kara as trustee of the Trust in place of Eugene.
- [3] In this action, the plaintiff seeks a declaration as to the validity of the Trust on the basis that Eugene did not have the capacity to settle the Trust when it was made, and did not know and approve of its contents.
- [4] By notice of application filed September 5, 2025, the defendants apply pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules [SCCR] to strike the claim on the basis that the plaintiff has no standing to advance it. In the alternative, they seek a stay of the action.

Background

- [5] As already noted, Eugene had four adult children, the plaintiff, Kyly, and the defendants, Zac, Kasley, and Kara.
- [6] Eugene died on October 25, 2023.
- [7] This action was commenced by the plaintiff filing a Notice of Civil Claim on May 6, 2022, one-and-a-half years prior to Eugene's death. The defendants filed their Response to Civil Claim on June 22, 2022, opposing the relief sought. On July 27, 2023, the Public Guardian and Trustee of British Columbia was appointed as Eugene's litigation guardian. On September 29, 2023, the Public Guardian and Trustee of British Columbia filed a Response to Civil Claim to the plaintiff's Notice of Civil Claim, opposing the relief sought on the basis of the presumption of capacity and the plaintiff's obligation to prove incapacity.
- [8] The result of granting the relief sought by the plaintiff in this action would be that the assets that were settled in the Trust would revert to Eugene's estate.
- [9] The plaintiff and her three siblings are equal beneficiaries under a will executed by Eugene in 2011 (the "Will"). Each of the four siblings is also a one-quarter beneficiary of the Trust. No grant of probate has been issued in respect of the Will, nor has any administrator or litigation representative been appointed in respect of Eugene's estate. Zac, as the named executor under the Will, has applied for probate. However, the plaintiff is disputing his appointment as executor.
- [10] Given that the plaintiff is an equal beneficiary under both the Trust and the Will, a fair question arises as to the plaintiff's motivation for commencing this action. Apparently, she is concerned that the Trust grants to the trustees (her three siblings) various powers, rights, and duties that could potentially affect her personal interests. It is noteworthy that there is no suggestion that the plaintiff's personal interests have been impacted to date.
- [11] Putting the foregoing to the side, the question to be decided on this application is whether it is plain and obvious that the plaintiff, as a beneficiary under the Trust, has no standing to contest the validity of the Trust. Discussion
- [12] Plaintiff's counsel submits that the plaintiff has standing to bring this action because, as a beneficiary of the Trust, she is directly and personally interested in the question of whether or not the Trust is valid as well as in the consequential relief that flows from the outcome of that question. Plaintiff's counsel argues that, without knowing whether a valid trust exists, a beneficiary: · cannot know their beneficial entitlement; · cannot know whether the trustee has acted and is acting in accordance with the trustee's duties and powers; and · cannot properly hold the trustee to account.

- [13] Plaintiff's counsel submits that, because the plaintiff would have standing to assert against the trustee the existence of a trust of which she is a beneficiary, the corollary must also be true--that is, she would have standing to assert against the trustee of a trust of which she is a beneficiary that the trust was invalid.
- [14] Plaintiff's counsel, however, was unable to find any authority directly on this point or, indeed, any authority supporting that proposition. Instead, she relies on a series of cases and legal texts to support the proposition that where the criteria for a declaratory judgment are satisfied, standing to seek that relief follows. The criteria are that:
- 1) a genuine problem exists;
 - 2) the party seeking the declaration has an existing legal interest in resolving the problem;
 - 3) the source of the problem is identified as a written instrument or legislation; and
 - 4) the party's objective is to have a right, power or obligation determined in order to resolve the problem. See: Lazar Sarna, *The Law of Declaratory Judgments*, 5th ed (Toronto: LexisNexis, 2024) 1.022-4 and 3.04 at 33-36. See also: *Carroll v. Toronto-Dominion Bank*, 2021 ONCA 38 at para. 33, leave to SCC ref'd, 39612 (15 July 2021); *Fraser v. Houston*, 1996 CanLII 2525 (B.C.S.C.), 1996 CarswellBC 2091 at paras. 29-33.
- [15] Plaintiff's counsel submits that the plaintiff meets each of those criteria.
- [16] Plaintiff's counsel argues that the foundation for the plaintiff's standing as a beneficiary to question the validity of the Trust is equivalent to what underpins standing in a probate proceeding to challenge the validity of a will: *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [WESA], s. 106; SCCR, Rules 25-2(2) and 25-10; *Klassen v. Cornies*, 2023 BCCA 420 at paras. 30-52; *Adams Estate v. Wilson*, 2020 SKCA 38, leave to appeal ref'd 2020 CanLII 87113 (S.C.C.).
- [17] I am not persuaded that the plaintiff has standing to advance her claims in this action. The plaintiff's claim of standing is based entirely on her being a beneficiary under the Trust. Her purpose in claiming standing is to challenge the validity of the Trust itself and thus to set aside the very document that is the underpinning of her claim of standing. I agree with defendants' counsel that this is "perverse logic": see *Adams Estate*, at paras. 83-84.
- [18] At its core, the plaintiff's action seeks to void the Trust on the basis of a wrong alleged to have been suffered by Eugene during his lifetime, namely the settling of the Trust when he did not have the capacity to do so. At the time this action was commenced, Eugene was alive. He was the sole beneficiary of the Trust during his lifetime. He was the only person who would have had standing to challenge the Trust. The plaintiff's interest as a beneficiary did not arise until Eugene's death. Now that Eugene is deceased, it is his estate that has an interest in any wrong that was perpetrated at the time the Trust was settled, not the plaintiff in her personal capacity.

- [19] I agree with defendants' counsel that the plaintiff did not have standing to seek such relief while Eugene was still alive--only Eugene himself or his litigation guardian did.
- [20] I also agree with defendants' counsel that the plaintiff does not have standing to advance the claim now that Eugene is deceased. That standing is for Eugene's personal representative(s). A personal representative has the exclusive authority to commence or defend a proceeding which the deceased would have been able to commence or defend. Any other person, including a plaintiff beneficiary, requires leave under s. 151 of the WESA to commence or defend proceedings on the deceased's behalf. The plaintiff has not brought an application pursuant to s. 151 of the WESA. She cannot do so because an administrator has not been appointed and, thus, is unable to meet the requirements of s. 151(3)(a): *Raye v. Phillip Estate*, 2021 BCSC 387 at para. 36.
- [21] None of the exceptions to the foregoing that exist at common law are engaged in this case.
- [22] This Court's decision in *Raye* is on all fours. In that case, the issue was whether the plaintiff had standing to challenge the validity of an inter vivos transfer of property by the father to the plaintiff's sister. The plaintiff argued that she had standing as an intestate beneficiary of the father's estate to seek an order that the property was held in trust for the estate. Justice Norell noted, at paras. 34-37:
- [34] A "representation grant" includes the grant of administration of the estate of a deceased person in B.C. without will annexed: s. 1 of WESA. A representation grant gives to the personal representative of an estate the exclusive authority to administer the estate or that part of the estate to which the representation grant applies in accordance with its terms: s. 136 of WESA. Subject to certain limitations, a personal representative "has the same authority over the estate as the deceased person would have if living": s. 142(1) of WESA.
- [35] Thus, by the above provisions of WESA, it is the personal representative of an estate who has the exclusive authority to commence or defend a proceeding which the deceased would have been able to commence or defend. However, there is an exception to these provisions in WESA. Section 151 gives the court the discretion to grant leave to someone, who is not a personal representative, to commence or defend a proceeding on behalf of an estate. The current relevant portions of s. 151 are: 151(0.1) In this section, "specified person" means a beneficiary, an intestate successor or a person who may commence a proceeding claiming the benefit of Division 6 [Variation of Wills] of Part 4 [Wills].
- (1) Despite section 136 [effect of representation grant], a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person
- (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or

- (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.
(1.1) A specified person may apply for leave of the court under subsection (1) in the proceedings described in that subsection.
 - (3) The court may grant leave under this section if
 - (a) the court determines the specified person seeking leave
 - (i) has made reasonable efforts to cause the personal representative to commence or defend the proceeding, (ii) has given notice of the application for leave to (A) the personal representative, (B) any other specified persons, and (C) any additional person the court directs that notice is to be given, and (iii) is acting in good faith, and
 - (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a specified person for the proceeding to be brought or defended.
 - (4) On application by a specified person or a personal representative, the court may authorize a person to control the conduct of a proceeding under this section or may give other directions for the conduct of the proceeding.
- [36] Patricia has not yet brought an application pursuant to s. 151. She cannot do so because until now an administrator had not been appointed, and she would be unable to meet the requirements of s. 151(3)(a).
- [37] In my view, the case authorities cited by Renee support her position that Patricia has no standing, without leave of the court, to bring an action for wrongs alleged to have occurred to the deceased during his lifetime. []
- [23] In my view, that reasoning applies equally in this case.
- [24] If the plaintiff wishes to advance a claim to set aside the Trust, she must apply for leave under s. 151 of the WESA to commence an action on behalf of Eugene's estate. She has the option of doing so by following the procedure set out in that section.

Conclusion

- [25] The defendants' application for an order striking this action is allowed.
- [26] I am not satisfied that a stay of this action and of the order I have made in this application pending a s. 151 leave application is warranted. Costs
- [27] The defendants are entitled to their costs at Scale B. "G.C. Weatherill J."

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