

CANADA / JUDGMENT

Kramer v. Kramer

2023 BCSC 116

COURT

Supreme Court of British Columbia

DECIDED

26 January 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 116 Kramer v. Kramer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kramer v. Kramer,

2023 BCSC 116

Date: 20230126

Docket: file No. 191204

Registry: Victoria

Between:

Karen Kramer

Plaintiff

And:

Leanne Kramer,

Leanne Kramer as the Executor and Trustee of the Estate of

Clara Beatrice Kramer, Deceased,

Kramer Alter Ego Trust,

Leanne Kramer, Aharon Ittah and John Waddell, as the

Trustees of the Kramer Alter Ego Trust,

Leanne Kramer Trust,

Leanne Kramer as the Trustee of the Leanne Kramer Trust

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 115 on February 17, 2023.

Before: The Honourable Justice Young

Reasons for Judgment on Summary Trial Regarding Fraudulent Conveyance Act Claim

Counsel for the Plaintiff:

P. Harrison

Counsel for the Defendants:

J. A. Bloomenthal

Place and Date of Trial:

Victoria, B.C.

December 12 - 16, 2022

Place and Date of Judgment:

Victoria, B.C.

January 26, 2023

Table of Contents

Overview.. 3

Appropriateness of a summary trial 6

Preliminary objections. 6

Breach of trust claim.. 6

Preliminary objections on evidence. 7

Financial statements. 7

Medical opinions. 9

Inadmissible hearsay evidence. 10

Does Karen Kramer have standing under the FCA?. 11

Was Karen Kramer a creditor of Clara Kramer?. 13

The Loan. 13

What are the terms of the Loan?. 18

Has the Loan been repaid?. 21

Were the assets of Clara Kramer transferred into the Trust with fraudulent intent?. 23

Is the plaintiff's claim for recovery of the Loan time-barred?. 27

Orders. 27

Overview

- [1] This matter involves the estate of Clara Beatrice Kramer ("Clara Kramer") who passed away July 14, 2017. Her only children, Karen Kramer and Leanne Kramer, are executors and the sole beneficiaries of her estate. Leanne Kramer held a power of attorney over Clara Kramer's affairs during her lifetime. On May 31, 2015, Leanne Kramer used the power of attorney to authorize the creation of the Kramer Alter Ego Trust (the "Trust"), transferring the majority of Clara Kramer's assets into the Trust and appointing herself and two Victoria solicitors as trustees. Karen Kramer learned of the Trust after the death of Clara Kramer.
- [2] The assets that were transferred into the Trust were:
- a) A commercial property located at 2780 Spencer Rd. (the "South Property");
 - b) A large parcel of undeveloped land located at 1100 McCallum Rd. (the "North Property");
 - c) A condominium located at 301-1375 Newport Ave. (the "Newport Condo");
 - d) The shares owned by Clara Kramer in Sky-Blue Properties Ltd. ("Sky-Blue");
 - e) The shares owned by Clara Kramer in Northern Junk Ltd. ("Northern Junk"); and
 - f) All the shares of Kramer Holdings Ltd. ("KHL") owned by Northern Junk.
- [3] On March 18, 2019, Karen Kramer commenced this action for a variation of Clara Kramer's will executed on May 4, 2009 (the "Will") and codicil executed on March 31, 2010 (the "Codicil") executed under s. 60 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] and for an order under s. 1 of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 [FCA] that Clara Kramer's disposition of property to the Trust is void and of no effect against Karen Kramer, and that the said property is part of Clara Kramer's estate.
- [4] The defendants apply for a summary judgment dismissing the plaintiff's relief sought under s. 1 of the FCA, namely that Clara Kramer's disposition of property to the Trust is void and of no effect against Karen Kramer, and that the said property is part of the estate of Clara Kramer.
- [5] Karen Kramer submits that the Trust was created to avoid paying her the money that was owed to her.

- [6] The defendants say that Karen Kramer was never a creditor of Clara Kramer, and in the alternative, if Karen Kramer had been a creditor of Clara Kramer, she had been paid what was owed to her prior to the disposition of property to the Trust. In the further alternative, even if Karen Kramer was a creditor and was owed money at the time of the disposition of property to the Trust, the purpose and effect of the Trust was not to avoid the payment of debts or to put one's assets out of the reach of one's creditors, and so no fraudulent intent has been proven.
- [7] I find that Karen Kramer was a creditor of Clara Kramer when Karen Kramer loaned her \$164,000 in 1998. I find that more likely than not, it was Clara Kramer who deposited the \$164,000 into a bank account of KHL without Karen Kramer's knowledge or agreement, in keeping with Clara Kramer's frequent practice of using the corporation and shareholder loans to avoid taxes.
- [8] I cannot find that this loan accrued interest, as there is no evidence of an agreement between Karen Kramer and Clara Kramer that interest was owing on this loan. The fact that Grant McNeill, the accountant for Clara Kramer, prepared a draft interest calculation at 5% does not prove an agreement that interest was owing. On June 22, 2012, Clara Kramer, Karen Kramer, and Leanne Kramer signed an agreement providing that Karen Kramer would be paid a \$200,000 advance on the loan Karen Kramer gave to Clara Kramer. I find this was payment of the loan that Karen Kramer had loaned Clara Kramer. Accordingly, when the assets were transferred to the Trust in May 2015, Karen Kramer was no longer a creditor of Clara Kramer. For this reason, Karen Kramer has no standing under the FCA, and the fraudulent conveyance action must fail.
- [9] I also find that there was no fraudulent intention in creating the Trust. The stated purpose for creating the Trust was:
- a) To facilitate estate planning by avoiding substantial probate fees and to effect an efficient and non-confrontational administration of Clara Kramer's estate;
 - b) The distribution of the Trust assets was to precisely mirror the terms of the Will and Codicil to provide a specific cash bequest of \$299,000 to Karen Kramer;
 - c) The three trustees were Leanne Kramer, John Waddell, K.C., and initially David Houston who passed away and was replaced by Aharon Ittah, and all decisions were to be made by the majority of trustees;
 - d) The Trust was to pay out all of Clara Kramer's liabilities. Over \$13,259,533 of capital gains, deferred property tax, legal costs, personal loans, and other expenses were paid by the trustees after the completion of the sale of the North Property and the South Property;

- [10] At the time the Trust was entered into, Karen Kramer had not provided any proof that she was owed more than the \$200,000 that she had received in June 2012. After that date, Karen Kramer had never demanded further payment for the loan or taken any steps to collect the alleged balance at any time before commencing these proceedings. I therefore accept the evidence of Peter Klassen that the debt owed to Karen Kramer was not considered when the Trust was created.
- [11] Having made these findings of fact, which I will set out in further detail below, I dismiss the plaintiff's claim under s. 1 of the FCA.

Appropriateness of a summary trial

- [12] The trial of this action is set down for 15 days, commencing September 18, 2023. This summary trial addresses one issue only, leaving the wills variation claim to be tried in September 2023. If the plaintiff successfully amends her pleadings to include breach of trust claims, those issues may also be tried.
- [13] The plaintiff has the onus of demonstrating that this matter is not suitable for a summary trial. Plaintiff's counsel relied on *Lougheed v. Lougheed*, 2019 BCSC 290 at paras. 43-51 to set out the factors to be considered when determining if a matter is suitable for summary trial. In his oral submissions, it appears that counsel for the plaintiff has conceded that this matter is suitable, as he made submissions on how credibility issues could be resolved on the affidavit material before the Court.
- [14] I find the issue of whether or not there was a fraudulent conveyance is suitable for a summary trial. Although there is conflicting evidence in the affidavit material, I am not satisfied that cross-examination would be of great assistance; any party being cross-examined would have to rely on the documents that are before the Court in the summary trial. This is a distinct issue that can be resolved by summary trial, thus reducing the time required for the viva voce trial in September 2023.

Preliminary objections

Breach of trust claim

- [15] On day four of a five-day summary trial, the plaintiff (the respondent in the application) submitted that there were several ways the Court could come to judgment by considering whether the attorney Leanne Kramer breached her duties under ss.19 and 21 of the Power of Attorney Act, R.S.B.C. 1996, c. 370 when she used her power of attorney to create the Trust.
- [16] During the hearing, counsel for the plaintiff made submissions about the validity of the Trust itself. Counsel for the defendants correctly objected to the submissions, given that there was no pleading alleging trust impropriety. I ruled that I would not deal with the allegation of a breach of trust, given that it was neither pleaded nor set out in the application response. The first time counsel for the defendants became aware of this argument was

when he was handed the written argument of the plaintiff during the hearing of this summary trial application.

- [17] Counsel for the plaintiff sought an order to amend the pleadings on day four of the five-day summary trial, which I denied, advising counsel that he could bring an application to amend pleadings after the conclusion of this summary trial. This summary trial focuses solely on whether or not there was a fraudulent conveyance.

Preliminary objections on evidence

- [18] The plaintiff raised several evidentiary objections to financial statements, medical opinions, and hearsay in affidavits. I will address those objections here.

Financial statements

- [19] First, the plaintiff asserts that the financial statements relied on in the affidavit material of the defendants, and in particular affidavit #3 of Peter Klassen, do not constitute business records under s. 43 of the Evidence Act, R.S.B.C. 1996, c. 124 [EA]. The plaintiff submits that it is not clear that the documents were made or kept in the usual and ordinary course of business, the author is unknown, and there is no indication the records were kept within a reasonable time after the transaction. The plaintiff submits that the draft general ledgers are not reliable because the boxes at the top of the page for initials indicating that the general ledger has been reviewed have not been initialed.
- [20] The defendants rely on *Hudson v. Myong*, 2020 BCSC 517 at para. 153 in support of their argument that the financial statements are not business records. At para. 154 of that decision, Justice Douglas notes that complicated financial statements usually require additional viva voce evidence to prove the truth of the statements contained therein. Justice Douglas was not satisfied that the personal plaintiff was sufficiently knowledgeable about the financial statements at issue to explain the information contained in them accurately. Justice Douglas concluded that the financial statements were inadmissible.
- [21] In this case, the financial statements were attached to the affidavit of the former lawyer for Clara Kramer and the Trust. The former lawyer represented Clara Kramer's companies: KHL, Northern Junk, and Sky-Blue. He was Clara Kramer's personal and corporate lawyer for over 40 years, and was intimately familiar with her personal and business affairs. The accountant for Clara Kramer and the companies has also sworn three affidavits explaining some of the transactions. This distinguishes the present case from *Hudson*.
- [22] Generally speaking, financial statements of a company are business records because they are created in the ordinary course of business using banking records, which are contemporaneous records. It may not always be clear which individual prepared the financial statements, but in this case the financial statements were prepared by a chartered accountancy firm under their letterhead and with signed Notice to Reader. I find these are business records. It appears from affidavit #3 of Grant McNeill that he was the accountant

for Clara Kramer and her companies for the last 20 years. He was responsible for managing the books of KHL and preparing the financial records for the company. Grant McNeill also went to Clara Kramer's house to have her sign the KHL accounts payable cheques.

- [23] There are some financial statements that predate Grant McNeill's involvement with the company. At exhibit E of affidavit #1 of Peter Klassen, financial statements that were prepared by the chartered accountancy firm of Thorne Riddell for the year ending May 31, 1984, are attached. Peter Klassen has no personal knowledge of these financial statements and makes no reference to them other than attaching them at para. 29 of his affidavit. These financial statements are business records although they are not being relied on in an argument. Accordingly I place no weight on these financial statements.
- [24] Peter Klassen attaches to his affidavit #1 at exhibit K, email correspondence he received from Grant McNeill forwarding documents Grant McNeill received from Karen Kramer and a one-page document from Grant McNeill's working files. In that email correspondence, Grant McNeill confirms the amounts of \$100,000 and \$64,000 from Karen Kramer tie into his working papers and are consistent with what Clara Kramer said to him years ago when the deposits were made. Many of the documents relate to the conveyance of Karen Kramer's condominium in Toronto. Page 68 of the exhibits is one page from the KHL general ledger showing a shareholder loan from Karen Kramer to KHL, totaling \$164,000 made in 1998. Grant McNeill's affidavit #1 at para. 6 confirms this evidence. I find the one page from the KHL general ledger at p. 68 is admissible. The balance of that exhibit contains conveyancing documents that are confirmed by Karen Kramer and are also admissible.
- [25] Exhibits L to T of Peter Klassen's affidavit #1 are financial statements and pages from general ledgers of KHL, which I find to be admissible business records. Also, exhibits B, L, and W of Leanne Kramer's affidavit #1 are admissible business records. Exhibits F to I of Leanne Kramer's affidavit #2 are admissible business records.
- [26] Exhibit E of affidavit # 2 of Leanne Kramer is a handwritten document that Leanne Kramer speculates was created by Cheryl Mackey from the Bank of Montreal ("BMO") but cannot attest to the accuracy of the document. This document is only admitted for non-hearsay purposes.
- [27] I find the financial statements relied on in this case are admissible. There may be entries that require explanation. Section 42(3) of the EA stipulates that lack of personal knowledge by the person who made the statement may be shown to affect the statement's weight but not its admissibility. If the plaintiff raises a concern about an entry and there is no evidence from the parties, Peter Klassen, or Grant McNeill to explain the entry, then I may place little weight on the entry itself.

Medical opinions

- [28] In this summary trial, the defendants have attached two psychiatric opinions to Peter Klassen's affidavit #1 at exhibits U and V. The plaintiff objects to them. Exhibit U is a short letter from geriatric psychiatrist Dr. Sylvie Argouarch dated June 19, 2012, saying that Clara Kramer has a cognitive impairment and is not competent to manage her financial affairs. Exhibit V is the November 23, 2012 report of geriatric psychiatrist Dr. Sandi Culo providing a medical opinion to a solicitor, David Johns, that Clara Kramer was not capable of making amendments to her will, revoking her existing power of attorney, or assigning a new power of attorney.
- [29] These letters are medical opinions, and therefore the defendants who wish to rely on them should have complied with SCBC Civil Rules 11-6 and 11-7. In reply, the defendants say that David Johns' refusal to draft a new will "opens the door for these reports". I do not see how David Johns' refusal to draft a new will invalidates the Rules for the admission of expert reports. If the defendants intended to rely on the opinions of these two medical practitioners, they could have properly served the report and notice of their intention.
- [30] Exhibit Z to the same affidavit is a letter repeating the contents of the psychiatrists' opinions. It is inadmissible hearsay evidence.
- [31] I have considered the probative value of the reports and the prejudice to the defendants if I do not admit the reports. The details of the reports are not required in this summary trial. I will admit these reports for non-hearsay purposes. The reports can be used to show that Clara Kramer's solicitors received the reports and acted or failed to act as a result of the contents of the reports. David Johns received the report of Dr. Culo and did not draft a new will for Clara Kramer as a result.
- [32] The issue of when Clara Kramer became incapacitated is not central to my decision in this summary trial.

Inadmissible hearsay evidence

- [33] The plaintiffs submit that the evidence contained at exhibit W of Peter Klassen's affidavit #1 is inadmissible hearsay. Exhibit W contains a November 15, 2012 letter from Dr. Ted Rosenberg to Karen Kramer attaching a November 13, 2012 letter from a community health worker who was caring for Clara Kramer. The November 13, 2012 letter is written by the community health worker's nurse supervisor. It describes events observed by the community health worker on November 13, 2012, including numerous telephone calls to Clara Kramer from her daughter Karen Kramer within a short period of time, which caused Clara Kramer anxiety and escalated these reactions with each subsequent call.

- [34] I find the November 13, 2012 letter is a clinical record setting out the personal observations of a community health worker regarding her patient's reactions. This record is admissible under s. 42 of the EA as a business record and under the common law rules established in *Ares v. Venner*, [1970] S.C.R. 608 at 626, 1970 CanLII 5. The correspondence attaching this clinical record is also admissible.
- [35] Exhibit G of affidavit #1 of Leanne Kramer is a consult report and illegible clinical record from Dr. Andiman dated December 28, 2010. Dr. Andiman assessed Clara Kramer to evaluate her gait status and cognitive function. This document was initially objected to, but counsel for the plaintiff withdrew his objection to it in reply.
- [36] Affidavit #1 of Michelle Erickson, legal assistant at Crease Harman LLP, attaches several exhibits that are hearsay evidence, and includes a further copy of the psychiatric reports that I have ruled as inadmissible except for non-hearsay purposes. Michelle Erickson can provide no explanation for the documents that she attached. I agree with the submission of plaintiff's counsel that the following exhibits are inadmissible hearsay: B, D, E, G, H, K to N; P except pages 108 to 109; R to T and W.

Does Karen Kramer have standing under the FCA?

- [37] The main issue to be determined is whether the disposition of property to the Trust constituted a fraudulent conveyance as against Karen Kramer. In order to assert that claim, Karen Kramer must have standing under the FCA.
- [38] Section 1 of the FCA provides:
- 1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies
- (a) a disposition of property, by writing or otherwise,
- is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.
- [39] The defendants submit that the plaintiff has no standing under the FCA because she is not a creditor and she has no rights and obligations that have been disturbed, hindered, delayed or defrauded.
- [40] The plaintiff seeks a variation of the Will under s. 60 of the WESA. Because most of the assets of the deceased were transferred during Clara Kramer's lifetime into the Trust, the plaintiff must first succeed in obtaining a) a declaration that the transfer is void, and b) an order transferring the assets back into the estate, so that there are assets in the estate to consider in the plaintiff's wills variation action.
- [41] A claim under the will variation provision in s. 60 of the WESA does not create standing as a creditor or other within the meaning of s. 1 of the FCA. This was established in *Mawdsley v. Meshen*, 2012 BCCA 91, leave to appeal to SCC ref'd, 34798 (30 August 2012) on similar facts.

In Mawdsley, the appellant was attempting to invalidate the transfer of assets to an alter ego trust for the purpose of pursuing his primary claim under the former Wills Variation Act (now repealed). Justice Newberry undertook a comprehensive review of the authorities on the proper interpretation of the term "creditors and others" in s. 1 of the FCA. Justice Newberry found that the term "creditors and others" encompassed transferors, creditors, and other claimants that have legal or equitable claims against the transferor during their lifetime based on legal obligations such as a contract or debt obligation. Justice Newberry concluded that the term "creditor and others" excluded claimants under the Wills Variation Act, as variation claims arise solely after the death of the transferor.

- [42] The plaintiff accepts the Mawdsley authority, and submits that Karen Kramer's claim is based on the September and November 1998 loans that Karen Kramer made to Clara Kramer, totalling the amount of \$164,000 ("the Loan"). The plaintiff asserts that the Loan was a personal loan, and not a loan made to KHL, despite the fact that the Loan was documented in the financial statements of KHL as a shareholder loan from Karen Kramer.
- [43] The defendants submit that the relief available to Karen Kramer under the FCA is limited to the declaratory relief required to compensate Karen Kramer for the unpaid balance of the Loan, such as restitution or compensation by way of damages.
- [44] In order for Karen Kramer to obtain any relief under the FCA, the defendants submit that she must establish as a matter of fact that she was a creditor of Clara Kramer or that she maintained a claim against Clara Kramer during her lifetime arising out of a legal obligation.
- [45] To establish that she was a creditor of Clara Kramer, Karen Kramer must establish that Clara Kramer was personally indebted to Karen Kramer as a result of the Loan, and that the balance of the Loan was more than \$200,000 on June 25, 2012.
- [46] The defendants submit that Karen Kramer was never a creditor of Clara Kramer personally. They submit that the Loan was made to KHL and not to Clara Kramer.

Was Karen Kramer a creditor of Clara Kramer?

The Loan

- [47] Karen Kramer deposes that Clara Kramer asked Karen Kramer for a loan for herself, and that Karen Kramer loaned her the money thinking it was for Clara Kramer personally. This money came from the sale of Karen Kramer's condominium in 1998.
- [48] The details of the purchase of that condominium have some relevance to this proceeding, as those details illustrate the financial control that Clara Kramer had over her daughters.
- [49] In 1983, Karen Kramer secured a mortgage from the Royal Bank of Canada ("RBC") to purchase a condominium in Toronto. Clara Kramer insisted that she loan the money to Karen Kramer instead because Clara Kramer wanted to do so as part of a self-directed RRSP,

where she could earn money in the RRSP. Karen Kramer was reluctant to agree to this private loan. Karen Kramer preferred to take the mortgage from RBC that she had secured. Karen Kramer was proud of the fact that she had independently secured a bank mortgage, and did not want her mother involved in the purchase of her home.

- [50] Clara Kramer was insistent that she be the lender, and so Karen Kramer agreed because she thought she was doing her mother a favour. On July 20, 1983, Karen Kramer signed a promissory note at her mother's request and agreed to pay her mother 10% interest on the loan.
- [51] Clara Kramer withheld \$2,000 per month from the KHL dividend that would otherwise have been paid to Karen Kramer. The promissory note was paid in approximately 1992.
- [52] Karen Kramer deposes that Clara Kramer used KHL's finances and bank account as something like a personal bank account. This is also confirmed by the affidavit of Grant McNeill, who deposes at para. 5 of his affidavit #1:

Clara used Kramer Holdings Ltd. almost as a personal bank account to transfer monies for herself, Karen and Leanne. Karen and Leanne each owned one-third of the Company, and Northern Junk Co. Ltd. owned the other third. Clara owned all the shares of Northern Junk Co. Ltd. Each of the three owners of Kramer Holdings Ltd. were to receive a dividend of \$45,000 per year but Clara, who was generous, used the dividend amounts to make irregular payments to Karen, Leanne and herself. I cannot recall the specifics without carefully reviewing company records but Clara sent a great deal of money to both Karen and Leanne. The money given by Clara was for various expenses to enhance her daughters' lives and her own. Clara did not like to pay taxes so that is why funds withdrawn from Kramer Holdings Ltd. in excess of the \$45,000 in dividends to each of the girls and Clara were recorded to the shareholder loan accounts including the separate shareholder loan account called Karen Housing Loan.

- [53] Karen Kramer deposes at para. 22 of her affidavit #1 that on December 11, 1995, she received a letter from a BMO branch in Victoria, British Columbia, saying that on December 7, they had opened a savings account with a \$150,000 deposit in her name only, deposited into BMO Account XXXX-199.
- [54] Leanne Kramer provided the background details for this transaction. These funds were a portion of funds Clara Kramer had received from an expropriation of land by the British Columbia Ministry of Transportation and Highways. Clara Kramer opened a similar account for Leanne Kramer at BMO Account XXXX-180 and an account in her own name at BMO Account XXXX-172. Leanne Kramer deposes at para. 20 of her affidavit #2 that these accounts were opened for the specific purpose of facilitating Clara Kramer's gifts from the expropriation funds and setting up Karen and Leanne Kramer's shareholder loans to KHL.
- [55] On December 12, 1995, Karen Kramer received another letter from the same author at BMO advising her that Clara Kramer would be coming to the branch, and that she wanted to invest \$50,000 from Karen Kramer's account into either a T-Bill fund or a money market

fund. Karen Kramer was asked to sign the bottom of a form entitled "non-registered plan application." Karen Kramer was also asked to sign a transfer form authorizing the \$100,000 transfer from her new account to be injected into KHL as a shareholder loan. This term had already been completed the previous week, but the BMO needed Karen Kramer's signature for their records. Karen Kramer deposes that she believes that Clara Kramer was using her bank account for her own purposes, perhaps to reduce taxes.

- [56] On December 12, 1995, the same BMO employee wrote to Karen Kramer, attaching a power of attorney for Karen Kramer's signature granting her mother a power attorney to manage and carry out for Karen Kramer every financial transaction with the accounts at BMO.
- [57] The transfer slip showing the transfer of funds from BMO dated December 7, 1995, stated the transfer amount was \$150,000. The document had both Karen Kramer and Clara Kramer's names on it, but was only signed by Clara Kramer.
- [58] Karen Kramer deposes that her mother was very insistent about banking matters. Clara Kramer demanded that things be done. Large sums of money were transferred in December 1995, solely by Clara Kramer. Karen Kramer did not receive the benefit of any of it. Karen Kramer believed her mother simply transferred money into Karen Kramer's account at BMO, and then used the power of attorney to transfer the money to KHL. Karen Kramer does not know why Clara Kramer made these transfers, but she does know that she did not receive or retain any of this money. Karen Kramer gave power of attorney to her mother because her mother told her to.
- [59] In August 1997, Karen Kramer sold her Toronto condominium for \$275,000 and received net proceeds of sale.
- [60] In 1998, Karen Kramer was residing in California. Her mother contacted her and seemed desperate to be given the sale proceeds from Karen Kramer's home. Karen Kramer deposes that Clara Kramer said she needed the money and was insistent to the point of demanding that Karen Kramer lend her the money. Reluctantly, Karen Kramer agreed to make the Loan by transferring the total of \$164,000 out of her RBC account in Ontario to her BMO account in Victoria, British Columbia. Doing so enabled Clara Kramer to withdraw the money she wanted using the power of attorney Karen Kramer had previously given Clara Kramer in 1995 over her BMO account.
- [61] Karen Kramer insists that she did not loan the money to KHL. She deposes at para. 32 of her affidavit #2:

Had I thought it was going to Kramer Holdings Ltd. I would not have transferred it to the Bank of Montreal. My mother said that the money was for her, that she needed it, and that is the reason I loaned her the money. If she used the money to give it to Kramer Holdings Ltd. then it was done without my knowledge or agreement.

- [62] Grant McNeill deposes in his affidavit #1 that Clara Kramer advised him that Karen Kramer lent her \$164,000. This was after Grant McNeill saw two separate deposits into the KHL bank account and asked Clara Kramer what they were for. One deposit was \$100,000 and one deposit was \$64,000. Grant McNeill believed the monies were deposited into KHL so that Clara could keep track of the amounts. Clara Kramer instructed him that she wanted it referred to as the Karen Housing Loan in the books of KHL, and he followed her instructions.
- [63] The defendants say that Karen Kramer's assertion that she made the Loan to Clara Kramer in her personal capacity relies exclusively on her own bare assertion and belief. Karen Kramer did not produce a single piece of evidence in the proceeding that substantiates the bare assertion that she made the Loan to Clara Kramer in her personal capacity, or that Clara Kramer requested the Loan for herself.
- [64] The defendants submit the documentary evidence unequivocally establishes that the transfers comprising the Loan were deposited into KHL's bank account in two separate transfers corresponding with the transfers from Karen Kramer. The transfers were recorded in KHL's books as a shareholder loan from Karen Kramer.
- [65] Karen Kramer produced documents showing that on September 11, 1998, she directed her personal banker, Megan Kong, at the RBC in Scarborough, Ontario, to transfer \$64,000 from the RBC account to Karen Kramer's account at a BMO branch located in Victoria, British Columbia.
- [66] On September 14, 1998, the \$64,000 was transferred from Karen Kramer's BMO account into KHL's BMO account at the same branch. There is no transfer of funds slip supporting who authorized the transfer from Karen Kramer's personal account to KHL's account.
- [67] On November 7, 1998, Karen Kramer directed Megan Kong at the RBC in Scarborough, Ontario, to transfer \$100,000 from the RBC account to Karen Kramer's account at the BMO branch located in Victoria, British Columbia.
- [68] On November 28, 1998, the \$100,000 was transferred from Karen Kramer's BMO account to KHL's account at the same branch. Again, there is no transfer of funds slip supporting who authorized the transfer from Karen Kramer's personal account to KHL's account.
- [69] Given the evidence summarized above of Karen Kramer regarding Clara Kramer's personal control over Karen Kramer's BMO account, I find it more likely than not that the transfers from Karen Kramer's personal account into KHL's account were authorized by Clara Kramer, in keeping with her practice of using KHL's account like a personal bank account and relying on shareholder loan accounts to avoid paying taxes on withdrawals. I also rely on the evidence of Grant McNeill. I accept Karen Kramer's evidence that she thought the money was needed by her mother and Karen Kramer would not have transferred the money to KHL.

[70] I find the Loan of \$164,000 was a personal loan from Karen Kramer to Clara Kramer.

What are the terms of the Loan?

[71] Karen Kramer deposes that the Loan she made to Clara Kramer was not fully repaid.

[72] Karen Kramer deposes that Grant McNeill prepared a calculation for Peter Klassen of the interest on the Loan. The calculation is attached as exhibit J to affidavit #1 of Peter Klassen, and it states that based on a 5% interest rate, as at June 30, 2012, Clara Kramer owed Karen Kramer \$339,824.89. After the payment of a \$200,000 advance which I will describe below, Karen Kramer says that Clara Kramer still owed her \$140,000.

[73] Peter Klassen deposes in his affidavit #1 that Karen Kramer has never provided any evidence establishing the terms of the Loan. All the documents he received to support the Loan appeared to unequivocally establish that the Loan was made to KHL, rather than to Clara Kramer personally. The first document he received in support of the Loan was a spreadsheet that purported to calculate accrued interest on the Loan between August 1997 and June 30, 2012. This document was prepared by Grant McNeill and was marked as a draft for discussion purposes only. It is Peter Klassen's belief that he received that document directly from Karen Kramer in the summer of 2012 as evidence of the existence and amount of the Loan. Peter Klassen does not say that this document was created at his request.

[74] Peter Klassen submits that the draft interest calculation appears to establish that the Loan was made to KHL, rather than to Clara Kramer in her personal capacity. I do not accept this as proof. The draft interest calculation merely references the date the funds were deposited into the KHL account.

[75] Grant McNeill did create the Karen Kramer housing loan interest document. Grant McNeill does not recall the date it was prepared, but based on the dates for calculation, he believes it was in June or July 2012. Grant McNeill decided to use a 5% interest rate in the calculation because after some investigation, he determined that 5% was the rate being used at that time for term deposits on similar investments.

[76] Grant McNeill deposes that at some date after he discussed the Loan with Clara Kramer, she told him that the total amount of the housing loan was \$300,000. He deposes that Clara Kramer wanted to make sure Karen Kramer would be paid back the \$300,000, and so that is why she added it as a codicil to her Will. There is some disagreement about this latter statement. The defendants have submitted that the Codicil gift of \$299,000 did not reference the Loan, but was to equalize the bequests between Karen and Leanne Kramer because Leanne Kramer was to receive the Newport Condo.

- [77] In Grant McNeill's affidavit #2, he states he cannot recall the last time Clara Kramer told him that she owed Karen Kramer \$300,000. In his affidavit #3, Grant McNeill deposes that he did not decide to prepare the draft interest calculation of his own accord. To the best of his recollection, Karen Kramer or her lawyer asked him to produce the draft interest calculation to show what the balance of the Loan would be as of June 30, 2012, if the Loan carried interest.
- [78] Grant McNeill clarifies in his affidavit #3 at para. 13 that the 5% interest rate on the draft interest calculation was not based on his personal knowledge of the terms of the Loan, or any agreement between Karen Kramer and Clara Kramer setting an interest rate for the Loan. He is not aware of any agreement to that effect, and does not have any personal knowledge of the Loan being subject to the interest rate of 5% per annum or any other interest rate. Clara Kramer did not instruct Grant McNeill to increase the balance of the Loan in account number 2053 of the general ledger to record or account for interest on the Loan at any time. Accordingly, to the best of his knowledge and belief, the Loan was not subject to any rate of interest.
- [79] Grant McNeill deposes at para. 14 of his affidavit #3 that he prepared the draft interest calculation for discussion purposes only and marked it as such. The contents of the draft interest calculation are only intended to provide an example of a theoretical scenario where the Loan carried interest at the rate of 5% per annum. Grant McNeill did not intend for Karen Kramer or anyone else to rely on the draft interest calculation as a true or accurate statement of the balance owing on the Loan as of June 30, 2012, or as evidence that the loan carried interest at the rate of 5% per annum or at all.
- [80] In Leanne Kramer's affidavit #2, she deposes that the shareholder loan accounts were initially interest-bearing. She notes that no interest was paid after 1998 on the shareholder loan accounts.
- [81] Karen Kramer attached a letter from Grant McNeill to Clara Kramer dated February 26, 1999, advising against paying interest on shareholder loans because of a concern arising from s. 18(4) (presumably of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)) about thin capitalization. Grant McNeill proposed complex options, but it appears that KHL just stopped paying interest. After 1998, the general ledgers show that KHL stopped paying any interest on the shareholder loans from Karen and Leanne Kramer.
- [82] I cannot find that there was an agreement for the payment of interest on the Loan on these facts. The draft interest calculation is a hypothetical calculation in the event that it was established that the Loan was interest-bearing.

Has the Loan been repaid?

- [83] In 2011, Peter Klassen was in the process of negotiating the sale of a building called the Janion, which was owned by Clara Kramer's company Sky-Blue. The proceeds of sale from the Janion were earmarked to pay off Clara Kramer's outstanding debts, including a loan

from her realtor and overdue accounts for legal services provided by various lawyers from Crease Harman LLP over a number of years, which the firm agreed to defer until after the sale of the Janion. The remainder of the funds from the sale of the Janion were allocated to Clara Kramer's maintenance and care.

- [84] On June 18, 2012, Karen Kramer called Peter Klassen and left a voicemail demanding repayment of the Loan from the proceeds of sale from the Janion, held in trust at Crease Harman LLP. To the best of Peter Klassen's recollection, Karen Kramer claimed in her voicemail that she was supposed to receive \$300,000 from the sale of the Janion for repayment of the Loan. This was the first time Peter Klassen had ever heard about the Loan. Karen Kramer had not made any requests for repayment after the sale of other assets owned by Clara Kramer's companies. Peter Klassen wrote to Karen Kramer and asked her for particulars of the Loan to confirm who the Loan was made to and what the terms of the Loan were, including the principal amount of the Loan and the rate of interest.
- [85] On June 20, 2012, Peter Klassen and David Hughson, another lawyer at Crease Harman LLP representing Clara Kramer in a number of matters over the years, met with Clara Kramer at her Newport Condo to discuss the Loan in person. Clara Kramer was unable to recall any details or particulars. She was quite agitated, and accused Peter Klassen of conspiring to put her in the Alzheimer's hospital and of injecting her with drugs. Clara Kramer did not know if the Loan was made to her or one of her companies, or when it was made. She could not recall the principal amount of the Loan or the interest rate. Despite her inability to recall any of the details, Clara Kramer insisted that she owed Karen Kramer \$300,000 and demanded that this amount of money be paid to Karen Kramer.
- [86] During the meeting with Clara Kramer on June 20, 2012 at the Newport condo, Karen Kramer called several times and engaged in an agitated conversation with Clara Kramer over the phone. Peter Klassen attempted to have a conversation with Karen Kramer about the terms of the Loan, but the call became unproductive and he hung up. A meeting was scheduled for the following morning with Clara Kramer and Grant McNeill. Peter Klassen deposes that Grant McNeill was not aware of any Loan made by Karen Kramer to Clara Kramer personally and could not provide details that were of assistance. Clara Kramer continued to insist she owed Karen Kramer \$300,000, but could not provide any details.
- [87] A conference call was convened, including Karen Kramer on the speakerphone to ask her questions about the Loan. Karen Kramer said that the proceeds of sale came from the sale of her townhouse in Toronto, which she sold in 1997. Karen Kramer advised that Clara Kramer had demanded the Loan after the sale of the townhouse, but Karen Kramer could not provide details or particulars regarding the terms of the Loan, including the date of the Loan, the principal amount of the Loan, the rate of interest, if any, or the recipient of the Loan.

- [88] Peter Klassen proposed that Karen Kramer, Clara Kramer, and Leanne Kramer enter into an agreement whereby they would transfer \$200,000 of the proceeds from the Janion sale to Karen Kramer as either an advance of her inheritance, or repayment of the Loan if particulars of the Loan could be provided. The onus was placed on Karen to provide the particulars. If Karen Kramer could establish that Clara Kramer owed her more than \$200,000, then Clara Kramer agreed to pay the outstanding balance of the Loan as soon as practicable. On June 25, 2012, the agreement was executed by Karen, Clara, and Leanne Kramer in counterparts (the "Agreement") and \$200,000 was wired to Karen Kramer's bank account at the Bank of America.
- [89] Karen Kramer has never provided any evidence establishing the terms of the Loan.
- [90] I find that Karen Kramer was repaid the principal owing under the Loan in the amount of \$164,000. She has not established to my satisfaction that there was an agreement for interest on the Loan. Accordingly, I find that Karen Kramer was overpaid and she was not a creditor of Clara Kramer at the time of the transfer of assets into the Trust.
- [91] Given that Karen Kramer was not a creditor of Clara Kramer, and she cannot rely on her will variation claim to assert that she had a right or obligation that was being disturbed, hindered, delayed, or defrauded, she does not have standing under the FCA.
- [92] That should be the end of the matter. I heard extensive submissions on what constitutes fraudulent intent under the FCA, and so I will render a decision on that issue even though it is not required, given my decision on standing.

Were the assets of Clara Kramer transferred into the Trust with fraudulent intent?

- [93] The general requirement for establishing a claim under the FCA was discussed in *Lau v. McDonald*, 2021 BCSC 1207 at paras. 145-146. The party claiming a fraudulent conveyance must establish that the person making the transfer of assets did so with the intent to put their assets out of the reach of creditors. There is no need to show a dishonest or morally blameworthy intent: see *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521, leave to appeal to SCC ref'd, 33545 (24 June 2010).
- [94] As Justice Newbury stated in *Mawdsley*, merely proving that the effect of the transfer is to hinder or delay creditors or others is insufficient to trigger the FCA:
- [7] With respect to the question of "intent" under the FCA, it is also my opinion that while a claimant need no longer show a "subjectively dishonest or fraudulent state of mind" on the part of the transferor, the claimant must prove an intention to defeat creditors or others as a matter of fact. Of course, such an intention may be inferred from all the circumstances, and the well-known "badges of fraud" are often resorted to for this purpose, creating a presumption of fraudulent intent. But the presumption is rebuttable, and merely proving that the effect of the transfer is to hinder or delay creditors or others is not, as a matter of law, sufficient.

[Emphasis in original.]

- [95] There is no direct or indirect evidence in this case that the Trust was created with the intention to hinder, delay, or defraud Karen Kramer as a creditor of Clara Kramer. The notice of civil claim does not plead any allegations of fact or provide particulars of fraudulent intent. The only allegation is contained in the Part 3 (Legal Basis) of the notice of civil claim, which says that "[t]he disposition of property to the Kramer Alter Ego Trust was made to delay, hinder or defraud creditors." I have found no facts to support this assertion.
- [96] I note that the Trust paid Clara Kramer's creditors in 2020 and early 2021 from the proceeds of sale from the North Property and South Property. The Trust paid over \$13 million to discharge Clara Kramer's outstanding debts, capital gains, deferred taxes, and expenses arising from the conveyance. The actions of the trustees refute any suggestion by Karen Kramer that the Trust was created to avoid paying creditors.
- [97] I see no evidence to draw an inference of fraudulent intent. The direct evidence would challenge such an inference in any event.
- [98] I am satisfied on the evidence of Leanne Kramer, Peter Klassen, and David Christian, who was Clara Kramer's tax lawyer, that the establishment of the Trust was for honest purposes. David Christian started recommending an alter ego trust to Clara Kramer in 2011. When he was advised that Karen Kramer and Leanne Kramer did not get along, David Christian recommended that they not be joint trustees and that Clara Kramer should find another trustee to avoid the risk of deadlock.
- [99] In Peter Klassen's affidavit #1, he describes the process he underwent with Karen Kramer's former solicitor, Mr. Murphy-Dyson, to establish an agreed-upon mechanism for the resolution of present and future disputes between Leanne and Karen Kramer that would help them administer Clara Kramer's estate in an efficient and cost-effective manner, without constant deadlock and discord. These discussions continued for over a year. Mr. Murphy-Dyson made it clear that Karen Kramer was not prepared to participate in these discussions unless the Will was changed to provide equal shares.
- [100] In the fall of 2014, local developers expressed interest in purchasing the North Property and South Property. Leanne Kramer deposes in her affidavit #1 that Clara Kramer was in poor health and suffering from dementia. Leanne Kramer was concerned that she and Karen Kramer would not be able to negotiate a sale. She sought the advice of Peter Klassen.
- [101] In October 2014, Peter Klassen recommended to Leanne Kramer that an alter ego trust be created for Clara Kramer's property and corporate shares, and that it include provisions for distribution of those assets after Clara Kramer's death mirroring the provisions of the Will and Codicil.

- [102] Peter Klassen advised Leanne Kramer that the establishment of an alter ego trust would avoid several hundred thousand dollars in probate fees, and would ensure an efficient, cost-effective, non-confrontational administration of the estate. It would also resolve potential tax issues arising from Karen Kramer's permanent residence in the United States.
- [103] Leanne Kramer relied on the advice and recommendation of Peter Klassen and David Christian.
- [104] Leanne Kramer instructed Peter Klassen to retain David Christian to prepare a trust for the purpose of planning and administering the estate of Clara Kramer.
- [105] At no time during the communication of these instructions did Leanne Kramer and Peter Klassen ever discuss an outstanding debt owed to Karen Kramer, nor was David Christian aware of any outstanding debt to Karen Kramer.
- [106] On November 24, 2014, Leanne Kramer spoke with David Christian, and said she was thinking about retaining a mobile home park located on one of Clara Kramer's properties and paying out Karen Kramer for her share of the property. David Christian raised a concern that this objective was not in keeping with the Will. Peter Klassen confirmed that it was not his understanding of the objective of the Trust.
- [107] Leanne Kramer deposes in her affidavit #2 at para. 26 that in the fall of 2014, she briefly considered the possibility of buying the mobile home park and South Property where it was situated at fair market value after Clara Kramer passed away. She quickly realized there was no way she could afford to do so. As trustee of the Trust, she spent countless hours working with Peter Klassen and the realtors to find a buyer for the South Property and on negotiating the sale of the same.
- [108] I am satisfied that Leanne Kramer's statements to David Christian on November 24, 2014 about wanting to buy the mobile home park constituted a fleeting episode of wishful thinking. Retaining the South Property would have been contrary to the wishes of Clara Kramer, and as Leanne Kramer realized, it was not a financially viable option.
- [109] Peter Klassen deposes that Leanne Kramer was instrumental in the negotiations with the purchasers of the North Property and the South Property, and spent countless hours working on the matters with him. Peter Klassen never considered the Loan or discussed it with David Christian or Leanne Kramer at any point during the process of planning and establishing the Trust. At no time was an intent formed to create a trust for the purpose of defeating or hindering Karen Kramer's ability to collect the Loan or what she claimed was owing on the Loan. After Karen Kramer received the \$200,000 payment in 2012, Peter Klassen did not receive any evidence whatsoever from Karen Kramer or anyone else to establish that Clara Kramer was personally indebted to Karen Kramer for any reason.

- [110] On December 12, 2014, David Christian received a letter from Peter Klassen confirming Leanne Kramer did not want to retain the mobile home park, and that his instructions from Leanne Kramer were that the objective of the Trust was to avoid probate fees and confrontation during the administration of Clara Kramer's estate.
- [111] David Christian was never informed that Clara Kramer was indebted to Karen Kramer for any amount, or that any purpose of establishing the Trust was to defeat or hinder any of Clara Kramer's creditors.
- [112] Significant planning and care went into the creation of the Trust. A draft alter ego trust document was sent to Peter Klassen in December 2014. The Trust was settled on May 31, 2015.
- [113] I am satisfied that there is direct evidence of the purpose for creating the Trust for legitimate estate planning purposes to maximize the value of Clara Kramer's estate by avoiding substantial probate fees that would have been payable on the gross value of the North Property and the South Property, and to ensure Clara Kramer's estate could be administrated in an efficient, cost-effective, non-confrontational manner after her death. There is no evidence on which to draw an inference of fraudulent intent.

Is the plaintiff's claim for recovery of the Loan time-barred?

- [114] This is a defence that was not pleaded, but was raised in submissions at the summary trial. Given that I found the debt was paid in 2012, I do not find it necessary to address this defence.

Orders

- [115] I dismiss the relief sought in paras. 2 and 3 of Part 2 of the notice of civil claim filed March 18, 2019.
- [116] At para. 2 of Part 1 of the notice of application filed October 11, 2022, the defendants seek a declaration and an order that Clara Kramer's disposition of property to the Trust is valid and enforceable as against the plaintiff, and that the said property forms part of the Trust and shall be distributed in accordance with the terms of the Trust pursuant to R. 9-7(15) of the Rules.
- [117] The defendants objected to the plaintiff making any submissions about the validity of the Trust or whether Leanne Kramer had breached her duties under the power of attorney in creating the Trust because of the plaintiff's failure to plead breach of trust. Accordingly, I declined to rule on the validity of the Trust or any suggestion that Leanne Kramer acted outside her powers under the power of attorney.

- [118] I order that, if the plaintiff chooses to pursue this relief, she must bring an application to a judge in chambers to amend her pleadings within 30 days of the release of this decision. I am not seized of that application. If the plaintiff is granted leave to amend her pleadings to incorporate a challenge to the validity of the Trust or a breach of trust by Leanne Kramer under the power of attorney, this is a matter that shall be dealt with at trial.
- [119] If the plaintiff chooses not to amend her pleadings, then the parties are at liberty to return to court before me to speak to para. 2 of Part 1 of the notice of application filed by the defendants on October 11, 2022.
- [120] The defendants are entitled to their costs of this application in any event of the cause at Scale B. Once the amount is either consented to or assessed by the registrar, the defendants' assessed costs are to be deducted from any monies payable pursuant to the terms of the trust.

"The Honourable Justice Young"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/01/2023BCSC0116cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kramer-v-kramer-2023>

Prepared on 26 October 2026 · Esheria