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OF THE
STATE OF DELAWARE

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Final Report: January 23, 2017

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Re: *IMO Kalil Trust and Estate*
C.A. No. 11047-MZ
Date Submitted: November 23, 2016

Dear Counsel and Mr. Kalil:

Petitioner contends that decedent James Kalil, Sr. (“James Sr.”) mistakenly failed to retitle an account in the name of a 1989 trust to be in the name of a 1997

trust, even though James Sr. intended to distribute the funds in that account according to the 1997 trust and James Sr.'s 1997 will. In support of that contention, Petitioner alleges James Sr. provided Respondent James Kalil, Jr. ("James Jr.") with economic support, including paying for a defense against criminal charges, and that James Sr. amended the 1997 trust several times to adjust James Jr.'s share accordingly.¹ Petitioner asks the Court to reform the 1997 trust to control the mistitled account. Petitioner also seeks dissolution of a partnership holding real estate in favor of a limited partnership to which Petitioner contends the real estate should have been transferred years ago.

James Jr.'s *pro se* Answer to the Petition denies James Sr. paid for James Jr.'s legal defense and requests reversal of a \$200,000 deduction from his inheritance representing that alleged payment. James Jr. also denies Petitioner's allegations regarding a 2012 trust amendment debiting James Jr.'s share and a 2014 trust amendment imposing a forfeiture clause in case James Jr. contested the 1997 trust's terms.² James Jr.'s Answer alleges Petitioner manipulated James Sr.'s estate to James Jr.'s detriment. James Jr. asks the Court to deny Petitioner's request to reform the 1997 trust. As for the partnership issue, James Jr. denies Petitioner's allegation that James Jr. was bought out of the limited partnership,

¹ Pet. ¶¶ 16, 17.

² Ans. ¶¶ 16, 17.

contends he never received the buyout funds, seeks distribution of funds allegedly held by the original partnership, and alleges further manipulation by Petitioner.

On October 31, 2016, James Jr. filed a *pro se* Motion to Amend, which Petitioner opposed on November 9, 2016. James Jr. filed a reply on November 23, 2016. This is my final report on James Jr.'s Motion.

Court of Chancery Rule 15(a) provides that leave to amend a pleading shall be freely given when justice so requires.

This determination is a matter of the court's discretion. Rule 15(a) reflects the modern philosophy that cases are to be tried on their merits, not on the pleadings. Therefore, courts generally will not test the sufficiency of the pleadings in ruling on a motion to amend. A motion to amend may be denied, however, if the amendment would be futile, in the sense that the legal insufficiency of the amendment is obvious on its face. In exercising its discretion, the court also considers factors such as bad faith, undue delay, dilatory motive, repeated failures to cure by prior amendment, undue prejudice, and futility of amendment.³

This Court also has discretion to exhibit some degree of leniency toward a *pro se* litigant in order to see that his case is fully and fairly heard.⁴

I read James Jr.'s Motion to propose amending his Answer to include six topics or requests for relief. First, James Jr. restates his request that the Court "uphold the 1989 trust," including James Jr.'s position as a co-trustee of the 1989

³ *NACCO Indus., Inc. v. Applicia Inc.*, 2008 WL 2082145, at *1 (Del. Ch. May 7, 2008) (internal citations and quotation omitted).

⁴ *Durham v. Grapetree*, 2014 WL 1980335, at *5 (Del. Ch. May 16, 2014) (citing cases).

trust. Petitioner opposes this amendment only on the grounds that it is redundant of James Jr.'s Answer. In pursuit of a full and fair hearing of James Jr.'s case, I recommend granting James Jr.'s Motion as to his first request.

James Jr.'s second and third proposed amendments both elaborate on the denial in his Answer that James Sr. paid for James Jr.'s legal defense. James Jr.'s original Answer attacked a "claim" in the "will" that James Sr. paid \$200,000.00 in James Jr.'s legal fees. In response to Petitioner's allegations regarding the 2014 amendment to the 1997 trust, James Jr. pled:

forfeiture clause was another manipulation by the Petitioner due to the fact of James Sr.'s ill health, mental state (eyesight & hearing) along with the stress and other factors brought on by his Leukemia do to these issues the petitioner was able to change the terms for his benefit. In the will it is claimed that \$200,000 was paid for James Jr.'s lawyer when in fact as stated James Jr. paid all his attorney fee out of his personal money. This is an attempt by the petitioner to cheat James Jr. out of \$200,000.00 as shown.

James Jr.'s Answer concluded by asking the Court to "reverse the \$200,000 additional deduction."

James Jr.'s second point in his Motion to Amend asks the Court to consider a May 6, 2005, codicil to James Sr.'s will, which allegedly deducted \$200,000 from James Jr., "stricken or offset by the fact that the loan was satisfied and signed as such" on May 5, 2005. In support, James Jr. attached a marked-up promissory note as an exhibit to his Motion. James Jr.'s third point in his Motion to Amend

asserts the 2014 trust amendment deducted \$500,000 from James Jr.'s inheritance, and asks \$200,000 to be retracted from that deduction because James Sr. did not pay for James Jr.'s criminal defense as Petitioner alleged.

Petitioner opposes these two requests to amend on the basis that they are untimely attacks on James Sr.'s estate documents pursuant to 12 *Del. C.* §§ 1309 and 3546(a)(3), and would therefore fail on a motion to dismiss. In reply, James Jr. argues his claims should not be barred because he attempted to obtain discovery regarding James Sr.'s estate from January to November 2015 by corresponding with Petitioner, Petitioner's probate attorney, and this Court, but was ignored. He also asserts fraud in connection with James Sr.'s estate documents and payouts to his siblings.

I find James Jr.'s requested amendments simply refine his Answer's request for \$200,000 based on the allegation that James Sr. did not pay for James Jr.'s legal defense. Petitioner has not moved to dismiss or strike James Jr.'s allegations in this vein from James Jr.'s Answer.⁵ In pursuit of consistency and a logical progression of this case, and to afford this Court's traditional leniency toward *pro se* pleadings, I recommend granting James Jr.'s second and third requests to amend. This will permit James Jr.'s theory regarding the \$200,000 to be fully

⁵ Petitioner has not waived any defenses of untimeliness.

heard, and for the overlapping allegations in his Answer and amendments thereto to rise or fall together.⁶

I also find James Jr.'s fifth request to amend is redundant of his original Answer. In that request, James Jr. asks the Court "to redistribute all payment of debts equally among the beneficiaries according to the terms of the 1989 Trust" because the 1997 Trust's amendments are "without merit," "inequitable," and obtained by Petitioner's undue influence. Petitioner responds that James Jr.'s attacks on the 1997 trust amendments are untimely pursuant to 12 *Del. C.* § 3546(a)(3). James Jr. replies simply that the estate's current structure does not comport with his father's wishes.

James Jr.'s original Answer pled his preference for the 1989 trust and requested the Court "allow equal distribution of James Jr. and Janice debt among all siblings." His original Answer also asserted Petitioner manipulated James Sr.'s estate. Those allegations remain in play. Therefore, I again recommend that James Jr.'s Answer and fifth proposed amendment rise and fall together as they express the same theory. I therefore recommend granting James Jr.'s fifth request to amend.

⁶ My recommendation to permit these amendments is based on the overlap between the amendments and James Jr.'s original Answer. Therefore, I do not evaluate the timeliness of James Jr.'s attacks on James Sr.'s estate documents today.

James Jr.'s fourth request to amend alleges James Sr. loaned Laura Gibson approximately \$450,000 to purchase a residence, and that no documentation of this loan or any repayment has been produced, where transactions by other beneficiaries generated discovery. James Jr. seeks to amend his Answer to request disclosure of this loan. Petitioner responds by surmising that "[p]resumably," James Jr. wants any outstanding balance of such a loan deducted from Ms. Gibson's share even though James Sr.'s estate documents do not require any such deduction. Petitioner argues such relief would be an untimely and unsupported attempt to rewrite James Sr.'s estate documents such that the amendment must be denied as futile. In reply, James Jr. again references his 2015 correspondence regarding James Sr.'s estate, and argues that the absence of any documentation regarding Ms. Gibson's loan is striking when compared to voluminous documentation regarding Janice Ketcham's transactions.

I read James Jr.'s proposed allegations more leniently than Petitioner does. James Jr. seeks to amend his Answer to include that James Sr. loaned Ms. Gibson money, and seeks "disclosure," or discovery, on those allegations. His request to amend does not mention any deduction. The terms and repayment of a loan to Ms. Gibson might illuminate the disputed transactions between James Sr. and James Jr., and their subsequent effect on the 1997 trust. I also discern from James Jr.'s Motion and exhibits thereto that discovery has been provided regarding

transactions between Janice Ketcham and James Sr. or his estate. The apparent relevance of Ms. Ketcham's transactions indicates Ms. Gibson's transactions may be relevant as well. Petitioner opposes this proposed amendment based only on a speculative form of ultimate relief that James Jr. has not yet requested. Given the potential relevance to Petitioner's disputed allegations of financial assistance to James Jr. and its impact on his inheritance, I recommend granting James Jr.'s request to amend to add allegations of a loan to Ms. Gibson.

Finally, James Jr. asks the Court to preclude the payment of Petitioner's legal expenses out of the trust due to Petitioner's alleged misuse of his position as executor. Petitioner responds by citing the 1997 trust's language empowering him to engage professionals, repeating the allegations of estate planning error at the heart of this case, and summarizing the litigants' conduct to date. In reply, James Jr. distinguishes the estate's administrative matters from "deliberate executor misconduct." In order to deny James Jr.'s request to amend, I would have to bless Petitioner's allegations of simple estate planning errors over James Jr.'s allegations of Petitioner's misconduct; I cannot do that at this juncture. I discern no prejudice from allowing James Jr. to amend to lodge an objection to Petitioner's actions and payment of fees out of the trust if misconduct is found. I recommend granting James Jr.'s final request to amend.

James Jr.'s amendments are short, and he is *pro se* and does not have access to a computer. Therefore, if and when this report is adopted by the Court, I will deem James Jr.'s Motion to amend to be part of his Answer in this case, in lieu of requiring an amended answer.

This is a final report pursuant to Chancery Rule 144.

Sincerely,

/s/ Morgan T. Zurn

Master in Chancery