

CITATION: Ludlow v. Clubbe, 2019 ONSC 941
COURT FILE NO.: 05-153/16
DATE: 20190208

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF KENNETH ROBERT LUDLOW

BETWEEN:)
)
ROBERT MURRAY LUDLOW, in) *Matthew M. A. Stroh*, for the
his personal capacity and in his) Applicant, Respondent on the Motion
capacity as co-estate trustee of)
Kenneth Robert Ludlow)
)
Applicant)
)
– and –)
)
KATHLEEN RUTH CLUBBE, in her) *D. Gordon Bent*, for the Respondent
personal capacity and in her capacity) Kathleen Ruth Clubbe, Moving Party
as co-estate trustee of the estate of)
Kenneth Robert Ludlow, SUSAN)
LUDLOW and RBC DOMINION)
SECURITIES INC.)
)
Respondents)
)
) **HEARD:** February 6, 2019

L. A. PATTILLO J.

[1] The question for determination on this motion is whether a handwritten note dated November 3, 2014, in the handwriting of the deceased, Kenneth Robert Ludlow, is a valid holograph codicil.

[2] The following are my findings of fact which are taken from the record and which I consider are not controversial. In light of Robert Ludlow's objections to some of his sister Kathleen's evidence, I have not relied on that evidence but rather have relied primarily on the evidence of Mr. Terry Fraser, Mr. Ludlow's long time lawyer who was involved in the events giving rise to this motion.

[3] Mr. Ludlow died on March 18, 2015 at the age of 92. He had four children, three of whom are the Applicant Robert Murray Ludlow ("Bob"), and the Respondents Kathleen Ruth Clubbe ("Kathy") and Susan Ludlow ("Susan"). Mr. Ludlow had been estranged from his fourth child John for some time before his death and was predeceased by his wife.

[4] On July 11, 2012, Mr. Ludlow executed a Will, drawn by Mr. Fraser, which left his Estate to be divided equally between Bob, Kathy and Susan. At the same time, he instructed Mr. Fraser to convey title of the longtime family cottage on Healy Lake in Mactier, Ontario (the "Cottage") where he resided full time, to Bob, Kathy and himself as joint tenants in order to avoid estate taxes and fees when he died. Susan was excluded because she lived in British Columbia and Mr. Ludlow believed she would not be able to enjoy the Cottage while being partially responsible for its expenses.

[5] In September, 2014, Mr. Ludlow consulted Mr. Fraser about adding Susan as a joint owner of the Cottage. Mr. Fraser advised him that in order to do that it would be necessary to get the consent of Bob and Kathy, the other owners, to execute a new transfer of title from the three owners to all four. Mr. Ludlow instructed Mr. Fraser to prepare the necessary documents for execution.

[6] On October 28, 2014, Mr. Ludlow dropped by Mr. Fraser's office and left a message for him saying he was leaving for Florida in a couple of weeks and he wanted the matter addressed. As a result, an appointment was arranged with Mr. Fraser for Mr. Ludlow, Bob and Kathy to attend at his office on October 31, 2014 and sign the new title documents.

[7] On October 31, 2014, Mr. Ludlow and Kathy attended at Mr. Fraser's office to sign the documents. Bob did not attend because he says that he was concerned

that Kathy and Susan were pressuring their father to include Susan on the title to the Cottage against his wishes. Mr. Fraser's evidence is that Mr. Ludlow was "very upset" that Bob had refused to sign and told him that Bob said he wanted off the Cottage title and out of the estate. Kathy signed the documents.

[8] In light of Bob not agreeing to sign the documents, Mr. Fraser advised Mr. Ludlow of what his options were if Bob maintained his refusal. They were:

- i. break the joint tenancy to create tenants in common (and incur probate fees of about \$5,000) and then leave his 1/3 interest in the Cottage to Susan, thereby giving 1/3 of the Cottage to each of the three children;
- ii. change the distribution of funds in his Will to equalize for Susan;
- iii. if Bob does want to be off the title, prepare a new deed.

[9] On November 14, 2014, Mr. Ludlow called Mr. Fraser's office and left a message saying he was leaving for Florida for six months and was worried about paying his bill. He said his daughter can pay his bills but it may take a while. Mr. Ludlow also asked if his son had been in to sign. Mr. Fraser called him back and left a message saying his son had not been in.

[10] Mr. Ludlow died some five months later in Florida.

[11] After his death, Kathy found an envelope amongst his papers in the Cottage. Written on the outside of the envelope in what is agreed to be Mr. Ludlow's handwriting was the following:

"Nov 3 called Bob 9 p.m. At restaurant. I said I would call back later. 10:45 – called and got recording (left time and from Healey Lake. 11:45 Still no call back."

[12] Inside the envelope, also in Mr. Ludlow's handwriting was the following note (the "Note"):

"Nov 3, 2014
The way I interpret any existing Will is Healy Lake is in 3 names Ken Ludlow Bob Ludlow Kathy Clubbe So on my demise they become the owners in joint tenancy & Susan is left out of Healy Lake property. However Susan shares any Cash available with Bob and Kathy on a one third basis. This should be changed

so she gets cash up to the current value of Healy Lake Property, before the one third sharing should happen. Kenneth Robert Ludlow (wrote by hand) KRL

Must see Terry Fraser about his change KRL”

[13] A holographic paper is not testamentary unless it contains a deliberate or fixed and final expression of intention as to disposal of property on death. Further, the onus is on the moving party to show, by the contents of the paper or by extrinsic evidence that the paper is of that character and nature: *Bennett v. Toronto General Trusts Corp.*, [1958] S.C.R. 392 at para. 5.

[14] Kathy submits that the Note, both by its own words and having regard to the circumstances surrounding its genesis, expresses her father’s final intention to dispose of his property by providing that Susan receive a cash amount from his Estate in lieu of her receiving an interest in the Cottage prior to the 1/3 split between her, Bob and Susan as provided for in his Will.

[15] In response, Bob submits that the Note does not reflect a final intention by his father to dispose of his property on death. Rather, it is simply “musings” by his father for potential changes to his Will similar to the decision in *Gibbon Estate v. Sleeping Children Around the World*, 2010 ONSC 6355. In support of his position, Bob relies on the final line at the bottom of the Note where Mr. Ludlow states: “Must see Terry Fraser about his change”.

[16] In my view the November 3, 2014 Note clearly establishes a testamentary intention on behalf of Mr. Ludlow to leave Susan money from his Estate to compensate her for not sharing in the Cottage in priority to the 1/3 division between his three children. It clearly states that on his death, Susan would be left out of the Cottage ownership and that should be changed by giving her cash before the 1/3 split of the balance of his Estate as provided for in his Will.

[17] Further, the Note has a formal manner to it which supports the conclusion that it Mr. Ludlow intended it to be of a testamentary nature. Mr. Ludlow was 92 at the time and not a lawyer. He dated the Note and signed it using his full name and wrote after his signature “(wrote by hand)” followed by his initials. By formalizing it like he did and putting it in an envelope, I am satisfied that Mr. Ludlow considered that he had created a formal document which he intended to finally have dealt with resolving Susan’s earlier exclusion from the ownership of the Cottage.

[18] My view that the Note is a testamentary document is further supported by the circumstances surrounding its formation. In September 2014, Mr. Ludlow began taking steps to deal with the fact that he had left Susan out of the Cottage in 2012. On the advice of his long time lawyer, he elected to give Susan an equal share of the Cottage by deeding her a ¼ joint interest. When that couldn't be accomplished because Bob would not agree, he was given two options by Mr. Fraser to accomplish what he wanted (I consider the option of removing Bob from the title and the Estate to never have been an option).

[19] As the purpose of putting the Cottage in joint names initially was to avoid probate fees, the option of severing the joint tenancy and leaving his interest to Susan which would attract probate fees likely didn't appeal to him. That left providing for a cash equivalent for Susan in his Estate, before the 1/3 split between Bob, Kathy and Susan which is precisely what he did.

[20] Nor do I consider the fact that 11 days after he wrote the Note, Mr. Ludlow inquired of Mr. Fraser as to whether Bob had signed the title documents to be inconsistent with or negate in any way his intention to leave Susan the cash equivalent to her interest in the Cottage. That intention would only change if Bob agreed to put Susan on title which he never did.

[21] In the circumstances, I cannot accept Bob's submission that the last line of the Note was, in effect, Mr. Ludlow's reminder to himself to speak to his lawyer about changing his Will. It is not clear what the line means. The sentence talks about "his change". As Mr. Ludlow nowhere refers to himself in the third person, it is reasonable to assume "his" refers to Mr. Fraser, not Mr. Ludlow. The only change that Mr. Fraser was involved in was the change of title to the Cottage. Given that he decided to give Susan the cash equivalent, it is reasonable to assume that Mr. Ludlow would want to speak to Mr. Fraser about discontinuing the title change. In addition, given the wording of the Note as a whole, I do not consider it was done for the purpose of assisting with future changes to the Will. Finally, the facts in this case are very different from the facts in the *Gibbon Estate*.

[22] The evidence of the circumstances leading up to the Note clearly establishes, in my view, that what Mr. Ludlow intended to do was to give Susan the cash equivalent of a 1/3 interest in the value of the Cottage from his Estate before the 1/3 split of the Estate between Bob, Kathy and Susan. However, on a plain reading of the Note, it does not accomplish that. Rather, it provides that Susan should get

cash up to the current value of the Cottage, effectively giving her the full value of the Cottage before the 1/3 split.

[23] While such an interpretation could be problematic, it is not an issue given the value of the Cottage together with the value of the Estate. As part of a resolution of the issues in this application, Kathy agreed to buy Bob's interest in the Cottage for \$365,000 establishing a value for the Cottage of \$730,000. Accordingly, Susan's 1/3 interest in the Cottage would be worth \$243,333.33 ($\$730,000 \div 3$). As the value of the Estate is approximately \$245,000, even if Susan was entitled to the current value of the Cottage, all she could receive from the Estate is the money in the Estate which is \$245,000 which is effectively the cash equivalent of 1/3 of the value of the Cottage.

[24] For the above reasons, therefore, the motion is allowed and the Note is declared to be a valid and subsisting holographic codicil to the Last Will and Testament of Kenneth Robert Ludlow dated July 11, 2012.

[25] As the costs of the motion have been dealt with between the parties as part of their resolution of the other issues on the application, there is no order as to costs.

L. A. Pattillo

Released: February 08, 2019

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Applicant

– and –

KATHLEEN RUTH CLUBBE, in her personal capacity as co-estate trustee of the estate of Kenneth Robert Ludlow, SUSAN LUDLOW and RBC DOMINION SECURITIES INC.

Respondents

REASONS FOR JUDGMENT

PATTILLO J.

Released: February 8, 2019