

CITATION: Selkirk v. Selkirk 2022 ONSC 2653
COURT FILE NO.: CV-20-41476-ES
DATE: 02/05/2022

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE ESTATE OF SHEILA SELKIRK, DECEASED,

BETWEEN:)	
)	
DARYL SELKIRK)	
)	
Applicant/Respondent on Motion/Moving)	
Party on Cross-Motion)	Miriam Vale Peters for Daryl Selkirk
)	
– and –)	
)	
JAMES SELKIRK and CAROLYN)	
ROUTLEDGE)	
)	
Respondents/Moving Parties and)	Cheryl Letourneau for James Selkirk and
Respondents on Cross-Motion)	Carolyn Routledge
)	
SHARON SELKIRK, LYNWEN)	No one appearing for the remaining
PLAMONDON and KELLY LINTON-)	Respondents
SELKIRK)	
)	
Respondents)	
)	
)	HEARD: January 20 and April 14, 2022

AMENDED DECISION ON MOTIONS TO INTERPRET A TRUST DECLARATION

AMENDED DECISION: THE TEXT OF THE ORIGINAL JUDGMENT WAS AMENDED ON
JUNE 27, 2022, AND A DESCRIPTION OF THE AMENDMENT IS APPENDED.

Justice Sally Gomery

[1] In September 2020, Daryl Selkirk, the sole estate trustee for the estate of his mother, Sheila Selkirk, brought this application to pass accounts. The respondents are Sheila's residuary beneficiaries pursuant her will: Daryl's brother James Selkirk; his sisters Carolyn Routledge,

Sharon Selkirk and Lynwen Plamondon; and his sister-in-law Kelly Linton-Selkirk, the widow of his late brother Robert Selkirk.¹ Sheila's will provides that each of her six heirs shall get an equal share of her estate, except that Lynwen must repay a debt owed by her husband within a certain deadline, failing which her share will be distributed equally amongst the other beneficiaries.

[2] On the motion and cross-motion before me, Daryl, James and Carolyn seek a ruling with respect to a trust declaration executed the day before Sheila died. On that day, title to Sheila's house was transferred to Daryl, James and Sheila as joint tenants. In the accompanying trust declaration, Daryl and James acknowledged Sheila "and/or her estate" as the beneficial owner of the house. They further acknowledged that they have no property interest in it and that they are acting as trustees of the property "for and on behalf of Sheila Selkirk".

[3] The house was sold after Sheila's death for a net amount of roughly \$326,000. This money is currently sitting in a trust account. James and Carolyn contend that, pursuant to the trust declaration, the money should be distributed equally between Sheila's heirs. Daryl takes the position that the proceeds of sale are part of Sheila's estate and therefore subject to the terms of her will.

Background

[4] James and Carolyn swore affidavits in August and November 2021 that have been filed for use on the motions before me. Daryl has tendered his affidavit sworn in October 2021. The parties have also filed the transcripts of cross-examinations conducted late last year.

[5] Sheila died of cancer on November 2, 2017, at her home at 1208 French Settlement Road in North Grenville. She was 93 years old.

[6] On May 5, 2015, Sheila gave James and Daryl power of attorney for property jointly and severally. In the appointment she signed that day, she authorized them to perform, on her behalf,

¹ For simplicity's sake, I will refer to Sheila Selkirk and her heirs by their first names in these reasons. No disrespect is intended by this.

“any and all acts, which I could do if capable, except make a will”, during any incapacity on her part.

[7] There is conflicting evidence about Sheila’s capacity to manage her financial affairs in the months prior to her death. According to Carolyn and James, she remained fully aware of what was going on until the day she died. According to Daryl, Sheila was in palliative care for a long period of time before her death and had a limited grasp of what was happening. I do not need to determine whose evidence I accept on this point for the purpose of this motion.

[8] James also held a power of attorney specific to some of Sheila’s CIBC accounts as of April 2015. He used this often, as he routinely assisted Sheila with financial matters in the last few years of her life. He says that he gave Daryl a debit card for these accounts, in case he was not available, but that Daryl never had any legitimate reason to access Sheila’s money. In his affidavit, Daryl says that he received an access card in early 2017 from CIBC after he contacted its ombudsman about unauthorized withdrawals from Sheila’s accounts by Lynwen’s son, Robert Plamondon, and that he and James were equally involved in investigating and remedying this situation. Again, none of this is relevant to the issues currently before me.

[9] According to James’ affidavit, Sheila asked him in July 2017 to take steps to ensure that her will would not need to be probated, and to provide equally for all her heirs. Her daughter Lynwen’s inheritance was however subject to a specific stipulation in Sheila’s September 8, 2015 will, as follows:

IT IS MY WISH that my daughter, **LYNWEN PLAMONDON’s**, share in my estate not be paid out to her unless and until the loan that I made to her husband, Michael Plamondon, which I provided to him in the amount of \$50,000.00 in 2008-2009, is repaid to my estate in full. I make this provision consequent to my inability to obtain a repayment of this money from Michael Plamondon, notwithstanding my numerous requests that he repay the loan with interest. Therefore, I instruct my Trustees to hold back **Lynwen Plamondon’s** share in my estate for at least sixty (60) days from the date of distribution of the balance of the residue of my estate to my other children and heirs. If after the passage of sixty (60) days the loan remains outstanding and has not been repaid in full together with interest at a rate of prime plus one percent from January 1st, 2010 to the date of payment, I instruct my Trustees to pay out **Lynwen Plamondon’s** share of my estate in equal shares to my remaining beneficiaries named herein.

[10] In his affidavit, James describes this stipulation as “extremely unfair”. Both he and Carolyn say that Sheila wanted to change her will but had apparently been advised by her lawyer in September 2015 that she could not make any changes. Carolyn says that she and James tried to convince Sheila that she could legally amend her will but she believed that, if she did so, this would be breaking the law.

[11] Following discussion with Sheila in July 2019, James says that he met with a lawyer to discuss how to carry out Sheila’s wishes “with respect to her estate and particularly to eliminate the need to probate her Will”. The lawyer proposed to transfer the house on French Settlement Road to Sheila, James, and one of his siblings as joint tenants. The siblings would not have any interest in the property but would simply act as trustees. When Sheila died, the proceeds of sale would be distributed equally amongst Sheila’s heirs, without the need for probate.

[12] James says that he sat down with Sheila and Carolyn to discuss this proposal early in September 2017. Sheila wanted Carolyn and James to be named as trustees when the house was transferred to a joint tenancy, but he convinced her that he and Daryl should be named to “avoid any animosity amongst the siblings”. At the end of this conversation, Sheila authorized James to go ahead with the transfer of the title to the house and a trust declaration.

[13] On November 1, 2017, the title to Sheila’s house was transferred to Sheila, James and Daryl as joint tenants, and James and Daryl signed a trust declaration. Since the declaration is at the heart of this litigation, I will reproduce it in full:

WHEREAS We, James Loris Selkirk and Daryl Earl Selkirk (hereinafter referred to as the “Trustees”), hereby acknowledge and declare that with respect to the transfer of the premises [legal description omitted] municipally known as 1209 Settlement Road, Kemptville, Ontario, the trustees are the holders thereof as Trustees for and on behalf of Sheila Selkirk.

AND WHEREAS we have no property interest in the above said lands and premises.

WE AS TRUSTEES further acknowledge and declare that we will not do any acts or take any actions in respect of the deed or mortgage except upon the instructions of the Beneficiary and/or her Estate in accordance with the terms of the instructions so given.

WE AS TRUSTEES further declare and acknowledge that Sheila Selkirk and/or her estate remain the beneficial owner of the property.

THE BENEFICIARY and/or HER ESTATE covenants and agrees to save harmless and indemnify the Trustees or their assigns against any liability incurred by them by reason of having acted or acting on behalf of the said Beneficiary in respect of all claims, demands, losses, damages, costs, charges, expenses and obligations which the said trustee may sustain or incur pursuant to the said transaction.

THIS DECLARATION and the obligations stated herein shall enure to the benefit of and be binding upon the Trustees and the Beneficiary and/or her Estate and their respective heirs, executors, administrators, successors and assigns.

[14] James and Daryl each signed the trust declaration in their personal capacity and their capacity as "Attorney for the Beneficial Owner".

[15] As already mentioned, Sheila died the day after the transfer and trust declaration were executed.

[16] Sheila's will appointed James and Daryl as estate trustees. In June 2018, Daryl applied to remove James as trustee. Among other things, he alleged that James refused to account for funds he had withdrawn from Sheila's account using his power of attorney. Although James contested Daryl's application, it was granted on September 21, 2018. James was ordered removed as estate trustee, leaving Daryl as the sole estate trustee. James was also ordered to provide an accounting, and to pay a portion of Daryl's costs.

[17] A certificate of appointment was issued November 14, 2018. In his application for the certificate, Daryl did not identify any beneficial interest in the house as an asset of the estate.

[18] On October 23, 2019, Daryl signed an agreement to sell the house. James says he was not consulted. James learned of the impending sale in mid-November, just before closing. He maintains that Daryl could not have completed the transaction without his authorization, because title to the house "was never held" by Sheila's estate. James gave his verbal authorization to the sale on the condition that the proceeds be placed in a separate account held by Daryl's lawyer, Ms. Vale Peters. In his October 2021 affidavit, James asserts that the funds would have had to be put

in a separate trust account, in any event, in accordance with the trust declaration. The net proceeds of the sale were about \$326,000.

[19] In his August 16, 2021 affidavit, James accuses Daryl of making unauthorized transfers of money from Sheila's CIBC accounts on October 28 and 29, 2017. In his affidavit, Daryl alleges that he made these transfers only after talking to James, and that they agreed that this was an appropriate step so that the amount left in Sheila's estate could be minimized. Daryl also says, because James has still not accounted for all of the funds that he withdrew from their mother's accounts from April 2017 to her death, he has not added him as an account-holder to the account to which he transferred funds just before her death. None of these allegations are relevant to the motions now before me.

[20] In September 2020, Daryl filed this application to pass his accounts as estate trustee. Four of the respondents, including James and Carolyn, filed notices of objection. James and Carolyn subsequently brought this motion. They contend that, pursuant to the trust declaration, the proceeds of sale of Sheila's house should be distributed equally amongst her heirs and seek declaratory and other relief as a result. Daryl brought a cross-motion, asking the court to declare that the proceeds of sale form part of the estate and must be distributed in accordance with Sheila's will. This would have the effect of precluding Lynwen from inheriting a share unless she first repays Michael's debt to the estate. Daryl seeks, if necessary, a declaration that the trust declaration is invalid.

Is the Trust Declaration Valid?

[21] Daryl argues the trust declaration is invalid for two reasons: (1) it is a testamentary disposition, and (2) it is a sham.

Is the trust declaration a testamentary disposition?

[22] Daryl and James could not, using the 2015 powers of attorney, change Sheila's will. This was explicit in the terms of the powers of attorney given to them. It is also explicit in s. 7(2) of the *Substitute Decisions Act, 1992*, S.O. 1990, c. 30 (the "SDA"), which provides that a continuing power of attorney "may authorize the person named as attorney to do on the grantor's behalf

anything in respect of property that the grantor could do if capable, except make a will". A will is defined in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, to include a codicil, or any other testamentary disposition.

[23] As a result, if the trust declaration is a testamentary disposition, it is invalid.

[24] There are three relatively recent cases that have dealt with challenges to trust instruments executed by attorneys: *Bank of Nova Scotia Trust Company v. Lawson*, 2005 CanLII 46390, 22 E.T.R. (3d) 198 (Ont. S.C.); *Easingwood v. Cockcroft*, 2013 BCCA 182, 361 D.L.R. (4th) 304; and *Testa v. Testa*, 2015 ONSC 2381, 10 E.T.R. (4th) 192.

[25] In *Lawson*, McLean J. held that a variation in the terms of a trust was invalid because it was testamentary in nature. In that case, a power of attorney acting for a settlor signed a variation to an existing trust agreement. The trust agreement at issue contained provisions that would only take effect on the death of the settlor and her son.

[26] In *Easingwood*, two sons transferred the bulk of their dying father's assets to a trust, the terms of which mirrored the provisions of his will, using their powers of attorney. The British Columbia Court of Appeal agreed with the judge in *Lawson* that an attorney may not make a testamentary disposition, even in the absence of a legislative provision like that found at s. 7(2) of the *SDA*: at para. 49. It held, however, that "where a document creates a trust that takes immediate effect, even though not performed until the death of the settlor, it is not dependent on death for its vigour and effect and is not testamentary": at para. 51. The Court concluded that the trust in *Easingwood* was fully established by the trust documents, irrevocable and not dependent upon the father's death for its efficacy: at para. 52. As a result, it was a valid *inter vivos* trust.

[27] Finally, in *Testa*, a son, using a power of attorney, transferred his mother's house to his brother. The brother executed a document saying that he was holding title in trust for his mother and the beneficiaries of her estate. Justice D.L. Edwards considered *Lawson* but preferred *Easingwood*. He concluded that, since the trust was effective immediately and not dependent on the mother's death for its creation, it was not a testamentary disposition: *Testa*, at paras. 92 and 93.

[28] *Easingwood* and *Testa* can be distinguished from *Lawson* on their facts. The challenged trust variation in *Lawson* was a testamentary disposition because, on the testator's death, it would have changed the arrangements she had previously put into place with respect to her estate. The trust documents at issue in *Easingwood* and *Testa* did not do so.

[29] The terms of the trust declaration here are similar to those in *Testa*. The trust created was not dependent on Sheila's death for its creation. There are no directions in the declaration for anything to take place on Sheila's death. Its terms do not purport to vary Sheila's will. The declaration refers only to the possibility that Sheila's estate would have the power to instruct the trustees to take actions in respect of the deed or mortgage. Under its terms, had Sheila survived longer, she could have instructed the trustees to dispose of the property and distribute all of the proceeds as she wished.

[30] I accordingly find that the trust declaration does not offend s. 7(2) of the *SDA*.

Is the trust declaration a sham?

[31] In *Duca Financial Services Credit Union Ltd. v. Bozzo*, 2011 ONCA 455, 68 E.T.R. (3d) 1, at para. 2, the Court of Appeal held that a purported trust may be a sham when:

[a] trust instrument sets out the persons who are to benefit but does not represent the settlor's true intent which is simply to create the appearance of a disposition of assets through the purported trust. The actual intent, in such cases, is to retain control of the assets purportedly held in trust. In such an instance, there is no true intention to create a trust and one of the three certainties is missing; hence, the purported trust is void.

[32] Determining whether a purported trust is a sham depends on evidence of the settlor's intention at the time the trust was created: *Re McGoey*, 2019 ONSC 80, 67 C.B.R. (6th) 287, at para. 20. A trust may be set aside as a sham in the absence of clear and cogent evidence of an intention to create a valid trust: *McGoey*, at para. 20.

[33] Daryl argues that the trust is a sham because Sheila and her estate remained the beneficial owner of the house, and the trust declaration did not alter the distribution of Sheila's assets pursuant to her will.

[34] This argument confuses Sheila's motives with her intention. Based on the evidence, she intended to create a trust, that is, to dispose absolutely of her sole title in the house for a legally acceptable purpose. The fact that Sheila remained the beneficial owner, and that the trustees were required to act on her instructions, does not automatically make the trust a sham.

[35] As stated in *McGoey*, at paras. 19 and 21, a sham trust is usually created for a fraudulent, deceitful, or illegal purpose. Daryl, James and Carolyn all agree that the primary purpose of transferring the title of Sheila's house to be held in trust was to avoid probate fees. There is nothing fraudulent, deceitful or illegal about attempting to minimize a tax burden in a way that is not legally prohibited.

[36] Daryl argues that, accepting Carolyn and James' evidence, the trust's secondary purpose was to circumvent the terms of Sheila's will by allowing Lynwen to inherit equally without first repaying Michael's debt. He qualifies this as deceitful.

[37] Sheila did not execute a codicil, nor is there any other evidence that corroborates James and Carolyn's account of her stated wish to change her will to eliminate the provision requiring Lynwen to repay the debt owed by her husband. They did not file an affidavit from the lawyer who supposedly told Sheila that she could not change her will. As a result, I place no weight on their evidence about Sheila's desire to modify her will: s. 13, *Evidence Act*, R.S.O. 1990, c. E.23, and *Salvation Army in Canada v. Coles-Lecuyer*, 2012 ONSC 3124, at paras. 55 to 58.

[38] It may turn out that Sheila's motives in creating the trust are defeated. This does not mean that the conveyance of the title of her house to the trust did not reflect her intention to create a valid trust for an acceptable purpose.

[39] As a result, I find that the trust is not a sham.

What is the Effect of the Trust Declaration?

[40] In the trust declaration, the trustees acknowledge that Sheila "and/or" her estate remain the beneficial owner of the house, and they declare that they will not "do any acts or taken any actions

in respect of the deed or mortgage except upon the instructions of the Beneficiary and/or her Estate in accordance with the instructions so given”.

[41] With Sheila’s passing, the estate became the beneficial owner of the house. There is no evidence that Sheila gave any instruction to Daryl and James about its disposition in the hours between the execution of the trust declaration and her death. The proceeds of sale therefore form part of Sheila’s estate, to be administered and disposed of by the estate trustee in accordance with her will.

[42] James and Carolyn argue that Sheila wanted the proceeds of sale of her house to be distributed equally amongst her heirs. I have already said that I place no weight on their evidence on this point. The bottom line is that Sheila did not change her will, and there is no indication, in the trust declaration, that the proceeds are to be distributed in any particular way. As a matter of law, a person’s will and other testamentary dispositions are taken to reflect their wishes with respect to the disposition of their assets upon their death. There is simply no basis for me to order that the proceeds of sale should be distributed otherwise than in accordance with Sheila’s September 8, 2015 will.

Disposition

[43] The motion and cross-motion are each granted in part. I find that the trust declaration is valid and that, pursuant to its terms, the proceeds of the sale of the house at 1208 French Settlement Road, in Kemptville, Ontario, form part of Sheila Selkirk’s estate and should be distributed in accordance with her will dated September 8, 2015.

[44] These motions were heard on January 20, 2022. I reserved my decision. Before I issued it, counsel for James and Carolyn asked to make further submissions on seven criminal charges laid against Daryl and his wife Deanna Selkirk in March 2022, including fraud and forgery. The forgery count relates to a loan agreement between Daryl and Sheila, purportedly signed on Sheila’s behalf by James, as her power of attorney. The charges do not relate to the trust declaration.

[45] I convened a case conference to determine how to proceed. James and Carolyn asked that I postpone my decision on these motions until their pending application to remove Daryl as estate

trustee could be heard. Daryl took the position that this was unnecessary. I determined that I could render a decision on the validity and impact of the trust declaration, but that I would confer with the parties before settling on the terms of orders based on my decision.

[46] I will accordingly hear submissions on the terms of the order to be issued at a hearing to be set by trial coordination. I will also hear cost submissions, since the submissions made in January do not reflect more recent events.

A handwritten signature in cursive script, appearing to read "Sally Gomery J.", is positioned above a horizontal line.

Justice Sally Gomery

Released: May 2, 2022

Appendix

Amendment made on June 27, 2022:

- The Decision on Motion to Interpret a Trust Declaration was Amended at para. 43 to replace the “James and Carolyn’s motion is dismissed, and Daryl’s cross-motion is granted” with : “The motion and cross-motion are each granted in part”.

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