

THE HIGH COURT

PROBATE

[2017/5531 P.]

IN THE MATTER OF

THE ESTATE OF ANGELA O'LOUGHLIN

LATE OF 100 RATHDOWN, TERENURE, 6W IN THE COUNTY OF DUBLIN DECEASED

BETWEEN

MARY DWYER AND KENNETH DWYER

PLAINTIFFS

AND

DOROTHEA DOWLING AND GRÁINNE O'FLYNN

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 10th day of April, 2019

1. The above named Angela O'Loughlin died on the 8th of September, 2016 aged 90 years having made her alleged last will on the 13th of December 2013 by which she appointed the plaintiffs her executors and principal beneficiaries. She is alleged to have made an earlier will on 29th April, 2013. The plaintiffs are husband and wife and the first name plaintiff is a niece of the deceased. The defendants are also nieces of the deceased and are sued in these proceedings because they entered caveats in the Probate Office. Accordingly, the plaintiffs seek that the will of the 13th December, 2013 be admitted to probate in solemn form of law. The defendants are substantial beneficiaries under an earlier will of the deceased which the first defendant, Ms. Dowling, seeks to propound as the last valid will of the deceased. In essence, the 2013 wills are challenged by the defendants on the grounds that the deceased was not of sound disposing mind when she made them. That is, in substance, the only issue in the case.

2. It would appear until late February or perhaps early March of this year, Ms. Dowling was represented by Messrs Willit Solicitors who have now been discharged and she continues these proceedings as a litigant in person. The second defendant, Ms. O'Flynn also represents herself.

3. There are three motions for discovery currently before the court, two brought by the plaintiffs against each of the defendants and a third motion brought by Ms. Dowling. It is with this latter motion that I propose to deal first.

4. Following taking this matter into case management on the 11th of March 2019, I gave liberty to each of the parties to issue these motions. However, in relation to Ms. Dowling's motion, that had been the subject matter of extensive correspondence between the parties' respective solicitors for about a year. On the 21st March, 2018, Messrs Willit wrote to the plaintiffs' solicitors, Messrs David R. Fowler seeking discovery of seven categories of documents as follows:-

- (1) All written material produced by the deceased, to include correspondence and diary entries.
- (2) Any video footage of the deceased from the beginning of 2012 to the end of 2014.
- (3) All medical records pertaining to the deceased from the beginning of 2012 to the end of 2014 that had not to date been provided by the plaintiffs to the defendant.
- (4) All statements pertaining to any and all bank accounts held by the deceased.
- (5) All documents having come into existence by reason of any savings or financial investments of the deceased.
- (6) All documents disclosing the assets and liabilities of the deceased in 2013, or, at the plaintiffs' election, a sworn inventory of the deceased's assets and liabilities, as nearly as can be identified, on the 29th April 2013 and the 13th December 2013.
- (7) All documents (not including, *inter partes* correspondence or pleadings) on which the plaintiffs intend to rely in support of their claim to have the testamentary document dated the 13th December 2013 admitted to proof.

5. The plaintiffs' solicitors responded on the 23rd of April, 2018 as follows:-

- (1) This category is obviously too broad and no time period has been specified.
- (2) We are instructed that no such video footage of the deceased, as is requested, exists.
- (3) Agreed. You will note that we have previously voluntarily provided you, under cover of our letters dated 8th January, 2018 and 30th January, 2018 with all of the available medical records of the deceased. As previously stated, we are not aware of any other GP, save Dr. Joyce, treating the deceased. We have recently reviewed the original records of Dr. Joyce and there are now a number of small records of Dr. Joyce to hand. We will forward you a copy of same under separate cover shortly. In addition, we have also recently received a copy of medical records from the HSE regarding the public health nurse and we have already sent you a copy of these records under separate cover.
- (4) – (5) These categories are declined. We will however provide you with

sufficient documentary evidence to demonstrate that the deceased, at all material times, was fully in charge of and prudently and properly managing her affairs.

(6) This category of document appears broadly, insofar as financial assets of the deceased are concerned, to replicate what has been requested under category 4. The deceased's assets are comprised of her house and contents thereof at 100 Rathdown Park, Terenure, D6W, the funds in three bank accounts, and a small number of prize bonds. It is not necessary or relevant for the defendants to know the nature or extent of the deceased's assets. No significant liabilities of the deceased, other than funeral expenses and conventional household outgoings, are known to our clients.

(7) Declined. This is not a proper matter for discovery. In advance of the trial of the action a booklet of core documents on which it is intended the plaintiffs will rely on at trial will be copied to you and we will expect you to reciprocate this arrangement.

6. Further correspondence ensued and the final position that appears to have been reached by the parties' solicitors regarding the categories sought was as follows:-

(1) Ms. Dowling's Solicitors indicated that they would accept category 1 confined to a period of 5 years prior to the death of the deceased. In response, the plaintiffs' solicitors offered to make discovery of the diary entries of the deceased for a period of one year prior to the date of execution of each of the wills in issue and a period of one month thereafter.

(3) As already noted, this was agreed.

(4) - (5) The plaintiffs agreed to make discovery of the bank accounts of the deceased for a period of one year prior to the execution of each of the wills.

(6) The defendants' solicitors continued to insist on this and the plaintiffs' solicitors reiterated that they had already indicated the deceased's assets.

(7) Ms. Dowling's solicitors continued to seek this but the final response of the plaintiffs' solicitors was to reiterate that they would provide a booklet of core documents in advance of the trial on a reciprocal basis.

7. The motion now brought by Ms. Dowling simply seeks general discovery without specifying any categories but those are to be found in her very lengthy affidavit sworn on the 22nd of March 2019. In summary, Ms. Dowling reiterates her solicitor's stance with regard to the documents sought but with the following additional matters now being sought:-

(2) This category is now expanded to include photographic evidence as well as video footage.

(3) This category now seeks discovery of the medical records of the deceased for 5 years prior to her death, whereas previously, Ms. Dowling's solicitors, on her instructions, sought 3 years, which was agreed. No explanation has been given for the change. In addition, Ms. Dowling in substance makes complaints about the discovery already made by the plaintiffs under this category and suggests that it falls short in a number of material respects. In the normal way this would be a matter for further and better discovery but in the interests of expedition, efficiency and the saving of costs, I propose to deal with all of these issues in this motion. She complains about the quality of some of the records already furnished but also of what she claims to be significant other records that have not been furnished. Thus she says that the plaintiffs have obtained no documents from the deceased's pharmacy. She also complains about the failure to initially discover documents from the public health nurse but that has now been rectified. She says that discovery ought to have been made of the records of a physiotherapist and occupational therapist who attended the deceased at her home following discharge from the Beacon Hospital in July, 2013. She also refers to the fact that a carer looked after the deceased for a period of time and no discovery of his or her records has been made. She also seeks liberty to apply for non-party discovery from the Beacon Hospital, St. James's Hospital, the HSE and Dr. Joyce, although his records have already been furnished.

8. In relation to the outstanding categories, she seeks the documents as originally sought by Messrs Willit but gives new and expanded reasons in her affidavit for seeking these documents. In addition, Ms. Dowling seeks to add two new categories as follows:-

(8) Additional financial documents already sought under categories 4, 5 and 6 but now extended up to the date of this motion.

(9) disclosure of all communications to Ms. Dowling from the first named plaintiff in which Ms. Dowling was purportedly kept apprised of the deteriorating health of the deceased.

9. It is axiomatic that the onus rests upon the party seeking discovery to prove that the documents sought are relevant to the issues in the case and necessary for its fair disposal or for saving costs. Many judges in recent times have expressed serious misgivings about the discovery process as it currently stands and of the fact that frequently, grossly disproportionate costs are incurred in the pursuit of discovery which often bears little or no fruit. It is widely recognised as an area of the law in need of urgent reform.

10. The time, cost and effort involved in making discovery must be proportionate to the objective to be attained. This is of particular importance in the context of a probate action such as the present where frequently, although not always, the costs of all parties including those who may have unsuccessfully challenged a will, are borne by the estate to the ultimate detriment of the beneficiaries.

11. Cases such as the present frequently turn in large measure on the opinion of medical experts regarding the capacity of the deceased at the time he or she made the will in issue. This case appears likely to be no different. The plaintiffs have already obtained medical opinion supportive of their case. The plaintiffs have made this position clear for a considerable period of time to the defendants. As recently as the 19th of March, 2019 the plaintiffs' solicitors wrote to the defendants inviting them to exchange medical reports and inviting them to a meeting of medical experts.

12. By the time of the hearing before me on the 3rd April, 2019, no response to this invitation was forthcoming. Nor is it mentioned in Ms. Dowling's subsequently sworn affidavit. Of importance, Ms. Dowling's affidavit contains no reference whatsoever to any medical evidence that she is proposing to call at the trial of the action. It is clear from Ms. Dowling's own affidavit that almost all of the requests for discovery of documents that have not so far been agreed by the plaintiffs rest upon assertions by her of the deceased's state of mind by reference to Ms. Dowling's own interpretation of various documents, including medical records, that have been made available to her.

13. She purports to give evidence that the deceased was suffering from various conditions at various times based on her analysis of

these records. Many of her averments are predicated by the assertion "my research indicates". Ms. Dowling does concede in her affidavit that she is not an independent medical expert but says that she has a certain proficiency in deciphering medical records from her extensive litigation experience. Despite that, the fact remains that Ms. Dowling is not a doctor and is not entitled to give opinion evidence on medical matters pertaining to the deceased's mental health. Her affidavit is however replete with such purported opinion evidence.

14. It therefore came as something of a surprise during the course of oral submissions at the hearing of this motion that Ms. Dowling indicated that she had consulted a medical expert, Professor William Molloy, who had formed the opinion that the deceased lacked capacity at the time she made her will. Ms. Dowling did not indicate when she had consulted Professor Molloy or if he has prepared any report.

15. However, one assumes that if he was in a position to reach the conclusion that the deceased lacked capacity, he felt able to arrive at the conclusion on the basis of the documents already furnished by way of discovery by the plaintiffs. Nowhere in Ms. Dowling's affidavit is it suggested that she had either retained a medical expert or that such expert required further documents in order to come to a conclusion. In fact, as I have said, in her submissions, she asserted to the contrary that he had in fact come to a conclusion.

16. To take some examples of the wide ranging discovery sought, category 1 seeks discovery of the deceased's written materials for a period of 5 years prior to her death. This includes a period of approximately three years after which she made the contested wills. How that could ever be relevant to the issues in the case is not explained by any admissible evidence and certainly not by any medical evidence. Similarly, it is not clear to me how the documents of a physiotherapist, occupational therapist, pharmacist or carer, could be required by any medical expert for the purpose of forming an opinion, and as I have pointed out there is no evidence to that effect. Nor is there any evidence or explanation justifying why the 3 years of medical records sought, agreed and provided should now be 5 years.

17. As was submitted by counsel for the plaintiffs, while a party making discovery is required to discover relevant documents within his or her possession or procurement, there is no onus on a deponent to carry out an extensive investigation to establish if other parties might potentially have in their possession documents which could possibly have some relevance to the issues in the case. In any event, in the normal way a party is only obliged to produce on discovery documents either in his possession or in respect of which he has a legal right to demand their production – see *Thema International v HSBC* [2013] 1 IR 274. It is not clear to me that such right exists in the context of people such as therapists and carers but in any event, the onus of course rests upon Ms. Dowling to establish such right and she has not done so.

18. With regard to category 7, the plaintiffs have proposed producing a core booklet of documents on which they intend to rely in advance of the trial and have offered to share same with the defendants on a reciprocal basis. This is not an appropriate matter for discovery but in any event, the offer has not been responded to in kind other than to state that production is required by Ms. Dowling now.

19. For these reasons therefore the applicant has not satisfied me that any of the documents that are sought, beyond those which have already been either furnished or offered, are relevant or necessary for the fair disposal of the proceedings and I accordingly will direct the plaintiffs to make discovery confined to the documents already offered by their solicitors in correspondence.

20. With regard to the discovery sought by the plaintiffs against the defendants, in my view no substantive reason has been advanced by the defendants as to why such discovery should not be granted and I therefore propose to make an order in the terms of the plaintiffs' notices of motion.