

**THE HIGH COURT
PROBATE**

[2022] IEHC 14
[Record No. 19/8896]

**IN THE MATTER OF THE ESTATE OF GEORGE MOORE DECEASED
AND IN THE MATTER OF SECTION 27(4) OF THE SUCCESSION ACT, 1965
AND IN THE MATTER OF AN APPLICATION BY MARGARET DOHERTY (NEE MCGEEHEN)
TO HAVE GERALDINE COGLIN APPOINTED ADMINISTRATRIX AD LITEM OF THE
ESTATE OF GEORGE MOORE**

JUDGMENT of Mr. Justice Allen delivered on the 14th day of January, 2022

1. George Moore, late of Ballyboe, Manorcunningham, County Donegal, died on 19th November, 2016.
2. The deceased was a widower and was survived by one child, the applicant. The deceased's parentage of the applicant was declared by order of the Circuit Court made on 20th October, 2006 and affirmed by the High Court on 26th April, 2007.
3. On 10th January, 2006 the deceased transferred the lands comprised in Folios DN16657 and DN16660, County Donegal, to his nephew, Lexie Mortimer. On 17th January, 2006 the deceased transferred the lands comprised in Folio DN13747 County Donegal, to his nephew, Clarke Moore. There was some suggestion along the way that the deceased might have transferred property to his brother, Noble Moore, who has since died. As far as I can see, that suggestion appears to have been mistaken but nothing turns on it. The applicant suggests, and her cousins deny, that the deceased remained in possession of those properties until his death. It is acknowledged that the deceased continued to live in the house, but it is contested that he continued to work the land.
4. By a Succession Civil Bill issued on 21st July, 2017 the applicant commenced proceedings against "*The Personal Representative of the Estate of the late George Moore, Deceased*" and her cousins and uncle claiming, variously, a declaration that the properties were part of the estate of the deceased; an order pursuant to s. 117 of the Succession Act, 1965; and a declaration that the transfers of the properties were dispositions made for the purpose of disinheriting the applicant.
5. Objection was taken that the Circuit Court action was not properly constituted. Specifically, what was said in a letter of 30th November, 2017 written by the solicitors for the applicant's cousins was that the proceedings were fundamentally flawed "*as there is no locus standi/representation on behalf of the estate of the deceased against whom relief is sought.*" In their defence, delivered on 8th March, 2018 the applicant's cousins pleaded that the applicant had "*failed to appoint a legal personal representative to the estate of the late George Moore deceased prior to the issuing of these proceedings.*" The defence made no reference to the existence of a will. The Civil Bill action went into abeyance for a while and after the applicant had changed her solicitor, it was discontinued on 25th November, 2019.
6. By notice of motion dated 10th October, 2019 the applicant applied in the non-contentious probate list for an order pursuant to s. 27(4) of the Act of 1965 granting

liberty to Ms. Geraldine Coghlin, solicitor, to apply for a grant of letters of administration of the estate of the deceased, limited for the purpose of substantiating proceedings which the applicant wished to bring against the estate for declaratory relief and orders under ss. 117 and 121 of the Act of 1965. The motion was not directed to but was served on the applicant's uncle and cousins, who were the defendants in the Circuit Court proceedings.

7. The premise of the motion before the High Court was (as the premise of the Civil Bill proceedings had been) that the deceased had died intestate. In her affidavit grounding the motion the applicant averred, on the advice of her solicitor, that the deceased had died without making a will. The applicant exhibited a copy letter sent by her solicitors to the second and third notice parties' solicitors on 31st May, 2019 and reminders of 4th July, 2019 and 24th July, 2019. In the second reminder they had asked whether the deceased had ever made a will.
8. The fact that the probate motion had been issued before the Civil Bill action had been discontinued, the fact that the grounding affidavit made no reference to the Civil Bill action, and the fact that the proposed proceedings for which the s. 27(4) order was sought were substantially the same as the existing proceedings, caused confusion. By letter dated 1st November, 2020 the solicitors for the second and third notice parties acknowledged receipt of the motion papers, protested that the application was misleading, and asserted that the deceased had died testate.
9. The applicant's solicitors, by letter of 25th November, 2019, explained that the proposed new proceedings were intended to be in substitution for the 2017 proceedings and enclosed the notice of discontinuance. They also asked for a copy of the will.
10. The applicant's motion first came before the court on 2nd December, 2019 and was adjourned until 20th January, 2020.
11. In an affidavit sworn on 13th January, 2020 in response to the motion the second notice party, Lexie Mortimer, exhibited a copy of his uncle's will dated 19th November, 2004. By that will the deceased had appointed Mr. Mortimer his executor and left his house to his brother, Noble Moore, and his farm lands to his two nephews, Mr. Mortimer and Mr. Clarke Moore. By a codicil dated 26th May, 2005 the deceased gave his motor car to another nephew. Mr. Mortimer explained that up to that point the applicant had not been provided with a copy of the will because she was not mentioned in it and he said that the estate of the deceased did not require probate.
12. Mr. Mortimer, in his affidavit, made much of the fact that the applicant had not disclosed to the High Court the existence of the earlier – then still existing – Circuit Court proceedings. He resisted the application on the grounds that there was a legal personal representative appointed by the deceased – namely, himself – and that he was in a position to defend any proceedings that might be brought against the estate of the deceased.

13. The applicant's motion was heard on 20th January, 2020. The upshot was that Mr. Mortimer said that he would prove the will and a grant of probate was issued on 5th June, 2020. That left the costs of the motion to be dealt with.
14. In the meantime, the first round of COVID-19 restrictions had intervened and the parties filed written submissions in relation to the costs: the applicant on 29th September, 2020 and the notice parties on 20th July, 2021. By oversight, the submissions did not reach the court until the end of Michaelmas term.
15. The submissions on both sides are extensive and elaborate. It is not necessary or useful to dwell on the detail but only to identify the main points.
16. The applicant submits that her motion was rendered moot by the undertaking given by Mr. Mortimer to prove the will and/or that the giving of the undertaking was an "event" which should carry the costs. The probate motion, it is said, was necessary, reasonable and proportionate. A grant was necessary before the proceedings could be brought. It is variously said that the applicant's solicitors were misled as to the existence of a personal representative of the deceased and that the notice parties' solicitors failed to provide them with a copy of the will. It is argued that the notice parties acted unreasonably in insisting on two court hearings before giving the undertaking which Mr. Mortimer gave.
17. Finally, the applicant submits that the court should make a wasted costs order against the notice parties' solicitors. Citing *Zhong He v. Governor of Castlereagh Prison* [2015] IEHC 854, the applicant submits that the notice parties' solicitors were bound to seek all reasonable and necessary instructions in order to ensure that the facts of the case were fully disclosed to the court. In essence the argument is that the solicitors should have to pay the costs because they failed to inform the applicant's solicitors of the existence of the will sooner than they did. This, it is said, would have avoided unnecessary litigation.
18. The notice parties' submissions are no less robust. They argue that they correctly "*advised the lack of representation to the deceased's estate.*" The notice parties argue that they had no obligation to assist the applicant and they say that they did not advise the applicant to apply to have an administrator *ad litem* appointed. They further argue that the motion was not properly constituted because the deceased's brother, Noble Moore, who was the fourth defendant in the Circuit Court proceedings, died on 20th February, 2019 and representation had not been raised to his estate before the motion was issued. Much is made also of the fact that the Circuit Court proceedings had not been discontinued before the probate motion issued. This is said to have had the result that the High Court did not have jurisdiction to deal with the motion and that the motion was an abuse of process. It is submitted, variously, that taking out a grant of representation was not necessary due to the nominal size of the deceased's estate, and that at the time the motion was issued a grant "*was not necessitated in light of the defective Circuit Court proceedings which had already issued prior to probate being extracted*".

19. On the one hand, the notice parties submit that liability for the costs of the motion cannot justly be adjudicated upon in advance of the conclusion of the substantive proceedings: which the notice parties say they will fully defend, and which they say they will win. On the other hand, the notice parties submit that they were entitled and obliged to defend their position and that there should be an order for costs against the applicant and/or the applicant's solicitors.
20. I might have said earlier that part of the applicant's argument that there should be a wasted costs order is that she will, or will very likely, win her Circuit Court action and so effectively wipe out the value of the estate. The effect of an order for the applicant's costs of the motion against the estate, it is said, would be that she would end up effectively paying her own costs. The notice parties' submission in this respect is a little less ambitious. They argue that because the applicant has no reasonable prospect of succeeding in her claim, she would not be penalised by an order for her costs against the estate.
21. In my view, the applicant's motion was relatively routine. I do not believe that it was ever as complicated as the parties tried to make it.
22. It is common case that the deceased refused to recognise the applicant as his daughter. When, on 21st July, 2017, before representation had been raised, the applicant issued her Succession Civil Bill naming "*The Personal Representative of the Estate of the late George Moore, Deceased*", the objection which was taken – whether by accident or design – was ambiguous. It was said in correspondence that the action was flawed "*as there is no locus standi/representation on behalf of the estate of the deceased against whom relief is sought*" and in the defence that the applicant had "*failed to appoint a legal personal representative to the estate of the late George Moore deceased prior to the issuing of these proceedings.*" At least in hindsight, it is not clear whether the objection was limited to the fact that no grant had been taken out, or whether the suggestion was that the deceased had died intestate.
23. It is not clear on this application what was said to the applicant's former solicitor as to whether there was a will. As I have said, the applicant deposed to a belief, on the advice of her solicitor, that the deceased had died intestate, but only three months earlier her solicitor had written to the notice parties' solicitor asking whether the deceased had ever made a will: which question had not been answered. I cannot see how the applicant's solicitor could possibly know whether the deceased had or had not made a will unless he had been unambiguously told, one way or the other, by the deceased's or the notice parties' solicitor: and I see no evidence that he was.
24. More than once in the course of their submissions the notice parties protest that the probate motion was issued without prior warning. In fact, that is demonstrably wrong. In their letter of 31st May, 2019 the applicant's solicitors said that they were arranging for the appointment of an administrator *ad litem*. It is true that under cover of the same letter the applicant's solicitors gave notice of intention to proceed with an action which – as against the estate – could not have been saved by a grant of letters of administration

intestate: but a grant of probate would have related back. The notice parties are correct in their submission that it is not a matter for them to advise the applicant's proofs, but it seems to me that it should have been clear from the applicant's solicitors' letter of 31st May, 2019 that they intended to deal with the question of representation, and progress the action. It would have been a simple matter for the notice parties' solicitors to have then said that there was a will and that Mr. Mortimer was named as executor and would prove the will. That would have obviated the necessity for this application.

25. The notice parties would make much of the fact that the affidavits grounding this motion did not refer to the previous Succession Civil Bill. It might have been better if the grounding affidavit had given a short narrative history, but the correspondence exhibited by the applicant did refer to the earlier proceedings. It might have been better if the grounding affidavit on this motion had spelled out what it was proposed to do with the then existing action, but I do not believe that the failure to do so, or the failure to discontinue the 2017 action before issuing this motion, goes to jurisdiction. In principle it is an abuse of process to pursue two actions at the same time in respect of the same cause of action but the probate motion was not a second action concerning the same cause of action but a necessary preliminary step to the commencement of the second action – before which the first would have to be discontinued. Moreover, as far as the estate was concerned, the notice parties' position in relation to the 2017 Civil Bill was that it was so fundamentally flawed as to be, as far as the estate was concerned, a nullity. A nullity cannot be a bar to anything.
26. I am quite satisfied that the fact that the deceased's brother, the fourth defendant in the Civil Bill action, died on 20th February, 2019 is irrelevant. On an application such as this it is not appropriate to engage with the merits of the substantive proceedings. The applicant had a claim which she wanted to agitate against the estate of her late father, to which end she needed a grant. If there was no will, the most likely *legitimus contradictor* was always going to be the beneficiaries of the transfers of the deceased's properties which the applicant claims should be undone. The plain object of putting them on notice of the motion was to give them an opportunity to ask that they, or one or other of them, should be appointed as administrator instead of the solicitor proposed by the applicant. The applicant's case is that the deceased's brother was one of the transferees, but on the notice parties' case he was not. As far as this application is concerned, the issue was who might defend the intended action on behalf of the estate of the late George Moore.
27. This was an application by the daughter of the deceased for an order pursuant to s. 27(4) of the Succession Act, 1965 to the intent that she might pursue a claim against the estate of her deceased father, who had died just short of three years earlier. It would not have been necessary if, in the intervening three years, the first notice party had proved the will of the deceased. It would not have been necessary if, when, in May, 2019, the applicant eventually recognised the infirmity in her 2017 Civil Bill, the first notice party had said that there was a will, and that he would prove it. The costs of this application would have undoubtedly been a fraction of what they must now be if, on the first return date for the applicant's motion, the first notice party had simply said that he was the executor and

would prove the will. I do not see that anything that has been done in the meantime has achieved anything other than to increase the costs.

28. In my firm view, the applicant has achieved all that she set out to achieve by the motion which was to ensure that her intended action would be properly constituted.
29. Frequently, the costs of a claimant against the estate of a deceased on a motion pursuant to s. 27(4) will be ordered to be costs in the cause, or reserved to the judge dealing with the action for the purposes of which the order is sought. In this case, however, it seems to me that the outcome of the motion is an event in itself which could and should have been avoided by the executor applying for a grant much sooner than he did.
30. As to the applicant's application for a wasted costs order against the notice parties' solicitor, or the notice parties' rather more tentative application for such an order against the applicant's solicitor, it is not obvious to me that the solicitors on either side are responsible for the costs which have been incurred. Mr. Mortimer, in the affidavit he filed on this motion, deposed that the estate of George Moore did not require probate. Without a hint of embarrassment, he deposed that he distributed a small sum of €5,957.33 *"in accordance with the testator's wishes"* to the residuary legatees. A distribution account exhibited by Mr. Mortier shows a total estate of €6,449.33, which was distributed as to €492.00 to the notice parties' solicitors and €851.05 to each of seven – I presume – nephews and nieces. If Mr. Mortimer did not know, I cannot imagine how he could not have known, of the liability of the estate for the applicant's costs of the parentage proceedings. He does not say what advice he was given before he distributed the money. It is not clear to me who was responsible for the fact that the deceased's daughter was not given a copy of the will, or even told of its existence.
31. Before I could contemplate making a wasted costs order – one way or the other – I would have to call on the solicitors to show cause why such an order ought not to be made. That course would further escalate the costs. As has been observed in other contexts, the ends of justice are not always best served by the relentless search for perfect truth.
32. In my firm view, the motion was necessary to allow the applicant to advance her claim and her purpose has been achieved. The applicant should have her costs from the estate. The motion could and would have been avoided if the executor had proved the will in the two and a half years or so between the date of death and the date on which the applicant acknowledged the infirmity in the 2017 proceedings. The probate application could also have been avoided if the executor had proved the will, or even said that he would prove the will, in the six or seven months between the time the applicant's solicitors said that they would move to appoint an administrator and the time when executor eventually said that he would apply for a grant. The root cause of the costs which have been incurred in connection with the motion was the failure of the executor to be forthcoming as to the existence of the will, and the costs have been greatly increased by his opposition to it which was abandoned at the last minute. For these reasons, it seems to me that there should be no order as to the notice parties' costs of the motion.

