Gagliardi & Ors v Gagliardi & Ors [2001] NTSC 5

PARTIES:	GAGLIARDI, Elena, MAMONE, Antoinette and BLAIKLOCK, Maria v GAGLIARDI, Jesse Aaron, GAGLIARDI, Shane Joseph, GAGLIARDI, Justine Ellenrose, PODUTI, Steven Venturino, DRUSETTA, Jenny, PODUTI, Joesphine and CAMPAGNA, Ricky Patrick
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	30 of 2000 (20005333)
DELIVERED:	22 February 2001
HEARING DATES:	16 February 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

SUCCESSION

Wills probate and administration – privilege of communications between a medical practitioner and patient where sanity in issue – meaning of "sanity".

Evidence Act 1939 (NT), s 12(2)

REPRESENTATION:

Counsel:

Plaintiffs:	Mr J Stirk
Defendants:	Mr D Francis

Solicitors:

Plaintiffs:	Povey Stirk
Defendants:	David Francis & Assoc

Judgment category classification:	B
Judgment ID Number:	mar0106
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Mar0106

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Gagliardi & Ors v Gagliardi & Ors [2000] NTSC 5
No 30 of 2000 (20005333)

BETWEEN:

ELENA GAGLIARDI, ANTOINETTE MAMONE and MARIA BLAIKLOCK
Applicants

AND:

JESSE AARON GAGLIARDI, SHANE JSOEPH GAGLIARDI, JUSTINE ELLENROSE GAGLIARDI, STEVEN VENTURINO PODUTI, JENNY DRUSETTA, JOSEPHINE PODUTI and RICKY PATRICK CAMPAGNA
Defendants

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 22 February 2001)

[1] These are the reasons for the ruling I made on 16 February that s 12(2) of the Evidence Act 1939 (NT) does not apply in this case. It reads:

> "A medical practitioner shall not, without the consent of his patient, divulge in any civil proceeding (unless the sanity of the patient is the matter in dispute) any communication made to him in his professional character by the patient, and necessary to enable him to prescribe or act for the patient."

[2] The plaintiffs are the executors named in the will of the late Guiseppe Gagliardi dated 18 February 1999. He died on 15 December 1999.

[3] The defendants lodged a caveat against the grant of probate to the executors. There is evidence to which I have had regard for these purposes from two of the defendants who speak of deterioration in the deceased's state of health, including his mental health over a period of years prior to his death, particularly around the time he executed the will. They also assert that the deceased became under the influence of the plaintiff, Antoinette Mamone, so as not to be able to resist her wishes.

[4] There have been brought into court documents held by Dr Pevy, the general practitioner who attended the deceased for some years, the Alice Springs Hospital where he received treatment, and the Old Timers Home at Alice Springs where the deceased resided. The defendants seek leave to inspect those documents.

[5] It is not necessary to decide many of the questions which were raised in argument. Similar legislation exists in Victoria, Tasmania and New Zealand, but there are differences. For example, in Victoria the prohibition is in respect of "any information which the physician or surgeon has acquired" (*National Mutual Life Association v Godrich* (1909) 10 CLR 1; *Hare v Riley & Anor* (1974) VR 577. The Territory statute refers only to "communications" between a "medical practitioner" and his patient (*Q v Q*

(1976) 2 NZLR 639; *Lucena v National Mutual Life Association* (1911) 31 NZLR 481).

[6] The Victorian Evidence Act of 1890 protected disclosures unless the "sanity of the patient be the matter in dispute" and that exception was expanded by amendment to read "unless the sanity or testamentary capacity of a patient is the matter in dispute".

[7] The Victorian statute makes express provision for a legal personal representative to consent in the place of a deceased patient (*Pacina v Gryma* (1963) VR 421; *Andasteel Constructions v Taylor* (1963) VR 112; *Hare v Riley*). The Territory Act is silent on the subject. Whether the executors named in the will to whom there has been no grant of probate could consent was also debated.

[8] The prohibition does not extend to the medical practitioners divulging the prescribed communication in civil proceedings where "sanity of a patient" is the matter in dispute. I am not persuaded that because the Victorian provision adds "or testamentary capacity" the Territory provision is to be construed so that "sanity" does not encompass testamentary capacity.

[9] At common law communication between doctors and their patients does not attract privilege. The statutory restraint operates as an exemption from the normal obligation of a citizen to provide the judicial arm of government with the information and documents which is required for the determination of litigation (Cross on Evidence, Australian Edition, par 25005). In my

opinion, the exception to the exemption should not be construed narrowly. The interests of justice require that the word "sanity" not be confined to any degree less than its ordinary meaning.

[10] The Oxford English Dictionary relevantly defines "sanity" as "the condition of being sane; soundness of mind; mental health".

[11] The test for testamentary capacity here is whether the deceased was of "sound mind, memory and understanding" at the time of the execution of the will (see for example the judgment of Knox CJ and Stirk J in *Bailey v Bailey* (1924) 34 CLR 558 at 559 and the well settled principles of law to which they refer commencing at p 566 and Isaacs J with whom Gavan, Duffy and Rich JJ agreed at pp 570-572).

[12] The defendants allege that the deceased was not of sound mind, memory and understanding at the time he executed his will. The plaintiffs deny that. The question of the deceased's sanity is clearly an issue. Section 12(2) of the Evidence Act does not apply.

[13] I will hear the parties as to any limitation which should be placed upon the defendants' inspection of the documents by reference to the period of time which they cover.
