

THE HIGH COURT

[2021] IEHC 407

[2015 No. 59 M]

IN THE MATTER OF SECTION 194 OF THE CIVIL PARTNERSHIP AND CERTAIN RIGHTS
AND OBLIGATIONS OF COHABITANTS ACT 2010

BETWEEN

D

APPLICANT

AND

B

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 2nd day of June, 2021

SUMMARY

1. The adult children of their deceased father ("Mr. T") dispute that the applicant ("Ms. D") had an '*intimate and committed relationship*' with him, such as to entitle her to claim against his estate as a co-habitant. In these circumstances, can those children attend the in camera hearing at which Ms. D's claim is being made, in order to assist the personal representative of their father contest Ms. D's claim. That is the issue for consideration in this case and it is one which, this Court has been advised, has not been considered previously by an Irish court.
2. The adult children claim that they should be allowed to attend the hearing of Ms. D's claim under s. 194 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. This is despite the fact that the Act specifically provides at s. 199, in clear and unambiguous terms, that a claim of that nature '*shall be heard otherwise than in public*'.
3. While it is clear that the children will benefit financially if Ms. D's claim is defeated, as they are beneficiaries of their father's estate, it is claimed that it is in the interests of justice that they should be entitled to attend the hearing, in particular when Ms. D is giving evidence, so as to assist their father's personal representative ("Mr. B") in defending the claim against the estate. Mr. B claims that the children are the persons who are best placed to challenge Ms. D's evidence and so should attend the hearing to hear Ms. D give her evidence.
4. While the children have raised plausible policy reasons why persons in their situation might be entitled to attend the hearing, there are also good policy reasons why such hearings are heard *in camera* (i.e. to protect the privacy of the parties involved), and the Oireachtas, as the elected law maker, has set down very limited exceptions to the *in camera* rule. In this Court's view, it is not the role of an unelected judge to seek to expand those exceptions. Thus, while one can sympathise with the adult children regarding what they view to be unfounded claims in relation to their father, this Court does not believe that it would be an appropriate exercise of its powers to seek to, in effect, expand the category of exceptions to the *in camera* rule to include adult children who dispute a cohabitation claim against their parent's estate. If any such expansion of the exceptions to the *in camera* rule is to be made, it is, in this Court's view, a matter for the Oireachtas.

BACKGROUND

5. Ms. D seeks an order pursuant to s. 194 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (the "2010 Act") that provision be made for her from the estate of Mr. T, Deceased, on the basis that she was in an '*intimate and committed relationship*' with Mr. T prior to his death, and was therefore a '*qualified cohabitant*' of the Deceased under s. 172(5) of the 2010 Act (that claim is referred to herein as the "s. 194 claim").
6. Under s. 199 of the 2010 Act, Ms. D's claim under s. 194 of the Act '*shall be heard otherwise than in public*'.
7. The respondent in the proceedings, Mr. B, who is the executor of the estate of the Deceased, is a solicitor and he seeks an order from this Court allowing for the Deceased's adult children to attend the hearing.
8. The s. 194 claim is due to be heard on 8th June, 2021 and on 18th May, 2021 an application was made on behalf of Mr. B for Mr. T's four adult children to be entitled to attend the s. 194 hearing. Written submissions were lodged on behalf of both parties in advance of the application.
9. It is accepted by both parties that the children of the Deceased may be called to give evidence at the hearing, since they do not accept the truthfulness of Ms. D's assertions that she had an intimate relationship with their father. Indeed, it appears that it is planned that at least some of the children will do so (and so they will have to attend that part of the hearing). However, the core issue is whether the children ought to be permitted to attend the *full* hearing of the action, including of course that portion of the hearing where evidence will be given by Ms. D, or whether, as is the normal case with *in camera* hearings, they ought to attend the hearing only for that portion of the hearing when/if they give their evidence.
10. This order is sought by Mr. B, on the basis that he intends to defend Ms. D's claim on the grounds, inter alia, that she was not in an intimate and committed cohabiting relationship with the Deceased and therefore is not a '*qualified cohabitant*' under the 2010 Act and thus has no claim for provision to be made for her out of the estate of the Deceased.
11. Mr. B claims that he will be in a better position to defend the proceedings if the children of the Deceased attend the hearing as they are '*the persons best placed to challenge the applicant's evidence with evidence of their own*'. Counsel for Mr. B made submissions to the effect that Mr. B will effectively be prejudiced in his defence of the s. 194 claim if the children of the Deceased are not able to attend the hearing for the purposes of fully disputing the applicant's evidence as to her relationship with their deceased father.
12. Mr. B claims that he requires the children to attend the full hearing so that they can listen to the evidence of the applicant and can provide instructions so that that evidence might be disputed. While that was the position set out on behalf of Mr. B at the hearing of this application, it is to be noted that attendance of the children at the hearing, seems to have

been initially sought in correspondence exchanged between the parties in April 2021, on the basis that the children are the ultimate beneficiaries of the estate (subject to certain trusts) and therefore are '*personally interested*' in the outcome of the applicant's s. 194 claim.

13. It is common case between the parties that the proceedings must be heard otherwise than in public pursuant to s. 199 of the 2010 Act. Both parties also accept that the rule contained in the 2010 Act is subject to the Civil Liability and Courts Act 2004 (the "2004 Act"), which sets out at s. 40 therein certain exceptions to s. 199 of the 2010 Act. It is also conceded that none of those exceptions are applicable to the circumstances of the present case, save for s. 40(5) of the 2004 Act. This will be considered first.

A . PERSON MAY BE 'ACCOMPANIED' TO *IN CAMERA* HEARING

14. Section 40(5) of the 2004 Act sets out the following exception to the *in camera* rule:

"Nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from being accompanied, in such proceedings, in court by another person subject to the approval of the court and any direction it may give in that behalf."

15. The case of *D.X. v. Judge Buttimer* [2012] IEHC 175 deals with this sub-section. It concerned an application by D.X. to be accompanied at an *in camera* hearing by a friend in circumstances where D.X. had a communication disability. Hogan J. acceded to his application on the basis of s. 40(5) of the 2004 Act. At para. 13, Hogan J. notes that:

"So far as the present case is concerned, it would appear that the respondent decided to exclude Ms. S. [D.X.'s friend] because [D. X.] was already legally represented. That *in itself*, however, is not a good reason for excluding Ms. S, since the legislative policy informing s. 40(5) clearly presumptively favours the right of a litigant to choose a friend to accompany them in court, irrespective of whether that litigant is already legally represented."

16. In light of this case, it seems clear to this Court that s. 40(5) is aimed a person who is akin to a McKenzie friend, i.e. a person who is in court:

"for the purposes of taking notes or of making quiet suggestions or of assisting a lay litigant during the course of a hearing, but who is not qualified as a solicitor or barrister, and does not act as an advocate at the hearing." (per Macken J. in *R.D. v. District Judge McGuinness* [1999] 2 I.R. 411 at p. 414)

17. However, it is not suggested in this case that Mr. B, as a solicitor himself, and as someone who has instructed a solicitor and barristers to represent him at the s. 194 hearing, is someone who needs support at the hearing for emotional, physical or other reasons. It seems clear, on any interpretation of s. 40(5), that what is sought by Mr. B in this case is not what is envisaged as falling within the exception contained in that sub-section whereby a litigant may *be accompanied* by another person during the course of the proceedings. In particular, it seems to this Court to be clear that, what is sought in

this case, i.e. the attendance of four non-parties at the hearing for the purpose of aiding the defence, is not what was envisaged by the legislature in enacting s. 40(5) of the 2004 Act.

B. DISCRETION OF COURT TO LIFT *IN CAMERA* RULE

18. While counsel for Mr. B did not appear to push, particularly strongly, the point that s. 40(5) of the 2004 Act entitled the children to attend the hearing, he did however rely in particular on two decisions of the High Court for his claim that the Court has discretion to depart from the statutory provision that the proceedings are to be heard otherwise than in public in the interests of justice, and that this discretion should be exercised in this case.
19. These two cases are *Eastern Health Board v. The Fitness to Practice Committee of the Medical Council* [1998] 3 I.R. 399 and *Health Service Executive v. McAnaspie* [2012] 1 I.R. 548. Those cases were urged upon this Court as examples of cases where judicial discretion was exercised in favour of lifting the *in camera* rule where the court in both cases concluded that the interests of justice so required.
20. While the High Court in both those cases allowed for the displacement of the *in camera* rule, those cases are to be distinguished from the present case on a number of grounds.

EHB v. Fitness to Practice Committee – disclosure of documents after *in camera* hearing

21. First, *Eastern Health Board v. The Fitness to Practice Committee* was a case concerning a dispute regarding the handing over of medical records relating to matters that had previously been the subject of *in camera* proceedings.
22. In that case, the applicant, the Eastern Health Board, sought judicial review of a decision made by the Fitness to Practice Committee ordering the Eastern Health Board to produce medical records for the purpose of a fitness to practice inquiry into a doctor's practice, in circumstances where those medical records related to matters the subject of the *in camera* proceedings (which proceedings related to alleged child sexual abuse). It was the view of the Eastern Health Board that it was prevented from handing over the medical documentation as a result of the *in camera* rule and so it sought judicial review of the decision of the Fitness to Practice Committee. The judicial review was refused by Barr J. who directed the Eastern Health Board to comply with the order to produce the records to the Fitness to Practice Committee. That decision was made on the grounds, *inter alia*, that there is no '*absolute embargo*' on disclosure of evidence given during *in camera* proceedings in all circumstances, and that the '*paramount consideration*' was to do justice in the case.
23. That case is very different to the circumstances of the present case. First, *Eastern Health Board v. The Fitness to Practice Committee* did not concern the attendance at the hearing of a non-party. Secondly, it was a case where the *in camera* proceedings had concluded and what Barr J. was essentially concerned with was whether the applicant was prevented by the *in camera* rule in those proceedings from complying with an order for the discovery

of medical records for a fitness to practice inquiry in circumstances where those records related to the matters previously heard *in camera*.

24. Thirdly and more importantly, *Eastern Health Board v. The Fitness to Practice Committee* was decided in 1998, when the *in camera* rule was absolute, i.e. before the Oireachtas legislated for exceptions to the *in camera* rule in the 2004 Act, including the exception contained in s. 40(5) which we have considered in relation to a person 'accompanying' a party to a hearing, but also including the other exceptions in s. 40 which have no application to the present case, such as s. 40(3) relating to the entitlement of a barrister or solicitor attending for the purposes of preparing a report of proceedings.
25. Therefore, when Barr J. considered that the *in camera* rule was not an '*absolute embargo*' on disclosure of evidence, he did so in circumstances where the legislature had not at that stage provided legislative certainty that the rule was not absolute, as they did a number of years later with s. 40 of the 2004 Act.
26. Of particular note is that the legislature in providing for exceptions to the *in camera* rule in the 2004 Act, specifically stated in s. 40(6) that the rule that proceedings were to be heard '*otherwise than in public*' would not operate to prohibit the production of a document prepared for the purposes of those proceedings to a body '*performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation*' – the exception that would have been directly applicable in 1998 in *Eastern Health Board v. The Fitness to Practice Committee*, had the 2004 Act been introduced by the legislature at that stage.
27. In the absence of legislative exceptions such as this one therefore, Barr J. was obliged in the interest of constitutional justice to depart from the *in camera* rule and to order the production of the medical records in that case. That is quite different from the present case, to which the provisions introduced in s. 40 of the 2004 Act *do* apply. It is clear therefore that this is not a case similar to that decided by Barr J. where the legislature has not given consideration to the exceptions that should apply to the formerly absolute rule that proceedings be '*heard otherwise than in public*'.

HSE v. McAnaspie – disclosure of documents after *in camera* hearing

28. In the *McAnaspie* case, Birmingham J. (as he then was) applied the principles set out in *Eastern Health Board v. The Fitness to Practice Committee*. That case involved an issue in relation to provisions set out in the Child Care Act, 1991 that proceedings under that Act are to be heard otherwise than in public and in particular whether certain childcare reports could be released for publication having regard to the *in camera* rule.
29. In that case, which was a case stated from the District Court, Birmingham J. held that the court has some discretion to authorise the disclosure of information relating to proceedings held *in camera* and he answered in the affirmative the question posed by the District Court as to whether the District Court could direct the release of certain reports prepared by the guardian *ad litem* in the context of child care proceedings so as to enable those reports be used and published by the next of kin of the deceased child.

30. First, what distinguishes that case from the present proceedings is the fact that it was dealing not with the attendance of third parties at an *in camera* hearing, but rather the release of certain evidence heard *in camera* after the hearing had completed. Secondly and importantly, the relevant legislation in that case (being the Child Care Act, 1991), was not subject, at least at the time when the case was heard and decided, to the exceptions contained in the Civil Liability and Courts Act, 2004 and therefore was not subject to *any* of the exceptions contained therein. It is clear that, absent any legislative clarification, Birmingham J. in that case was asked to decide whether there were exceptional reasons in the interests of justice that gave discretion to the court to depart from the rule that proceedings be heard otherwise than in public. Birmingham J. was dealing in that case with the tragic violent death of a child while in the care of the State which he considered raised '*serious public interest issues*'. He decided that the interests of justice warranted a departure in that case and so he affirmed that the District Court was entitled to release the relevant reports to the applicant.
31. Mr. B also relies on two more recent decisions of the High Court where the court in both cases lifted the *in camera* rule in relation to child care proceedings under the Child Care Act, 1991 - *The Child and Family Agency v. K.B. and R.B.* [2018] IEHC 513 and *The Child and Family Agency v. T.N.* [2018] IEHC 568.
32. Reliance is placed on the *K.B.* decision of Humphreys J. primarily, it seems, because of his recognition in the context of childcare proceedings under the Child Care Act, 1991 that:

"a court [has a] discretion to impose reporting restrictions rather than requiring an *in camera* hearing."

That this Court has a discretion regarding reporting restrictions and/or the attendance of non-parties at an *in camera* hearing is not at issue, as noted below in the context *R.D. v. District Judge McGuinness* [1999] 2 I.R. 411. However, apart from recognising the existence of the court's discretion, this case does not provide support for the adult children's application in this case to attend Ms. D's s. 194 claim.

The Child and Family Agency v. T.N. – attendance at *in camera* hearing by non-party

33. Mr. B also relies on the decision of Reynolds J. in *The Child and Family Agency v. T.N.* which concerned the discretion of the court to permit the attendance of non-parties at the proceedings. In that case, an application was brought by the Child Care Law Reporting Project and an academic researcher to attend applications brought under Part IVA of the Child Care Act, 1991. Having decided that the court had discretion to lift the *in camera* rule, Reynolds J. proceeded to balance the two considerations in that case, the first being the best interests of the child, and the second being the public interest involved in understanding how a statutory body, The Child and Family Agency, discharges its functions. Having carried out that balancing exercise, Reynolds J. concluded that the best interests of the child would be met by allowing the application in that case.
34. In truth therefore, *T.N.* is not comparable to the exercise that this Court must engage with in the present case. There is no public interest element in the present case, as there

was in *T.N.* where an uninterested non-party sought to attend hearings for research purposes. What is sought in the present case is an order allowing the attendance of third parties in order for Mr. B to better defend the proceedings, in circumstances where those third parties have a direct financial (as well of course as personal and emotional) interest in the outcome of the proceedings and may in any case be called to give evidence for the purpose of disputing Ms. D's s. 194 claim. *T.N.* therefore does not support the children's application to be allowed attend the hearing in this case.

Construing the 2010 Act in accordance with constitutional principles

35. Mr. B also relies on the decision of Walsh J. in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 in support of the present application on the basis that at p. 341 therein Walsh J. discusses the presumption of constitutionality of legislation and says that it must be presumed that the Oireachtas:

"intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice"

and that where those proceedings and procedures depart from the principles of constitutional justice, this will be '*restrained and corrected by the Courts*'.

The submission made by Mr. B is that the principles of constitutional justice require this Court to consider his predicament and in particular his claim that he will not be able to properly defend Ms. D's s. 194 claim if the children of the Deceased are not permitted to attend the hearing in full.

36. Essentially therefore Mr. B's application for an order allowing attendance by the Deceased's children at the hearing is premised on the claim that it is in the interests of justice and that without it, Mr. B will be hindered in his ability to properly defend the claim made against the estate.
37. However, in considering the interests of justice and the issue of any prejudice Mr. B might suffer if his application to have the Deceased's children attend the hearing is not granted, this Court has regard to the decision of Macken J. in *R.D. v. District Judge McGuinness* [1999] 2 I.R. 411, which case was relied upon by Ms. D as a case where the attendance of a non-party during *in camera* proceedings was not permitted by the court.

R.D. v. District Judge McGuinness - attendance at *in camera* hearing by non-party

38. *R.D.* was also a case decided prior to the enactment of the 2004 Act. In it Macken J. considered an application for the judicial review of a decision by a district judge, in the context of proceedings under the Domestic Violence Act, 1996, not to allow the applicant be accompanied in court by a McKenzie friend. In refusing to grant the application for judicial review, Macken J. considered that '*no evidence*' had been presented to her to suggest that the applicant would be '*so overwhelmed*' by the refusal to allow a McKenzie friend attend court with him, or thereby deprived of the right to a fair hearing, such as to justify setting aside the *in camera* rule. At page 422, she states:

“I would be reluctant to find that the long standing view of the legislature that all matters of a matrimonial nature, including barring orders or any other relief sought under the Domestic Violence Act, 1996, are to be heard otherwise than in public, ought to be set aside or modified in favour of the attendance in court of a member of the public, as a “McKenzie friend”, unless there were overwhelming evidence that a fair hearing could not be secured by the applicant, the applicant having a constitutional right to such a hearing.”

39. This decision is relied upon by both sides to this dispute as one which establishes that there is a discretion on the part of the court to depart from the *in camera* rule in certain circumstances. As noted in the context of the *T.N.* decision, the existence of such a discretion is not in doubt. However, what is clear from *R.D.* is that in the context of an application for a non-party to attend for the benefit of one of the parties to litigation, as distinct from the public interest (which was at issue in *T.N.*), the lifting of the *in camera* rule only applies if there is overwhelming evidence that a fair hearing could not otherwise be secured.
40. In this regard, it is also to be noted that the *R.D.* decision was made prior to the enactment of the 2004 Act, and therefore prior to the legislative exception, allowing for a litigant to be ‘*accompanied*’ contained in s. 40(5) of that Act. Arguably, therefore, it was made at a time when there was a justification for the bar for exceptions to be lower (since the *in camera* rule was absolute at that time). Now that exceptions have been recognised by the legislature, it seems to this Court to be difficult to argue that the bar should be lowered now for judicial exceptions to be made to the *in camera* rule.
41. In *R.D.*, Macken J. was considering an application by an unrepresented litigant to have a non-party attend *in camera* proceedings. Her decision was informed by the fact that the applicant was a ‘*very articulate person*’ for whom the refusal to have a McKenzie friend would not be ‘*so overwhelming*’ so as to deny him a fair trial and so she refused the application.
42. In this case, the prejudice alleged by Mr. B is claimed to arise in circumstances where Mr. B is not only a solicitor himself, but he also has the benefit of legal representation. This Court has already noted that Mr. B has the ability to call any or all of the Deceased’s children to give evidence in support of his defence to Ms. D’s claims, once Mr. B and his legal team have heard the evidence of Ms. D.
43. It seems clear therefore that there is no question of Mr. B being overwhelmed by the refusal of this Court to allow the Deceased’s children attend the hearing so as to deny him a fair hearing.
44. Furthermore, it does not appear to this Court that Mr. B will be prohibited from properly defending Ms. D’s s. 194 claim merely by virtue of not having the Deceased’s children attend the hearing. The evidence of the children of the Deceased, if called as witnesses, will be taken into account by the court in deciding the s. 194 claim. Insofar as their

evidence disputes or contradicts the evidence of Ms. D, it is for the trial judge hearing the s. 194 claim to consider and to decide upon.

45. Mr. B has also submitted that he is at a disadvantage meeting Ms. D's claim, since the person best placed to meet her evidence, Mr. T, is dead. However, no doubt the trial judge will be acutely conscious of this fact. Similarly no doubt the trial judge will be conscious of the extent to which the evidence that Ms. D relies upon to support the existence of an '*intimate and committed relationship*' depends on her evidence alone, and the extent to which it is corroborated and the extent, if any, to which it is contradicted. No evidence has been presented as to why, exactly, the children of the Deceased are best placed to dispute the nature of the relationship claimed by the applicant. Indeed, while an affidavit was sworn by one of the children in support of Mr. B's application, that affidavit sets out nothing more than the fact the Deceased's children dispute that the applicant had a relationship with their father. The nature of the evidence proposed to be given is especially unclear in circumstances where the Mr. B accepts, in his written submissions, that he was:

"personally acquainted with the deceased, and is in a position to provide first-hand evidence of his own that goes to the central issue arising in the action (namely whether the relationship asserted by the applicant did or did not exist)."

46. On this basis, this Court does not believe that his claim falls within the discretion to allow attendance at an *in camera* hearing, as set out in *R.D.*
47. More generally, it seems to this Court that the claim by Mr. B that some disadvantage may be conferred upon him if the Deceased's children are not permitted to attend the full hearing is not sufficient reason for this Court to depart from the clear rule contained in s. 199 of the 2010 Act. The primary consideration in the present case must be the privacy of the parties involved (including the privacy of Ms. D), since it seems clear that this is the rationale for the *in camera* rule applying to cohabitation proceedings.
48. Mr. B's application must therefore be viewed in that light and the mere fact that he might be in a '*better position*' if the children of the Deceased attend the hearing, when weighed against the privacy rights of Ms. D, does not justify the lifting of the statutory *in camera* provision in this case. Similarly, while the nature of the present claim made by Ms. D may be contentious, and while the Deceased's children may feel somewhat aggrieved by the claims made in relation to their father, that is also not sufficient reason for this Court to grant the order sought by Mr. B.
49. What Mr. B is asking this Court to do, notwithstanding the clear exceptions set out in s. 40 of the 2004 Act, is to make an order allowing for a *different* exception, not envisaged by either the 2004 Act or the 2010 Act, whereby if a litigant can better defend an *in camera* case by having third parties present, then this Court should permit their attendance in the interests of justice. This Court believes that this would involve it making laws in contravention of the separation of powers.

Consequences of lifting of *in camera* rule to put litigant in a better position

50. The primary role of this court in this case is to consider the consequences in this case for the order sought by Mr. B. Accordingly, longer term consequences are not determinative of this Court's decision. Nonetheless, it is worth noting that the issue raised in this case could conceivably arise in any *in camera* case. This is because what is claimed by Mr. B is that the children of the Deceased are in the best position to dispute the claim made by Ms. D that she had an intimate and committed cohabiting relationship with their father such as to justify provision being made of the estate under s. 194 of the 2010 Act.
51. If the legal position was as suggested by Mr. B, a litigant in proceedings that are to be heard *in camera* could make an application, to allow the attendance of a person (or indeed, as in this case, multiple people) at the hearing based merely on the claim that this person will be in the 'best position' to allow that litigant to 'properly defend' a claim (or indeed advance a claim). This could well involve the courts having to consider in advance in proceedings, usually highly sensitive proceedings, e.g. childcare proceedings, judicial separation proceedings etc., whether the circumstances and/or evidence of the non-party (who may or may not be a witness) justify his/her attendance at the entirety of the *in camera* hearing.
52. If the legislature felt that it was appropriate that such applications would be made (and in some cases granted), thereby impacting upon the privacy of the parties to contentious and highly sensitive proceedings such as childcare proceedings, judicial separation proceedings, cohabitation claims etc., then it seems to this Court that it would have set out that exception in legislation.

Policy reasons for child of deceased attending a claim by deceased's alleged cohabitant

53. Finally, it is to be noted that Mr. B's counsel made persuasive arguments, from a policy perspective at least, why the legislature might have provided an exception for adult children in the current circumstances (although there are clearly contradicting policy reasons as to why the privacy of the litigants would nonetheless take precedence).
54. Indeed, he may well have raised a particular category of case where such an exception might be justified (i.e. where an adult child is allowed to attend a s. 194 claim against his/her deceased parent by an alleged cohabitant, which has direct financial consequences for that child). However, whether the policy reasons in favour of such an exception trump the policy reasons for protecting the personal life of the alleged cohabitee is more properly a matter for the legislature. In this Court's view, it is not for unelected judges to be making such a significant policy change to the legislation, by permitting the exception sought. If this Court were to accede to this application, it would, in effect, be saying that in every *in camera* case it would be possible for third parties to be present if one of the parties could reasonably claim that it would be able to better defend the proceedings if that party were present. This would, in this Court's view, involve the courts in law-making in contravention of the separation of powers.
55. In this regard, the *D.X.* case, which has previously been referred to, provides examples of where judges did not breach the separation of powers, notwithstanding the unintended

and apparently unjust consequences which arose from what was then the undiluted *in camera* rule. It was undiluted as the cases in question were heard prior to the enactment of exceptions to the *in camera* rule contained in the 2004 Act. The undiluted *in camera* rule led, as noted by Hogan J., to unintended and unjust side effects, in the same way as it is argued by Mr. B that it is unjust that the children should not be in court to hear the evidence first hand of Ms. D's alleged cohabitation relationship with their deceased father.

56. However, what is of particular relevance is that the alleged injustice in the other cases (instanced by Hogan J.) was not sufficient for the courts to override the *in camera* rule and create new exceptions. Rather, as noted by Hogan J., what happened is that these unintended effects, rather than leading to 'law making' by unelected judges (or 'hard cases' making 'bad law'), instead led to subsequent amending legislation by the elected law makers. At para. 7 *et seq.* of *D.X.*, Hogan J. notes:

"Experience had shown, however, that the mandatory nature of s. 34 [of the Judicial Separation and Family Law Reform Act 1989 which provided for *in camera* hearings] as originally enacted was capable of having unintended effects which were not altogether satisfactory. Thus, in *Tesco (Ire.) Ltd. v. McGrath*, High Court, 14th June 1999, Morris P. held that the effect of the prohibition was to preclude the release of court orders concerning the sale of property, *even in those cases where these orders might well be critical so far as the title of third parties was concerned*. Likewise, in *RM v. DM* [2000] IEHC 140, [2000] 3 I.R. 373 Murphy J. held that the section precluded the disclosure of pleadings captured by the *in camera* rule to professional disciplinary body which was examining a complaint against a legal representative.

Conscious of the fact that the wording of this statutory prohibition had consequences which were not merely unintended, but went further than was reasonably necessary to achieve the original statutory objectives, *the Oireachtas concluded that the (apparently) unqualified nature of the prohibition should be diluted*. Thus, for example, s. 40(4) of the Civil Liability and Courts Act 2004 ("the Act of 2004") now provides that the statutory prohibition should not permit the disclosure of the extracts from courts orders in family law proceedings to relevant third parties.

Section 40(5) of the Act of 2004 is in the same vein in that it provides:-

"(5) Nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from being accompanied, in such proceedings, in court by another person subject to the approval of the court and any directions it may give in that behalf."

(Emphasis added)

57. In this case therefore, just as in the *Tesco* case and the *R.M.* case, if there is perceived to be an injustice to children of an alleged cohabitant (who is deceased) not attending the s.

194 claim (and certainly this is an arguable point, at least), this is a matter for the legislature and not a matter for this Court, particularly not only is there a clear rule set down by the legislature on the hearing being heard *in camera* (which is supported by good policy reasons in favour of protecting the parties' privacy), but also specific exceptions have been created to that rule, into which the present circumstances do not fit.

CONCLUSION

58. This Court does have some sympathy for any adult children of a deceased parent, who they believe is being wrongfully subjected to a claim of co-habitation by another person along with a claim for financial provision out of the parent's estate (at their expense), but where those children are nonetheless prevented from attending the hearing of that claim to help defend, what they regard as, their parent's honour as well as his finances. However, for the foregoing reasons, this Court does not believe that the law, as it currently stands and as interpreted by the courts, allows for an exception to be made for the children to attend the hearing in this case.
59. Accordingly, this Court refuses to grant an order allowing for the children of Mr. T, to attend the hearing of the s. 194 claim made by Ms. D.