THE HIGH COURT

PROBATE

[2022] IEHC 449

2021 PO 011832

IN THE MATTER OF THE ESTATE OF P.M., LATE OF (ADDRESS), (OCCUPATION), DECEASED

BETWEEN

S.M.

APPLICANT

AND

S.L.

RESPONDENT

Judgement of Ms Justice Butler delivered on 11th day of July 2022:

Introduction:

1. The underlying application to which this judgement relates is an application under section 27(4) of the Succession Act 1965 in which the applicant seeks liberty to apply for letters of administration in respect of the estate of her deceased adult child. The need for this application arises because the respondent, the deceased's spouse from whom the deceased was separated

at the time of their death, has already lodged an application in the Probate Office for a grant of letters of administration intestate to the deceased's estate. The deceased's estate is a valuable one, comprising property and significant cash and investments. This judgement deals with a preliminary application made by the applicant to have the section 27(4) application heard *in camera*.

2. When the matter initially came before the court, the applicant pointed to the provisions of section 45 of the Courts (Miscellaneous Provisions) Act 1961 under which matrimonial causes and actions are to be heard "*otherwise than in public*". She also referred to the legislation under which family law proceedings between the spouses had been heard before the District Court or were pending before the Circuit Court at the time of the deceased's death. All of these cases and applications were held *in camera*. However, the applicant was unable to articulate a clear legal basis upon which the court should depart from the constitutional principle that justice should be administered in public in circumstances where the application under section 27(4) is not itself a matrimonial cause or matter and did not come within any of the family law statutes to which reference had been made save to argue that it was related to such matrimonial matters.
3. Reliance was also placed on the provisions of section 40 of the Civil Liability and Courts Act 2004. Under this section information, evidence and documents generated for and in *in camera* proceedings may be produced as evidence before a different body or person conducting a hearing or adjudicating under statute on any matter. If so produced, the hearing concerned shall be held *in camera* insofar as it relates to that evidence and that evidence cannot be published. However, it seems to me that this provision would only be applicable in the event that the hearing of the application under section 27(4) is held in public. Therefore, it is necessary to decide in the first instance whether the section 27(4) application should be heard *in camera* and only if the applicant's application in this regard is refused will it be necessary to consider the potential application of section 40 of the 2004 Act to the evidence which the parties have

already put on affidavit relating to the *in camera* family law proceedings between the spouses before the District and Circuit courts prior to the death of the deceased.

4. The respondent, being the separated spouse of the deceased, adopted a neutral stance towards the applicant's application. They were in a position to address the court on some potentially relevant authority which, although not directly on point, identified circumstances in which the *in camera* rule might be either lifted or applied outside of strict statutory parameters. In circumstances where the applicant had not established a clear legal basis for departing from the normal constitutional principle that justice be administered in public, I adjourned the matter to allow both sides to provide written submissions which they have now helpfully done.
5. Before looking at these submissions and teasing out the potential application of the legal principles therein identified to the circumstances of this case, I propose setting out the background against which the application is made. In order to preserve the confidentiality of the parties, I will refer to one spouse as *'the deceased'* and the other spouse as '*the spouse'* and I will use gender neutral pronouns throughout.

Background to this Application:

6. The spouses were married to each other and lived together for a period of just under a year. The circumstances in which they got married, of the marriage itself and of their separation are not relevant to the issues I have to decide save to note that in the proceedings issued before the deceased's death there were serious factual conflicts between the spouses as to these circumstances. It is also appropriate to note that both spouses experienced certain personal difficulties during the marriage. Some three months after the parties separated, the deceased contacted a solicitor with a view to regularising matters arising from the breakup of the marriage. The deceased wished the solicitor to negotiate a separation agreement under which the spouse would waive all rights to maintenance, property, succession and pension in

exchange for a lump-sum payment. Thereafter, the spouses would each support and maintain themselves out of their own resources.

7. A separation agreement in those terms was drawn up by the deceased's solicitor and signed by the spouse a few weeks later. A financial payment was made by the deceased and accepted by the spouse. The applicant relies on the provisions of the separation agreement in a number of respects. Firstly, the agreement includes a formal surrender and renunciation of all of the rights each spouse had under the Succession Act 1965 to any share or legal right in the other's estate. Secondly, the spouses renounced and waived their respective rights to extract probate or administration of the estate of the other. Thirdly, they each undertook not to interfere with the extraction of a grant of probate or administration of the estate of the other. Fourthly, the spouses agreed that after the death of the other, neither of them would seek provision from the estate of the other pursuant to various statutory provisions under which such an application could otherwise have been made. There is no doubt that the separation agreement was intended to completely exclude any claim that the spouses might have or make against the estate of the other. It also included number of other provisions which excluded maintenance and other financial claims against the other.

8. Although the spouse signed the separation agreement, it was never signed by the deceased. The spouse subsequently contended that the separation agreement was not valid for a number of reasons, both procedural and substantive. Apart from the fact that it was not signed by the deceased, the spouse's signature was not witnessed. In addition, the spouse, although having some legal experience, did not receive independent legal advice in respect of the terms of the separation agreement. The spouse also contends that they were unwell at the time the agreement was signed and under significant financial and personal pressure. A medical report is exhibited. Consequently, the spouse contends that they were not capable of giving and did not give valid consent to its terms.

9. Eighteen months after the separation agreement was signed, the spouse brought District Court proceedings for maintenance against the deceased. This application was part-heard before being adjourned on agreed terms under which the deceased paid interim maintenance on a "without prejudice" basis. The spouse did not attend the District Court on the adjourned date and the maintenance summons was struck out.
10. Four years after the separation, the spouse issued divorce proceedings in which extensive financial relief was sought against the deceased through various ancillary orders. A defence and counterclaim to these proceedings was filed by the deceased in which they sought a declaration of nullity in respect of the marriage. Some 2 ½ years later the deceased died without the divorce proceedings having been heard or determined. Consequently, and notwithstanding the terms of the separation agreement, at the time of the deceased's death there were live family law proceedings before the Circuit Court in which the spouse disputed the validity of the separation agreement and sought financial relief, inconsistent with that agreement, against the deceased.

The Submissions of the Parties:

11. The written submissions made on behalf of the applicant are both more complete and more nuanced than the argument initially made to the court. Although the submission asserts that an application under section 27(4) of the Succession Act, 1965 could constitute a matrimonial cause or matter for the purposes of section 45(1)(b) of the Courts (Miscellaneous Provisions) Act 1961, a broader argument is also made on the basis of the court's common law power to hear matters in private and without an express statutory basis for doing so. Needless to say, in circumstances where any exception to a constitutional requirement – such as the administration of justice in public – must necessarily be strictly construed, I reject the proposition that an application under section 27(4) could constitute a matrimonial cause or matter for the purposes

of availing of such an exception when, by its nature and character, it manifestly is not a matrimonial cause or matter.

12. The broader argument proceeded by identifying a range of statutory provisions under which family law proceedings are invariably heard *in camera* and additional reporting restrictions are applied to prevent the parties to such proceedings been publicly identified. In addition, reference was made to the provisions of sections 119 and 56 (11) of the Succession Act, 1965 under which applications concerning the legal right of a spouse (including the right to appropriate the dwelling house) and provision for children from the estate of a deceased person are heard *in camera*. The applicant characterises these provisions as effectively meaning that in probate matters concerning the spousal relationship '*the cloak of privacy survives the death of one of the spouses'*. As the separation agreement and the family law proceedings pending at the time of the deceased's death would enjoy privacy were both parties still alive, the applicant argues that residual matters concerning "*the outworking of a matrimonial relationship between the spouses*" should continue to benefit from such privacy regardless of the nature of the jurisdiction being exercised by the court.

13. The spouse continued to maintain a neutral stance on the application but provided written legal submissions for the assistance of the court. More tentatively, but for broadly similar reasons to the applicant, the spouse concluded that the court has a formal jurisdiction to extend the *in camera* rule to this application. In addressing whether it was appropriate that this jurisdiction be exercised in this case, the spouse regarded the critical consideration as being whether not doing so would '*unwarrantably undermine rights of privacy and confidentiality afforded to litigants in family law proceedings by way of the in camera rule*'. The spouse was careful not to argue that the existence of underlying family law proceedings in an application of this nature would either generally or automatically attract the *in camera* rule. Instead, having regard to the particular circumstances, including the extent to which reference is being made to the pleadings

in the divorce proceedings and nullity action and the transcript of district court maintenance proceedings, it was submitted that it would be appropriate to extend the *in camera* rule to this application on an exceptional basis.

The Administration of Justice in Public Under the Constitution:

14. The starting point for any analysis as to whether this application should be heard *in camera* must be article 34(1) of the Constitution. This provides: –

> "*Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public*."

This provision establishes the administration of justice in public as a general principle of high constitutional standing from which exceptions may be made in special and limited cases. The text of the Constitution envisages that the exceptional, special and limited cases will be *'prescribed by law'* a phrase is which is normally understood as requiring express statutory authority. The leading case on this issue prior to 1998, *In Re R Ltd.* [1989] I.R. 126, held not merely that statutory authority was required but that it must be a law enacted, re-enacted or applied by the Oireachtas subsequent to the coming into force of the Constitution.

15. However, the Supreme Court has since recognized that the existence of a legislative provision is not an absolute prerequisite to a court exercising jurisdiction to direct that a matter be heard otherwise than in public (see *Irish Times v Ireland* [1998] 1 IR 359). Although the wholly exceptional circumstances in which it was envisaged that such jurisdiction might be exercised initially related to criminal cases - and the constitutional right to a fair trial under article 38 undoubtedly had a bearing on the court's analysis in this regard - more recently it has been accepted that a similar jurisdiction exists in relation to civil cases where it's exercise is necessary to protect some other constitutionally protected interest.

16. The issue came before the Supreme Court in *Gilchrest and Rogers v Sunday Newspapers Ltd* [2017] 2 IR 284, a case concerning a newspaper article about the witness protection programme operated by An Garda Síochána, the facts of which O'Donnell J regarded as *"extreme".* The newspaper sought to restrict the application of the *Irish Times* judgement to its specific criminal context and argued that the correct test to be applied in civil cases was that found in *In Re R Ltd*. Under this test, a case could only be heard in camera if the administration of justice in public, i.e. publicity, would itself deny the doing of justice as between the parties. O'Donnell J did not accept that the test was necessarily so strict, although he acknowledged that most of the circumstances in which it would be appropriate for the court to exercise an inherent jurisdiction to hear a case *in camera* would in fact meet the *In Re R. Ltd* test.

17. Interestingly, in considering the extent to which the potential harm to another right or interest protected by the Constitution might justify a departure from the general principle that justice be administered in public, O'Donnell J looked at the provisions of article 6.1 of the European Convention on Human Rights under which a person is, in principle, entitled to a "*fair and public hearing*" of cases concerning their civil rights and obligations. The exceptions to this general principle, also contained in article 6.1, include "*where… the protection of the private life of the parties so require*". O'Donnell J commented:

> "23. The formulation in the ECHR makes it clear that while interference with the administration of justice is a ground for permitting hearing other than in public, it is not the sole ground. There are other areas where it can be said that the exclusion of the public is justified, normally because publicity for proceedings or even access to them would offend important values, many of which are also protected by the Convention and Constitution. The headings in s.45 of the 1961 Act do not themselves identify subject matter where it will be impossible to do justice if a hearing is conducted in public: instead they identify areas where it is generally believed that a hearing in public

provides justice at too high a price for other values considered important. Under the Convention at least, it is not necessary to force cases involving intimate relationships, the affairs of children, or those of people under a disability into the restrictive rubric of demonstrating that justice cannot be done in the individual case, even if that may be a component of a valid and justifiable decision to exclude the public from whole or part of the case."

The ECHR was not raised by either party in their written or oral legal submissions but is nonetheless something to which, in my view, the Court can have regard.

18. In rejecting the argument that the only permissible exception to the administration of justice in public was where a public hearing would itself defeat the doing of justice, O'Donnell J looked specifically at the rationale for including matrimonial causes and matters (now more generally described as family law matters) in section 45 of the 1961 act. In doing so he was particularly conscious of the constitutional value afforded by that privacy to the protection of family life and the dignity of the individual: -

> "41. In my view it is not necessary to read Article 34.1 down to the point where the only exception permissible in respect of any subject matter, is where it can be demonstrated that justice simply cannot be done otherwise. While that consideration is certainly a thread running through many of the cases, and where present will certainly justify a hearing other than in public, it cannot explain them all. A couple should not have to go to the lengths of contemplating withdrawing an application for a divorce, separation, or custody of children, to secure a hearing in private, of personal matters. It is true that the interest of administration of justice between the parties is engaged in such a case, but so too is the importance of protecting family life and of avoiding the insult to the dignity of the individual by requiring that intimate matters be aired in a public hearing, with a risk of wider publicity. Conversely, one party to a relationship

ought not to be able to bring pressure to bear on the other and perhaps more sensitive, partner by demanding a hearing in public as a constitutional entitlement. In a case where justice cannot be done or cannot be done without damage to important constitutional values, it is appropriate to provide for the possibility of a hearing other than in public, albeit that is a matter for the court to decide whether any departure for the standard of trial full trial in public is required and if so what measures are the minimum necessary."

19. The principles that should be adopted in considering an application for proceedings to be held in camera on the basis of the court's common law jurisdiction were summarised by O'Donnell J as follows:

    (i) The Article 34.1 requirement of administration of justice in public is a fundamental constitutional value of great importance.

    (ii) Article 34.1 itself recognises however that there may be exceptions to that fundamental rule;

    (iii) Any such exception to the general rule must be strictly construed, both as to the subject matter, and the manner in which the procedures depart from the standard of a full hearing in public;

    (iv) Any such exception may be provided for by statute but also under the common law power of the court to regulate its own proceedings;

    (v) Where an exception from the principle of hearing in public is sought to be justified by reference only to the common law power and in the absence of legislation, then the interests involved must be very clear, and the circumstances pressing. Here that demanding test is capable of being met by the combination of the threat to the programme and the risk to the lives of people in it or administering it. This is not a matter of speculation, but seems an unavoidable consequence of the existence of a witness protection programme.

(vi) While if it can be shown the justice cannot be done unless a hearing is conducted other than in public, that will plainly justify the exception from the rule established by Article 34.1, but that is not the only criterion. Where constitutional interest and values of considerable weight may be damaged or destroyed by a hearing in public, it may be appropriate for the legislature to provide for the possibility of the hearing other than in public, (as it has done) and for the court to exercise that power in a particular case if satisfied that it is a case which presents those features which justify a hearing other than in public.

(vii) The requirement of strict construction of any exception to the principle of trial in public means that a court must be satisfied that each departure from that general rule is no more than is required to protect the countervailing interest. It also means that court must be resolutely sceptical of any claim to depart from any aspect of a full hearing in public. Litigation is a robust business. The presence of the public is not just unavoidable, but is necessary and welcome. In particular this will mean that even after concluding that case warrants a departure from that constitutional standard, the court must consider if any lesser steps are possible such as providing for witnesses not to be identified by name, or otherwise identified or for the provision of a redacted transcript for any portion of the hearing conducted *in camera*.

Application to the Facts of this Case:

20. At this stage there is no doubt but that the court has an inherent or common law jurisdiction to hear a matter in private notwithstanding the general constitutional principle that justice should be administered in public. However, that jurisdiction can only be exercised where the interests are very clear and the circumstances very pressing and where the court is satisfied

that constitutional interests and values of considerable weight may be damaged or destroyed by a public hearing. The court must look to the nature of the interest relied on, the extent to which it is likely to be damaged by a public hearing and the extent to which there are measures short of an *in camera* hearing which would adequately protect the interests in question. The issue in this case is whether circumstances in which there is a significant overlap between the underlying application and the family law proceedings in being at the time of the death of the deceased are sufficient to warrant a departure from the general principle.

21. There is also no doubt that family law proceedings in general have been properly afforded the protection of an *in camera* hearing by statute both in the interests of the family as protected under article 41 of the Constitution and to protect the unenumerated right of the individual to dignity and to privacy. The application of the *in camera* rule to all such proceedings has not been without adverse comment. In circumstances where marital breakup is now relatively common and the fact that spouses separate or divorce is no longer a matter of public scandal, the need to have this category of case heard exclusively behind closed doors such that the public does not have a realistic understanding of how the courts approach family law matters has been questioned by academics and others. Nonetheless the understanding that *"family law matters"* will and should be dealt with *in camera* remains deeply ingrained. The spouse has pointed to a number of decisions where a separation agreement was impugned in plenary proceedings on classic contractual and equitable grounds and yet the *in camera* rule was applied without comment (see *W. v W.* (Unreported, High Court, 10 April 1978) and *L.M. v M.* [1994] 2 Fam. L.J. 60 (Supreme Court)).

22. In my view, this is not a case in which it has been shown that justice cannot be done unless the hearing is conducted other than public (i.e. the *In Re R. Ltd.* test). Therefore, it is necessary to consider whether the facts and circumstances are such that when the principles outlined by O'Donnell J. in *Gilchrist and Rogers* particularly at (v), (vi) and (vii) above have been

considered, it is nonetheless appropriate to hear the matter *in camera*. I am conscious that in applying these principles the court is not conducting a balancing exercise *simpliciter* in which the interest of the litigants, on the one hand, are weighed against the interest of the public in the administration of justice in public on the other. The threshold which the applicant must meet in order to establish that this application should be heard *in camera* notwithstanding the constitutional imperative as regards the administration of justice in public is a high one. Further, although the applicant naturally points to matters specific to this application, the countervailing interest to which the court must also have regard is a broader one. It is not just the desirability of this particular application being heard in public, but a system of justice mandated by the constitution in which the operation of the courts and the decisions of judges are subject to public scrutiny.

23. The difficulty facing the court in the present case arises in large part because the applicant, being the person seeking an *in camera* hearing, was not a party to the marriage that is the subject of the family law proceedings. The spouse, who was a party, has not brought a similar application and has remained neutral on the applicant's application. Thus, the constitutional values relied on are not ones which the applicant would normally have *locus standi* to invoke. Further the very fact that the deceased is dead has a bearing on the extent to which a right of privacy can still be asserted on their behalf and the content of that right. The law takes a relatively mixed view on the protection of a deceased person's privacy – for example medical records remain privileged but GDPR rules no longer apply. A publication concerning a dead person cannot constitute a defamation of that person although, since 2009, a cause of action in defamation vested in a person at the time of their death survives the death but the type of damages which may be recoverable are limited. Given the overlap between the right to privacy and the dignity of the individual, it is perhaps understandable that the protection afforded by the law to an individual's right to privacy begins to wane after death when the dignity of the

individual is less susceptible to being affronted by a lack of privacy.

24. As against this, the protection afforded to family law litigants both generally under section 45 of the 1961 act and specifically the family law legislation cited by the parties is not one of which the litigants must positively choose to avail in each individual case. Equally it is not a protection which the courts, exercising their family law jurisdiction, can readily choose to grant or withhold in individual cases. Rather it applies generally to all such litigation regardless of the attitude of the individual litigant and regardless of the view the court might take as to the conduct of the litigants or the merits of the case. The spouse has drawn the court's attention to a number of cases in which the *in camera* rule was relaxed pursuant to section 40(8) of the Civil Liability and Courts Act 2004. This provision allows a court which is hearing an *in camera* matter pursuant to statute to order disclosure of documents, information or evidence connected with or arising in the course of the proceedings to third parties '*if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings*'. These cases are interesting because they show how courts have grappled with the competing interests to be served on the one hand by the maintaining of confidentiality of certain types of proceedings and, on the other, by allowing certain persons who are not parties to those proceedings access to material for other legitimate purposes. However, some caution needs to be exercised as the issues involved in those cases are largely the obverse of this as the lifting of the *in camera* rule is, broadly speaking, consistent with the principle that justice should be administered in public whereas the exclusion of the public from a hearing which would otherwise be held in public might be regarded as a move away from that principle.

25. Taking all of these factors into account I am satisfied that in principle there is an interest to be served by hearing this application *in camera*. That interest derives from the intimate nature of the evidence most of which is drawn from proceedings in the lower courts which were

themselves afforded the statutory protection of the *in camera* rule. However, I do not think that it could be said that the circumstances of the case are very pressing. A claim of privacy made on behalf of the deceased by their mother is necessarily weaker than the claim they could have made on their own behalf were they still alive. The spouse, who would be in a position to make such a claim, is not seeking to have this application heard *in camera*. In circumstances where the deceased is dead such family life as the deceased and the spouse may have enjoyed prior to their separation is no longer extant and as there are no children of the marriage whose privacy or family life might be affected, it is difficult to understand how it can be contended that a public hearing of this application would damage a constitutional interest or value of considerable weight. I am conscious that in reality there is unlikely to be any actual public interest in a hearing in the non-contentious probate list to determine which of two people should have the right to extract a grant of letters of administration to the deceased's estate. This stands in distinction to the facts in the *Irish Times* and *Gilchrist and Rogers* cases both of which concerned media reporting of proceedings before the courts. However, as noted above, the constitutional value of the administration of justice in public is not limited to the circumstances of the individual case but lies in the opening up of the operation of the courts and the decisions of judges to public scrutiny.

26. Finally, in this regard I note the applicant's argument that because an application under section 27(4) falls under the High Court's non-contentious probate jurisdiction, it does not constitute *'litigation'* and, presumably by extension, there is no constitutional requirement that it be heard in public. The argument is made on two main grounds: firstly, because some matters which come into the probate list are administrative matters which the Probate Office has deemed too complex to be dealt with on a purely administrative basis and secondly because it has been held that at this stage of a probate application there is no *lis inter partes* upon which a *lis pendens* could be registered (see *Salter v Salter* [1896] P. 291). This is not the

place for a detailed analysis of the nature of the court's probate jurisdiction. However, notwithstanding its non-contentious nature, I have no doubt that the jurisdiction exercised by the High Court in probate matters is part of the full original jurisdiction of the High Court and consequently constitutes part of the administration of justice which is entrusted by the Constitution to the courts. Therefore, I do not think that it is open to the Probate Judge hearing non-contentious matters to simply elect to hear all or any of those matters *in camera*. In any event, in my view the submission is moot as the application in issue here is not one which, but for its administrative complexity might otherwise be dealt with by the Probate Office, but is one made under section 27(4) of the Succession Act 1965 which must be made to either the High Court or the Circuit Court.

Section 40 of the Civil Liability and Courts Act 2004:

27. In circumstances where I have not been persuaded that I should exercise the common-law or inherent jurisdiction that the High Court undoubtedly has to hear a civil case *in camera,* it is now necessary to consider the extent to which the court can receive evidence of the District Court maintenance proceedings and of the pleadings in the Circuit Court divorce/nullity application. All of these proceedings are undoubtedly covered by section 45 of the 1961 Act and by other *'relevant enactments'*. Thus, it is necessary to consider whether the *in camera* rule can be lifted to allow material and evidence which was before the courts hearing those cases *in camera* to be received into evidence on this application which is being held in public. Interestingly, I note that the parties to this application have proceeded on the basis that were this application to be heard *in camera* there would be no difficulty in using the evidence relating to the marriage that was generated in other *in camera* proceedings. I am not certain that this is correct especially in circumstances where one of the parties to this application, namely the applicant, was not a party to the marriage which has been deemed to warrant such

protection by the Oireachtas. However, this is not a matter which I need to address further at this point as I am not proposing to hear this application *in camera*.

28. The statutory provision which governs the use of *in camera* material is section 40 of the Civil Liability and Courts Act 2004 (as amended) which provides as follows, *inter alia*:

> *(6) Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the production of a document prepared for the purposes or in contemplation of such proceedings or given in evidence in such proceedings, to—*
>
> > *(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or*
> >
> > *(b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.*
>
> *(7) Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the giving of information or evidence given in such proceedings to—*
>
> > *(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or*
> >
> > *(b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.*
>
> *(8) A court hearing proceedings under a relevant enactment shall, on its own motion or on the application of one of the parties to the proceedings, have discretion to order disclosure of documents, information or evidence connected with or arising in the*

course of the proceedings to third parties if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings.

(9) A hearing, inquiry or investigation referred to in subsection (6) or (7) shall, in so far as it relates to a document referred to in subsection (6) or information or evidence referred to in subsection (7), be conducted otherwise than in public and no such document, information or evidence shall be published.

29. Taken in the round, section 40 permits the use of documents (sub-section 6) and information or evidence (sub-section 7) prepared for or given in evidence at an *in camera* court hearing to be produced or given to bodies or persons performing functions under statute which involve *inter alia* the conduct of a hearing or the adjudication of any matter. The section has clearly been drafted with a focus on material originating before the courts in *in camera* proceedings being used by bodies which are not courts for the purposes of statutory investigation or decision-making. In order to come within the section, the body or person concerned must either be performing a statutory function or be prescribed by Ministerial Order. Whilst it is likely that in exercising the jurisdiction to make order under section 27(4) of the Succession Act 1965 a High Court Judge is a "body or person" adjudicating on a matter under statute, it is not invariably the case that in exercising its full original jurisdiction the High Court would come within the terms of these sub-sections. However, in circumstances where I am satisfied that the jurisdiction being exercised for the purposes of this application can be brought within section 40, I will leave over to another case the question of whether the High Court has of its own motion an inherent power to receive material having its origin in *in camera* proceedings before the District or Circuit Court.

30. I have specifically raised the issue of whether the High Court has such an inherent power exercisable of its own motion because under section 40(8) the court with seisin of the *in camera* proceedings has a separate statutory power to order the disclosure of documents, information or evidence connected with those proceedings to third parties. Again, it seems

likely that the third parties on whom the section is focused are envisaged as legal or natural persons whose interests may be affected by the contents or the outcome of the *in camera* proceedings. This begs the question as to whether the High Court can be a *'third party'* for the purpose of the receipt of such material from another court. Again, as no order under section 40(8) has been asked of or made by the courts of trial, and the material in this application has been put before the High Court by the parties to the application it is not necessary for me to resolve this issue.

31. There is also a question as to the extent to which the permitted use of material under sub-sections (6) and (7) is dependent on the court with seisin of the case having made an order permitting the disclosure of the *in camera* material under sub-section (8). Both parties to this application have pragmatically submitted that as the High Court has full original jurisdiction under the Constitution, it can receive and use *in camera* material generated before a lower court without the formal consent of the lower court being required. Without any disrespect to the judges of the District and Circuit Courts who have seisin of these *in camera* cases, I think this must be correct. It is of course entirely appropriate that an application be made to the trial judge in circumstances where the material is being disclosed to a person who is not a judge or a body which is not court. This ensures that the trial judge can supervise the protection of the interests for which the *in camera* rule applied to the proceedings in the first place. It is not however necessary in the case of the High Court which itself has jurisdiction to consider all of the constitutional interests involved and to take steps ensure that they are appropriately protected.

32. Two factors lead me to conclude that in any event there is no mandatory obligation to have received material pursuant to sub-section (8) in order to be able to use it under sub-sections (6) or (7). Firstly, the text of the sub-sections themselves do not create such a link and, in my view, a limiting pre-condition should only be read in to the text if it were necessary to give

practical effect to the section. Secondly, the sequencing of the subsections is potentially significant as, if it were intended that material which could be used under sub-sections (6) and (7) had to be obtained through the mechanism in sub-section (8), then it might be expected that sub-section (8) would precede rather than follow sub-sections (6) and (7). Instead, it seems that section 40 establishes two different pathways through which *in camera* material might become available and be used outside the parameters of the case in which it originated. One relates to the use which might be made of the material by persons or bodies exercising particular functions and the other relates to the legitimate interest of the person to whom the material is disclosed.

33. Crucially, under sub-section (9) any hearing in which *in camera* material is to be used pursuant to sub-sections (6) or (7) must itself be conducted *'otherwise than in public'* insofar as it relates to that material. There is also a prohibition on the publication of *in camera* material released through the mechanism of sub-sections (6) or (7). Perhaps surprisingly, there are no equivalent statutory restrictions placed on material released by a court pursuant to sub-section (8). It may be that the court directing the release of such material has an implied jurisdiction to attach conditions to such release to ensure that the interest protected by the *in camera* hearing is not damaged to any greater extent than necessary to protect the legitimate interest of the party concerned.

34. Taking all of these factors into account I am satisfied, at a minimum, that when exercising its jurisdiction pursuant to section 27(4) of the Succession Act, 1965 the High Court can receive documents, information and evidence relating to in camera proceedings before the District and Circuit Courts pursuant to section 40(6) and (7) of the 2004 Act. I am also satisfied that the hearing of the application insofar as it relates to this material should be *in camera* and that there should be no subsequent publication of that material and I will make an order to this effect if required.

35. Given that the evidence before the court on this application is largely, if not exclusively, drawn from the family law proceedings between the spouses before the death of the deceased, for all practical purposes this may have the resulting *de facto* effect of the application being heard *in camera*. There is however a significant difference in principle between hearing a section 27(4) application *in camera* because the dispute between the parties has its origins in family law matters between the deceased and their spouse and hearing that application in public but continuing to afford *in camera* protection to material that originated in the *in camera* proceedings. Reverting to the principle outlined in paragraph (vii) of O'Donnell J's judgement in *Gilchrist and Rogers*, this ensures that the departure from the general principle is no more than required to protect the countervailing interest.
36. Finally, in reaching this conclusion I am conscious that the outcome largely accords with article 6.1 of the ECHR under which the protection of the private lives of parties may justify the exclusion of the press or the public from all or part of the trial.