

THE HIGH COURT

[2021] IEHC 684

[Record No. 2015/59M]

BETWEEN

C.D.

APPLICANT

-AND-

B.B.

RESPONDENT

JUDGMENT of Ms. Justice Stack delivered on the 22 day of October, 2021.

Introduction

1. This is a preliminary issue raised by the respondent by letter dated 4 June 2021, just before the substantive hearing commenced on 8 June, 2021. Legal submissions were subsequently heard on this issue and I indicated I would rule on the matter at a later date.
2. The applicant in these proceedings seeks relief pursuant to s. 194 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010. Section 194 provides:

"(1) A qualified cohabitant may, after the death of his or her cohabitant but not more than 6 months after representation is first granted under the Succession Act 1965 in respect of that cohabitant's estate, apply for an order under this section for provision out of the net estate."
3. In this case, the applicant claims to have been living together as a couple with the deceased in an intimate and committed relationship for over 30 years ending on the death of the deceased in the summer of 2011. The 2010 Act was commenced on 1 January, 2011 (art. 3(1), S.I. 648 of 2010).
4. It is common case that the applicant and the deceased did not have children together. A "qualified cohabitant" is defined by s. 172(5) of the 2010 Act, in the case of a couple without dependent children, as meaning:

"an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period – ... (b) of 5 years or more..."
5. Ryan, *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, (Dublin, Round Hall, 2011) points out (at p. 275) that a person is entitled to be treated as a qualified cohabitant only at the end of the relationship, as indicated by the use of the past tense in this definition.
6. The respondent contends that s. 194 only applies where the requisite period of cohabitation took place after the commencement of the Act. If this contention is correct, then clearly the entire application would fail *in limine* as the applicant could not show five years' cohabitation between the commencement of the Act and the death of the deceased.

7. There are two previous judgments of this court in which, as in these proceedings, the fact of the existence of the necessary intimate and committed relationship was put in issue. In both cases, *D.C. v. D.R.* [2015] IEHC 309 and *G.R. v. Regan* [2020] IEHC 89, part of the requisite period of cohabitation took place prior to the commencement of the 2010 Act. However, this issue was not raised, and consequently neither judgment constitutes a precedent which is applicable to this ruling.
8. There are two components to the respondent's argument. First, it is said that the transitional provision, s. 206, which explicitly provides that the qualifying period of cohabitation can take place prior to the commencement of the Act, on its face expressly applies only to applications under provisions of Part 15 other than under section 194. Applying the maxim *expressio unius est exclusio alterius*, this means that pre-commencement periods of cohabitation are not reckonable for the purposes of s. 194, and that s. 194 therefore does not apply to the applicant, such that these proceedings should be dismissed. Secondly, it is said that the presumption against retrospective legislation applies, such that clear statutory words are required to render pre-commencement periods of cohabitation reckonable for the purpose of an application pursuant to section 194.
9. The two arguments are, in reality, interrelated. If the common law presumption against retrospective legislation applies, then the ordinary canons of construction are modified somewhat so as to require clear provision for a right to apply for relief under s. 194 where all or part of the necessary period of cohabitation took place prior to the commencement of the Act. I will therefore consider first whether an interpretation of s. 194 which takes into account a pre-commencement period of cohabitation would bring that provision within the category of retrospective legislation. If so, it will be necessary to consider whether the presumption has been rebutted with the necessary clarity. If not, then the presumption will have no relevance to the interpretation of the relevant statutory provisions.

Whether the presumption against retrospective legislation applies

10. There is a presumption at common law that the legislature does not intend retrospective effect, but this can be displaced by clear statutory wording or by necessary implication. There is no constitutional presumption to this effect, although Article 15.5 prohibits the Oireachtas from declaring acts to be infringements of the law that were not so at the time of their commission, and legislation which retrospectively interferes with or impairs constitutionally protected rights, such as property rights, could thereby also become unconstitutional.
11. The respondent does not challenge the constitutionality of any provision of the 2010 Act although he suggests in written submissions filed for the purposes of this issue that a constitutional interpretation of the Act may require exclusion of pre-commencement periods of cohabitation from reckoning. However, I did not understand the respondent to pursue this suggestion that a constitutional interpretation of the relevant provisions required the exclusion of pre-commencement periods of cohabitation, and the argument proceeded by reference to the common law presumption only.

12. The two main authorities cited to me in support of the submission that the presumption against retrospective legislation applies were *O'H v. O'H* [1990] 2 I.R. 558 and *Hamilton v. Hamilton* [1982] I.R. 466.
13. *Hamilton v. Hamilton* was a case where the Family Home Protection Act, 1976, was enacted after the conclusion of a binding contract for the sale of land. To apply the provisions of the 1976 Act to a pre-existing enforceable contract of that kind would be to disturb the vested right of the purchaser to compel completion of the sale. As a matter of law, the contract had already, prior to the commencement of the 1976 Act, passed at least part of the beneficial interest in lands to the purchaser. On the facts of that particular case, the purchaser had in fact issued specific performance proceedings prior to the commencement of the 1976 Act, and these ultimately resulted in an order for specific performance, but it is clear from the judgments of the majority that, even without that particular circumstance, they would have required the 1976 Act to have clearly provided for the application of s. 3 of the 1976 Act to contracts executed before it was commenced.
14. It was not necessary, however, that such provision be made expressly, and it would have been sufficient for the purposes of rebutting the common law presumption if such a meaning emerged by necessary implication: see the judgment of Henchy J. at p. 484-5. This point is reiterated by the Supreme Court (per Fennelly J.) in *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64, at p. 87-8.
15. In *Hamilton v. Hamilton*, O'Higgins C.J. adopted (at pp. 473-474) a definition taken from Craies on Statute Law (7th ed., p. 387) to the effect that a statute is to be deemed to be retrospective in effect when it "takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."
16. At the hearing of the preliminary issue, counsel for the respondent was unable to point to any vested or established right enjoyed by the respondent, or indeed any beneficiary of the estate of the deceased, which might have been impaired or taken away by the application of the applicant to provision out of the estate.
17. Counsel pointed to the right of the deceased to dispose of his assets as he saw fit. However, the freedom of a testator has, at least since the commencement of the Succession Act, 1965, been subject to important restrictions, such as the legal right share of a surviving spouse, and the right of a child of a deceased to apply pursuant to s. 117 for provision out of the estate. It therefore does not seem that there is any vested right in any person to have complete freedom to dispose of their assets on death as they see fit. That freedom, if it can be regarded as a vested right of some kind, appears to be understood as a freedom which is subject to statutory regulation. It is notable that s. 194 is in similar terms to s. 117 of the 1965 Act and presumably was enacted to reflect the social reality that many couples now choose to remain unmarried, despite their commitment to each other. The freedom of the testator is a concept that has been subject to significant erosion since the commencement of the 1965 Act, in the interests of other persons to whom it is felt the testator owes a duty.

18. Separately, I would add that it is very unclear to me how the rights of a deceased person can be invoked. The purpose of the application under s. 194 is to determine, now that the deceased is no longer with us, how the assets formerly owned by him are to be distributed, having regard to his possible obligations to have provided for the applicant (if she succeeds in showing that she is in fact a "*qualified cohabitant*") in his will.
19. Insofar as reliance is placed on the rights of the ultimate beneficiaries of the deceased, only on death does the will of a deceased take effect. Up to that point, there is no vested right in any possible beneficiary and the mere drafting of a will does not even give rise to a contingent right, as wills can be revoked at any time prior to death.
20. On the facts of this case, therefore, the Act did not operate to impair or affect any existing or vested right and did not operate with retrospective effect. It was in force before the death of the deceased and therefore before his will took effect, before the property of the deceased vested in the respondent as personal representative, and before anyone could take a benefit from the deceased's estate.
21. In the circumstances, it seems to me that, merely to regard s. 194 as permitting the taking into account of pre-commencement periods of cohabitation does not mean it has retrospective effect.
22. In addition, the judgment of Barron J. in *O'H v. O'H* appears to be particularly helpful in considering this preliminary issue. That case concerned the application of s. 29 of the Judicial Separation and Family Law Reform Act, 1989. Section 29 (2) provided that certain dispositions could be set aside if they had been made for the purpose of avoiding financial relief under the Act.
23. In that case, the relevant disposition had been made prior to the commencement of the Act and Barron J. dealt with the correct interpretation of s. 29 as a preliminary issue. Barron J held that s. 29 had no application to pre-commencement dispositions as it did not expressly so provide and the presumption against retrospective legislation applied.
24. However, he drew an important distinction between "*applying the new law to past events and taking past events into account*". To do the latter, he said, is not to apply the Act retrospectively (see p. 563). He contrasted the proposed operation of s. 29 of the 1989 Act with s. 2 of the same Act, which provided for the grant of the decree of judicial separation in certain circumstances, including where there had been desertion by the respondent of the applicant for a continuous period of at least one year immediately preceding the date of the application and where the spouses had lived apart from one another for a continuous period of at least three years immediately preceding the date of the application.
25. Barron J. stated that the two sections indicated the distinction which was to be drawn between applying a new law to past events and taking past events into account. He continued (at p. 565):

"To take into account periods during which the parties lived apart and which pre-dated the date upon which the Act came into force would not be giving the Act retrospective effect. In my view such evidence is one of the requisites for applying the Act. If such facts are not taken into account, then for some time after the operative date a considerable portion of the jurisdiction created by the Act would be unenforceable."

26. In my view, s. 194 is analogous to s. 2 of the 1989 Act and insofar as pre-commencement periods of cohabitation are reckonable for the purpose of s. 194, that section is a new law which takes past events into account, rather than a retrospective provision. As such, no presumption needs to be rebutted and the Act falls to be interpreted according to the more general principles of statutory interpretation.
27. It should be noted, of course, that there is no suggestion in this case that any relationship between the applicant and the deceased ended other than on the death of the deceased which occurred some months after the commencement of section 194. On the facts of this case, therefore, a new law was enacted with effect from 1 January, 2011, which is applicable to the distribution of the deceased's estate, the death having occurred after the commencement of the Act. In my view, s. 194 does not have retrospective effect in this case and the presumption against retrospective legislation does not apply.
28. There was reference in oral argument to the possibility that, because s. 206 does not apply to applications under s. 194, such an application could be made for provision out of the estate of a deceased who died prior to commencement of the Act, and it was suggested that this would be retrospective legislation. One could certainly see a greater potential for unjust retrospective effect in such a case, and in the event (which must be increasingly unlikely, if not already theoretical at this stage) that an application is made within six months of the first taking out of representation to the estate of a person who died prior to 1 January 2011, it is entirely possible that the personal representative or other appropriate respondent will argue that the Act should be interpreted to exclude the application of s. 194 to pre-commencement deaths.
29. However, the question of whether the Act should be interpreted so that s. 194 only applied to the estates of those who died after commencement but not to those who died pre-commencement does not arise here as I am not being asked to determine whether s. 194 applies in the case of deaths which occurred prior to 1 January 2011. It is common case that the deceased died some months after commencement and therefore the only question which arises is whether the legislation may be considered to be retrospective in nature by reason of the fact that the period of cohabitation pre-commencement may be taken into account. I am satisfied that the taking into account of past events, such as a period of cohabitation occurring prior to commencement, for the purposes of determining whether a person is a qualified cohabitant does not mean that either s. 172 (5) or s. 194 is retrospective in nature.
30. I now turn to consider the interpretation of s. 194 and related provisions of Part 15 of the Act.

Interpretation of relevant provisions

31. In support of an interpretation of Part 15 of the 2010 Act which would exclude pre-commencement periods of cohabitation from reckoning in considering whether an application for relief under s. 194 is a "*qualified cohabitant*", the respondent relies heavily on s. 206, which provides:

"An order for redress referred to in section 173 shall only be made if the application for it is made with respect to a relationship that ends, whether by death or otherwise, after the commencement of this section but the time during which two persons lived as a couple before the commencement date is included for the purposes of calculating whether they are qualified cohabitants within the meaning of this Part."

32. The orders for redress referred to in s. 173 are: property adjustment orders pursuant to s. 174, compensatory maintenance orders pursuant to s. 175, and pension adjustment orders pursuant to section 187. The respondent argues that, by referring explicitly to the orders for redress referred to in s. 173, s. 206 implicitly excludes an order pursuant to s. 194. The respondent relies on *expressio unius est exclusio alterius* and contends that any period of cohabitation prior to the commencement date is excluded for the purposes of calculating whether the applicant is a "*qualified cohabitant*" within the meaning of Part 15 so as to entitle her to apply for an order pursuant to section 194.
33. The respondent concedes that it is possible that the portion of s. 206 beginning "*but the time during which... this Part*" may be read separately from the remainder of the section so that "*qualified cohabitant*" is properly interpreted for the entire of Part 15 on the basis that a period of cohabitation prior to the commencement date is reckonable. However, he says that the use of the present tense ("*they are qualified cohabitants*") excludes this interpretation.
34. By contrast, the applicant says s. 206 is not relevant to the proper interpretation of s. 194, and that the natural and ordinary meaning of s. 172 (5) is sufficiently clear to include pre-commencement periods of cohabitation, such that it is not necessary to have recourse to section 206.
35. In construing any particular provision of Part 15, I am required to look first at the literal meaning of that provision, but if it is obscure or ambiguous, or if a literal meaning would give rise to an absurdity or would fail to reflect the plain intention of the Oireachtas, I can proceed to give effect to that intention, where it can be ascertained from the Act as a whole: s. 5 of the Interpretation Act, 2005.
36. In my view, the respondent has misconstrued the meaning and effect of the use of the present tense in section 206. As pointed out above, the definition of "*qualified cohabitant*" itself uses the past tense. A person is a qualified cohabitant in the present time, with the right to see various types of redress under Part 15 of the Act, if, in the past, he or she cohabited for the requisite period of time with another person with whom he or she was in a committed relationship. A "*qualified cohabitant*" enjoys a present right to make various

applications under the Act based on past relationship history. The use of the present tense in s. 206 therefore, refers to that present right to apply for redress and not to a continuing relationship status, and does not support the respondent's argument.

37. In my view, the reason why s. 206 does not refer to s. 194 is because Part 15 is treating the right to apply for redress against a former cohabitant during the lifetime of that cohabitant differently from the right to seek redress pursuant to s. 194. Section 195 draws a distinction between applications under s. 173 (6) and s. 194 and all other applications under Part 15, by providing that proceedings under all of the other provisions of Part 15 shall, save in exceptional circumstances, be instituted within two years of the time that the relationship between the cohabitants ends, whether through death or otherwise. Section 173 (6) relates to applications to suspend, vary or discharge orders already made under s. 175 or 187, and therefore the time limit for those applications could not be applied to applications under s. 173(6). More pertinently for this discussion, s. 195 clearly excludes applications under s. 194 from the general time limit provided for therein.
38. However, s. 194 contains its own time limits. First, no application may be made more than six months from the first grant of representation in respect of the deceased cohabitant's estate: s. 194 (1). That time limit was observed in this case as the first grant of representation was extracted on 29 April 2015 and the proceedings were instituted by special summons issued on 23 October 2015.
39. In addition, s. 194 (2) provides that no application may be made pursuant to s. 194 (2) where the relationship concerned ended two years or more before the death of the deceased, subject to certain exceptions including where the "*qualified cohabitant*" applied for orders for redress within the meaning of s. 173 within two years of the relationship ending. The applicant is not precluded by s. 194 (2) from maintaining these proceedings because she asserts a relationship which ended on death.
40. It seems to me that the primary purpose of the Oireachtas in enacting s. 206 was to specify that applications for redress within the meaning of s. 173 could only be made where the relationship ended (whether by death or otherwise) after commencement, rather than to specify that pre-commencement periods of cohabitation was reckonable for the purpose of establishing that an applicant for such redress was a "*qualified cohabitant*" within the meaning of section 172(5). On its plain meaning, that is its principal purpose, and the reference to pre-commencement periods of cohabitation is in the nature of a saver or a clarification to ensure that, while the relationship must have ended after commencement, cohabitation prior to 1 January, 2011 is reckonable in considering whether the applicant is a qualified cohabitant.
41. The absence of any reference in s. 206 to s. 194, therefore, does not mean that the saver or clarification about pre-commencement cohabitation does not apply to applications under s. 194 (as the respondent contends) but that the saver or clarification does not need to be provided for explicitly because s. 206 does not deal with the issue of whether an applicant can seek relief under s. 194 where the death occurred prior to the

commencement. As I understood the applicant's argument, relying on the passage from Maxwell on Statutes (7th ed., p. 268) cited in *Inspector of Taxes v. Arida Ltd.* [1992] 2 I.R. 155, at p. 159, she contended that this clarification was no more than a superfluous restatement of the correct interpretation of the definition of "qualified cohabitant". Based on authorities such as *O'H v. O'H.*, s. 172 (5) should be interpreted to include pre-commencement periods of cohabitation and the saver or clarification in s. 206 was an arguably unnecessary restatement of that position.

42. As already stated, whether this has the necessary implication that an application pursuant to s. 194 is possible where the death occurred prior to 1 January 2011 is not something I have to decide and, if a suitable case arises in the future, it may be that the presumption against retrospective legislation would require Part 15 to be interpreted to mean, notwithstanding the exclusion of s. 194 from s. 206, that an application pursuant to s. 194 would not be possible where the relevant death occurred prior to 1 January 2011.
43. As already set out, I do not have to determine that issue as it does not arise in this case. However, I would simply note that the seeming lack of any temporal application on the operation of s. 194 is negated by the requirement to apply within six months of the first grant of representation. Although it is possible (as indeed occurred in this case) that there could be a delay of several years between death and the first grant of representation, such that an application pursuant to s. 194 might still be made even though the relevant death occurred prior to 1 January 2011, proper consideration of that issue should await any case in which it might arise, albeit that such a case presumably becomes more and more unlikely as time passes.
44. It seems that, where the relationship between the cohabitants ends on death, s. 194 applications principally become time barred by reason of the six month time limit in section 194 (1) which, in the ordinary course of events, should ensure that the potential retrospective reach of s. 194 is limited by the fact that first representations are ordinarily taken out within a few years of the date of death and therefore the six month time limit in s. 194 (1) means that, regardless of whether the Oireachtas intended that s. 194 would apply even in the case of pre-commencement deaths, it will not, in practice, apply to the vast majority of the estates of deceased persons who died prior to 1 January, 2011.
45. But all of those comments on whether a s. 194 application could be made in respect of the estate of a deceased who died prior to 1 January 2011 are entirely *obiter* and the key point for this ruling is that I do not agree that s. 206 implicitly excludes pre-commencement periods of cohabitation from reckoning in considering whether an applicant is a "qualified cohabitant" for the purposes of section 194.
46. For her part, the applicant relies on the natural and ordinary meaning of s. 172 (5), but I do not think this assists me too much other than that it allows me to say that the construction contended for by the applicant is open on the words of the provision.
47. However, what is notable about s. 172 (5) is that it gives a single interpretation of "qualified cohabitant" for the purposes of Part 15. It does not provide for alternative

interpretations depending on whether the redress referred to in s. 173 is sought, or whether relief pursuant to s. 194 is sought. This suggests to me that what I have regarded as a clarification or saver in s. 206 as regards applications for redress referred to in s. 173 is exactly that: a clarification that the general position pertaining throughout Part 15 applies as regards reckoning the period of cohabitation, even though the section expressly limits the availability of the redress referred to in s. 173 to situations where the relevant relationship ends after commencement of the Act.

48. In considering whether the interpretation contended for by either party on this issue would create an absurdity which should be avoided, I also think it is material that s. 194 (2) makes specific provision for what is to occur where a relationship ends prior to death, and, in particular, creates exceptions to the general prohibition on making a claim pursuant to s. 194 where the relationship had ended more than two years before death. Those exceptions include situations where the applicant was in receipt of periodical payments from the deceased under s. 175 or had (subject to certain qualifications which it is not necessary to set out here) made an application for an order under ss. 174, 175 or 187.
49. As it is clear from s. 206 that an application for orders under ss. 174, 175 and 187 can take into account pre-commencement periods of cohabitation, s. 194 (2) cannot operate in any sensible way if the respondent is correct in saying that such periods of cohabitation cannot be taken into account for the purposes of s. 194. Section 194 (2) recognises that, where a committed relationship breaks down, it may be necessary for one party to seek redress pursuant to section 174, 175 or 187 during the lifetime of the other party, followed by, on the death of that other party, an application pursuant to section 194.
50. The Oireachtas must therefore have intended that some cohabitants who had previously applied for orders under s. 174, 175 or 187, should then be entitled to apply pursuant to s. 194 on the death of their former cohabitant. We know from s. 206 that pre-commencement periods of cohabitation may be relied upon in applications for orders under s. 174, 175 or 187, and therefore at least some of the "*qualified cohabitants*" who had applied for those orders during the lifetime of the deceased will qualify on the basis of pre-commencement periods of cohabitation. Nevertheless, s. 194 (2) anticipates such applicants then going on to apply for provision out of the estate of the deceased. This necessarily implies that pre-commencement periods of cohabitation may be reckonable for the purposes of an application under s. 194.
51. I therefore agree with the applicant that she may rely on pre-commencement periods of cohabitation for the purpose of bringing herself within the definition of "*qualified cohabitant*" in s. 172 (5) and is therefore entitled to make an application under section 194. I further agree with the applicant's submission that the respondent's suggested interpretation of the Act would have resulted in s. 194 of the Act not operating at all for a period of at least two and, in the case of couples without children, five years after commencement, which could not have been intended, and I note that a similar contention as regards s. 2 of the 1989 Act was rejected in *O'H v. O'H*.

Conclusion

52. In my view, therefore, a person may be a "*qualified cohabitant*" within the meaning of s. 172 (5) and for the purposes of s. 194 of the 2010 Act where some or all of the period of cohabitation relied upon took place prior to the commencement of the 2010 Act.