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Re H in the Court of Appeal

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Kate Selway QC has a wide ranging and highly successful commercial and traditional chancery practice. Her core areas of practice are trusts; all aspects of real property, and landlord and tenant; wills, probate and the administration of estates; charities; Court of Protection; and professional negligence.

Non-spousal family provision claims and CFA success fees: What will the Court of Appeal decide?

The Court of Appeal will soon give judgment on a point that, surprisingly, has not been considered at appellate level before now. Put simply, is a judge hearing a non-spousal claim for reasonable provision under the Inheritance (Provision for Family and Dependants) Act 1975 entitled to take into account, and make provision for, an applicant's indebtedness to her lawyers for a CFA success fee when making an award?

The case of *Re H* [2020] EWHC 1134 (Fam) was heard remotely by Cohen J in April 2020. At the time, Sheila, the applicant, was aged 50 and of limited means. She had a partner and two daughters under the age of ten. She had suffered significant mental health problems since at least the age of 30 and had not worked since the birth of her second daughter in 2014. She had become estranged from her parents in 2010. Sheila's father died in a house fire in 2016, after which her elderly mother, Nalini, moved permanently into residential care at an annual cost of £52,000.

Nalini inherited her late husband's entire estate. Certain joint assets passed to her by survivorship: the family home worth around £700,000 and joint bank accounts containing £127,000. At the time of the hearing, the deceased's free estate (net of expenses and executor's costs) otherwise consisted of £142,000 in cash.

Nalini filed no evidence in response to Sheila's claim and due to multiple breaches of orders to file acknowledgement of service and evidence was debarred from participating in the remote hearing. She attended but could not hear the proceedings, due to her profound deafness, although she did receive some assistance from one of the care home workers who passed her notes during the hearing. Nalini was then aged 79, frail and in deteriorating health.

Sheila had entered into a CFA for all her legal expenses incurred from a particular date, which included an agreement that her lawyers should have an uplift of 72% in the event that her claim succeeded. At the hearing that success fee was quantified at £48,175. Sheila claimed that this sum should form part of her award for reasonable provision. Two authorities on the point were cited to the judge: *Re Clarke* [2019] EWHC 1193 (Ch), a decision of Deputy Master Linwood, who declined to take a success fee into account as matter of principle; and an unreported decision in the Leeds County Court, *Bullock-v-Denton*, decided only days before the Re H hearing, in which provision for partial payment of a success fee did form part of the court's award (although it appeared that *Re Clarke* was not cited to the county court judge).

In *Re H*, Cohen J decided that reasonable provision had not been made for Sheila. On the assumption that his award would bring about the operation of the uplift, he also decided that it would be fair to take account of and make provision for at least some element of the success fee given that it was a liability Sheila owed to her solicitors which could not be recovered as part of any costs award from the other parties. The judge considered, however, that the success fee was set too high ("I cannot envisage how it could reasonably be thought that the chance of failure was a high chance") and so allowed a sum of £16,750, or roughly 25% of the uplift. This formed part of a total award of £138,918, the bulk of which met an income need, but which also included capital sums for replacement white goods and a possible future rental deposit.

Nalini sought permission to appeal on various grounds and was granted permission on two: whether a non-spousal award under the 1975 Act may properly include a sum referable to an applicant's liability for a success fee; and whether the court's decision to proceed with a remote hearing denied Nalini a fair hearing, given her disability and residence in a care home.

The "success fee" ground of appeal

Given the court's reasoning in the *Re Clarke* case, and Cohen J's decision not to follow that authority, it seems likely that the main point for the Court of Appeal to resolve will be the apparent tension between the provisions of the 1975 Act on the one hand, and s. 58A(6) of the Courts and Legal Services Act 1990. The latter provision states that "[a] costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement".

In *Re Clarke* the court took the view that to include provision for the payment of a success fee in an award under the 1975 Act would be contrary to legislative policy that the losing party should not be responsible for a success fee. But can that be the correct analysis? Is it really right to say that an award under the 1975 Act which includes a sum directly referable to an applicant's liability for a success fee subverts the intention of Parliament? After all, an award under the 1975 Act is for an applicant's reasonable financial provision; it is not in itself a costs order.

Section 3(1) of the 1975 Act requires the court to have regard to an applicant's current and likely future "financial needs" as part of the exercise in deciding whether, and if so what, reasonable provision should be made for a non-spousal applicant seeking an award. The phrase "financial needs" is not circumscribed in any way by the 1975 Act (and in *Illott-v-Mitson* [2012] 2 FLR Black LJ emphasised the impermissibility of putting a gloss on the clear words of the statute). An applicant's financial needs will be a question of fact in any given case. Surely, therefore, an applicant's liability for a success fee is properly to be considered, indeed must be considered, by the court as part of that applicant's financial needs.

Having identified an applicant's financial needs, and also considered the other section 3 factors as part of the statutory exercise, the court must then consider what, if anything, an applicant should receive as "reasonable provision". It is well settled law that while non-spousal claims must be limited to what it would be reasonable for an applicant to receive for their maintenance, that term has a broad meaning. As Goff LJ said in *Re Coventry* [1980] 1 Ch 461, "What is proper maintenance must in all cases depend upon all the facts and circumstances of the particular case being considered at the time."

This broad interpretation was endorsed by Lord Hughes in *Illot-v-The Blue Cross* [2018] AC 545 who said that the concept of

maintenance "must import provision to meet the everyday expenses of living". It has been clear since at least *Re Dennis, decd* [1981] 2 All ER 140 that provision for maintenance might in principle be by way of a lump sum and that payment of existing debts might be appropriate as a maintenance payment. The key justification for this is that where an applicant has no other means to discharge a debt other than from income, that may have a detrimental effect on their ability to pay their every day living expenses.

It is difficult to see that merely because a particular indebtedness relates to an applicant's liability for legal costs the court should be precluded from taking it into account. After all, interim orders under s. 5 of the 1975 Act may be made for the purpose of enabling an applicant to pay legal costs (see for example *Smith-v-Smith* [2012] 2 FLR 230 at [41] per Mann J).

No doubt the scope of the arguments before the Court of Appeal will be broader than those rehearsed here, and it will be interesting to see what the court makes of the "fair hearing" ground of appeal in circumstances where the appellant's own persistent procedural default was the direct cause of her non-participation.

Nevertheless, it seems altogether unlikely that the Court of Appeal will decide that s. 58A(6) of the Courts and Legal Services Act 1990 circumscribes the Court's discretion to decide what reasonable financial provision may mean in any given case where an applicant is liable to pay a success fee.

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