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Hirachand v Hirachand

[2021] EWCA Civ 1498

26 October 2021

Kate Selway QC and Sophia Rogers

Re H [2020] EWHC 1134 (Fam)

Facts

- Deceased father left estate to wife
- Had 2 children (C and brother)
- C's circumstances:
    - 50 years old
    - 2 children
    - Financial needs – housing, reliant on state benefits, income shortfall
    - Severe mental health disorders – Other Specified Dissociative Disorder and OCD
    - c. 10 year estrangement, albeit parents financially supported her until the age of 30 and for a further period between 2007-2011

Re H [2020] EWHC 1134 (Fam)

Facts

D's circumstances:

- c.80 years old
- Profoundly deaf
- Resides in a care home
- Ill-health

D subject to sanctions:

- Previously represented
- Declared to be automatically debarred from participating in the hearing and from relying on written evidence (CPR 8.4 and 8.6)

Re H [2020] EWHC 1134 (Fam)

Net estate

If power under section 9 of the 1975 Act exercised:

- Deceased's severable share of the family home - £350,000
- Deceased's share of money in joint accounts £63,000
- Money in sole name - £141,000

Total - £554,000

Re H [2020] EWHC 1134 (Fam)

Cohen J:

Priorities:

- D being able to meet care home costs for rest of her life
- C having been financially independent of parents
- Estrangement
- C's priority need is to get well again – to recover health and be financially supported over the 3 years that is likely to take

Re H [2020] EWHC 1134 (Fam)

Cohen J:

Total award - £138,918

- Lump sum for 3 years of therapy and psychiatric oversight
- Lump sum to cover income shortfall over those 3 years
- Lump sum for top up for loss of universal credit over those 3 years
- Lump sum for replacement white goods and car upgrade
- £10,000 towards rental deposit
- £16,750 as 25% CFA uplift

To extent necessary, section 9 power exercised to facilitate provision.

Re H [2020] EWHC 1134 (Fam)

Cohen J:

CFA success fee issue:

- The other party to litigation cannot be ordered to pay the uplift by costs order - Section 58A(6) Courts and Legal Services Act 1990:

  '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.'

- *Re Clarke* [2019] EWHC 1193 and 1194 (Ch) – Deputy Master Linwood

- *Bullock v Denton* (unreported, Leeds County Court, 15 April 2020) – HHJ Gosnell

Re H [2020] EWHC 1134 (Fam)

Cohen J:

> 'I accept that it is appropriate for me to consider this liability as part of C's needs. I do so largely for case specific reasons. I am not making a large award (unlike in Re Clarke). It is not an award that permits of much elasticity. If I do not make such an allowance one or more of C's primary needs will not be met. The liability cannot be recovered as part of any costs award from the other parties. The liability is that of C alone. She had no other means of funding the litigation. ….
>
> [I]t would not be fair on C for me to ignore completely her liability to her solicitors. But, I recognise that there is a risk of injustice to the estate, in particular if an appropriate Part 36 offer had been made…'

Re H [2020] EWHC 1134 (Fam)

Cohen J:

> 'I cannot see how I can avoid some potential (and it is only potential) injustice to either C or the estate. All I can do is mitigate the potential by taking a cautious approach towards this liability…. I propose to allow the figure… of £16,750, which approximates to a 25% uplift.'

Re H [2020] EWHC 1134 (Fam)

Briggs J in *Lilleyman v Lilleyman* [2012] 1 WLR 2801:

'I must in concluding express a real sense of unease at the remarkable disparity between the costs regimes enforced, on the one hand for Inheritance Act cases (whether in the Chancery or Family Divisions) and, on the other hand, in financial relief proceedings arising from divorce. In the latter, my understanding is that the emphasis is all on the making of open offers, and that there is limited scope for costs shifting, so that the court is enabled to make financial provision which properly takes into account the parties' costs liabilities. In sharp contract, the modern emphasis in Inheritance Act claims…'

Re H [2020] EWHC 1134 (Fam)

Cohen J:

> ‘The judge [Briggs J in Lilleyman] then went on to observe that the potential for negotiation offers to undermine a judge’s attempt to meet needs is a disadvantage to the sole litigation costs regime. It was, of course, for that main reason that the making of Calderbank offers in matrimonial financial remedy cases was outlawed.’

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Court of Appeal

Ground 1:

'The Court erred in proceeding with a trial by video-link, when by reason of [D's] disability (profound deafness) and residence in a care home (closed to outside visitors due to the Covid-19 Crisis), the [D] was effectively denied access to the trial…'

Ground 2:

'The Court erred in law when it made an order for financial provision in favour of [C] which included a sum of £16,750 as a contribution towards [C's] liability to pay a CFA uplift.'

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Ground 1:

- D argued that:
  - the judge should have adjourned the hearing to a future date for an 'in court' hearing and she could be provided with some support additional to that the care home staff had given her
  - her attendance must be 'meaningful'
  - She should have been able to make submissions in respect of the costs order. There should be a retrial of the costs and CFA issues
- C relied on authorities on vulnerable and disabled litigants incl. CPR PD 1A- Participation of Vulnerable Parties and the Equal Treatment Bench Book, and the actions of the judge and C's solicitors in affording D opportunity to attend

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Ground 1 - Dismissed

- CA considered authority on management of cases involving profoundly deaf individuals

'No merit in the ground [re attendance by video link]. In that respect, [D] was in no worse a position than thousands of other people who… had to conduct their cases remotely.

…debarring orders should mean what they say and that a litigant who is debarred as a consequence of their own failure to comply with the rules cannot expect nevertheless to be entitled to have made available to him or her all the proper and carefully developed protections which have been put in place over the years to ensure that a participating party can put their case effectively. … there is no obligation on a court to proactively manage the attendance of a debarred party, although it is a matter for a judge whether or not to grant any request… for special measures or to address the court.'

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Ground 2 – the CA:

- Noted that a succession of cases have emphasised not only that maintenance should not be defined too prescriptively for the purposes of the Act, but also that the payment of debts form a legitimate part of a maintenance award (*Ilott v Blue Cross (No 2) [2018] A..C. 545)*

- Section 3(1)(a) requires the court to 'have regard to… the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future'

- The term 'financial needs' is unqualified and unlimited and can include payment of a debt

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Ground 2 – the CA:

- Considered:
  - the two conflicting authorities – *Re Clarke* and *Bullock v Denton*
  - the dicta of Briggs J in *Lilleyman* and
  - drew comparisons to financial remedy proceedings on divorce – in particular noted that in a financial remedy case, outstanding costs which could not otherwise be recovered as a consequence of the 'no order principle' are capable of being a debt, the repayment of which is a 'financial need' pursuant to section 25(2)(b) MCA 1973.

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Ground 2 – the CA:

King LJ at [58]-[59]:

> ‘In my judgment a success fee, which cannot be recovered by way of a costs order by virtue of section 58A(6) CLSA 1990, is equally capable of being a debt, the satisfaction of which is in whole or part a ‘financial need’ for which the court may in its discretion make provision in its needs based calculation.
>
> ….

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Ground 2 – the CA:

… Having said that I should make it clear that it will by no means always be appropriate to make such an order. It is unlikely that an award will include a sum representing part of the success fee unless the judge is satisfied that the only way in which the claimant had been able to litigate was by entering into a CFA arrangement and consideration will no doubt be given of the extent to which the claimant has 'succeeded' in his or her claim. Further, an order will only be made to the extent necessary in order to ensure reasonable provision is made.'

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Ground 2 – the CA:

King LJ at [63]:

'I am conscious, as was the judge, of the difficulty identified by Briggs J in *Lilleyman*, namely of the potential for undisclosed negotiations to undermine a judge's efforts to make appropriate provision under the Inheritance Act. The civil litigation costs regime, unlike the approach in financial remedy cases, means that there is the potential for a situation where a claimant is awarded a contribution to her CFA uplift but is subsequently ordered to pay the Defendant's costs of the claim where, for example the claimant won overall but failed to beat a Part 36 offer.

….

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Ground 2 – the CA:

King LJ at [63]:

> however this is likely to be less of a risk than might be thought at first blush to be the case given that under many CFAs the claimant is obliged to accept any reasonable settlement offer or an offer above a specified threshold or risk the solicitors withdrawing from the CFA. Conversely a success fee is frequently not payable in the event that the claimant, on advice, rejects a Part 36 offer or other relevant settlement offer but subsequently fails to beat that offer at trial.'

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