



## CFA Uplifts in Inheritance Act Claims: recent developments

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**Elis Gomer**

**St John's Buildings**

Conditional fee agreements have been a facet of contentious probate and estates litigation for many years and are, in many cases, the only realistic way for disappointed beneficiaries to fund litigation. This is particularly true of claims under the Inheritance (Provision for Family and Dependents) Act 1975.

Until recently, it was accepted that successful claimants who brought claims under the 1975 Act with the benefit of a CFA – like any other claims brought following the coming into force of sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)<sup>1</sup> on 1 April, 2013 – were limited to recovering their base costs from the defendants to the litigation, and that the success fee payable under the CFA was a liability that the claimant would have to pay from their own pocket.

This view is entirely understandable. There was no exception in LASPO for claims under the 1975 Act and no other indication that the success fee could be recovered in any other way. It is perhaps regrettable that the reforms brought about by LASPO – focused as they were on lower-value personal injury litigation – did not consider the impact of abolishing recovery of success fees in a jurisdiction which is focused on making provision for a claimant's financial need based on the Court's assessment of it, as opposed to compensating him for a defined loss without specific reference to the claimant's specific financial position.<sup>2</sup>

This gives rise to the obvious problem that successful 1975 Act claims, if brought on a CFA which has a success fee, will involve the Court making provision for the claimant based on its assessment of his financial need only for a part of that award (frequently a large part, if the case runs to trial) to be lost in order to satisfy the success fee. I have frequently been involved in 1975 Act cases where the point is made that it will be pointless for the claimant to litigate a case to trial, as his liability for the success fee will exhaust any award that he could expect; I have also seen the fraught negotiations that can often happen when the claimant – whose negotiating position has been brought about by his solicitors' handling of the case – demands that they take a 'haircut' on their fees before agreeing to settle the case.

As stated by Briggs J (as he then was) in his costs judgment in Lilleyman v Lilleyman [2012] 1 WLR 2801:

*“26. 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 contrast, the modern emphasis in Inheritance Act claims, like other ordinary civil litigation, is to encourage without prejudice negotiation*

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<sup>1</sup> Amending section 58 of the Courts and Legal Services Act 1990.

<sup>2</sup> This is an oversimplification and does not take into account the (often very complex) assessment of needs which feature in serious injury cases. Nevertheless, the point is that a particular severity of physical injury would attract the same level of general damages for a particular claimant regardless of that claimant's financial means.

*and to provide for very substantial costs shifting in favour of the successful party. Yet at their root, both types of proceedings (at least where the claimant is a surviving spouse under the Inheritance Act) are directed towards the same fundamental goal, albeit that the relevant considerations are different, and that there is the important difference that one of the spouses has died, so that his estate stands in his (or her) shoes.*

This is, as a matter of logic, clearly correct. Briggs J commented in his substantive judgment that it was likely to be “unrealistic in the real world” to ignore the claimant’s costs liabilities when assessing needs. Judges in the financial remedy jurisdiction have long had the power to adjust their division of the marital assets in order to take costs into account where to overlook them would run the risk of frustrating the Court’s assessment of the parties’ financial needs.

In light of that, it is perhaps unsurprising that three recent cases have grappled with the question of whether it is possible to include the claimant’s liability under the CFA uplift as a ‘financial need’ within the context of claims under the 1975 Act.

The first in time was *Re Clarke* [2019] EWHC 1193 and 1194 (Ch), a decision of Deputy Master Linwood sitting in the Chancery Division in a 1975 Act claim brought by the deceased’s widow. The judge declined to accede to the successful claimant’s request that he increase his award to include the success fee due pursuant to the CFA on 5 grounds (at paragraph 196):

- i. The calculation of damages is a matter of procedure carried out before costs are considered. It has never included an element of costs;*
- ii. To permit [the interpretation sought by the claimant] would be contrary to legislative policy that the losing party should not be responsible for a success fee – s.58A(6) Courts and Legal Services Act 1980;*
- iii. It would amount to an increase in damages by way of costs;*
- iv. It may put a CFA funded litigant in a better position in terms of negotiation due to the risk of a substantial costs burden; and*
- v. It would put a claimant in Inheritance Act proceedings in a better position than, say, a claimant in a personal injuries claim.*

Leaving aside the slight non sequitur of the references to ‘damages’ – provision ordered under the 1975 Act is not an award of damages nor is it compensatory in any conventionally understood sense – the reasoning of Deputy Master Linwood can probably be said to represent the understanding of the majority of the profession until recently. It is, however, notable that the judgment does not attempt to address the dichotomy that his assessment of the provision for the claimant’s reasonable needs would be subverted by the uplift.

The cat was put among the pigeons by HHJ Gosnell, sitting in the Leeds County Court, in his judgment in the case of *Bullock v Denton and anor* (unreported; 15 April, 2020).<sup>3</sup> In that case (brought by a dependant of the deceased) the successful claimant had entered into both a Damages Based Agreement (DBA) with her first set of solicitors and a Conditional Fee Agreement with her second solicitors and arguably might be liable under both agreements. The judge disregarded the potential DBA liability and considered the CFA. In that case there was a success fee representing a 50% uplift on costs which as at 7 June 2019 (i.e. almost a year before trial) stood at approximately £24,000 + VAT with a substantial (but unquantified) increase as a result of the trial. The judge allowed a figure of £25,000 in total in respect of the CFA by way of contribution. That was added to the claimant's award.

As HHJ Gosnell put it (at paragraph 94):

*In my view, I am entitled to take [the liabilities] into account, both because they fall within the Claimant's financial needs under section 3(1)(a) and because they are debts incurred since the death and the court is enjoined to make the assessment under the Act at the date of trial, not at the date of death (section 3(5)). I am sympathetic to the Defendant's argument that these are not costs that could in law be awarded against the Defendant, but I think I have to look at the reality of the situation or as Briggs J. put it "in the real world". If I make no award under this head of claim the Claimant will have a substantial debt that she could only pay out of the other lump sum awards I have made. There may be very little left in the light of the fact that I have only awarded a life interest in her accommodation. When assessing what would amount to reasonable financial provision for her maintenance, I felt she was entitled to have her accommodation needs met and for her to be placed in a situation where she could manage afterwards an independent yet modest lifestyle. If no award at all is made this overall aim is placed in jeopardy.*

It would seem that HHJ Gosnell did not have the decision in *Re Clarke* cited to him (see paragraph 91) and it has been suggested, given that a decision of the High Court would normally bind the County Court, that *Bullock v Denton* was decided per incuriam. It is clear that it was pointed out to HHJ Gosnell that the success fee could not be recovered following LASPO and it was submitted by counsel for the defendants that allowing the liability to be recovered as part of the claimant's reasonable needs would be wrong. HHJ Gosnell cited Briggs J's judgment in *Lilleyman* (quoted above) in support of his argument.

Whilst HHJ Gosnell's judgment in *Bullock v Denton*, as an unreported County Court decision, might have had a limited impact in normal circumstances, it is clear that it was cited in the even more recent case of *Re H (deceased) [2020] EWHC 1134 (Fam)*, an adult child claim brought in the Family Division and heard by Cohen J. In the relevant part of the judgment (paragraphs 50-60), Cohen J stated that he would "adopt the same approach as HHJ Gosnell" and found that it was open to him to award a sum in respect of the success fee as part of the claimant's reasonable needs. He said (at paragraph 55):

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<sup>3</sup> I am grateful to Adam Draper of Shoosmiths LLP, who represented the successful Claimant, for providing me with a copy of the judgment.

*“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.”*

He accordingly awarded the claimant a sum equivalent to a success fee of 25%, which he assessed as a reasonable success fee percentage in the circumstances.

This is a High Court authority that will be binding on the County Court and any decisions in the High Court heard by a Master or District Judge. It has the potential to be highly influential. Many 1975 Act cases are brought on CFAs, and whilst it is clear from Cohen J’s judgment in Re H that the question of whether to award a sum in respect of the success fee will depend on the facts of the case, the general principle is now beyond doubt: it is open to the Court to make an award in respect of a CFA uplift if it considers that not doing so would subvert its assessment of the claimant’s reasonable needs, just as it is open for the Court to do so in appropriate matrimonial cases. The likely impact on solicitors’ risk assessments, and their quantification of their clients’ claims in light of this decision, will be considerable.

**ELIS MEREDYDD GOMER**

**St John’s Buildings**

**Manchester / Chester / Liverpool / Sheffield**

**clerk@stjohnsbldings.co.uk**

**01244 323070**