Success fees in 1975 Act claims: SH v NH [2020] EWHC 1134

The Family Division has determined that a claimant’s success fee should be awarded to her as part of her award under the Inheritance (Provision for Family and Dependants) Act 1975.

The facts are unexceptional. The claimant claimed against the estate of her late father, and against her elderly mother as the sole beneficiary of his estate. The mother did not defend the claim. The claimant had been estranged from her parents for many years, and suffered various health issues. She asked for a home, a capital sum to cover expenditure and various other sums that would have extinguished the net estate entirely. She also owed her solicitors £84,729 in fees, plus a success fee (if the claim succeeded) of a further £48,175 and asked for the latter sum to be added to her award.

Cohen J held that the priority must be to ensure that the mother had sufficient funds to be maintained adequately for the rest of her days, but also that the will failed to make reasonable provision for the claimant. Before determining what award to make he considered whether he should take account of the claimant’s liability to pay her solicitors a success fee.

Dealing with the uplift, he held that as a matter of law the mother could not be ordered to pay the uplift. Previous authority in Re Clarke [2019] EWHC 1193 (Ch) held that it would be contrary to the policy of the legislation on success fees to allow them to be recovered ‘by the back door’. Nevertheless, Cohen J held that he could take the claimant’s success fee liability into account. If he did not do so, part of the claimant’s needs would not be met. Adopting the reasoning of HHJ Gosnell in Bullock v Denton (unreported, but decided 9 days earlier in Leeds CC, 15 April 2020), Cohen J decided he should include in his award the sum of £16,750, being 25% of the claimant’s uplift liability, commenting that this reflected his assessment of a reasonable uplift. The court ultimately made an award of £138,918, declining the most substantial part of the claimant’s claim to a new home.

Comment: Costs in 1975 Act claims are an anomaly, and this decision flies in the face of the policy behind the rule changes in 2013. Although the rules prevent the recovery of success fees from opposing parties, it now appears that the court may permit them to be recovered as part of the award made under the 1975 Act. This will doubtless encourage more claimants to enter into CFAs at the expense of estates and defendants, where parliament has dictated that such costs should be borne by claimants. A claimant in a 1975 Act is not in such a different position to one in a personal injury claim, yet the rules for the two have now diverged without much principle basis.

In contrast to matrimonial cases, Part 36 and Calderbank offers can still be made in 1975 Act claims, so there is always a risk that the claimant’s award will be reduced or extinguished by an adverse costs order, and there is nothing the court can do to guard against this without a change in the rules. I would expect this decision to come under the scrutiny of the Court of Appeal in due course.