Neutral Citation Number: [2021] EWHC 2846 (Ch)

Case Nos: H30MA040

IN THE COUNTY COURT AT MANCHESTER
BUSINESS AND PROPERTY COURT WORK
PROPERTY TRUSTS AND PROBATE LIST

Manchester Civil Justice Centre
1 Bridge Street West, Manchester M60 9DJ

Date: 21 October 2021

Before :

HHJ CAWSON QC

- -

Between :

BARRIE RICHARD MARC HIGGINS	**Claimant**
- and -	
(1) ANDREW PHILIP MORGAN (as former administrator ad colligenda bona of the estate of Stewart Neville Higgins, deceased)	
(2) ROGER WHINFREY (as administrator and beneficiary of the estate of Stewart Neville Higgins, deceased)	
(3) ADRIAN WHINFREY	
(4) COLIN MOODY	
(5) GLEN MOODY	
(6) JOSEPHINE DEVLIN	
(7) ROY DEVLIN	
(8) LOUISE DEVLIN (as personal representative of the estate of Patricia Devlin, deceased, whose estate are beneficiaries of the estate of Stewart Neville Higgins, deceased)	**Defendants**

- -
- -

ELIS GOMER (instructed by **Myerson Solicitors LLP**) for the **Claimant**
GLENN WILLETTS (instructed by **Dilwyns**) for the **Defendants**

Hearing dates: 21 and 22 September 2021

- -

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ Mark Cawson QC

Introduction

1. This is a claim brought by the Claimant, Barrie Richard Marc Higgins ("**Mr Higgins**"), under the Inheritance (Provision for Family and Dependents) Act 1975 ("**the 1975 Act**"). Mr Higgins brings the claim as a person falling within s. 1(1)(d) of the 1975 Act, that is as a person who, although not a child of the late Stewart Neville Higgins ("**the Deceased**"), was treated by the Deceased as a child of the family. It is not in dispute that Mr Higgins has standing to bring the claim on this basis.

2. Mr Higgins' mother, Joan Higgins, married the Deceased in 1986, when Mr Higgins was nine years old. Thereafter, Mr Higgins, together with his mother and sister, Heather, moved to live with the Deceased. The Deceased, who had no children of his own, treated Mr Higgins and Heather as his children.

3. Mr Higgins' mother left the family home in 1992, when Mr Higgins was 15, and subsequently divorced the Deceased. Mr Higgins and Heather remained living with the Deceased.

4. Mr Higgins subsequently married and left home. Mr Higgins is now married for the third time, and lives in France.

5. The Deceased died on 23 July 2017 aged 59, intestate, despite, according to Mr Higgins, having told Mr Higgins that he had made a will providing for him. Neither Mr Higgins nor Heather, not being biological children of the Deceased, take on his intestacy. Rather, the effect of the intestacy is that the Deceased's estate falls to be divided between six cousins of the Deceased and the estate of the further cousin who has died.

6. The First Defendant, Andrew Philip Morgan ("**Mr Morgan**"), is the former personal representative of the estate of the Deceased pursuant to a Grant ad colligenda bona granted on 1 June 2018, and is a partner at Dilwyns Solicitors, who also represent the Second to Eight Defendants. The Second to Seventh Defendants are cousins of the Deceased, and the Second Defendant, Roger Whinfrey, is, in addition to being an intestacy beneficiary, the current administrator of the Deceased's estate pursuant to a grant of letters of administration dated 18 October 2020. The Eighth Defendant has recently, by order dated 2 August 2021, been joined as a party to the proceedings as personal representative of Patricia Devlin, one of the intestacy beneficiaries.

7. It is Mr Higgins' case that the disposition of the Deceased's estate effected by the law relating to intestacy is not such as to make reasonable financial provision for him within the meaning of s. 1 of the 1975 Act. This is disputed by the Second to Eighth Defendants, who I shall refer to as *"the Defendants"*.

8. Mr Higgins is represented by Mr Elis Gomer of Counsel, and the Defendants by Mr Glenn Willetts of Counsel. I am grateful to them for their helpful written and oral submissions.

9. Mr Morgan was not formally represented, but gave evidence and was cross-examined by Mr Gomer. His evidence assists as to the size and nature of the Deceased's estate.

Procedural history

10. The proceedings were commenced on 14 September 2020.

11. Mr Higgins has made three witness statements, dated 11 September 2020, 8 October 2020 and 10 June 2021.

12. In response to the claim, Mr Morgan made a witness statement dated 24 September 2020, Roger Whinfrey made witness statements dated 6 November 2020 and 21 June 2021, Adrian Whinfrey made a witness statement dated 22 June 2021, Colin Moody made a witness statement dated 21 June 2021, and Josephine Devlin made a witness statement dated 22 June 2021.

13. On issuing the claim, Mr Higgins made an application for an interim order pursuant to s. 5 of the 1975 Act. On 4 February 2021, an interim order was made by consent pursuant to which Roger Whinfrey, as personal representative, was ordered to make a one-off payment of £4,000 by 18 February 2021, and a further sum of £1,000 monthly, with a first payment to be paid by 18 February 2021, and subsequent on the 18th day of each month thereafter until judgment or further order.

14. Pursuant to the order dated 4 February 2021, it was ordered that interim estate accounts be prepared, which they were being dated 9 February 2021. Updated interim estate accounts were subsequently prepared on 10 September 2021.

Witnesses

15. In addition to Mr Higgins and Mr Morgan, I heard evidence from the following of the Defendant cousins, who confirmed their witness statements and were cross-examined:

    a. Roger Whinfrey;

    b. Adrian Whinfrey;

    c. Colin Moody; and

    d. Josephine Devlin.

16. I deal in more detail with the evidence of Mr Higgins and Mr Morgan in due course. So far as the Defendant cousins who did give evidence is concerned, they came across as perfectly honest witnesses doing their best to assist the Court. They described how the various branches of the family had kept in touch with the Deceased in varying degrees over the years, and they described having rather more contact with Heather than Mr Higgins, and to the Deceased talking more about Heather than Mr Higgins. Each of them accepted that they had no expectation of benefiting from the Deceased's estate, and none

of them claimed to be in any form of necessitous circumstances or need of maintenance apart from Josephine Devlin.

17. So far as Josephine Devlin is concerned, she is aged 74 and lives in Australia. As a result of becoming unemployed as a social worker in October 2019, she had to move back in to live with her abusive and ill ex-husband, and her ability to earn money as a social worker has been further affected by the COVID-19 pandemic. Further, she suffers from ill-health herself, including acute glaucoma, and is not optimistic of obtaining significant remunerative employment in the foreseeable future. She said that she finds it difficult to make ends meet, and has a credit card bill that has built up of approximately AUS $6,000.

Mr Higgins' Evidence

18. Mr Higgins was born on 13 October 1976, and is now aged 45.

19. As already referred to, Mr Higgins and Heather were treated by the Deceased, who had no biological children of his own, as his children from when Mr Higgins' and Heather's mother ("Mother") married the Deceased in approximately 1986. Thus, he provided financially for them, they spent time together and went on holiday together, and were disciplined by the Deceased as, as Mr Higgins put it *"any father would"*.

20. In 1991 the Deceased, who was a chartered accountant, purchased a commercial property at 19 York Road, Maidenhead, SL6 1SQ ("**19 York Road**") together with Patrick Maher ("**Mr Maher**"), a solicitor, and another party. Thereafter, the Deceased ran his practice from 19 York Road, as did Mr Maher. Mr Higgins describes having assisted the Deceased with his business from time to time.

21. After Mother left the Deceased in 1992, Mr Higgins and Heather decided to remain living with the Deceased rather than their mother. Mr Higgins points to this as demonstrating how close he and Heather were to the Deceased.

22. In October 1995, the Deceased and Mother divorced. Mr Higgins and Heather, who were still in full-time education, asked to continue living with the Deceased. The Deceased was granted custody of both of them, and the financial order following the divorce records the Deceased as having undertaken to provide a home and to maintain Mr Higgins and Heather until the age of 21 or until completion of their full-time education. At the age of 18, Mr Higgins changed his surname by deed poll to Higgins.

23. Mr Higgins lived with the Deceased until he married his first wife at the age of 21, prior to the birth of a child. This marriage broke down in 2001, and Mr Higgins returned to live with the Deceased. At this time, Mr Higgins worked as a car mechanic. It was Mr Higgins' evidence that his first wife ran up a debt of some £14,000 in their joint names, notwithstanding that Mr Higgins was working and earning. As a result, Mr Higgins petitioned for his own bankruptcy, and the Deceased assisted with the paperwork as well as helping Mr Higgins to pay the costs associated therewith.

24. In 2002, Mr Higgins moved in to live with his then girlfriend, who he married in 2003. This marriage began to break down in 2011 when Mr Higgins, again, moved back to live

with the Deceased. It is Mr Higgins' evidence that further debts of some £14,000 had arisen as a result of his second marriage, that he was unable to meet these debts, and that the Deceased financially assisted him by meeting these debts.

25. In 2007, Mr Higgins was forced to stop working as a mechanic as a result of a number of physical injuries suffered in consequence of the heavy labour involved, the injuries including lower back pain caused by degradation of his vertebrae, and tendinitis. The latter condition required surgery on Mr Higgins' right arm, making it impossible for him to carry out physical labour. It is Mr Higgins' evidence that these physical ailments remain, and that he remains unable to work as a mechanic, or to carry out significant physical work.

26. From 2007 to 2018, Mr Higgins worked full-time as an Origination Editor for Autodata, a provider of automotive technical information. This was a specialist role which is only available in a few companies worldwide. Mr Higgins had a salary of approximately £30,000 per annum.

27. Mr Higgins says that, in 2011, the Deceased's health began to deteriorate, and he started to suffer from heart and kidney problems in addition to diabetes from which he has suffered for a number of years, but which had become more acute prior to his death. By 2011, the Deceased was struggling to walk and had limited mobility, meaning that he often needed a wheelchair to get around. The Deceased had previously suffered from bladder cancer in 1999, and from kidney and prostate cancer in 2014. As a result of these various conditions, from 2011, the Deceased increasingly worked from home. As Mr Higgins was, by then, living with the Deceased once again, Mr Higgins provided care, including doing washing, cleaning and shopping.

28. Despite his illness, the Deceased was able to continue to work as a chartered accountant until his death.

29. Mr Higgins says that he remained living with, and helping the Deceased until 2013 when he left home to live with his girlfriend, Claire Jeffrey ("**Claire**"). Agreement was reached at that stage that Heather would move in to live with the Deceased so that she could provide care and assistance. It is said that this worked well for Heather as her own marriage had broken down and she needed somewhere to live. Heather thus provided care for the Deceased from 2013 until his death on 23 July 2017.

30. In 2015, the Deceased and Heather moved to 12 Russet Road, Maidenhead ("**Russet Road**"). This property was sufficiently large to enable a ground floor annex to be built for the Deceased to cater for his health condition and disabilities. Mr Higgins says that he was informed by both the Deceased and Heather, at the time, that whilst the Deceased was buying this property, it be put into Heather's name and belong to her. Mr Higgins says that he believed that this was done in order to provide a stable home for Heather and her children. Mr Higgins further says that he was told by the Deceased that as Heather was to receive Russet Road, Mr Higgins would receive an amount equal to the value of Russet Road on the Deceased's death, with the rest of the Deceased's estate being shared equally between him and Heather, subject to some provision being made for charities and

the Deceased's *"grandchildren"*, i.e. Mr Higgins' and Heather's children. Mr Higgins says that he supported Russet Road being given to Heather as this meant that Heather and her children would have a stable home, and the Deceased would benefit from having a care arrangement in place, Mr Higgins believing, on the basis of what had been told by the Deceased, that the Deceased would deal with matters fairly, in the way that he said that he would do, upon his death.

31. Mr Higgins further says that throughout his life, and on more than one occasion, the Deceased informed him that he had made a will, and that he would be looked after. He says that the last occasion that he recalls the Deceased mentioning the same was in December 2016. He says that he genuinely believed what he had been told given how close he was to the Deceased, and how generous the Deceased had been with him.

32. Mr Higgins says that he continued to have a close relationship with the Deceased after he had ceased to live with him. He says that he would see the Deceased on, approximately, a weekly basis and would speak to him regularly on the telephone. Further, Mr Higgins, Claire and Claire's son and Mr Higgins' stepson, Elliott, would go on holiday with the Deceased, and enjoy further time together. This would include not only family holidays, but Christmas, birthdays and weekends. As an example, Mr Higgins refers to an expensive holiday to Italy in 2016, including also Heather's family, that the Deceased paid for.

33. Mr Higgins married Claire in 2017, and the Deceased contributed £2000 towards the wedding. Mr Higgins refers to having helped raise Elliott from the age of three, and to the fact that he would like to adopt him, but is presently unable to afford to do so.

34. At the time of the Deceased's death, Mr Higgins and Claire had been considering a move to France. Mr Higgins explains the reasoning behind this in paragraph 25 of his first witness statement as follows:

> *"25.1 Claire works as a self-employed wedding photographer with the majority of her work being based in France. Her business was very successful there and Claire was often absent for long periods of time working. However, the travel costs made her work not very profitable. Moving to France was the logical conclusion to this problem as it would not only save her frequent travel there and back but would also reduce her travel expenses;*
>
> *25.2 My employer at the time, Autodata, had been bought by an American company in late 2017. This meant that Autodata was being dismantled and absorbed into the new company which was resulting in a huge number of job losses. This was likely to involve my role as well meaning I would soon be unemployed;*
>
> *25.3 Having assisted and acted as a second photographer at many of Claire's weddings in the UK, it was clear that I had enough skill to be able to join her business as a videographer. Claire had always had to outsource the role of second photographer and videographer and, with my unemployment looming, it made sense for me to take on that position to make sure that the income was*

kept within our household. We believed this would be a way to almost doublethe income of each wedding Claire booked

25.4 My Dad offered to pay for the equipment I would need to start working as a videographer (which costs around £10,000) and also with the move to France and to help us financially whilst we found our feet. Based on this assurance, we believed we would be able to get by financially and so took steps to relocate;

25.5 My Dad and Heather agreed that it would be fine for me to move abroad as she was, by then, caring for him and living with him. My Dad was very happy with the arrangements and looked forward to staying with us frequently in France;

25.6 We found the cost of living in the UK to be very high and we were struggling to live in the UK even when we were both working; and

25.7 Claire's mother was diagnosed with several illnesses and certified as disabled. She was living alone and we knew that she needed to be cared for on a daily basis and to, therefore, be close to us. We could not afford a property in Berkshire that would accommodate myself, Claire, my step-son and my mother-in-law but we knew that we could rent a suitable property in France for us all to live."

35. In the light of these considerations, Mr Higgins said that the clear solution was considered to be to move to France, and that the plan to do so had already been set in motion when the Deceased died. In paragraph 26 of his first witness statement, Mr Higgins said that he and Claire were not in a position to stop this, and that it made no sense to do so *"especially when I had been told that provision had been made for me [by the Deceased] in his Will"*. However, in the course of cross-examination Mr Higgins frankly accepted that in respect of the move to France, he did not rely upon any assurances by the Deceased with regard to the disposition of his estate on his death, and that the only matter that Mr Higgins did rely upon in deciding to move to France was the offer to pay for equipment costing around £10,000 to enable Mr Higgins to work as a videographer, which he says would have enabled him and Claire to significantly increase the turnover of the wedding photography business.

36. Mr Higgins says that although he did, prior to the move to France, have his own income whilst working for Autodata, the Deceased continued to support him up to his death, and that historically the Deceased would always help him with any unexpected items of expenditure which arose from time to time, as well as assisting paying debts that arose. It was Mr Higgins' evidence that the Deceased would regularly help him with items such as the family's weekly shopping and bills that were needed to be paid urgently, but which he and Claire were struggling to afford. When pressed so far as the shopping was concerned, Mr Higgins said that he would go shopping with the Deceased every couple of months or so, and the Deceased would pay the shopping, including that for Mr Higgins and his family, by his credit card. Mr Higgins said that the last time that the Deceased assisted him was in May/June 2017 when the Deceased provided him with £3,000 worth

of car parts to enable him to repair a classic car which he was refurbishing with a view to selling to fund the costs of relocation to France.

37. Mr Higgins said that without the support of the Deceased, it was a *"real struggle to get by on a daily basis"*, and he described the conduct of the Deceased as that of someone *"helping his child get through a month that he knew he could not."*

38. Mr Willetts submitted that I should reject, or at least treat with caution Mr Higgins' evidence as to the support given to him by his father. He relied, in particular, on two matters:

    a. Firstly, he pointed out that with Mr Higgins' wages from Autodata, and Claire's income from the wedding photography business, during the Deceased's lifetime they would have been earning some £60,000 per annum and that, given this level of income, it is not credible the Deceased would have provided the financial support that Mr Higgins claims that he did;

    b. Secondly, Mr Willetts refers to a passage in paragraph 27 of Mr Higgins' first witness statement in which he said that he no longer had access to bank statements so that he could not confirm the total amount that the Deceased helped him with over the years. Mr Willetts contrasts this with Mr Higgins' oral evidence under cross examination that the Deceased provided support through the use of his credit card. Mr Willetts submits that had that been the case, then the bank statements would not have assisted, and Mr Higgins need not to have referred to them.

39. Upon the Deceased dying from septicaemia at the age of 59 on 23 July 2017, Mr Higgins believed that the Deceased had left a will, and that Mr Maher would have been in possession of it as he had been the Deceased's Solicitor over the years. However, no such will could be found, and no will has subsequently come to light.

40. Mr Higgins says that he left his job as an origination editor on 13 April 2018, a week before he moved to France with Claire and Elliott, and also Claire's mother. Mr Higgins says that he would have stayed longer at this job but for the fact that the wedding season ran between April and September, and they did not want Claire to miss out on the seasonal work in France that she had contractually agreed to provide. He says that by locating to France, they were *"actively trying"* to reduce their expenditure and to improve their financial position. However, Mr Higgins says that whilst their situation might have improved *"moderately"* due to the low cost of living in France, it was *"never sufficient to enable us to save enough money to get through any bad times."*

41. In his first witness statement, Mr Higgins described how, subject to acting as house husband and carer for his mother-in-law and stepson, Elliott, so as to enable Claire to work, the intention had been for Mr Higgins to train to become a second photographer and a video photographer with a view to doubling the income of Claire's business by offering video photography as a service, but that this had been frustrated by the inability to buy the equipment that the Deceased had said that he would pay for.

42. Mr Higgins further explains that in addition to caring for Claire's mother-in-law, there are further difficulties in him obtaining alternative employment to assist with day-to-day expenses, given his inability to carry out physical work referred to above, and also his limited skills with the French language accentuated by suffering from dyslexia. Further, given his current residency status, he is not presently in a position to obtain state benefits in France.

43. Mr Higgins lives in a rental property in France together with Claire, Claire's mother and Elliott, and their only personal asset, apart from the equipment required for Claire's business, is a vehicle valued at approximately £4,500.

44. In paragraph 51 of his first witness statement, Mr Higgins said this:

> *"51. We have been living at subsistence level for some time now. Even with Claire's business being busy and in demand, we needed to have additional income from me to feel comfortable. COVID-19 has had a devastating impact on our finances, Claire has had no new wedding photography bookings since February 2020. There has been an approximately 55% drop in Claire's income for 2020 compared to last year."*

45. During the course of his oral evidence, Mr Higgins explained that Claire's wedding photography business was not what one might describe as a traditional wedding photography business, where photographs are taken at the church or other wedding venue. Rather, the business involves photographing events where, following the wedding, the bride and groom, usually from the UK, hold a prestigious party or other event at a French château or other similar venue in order to celebrate the wedding and that it is this later event that is photographed. He made the point that although businesses associated with weddings were now recovering following the improvement in the COVID-19 situation, there was still a marked reluctance to book or hold parties or events of the kind that Claire's business had concentrated upon, involving a large number of people travelling abroad. Thus, his evidence was that there was a less marked recovery than might otherwise have been expected.

46. Mr Willetts, on behalf of the Defendants, points to the lack of documentary or other hard evidence as to the income generated by Claire's wedding business, and the bookings placed in respect thereof, Mr Higgins' case being based upon figures asserted without any supporting documentation.

47. Mr Higgins had, earlier in his first witness statement, set out monthly income and expenditure figures, showing the only income as being Claire's monthly income, then averaging at €1,481.68 (£1,339) per month, as against expenditure of £2,321.50 per month, meaning a deficit of some £982.50. The expenditure included rent of £846.

48. Mr Higgins further referred to historic debts of £31,176.19, being £16,313.64 in respect of a Nationwide bank loan, £7,916.47 in respect of a Nationwide credit card, and £6,946.08 in respect of a Tesco credit card. He said that due to the impact of COVID-19, further debts had been incurred of €4,500 rent, and €3,000 business taxes, although under

cross examination he recognised that the latter debt was owed by Claire. The interim order made in the present case will have served to clear the rent arrears, and fund the continuing rent.

49. Mr Higgins has produced an updated Schedule of Means, Expenses and Reasonable Provision, setting out the position as at April 2021. So far as income is concerned, Claire's income is referred to therein as having averaged £2,297.97 per month in the previous six months, as against average expenditure of £2,732.50 per month, meaning a reduced deficit of £434.53 per month. In addition reference is made to future medical costs for the Claimant, Claire and Elliott.

50. So far as debts are concerned, these remain as above, but with an additional £2,915.13 in respect of an end of year electricity bill.

51. Mr Willetts takes the point that the figures produced have been produced up to April 2021, rather than to the date of trial, and he submits that I should be cautious in accepting Mr Higgins' evidence that there has been no significant change in the position between April 2021 and the date of trial. Further, so far as the claimed deficit is concerned, Mr Willetts takes the point that if the deficit was approximately £1000 per month as at the date of the commencement of the present claim, and approximately £500 currently, then one would have expected the debts to have increased, but they do not appear to have done so.

52. The updated Schedule sets out that Mr Higgins' primary case is that reasonable provision would equate to the payment of the historic debts, a capital cushion of £20,000 to address contingencies, and capitalised maintenance for 10 years as a lump sum to address the deficit in expenses and income. So far as this capitalised maintenance claim is concerned, a figure of £68,967.52 is put forward as being appropriate. It is this provision that Mr Higgins seeks.

53. Mr Higgins is pursuing the present claim by way of a conditional fee agreement, which makes provision for a success fee of 100%. It is the Claimant's case that the success fee ought to be added to such award as the Court makes, otherwise the award would not be available to provide the maintenance that it is supposed to.

Mr Morgan's evidence

54. In giving evidence in chief, Mr Morgan was initially reluctant to confirm the contents of his witness statement, merely being prepared to confirm that it was *"a witness statement"* rather than his witness statement.

55. Mr Morgan's witness statement helpfully sets out details of the estate, but also, inappropriately, sets out what are in effect submissions in relation to the claim. Mr Morgan essentially sought to disassociate himself from the latter, in effect saying that they represented Roger Whinfrey's position.

56. This was not a satisfactory state of affairs, and may have to be revisited on the question of costs, but ultimately I shall proceed on the basis that Mr Morgan's witness statement

does contain helpful evidence with regard to the size and nature of the estate, and I will have regard to that, but I will otherwise ignore the contents of his witness statement.

57. Mr Morgan confirmed that he continues to act as Solicitor in respect of the administration of the estate, and in addition to the information contained in his witness statement, was behind the preparation of the interim estate accounts dated 15 February 2021, and the updated interim estate accounts dated 10 September 2021.

58. Mr Morgan was cross examined at some length with regard to the size of the estate, but I consider that the evidence in respect thereof be summarised as follows:

    a. Schedules of assets and liabilities have been prepared showing assets of £492,796.71 and liabilities of £305,370.65, i.e. a balance of £187,426.06. However, it is recognised that certain adjustments are required there to, including removing a liability in respect of Myerson Solicitors' fees in respect of the interim order application, which require to be borne by the beneficiary Defendants. This leads to a surplus of approximately £195,000.

    b. However, included within the assets is the principal asset, namely the Deceased's half share and interest in 19 York Road, which is included with a value of £260,000. Various valuations have been obtained in respect of 19 York Road, valuing it at between £360,000 and £700,000. The figure of £260,000 is based upon Mr Maher's latest offer to acquire the Deceased's interest. The position is complicated by the fact that Mr Maher currently opposes an application brought by the estate seeking an order for the sale of 19 York Road, Mr Maher claiming that the purpose of the trust pursuant to which the latter was acquired has not come to an end.

    c. The liabilities include £41,092.25, being a balance claimed by PC Mac Doctors. The latter owed the Deceased £8,045.75, but has asserted a professional negligence claim of £49,138. This latter claim is disputed, and a drop hands settlement has been proposed. There is some suggestion of an earlier compromise of this claim, and it may be statute barred. Consequently, there is a realistic possibility that the estate will not have to bear this liability.

    d. There are future and contingent liabilities of at least approximately £25,000.

59. Against this background, there can be no certainty as to the value of the net estate, nor as to how readily realisable 19 York Road will be, at least for in excess of £260,000 in respect of the Deceased's interest therein. Thus, in short, the starting point is that the net estate is worth approximately £195,000, but this could easily increase or decrease by some £50,000 either way.

The 1975 Act

60. As I have said, it is not in dispute that Mr Higgins is a person falling within s. 1(1)(d) of the 1975 Act.

61. S. 1 of the 1975 Act enables those eligible to do so to apply to the Court for an order under s. 2 of the 1975 Act … *"on the ground that the disposition of the deceased's estate*

effected by his will or the law relating to intestacy, or the combination of his will and that, is not such as to make reasonable financial provision for the applicant."

62. In the case of an applicant such as one under s.(1)(d), s. 1(2)(b) provides that *"reasonable financial provision" ... "means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance."*

63. S. 2 sets out the various powers of the Court so far as the granting relief is concerned.

64. S. 3 then sets out the matters to which the court is to have regard in exercising powers under s. 2. S. 3(1) provides as follows:

> *"Where an application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say—*
>
> *(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;*
>
> *(b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;*
>
> *(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;*
>
> *(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;*
>
> *(e) the size and nature of the net estate of the deceased;*
>
> *(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;*
>
> *(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant."*

65. Although s 3(3) also applies to claims by persons falling within ss. 1(1)(c) and (d), I do not consider it to be of significant relevance or assistance on the present facts.

66. S. 3(5) provides that, in considering the matters to which the court is required to have regard under s. 3, the court is required to take into account the facts as known to the court at the date of the hearing.

67. S. 3(6) provides that in considering the financial resources of any person for the purposes of s. 3, the court is required to take into account his earnings capacity, and in considering

the financial needs of any person for the purposes of s. 3, the court is required to take into account his financial obligations and responsibilities.

68. The authorities suggest that a person treated as a child of the family falling within s.1(1)(d) should be treated, so far as a claim under the 1975 Act is concerned, in much the same way as a child falling within s. 1(1)(c). The leading authority so far as claims by adult children are concerned is the decision of the Supreme Court in *Ilott v The Blue Cross and others (No. 2)* [2018] AC 545.

69. I note the following from the leading judgment of Lord Hughes in *Ilott*, with whom the other members of the Supreme Court agreed:

    a. At paragraph 2, Lord Hughes emphasised that the test of reasonable financial provision is objective, and that it is not simply whether the deceased behaved reasonably or otherwise in providing as he did.

    b. At paragraph 14, Lord Hughes said that whilst the concept of maintenance was no doubt a broad one, the distinction between the differing paragraphs of s. 1(2) shows that it cannot extend to everything which it would be desirable for the claimant to have, and that it must import provision to meet the everyday expenses of living. Lord Hughes referred with approval to the following summary of the relevant principles by Browne-Wilkinson J in In re Dennis dec'd [1981] 2 All ER 140, 145-146:

        > *" "The applicant has to show that the will fails to make provision for his maintenance: see In re Coventry (deceased) . . . [1980] Ch 461. In that case both Oliver J at first instance and Go› LJ in the Court of Appeal disapproved of the decision in In re Christie (deceased) . . . [1979] Ch 168, in which the judge had treated maintenance as being equivalent to providing for the well-being or benefit of the applicant. The word 'maintenance' is not as wide as that. The court has, up until now, declined to define the exact meaning of the word 'maintenance' and I am certainly not going to depart from that approach. But in my judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature. This does not mean that the provision need be by way of income payments. The provision can be by way of a lump sum, for example, to buy a house in which the applicant can be housed, thereby relieving him pro tanto of income expenditure. Nor am I suggesting that there may not be cases in which payment of existing debts may not be appropriate as a maintenance payment; for example, to pay the debts of an applicant in order to enable a him to continue to carry on a profit-making business or profession may well be for his maintenance."*

    c. At paragraph 15, Lord Hughes made clear that the level at which maintenance might be provided was flexible, and fell be assessed on facts of each case, and was not limited to subsistence level. However, it is, as I see it, reasonably clear from Lord

Hughes' analysis that an applicant is required to demonstrate a need for maintenance, although what that need might be will depend upon the facts of each case, requires the application of a flexible approach, and is not limited to subsistence.

d. At paragraphs 18 to 20. Lord Hughes approved the approach of Oliver J and the Court of Appeal in *In re Coventry dec'd, Coventry v Coventry* [1980] Ch 461 with regard to claims by adult children, but did so in the following terms:

> *"18 The right test was well set out by Oliver J in In re Coventry, decd [1980] Ch 461, 474—475 in a passage which has often been cited with approval since:*
>
> > *"It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court's powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant — and that means, in the case of an applicant other than a spouse for that applicant's maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no carte blanche to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position."*
>
> *19 Next, all cases which are limited to maintenance, and many others also, will turn largely upon the asserted needs of the claimant. It is important to put the matter of needs in its correct place. For current spouses and civil partners (section 1(2)(a)(aa)), need is not the measure of reasonable provision, but if it exists will clearly be very relevant. For all other claimants, need (for maintenance rather than for anything else, and judged not by subsistence levels but by the standard appropriate to the circumstances) is a necessary but not a su–cient condition for an order. Need, plus the relevant relationship to qualify the claimant, is not always enough. In In re Coventry the passage cited above was followed almost immediately by another much-cited observation of Oliver J, at p 475:*

"It cannot be enough to say "here is a son of the deceased; he is in necessitous circumstances; there is property of the deceased which could be made available to assist him but which is not available if the deceased's dispositions stand; therefore those dispositions do not make reasonable provision for the applicant.' There must, as it seems to me, be established some sort of moral claim by the applicant to be maintained by the deceased or at the expense of his estate beyond the mere fact of a blood relationship, some reason why it can be said that, in the circumstances, it is unreasonable that no or no greater provision was in fact made."

20. Oliver J's reference to moral claim must be understood as explained by the Court of Appeal in both In re Coventry itself and subsequently in In re Hancock, where the judge had held that there was no moral claim on the part of the claimant daughter. There is no requirement for a moral claim as a sine qua non for all applications under the 1975 Act, and Oliver J did not impose one. He meant no more, but no less, than that in the case of a claimant adult son well capable of living independently, something more than a qualifying relationship is needed to found a claim, and that in the case before him the additional something could only be a moral claim. That will be true of a number of cases. Clearly, the presence or absence of a moral claim will often be at the centre of the decision under the 1975 Act."

e. In short, therefore, need for maintenance plus the relevant relationship to qualify the claimant is not always, and is perhaps not generally, enough, and in the case of an adult child well capable of living independently, *"something more"* is required, which might include being able to demonstrate some form of moral claim.

f. At paragraph 22, Lord Hughes stated that it was obvious that the competing claims of others might inhibit the practicability of wholly meeting the claims of the claimant, however reasonable, but that it was perhaps less obvious, but also true, that the circumstances of the relationship between the deceased and the claimant might affect what was the just order to make.

g. At paragraphs 23 and 24, Lord Hughes referred to the fact that it had become conventional to treat the consideration of a claim under the 1975 Act as a two-stage process, namely, firstly, whether there has been a failure to make reasonable financial provision and, secondly, if so, what order ought to be made? He said that whilst there may be some cases where it would be convenient to separate out those questions, in many cases, exactly the same conclusions will both answer the question whether financial provision has been made for the claimant and identify what that financial provision should be. As he put it: *"The Act plainly requires a broad-brush approach from the judge to very variable personal and family circumstances. There*

can be nothing wrong, in such cases, with the judge simply setting out the facts as he finds them and then addressing both questions arising under the Act without repeating them."

h. At paragraph 47, Lord Hughes cautioned that care is required to be taken to avoid making awards under the 1975 Act primarily as rewards for good behaviour on the part of the claimant or as penalties for bad on the part of the deceased.

70. I note that at paragraph 59, Lady Hale in *Illott* referred to the fact that the Law Commission had, in their report that led to the 1975 Act, considered limiting adult claims to children who were actually dependent on the deceased when he died, but rejected that because: *"... this would rule out a claim against the estate of a parent who had unreasonably refused to support an adult child during his life time where it would have been morally appropriate to provide such support. Moreover an adult child, who is fully self-supporting at the time of the parent's death, may quite suddenly thereafter cease to be so."*

71. Mr Willetts referred me to passages at first instance and in the Court of Appeal in *In re Coventry* (supra) as to the relevance of views expressed by the deceased that he wished a particular person to benefit. Mr Willetts submits that these passages demonstrate that such views are irrelevant to the question as to whether reasonable financial provision has been made. Specifically, Mr Willetts referred to what was said by Oliver J at 477H-478B, and by Goff LJ at 488G-489A, and in particular at 488H-489A, where Goff LJ said:

"In my judgment, the problem must be exactly the same whether one is dealing with a will or intestacy, or the combination of both. The question is whether the operative dispositions make, or fail to make, reasonable provision in the circumstances. Indeed, I think any view expressed by a deceased person that he wishes a particular person to benefit will generally be of little significance, because the question is not subjective but objective. An express reason for rejecting the applicant is a different matter and may be very relevant to the problem."

72. Applying this passage, I must proceed on the basis that a mere statement by a deceased that he wishes a particular person to benefit will be of little significance because of the objective nature of the exercise. However, where a deceased gives reasons for either rejecting an applicant, and also, as I see it, for intending to benefit an applicant in a particular way, that may well be relevant to the exercise because it may go to the issue as to whether, looking at matters objectively, reasonable financial provision has been made.

Mr Higgins' case

73. Mr Higgins' case is, in essence, as follows.

74. Mr Gomer submits that the disposition of the Deceased's estate under the laws relating to intestacy was not such as to make reasonable financial provision for Mr Higgins, i.e. such financial provision as it would be reasonable in all circumstances of the case for Mr Higgins to receive for his maintenance.

75. Mr Gomer disputes that there is a threshold requirement that Mr Higgins should have to demonstrate a need for maintenance, but rather that the question of Mr Higgins' needs is simply part of the broader consideration of the factors that the Court is required to take into account pursuant to s. 3 of 1975 Act.

76. However, it is submitted that Mr Higgins was a good witness who has, in any event, provided cogent evidence of a need for maintenance in the sense recognised by the authorities. In short, it is said that maintenance is not confined to mere subsistence, that Mr Higgins' evidence was to the effect that he was only managing to keep his head above the water, and clearly struggling, and that this is sufficient even if the evidence as to Claire's present earnings, and as to the prospects of her business, is not as full and detailed as it might have been.

77. Mr Gomer submitted that there is the requisite *"something more"* in the circumstances of the present case. Mr Gomer focused on the close relationship that Mr Higgins had had with the Deceased, providing support when he lived with him between 2011 and 2013, and the Deceased providing financial support in a number of ways over the years so as to help Mr Higgins out when he was having a difficult financial time. Mr Gomer also relied upon it being a relevant consideration that the Deceased had said to him that he would benefit under the Deceased's will, particularly given the accompanying explanation that the Deceased wished to provide for Mr Higgins in the light of the fact that he had bought a property for Heather. A further important consideration was, Mr Gomer submitted, that the Deceased, having stated that he would fund at a cost of some £10,000 the cost of the additional equipment required so that Mr Higgins could assist Claire with the wedding photography business by providing video photography, died before effect could be given thereto. Whilst these latter considerations might not be sufficient to support a proprietary or other estoppel, they were, Mr Gomer submitted, sufficient to demonstrate the *"something more"*.

78. So far as matters set out in s. 3 of the 1975 Act to which the court is required to have regard are concerned, Mr Gomer submitted that the court ought to have regard thereto considering together the question as to whether the application of the intestacy rules has failed to make reasonable financial provision for Mr Higgins, and, if so, the question as to what provision ought to be made for him. As to these considerations, it was submitted that:

    a. The evidence as to Mr Higgins' financial resources and financial needs demonstrated a present income shortfall, and significant debts, which if they had to be paid, would make life extremely difficult. Of course, s. 3(1)(a) requires to be considered together with s. 3(6) of the 1975 Act. Mr Gomer submits that I am entitled to have regard to Mr Higgins' family circumstances, which represents a not unreasonable lifestyle choice in the light of the consideration set out in paragraph 25 of Mr Higgins' first witness, and that I am entitled to have regard to Mr Higgins' needs within the context of his family, and the support provided by Claire through the photography business.

b. So far as the financial resources and financial needs of the Defendant beneficiaries were concerned, both now and in the foreseeable future, none of them apart from Josephine Devlin had demonstrated that they were suffering any form of, or were in need of any form of support. Mr Gomer recognised that the position is somewhat different in the case of Josephine Devlin, whose circumstances are likely to be significantly assisted by the share of the Deceased's estate to which she is entitled, subject to the present claim.

c. So far as any obligations and responsibilities which the Deceased may have had towards Mr Higgins and towards the Defendant beneficiaries are concerned, Mr Higgins maintains that the Deceased had no obligations or responsibilities towards the latter as they each recognised under cross examination. So far as Mr Higgins himself is concerned, whilst it could not be said that Mr Higgins was dependent upon the Deceased as such, or that the Deceased had assumed a formal responsibility for his maintenance into adulthood, the way that the Deceased had treated him as a child of the family included fairly generous financial support into adulthood and, if Mr Higgins' evidence is to be believed as to what the Deceased said as to his testamentary intentions, the Deceased had recognised that having made significant provision for Heather in his lifetime in respect of the property that he had bought for her, it would only be right for him to make equivalent provision on death for Mr Higgins in order to balance things out.

d. So far as the size of the estate of the Deceased is concerned, Mr Gomer submitted that I should view the latter towards the higher end of the scale suggested by the figures that I have referred to above, thus allowing for fairly generous provision.

e. So far as physical or mental disability of Mr Higgins or of the Defendant beneficiaries is concerned, Mr Gomer points to Mr Higgins inability to carry out physical work, and the difficulties that his dyslexia causes with the use of the French language.

79. Mr Gomer reminds me that I am, pursuant to s. 3(5), required to take into account the facts as known to the Court at the date of the hearing.

80. In the light of the above considerations, Mr Gomer submits that reasonable financial provision ought to be made for Mr Higgins by discharging the debts of £36,488.32, awarding between £10,000 and £20,000 as a cushion in respect of other liabilities, and by awarding a further capitalised sum reflecting the deficiency between income and expenditure. As to the latter, as referred to above, a figure of £68,067.52 is claimed in respect thereof, capitalising the deficiency over a period of some 10 years. Thus, on a best case analysis, a figure of some £125,448.84 is claimed, before one has regard to the success fee under Mr Higgins' CFA, under which Mr Higgins is potentially liable to pay his Solicitors, Myerson, a success fee representing an uplift of 100% on their costs.

81. So far as the success fee is concerned, and as to whether it might properly be taken into an account in an award under the 1975 Act, Mr Gomer relies upon *Re H (Deceased)* [2020] EWHC 1134 (Fam), [2020] 2 FLR 561, as authority for the proposition that it is

appropriate to consider a claimant's potential liability under the CFA is a factor relevant to the claimant's needs, and thus to increase the award, potentially by reference to a success fee that a claimant is bound to pay, in order to ensure that reasonable financial provision is made for the claimant. In *Re H*, Cohen J expressed the issue thus at [55]:

> *"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 ... 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."*

82. In adopting this approach, Cohen J followed the approach taken by HHJ Gosnell in the Leeds County Court in *Bullock v Denton* (unreported) 15 April 2020, in distinction to that taken by Deputy Master Linwood in *In re George Clarke*, deceased [2019] EWHC 1194 (Ch). In the latter case Deputy Master Linwood concluded, amongst other considerations, that to allow the recovery of the CFA success fee in this way would be contrary to legislative policy, given that the recovery of the CFA success fee by way of costs from the opposing party is now prohibited by s. 58A(6) of the Courts and Legal Services Act 1990 ("**CALSA**").

83. However, Mr Gomer submits that I am bound to apply *Re H*, and that in doing so I should enhance any award in favour of Mr Higgins so as to include at least a substantial element of the success fee that Mr Higgins will be bound to pay his Solicitors, Myerson, in the event of *"success"*.

84. During the course of the hearing, I made enquiries with regard to the amount of Mr Higgins' legal costs. I was told that his cost budget provided for incurred and future costs totalling £94,619.50, which provides some indication as to the amount of the success fee that might, potentially, be payable.

The Defendant beneficiaries' case

85. The Defendants' case can be summarised as follows.

86. Mr Willetts submitted that the present claim requires to be considered in four stages, namely:

    a. Whether Mr Higgins can discharge the burden of demonstrating a need for maintenance and, if so, to what extent?

    b. Whether Mr Higgins demonstrated the necessary *"something more"*?

    c. If the above can be satisfied, does a consideration of the various matters set out in s. 3 of the 1975 Act demonstrate that reasonable financial provision has not been made for Mr Higgins, which Mr Willetts expressed as a matter of value judgment?

    d. If, contrary to the Defendants' case, Mr Higgins has demonstrated that reasonable financial provision has not been made, what provision ought to be made for him?

87. Mr Willetts took me to the passages from *Ilott* and *In re Coventry* that I have referred to above, and by reference to the latter, taking the point regarding testamentary wishes that I have referred to.

88. So far as the discrete point concerning the CFA success fee is concerned, Mr Willetts submitted that I should not consider myself bound by the decision in *Re H* on the basis that it was clear from the relevant report that there had been no real legal argument on the key issue, the defendants appearing in person.

89. Mr Willetts submitted that a key consideration was the introduction of s. 58A(6) of CALSA by s. 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which provides that:

> *"(6) 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."*

90. Mr Willetts submitted that to allow the recovery of a success fee through an award under the 1975 Act would, at the very least, undermine the policy behind s. 58A(6), if not specifically impermissible pursuant thereto. He submitted that this could be demonstrated by reference to a hypothetical case where there had been an unaccepted claimant's offer under CPR Part 36, which the claimant had beaten with the consequences set out in CPR 36.17(4), which included punitive interest pursuant to CPR 36.17(4)(a), and a requirement for the defendant to pay an additional amount representing 10% of the amount awarded (in claims up to £500,000) pursuant to CPR 36.17(4)(d). Mr Willetts submitted that were the amount recovered by the claimant by an award under the 1975 Act to include the whole or some part of the success fee, then this would lead to the recovery of 10% of the success fee element of the award by way of costs contrary to s.58A(6).

91. Further, Mr Willetts submitted that Cohen J, in *Re H*, overlooked the fact that an award under the 1975 could only provide for maintenance, and to include the whole or some part of the success fee in an award would run counter to the clear meaning and effect of s. 1(2)(b) of the 1975 Act.

92. To the extent that I considered that I could take into account the CFA success fee, and that I should do so in a similar way to Cohen J in *Re H* by discounting the success fee to reflect the merits of the case, then Mr Willetts submitted that I should defer consideration of the amount of the appropriate discount until after I had decided the other issues in the case given that arguments in relation thereto would, in essence, involve the parties arguing against the merits of their own case. I indicated during the course of submissions that I would adopt this suggested approach in the event that I considered the amount of the CFA success that might be recoverable should turn upon a consideration of the merits.

93. Turning to the first of the four stages identified in paragraph 86 above, namely the question as to whether Mr Higgins has demonstrated a need for maintenance, and, if so,

the extent thereof, the gist of Mr Willetts' submissions on behalf of the Defendant beneficiaries was as follows:

a. Mr Higgins' evidence as to a need for maintenance was very unsatisfactory and lacking in detail, such that I should treat his evidence with great caution. In particular, Mr Willetts submitted that:

   i. There has been no disclosure of Claire's business accounts with the result that there is no evidence as to income in 2018/19, and the income figures relied upon by Mr Higgins are based on figures provided to him by Claire without any form of verification;

   ii. There is no proper evidence with regard to the level of future work, apart from a suggestion that there are only two bookings for the current year;

   iii. The *"updated"* means schedule is, in any event, five months out of date, and the Court is required to consider the position as at the date of the hearing;

   iv. The extent to which Mr Higgins might be entitled to benefits in France is obscure, and has not been properly explained;

   v. The position with regard to Mr Higgins' mother-in-law is unclear. In particular, it is unclear what income and/or benefits she might be entitled to, and the extent to which she might be in a position to provide support for the family unit.

   vi. As already mentioned, Mr Willetts takes the point that Mr Higgins' evidence was to the effect that at the height of the COVID-19 pandemic there was a shortfall in income of approximately £1,000 per month. If that had been the case, then one would have expected the level of debts to have significantly increased, but this does not appear to have been the case, thus fundamentally calling into question whether there was, in fact, any such deficit.

   vii. So far as the debts are concerned, the Nationwide bank loan is historic. There is no evidence that Nationwide is chasing this debt, there being no evidence of any chasing letters or anything of that nature. There is thus no evidence that it will be pursued, and it might well be statute barred. Similar points are made in respect of the Nationwide and Tesco credit card liabilities.

   viii. Criticism is made that the budget includes provision for food, medical expenses etc. of others than Mr Higgins himself. It is submitted that the Court can only properly concern itself with Mr Higgins' own needs.

   ix. Having regard to the above considerations, the Court can place no reliance upon Mr Higgins' evidence with regard to the alleged deficit figure of £434.53.

b. Mr Willetts raises other credibility issues and, in particular:

   i. The point concerning whether the Deceased would, in fact, have provided the support contended for given the wages that Mr Higgins was receiving from

Autodata, and the takings of Claire, that I have referred to in paragraph 38(a) above; and

ii. The point concerning bank statements that I have referred to in paragraph 38(b) above.

94. It is thus submitted that Mr Higgins has failed to demonstrate a need for maintenance.

95. By way of fall-back, Mr Willetts submits that if, contrary to the Defendants' primary case, a need for maintenance is made out, that need is very much less than Mr Higgins contends for. Firstly, it is submitted that the historic debts should be ignored, and that whilst the starting point might be the deficit of approximately £450 a month, I should proceed on the basis that Claire's photography business will get back on its feet very much sooner than is suggested, particularly if the award were to make provision to cover the cost of the video photography equipment that it is said would enhance the earnings capacity of the photography business. Thus it is submitted that provision for future maintenance should be very much less than contended for by Mr Higgins, Mr Willetts submitting that it should be based on no more than £5,000 for a two year period. Further, consistent with Mr Willetts' submissions referred to above, the award should make no provision in respect of the CFA success fee.

96. Turning to the requirement for *"something more"*, it is again submitted that Mr Higgins has failed to demonstrate the requisite *"something more"* , i.e. something above a need for maintenance (if established) and his status as a person treated as a child of the family.

97. Mr Willetts reminded me of the approval by Lord Hughes at paragraph 18 in *Ilott* of the approach taken by Oliver J in *In re Coventry* at 474-475, and the clear statement therein that what the Court should be concerned with is as to whether the relevant disposition has produced an unreasonable result in not making any or any greater provision for the applicant's maintenance.

98. It is said that, in the light of this test, the fact that the Deceased might have promised equality with Heather given the gift of a property to her during his lifetime, is beside the point, because any such provision would not be concerned with maintenance. Further, based upon passages from *In re Coventry* that I have already referred to, Mr Willetts submits that the Deceased's subjective wishes are irrelevant in any event to the relevant question.

99. Reliance is placed upon the fact that whilst the Deceased might have provided financial support for Mr Higgins during his lifetime, he had not assumed any responsibility for his maintenance. Particular reference is made to paragraph 61 of Mr Higgins' first witness statement in which he said: *"As far as I'm aware, there are no other claimants and I am unaware of obligations, and responsibilities which my Dad owed towards me or the beneficiaries."*

100. Mr Willetts submits that the high point, or full extent of any moral claim that Mr Higgins might have is what is said at paragraph 25.4 of his first witness statement, where Mr

Higgins refers to the fact that the Deceased was to provide £10,000 in order to fund the cost of video photography equipment.

101. It is further submitted that to the extent that the Deceased might have assisted Mr Higgins financially, this was very limited and, for the reasons referred to above, that I should treat with caution Mr Higgins' evidence in respect thereof.

102. Turning to the s. 3 considerations:

    a. Mr Higgins' financial resources and needs have already been addressed as above.

    b. So far as the financial resources and financial needs of any other beneficiaries are concerned, it is submitted that the position of Josephine Devlin is highly relevant, and cannot be ignored.

    c. So far as obligations and responsibilities of the Deceased towards Mr Higgins is concerned, reference is again made by Mr Willetts to paragraph 61 of Mr Higgins' first witness statement.

    d. So far as the size and nature of the estate is concerned, Mr Willetts suggested that I should proceed on the basis that the net estate is worth only £168,000 odd. A further factor is that Mr Maher is presently opposing the application seeking an order for sale of 19 York Road, and so there are questions at least regarding the realisability thereof.

    e. So far as physical or mental disability of any applicant is concerned, Mr Willetts submitted that there was nothing that fundamentally supported Mr Higgins claim in this respect given that there clearly are occupations that Mr Higgins could pursue.

103. Thus, in conclusion, Mr Willetts submitted that Mr Higgins has failed to demonstrate that the disposition of the Deceased's estate on intestacy has failed to make reasonable financial provision for him. Alternatively, should I find the contrary, then any award in Mr Higgins' favour should be very much more limited than contended for by Mr Higgins as referred to in paragraph 95 above.

Reasonable financial provision for Mr Higgins?

Introduction

104. I agree with Mr Willetts that it is appropriate to consider the claim by reference to the four stages referred to in paragraph 86 above.

105. Although Mr Gomer disputes that it is appropriate to regard a need to show a requirement for maintenance as a gateway requirement to a successful claim by an applicant such as Mr Higgins under the 1975 Act, I consider it reasonably clear from the authorities, and in particular from what was said by Lord Hughes in *Illott* at paragraph 19, that a claim by an adult child (or person treated as a child of the family) does need to demonstrate a need for maintenance. Whether this should strictly be treated as a gateway requirement, or as part of the Court's consideration of the application of s. 3(a) of the 1975 is perhaps moot. However, given the requirement to demonstrate a need for maintenance at some

stage, I consider it appropriate on the present facts to consider this issue on a preliminary basis prior to a wider consideration of the application of s. 3.

Need for maintenance

106. I remind myself that by maintenance, we are concerned with payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him, something that requires to be assessed on the facts of each case and as not being limited to subsistence level.

107. I accept that there is considerable force in the points made on behalf of the Defendants with regard to the inadequacies with Mr Higgins' evidence on the question of need for maintenance as referred to in paragraph 93(a) above, and in particular the evidence supporting the levels of income currently enjoyed by Claire, and the income that might reasonably be expected to be earned by her into the future in the light of the current state of bookings for the photography business.

108. However, as against these deficiencies, I found Mr Higgins to be a generally credible and good witness who was prepared to make concessions, and accept points against himself, e.g. that he had only relied upon the Deceased saying that £10,000 would be provided towards the cost of the video photography equipment in influencing the decision to move to France, rather than upon any wider indications given by the Deceased as to his intentions towards Mr Higgins. I take on board the credibility points focused upon by Mr Willetts as referred to in paragraph 38 above, but consider that Mr Higgins provided reasonably satisfactory answers when pressed on these points.

109. I accept the general thrust of Mr Higgins' evidence that, prior to his death, the Deceased assisted him, as Mr Higgins put it when re-examined, by *"helping his child get through a month that he knew he could not"*, and that Mr Higgins, in the context of his marriage to Claire, struggled with finances, and that, as referred to in paragraph 25 of Mr Higgins' witness statement, the move to France was seen as a way of better coping.

110. However, the move to France was, I find, significantly affected by:

    a. The effect of the COVID-19 pandemic on Claire's photography business; and

    b. Very significantly, the fact that the Deceased's death had frustrated Mr Higgins's ability to spend £10,000 on video photography equipment that would have increased the earnings capacity of the wedding photography business in the way that had been envisaged when the move to France was decided upon.

111. I further find that the effect of these two factors has been to cause Mr Higgins, again within the context of his marriage to Claire, to struggle with finances even more than before, with him presently struggling to keep his head above water in maintaining a standard of living appropriate to him. Thus whilst the alleged deficit of £434.53 per month might not be a particularly robust figure in itself, I am satisfied that a need for maintenance has been made out.

112. I take on board Mr Willetts' point that we are presently concerned with Mr Higgins' maintenance, and not the maintenance of others. However, bearing in mind that Mr Higgins is currently dependent upon Claire's income, I consider it relevant to consider the other calls that there might be upon that income, which might otherwise mean that the income was not available to meet Mr Higgins' own needs. Thus I consider it entirely appropriate that the budget produced includes the cost of providing food for other members of the family, and providing for the medical needs of other members of the family.

113. So far as the position of Mr Higgins' mother-in-law is concerned, whilst the position may not have been entirely satisfactorily explained, I accept the gist of Mr Higgins' evidence that she is contributing from her own income, to the expenditure that is referable to her.

114. However, I do consider that Mr Willetts makes a good point so far as the historic debts are concerned. The evidence suggests that it is very unlikely that the debts will actually be chased by Nationwide or Tesco, and this does, in my judgment, require to be factored into any consideration of Mr Higgins' needs. However, one cannot, as I see it, wholly rule out the prospect that steps might be taken to pursue one or other of these debts, and so it may be appropriate to make some provision for the same.

115. Further, despite Mr Higgins' evidence as to the difficulties of Claire's business getting back to its pre-COVID-19 position, the absence of firm evidence to support the extent of the difficulties suffered by the business means that I am simply unable to conclude that there will be a very significant delay in the business getting back onto a proper footing. Further, if provision were to be made to enable the video equipment to be acquired, then that ought to assist in developing the business in the way that had been anticipated when the move to France was decided upon. I will return to the question of quantum in due course dependent upon my findings, but, to the extent that there is a need for maintenance going forward, I do not consider that it can properly be regarded as being to the extent contended for by Mr Higgins.

"Something more"

116. I accept that, given that one is essentially concerned with an objective exercise, and that the key question is as to whether reasonable provision has been made for Mr Higgins' *maintenance*, the Deceased's expressions of testamentary intention are of limited value for reasons that have already been mentioned in this judgment. However, as Goff LJ himself recognised in *In re Coventry* at 489A, an express reason for rejecting the applicant may be relevant to the *"problem"*. But so equally, as I see it, a reason for wanting to make provision for a particular party in that it might, for example, point to a perceived moral obligation that is relevant to the objective exercise in hand.

117. I accept Mr Higgins' evidence that the Deceased did, at some point, explain that he intended to equalise matters as between Mr Higgins and Heather when it came to making a will. One can only speculate as to the reasons why there was no will found upon the Deceased's death, but this conversation does, as I see it, point to the Deceased

considering himself under some continuing obligation to Mr Higgins, albeit not for his maintenance as such, given his gift to Heather.

118. I do consider it to be a relevant consideration that the Deceased was, as I find that he was, close to Mr Higgins, and vice versa. This is in contrast to the Defendant beneficiaries, albeit that the Deceased did maintain contact with the latter.

119. As conceded by Mr Willetts, albeit not to the extent of accepting that the same gives rise to the requisite *"something more"*, the fact that the Deceased intended to provide £10,000 to fund the purchase of the video equipment in the context of the move to France, does provide the basis for some form of moral claim. However, I consider that this particular intended gift requires to be considered in the wider context of the Deceased providing assistance to Mr Higgins when required at times of particular difficulty as described by Mr Higgins.

120. Although Mr Higgins might have said what he did in paragraph 61 of his first witness statement regarding obligations and responsibilities, I consider that I am entitled to take into account the fact that the Deceased did provide the assistance that he did in respect of Mr Higgins' finances when the need arose, in addition to the fact that he had said that he would specifically fund the video photography equipment.

121. It is also highly relevant that the Deceased was close to Mr Higgins up to his death, in contrast to the position of the Defendant beneficiaries.

122. In the circumstances, I consider this to be a claim founded on more than simply the relevant relationship and a need for maintenance, and that there is sufficient within the above to provide the requisite *"something more"* to support the claim that reasonable financial provision was not made for Mr Higgins by the Deceased for whatever reason.

S.3 Considerations

123. I have already dealt at some length with Mr Higgins' financial resources and needs, now and in the foreseeable future.

124. I consider it a relevant consideration that none of the other Defendant beneficiaries, apart from Josephine Devlin, has any need for maintenance. So far as Josephine Devlin is concerned, she only has a 1/7th interest on intestacy, and the award that I propose to make ought still to leave her with some significant interest.

125. So far as the Deceased's obligations and responsibilities are concerned, he plainly had none towards the Defendant beneficiaries. So far as Mr Higgins is concerned, I repeat what I say in paragraphs 116 to 122 above when dealing with the issue of *"something more"*.

126. So far as the size and nature of the estate is concerned, I do not accept that I should simply proceed on the basis that the estate is worth approximately £168,000 as contended by Mr Willetts. For the reasons set out in paragraphs 58 and 59 above, I consider that I should proceed on the basis that the starting point is that the estate is worth approximately £195,000, but that this could go up or down by some £50,000 either way. In any event,

the size of the estate is not particularly large, particularly when contrasted with the costs of the present litigation as evidenced by Mr Higgins' cost budget at least.

127. So far as 19 York Road is concerned, it is certainly true that Mr Maher is opposing a sale which is frustrating the ability to test the market. However, Mr Maher has indicated that he would purchase the Deceased's interest therein for £260,000, and so I consider that I am entitled to proceed on the basis that the Deceased's interest in 19 York Road could be realised for at least that sum should the need arise.

128. So far as physical or mental disabilities of Mr Higgins as applicant are concerned, whilst Mr Higgins can still plainly work, and in particular could work as a video photographer, I consider that I am entitled to take into account that he is disadvantaged in the labour market by his inability to carry out physical work, and further disadvantaged in working in France given his dyslexia and limited knowledge of French language.

Conclusions regarding failure to make reasonable financial provision

129. On the basis of the above, and considering the position as matters presently stand, I am satisfied that the operation of the rules relating to intestacy is not such as to make reasonable financial provision for Mr Higgins, and that the Court should make such provision in exercise of its powers under s. 2 of the 1975 Act.

Quantum

130. However, although persuaded that the Court should exercise its powers in favour of Mr Higgins, I am simply not persuaded that Mr Higgins is entitled to the extent of relief that he seeks.

131. Leaving aside the question of the CFA success fee, to which I shall return, I consider it appropriate to make an award by reference to the following:

    a. I consider it appropriate to provide for Mr Higgins' maintenance by awarding sufficient (£10,000) to cover the cost of the video photography equipment required to enable Mr Higgins to assist Claire in the wedding photography business, and enhance the takings thereof with a view to providing more income.

    b. As I have said, I consider it unlikely that the historic debts will, in fact, require to be paid, but that there remains a risk that at least some element thereof might be pursued. In the circumstances, I consider that the appropriate course is to significantly discount the amount claimed by reference to these debts to reflect, as best as I am able and the evidence available, the risks of enforcement involved. I propose to include a sum of £10,000 within the award to reflect the debts, and that resources may have to be deployed in order to defray the same.

    c. So far as continuing maintenance is concerned, despite the lack of robustness surrounding the figure of £434.53, I consider that I should take a monthly figure of £450 as a starting point meeting any deficiency, but as already indicated, I consider that any multiple applied thereto should be very much more limited than contended

for on behalf of Mr Higgins, and should be limited to simply two years. I shall award £10,800 under this head.

d. I consider it appropriate to award a further £10,000 to meet contingencies that might otherwise affect the ability of Mr Higgins to maintain himself going forward, and that might reasonably be expected to rise within the foreseeable future.

132. It follows from the above that, subject to a consideration of the CFA success fee, I will make an award of £40,800.

CFA success fee

133. I do not agree with Mr Willetts that awarding some part of the CFA success fee would necessarily be contrary to s. 1(2)(b), because it involves providing for something other than maintenance. To the contrary, I consider it relevant for the purposes of s. 3(1)(a) of the 1975 Act to the question of the financial resources and financial needs which Mr Higgins has or is likely to have in the foreseeable future. This is because if I do make an award in his favour so as to trigger *"success"* and a requirement to pay the success fee, which cannot as a result of s. 58A(6) of CALSA be recovered from the Defendants as costs, then his liability to pay the success fee will be bound to affect his ability to maintain himself to the extent sought to be achieved by the award. I consider that Cohen J was thus correct at [55] in *Re H* to consider it appropriate to consider the liability for the CFA success fee as part of the claimant's needs.

134. However, there is plainly a tension, in my judgment, between giving effect to s. 3(1)(a) of the 1975 Act in taking into consideration the success fee on the basis that it would affect the claimant's ability to maintain himself on the one hand, and the policy considerations behind s. 58A(6) of CALSA on the other hand in not requiring the opposing party to litigation to meet the payment of success fees, a factor taken into account by Deputy Master Linwood in *In re Clarke*, but not seemingly by Cohen J in *Re H.*

135. On the other hand, the actual effect of s. 58A(6) is simply to prevent a *"costs order"* being made so as to permit the recovery of the success fee. It is not in terms outlawing the making of an order under the 1975 Act that includes an element of successf fee within the quantum of the award because that has been taken into account as a consideration in respect of the claimant's needs. I take Mr Willetts' point in respect of CPR 36.17(4) that circumstances might arise in which an element of the success fee is brought into account in calculating the punitive sums provided for thereby. However, even if this can properly be construed as a *"costs order"*, the difficulty occasioned by any unlawfulness could be dealt with by the exercise of the Court's power under CPR 36.17(4) to depart from the operation thereof, given that the relevant provisions only apply *"unless [the Court] consider it unjust to do so"*. This exception could be used to avoid any difficulties of the kind that Mr Willetts raises.

136. The overall conclusion that I come to is that I am required to take into account the success fee in considering Mr Higgins' financial resources and financial needs for the purposes

of s. 3(1)(a), but that the policy considerations behind s. 58A(6) CALSA fall within the category of *"any other matter"* which the Court is entitled to, and in my view should take into account for the purposes of determining the manner in which it should exercise its powers under s.2 of the 1975 Act.

137. I am not persuaded that it is appropriate to take into consideration the respective merits of the case in deciding how much of the success fee ought to be recoverable as part of an award under the 1975 Act, even on the basis of submissions made post judgment. Apart from the difficulties that is likely to create so far as questions of privilege are concerned, I consider it to be an inherently unreliable exercise. I consider that I am entitled to take a rather broader view of the position and have regard to the size of the estate, the amount of the likely success fee compared with the award actually made, and the fact that in many cases, particularly where significantly less is recovered than claimed, some agreement for payment of a significantly smaller success fee might well be negotiated, even if the same is technically payable under the relevant CFA.

138. Taking these broad considerations into account, and having regard to the policy considerations behind s. 58(6)(A), I consider that the appropriate course is to increase the award to £55,000 to include an element of success fee provided that evidence can be produced, in an appropriate way, to prove that the success fee has become payable.

Overall conclusion

139. On the basis of my above findings, I propose to make an award of a lump sum payment of £55,000 out of the Deceased's estate pursuant to s. 2(1)(a) of the 1975 Act, subject to the matters referred to in paragraph 138 above.

140. Following the circulation of the draft of this Judgment, Mr Gomer quite properly pointed out that it did not explain how the interim award referred to above ought to be taken into account for the purposes of a final award, bearing in mind that a lump sum of £4,000 was paid pursuant to the interim award, and that some 8 monthly payments of £1000 have been paid to date pursuant thereto, giving a total of £12,000. My intention had been that the award provided for in this judgment should be in addition to the sums already paid and received pursuant to the interim award bearing in mind that the £4,000 element thereof related to a specific debt in respect of arrears of rent, and the figure for maintenance referred to in paragraph 131(c) above was intended to cover the position going forward rather than dealing with the position retrospectively. Whilst the 8 monthly payments of £1000 per month exceed the monthly deficiency identified in Mr Higgins' Statement of Means as at April 2021, I consider it necessary to bear in mind that Mr Higgins evidence in his first witness statement as to the then monthly deficiency, and that COVID-19 began to have a serious effect from as long ago as March 2019. It is in the light of these considerations that I proceed on the basis that the interim award stands insofar as it has taken effect to date, and that insofar as may be necessary, the figure of £12,000 paid be treated as additional in the final award to the figure of £40,800 referred to in paragraph 132 above, and thus to the figure of £55,000 referred to in paragraph 139 above. However, for the avoidance of doubt, so far as any further monthly payment or

payments of £1,000 since the date of the trial are concerned, including the payment due in October 2021, these are to be included within the figure of £40,800, and thus within the figure of £55,000.

141. There is one further postscript to add following the circulation of my draft judgment. On 15 October 2021, and following the circulation of my judgment, the Court of Appeal handed down judgment in an appeal from the decision of Cohen J in *Re H* (supra) – see *Hirachand v Hirachand* [2021] EWCA Civ 1498. The decision of Cohen J was affirmed, and Mr Gomer and Mr Willetts have each confirmed that they do not seek to content otherwise than that the decision of the Court of Appeal was consistent with my own reasoning on the issue as to whether, and if so how, the CFA success fee should be taken into account. In these circumstances, I have not considered it necessary to rewrite the relevant parts of the judgment dealing with this issue in order to take into account the decision of the Court of Appeal.