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King's Bench Walk

Fatal Accident Act Apportionment – a pragmatic solution to an unusual problem?

The decision of Master Cook in ARN v Ageas Insurance Ltd (27/1/2020), when approving a Fatal Accident Act settlement involving four children, provides a novel and pragmatic solution to a difficult apportionment problem. A single mother was killed in a road traffic accident, leaving four young children. The children were the deceased's only dependants and their claim was settled for a substantial lump sum.

At the Approval Hearing Master Cook agreed to adjourn final apportionment of the damages between the four children until 2028, when the youngest child would be 16 and the other three 18 or over. Pending that final apportionment, he approved the payment of the damages into various trusts, including a discretionary trust.

David Sanderson, instructed by Rogers & Norton, acted on behalf of the Claimants.

Background Facts

1. FRN, an unmarried mother, was killed in a road traffic accident, leaving four children aged 8, 7, 5 and 2. At the time of her death, FRN was a full-time single mother. She was estranged from ARN, the father of the four children, although he continued to share some of the childcare.
2. Following the death of their mother, ARN took full responsibility for the care of his four children.
3. ARN instructed Solicitors to bring a claim on behalf of his children, as the only dependents of the deceased. He was not a dependant himself, as he did not come within the definition of 'dependant' in S1 of the Fatal Accidents Act 1976.
4. Initially the children were cared for on a gratuitous basis by their paternal grandmother and by their father. Unfortunately, this arrangement came to an end after only a few months, when the grandmother's own husband became ill and she was forced to give up looking after her grandchildren.
5. For a further period, ARN juggled his responsibilities, working flexibly and part time and using nurseries, after school clubs and other gratuitous family childcare, with the help of funding from an interim payment.
6. After a while it became clear that this arrangement was unworkable and, following an unsuccessful attempt to settle the whole claim at an early Joint Settlement Meeting, the Defendant made a further substantial interim payment, which funded the appointment a case manager and a full-time nanny.
7. The Claimants' solicitors set up four bare trusts, one in the name of each of the children, to receive the interim payment. The payment was divided equally between the trusts.
8. The parties then co-operated with a view to making a further attempt the settle the claim. They exchanged expert evidence on the value of the mother's services, while the Claimants' solicitors gave disclosure and served witness statements. Further interim payments were made to fund continuing childcare costs, case management and professional fees for administering the trusts.
9. In March 2019 the Claimants' Solicitors issued a Claim Form and the parties agreed to hold a mediation, which took place with Richard Methuen QC as mediator, on 4 October 2020.
10. In summary, the dependency presented in the schedule covered:
    a. The commercial cost of employing a nanny 70 hours a week until the youngest child reached the age of 14 and 20 hours a week thereafter, until the youngest child reached the age of 18.

b. A modest financial dependency on the mother's earnings as a waitress.
c. A modest services dependency beyond the age of 18.
d. Conventional claims for loss of a mother's care and attention.
e. Case management fees.
f. The costs of administering trusts to hold the damages, until the youngest child reached the age of 18.

11. The mediation was successful and the claim settled for a gross lump sum of £800,000.

Approval, Apportionment and Investment

12. The difficulty that then arose was how to deal with the apportionment of the damages between the four children.
13. The entire award needed to be apportioned between the four children, albeit that the bulk of the damages was intended to fund continuing childcare and maintenance costs until they were 18.
14. In the more usual case, when children lose one of their parents and have a Fatal Accidents Act claim, the surviving parent is also a dependent and the court will apportion the bulk of the award to the surviving parent, who is then able to spend the money appropriately, replacing the services and income formerly provided by the deceased. It is standard practice to apportion relatively modest amounts to each of the dependent children. For instance, in a claim approved by Margaret Obi, sitting as a Deputy High Court Judge, on 14 January 2020 (*JZX v DZX*), where a father was killed leaving a widow and three young children, the award was apportioned £645,000 to the widow, and £10,000 to each child. The sum apportioned to each child was to be retained in the court funds office and paid out when each child was 18.
15. In this case, if apportionment was to be carried out now, while the children were aged 13, 12, 10 and 7, it would be necessary to forecast expenditure on childcare and to apportion unequal sums to the children, with the eldest receiving the least and the youngest the most.
16. To assist in such an apportionment, Frenkel Topping were instructed to prepare a cash flow projection of anticipated expenditure, to take each child to the age of 18. This projection accounted for about 60% of the outstanding award of damages.
17. To carry out the apportionment now, using those figures, would create difficulties and inevitable injustice between the siblings. The difficulties were:
    a. Any projection of future costs is vulnerable to unpredicted and unpredictable changes in circumstances, meaning that either less than has been apportioned would be spent or more than is apportioned is needed. There is an almost infinite variety of ways in which expenditure might differ from that now anticipated: for example nannies may change, or rates may change, or the father, or another family member, might choose to undertake more childcare on a gratuitous basis, so reducing the anticipated expenditure.
    b. The need to apportion the outstanding balance of 40% of the damages. Whilst this sum could provide a contingency fund, once the fund had been apportioned, the damages would belong to each child absolutely and would no longer be available to make up for unanticipated expenditure that might be required for one or more of the other children.
18. Accordingly, when the children reached the age of 18, each would receive a different, quite possible wildly different, sum in damages. There can be no justification for this unequal treatment of the four children. Had their mother lived, she would, in her discretion, have used her time and money to provide for the differing needs of her four children. She would have wished to ensure that each child's needs were satisfied and that they were each treated as equitably as possible.
19. It was our concern, and the concern of their father, that if the children were to receive unequal sums at 18, this would be a cause of legitimate grievance that would only add to the emotional turmoil initiated by the violent death of their mother.
20. The solution that we proposed, and which the court was ultimately persuaded to adopt, was for the court to approve the overall settlement figure, but to adjourn final apportionment of the damages, until the youngest child had reached the age of 16 in 2028, by which date his three siblings would be 18 or over.
21. There was also the question as to where the money would be held, in order allow access to the damages, allowing them to continue to be spent on educating, maintaining and supervising the four children.
22. The options were either for the damages to be held in the court funds office, with a scheme of repeated applications for payment out, or for the money to continue to be held in trusts and administered by trustees.
23. Holding the money in trust would be more cost effective than for there to be repeated applications to the court funds office, particularly since, between each application to withdraw, the money would need to be looked after by trustees pending its expenditure. However, placing the money into four bare trusts would

require final apportionment. Once money is placed into a bare trust in the name of one of the children, it belongs absolutely to that child and can only be spent for the benefit of that child. On reaching the age of 18 the child will be able to insist on the dissolution of the trust and the payment out of all the remaining money.

24. The trust solution that would best replicate the ability of a mother to have discretion over how to spend her time and money on her children, would be a discretionary trust, with the four children named as the only beneficiaries. There is, however, a tension between the implementation of this attractive solution and the obligation placed upon the court by S3(2) of the FAA, to "divide the damages among the dependants in such shares as may be directed" (see the White Book notes at 21.11.3).
25. There is an additional problem with discretionary trusts, that they are subject to a punitive tax regime, designed to prevent the evasion of Inheritance Tax. Those tax charges apply to any discretionary trust:
    a. into which a total of more than £325,000 is settled (either on being originally set up or subsequently); and
    b. whose value comes to exceed £325,000, as a consequence of the accrual of investment income.
26. This was the difficulty that was presented to Master Cook in January. It became clear at the approval hearing that Master Cook ultimately shared the philosophy of the Claimant's legal team and of the father, which was that the principal aims must be to keep administrative and legal expenditure to minimum and to ensure, as far as possible, complete equality between the four siblings.
27. The solution to all these problems that we proposed and which Master Cook adopted was as follows:
    a. To pay £250,000 into a discretionary trust (being a sum that, even with growth, would not foreseeably ever exceed £325,000).
    b. To divide the balance of £360,000 (£190,000 had already been spent), equally between four bare trusts.
    c. To direct that all expenditure on the children should be pooled, regardless of which individual child it was to be spent upon, and should be funded equally from the bare trusts, until each trust was left with £30,000.
    d. To direct that thereafter all expenditure should be funded from the discretionary trust, leaving each child absolutely entitled to the £30,000 left in their bare trust.
    e. To adjourn final apportionment until 2028, when the youngest sibling was 16, at which hearing the balance of the damages left in the discretionary trust would be divided, firstly to fund the maintenance of the youngest child between the date of the hearing and their 18th birthday and secondly, to share the remaining funds equally to the four siblings.
28. The Master was partly persuaded to adopt this solution by the fact that the valuation of the dependency that underpinned the settlement figure of £800,000 included provision for the past and future cost of administering the trusts up to the date each child was 18.
29. The Master also ordered a detailed assessment of costs and made a summary assessment of the anticipated costs of the final apportionment hearing.
30. One point of practice to note, is that, while ultimately persuaded that the solutions adopted by the Claimant's advisors were correct, the Master strongly criticised the legal teams for both parties for having made and received substantial interim payments, and for having set up trusts to receive those payments, without first issuing proceedings and seeking the approval of the court pursuant to CPR 21.10.

David Sanderson