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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2nd October 2019
Start Time: **15.54** Finish Time**: 16.29**

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Before:

MR. JUSTICE FRANCIS

- -

Between:

SARAH WEISZ	**Claimant**
- and -	
(1) JONATHAN BARNA WEISZ	
(2) HILARY JANE LESSER	
(3) DANIELLE LOUISE OGNALL	
(4) JONATHAN BARNA WEISZ	
(5) EDWARD WEISZ	**Defendants**

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MR. SIMON CALHAEM appeared for the **Claimant.**
MS. JULIA BEER appeared for the **1st and 2nd Defendants.**
MR. GILES RICHARDSON appeared for the **3rd and 4th Defendants.**

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APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR. JUSTICE FRANCIS:

1. The claimant in these proceedings is Sarah Weisz, who married the deceased on 19th April 2005. It was for both of them a second marriage.

2. The application which is before me today relates to an application issued by the claimant on 5th July this year for interim provision pursuant to section 5 of the Inheritance (Provision for Family and Dependants) Act 1975.

3. The application is supported by a draft order which Mr. Simon Calhaem of counsel has drafted on behalf of his client, the claimant, and it is split essentially into three blocks. He seeks interim payments at the rate of £8,511.78 a month, backdated to 5th July 2019 and payable thereafter on the 5th of every month until further order. He seeks that the respondents pay or cause to be paid to the claimant an interim payment of £20,000 in order to repay funds loaned to her by Scott Saunders. He seeks an interim payment of £55,578 for the purposes of meeting the claimant's legal fees up to and including the FDR hearing. I should say that the FDR has not yet been listed and if there is a court-led FDR, I think we are all agreed that it is unlikely to happen until the early part of, or even the spring of, next year.

4. The application was listed today for two hours. I should say, so that counsel are aware, that in most of these cases where the time estimate is obviously hopeless, it is very likely that they will be sent out without having been heard, however urgent the case may be, unless of course it is urgent in the sense of relating to the welfare of, or danger to, a child. However, we have been lucky today in that one of the cases that was listed was not effective. Nevertheless, we have effectively taken the whole of today to hear this case and if I fail in the course of this necessarily ex tempore judgment to set out every argument that has been put before me, it is only because I have not had time to deal with each and every point. It does not mean to say that I have not had them all very much in mind.

5. The starting point in relation to this case, having set out the provision which is sought by the claimant, is to express concern, if not astonishment, at the level of costs in relation to today's application. The claimant's costs - and this is just for today and not the claim overall – are just over £18,000. The costs of the third and fourth defendants, who are two of the children of the deceased, are £37,880. Remarkably, I am told that the executors of the estate do not even know what their costs of today are, and I should say that if any of the lawyers in this court appear in front of me again not knowing what their costs are for the application in front of me, I will have a lot more to say about it than I have done today; but, if I take the executors' costs as being the same as the claimant's (and I note that the claimant has instructed – I hope I can say this without any disrespect – much less expensive solicitors than the third and fourth defendants), then that means that the overall costs of today are in the order of £74,000.

6. That is to be set in the context of the total amount claimed today by the claimant of £75,000 in terms of the lump sum plus the £8,511 a month to which I have referred. It cannot be proportionate for so much money to be spent on this issue and it is very sad indeed that the parties have been unable to settle today's application.

7. It would be wholly wrong for me today to criticise anyone in particular because, first of all, this is an interim hearing and I have made no findings of fact; and, secondly, I dare say that a great deal more has gone on behind the scenes than I am privy to, because of course I understand how these things work; but I hope, if nothing else, that the parties who are in court today will reflect upon the fact that if this were a commercial deal rather than a family row, they would not have spent this amount of money on this litigation because it would not be commercially sensible to do so, and the only way they are going to settle this litigation - whether it be next week or some time next year - rather than fight the case, the only way they are going to do so is by standing back and taking a commercial view, on advice.

8. I understand that these Inheritance Act claims are often very distressing. It is all the more distressing in this case because I have been told, and I accept, that the claimant, Mrs. Weisz, and the children of her late husband's marriage and therefore her step children, all got on perfectly well before her late husband died, and it is therefore especially tragic that they are now locked into emotional and expensive litigation.

9. I have already said during the course of discussion in court today, and repeat, that there are many forms of dispute resolution available, which are very well known to all the lawyers in this case, and I would hope that a private FDR or mediation would effectively settle this case: because somebody sitting as, whether it is a mediator or a judge or a chair of the meeting, would be able to express a very frank view, having heard not only what I have heard, which is the parties' open positions, but having got behind the detail and looked at their "without prejudice" positions.

10. That is the beauty of that process. The person who chairs those meetings really knows what people are thinking rather than seeing on paper what their positioning or posturing is, and when I say "posturing" I do not mean that there is anything dishonest about it but we all know in litigation there is the open position, which is one thing, and the "without prejudice" position, which of course I shall not and cannot know, which is something completely different in most cases.

11. Very shortly the background is as follows.

12. At the time of the marriage Natalie and Joseph, the claimant's children, were 18 and 16, and the deceased's children Danielle, Jonathan and Edward were 21, 18 and 15 respectively.

13. It is not necessary for me to say very much about the detail of the marriage. That is something that will be gone into, I daresay, at the final hearing if that has to take place; but, it is fair to say that although this was not the longest of marriages, it was long enough that the claimant plainly has a legitimate and would have had a legitimate claim to make on divorce for at least an element of sharing, albeit that it would have been possibly viewed more in the context of a needs case. That is, of course, not the territory we are in. The reality is that this has become a claim under the Inheritance Act.

14. By his will dated 12th December 2017, the deceased appointed his son Jonathan and his sister Hilary as executors and trustees. I am told that the net estate for the purposes of the Inheritance Act is not less than £4,088,336.

15. The deceased by his will made a specific gift to the claimant of his half share of the matrimonial home, a property in London NW4, which was subject to a mortgage of £200,000 odd. The claimant was also provided with a car which was under a lease from the deceased's company. In circumstances which it is not necessary for me to go into today, the car lease was terminated and the car removed from the claimant. Whether that was spiteful, legitimate, commercial or not, it is not for me to postulate for the purposes of this judgment because I have heard no evidence, but I can well understand that, when you are already trying to come to terms with bereavement, that to find that your car is taken away from you with or without notice, because there is an issue about that for which again I cannot conclude, it is not going to speed this litigation towards a happy conclusion. It may be that on reflection people think that they could have dealt with things a little bit differently, but now is not the time for looking back. What I have to do is to look forward.

16. There is no doubt, and it is agreed by all the parties that I have the power to make the orders that are sought.

17. Section 5 of the Inheritance Act says:

> "Where on an application for an order under section 2 of this Act it appears to the court
>
> (a) that the applicant is in immediate need of financial assistance, but it is not yet possible to determine what order (if any) should be made under that section; and
>
> (b) that property forming part of the net estate of the deceased is or can be made available to meet the need of the applicant;
>
> the court may order that, subject to such conditions or restrictions, if any, as the court may impose and to any further order of the court, there shall be paid to the applicant out of the net estate of the deceased such sum or sums and (if more than one) at such intervals as the court thinks reasonable; and the court may order that, subject to the provisions of this Act, such payments are to be made until such date as the court may specify, not being later than the date on which the court either makes an order under the said section 2 or decides not to exercise its powers under that section".

18. Then sub-section (3) says:

> "In determining what order, if any, should be made under this section the court shall, so far as the urgency of the case admits, have regard to the same matters as those to which the court is required to have regard under section 3 of this Act".

19. Section 3 of the Act is extremely well known. Section 3(1) provides:

> "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 of the 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".

20. Therefore, it is clear that I have the discretion to order both periodic payments pursuant to section 5 and I can order lump sum payments. Crucially, the provisions of section 5 to which I have just referred include the words: "Where … it appears to the court that the applicant is in immediate need".

21. Mr. Calhaem, on behalf of the claimant, sought to persuade me that that is broadly similar to the provisions of section 22 of the Matrimonial Causes Act which deals with maintenance pending suit and interim periodical payments.

22. I do not accept that the exercise of the discretion is identical. I do not even accept that it is broadly the same, although there are necessarily considerable overlaps. The words "immediate need" seems to me to make it very clear that I have to identify exactly that: an immediate need. Some things which claimants receive in interim periodical payments or maintenance pending suit applications go beyond what might be described as immediate needs. It is not appropriate for me to set out a list of things that might or might not come within that heading. I shall do so only restricted to the specific context of this case.

23. There is a debate in this case about the amount of money that was being spent by Mrs. Weisz and her late husband during their marriage. Mr. Richardson on behalf of the third and fourth defendants said that the obvious information as to the amount of the expenditure is the net income demonstrated by the late Mr. Weisz's tax return.

24. It is not as easy as that. First of all, it is clear that Mr. Weisz had a director's loan account with his company, and he was drawing down money against that loan account entirely legitimately; and it would of course, because it was from the director's loan account, have been tax free. Mr. Richardson says to me, correctly, that it would not have gone on forever. I accept that; but, what I have been trying to look at is the history of what was being spent and there is a debate about that, but plainly what was being spent in recent years was not only the available net income but also the draw downs against the director's loan account.

25. Whether or not there were additional sums I do not know; but, in the absence of an allegation backed up by cogent evidence that there were monies that were being utilised by this couple that did not form part of either the declared monies in the tax return or the director's loan account, then I assume that there were no other monies. That is an investigation which may be made by those acting for the claimant in relation to her claim on a longer term basis, but I am certainly, for the time being at least, going to assume that the late Mr. Weisz conducted his financial affairs properly and honestly, until somebody makes an allegation backed up by cogent evidence that a judge should form a contrary view.

26. What I have to do today is to make an order that fairly provides for the claimant's immediate needs between now and the time when this case may be resolved.

27. The first thing I want to say about the monthly payments that I am going to order is that it seems to me that it is inappropriate that those should stop on the date of the FDR. They will of course stop on the date when the case settles because then, if it settles, what I am ordering will be replaced by whatever the parties may agree; but, if there is an FDR which fails, the FDR judge cannot deal with a renewed application for interim provision because he or she is expressly prohibited from having anything further to do with the case, except to make consensual directions. The reason for that is obvious: the judge will have got into the detail of the "without prejudice" negotiations in the case and the judge cannot thereafter make orders other than by consent. That is a very well established principle in the Family Division and we are hearing this application under the Inheritance Act in the Family Division, but I am quite sure that the FDR process in the Chancery Division would apply that same basic and obvious rule.

28. Therefore the order that I am going to make in relation to interim provision for the claimant is going to run until two months after the date of the FDR, or obviously if it settles it stops when it settles, so that there is time for the parties to try and negotiate a renewal of the interim provision, and I put in parenthesis there that it might be rather obvious that the renewal should be at the same rate unless something remarkable has happened in the case; but, if they cannot, then it gives time for the applicant to make an application. It may be, if that happens, that it would be sensible for that application to be made to me if I am available and if I have not done the FDR, because then it would be a rather shorter hearing as I have some familiarity with the case.

29. I turn then to deal with the detail of the figures which have been submitted on behalf of the claimant, Mrs. Weisz.

30. Dealing with them in the order in which they have been set out by Mr. Calhaem in his draft order, as I have said the first part is that he says that his client should be paid £8,511.78 a month.

31. The budget that has been put forward on behalf of the claimant appears at page B194 of the bundle. I have made it clear in numerous judgments in family law cases that budgets need to be evidence based and not just put forward as some kind of number on a "best guess" basis. It seems to me that this is an evidence based budget and I do not accept Mr. Richardson's criticism that they are not backed up by much documentation. At an interim hearing the judge does not want to be burdened with water bills, electricity bills and shopping bills; but, there are some elements of the budget which it seems to me have been rounded and I will deal with them.

32. The first block is under the heading of "Housing" and seeks – I am going to leave out the pennies; I do not know why solicitors preparing these things put in the odd pennies and I would encourage them not to. The amount claimed is £18,576. Most of that is unexceptional and most of it is agreed, and I am not going to go through the agreed amounts. The numbers in relation to which Mr. Richardson – and I should say Ms. Beer, who has acted on behalf of the executors, has adopted almost all the submissions made by Mr. Richardson and my failure to refer to her as often as to the others is not any lack of effort on her part, but by the time Mr. Richardson sat down he had probably said most of what could have been said on behalf of the estate, the interest of his clients and the estate being aligned.

33. The numbers to which exception is taken are first £5,000 for interior/exterior decoration averaged over five years. Well, the words in parenthesis "averaged over five years", immediately make it clear that that could not fit into the category of immediate need. Immediate, in the context of this case, seems to me to be within the next year or so; and so, even if I was to accept that amount, I would have to knock it down from £5,000 to £1,000.

34. Then there is the maintenance of domestic machines and central heating, £500. I think Mr. Richardson's objection to that is unfair. We all know that if things like washing machines or boilers break down they cost an awful lot to repair; and, in my experience, something breaks down every year and has to be paid for and it is a fair claim.

35. Then we have got £1,000 for repairs, replacing furniture, etc., and that is also said to be averaged over five years.

36. Doing the best that I can and applying the inevitable broad discretion that I have whilst bearing in mind the words of the Statute, in particular the reference to "immediate need", I have reduced that claim of £6,500 down to £2,500, which means that I take off £4,000 from that block.

37. The next item is "Housekeeping". It may be that the figure for food, wine and household goods of £10,000 is a pretty round number plucked out of the air, but it seems to me that that is something that can be the subject of cross-examination at the

final hearing if necessary and is not something that I should start to try and dissect for the purposes of an interim hearing.

38. Nobody seems to suggest that the claimant does not have a dog and therefore the amounts claimed under "Dog" seem to me to be broadly unexceptional, but the item for domestic help of £7,800 to which exception is taken, does seem to me to be high. I do not think it would be right to reduce it to nothing. Apart from anything else, if Mrs. Weisz does employ one or more people to help her in the house, why should she have to sack them and then try to re-engage and they might not be available; but it may be that she either has to make other economies or reduce their hours and I am afraid that I am, with a slightly broad brush, reduce that number by 50% and therefore take £3,900 off that block.

39. The next item is "Clothes and Footwear" averaged over a year. This includes not only £3,230 for clothes and £1,850 for footwear, but £1,800 for accessories, £3,000 for jewellery and £2,500 for evening wear. I anticipate that she probably has enough jewellery and accessories to keep her going for the next year, and if she goes out to an evening do she has probably got something that she can wear without having to buy something new just for the moment. Of course she will need to buy some clothes and footwear during the course of this phase, and again doing the best that I can and recognising that it is a bit of a broad brush, I am going to allow a total of £3,000 in relation to that block, which means that there is a saving against budget of £9,380.

40. The next heading is "Cars". Exception is taken by Mr. Richardson to the claim of car lease payments of £3,600 a year. I am against him on this. Mr. Calhaem tells me, and I accept, that his client has borrowed an old Peugeot 106 with a leaky roof. I do not think that the late Mr. Weisz would have wanted his wife to be driving around in an old Peugeot 106 with a leaky roof when there is an estate of over £4 million, and I am afraid I find the estate's attitude in relation to this heading a little unsatisfactory.

41. I am going to allow all of the items in relation to the claimed amounts for cars. If, on cross-examination at the final hearing, it is found that £1,300 on petrol or diesel was far too much, then the parties can pay their lawyers three times as much as they will save to argue over that heading. Good luck to them if they seek to do that, but I hope that common-sense will prevail.

42. The next heading is "Personal Expenses", which is a slightly misnomer because I should have thought that clothes and footwear come into that category as well, but the two items to which exception is taken are optician of £1,100 and dentist at £1,500. Unfortunately Mrs. Weisz has not identified in her statement any ongoing dental treatment or eye treatment, happily; but, it sounds to me as if, for example, optician is including at least one good pair of glasses which I should hope she could avoid having to buy for the phase of this litigation, and I do not know, as I say, whether there is ongoing dental treatment or not, but the amount claimed is £2,600. I am going to allow £1,000 for that amount, which means I am taking £1,600 in relation to this block.

43. The next is probably the next contentious of all of them, which is "Holidays, Entertainment, Sport and Hobbies".

44. Of course people in the situation that Mrs. Weisz is in are entitled to and should have a break. I am sure that this has been a hideous phase of her life and I hope that those who are on the other side of this litigation will recognise that, just as they have suffered from bereavement as well; but the idea that there is no money under this seems to me to be plainly wrong. On the other hand, to claim £20,000 for holidays for the course of the next year or so, I do not I am afraid find that it is possible to reconcile £20,000 on holidays with the phrase "immediate need". Again, doing the best that I can, I am going to allow under this heading £8,000 instead of £31,400, which means that I am taking £21,850 off this item.

45. There was a most inelegant scrap over whether Mrs. Weisz should be able to give £1,000 a year to charities. Well, I do not know and I do not want to know what charities they are, but of all the items for the estate to query, this is not a meritorious one, a requested expenditure of only £1,000 per year would seem to be de minimis. I recognise, of course, that charitable donation is entirely a matter for the individual, but given that the amount that Mrs. Weisz seeks to give each year to charities is about one hour plus VAT of the defendants' solicitor's time, that rather puts it all into context.

46. You can check my maths but I have done it a couple of times and I believe that this is the correct maths. What I have done, therefore, is that I have taken £40,730 off the budget which reduces the budget to £61,411, which is £5,200 a month. The amount offered by the estate was £4,000 a month. I am going to order that £5,200 a month be paid, backdated to 5th July, with credit being given for payments received since that date. That order will continue until two months after the conclusion of the FDR or earlier settlement if achieved.

47. I turn next to deal with the interim payment in order to repay funds loaned to the applicant by Scott Saunders.

48. I am afraid that Mr. Richardson in this regard has what I would call something of a knockout blow, which is that there is no evidence from Mr. Saunders that he is about to issue a claim in relation to that money or cannot live without it. There is nothing to prevent Mrs. Weisz bringing a further claim of course under section 5 if she wants to. I do not encourage her to and if she has evidence that proves this, well then she can produce it. I very much expect that this debt will be taken into account by the Judge, if it has to be determined by a Judge at the final hearing and that money will be given to Mrs. Weisz to repay that what seems to be an entirely legitimate debt; but there is no evidence before me which categorises it as an immediate need and therefore I reject the claim in relation to that amount.

49. In relation to the claimed costs it is well established now that there is the power to make an order, in this case against an estate, to provide for the payment of costs to a claimant. It is only fair that there should be a level playing field.

50. Mr. Richardson makes some complaints which are superficially attractive.

51. The first is that there is no evidence from the claimant's solicitors saying that they will not continue to act if she is not put in funds. Why, I ask though, should a firm of solicitors have to act as creditor? It is entirely unreasonable to expect a firm of solicitors in a case like this when there is, as I say, some £4 million odd in the estate,

to extend credit to a client of theirs when there is a perfectly legitimate source from which that money can be paid.

52. Secondly, Mr. Richardson complains that there is no evidence that the claimant could not find a firm of solicitors to act for her on a conditional fee basis. Perhaps he should be careful what he wishes for, because if he ends up losing this litigation there could of course be an enhancement of the fees that Mrs. Weisz would have to pay, but in those circumstances the estate themselves might be ordered to pay. It seems to me that it is not necessary when Mrs. Weisz has found, I daresay in very uncomfortable and emotional circumstances, a firm of solicitors that she is happy with and counsel that she is happy with, why should she have to go and change horses and spend time and possibly money looking around for a lawyer who may take this case on a CFA basis? I do not think that it is her duty to do that.

53. Mr. Richardson has not advanced the argument that she should go out into the market and borrow from one of the well known litigation funders. My experience in family law litigation is that firms such as Novatas typically charge 18% compound interest. They provide a necessary and invaluable service in the right case. However, my attitude if it is a divorce situation where the paying party makes the financially less secure party go and borrow money at 18%, is that I make the paying party pay that interest back to them when the case is over, because I think it is totally wrong to make, in some cases your spouse, but in this case the claimant, go and borrow money at an expensive rate like that when there is money in the estate or in the matrimonial estate as the case may be, to make provision for that funding.

54. No complaint is made about the amount of costs sought in the sense of hourly rates because at the end of the day it is accepted, I think sensibly on behalf of the third and fourth defendants, that when their costs are running at something like twice the rate of the amount of the claimant's costs, that I think that they probably have sensibly recognised that it would be difficult for them to criticise the rates of a firm that is actually charging something like less than half of the firm that is instructed by the third and fourth defendants.

55. I make it clear that I am not for a moment criticising anybody in this case, least of all the solicitors acting for the third and fourth defendants. The third and fourth defendants are entirely entitled to choose the solicitors that they want and they have gone, I note, to a firm with particular expertise in tax issues, and so it may very well be that there is some saving in that regard; but, given what I have said, I therefore allow the claim in the full amount claimed for costs in the sum of £55,578 for the purpose of meeting her legal fees up to a concluded FDR hearing. That would be on the basis that the sum paid in relation to costs will be paid to the claimant's solicitors and will be held by them in respect of the costs that are incurred up to and including the end of that FDR. They will return to the estate any monies which are not utilised and will obviously account in the normal and proper way for all the sums that they have drawn down in relation to that amount.

56. I want to conclude by saying one thing in relation to the case to which I have been referred of *T v. V* [2019 EWHC] 214 Fam., a recent decision of Mrs. Justice Lieven, in which Mrs. Justice Lieven rightly, in my view, set out the test which is to be applied in these cases and which I have broadly applied again when giving this judgment. Mrs. Justice Lieven also referred to the possibility that orders under

section 5 were draconian. They can be draconian, but the circumstances of her case were, I note, rather different from the circumstances of this case.

57. It is reasonable to conclude that Mrs. Weisz is going to achieve something from this litigation. I say that because there is an open offer by the estate to make provision for her in the sum of £4,000 a month. In the *T v. V* case there was identified by the Judge a real possibility that the claimant would come away with nothing; and, in circumstances where the claimant may come away with nothing and may not be able to repay the money because it has been spent, then I can well see that the use of the word "draconian" might be apposite. It is less so here.

58. I have, as I have identified, the power to attach conditions or restrictions in relation to the monies which are being paid.

59. I invited Mr. Calhaem to set out an undertaking which his client was willing to give, and in fairness to those acting for the defendants they have not had yet the full chance to consider this and when I have finished giving this judgment I will give the parties an opportunity to have a discussion about the terms of the undertaking and I will not therefore say anything further about it at this stage.

60. The first and second defendants have undertaken - and I understand that this is now agreed – that until the conclusion of this claim or further order or agreement in the meantime that they shall not, save for the purposes of complying with this order, make any further distributions to the beneficiaries from the estate of the deceased. That undertaking I am very happy to accept. I will, when we come back into court, just want to do as all Judges have to do, which is to make it clear to the defendants who are giving the undertaking, precisely what it is they are doing and what the consequences could be if they were to breach that undertaking, which I am sure that they would not do.

61. So that concludes this part of the case.

This transcript has been approved by Mr. Justice Francis