

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

PROPERTY, TRUSTS & PROBATE LIST (ChD)

IN THE MATTER OF SECTION 116 OF THE SENIOR COURTS ACT 1981

AND THE INHERENT JURISDICTION OF THE HIGH COURT

AND THE ESTATE OF X (DECEASED)

Deputy Master Linwood

20th November 2018

Y

Claimant

and

Z

Defendant

MR G REEDS appeared on behalf of the Claimant

MISS F JULIAN appeared on behalf of the Defendant

JUDGMENT

Hearing: 19th & 20th November 2018

(AS APPROVED)

WARNING: By Order dated 20th November 2018 Deputy Master Linwood ordered that the identities of the children, the claimant and the defendant (“the Parties”) were not to be disclosed and that reporting restrictions apply as to as to the disclosing of any information that may lead to the identification of the Parties. Further, he ordered that the publication of the name and address of the Parties or of any member of the Parties’ respective immediate families is prohibited.

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DEPUTY MASTER LINWOOD:

1. This is a dispute between two parts of a family as to the proper disposal or burial of the body of Mr X who died [in] June 2018 from a rare form of cancer. It has a complicated procedural history, which I will turn to shortly, but in essence proceeds now as a Part 8 claim. For ease of reference, and no disrespect to the parties, I will refer to the family members by [initials]. When I refer to their witness statements, again for ease of reference, due to the substantial numbers I will refer by their [initial] and the number of the witness statement in relation to that deponent.

2. I give this judgment *extempore* in view of the overriding need for X to be laid to rest in the manner required by the law, but as early as possible in view of the fact that he died almost [five months] ago. This judgment is therefore shorter than a full reserved judgment, but I assure the parties that I have read and considered carefully all of the evidence and the law before me and listened carefully to the oral evidence of the witnesses, all of which I have taken into account in this judgment. I am also particularly grateful to both counsel, Mr Reeds for Mrs Y and Ms Julian for Mrs Z, for their skeleton arguments, succinct submissions and the way in which they have dealt with this trial. In particular, I appreciate Mr Reed's sensitive cross-examination of the children.

3. X was born in [DDDD]. His mother, Mrs Y, is the claimant. X's father still lives in DDDD. Mrs Y and X's father have two other sons, Brother A and Brother B. All of Mrs Y, Brother A and Brother B live in London. The defendant, Mrs Z, was also born in DDDD. She married X [in] 2002. They have had three children: Child A, now 16; Child B, 15 and Child C, who is nine. All the aforementioned, save X's father, are British citizens. X was brought by his mother to the UK in about 2000. Mrs Z came to the UK shortly thereafter. They all live or have lived in London.

The parties' contentions

4. In essence, Mrs Y, supported by her sons Brother A and Brother B and their father, say that X's body should be repatriated to DDDD for burial according to local custom in the 300-year-old ancestral burial ground. Mrs Y claims that she is to arrange the funeral as she is appointed executor of X's estate by a will made whilst he was in hospital on 13 May 2018. Mrs Y says that on his deathbed, her son said he wanted to be buried in DDDD in his ancestors' burial ground. Mrs Z, supported by her children Child A and Child B, wishes her husband to be buried in the UK in a cemetery [in] London quite close to the home they all live in, so that they all can attend the funeral and visit his grave easily as and when they wish. Mrs Z says that her husband said to her that he wanted to be buried in London.

5. Mrs Z challenges the validity of the will and thereby Mrs Y's position as executor, and further says even if Mrs Y was validly appointed, she seeks an order permitting burial here pursuant to the inherent jurisdiction of this court or s.116 of the Senior Courts Act 1981. This claim commenced shortly after X's death. Mrs Z arranged a funeral for 26 July 2018. Mrs Y says she was unaware of this until alerted by the Reverend, a community elder, who had tried to act as a go-between between Mrs Y and Mrs Z. Mrs Y then commenced what eventually became these Part 8 proceedings by making an application to suspend or stop the burial on 23 July 2018.

The procedural history

6. There have been four applications by Mrs Y and seven hearings to date. These are, and I take these from Mr Reeds' skeleton: (1) 23 July 2018 before Cheema Grubb J; (2) 7

August 2018 before Choudhury J; (3), 22 August 2018 before Nicklin J; (4), 24 August 2018 before Nicklin J; (5&6), 10 and 4 September 2018 before Garnham J; and (7), 23 October 2018 before Deputy Master Jefferis, from which some nine orders have arisen.

The issues for determination

7. I proposed certain issues on the first day of trial and there is now, thanks to counsel and, in particular, Ms Julian, an agreed list of issues:

- i. Is the purported will of X dated 13 May 2018 valid?
- ii. If validity is accepted:-
 - a) Should the court exercise its inherent jurisdiction and/or its power under s.116 of the Senior Courts Act 1981 and make a direction as to funeral arrangements and/or limited grant of representation for that purpose?
 - b) If so, in whose favour?
- iii. If validity is not accepted or cannot be determined:-
 - a) Should the court exercise its inherent jurisdiction and/or its power under s.116 of the Senior Courts Act 1981 and make a direction as to funeral arrangements and/or limited grant of representation for that purpose?
 - b) If so, in whose favour?

8. Deputy Master Jefferis gave directions in his order of 23 October including requiring Mrs Y to issue a Part 8 claim form. Also, he provided for the exchange of witness evidence and this two-day disposal hearing at which all of Mrs Y's outstanding applications – there are now four – would be determined, together with costs. I made a further directions order in November permitting oral evidence limited to the issue of proper disposal of the remains of X and directing that only those persons who had filed witness statements could give evidence.

Matters not in dispute

9. First, there is, as Mr Reeds submits, no other document before the court purporting to be a will of X save the will dated 13 May 2018 which provides:

“This is my last will and testament dated 13 May 2018. I, X, born on [] 19[] of [address], will say as follows: In the event that I pass I appoint my mother, [Mrs Y], as the executor of all my affairs. She can call on the help of my brothers, [Brother A and Brother B] to assist her in handling my affairs. My mother, as my appointed executor, will oversee my funeral arrangements. She will liaise with and inform the rest of the family. If it is decided that my body will be made”, I think that is “laid”, “to rest here in the UK, it is my wish that my father, who resides in [DDDD], attends my burial ceremony here in the UK, except if hardship is encountered for his travelling to the UK and then my funeral here can proceed in his absence. My wife, or anyone else, should consult my mother and seek her approval before they carry out any responsibilities regarding any affairs involving myself. I have discussed at length this matter with my mother and she confirms to me that she accepts being my executor should I pass.”

10. Then there is a line of dots with “*Signature*” and underneath it “[X]” and the date written in manuscript to the right-hand side, [] [] 2018. And then beneath that the same again for Mrs Y, and the date, “*Signed*” and, the same again, a line of dots and then Brother A, and again “*Signed*” with the date [] [] 2018 written in manuscript. I will call this “the Will” without prejudice to arguments as to validity and formalities that I will turn to later.

11. Secondly, the Will was first produced to the court with Mrs Y’s application of July 2018, which was heard on 26 July. Mrs Z only became aware of the will, she says, at that hearing.

12. Thirdly, X died with no or minimal assets.

The background to the parties’ contentions

13. Brother A wrote in his handwritten letter of 4 July 2018 to the Coroner as follows:

“As a brother, relative and family we write to request an investigation into X’s cause of death. One, he was discharged severely dehydrated. Two, he was immediately readmitted after discharge with severe dehydration. Three, he was discharged with hypoglycaemia. Nothing much was done on X’s readmission. We advised doctor of drugs used in [another country overseas, EEEE] for X’s hypoglycaemia. Doctors were adamant and only left promising to administer IT calcitonin, but never did. Four, X was not fed despite the family printing out the need for family and we had requested intravenous nutritional feeding. Five, the hospital failed – [a London hospital] – to carry out their own investigations into X’s condition. We believe it was necessary, especially as his bloods had improved. We look forward to hearing from you soon. Yours safely”, and it is signed by Brother A, stated in brackets underneath “on behalf of all the family.”

14. Brother A wrote again on 9 July 2018:

“Dear Sirs/Madam, first, in my handwritten letter of 4 July, I and the whole family also request that you expedite the investigation as soon as possible so that we can finalise X’s funeral rites to lay in rest for repatriation to DDDD. A timeframe would help us plan well”. There was then a third letter on 17 July. It is addressed to Mr Andrew Harris, Senior Coroner: “Dear Mr Harris, thank you for your letter of 11 June” – that was not in the evidence – and then “While it is believed the death was prima facie natural, I have requested pathological investigation”, and then in the final paragraph, “We also suspect something could have happened at home when my brother was discharged. He rapidly deteriorated in the two days he was discharged, and we had to rush him back to hospital by ambulance. All along, the wife has been against involving coroner investigation into my brother’s death. It is all making us suspicious of her intentions, especially now that she is rushing with the burial ceremony. We look forward to hearing from you soon.”

15. The response from the Coroner was dated 25 July, and is addressed to Brother A:

“To interested persons. The Coroner is in receipt of the submission from both the brother and wife of X. He notes his death has been registered.....The legal test for opening an investigation is reason to suspect culpable human failure. The matters raised by his brother in his letter amount to no more than speculation which does not trigger the Coroner’s section 1 duty to open an investigation. He is therefore taking no further action.”

I add that Mrs Z wrote disassociating herself from that investigation, although her letter was not before the court.

16. Mrs Y’s application to stop the burial was opposed by Mrs Z. She did not oppose X’s father attending the funeral but did object to its postponement on the basis that (a) he had not travelled to the UK during his son’s long illness, (b) he was almost estranged from him, (c) a postponement would mean a wait of months to bury her husband, and (d) she questioned the authenticity of the Will.

17. Mrs Y’s first application dated 23 July was adjourned before Cheema Grubb J on 26 July and by consent it was ordered that: (a) no burial or funeral was to take place without the consent of the court; (b) the parties were to update the court as to the steps to bring X’s father to the UK as he needed a new passport together with a visa, both of which took time; (c) Mrs Y was to pay 50 per cent of the reasonable costs of storage of her son’s body; and (d) paragraph 4 provided that *“The parties shall return to court on [] August 2018 at 2 pm to provide an update on (a) the steps taken to bring the deceased’s father to the UK for the purposes of attending a funeral of the deceased and (b) any other matters upon which the parties have reached agreement.”*

18. On 7 August, Choudhury J ordered the time to obtain a visa for X’s father was to be provided so the funeral was to be not before 15 September or his arrival. It was repeated that Mrs Y was to contribute 50 per cent of the reasonable costs of storage of her son’s body. This order therefore was almost wholly concerned with entry into the UK of X’s father to attend his son’s funeral and the according extension of time to permit that.

19. Mrs Y then issued her second application on 22 August 2018 to extend the time limits. This came before Nicklin J on 22 and 24 August. The recital to his order records that burial should take place in the UK and the order reflects this with the funeral to take place not before 17 September.

20. X’s father entered the UK on 5 September and Mrs Z arranged a second date for the funeral, namely 20 September. The exchanges between Brother B speaking for and with his mother, Mrs Y, and Nicklin J are the basis of the funeral planned to take place in the UK. Brother B when questioned about this during that hearing said, *“It is the intention”* and as to their father attending the funeral in the UK *“this is very much our wish.”*

21. As a result, it appeared to the court on or by 24 August that the arrangements for attendance by X’s father and arrangements for the funeral itself had been successfully resolved.

22. However, then Mrs Y made an oral application to the Applications Court in the Queen’s Bench Division on 10 September 2018 to repatriate her son’s body to DDDD. Garnham J ordered Mrs Y to issue a formal application, which she did that same day. In that third application Mrs Y confirmed her oral application, namely an order permitting her to repatriate her son’s body to DDDD. Further witness statements were to be filed by the parties.

23. There was then a third application before Garnham J on 14 September. He transferred the application to this Division and ordered transcripts to be obtained. The second arranged funeral had to be cancelled. Then followed the procedural directions I have mentioned by Deputy Master Jefferis.

24. I emphasise that by the letter of 9 July to the Coroner that I have quoted above that Brother A, on behalf of, as he put it, the whole family, including his mother and brother, requested an expedited investigation as soon as possible so they could finalise X's repatriation to DDDD. This clear and obvious intent to repatriate was not communicated to the court on either hearing in August, one and a half months after that indication was made known to the Coroner. I regard that as most questionable conduct on the part of Mrs Y and her sons.

25. Taking into account that correspondence, the submissions to the court and the witness evidence of all three, I find that they intentionally did not inform the court nor Mrs Z of their intentions at the latest as of July, namely a funeral in DDDD. I appreciate that, as Garnham J pointed out, it is the right of the properly appointed executor to change his or her mind in respect of such matters. However, in these circumstances there should have been more openness on their part. As ever with family disputes, lack of transparency engenders distrust, delay and increases costs.

The evidence

26. I have 14 statements served on behalf of the claimant - nine by Mrs Y, two by X's father and one each by Brother A and Brother B. For the defendant, Mrs Z has made four statements, Child A three, Child B one, [Mr X's friend] one and Mrs Z's solicitor, one, relating to a procedural issue which has been resolved. Much of the witness evidence of both Mrs Y and Mrs Z is repetitive. I heard oral evidence from Mrs Y and Brother A. Ms Julian indicated that she would accept the evidence of Brother B, so whilst he was present he was not called to give oral evidence. I also heard oral evidence from Mrs Z, Child A and Child B.

The evidence of Mrs Y

27. I find her evidence in part truthful but I had concerns as to her evidence in certain respects. For example, when asked why she had said nothing in Y1 regarding repatriation to DDDD her reply was: "*My main reason was to stop the funeral so we could proceed with other things.*" It was put to her that in Y2, dated 2 August, was the first indication of her looking to repatriate her son's body to DDDD. When questioned on this, she said she mentioned it in a joint visit with Mrs Z to the funeral directors but had not made up her mind. That visit was just after 3 July, being the date of registration of death. She maintains she never agreed to burial in the UK. That flies in the face of what was recorded in the court orders at the time.

28. I contrast that with her rapid actions in response to my order extending time by two days for Mrs Z to serve her final evidence as she made an application immediately to set it aside, which Mr Reeds, quite rightly in my judgment, said he would not pursue at this hearing. I find Mrs Y did in certain respects mislead the court and I have concerns over parts of her evidence. As with the possible burial in DDDD, she said that she told Mrs Z of it at the funeral directors, but this is denied by Mrs Z.

29. Then Mrs Y said that her son, when in hospital, kept repeating that he wanted to be buried in DDDD. It was put to her that he had only said that once. She replied: "*I am telling you now. I am telling you more.*" I find that to be an exaggeration as it is

remarkable that in almost 80 pages of her witness evidence, this allegation of repeated requests to be buried in DDDD appeared only the once, notwithstanding its apparent crucial importance to her son and her. Likewise, Mrs Y said her son did not want to be buried in London with strangers. It was put to her that she did not say that in her witness statement and her reply again was: *“I am telling you now. I am telling you more.”* Likewise, I find her reluctance to accept that Mrs Z was present at her son’s passing to be of concern in that Mrs Z was clearly there.

30. As to the signature of the Will, she confirmed that her son signed it and then so did she and Brother A, and that, even though not mentioned in her statement, she actually saw her son sign it. In re-examination, Mrs Y gave an especially full account of her son’s last words and how he asked her to be responsible for all his affairs and how Brother A then arranged - Mrs Y was spending every day at the hospital - to produce or type the Will.

31. I do recognise and take into account the substantial strain that Mrs Y had been under caring for her dying son, in and out of hospital and all the time she spent at hospital and then the family dispute as to burial. I do find, however, that she deliberately delayed the funeral arrangements and was quite prepared to gloss over matters to ensure that happened, including giving the misleading impression to this court that the second funeral was going to occur once X’s father had his passport and visa. A substantial amount of court time was spent on that when in my judgment Mrs Y should, and this includes Brother A, have been open with the court as to what their intentions were at the latest of 9 July, namely Brother A’s letter to the Coroner for burial in DDDD.

32. Further, Mrs Y made a series of very serious allegations against Mrs Z. I am will list these in view of their importance:

(1) In Y2, 2 August, referring to part of Mrs Z’s statement where she says: *“I wrote to the Coroner disassociating myself from this petition”*, that is the application to the Coroner to consider the death, Mrs Y said *“If that is not tempering”*, I think that means *“tampering”*, *“with the functions and functionality of the Coroner’s Office, what else is it?”*

(2) Also in Y2 at page 117: *“Mrs Z’s life is shrouded in secrecy. This being the case, could it be possible, therefore, that the children, who are being cut off from us, do not actually belong to us? If so, isn’t this enough reason for a DNA to be carried out on the children so that we know the truth?”*

(3) Y4, 14 September, paragraph 8: *“I believe the respondent did not care about my son, her husband. I also doubt she really loved him. My son was hospitalised for six months and was receiving private treatment. The respondent did not at all time ever visit him or bring the children, even when he was poorly.”*

(4) Y5, 29 October: *“I am led to wonder whether the children are truly my grandchildren. I am led to think of a DNA test and pursue to carry out a paternity test. Mrs Z’s ways are so dismissive to exclude the children from their father’s funeral, if at all they are my son’s children.”*

(5) Y7, 12 November, paragraph 3: *“This leads me to wonder whether it’s because she knows the children are not my son’s. It’s not only me who has these doubts. The children’s grandfather has these doubts, as do the rest of the family because of the way the defendant’s behaved towards them. She has prevented the grandfather to meet his grandchildren when he was here in the UK. It is for such reasons I seek to have a DNA test on the children to prove that they really belong to my son. Birth certificates are not proof of biological parentage.”*

(6) Y7, paragraph 9: *“I am very disturbed by the behaviour of the defendant towards my son. To me, she had the money but refused to spend it on her husband because she didn’t care about him.”*

(7) The most serious allegation is in Y7 where Mrs Y says: *“Soon arriving at [hospital], X went into a coma and died four days later. To me and his brothers his rapid deterioration was sudden. The defendant was showing no remorse. I sometimes wonder whether she gave him something toxic to get rid of him as she appeared bothered when he returned home. Blood tests were done on X soon arriving at the hospital showed very high liver and kidney values, something I question to this day. X was not taking any toxic medication. I wonder what went into his liver and kidney to cause these high value numbers that were not there on previous blood tests. The Coroner was prevented from investigation, but my son approached the police and they are looking into the matter. The defendant’s awkward attitude in all this and an attempt to make a quick burial without us also makes me more suspicious as if she’s trying to cover up something.”*

33. This allegation is a stronger reiteration and more direct than that against Mrs Z in Brother A’s letter to the Coroner that I have quoted above. Mr Reeds submitted that I should not place too much weight on these most serious allegations as Mrs Z appeared as a litigant in person, albeit instructing Direct Access counsel. I disagree for these reasons:

(1) Mrs Z has had the benefit of counsel or solicitor at hearings in July, August (twice) and October, so she has not proceeded wholly without legal advice.

(2) Whilst witness statements are often a product of what can be called “over-lawyering” in that lawyers perfect statements in a manner more suited to pleadings (see in particular the guidance of Leggatt J, as he then was, in *Gestmin SGPS Sa v Credit Suisse (UK) Ltd*), I find Mrs Y’s witness statements set out in the above respects what she thinks.

(3) All of her statements were put to her in her brief evidence-in-chief. She confirmed they were all true and there was nothing she wished to change. Had she wanted to withdraw any or all of those allegations, that was the time.

Brother A

34. Brother A in cross-examination was direct and to the point when it suited him. Accordingly I do not accept all he said. He explained it was always their intention to have his brother buried in DDDD. However, the court transcript of the hearing before Nicklin J was put to him and, in particular, his brother’s reply on his and his mother’s behalf that the intention was to have the funeral in London. He said that this was said because this was an application to extend time, but accepted that Brother B, who appeared at that hearing, did not say their intention was for burial in DDDD. But he – Brother A - had written to the Coroner on 9 July saying the family wanted to repatriate his body there.

35. The argument with Mrs Z, after she wrote to the Coroner in mid-July saying she did not wish to be associated with his request for an inquest was put to him. Brother A said that he went to Mrs Z’s house to ask why she wished to disassociate herself. It was put to him in cross-examination that they argued. He replied that they did not argue. Mrs Z and Child A say otherwise. Indeed, they say they had to call the police because a very heated argument developed. I find that Brother A tried to downplay this incident. A very serious argument did take place contrary to his evidence. He confirmed that the signature of his brother X on the Will was genuine and that he was present and saw his brother sign the will, notwithstanding that this important matter was omitted from his statement.

36. I find that as to the repatriation, Brother A, Brother B and Mrs Y did mislead this court on several occasions. I appreciate the circumstances namely that all of them are most anxious and, indeed, desperate to fulfil what they see as an imperative, namely a traditional funeral in accordance with [DDDD] customs. This was to take place at his ancestors' burial grounds which have been there for some 300 years for which there is no charge [and] where he would not be alone. Further, there should in their view be a traditional ceremony in DDDD to confirm X's heir.

Mrs Z

37. I found Mrs Z a somewhat recalcitrant witness. She was cross-examined in detail as to her failure to go and see her husband in hospital in EEEE or [another country overseas FFFF]. She said that X had told her not to go but that she had many telephone calls with him. However she did not produce her telephone logs in evidence. When questioned about the costs of her husband's hospitalisation, she said that she did not know how much it cost save she had some accounts in euros. She had seen bills for, say, 800, 350, 300 and so on. She said that her husband told her that he used his EU health card for the hospital and bills. It is possible that to avoid concern and worry on her part that may have happened, although the hospital bills were most substantial; I accept the evidence of Brother A, Brother B and Mrs Y that they were in six figures and that properties were remortgaged so as to provide health care for their brother in those countries.

38. Mrs Z also said she was unaware of what Mr Reeds described as "*a turn for the worse*" in her husband's health in September or October 2017, although she then said for a week he did not answer his telephone. She said, quite understandably, she had her three children to look after and she repeated that X told her not to go and see him in hospital in EEEE or FFFF and, further, that Brother A also kept her informed as to what was happening. What I do find of importance was how the family effectively separated on this. It seemed the overall relationship, and all have known each other for many years, was reasonable, if not good, but Mrs Z said that changed when Brother A came to her house and the argument that I described earlier at some time in mid-July took place as he accused her of writing to the Coroner and disassociating herself, and in her view that changed everything.

39. In her evidence, she said Brother A threatened her and she felt forced out of her house and therefore had to call the police. I prefer her account of this incident and how it alienated her from Mrs Y, Brother A and Brother B. She consistently maintained, and I accept, that she was never aware of the Will until it was produced in evidence with Mrs Y's application of 23 July 2018. She also said for the first time in Z2, dated 6 August, paragraph 12, that she could not go to the funeral because she feared for her life as she did not know what her in-laws could do to her in DDDD. This is strongly rejected by in particular Brother B, saying that he and his family are honourable and honest people who would never be involved in such a thing. In Z4, dated 6 November, Mrs Z repeats her fears for her life so that she and her children cannot travel to DDDD for burial as she does not know what could happen to her there.

40. I note that her fear for her life first appeared in her statement dated 6 August. This was before the stream of allegations by Mrs Y I have recounted above and, in particular, the most serious, namely that Mrs Z could have administered toxins to her husband, which was in Mrs Y's evidence of 12 November. Having said that, Brother A's letter to the Coroner, dated 17 July, stated that they were suspicious of Mrs Z. However, Mrs Z's fear for her life was not put to her in cross-examination. It was put to her that she would not go to DDDD, which she confirmed, saying that the law there was different to the law here.

41. I am satisfied that Mrs Z does have a fear for her life if she was to go to DDDD. That fear must be well-founded for me to take it into consideration, and I find it is, but in my judgment, it can be a subjective fear. I find in the circumstances of this correspondence her fear was a real one, even though viewed objectively it may not seem so. I would emphasise that I make absolutely no finding against Mrs Y, Brother A and Brother B in that respect. I accept unreservedly their assurances as to her safety but, as I have said, the test must be subjective, and I believe Mrs Z's fear to her is a real one.

Child A

42. Child A was thoughtful, careful and very serious as she gave her evidence and I have no hesitation in accepting all she said. She explained that they had a very happy family life, including Mrs Y as her grandmother, that especially when her father was ill and her mother also became sick it meant that she had to take care of her two siblings and with those responsibilities she became more independent. She said she did not see her father in hospital in EEEE or FFFF as she was sitting examinations and confirmed she was not told of the offer of flights by Mrs Y.

43. Importantly, when asked about travelling to DDDD for a burial ceremony there, she said:

“Considering all that has happened, I don't think it would be a comfortable situation for all of us. DDDD is where dad was born, not my home. I don't know people from there. We don't know them. They don't know us. Especially in view of the relationship, it could be really uncomfortable in view of what has been said.”

44. She did confirm that she was aware of what had been said in these proceedings, that she had been to DDDD three times in her life and she knew her parents owned property there but no idea whether it was near the proposed burial ground. Child A also said she had not been aware of the Will and could not believe, in view of her father's love for her and her brothers, that he had made no mention of them. She said in her view he would want them all to visit his grave and if it was at the cemetery proposed, she and her brothers could just jump on a bus to visit it.

Child B

45. Child B gave evidence in a direct and transparent manner and, again, I have no hesitation in accepting all that he said was truthful. He also was asked if he would have travelled to either EEEE or FFFF. He confirmed that he was not aware of any offer to pay his airfare, but he said in answer:

“Yes and no. I was doing exams and my father wanted me to do well.”

46. Child B said in his statement that he read his mother's and Child A's statements and he believed them to be true. He also said, as to the Will, he was shocked that the Will did not mention him or his brother and sister, especially as his father loved him and his brother and sister dearly and he could not believe his father would make a will without mentioning them. Child B also emphasised his wish for his father to be buried in the UK so that he

could visit the grave as often as possible, and he said that he believed that to be his father's wish too.

The law

47. As this is an *extempore* judgment, I will not quote fully from all the authorities, but every paragraph of the authorities I cite or refer to are to be regarded as incorporated in this judgment.

48. First, there is a preliminary issue: is the Will a will at all? There is no complete and authoritative definition of a will (see Theobald on Wills, 18th Ed at paragraph 1001). Further, paragraph 1004 sets out various examples of what can be a will if properly executed. In *Re Berger (Deceased)* [1990] Ch 118, the Court of Appeal set out five propositions at paragraph 129:

(1) An instrument cannot be a 'provable will' (by which expression I mean the type of instrument which will be admitted to probate in the English courts) unless it contains a revocable ambulatory disposition of the maker's property which is to take effect on death.

(2) An instrument cannot be a 'provable will' unless the maker had an 'animus testandi'.

3) This expression does not mean that a document cannot be a 'provable will' unless the maker has addressed his mind to the question whether the instrument will be capable of admission to probate in the English court and wishes that it shall be so. Rather, it conveys only that the maker must intend that his document shall effect the kind of disposition referred to under item 1 above.

(4) Thus, it is possible to make a 'provable will', whatever its form or appearance or mode of expression and irrespective of the language in which it is written, so long as it combines the requirements above mentioned, the necessary intention and execution as required by the 1837 Act (if the circumstances are such as to require execution).

(5) If the document has the necessary dispositive effect, and is duly executed, the necessary animus will be presumed. This presumption is however rebuttable, either by other terms of the document itself, such as the statement that the document is intended for guidance only, or by strong extrinsic evidence."

49. Ms Julian submitted there were certain Victorian authorities that said the bare nomination of an executor can amount to a will admissible to probate, but these have not

been cited in recent years. Accordingly she submits that this Will does not meet the test in *Re Berger*. Mr Reeds submits with some force that that would preclude, for example, a homeless man from giving directions as to the disposal of his body. Ms Julian submits the Will is not a will as it makes no testamentary disposition and if it is said to be the right to arrange the funeral, that argument cannot be sustained as that must breach the witness beneficiary rule. Therefore, she submits, X had no *animus testandi* at the date of execution of the will and, therefore, Mrs Y has no standing in law to arrange the funeral and the court should therefore consider its inherent jurisdiction and/or section 116 to determine who should arrange the funeral.

Decision

50. In my judgment, Miss Julian is correct in that the Will does not demonstrate a revocable testamentary disposition of X's property. It simply cannot therefore be recognised as a will. As to Mr Reeds' point regarding someone with no assets but requiring to make a will for someone to carry out funeral wishes, I think the answer must be the law cannot provide for every situation at all times.

51. On the basis that the Will is not a will, that means the court has to consider its inherent jurisdiction and decide who should arrange the funeral. On intestacy as here, a grant would be made to the nearest relative, namely Mrs Z. However, the family reasonably may expect all arguments canvassed before me today to be determined, so I will proceed on the alternative basis that had I found in favour of Mrs Y on the preliminary issue, namely the Will in terms of formal structure in the *Re Berger* sense is in fact a will.

52. Mr Reeds' position is simple, here is a valid will, Mrs Y is executor, and she can choose the way to lay her son to rest. The burden is on Mrs Z, he says, to show otherwise - see *Williams v Williams* [1882] 20 Ch. D. 659 at page 654: "*Prima facie the executors are entitled to possession and are responsible for the burial of a dead body...*". See, also, *Williams, Mortimer & Sunnocks* 21st Ed at paragraph 42-02.

53. Mr Reed also referred me to *Gloucestershire County Council v Re K* [2017] EWHC 1083 (Fam), where Hayden J considered the burial of a child who had died in suspicious circumstances, at [6] - namely the deceased's remains cannot be disposed of by will - and s.116 of the Supreme Court Act 1981 as to special circumstances.

54. Further, he cited [7, 8 and 9] and the consideration of special circumstances at [10] which referred to *Anstey v Mundle* [2016] EWHC 1073 (Ch), especially the listing of the factors identified by Ms Sonia Proudman QC sitting as a Deputy High Court Judge in *Hartshorne v Gardner* [2008] EWHC 3675, at [24 and 25]. Paragraph 25 sets out the factors relevant to the court's exercise of its discretion:

"One, the deceased's wishes; two, the reasonable requirements and wishes of the family who are left to grieve; three, the location with which the deceased was most closely connected; and, four, to quote the judgment, 'the most important consideration is that the body be disposed of with all proper respect and decency and if possible without further delay'. I have concluded that in this case those are also the relevant factors which I should consider."

55. I was also referred to the judgment of Deputy Master Cousins in *Cook v Abrahams* [2018] 4 WLUK 517 at [34 to 42] and, in particular, the burden of proof being on the party seeking to propound the will where the court's suspicion is aroused - see especially [39]. In *Fuller v Strum* [2001] EWCA Civ 1879, it was held that the court must be satisfied on the balance of probabilities that the contents of the will had been approved by the testator (see [33]). At [64 and 65], the Court of Appeal considered "...the onus of showing the righteousness of the transaction..." and held that it was not a licence for the court to refuse probate to a document of which it disapproved, saying:

"The question is whether the court is satisfied that the contents do truly represent the testator's testamentary intentions. That is not, of course, to suggest that the circumstances of execution or the contents may not, in the particular case, be of the greatest materiality in reaching a conclusion whether or not the testator did know and approve of the contents of the document – and did intend that they should have testamentary effect."

56. In *King v King* [2014] EWHC 2827 (Ch) at [27-29] the question of suspicion of the court was considered by Mr Edward Murray sitting as a Deputy Judge. Mr Reeds relies on this to show that any suspicions the court may have can be dispelled by (1) the evidence as to creation of the will, (2) the fact that there is no other document to challenge it, (3) that X signed it on the balance of probabilities and there is no evidence to the contrary and therefore he submits there is no need to exercise the inherent jurisdiction or consider the section 116 discretion.

57. With further regard to s.116, Mr Reeds referred me to *A-B v Dodds* [2010] EWHC 497 (Fam) and in particular the headnote:

"The replacement of a personal representative other than when the proposed executor was in prison, demented, bankrupt or refusing point blank to carry out the task is not something which should be lightly undertaken. The point of section 116 was to ensure a testator who took the trouble to name people to administer their estate after their death should not have their intentions lightly set aside 'unless the people chosen had disentitled themselves from carrying out the task'."

58. And the end of paragraph 20:

"The point of the section is to ensure that a testator who takes the trouble to name people to administer his or her estate after his death should not have his intentions lightly aside unless the people he chooses by the time of his death for one reason or another have more or less disentitled themselves from carrying out the task."

59. Mr Reeds sets out in his skeleton examples of special circumstances from the authorities and submits they are all extreme compared to the position here - such as homicide of deceased at the hands of a personal representative - *Crippen* - the personal representative cannot be traced - the personal representative is mentally unfit - drunken habits of a personal representative will result in mismanagement of the estate – personal representative serving time in prison/resident overseas/establishes interests adverse to estate or undue delay in applying or all beneficiaries wanting the personal representative to renounce the role.

60. As to inherent jurisdiction, *Kershaw v Micklethwaite and Others* [2010] EWHC 506 (Ch) was an application by a beneficiary to remove executors pursuant to section 50 of the Administration of Justice Act 1985. Paragraph 28 states that friction or hostility is not sufficient for their replacement.

61. In *Re Stewart-Brady (Deceased)* [2017] EWHC 2543 (Ch), Sir Geoffrey Vos referred to s.116 at [71 and 72] and approved the summary of special conditions in *Burrows v HM Coroner for Preston* [2008] 2 FLR 1225 at [12 to 17]. I was also referred to paragraphs 70 to 80 of *Brady* being authority for the court having inherent jurisdiction to give detailed directions as to disposal of the deceased's remains.

62. Mr Reeds submission is that it is clear here there is no basis to challenge the wording and wishes of X in his Will and therefore Mrs Y should oversee the funeral arrangements. Ms Julian submits that there are substantial concerns as to the validity of the will. First, formal validity – s.9 of the Wills Act 1837 which requires that the will be signed by the testator in the presence of witnesses and the witnesses should sign in the presence of the testator. Here Ms Julian submits that has not been established in some 80 pages of Mrs Y's evidence in that nowhere does she expressly state that she saw her son sign the will or that he saw her sign it.

63. Then, as Ms Julian put it, Mrs Y embellished her account heavily in re-examination with some narrative flair given the passage of time. Therefore Ms Julian submits I should treat her evidence with real caution as Mrs Y deliberately crafted her evidence to get herself out of an evidential difficulty. I accept that I should treat Mrs Y's evidence with caution as those details did not appear in her written evidence and only came up on re-examination. That does create a concern or a suspicion.

64. Ms Julian's second challenge is forgery. There is no evidence of X signing the will. Mrs Z says the signature is not genuine, but I can make no finding in that respect in the absence of expert evidence. There are here, I am told, suspicious circumstances. Likewise Ms Julian challenges testamentary capacity (see *Banks v Goodfellow* [1870] 5QB at 549). But there is no medical evidence here. Ms Julian pursues this as she submits the Will is not rational and therefore cannot have been validly executed. Further, the testator must know and approve of the contents and what was in a will and what its effect would be - *Gill v Woodall* [2011] Ch 380.

65. Like capacity, the burden of proof is on the person propounding the will (*Theobald* paragraph 3-020). Here, Ms Julian submits the burden is on Mrs Y as she is the only person who benefits, that she had it prepared, she witnessed it and she was always in the hospital at her son's side. All these matters, Ms Julian submits, should arouse the suspicion of the court.

66. Ms Julian submits there has been coercion here in terms of Mrs Y's overbearing presence in her son's life, evidenced by the transcript of the telephone calls and the fact she never left his side, and also the Will on her and Brother A's evidence being signed in the hospital.

Decision

67. Taking all the above into account, I find that I cannot accept the validity of the Will can be determined in Mrs Y's favour in the totality of these circumstances. The first is formal validity. Mrs Y, notwithstanding her substantial and detailed written evidence of some 80 pages, did not explicitly state that she saw her son sign until she gave her embellished account of what happened in re-examination. I find her overwhelming desire to do what she thinks is best for her son has led her to exaggerate or else mislead such as intending a burial in DDDD but making it appear to the court that she would go along with a burial in London - if she was involved - for two hearings.

68. Mrs Y gave evidence in such a way to extricate herself from her original position. I consider that Brother A played a similar part in this in all the circumstances and, again, my concerns as to his participation in what was put to the court as to the burial in London remain. Generally, looking at the totality of the evidence, I do note and accept Mrs Z's evidence that her husband never told her of the Will and she first found out about it when Mrs Y made her application in July. Mrs Z says that it is not her husband's signature but that cannot be determined without expert evidence.

69. Also of concern to me is the complete lack of reference in the Will to Mrs Z and also to Child A, Child B and Child C. Child A and Child B's evidence, which I accept, was that they were completely surprised in view of their loving relationship with their father that there was no mention of them at all. Special circumstances also include:

(1) the rapidity of the preparation by Brother A and signature in one day of the Will;

(2) lack of reference to Mrs Z and the children;

(3) the fact that the Will was limited to, in just three paragraphs, the funeral arrangements and how Mrs Y was to oversee the arrangements and that "*my wife or anyone else should consult my mother and seek her approval.*"

70. I accept as Ms Julian submits that the Will with its concentration upon Mrs Y and her managing in particular the funeral is remarkably prescient in envisaging Mrs Z arranging the funeral without the attendance of X's father and the dispute as to place of burial, especially as the evidence from all the witnesses was that relationships were satisfactory if not good at that time.

71. As to capacity, I again find the Will questionable as, first, it does not appear to be rational on its face as it only deals with the funeral and secondly expresses X's wishes as only being that his mother should take charge of all the funeral arrangements. It does not say what his wishes are. There is therefore in my judgment a reasonable doubt as to capacity. The burden of proof is on Mrs Y as the person propounding the Will - unless the will is rational on its face when there is presumption of capacity.

72. Further there is the fact that X had no assets or assets of value to dispose of. That is agreed between the parties as being the case but, having said that, and whilst one cannot dispose of something one does not have, the simple fact remains that no mention whatsoever is made of Mrs Z or his three children. As for knowledge and approval, the burden of proof is again on the propounder, but it is presumed if the testator had

testamentary capacity that the will was duly executed. Here, Mrs Y was the only person who benefits in the sense of the control of the funeral arrangements in circumstances where she never left his side and she arranged for Brother A to type and witness it. All of those matters cumulatively in my judgment arouse the suspicion of the court.

73. As to undue influence, I accept the evidence of Mrs Z that Mrs Y was an overbearing presence in her son's life. It was put to her in cross-examination that she could be overbearing with X and her response effectively confirms that as she said: "*Well, I am his mother. I had to play my part in his life and his treatment.*" There is therefore the possibility that if X did sign the Will it was because he had been coerced by his mother into so doing.

74. In conclusion, and in the alternative to my first finding on the preliminary issue, in all the above circumstances I do not find that the Will is valid as the court's suspicion has been aroused.

75. I therefore need to consider the exercise of the court's inherent jurisdiction in s.116. I have already referred to the relevant authorities and, in particular, *Brady* at [71, 72 and 78 – 80], and to *Burrows* at [12 to 17]. I consider I have to exercise the court's inherent jurisdiction as there otherwise would be a stalemate between the parties as they cannot agree the way forward and only the court by exercising its inherent jurisdiction can give directions for a proper respectful burial.

76. This is especially true in circumstances where even if I had found the Will was valid, I would be very concerned over the way Mrs Y let proceedings continue until 10 September before changing her position with regard to repatriation to DDDD as opposed to burial in London. As is set out in *Brady*, delay is against public policy and substantial delay due to change of position here has clearly occurred. There are, in my judgment, extraordinary circumstances here in the plain division between the family in that the wishes of Mrs Z have been put to one side. I will therefore exercise the inherent jurisdiction of the court and must now consider the factors in *Hartshorne v Gardner* [2008] EWHC 3675 (Ch).

i) The deceased's wishes

77. Mrs Y accepted that her son loved his children and her affection also for them was apparent. Mrs Z's evidence is clear - her husband would want to be buried here so she and the children could visit his grave easily, as they married and lived here for some 16 years. The burial is proposed to be near where Mrs Z and their children live, which follows naturally in those circumstances. I consider Mrs Y's evidence to be secondary here as it is based on the authority in the Will and the somewhat late addition of evidence which I do not accept as to her son wishing to be buried in the DDDD but not in the UK.

78. I prefer the evidence of Mrs Z and the position taken by her children in that her husband wished to be buried near them. I do find it is a significant omission in that in Mrs Y's evidence that there was only one mention of her son's wish to be buried in DDDD and Brother A and Brother B do not mention it. I also take into account that all the parties before me live in London, so all can participate in the funeral arrangements and visit the grave as they wish easily, regularly and at minimal cost. Whilst I acknowledge their birthplace in DDDD and their cultural traditions as a result, all of the adults here have chosen to become British citizens.

(ii) Reasonable requirements and the wishes of the family left to grieve

79. Mrs Y originally accepted burial in south London, as appears from the transcript of the evidence and the order of 24 August - and I consider her sons did likewise. It appeared that as of 24 August a funeral had been arranged. Mrs Y sought to resile from it. Only on 10 September was the repatriation application made, which in itself was a most regrettable delay in all the circumstances as some 10 weeks had passed since X had died.

80. This apparently was all to ensure X's father could attend a funeral in London. In those circumstances there is no alternative but to accept the proposals of Mrs Z for a funeral near her husband's long-established family home. I say that particularly for Child A and Child B who said, and I accept, they wish to visit the grave regularly. A grave in DDDD would be expensive and difficult for them to visit. Another most substantial factor here is Mrs Z's fears for her life as I have referred to above, and Child A saying she would feel uncomfortable for the reasons she gave as to attending a burial in DDDD. Mrs Z says, and I accept, she could not accept a burial in DDDD. However, all of Mrs Y, Brother A and Brother B can attend a burial in London.

(iii) Location

81. Clearly over almost the last two decades, the closest connection X has is with the UK and in particular London. He is a UK citizen. He married here in 2002 and all of his mother, two brothers, wife and three children live here. His three children were born here. It was his home for some 19 years. There was no evidence before me as to his visits to DDDD nor any evidence as to him retaining close connections with that country.

(iv) A proper and respectful funeral without delay

82. I reiterate that it would be very sad to exclude Mrs Z and her children from a funeral. The evidence put to me this morning as to the burial proposals is that Mrs Y had set out in substantial detail all the work necessary to be done to arrange a planned burial on 7 December with her son's remains arriving [in] DDDD on 6 December. Mrs Z proposes and includes an email from her funeral director to her solicitor referring to a funeral that could take place on 5 December or possibly earlier, 29 November, with a wake or reception at the home thereafter where everyone would be welcome. There is so little difference in those dates as to amount to no difference. For the reasons I have given as to the other three factors, I will order the funeral to take place in London as set out by Mrs Z on 5 December at 12.30 or earlier on 29 November if agreement is possible.

83. If I had to address s.116, but in the above circumstances I do not think it necessary to do so, I would find that Mrs Z's fear for her life amounted to special circumstances so as to warrant the exercise of my discretion in her favour. However, as I have found for her on the basis of inherent jurisdiction I need say no more. Finally, I sincerely hope that this once united family can come together to give X the burial he deserves amongst his entire family and friends.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge