

Case Reference: A29/13

JUDGMENT
Of
Sheriff Valerie Johnston

in causa

MRS S C
PURSUER

Against

MRS. L M
DEFENDER

FORFAR, 17 June 2014, The Sheriff having resumed consideration of the cause, Finds in Fact:

1. The pursuer is S C.
2. The pursuer is the widow of Private M C ("the deceased").
3. The deceased was a soldier who served in the Black Watch, 3rd Battalion, the Royal Regiment of Scotland ("the Regiment") and who latterly resided with the pursuer at Inverness.
4. The defender is L M. The defender was the mother of the deceased.
5. The deceased was raised primarily in the Methil area of Fife. He left home to join the Army at the age of about seventeen and never returned to live in Methil or with the defender.
6. The deceased died in Germany on 14 May 2011. His body was released to the Regiment and returned to the United Kingdom on or about 3 June 2011.
7. The relationship between the pursuer and the deceased began in September 2007 and they lived together as spouses from that time until his death. They married on 27 February 2009.
8. The deceased's grandfather died in 2008. At the funeral the deceased was upset and stated that he wanted to be buried near his grandfather. He expressed this wish again at his wedding in 2009.
9. The deceased was sent on a tour of duty to Afghanistan in 2009. The Ministry of Defence administration procedure included a check on the existence of a Will for each soldier to be deployed. The deceased did not have a Will and was issued with a pro-forma Will MOD form 106 (revised 9/00) for completion.
10. 10. In terms of the deceased's Will dated 5 March 2009 the defender was appointed as his executor-nominate along with his brother of the full blood. He bequeathed his entire estate to the pursuer. The deceased intended that the pursuer should be both his executor and his beneficiary and had completed the pro-forma Will form 106 with the pursuer as executor. He asked for an explanation of the terms "beneficiary" and "executor". He was advised by his Platoon Sergeant that the beneficiary was the next of kin and the executor a person who paid the debts and funeral expenses after which the rest of the estate went to the beneficiary. He was told that the same person could not be both. He followed that erroneous advice, destroyed the first Will and completed a new form with the pursuer as beneficiary and the defender and his brother as his executors. He was given no further information verbal or in writing as to the consequences of the appointments made in the event of his death. He did

not anticipate that the appointments would permit the defender or his brother to make the arrangements for his funeral.

11. 11. On or about 11 June 2009 the deceased was serving in Afghanistan when he suffered shrapnel injuries in an explosion. The soldier he was with was killed.
12. 12. The deceased was returned to the United Kingdom for treatment at Selly Oak Hospital in Birmingham. The pursuer was taken to be with him while he was in hospital and looked after him for three weeks there then at their home in Inverness during his recuperation period. The defender did not visit him in Birmingham or Inverness. She spoke to him on the telephone and exchanged some text messages during this time.
13. 13. The pursuer and the deceased attended the military funeral held for his dead comrade. They were moved by that experience and the deceased expressed a wish to be buried and to have a military funeral.
14. 14. The pursuer's brother died at the time the pursuer and the defender returned from Birmingham. Her brother's funeral was held in Forfar and he was buried in a plot paid for by his family in Forfar cemetery. The deceased knew her brother well and was a rope bearer at his funeral.
15. 15. When preparing to return to active duty in Afghanistan in 2010 the deceased discussed with the pursuer the funeral arrangements that he would wish to be made in the event of his death. He confirmed a desire for a military funeral and wished to be buried not cremated. He stated that he wanted to be buried wherever the pursuer intended to be buried on her own death. He intended that the pursuer should make the funeral arrangements.
16. 16. The deceased intended to leave the Army and settle with the pursuer in Forfar when he was able to do so.
17. 17. The deceased had previously made an agreement with a close friend that the survivor would wear pink to the other's funeral. He was a humorous man and liked bright colours.
18. 18. The pursuer intends to be buried with her brother in a family plot in Forfar Cemetery. The deceased was aware of her intention and told her that he wanted to be there with her.
19. 19. After the deceased died visiting officers were appointed to assist both the pursuer and the defender. The Joint Casualty and Compassionate Centre of the Service Personnel and Veterans Agency of the Ministry of Defence ("the JCCC") took responsibility for assisting the pursuer with the funeral arrangements.
20. 20. In May 2011 the pursuer's visiting officer indicated that the JCCC would release the body to her and that the Army would follow the deceased's last known wishes for the funeral, as reported by the pursuer.
21. 21. Representatives of the Regiment began to make the arrangements. A representative attended on behalf of the Regiment to inspect and approve Forfar Cemetery and potential venues. A venue was selected and approved in Forfar.
22. 22. The defender accepted that as next of kin the pursuer had the right to make the funeral arrangements. On Monday 16 May 2011 the defender's partner called to speak to the pursuer about the funeral arrangements. He did not speak to the pursuer who was too distressed. The pursuer's mother advised him that the funeral would be in Forfar and that it was the wish of the deceased that those attending wear bright colours.
23. 23. The defender and her partner took offence as they considered that they were being dictated to and an acrimonious dispute arose between the pursuer's mother and the defender over the wearing of bright colours at the funeral. The acrimony between them has continued and has significantly contributed to the delay in according the deceased a dignified and appropriate burial.
24. 24. The defender complained about the proposed funeral arrangements to her visitation officer and the deceased's Will was consulted. It was established that he had appointed the defender and his brother as his executors and advice was taken by the JCCC about who they should release the body to.
25. 25. On 1 June 2011 the pursuer's visitation officer advised her that the deceased's body could not be released to her. On 6 June the JCCC intimated to the pursuer that while the

Ministry of Defence usually dealt with the closest living relative (next of kin) over the funeral arrangements the defender was named as executor in the Will and her solicitors had indicated that she wanted to have the body released to undertakers of her choice in Fife. The JCCC advised that and under the laws of both Scotland and England the executor retained certain legal rights and responsibilities in regard to ensuring the burial or cremation of the deceased and the intention was to release the body to the defender.

26. 26.A meeting was arranged between the pursuer and the defender in an attempt to reach a compromise. The pursuer was distraught, cried and begged the defender to relent. The defender refused to do so. The situation was inflamed by the intervention of the pursuer's mother and the acrimony between the pursuer's mother and the defender.
27. 27.The defender intimated that she wished to make her own funeral arrangements with interment of the deceased being at a family lair in MacDuff Cemetery, Wemyss, Fife near his late grandfather as that was the wish of the deceased.She made this decision when she became aware of the priority accorded to an executor by the JCCC.
28. 28.The pursuer tried to compromise.She indicated she would agree to bury her late husband on his own in Forfar rather than alongside her brother.The defender refused to compromise and continues to refuse. The pursuer has offered a compromise position. All attempts to resolve the matter through court action and mediation have failed.
29. The defender as executor has given priority to her own personal wishes for the funeral arrangements and burial of the deceased as a close family member and has influenced the wishes of others to accord with her own without proper consideration of the pursuer as his widow and the last stated wishes of the deceased.

Finds in Fact and Law

1. The pursuer as widow of the deceased and who was living in family with him at the time of his death is entitled to decide upon and make the arrangements for the funeral of the late M C.

Finds in Law

1. An order declaring that the pursuer as widow of the late M C is entitled in law to decide upon and make the arrangements for his funeral should be made.

Therefore:

Sustains the first plea in law for the pursuer; Repels the second plea in law for the pursuer; Repels the first plea in law for the defender; FINDS AND DECLARES that the pursuer being the widow of the late M C is entitled to decide upon and make the arrangements for the funeral of the late M C; Quoad ultra Dismisses the pursuer's crave two, Dismisses the defender's crave one; Finds no expenses due to or by either party.

Sheriff

NOTE:

[1] This action was raised in 2013. I heard evidence by way of witness testimony, an affidavit and documents lodged spoken to and agreed. The parties produced written submissions supplemented orally. The cause had been judicially considered before. The pursuer petitioned the Court of Session in an attempt to review the decision of the JCCC to release the deceased's body to the defender. The cause called before Lord Brodie and parties produced and referred me to his opinion which was accepted as an accurate statement of Scots law. Lord Brodie dismissed the petition as

incompetent but took the opportunity to consider the position in Scots law where there is a competition for the right to claim a body for burial.

[2] On the facts admitted or proved in the cause it is clear that prior to the consultation of the deceased's Will there was no dubiety in anyone's mind about who had the right and responsibility to make the funeral arrangements. The normal social convention was being applied where a wife in a live marriage was accepted as having priority as the closest living relative. Were it not for the acrimonious dispute, which erupted over the colour of clothing to be worn by the mourners, this brave young man would have been afforded the dignity of a Military funeral and be buried in Forfar. The events which have prevented this for over three years were the discovery that his Will appointed his mother as executor, along with his close brother of the full blood, and the advice taken by the JCCC to the effect that in Scots law as in English law the executor had priority.

EVIDENCE

The Will

[3] The defender founded on her appointment as executor and argued that whatever led up to the appointment was irrelevant. Her position was that as executor she had priority when it came to deciding what the funeral arrangements should be provided she had considered the wishes of the deceased's close family members. The pursuer relied on her status as the widow of the deceased. She pointed to the the evidence of the platoon sergeant who oversaw completion of the Will and the soldier who was witness to the Will to cast doubt on the deceased's intention and understanding when he made the defender's appointment.

[4] The Will is a standard one size fits all document with notes for completion on the reverse. It contains information in the Notes showing that consideration has been given to the legal differences applicable to those domiciled in England, Wales and Northern Ireland and those domiciled in Scotland. Servicemen are directed to have regard to the information in Note B on the reverse of the form if they decide to use it to make a Will. At part B (1.) it states:

“Executors. Space (d) overleaf following the words ‘I appoint’ should be filled in with the name and address of the person you wish to be ‘executor’ of your Will, that is, the person who will have responsibility of carrying it into effect. You may appoint two executors if you wish.”

On the face of the document the beneficiary is dealt with at part (e) where it states:

“TO BE COMPLETED WHEN EVERYTHING IS BEING LEFT TO ONE PERSON
After payment of my just Debts and Funeral Expenses I give all my estate and Effects and everything that I can give and dispose of to...”

On the face of the document there is no reference to who has the responsibility for making the funeral arrangements. The plain English of the wording supports the inference that the executor deals with the financial matters following a death. There is the standard reference to the payment of “just Debts and Funeral Expenses”.

[5] The circumstances leading to the defender's appointment were explained by the Platoon Sergeant who had known the deceased for the two years. They were based in Inverness where they lived two doors apart in married quarters. They met socially once or twice. Their wives were friends. He described the deceased as a humorous man. The sergeant's duties included overseeing Platoon administration and it was policy that every soldier should have a Will. When checks were made prior to the regiment going on tour to Afghanistan in 2009 it was the first time he had overseen the process. He dealt with fifteen or sixteen people altogether. The deceased, who did not have a Will, was about the fifth or sixth to come in and had already read the document

through. He explained that the soldiers found it hard to comprehend what parts of the form meant and the deceased had already put his wife in as the executor but asked who the beneficiary was. The sergeant told him it was the next of kin which prompted the question as to what an executor was. He explained to the deceased that the executor did payment of the debts and funeral expenses and the beneficiary got the rest after that. He told him that his own wife was his next of kin so he would put her as his beneficiary but not his executor. He told him that he could not have the same person for both. It was then that the deceased changed the executor to the defender. He was told it was best to put in an additional next of kin so he had put in his brother as executor as well. In cross examination he accepted that he was not trained to give legal advice and confirmed that the deceased had changed his mind after he advised him that the same person could not be both executor and beneficiary.

[6] The witness was under the impression that the deceased was close to his brother as he had heard him speak of his brother. He had never heard him speak of his mother. He gave him no advice on whom to appoint and he was asked no other questions. There was no discussion about any funeral arrangements. When examined on his understanding of what an executor was he volunteered that the executor executes the will before the beneficiary receives the assets. He understood that the executor paid the debts and the funeral expenses. Although in re-examination he agreed with the proposition that the executor dealt with the funeral and that he had told the deceased this I formed a clear view that this was not a reliable concession. He had referred to payment of funeral expenses by the executor in examination in chief and in cross examination and my reading of his evidence is that he considered the executor to have the administrative function of dealing with the funeral expenses but not the actual arrangements.

[7] I was not surprised to hear from the serving soldier who had witnessed the deceased's Will that his comrades paid little regard to the close writing on the form and did not attach much importance to it. He explained that information was given to them about Wills before deployment at the same time as they dealt with life insurance, kit lists, emergency contact numbers, and their driving licence details. He estimated that about five to ten minutes was devoted to Wills. He gave some insight into the attitude of soldiers about to go on a tour of duty when describing how the administration requirements were conducted. There were sixty men in a line in a gym hall who went from desk to desk. He said that there was probably banter going on as it was a defence mechanism to make light of the dangers they were about to face. He was clear that when this Will was completed they were going to a war zone and no one wanted to contemplate death. He took for granted that his comrades had discussed with their wives what arrangements they wanted for any funeral. He had done so with his wife so had no need to tell the Army. He had never heard of the Army giving advice about funerals, nor of anyone asking about changing their Will, although when he got married he had been prompted to do so by his father.

[8] My conclusion is that the deceased intended to have his wife as both executor and beneficiary and would have done so if he had not been advised, erroneously though in good faith, that this was not possible. This lends weight to the position of the pursuer as the closest relative to the deceased and the person most likely to be aware of his wishes in the event of his death.

The Funeral Wishes of the Deceased

The Pursuer's Position

[9] The deceased had expressed a wish to have a Military Funeral following their attendance at that of his lost colleague. The pursuer's position was that the detail of any funeral was the last thing anyone wanted to discuss when they had just missed death but she knew that he wanted a Military Funeral as they had discussed it extensively after they attended his colleague's funeral. Neither of them had been to a Military Funeral before and found it very moving. Those initial discussions had not included the issue of the location of the burial but he and a person named as his best friend

(not a witness) had discussed that whoever the survivor was between them would wear a pink suit at the other's funeral.

[10] In the middle of 2010 the deceased was being sent back for a further tour of duty in Afghanistan. The pursuer explained that neither of them wanted that to happen but they had no choice. At that time they discussed how the deceased was feeling. He was told that he could remain in camp but he told her he wanted to be with his boys not there as a "*camp prat*". They had discussed their future plans and envisaged a life with him outside the Army. In the privacy of the marital home he had broken down to her while watching a programme about American troops on active service. They discussed what each wanted to happen to them after death. Her wish was to be buried with her brother as she did not want him to be alone. Her husband stated that he wished to be there with her. He expressed an understandable wish to be buried at the location where his wife wished her own remains to be interred.

[11] Further evidence supportive of the approach taken by serving soldiers was found in the affidavit of an Army wife who was a close friend of the pursuer in married quarters. Her husband was a close friend of the deceased. Her position was that the pursuer was devoted to her husband and that the couple intended to settle in Forfar. She confirmed what was said by the servicemen, that soldiers do not speak to one another about dying. She had spoken to her own husband about his wishes for the funeral and was sure that the deceased and the pursuer would have done so as well. It was this lady who was taken to Germany with the pursuer when the deceased had suffered his fatal injury and she confirmed that the pursuer was distraught.

The Defender's Position

[12] The defender in evidence advised that her son had joined the Army at seventeen as he was a wee bit fed up and wanted to see the world. She could not remember where he did his training and advised that she had left him to it. She did attend his Passing Out Parade with her partner and her other three sons. She confirmed that when he was on leave he generally he spent one night with her before going to stay with his brother. The defender advised that when they met the pursuer she gave the pursuer the benefit of the doubt as she found her very quiet. There were, according to the defender, only two or three more visits to her home by the pursuer during the marriage and it came over very clearly that the defender felt sidelined and resentful about how she perceived her treatment by the pursuer. She described being "blanked" by the pursuer when she took up her son's invitation to visit them in Perth the day after the wedding. The falling out did not occur until after her son was injured in Afghanistan but the groundwork for an unhappy relationship was evidently already there.

[13] They fell out when her failure to visit her injured son in hospital was construed as due to her demand that the Army pay her travel costs. She denied that she had made such a demand. The pursuer believed that to be true and adverse comments were posted on social media. From that point on the relationship between pursuer and defender was poor. There were no visits to her son in Inverness and only one visit by the couple to the defender's home at a Christmastime. The pursuer accepted that this rift upset the deceased as he loved his mother.

[14] The defender described feeling left out as the couple did visit the pursuer's mother in Forfar. Her position on his attitude to Forfar and to his mother-in-law was affected by the incident in January 2010 when he was arrested and spent a night in the cells. The pursuer's mother had called the police because of his behaviour. On the day of his release from custody he told the defender that he hated Forfar and his mother-in-law. She recalled that he stayed the night then went to his brother. After the incident she did not see him for five or six months and missed his visit before he left for Germany. She stated that they exchanged general texts.

[15] The defender was highly critical of the pursuer whom she saw as failing to inform her firstly when her son was injured in Afghanistan and then when he sustained the fatal injury in Germany. She accepted that the Army had done so, promptly, but felt it was the pursuer's duty to do so. She was very unhappy about what she perceived as the pursuer's failure to contact her about the funeral arrangements. Her recollection was that two weeks had passed before the defender's partner called and spoke to the pursuer's mother. The defender became agitated and angry when she described what happened. Her agitation was due to her belief that the pursuer's mother dictated to her partner what was to happen. She had called her back and told her that she wasn't happy about being told what to wear at her own son's funeral. There was a falling out and the defender described a message left on her answering service by this lady which was full of expletives telling her to respect the pursuer's wishes, to wear colours or not to come at all if she wore black.

[16] Up to this point the defender indicated that she had accepted that the pursuer as next of kin had the right to decide on the funeral arrangements. She was not happy about the burial in Forfar but felt that she had no choice. She was also upset that the pursuer had refused her a keepsake and refused a meeting to discuss things. There was no evidence of any direct conversation between the pursuer and the defender. The turning point was the discovery of the Will and the position of power that placed the defender in. She was almost triumphant in court when she stated: "Then they wanted a meeting."

[17] She described the meeting which took place at Finavon in the presence of two Army officers, herself and her aunt, the pursuer and the pursuer's mother. The pursuer was crying and begging her to relent and allow the funeral to take place as arranged. She indicated with a breathtaking lack of insight or apparent concern, that she felt quite bad but the pursuer's mother had told her daughter not to beg "*her*" with heavy emphasis on the word "*her*". My perception of her demeanour in court was that this led to her taking pleasure in maintaining her position and responding that the pursuer could have a memorial service in Forfar. There was no sign of compassion in her presentation of this evidence. She has not and does not intend to compromise.

[18] Her decision is expressed as being based on what she perceives to be her son's wishes. He had stated in his grief at his grandfather's graveside that he wanted to be buried beside him and repeated that wish to his grandmother at his wedding. There was no contradictor to that as far as she was concerned. It was drawn from her that her position was reasonable as the deceased had family and friends in Methil and no connection to Forfar. It was taken from her that her desire as both his mother and his executor was to bury the deceased in the MacDuff Cemetery. She was asked if she had considered the wishes of family members including his closest family member, his wife. Her response was that she had but that the pursuer had not considered her family's wishes and what the pursuer wanted was not what her son had wanted.

[19] In cross-examination she agreed that her father had died in 2008 and that her son had never discussed his wishes directly with her. She accepted that she had a poor relationship with the pursuer but felt she had tried. She explained that after the fall out her son had tried to get her to say sorry to the pursuer but she had wanted to be apologised to first. Her understanding of how information about the critical events that befell her son was communicated to her was limited. When it was put to her that the pursuer had asked the Army to inform her of the Afghanistan explosion she stated that she did not know but would have thought more of the pursuer if she had called her. She agreed that her son liked colour but was adamant that the "other side" do not dictate what the mother wears.

[20] The defender presented as a very strong character. She was clearly emotional when she spoke of her son and has convinced herself that what she is doing is what he truly wanted and is

the right thing to do. She was not prepared to accept that what the pursuer said was what he had wanted.

[21] I accepted the evidence of the pursuer as to the deceased's wishes as credible and reliable. His wishes may have changed, had he lived, as they had in the time since his grandfather had passed away. Lives had moved on and events had intervened as they would continue to do. However, he did not live to change his mind.

The Views of Others

[22] The defender's mother confirmed that as a child the deceased had been a regular visitor to her home and was close to herself and her late husband. In the normal way of things contact became less as he matured into adulthood then joined the Army. Her husband died of cancer and at his funeral in 2008 the deceased had been distressed and said that he wanted to be buried with his grandfather. He had repeated this comment at the wake and again, when at his wedding, she said she wished his grandfather could have been there. She indicated that the lair in MacDuff took three bodies and as the places were already allocated the defender had purchased an adjacent lair for the deceased. Her opinion was that he should be buried in MacDuff which was a nice cemetery and because the defender had told her the deceased said he didn't want to be buried in Forfar.

[23] The defender led evidence from her partner with whom she had lived for twenty years and with whom she had two more sons. He said he had a good relationship with the deceased who had worked with him for just over a year after leaving school. When introduced to the pursuer he found her quiet in contrast to his own chatty nature but he thought it would get better. He confirmed that they were made welcome at the wedding. He also confirmed that the deceased had told the defender not to visit him in hospital in England and that she was in regular phone contact at that time.

[24] He had been in the Army himself and he considered that the incident at the home of the pursuer's mother was totally out of character for the deceased who was suffering from Post-Traumatic Stress Disorder. He had heard the deceased say that he did not like Forfar or his mother-in-law and he could not understand why he would want to be buried there next to his brother-in-law whom he did not really know. He also questioned the likelihood of the pursuer, a young woman, changing her mind in the future about where she wanted buried.

[25] On the critical point about the funeral arrangements he stated that he called the pursuer on Monday the sixteenth of May. He spoke to her mother and asked after the pursuer. He was told that she was not doing very well. He was told that the funeral was to be in Forfar but not why and that the deceased had wanted it to be colourful. He felt that as it was only three days since the death it was too soon to make those decisions and what got to him was that someone he had never met was dictating what he was to do. He knew that the defender did not like being dictated to. His understanding at the time was that they had no say in the matter as the pursuer was the next of kin. He described the attempts made by the defender to speak to the pursuer's mother who kept putting the phone down on her and to the abusive, garbled message left by the pursuer's mother on the answering service saying that they were not to bother coming if they were not wearing colour. It was after this that he instituted the search for the Will.

[26] He was fully supportive of the defender as the deceased did not like Forfar and belonged in Methil with his family although he accepted that he could not comment on what the deceased had said to the pursuer. In cross-examination he made it clear that he had not said that the deceased did not love her. He was adamant that no one was listening to his family and that they had tried unsuccessfully to compromise. I found him to be a much more accurate historian than the defender and to have some more insight. His evidence, however, was also affected by his perception of where the fault lay at the critical time when communication broke down and his understandable

support of his partner. He also described his own wishes for the disposal of his ashes after his death and said that he expected those wishes to be carried out.

[27] The defender called a young man who had been a school friend of the deceased from the age of four to sixteen. He stayed on at school and lost touch with the deceased until a chance meeting in the street a year later. They were, he accepted, drinking buddies from time to time. He joined the Army a month after the deceased and was in a different Battalion. He was not able attend the deceased's wedding. He saw him in hospital in Kandahar after the IED incident and described him as pretty shaky. He went for a drink with him a couple of months after he came back from Afghanistan. He advised that the deceased never spoke of Methil, his Will or his funeral wishes in event of death.

[28] The witness described his own wish to be buried in Leven and considered it better for the deceased to be buried where he was brought up and where he understood the deceased had said he wanted to be buried, with his granddad. His other friends were of the same mind. He accepted that it was reasonable for the deceased to have spoken to the pursuer about his wishes in the privacy of their home and that he would expect those wishes to be carried out. I considered him to be a reasoned witness expressing his views on the basis of what his late friend's family had told him the deceased wanted and what he thinks is probably the right thing to do now.

[29] For some reason not adequately explained the one person with whom the deceased had a long, close and enduring relationship, his brother of the full blood, had resigned as an executor, had not associated himself with this or the previous cause, and did not attend to give evidence. He was the person with whom the deceased stayed while on leave, they had attempted to join the army at the same time, he was his best man, he visited and stayed with the couple in their marital home, he was present in Forfar when the deceased was arrested, and he was described by all as close to the deceased. The evidence that he supported the defender in her desire to have control of the funeral arrangements came from the defender.

[30] It was notable that all of the witnesses who expressed a view were of the opinion that their last wishes for their own funeral arrangements ought to be complied with.

SUBMISSIONS

[31] The pursuer sought an order finding her entitled as widow of the deceased to decide upon and make the arrangements for his funeral. Failing that she sought a declaration that the defender is obliged in terms of her fiduciary duties as executor nominate to conduct his funeral in accordance with his wishes.

[32] In support of her main proposition she looked at the summary of the relevant cases contained within the opinion of Lord Brodie and found support through distinguishing the factual circumstances underpinning this cause. In *Willis v McCallum* (1996) 24 Family Law Bulletin 6 the spouses were separated and the birth family were allowed to arrange the funeral "on balance of convenience" to allow the woman to be buried without delay. She pointed out that in *Evans v McIntyre*, Aberdeen Sheriff Court 1980, Sheriff Scott was of the view that it is "... the executor of the deceased, if there is one, or, if there is not, the person who would be entitled to be appointed executor dative." She accepted that at first sight this appeared to be against her but could be distinguished as in that cause no executor had been appointed and the spouse of the deceased was the entitled party. In contrast the executor and the person who would have been entitled to be appointed executor dative in this cause are different people. She submitted that Sheriff Scott's basis for his conclusion was unsound as it derived from the executor's duty to meet the cost of the funeral. Sheriff Scott concluded that the widow had the right to organise the funeral which was "the ordinary way". She suggested that he did not have the circumstances of this case in his contemplation and submitted that it was trite law that the surviving spouse of a loving and co-

habiting marriage was first and foremost next of kin. Thus, barring any legal impediment, the surviving spouse was the principal decision maker in all matters relating to the management of the deceased's affairs including disposal of the body. For support she pointed to the position in intestacy where it was the surviving spouse who petitioned for appointment as executor-dative.

[33] In the facts of this cause the pursuer submitted that the Will did not reveal or truly reflect the deceased's wishes. It was completed in error on the basis of erroneous advice given in good faith. His intention was that his wife would administer and benefit from his estate as his next of kin and, in life, she was the person in whom he came to confide as he faced his fear of a return to combat.

[34] The pursuer argued that the views of the defender and her witnesses on the location of the burial and the arrangements for the funeral were irrelevant. They looked to where things would be in ten years instead of considering what the deceased had wanted. His wishes had been shared with the pursuer only a few weeks before his death. The acrimonious personal Vendetta engaged in by the defender had blinded her to the centrality of that issue and neither she nor her witnesses understood that it was not a matter of the pursuer or her family choosing what was to happen and dictating to them that they must comply.

[35] The pursuer maintained that she had relied on uncontroversial or objectively ascertainable facts in seeking the right to conduct the funeral. If that was not granted to her the second proposition was that the defender should be directed by the court to comply with her son's last declared wishes. She submitted that the defender was blind to his wishes and could not be trusted to honour them as his executor. She was unable or unwilling to accept that the plans for the funeral were his and not those of the pursuer.

[36] The defender's primary submission was that the cause could only be determined by reference to legal norms and principles which in Scots law as in English law placed on the executor as administrator the responsibility for the funeral costs and ancillary to that was the power to decide on the place and scale of the funeral, taking into account, but not bound by, the wishes of the deceased and his near relatives. She accepted that she subject to the control of the court if, as executor, she acted in a way that no reasonable executor would in all the circumstances and on the facts knew her. It was conceded that there was no binding Scottish authority but maintained that support for the proposition that the executor has the last word was to be found in both Scottish and English cases. The defender submitted that the pursuer's principal crave was not sustainable as it relied on her relationship to the deceased. Her view and proposals on the disposal of her husband's remains were accepted as important considerations but no more important than the views of his other close relatives. To seek declarator that in law she was the person most entitled to carry out the deceased's wishes was not accepted as having a sound basis in law. It was conceded that no debate point had been taken.

[37] The defender stated that the evidence had established that the deceased did not have a settled or consistent intention as to where he wished to be buried. If that was incorrect and he did have a wish and a settled intention that intention would need to be taken into account but it would not be conclusive or mandatory for his executors to implement. Support for that proposition was taken from the *Stair Memorial Encyclopaedia in Volume 3 paragraph 506* as quoted by Lord Brodie.

[38] The defender argued that another crucial fact that could be objectively ascertained was that the deceased wrote in his Will that he wanted his mother and brother to be his executors. Any flawed practice in the Army or misapprehension about whether the executor and universal legatee could be one and the same person did not alter the fact that he nominated them. It was further stated that it had not been established that he or all the soldiers saw the Will exercise as a formality to which they attached no importance or thought. The defender pointed out that in re-

examination the Sergeant overseeing the making and signing of the Will had indicated that an executor was “someone who deals with the funeral”. The deceased had made no change to the Will or made a codicil over the two years from the date of signing.

[39] The defender submitted that as there was no petition to reduce or challenge the validity of the Will, and no valid ground to do so, the court, in determining these proceedings, was precluded from going beyond the signature of the Will and the nominated appointment of the deceased’s executors.

[40] She accepted that the role of the executor was to administer the estate. She argued that it was a rule that the executor had the last word on the funeral arrangements which was consistent with Scottish and English cases. I was referred to: *Holtham v Arnold* 1986 2 BMLR 1231 (Ch); *Buchanan v Milton* 1999 2 FLR 844 (Fam); *Grandison v Nembhar* 1989 4 BMCR 143 (CHD); and the old Scottish case of *Robson v Robson* 1897 5 SLT 351. In the latter support was drawn for an inference that the Sheriff would have been of the view that the decision lay with the executors had any been appointed. The case of *Evans v McIntyre* was quoted for the opinion of Sheriff Scott:

“Although there is no direct authority on the matter I apprehend that the law must have an answer to the question of who has the right to say how a dead body is to be disposed of, in the event of a competition. The answer in my opinion is that the person who has the right to decide is the Executor of the deceased if there is one, or if there is not the person who would be entitled to be appointed Executor Dative. The Executor has the responsibility of winding up the estate of the deceased and one of the first things he must do is pay the funeral account. In my view the law is that it is for the Executors to arrange the burial and choose its form”.

[41] Further support for recognition in Scotland of a special position and status of an executor was taken from the comments of Lord Gill in Willis Petitioner reported only in a case note of a 1996 Family Law Bulletin to the effect that *“It was by no means certain that the husband would be deemed executor”*.

Lord Brodie’s opinion at page 31 of 34 was cited where he stated:

“In the event of divergence of view I can see that the executor may have to come to a decision but only after giving consideration to such proposals as the family have to make. The executor who merely consulted his own preferences would be failing in his duties”.

The reference to *“The executor may have to come to a decision”* was stated to lend weight to the primary submission that the executor had the last word, *“but only after giving consideration to such proposals as the family have to make”*. She maintained that she had considered and taken into account the proposals made by the pursuer and discharged her duty to do so preferring the views of the members of her own family in all the circumstances of the cause.

[42] The defender submitted that as executor-nominate she was entitled to conduct the deceased’s funeral as she deemed appropriate as to do otherwise would make an executor subject to direction by near relatives. There were no guidelines as to which near relatives could direct an executor or how they would do so if that were not correct. That would lead to an inherent danger of the floodgates opening for relatives with conflicting views and there was no hierarchy as to how to prioritise the views. In the absence of any legislation to the contrary and based on Scottish and English decisions the rule was that the executor’s decision took priority. That rule provided clarity, consistency and certainty to the law and any departure from this rule would be unsound and unsafe in law.

[43] The defender's second submission was that she had not acted in any way which would warrant the Court interfering with her decision to conduct the deceased's funeral in the manner she deemed appropriate. At its highest the pursuer's case was that the deceased later told her something different from what he told his grandmother and that he might not have appointed his mother executor had he known he could have appointed the pursuer. The pursuer's basis for her case was on that basis stated to be speculative.

DISCUSSION

[44] In the Court of Session the pursuer, as petitioner, sought to review the decision of the Service Personnel and Veterans Agency of the Ministry of Defence, the first respondent, to release her late husband's body to his mother, the second respondent, as the person nominated as executor in his Will. In dismissing the petition as incompetent Lord Brodie compared the position in English and Scots law. His opinion *P 651/11* can be found at [2011] CSOH 124. He concluded that the approach was different in Scotland. Lord Brodie noted that at the date of the continued hearing before him on 19 July 2011 no steps had been taken by the defender to seek appointment and expressed the view that this did not suggest that she intended to do so. However, as she was also the mother of the deceased she was in the category of a near relative. At paragraph 72 he stated:

"[72] The question that this opinion singularly fails to answer is who has the better claim to determine where and how the deceased is to be buried or his remains otherwise disposed of. This may not be so remarkable. The arrangement of a dignified and appropriate funeral is essentially a private and family matter to be decided by what the sheriff in Robson v Robson described as "the good sense and good feeling of the parties". Scots law has not had much to say on the matter and in particular, at this stage in its development offers no formal mechanism for prioritising claims. To the extent that the respective claims of the petitioner and second respondent admit of legal analysis, it can be said that both have rights which a public authority must respect and which any prospective executor must consider. The first respondent may lawfully transfer custody of the body of the deceased to the second respondent but he may also lawfully transfer the body to the petitioner. Nothing in this opinion should be construed as an expression of preference on my part of the position of the second respondent over that of the petitioner."

[45] He reached this conclusion having considered the nature of the rights in the body of the deceased as between the near relatives and the executor. At paragraph 60 he states:

"[60] Thus, in Scots law I would see near relatives as well as the executor or prospective executor as having rights or interests in respect of the body of the deceased. The nature of these interests is not the same. Whether or not one describes it as an aspect of personality rights, as Whitty would propose, the near relative has an interest which is personal to himself as an individual. As a consequence of that, albeit potentially in competition with others, the near relative has a right to claim custody of the body of the deceased for the purpose of burial. As I have indicated, the executor or prospective executor also has a right to custody of the body of the deceased for the purpose of burial but the nature of that right is different from that of the near relative. The model of trust and fiduciary obligation suggests itself and indeed a contention to that effect appears in the petition at paragraph 10(1). As the legal advice to the first respondent puts it, "executors have to be careful and aware that they have to act in the best interests of the estate." That is clearly true in respect of patrimonial interests. It seems to me that an analogous duty should be considered as being owed in respect of the personal interests of the deceased's family in relation to the dignified treatment of his body and the making of appropriate funeral arrangements."

[46] At paragraph 63 he considers the position of the executor further:

"[63] By referring to a trust model I have in mind no more than an analogy with trust and the fiduciary duties consequent thereon. As there are not rights of property in a corpse it can hardly be held on trust, properly speaking. However, I do see the position of a Scottish executor having custody of a body for the purpose of burial as acting in a quasi-fiduciary capacity, subject to the claims of the near relatives. I do not see him as having the right to arrange the burial subject only to special circumstances which would appear to be the case with his English equivalent.

No doubt there will be circumstances in which it will be appropriate for a Scottish executor to proceed to arrange for the conduct of the burial but only after consulting the wishes of the near relatives. In the event of a divergence of view I can see that the executor may have to come to a decision but only after giving consideration to such proposals as the family have to make. The executor who merely consulted his own preferences would be failing in his duties. I would see it as being capable of being tested in this way."

DECISION

[47] In Scotland the close family make the funeral arrangements. I do not consider that an executor has priority over close family members and find support for that view in the guidance provided in paragraph 63 quoted above. I would be very surprised if many even thought about an executor at such a time. I am not surprised that the defender and her partner initially accepted that the pursuer would decide on these arrangements as her son's next of kin. In Scotland the close family usually pay for the funeral and recover the costs once an executor has been identified and appointed if such appointment is necessary. Where there is a surviving spouse he or she will make the arrangements. If there is no surviving spouse it would usually be the surviving adult children or, as with the pursuer's brother, where there are no adult children the surviving parents or siblings.

[48] The pursuer has raised an action the object of which is to have the court declare that she has the right to decide upon and make the arrangements for the funeral of the deceased. A court can only grant a declarator if there is a live practical issue to be determined. There is such an issue in this cause.

[49] On the facts in this case I consider that the pursuer as widow has priority over the defender and other close family members when it comes to making the funeral arrangements. The deceased left his family at a young age to join the Army. He never returned. He married and was living in family with his wife. He rarely visited Methil and maintained no close friendships there. He had witnessed at extremely close quarters the obliteration of a fellow serviceman in an explosion and suffered physical injuries in that explosion. He was also left with the sort of mental scars that a person who has not been in a combat situation cannot properly understand. His wife had been at his side throughout his recovery. She had also during that time endured the loss of her brother in tragic circumstances and had the comfort of her husband to assist her in coming to terms with that. In the intimacy of that marital relationship conversation took place about the couple's respective wishes should the unthinkable occur. There is no evidence that her desire to comply with those wishes is motivated by any grudge against the defender or her family. I accepted her evidence that she was seeking to ensure that his last wishes were honoured. She gave her evidence in a quiet, dignified manner and with due regard to the delicacy of the subject matter involved.

[50] That is not to say that the defender and the other members of the deceased's family do not have a legitimate point of view. It is understandable that they view the marriage as a short one. It is understandable that they wish to see the deceased laid to rest near his birth family and where he grew up. Their belief that the deceased had wished to be buried in MacDuff cemetery further

underpins that point of view. However, that information about his wishes comes from the defender and the contrary position from the pursuer a woman viewed, by her as, at the least, unreliable.

[51] In this case but for the erroneous advice given to the deceased there would have been no impediment to the funeral proceeding at the appropriate time three years ago. The defender used the position she just happened by chance to find herself in to exercise the power she believed that gave her. She did not do so in my opinion due to her perceived concern about the wishes of her late son, or the wishes of other members of her family, but because of her attitude towards her daughter-in-law. The pursuer had not accorded her the place she felt was due to her during the marriage. Her disgruntlement over that perceived slight festered and turned acrimonious when she was not told of the IED injury directly by the pursuer and when she considered that the pursuer had blackened her name on social media over her failure to visit her injured son in hospital.

[52] The acrimony she felt was further cemented in the period after her son's death and her ability to be rational was undoubtedly affected by her own understandable grief and her inability to travel to Germany due to her expired passport. When the pursuer's mother, whom she believed her son did not like, appeared to be dictating to her what she should wear to her own son's funeral matters came to a head. This bitterness continued when the pursuer did not invite her to the memorial service held by the Regiment. As I have already indicated the defender showed a lack of insight into the situation of a young recently widowed woman and a distinct lack of compassion. She thought only of herself and how she had been overlooked. She considered that the pursuer had failed in her duty to inform her directly when the deceased was injured in Afghanistan and later when in Germany he suffered the fatal injury.

[53] I do not consider that as executor the defender at the time or since has given due thought to her duties and to the wishes of her late son and his widow. She has only had regard to her own views coloured as they have been by past events. As executor she has been unable or unwilling to see past her own wishes, to give due regard to the wishes of her late son, or to give any regard to the wishes of the pursuer. This is a battle waged by her to achieve the result she wants with little regard for the body of her son languishing in storage in London for over three years. She has been blinded by her own desire to win the argument. As executor she is regrettably incapable of adopting an unbiased approach to the consideration of the competing wishes of the close relatives of the deceased.

[54] This has been a particularly sensitive case and I am grateful to the parties' agents for their thoroughness and professionalism.