

The family court's jurisdiction to direct the burial of a child: *Re K*

Christopher Sharp QC, *St John's Chambers, Bristol*



Christopher Sharp practices principally in London and on the Western Circuit. He writes a regular financial remedies update article for *Family Affairs* (the FLBA magazine) and lives under the illusion that he has a life outside

the law.

It will be rarely that the court is confronted with the dilemma of how to effect the appropriate burial of a child and to ensure that the body be disposed of with all proper respect and decency and, if possible, without further delay. It is, sadly, not uncommon for the court to have to rule between disputing parties as to who should have the authority (and responsibility) to arrange the disposal, and thus, coincidentally, usually, where the body is to be buried and perhaps according to what rites, but the question of whether the court has jurisdiction to order that a body be buried, due to a delay in making the arrangements by those who would normally be expected to do so appears not to have been decided until Hayden J ruled on the topic very recently *Re K (A Child: deceased)* [2017] EWHC 1083 (Fam), [2017] FLR (forthcoming).

No order in respect of a child's body or burial can be made under the Children Act 1989. By s 8 Children Act 1989 a specific issue order is 'an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.' The Act applies to the exercise of parental responsibility for a child, defined as a person under the age of 18. While parental responsibility extends, at least for a parent

who has the means to do so, to providing for the burial of his or her deceased child), it does not extend to regulating events arising after the child's death. See per Peter Jackson J (as he then was) *Re JS (Disposal of Body)* [2016] EWHC 2859 (Fam), [2017] FLR (forthcoming and reported at [2017] Fam Law 56) para [45], referring to, *R v Gwynedd County Council ex parte B* [1991] 2 FLR 365, [1992] 3 All ER 317, CA a decision under the Child Care Act 1980; also *Fessi v Whitmore* [1999] 1 FLR 767. It follows that a solution to the question of how the court may regulate or direct the burial of a child's body lies outside the provisions of the Children Act.

The decided cases appear to rely either upon the inherent jurisdiction or to treat the issue as a species of resolving an issue relating to the administration of the deceased's estate. However, all these cases appear to relate to disputes between parents, relatives or friends of the deceased as to where or how the deceased should be buried, rather than whether or when. A starting point is Hale J's (as she then was) judgment in *Buchanan v Milton* [1999] 2 FLR 844 at para [845]–[846] where she said:

'There is no right of ownership in a dead body. However, there is a duty at common law to arrange for its proper disposal. This duty falls primarily upon the personal representatives of the deceased (see *Williams v Williams* (1881) 20 ChD 659; *Rees v Hughes* [1946] KB 517). An executor appointed by will is entitled to obtain possession of the body for that purpose (see *Sharp v Lush* (1879) 10 ChD 468, 472; *Dobson v North Tyneside Health Authority and Another* [1997] 1 FLR 598, 602, obiter) even before the grant of probate. Where there is no executor, that same duty falls upon the administrators of the estate, but they

may not be able to obtain an injunction for delivery of the body before the grant of letters of administration (see *Dobson*).’

In *Re JS* Peter Jackson J summarised the matter thus:

‘The law in relation to the disposition of a dead body emanates from the decision of Kay J in *Williams v Williams* [1882] LR 20 ChD 659, which establishes that a dead body is not property and therefore cannot be disposed of by will. The administrator or executor of the estate has the right to possession of (but no property in) the body and the duty to arrange for its proper disposal. The concept of ‘proper disposal’ is not defined . . .’

The Non-Contentious Probate Rules 1987 r 22 provides an order of priority of persons entitled to a grant of administration where the deceased died wholly intestate (as will be the case with an infant). After the surviving spouse and children of the deceased, r 22(1)(c) identifies the priority of the mother and the father and other relatives follow. Disputes between parties entitled to such a grant can be resolved pursuant to the powers derived from s 116 of the Senior Courts Act 1981 which reads:

- (1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
- (2) Any grant of administration under this section may be limited in any way the court thinks fit.’

In *Re JS* Peter Jackson J took the view that this provision empowered the court, where there are two persons entitled to such a grant, to substitute one for both, and if he was wrong about that then he took the view that such a power derived from the inherent

jurisdiction. Although no one can own the body, certain people can have a right to possess it. The personal representatives of the deceased are generally responsible for disposing of the body. In *Buchanan* Hale J observed (in a case where there was a dispute between the deceased’s adoptive English family and his Australian Aboriginal birth family as to where and how he should be buried) that:

‘There is very little modern authority on the use of this power and none at all on its use in this particularly unhappy context. In *Re Taylor, decd* [1950] 2 All ER 446, 448, Willmer J (as he then was) was attracted by the view that the term “special circumstances” relates only to special circumstances in connection with the estate itself or its administration: he therefore declined to interfere for the ulterior purpose of protecting a 21-year-old sole beneficiary from the consequences of her youth and alleged immaturity. But in *Re Clore (Deceased) (No 1)* [1982] Fam 113, 117, Ewbank J declined to impose any such limitation:

‘I would say that the words ‘special circumstances’ are not necessarily limited to circumstances in connection with the estate itself or its administration, but could extend to any other circumstances which the court thinks are relevant, which lead the court to think that it is necessary, or expedient, to pass over the executors.” ’

Hale J preferred Ewbank J’s approach.

Thus the issue would appear to be whether the court finds there to be ‘special circumstances’ (as so explained) and, if so, whether it is either ‘necessary’ or ‘expedient’ to displace the persons normally entitled to the grant of letters of administration of the estate of the deceased. If not, then the court cannot intervene under s 116 and in any event it would seem clear from *Buchanan* that the court cannot itself dictate the mode of funerary rites and perhaps not the time of a burial either. In *Anstey v Mundle* [2016] EWHC 1073 (Ch) the court concluded that it could not determine or direct where or how the deceased would be buried, but

could declare who, among the various contending parties, had the power and duty to bury the deceased. However the judge observed that in determining to whom a deceased's body should be released for the purposes of its burial, the following non-exhaustive factors were relevant: (i) the deceased's wishes; (ii) the reasonable requirements and wishes of the family who were left to grieve; (iii) the location with which the deceased had been most closely connected; and (iv) most importantly, that the body be disposed of with all proper respect and decency and, if possible, without further delay (see paras [24]–[25] of the judgment).

If there has been delay in arranging the burial then, although the consideration under (ii) is plainly relevant, it is suggested that the consideration under (iv) is going to be particularly relevant. See also to like effect *Hartshorne v Gardner* [2008] 2 FLR 1681 where it was observed that:

‘The most important consideration is that the body be disposed of with all proper respect and decency and, if possible, without further delay. Subject to that overriding consideration, it seems to me that there are two types of factor that are relevant in the present case. First, those that do or might be expected to reflect the wishes of the deceased himself. Secondly, those that reflect the reasonable wishes and requirements of family and friends who are left.’

In the context of considerations of issues of delay it is noted that the Registration of Births and Deaths Regulations 1987 reg 51(2) provides that if the registrar learns (after a delay of 14 days from the date on which he should have received notification of the date, place and means of disposal of the body) that the body has not been disposed of he must, unless he is informed that the body is being held for the purposes of the Human Tissue Act 2004, report the matter to the officer responsible for matters of environmental health for the district in which the body is lying. This would seem to indicate as a matter of policy that a body should be disposed of with due dispatch.

The process through which the court should approach this issue was again set out by Cranston J in *Burrows v HM Coroner for Preston* [2008] EWHC 1387 (QB), [2008] 2 FLR 1225. The law is set out with clarity at paras [12]–[17]. At [13] he said:

‘At common law, if there is no property in the body of a deceased person, various people have rights and duties in relation to it. First, the deceased's personal representatives – the executors of the will or the administrators of the estate when the deceased dies intestate – have the right to determine the mode and place of disposal of the body, even where other members of the family object. The personal representative's claims to the body oust other claimants, although in some cases statute might entitle, as in this case, the coroner, or possibly in other cases a hospital or a local authority, to make claims on the deceased's body. Where personal representatives have not been appointed, the person with the best right to the grant of administration takes precedence; where two or more persons rank equally, then the dispute will be decided on a practical basis:…’

It is relevant to note that the relief granted under s 116 is declaratory, merely declaring who is to have the grant of administration for the purposes of making the funerary arrangements.

If the court were to find the special circumstances and to find it necessary or expedient to make the order under s 116, it would then have to identify the alternative grantee of the (appropriately limited) letters of administration. In *Burrows* it was made clear that the person who could be declared as entitled to the grant had to be someone who had ‘standing’. In that case the aunt had the means to make arrangements and the capacity (which the mother, a drug addict, did not) but the judge held the aunt had no standing (or no ‘independent claim’ to carry out the funeral arrangements) (It is unclear why she was thus totally excluded since, as an aunt of the whole blood she came within the order of priority under r 22(1)(g)). She had however only met the

child once in 8 years). A person with the necessary standing would appear to be someone who comes within the hierarchy of priority for a grant under r 22 of the Non-Contentious Probate Rules 1987, or (see below) someone in possession of the body, or subject to a common law or statutory duty in respect of the body.

In *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 the claimant hospital being ‘the person currently in lawful possession of the body’ was held (on its application) to have the authority to decide the appropriate means for the disposal of the testator’s body in circumstances where there was a bona fide dispute between the defendants in respect of the validity of the testator’s will and the entitlement of the first defendant to act as executor. Hart J noted that ‘The authorities also establish that at common law it is the duty of a householder under whose roof a person has died to make arrangements for the dignified and decent burial of the deceased, at least in circumstances where the deceased is a poor person in relation to whom no other arrangements can be made – see *R v Stewart* (1840) 12 Ad & E 773 at 778.’ The hospital needed to dispose of the body to make room in its morgue and contended that it was in the position of such a householder and, subject to the claims of others who have the better right to make arrangements for the disposal of the body, it has both the duty and the right to make such arrangements. He went on:

‘[16] There is, so far as appears, no direct authority on the question. Plainly in a case where there is no dispute as to the executor’s entitlement to act, the right of the executor is likely to be accorded a high priority, and it may indeed be, although the point has not been decided, that the executor in circumstances where no dispute at all exists will always be entitled to the final say. That appears to have been the basis upon which Vinelott J decided the case of *Re Grandison*, reported in *The Times* for 10 July 1989, although it is also right to say that Vinelott J in that

judgment left open the question of whether the court had the power to override or supplant the executor’s decision at the instance of a near relative and observed that “he would be surprised to find that the court had no power in any circumstances”.

[17] In the present case, the Claimant being in lawful possession of the body and there being no way of resolving the dispute as to the entitlement of the First Defendant to act as executor within an acceptable time period, it seems to me that the decision as to the appropriate arrangements for the disposal of the body must be left to the Claimant as the person currently in lawful possession of the body, and I would accordingly make the declaration which the Claimant asks me to make.’

In that case, however, the hospital was planning to hand over the body to the family, once the post mortem was complete.

It has been seen (above) that at para [13] of Cranston J’s judgment in *Burrows* he comments that, while the claims of the personal representative (where one has been appointed) to the body will oust those of other claimants, in some cases statute might entitle, as in that case, the coroner, or possibly in other cases a hospital or a local authority, to make claims on the deceased’s body. Such a statute is the Public Health (Control of Disease) Act 1984 by s 46(1) of which it is provided that:

‘It shall be the duty of a local authority to cause to be buried or cremated the body of any person who has died or been found dead in their area, in any case where it appears to the authority that no suitable arrangements for the disposal of the body have been or are being made otherwise than by the authority.’

It would appear that the jurisdiction upon which Hart J relied in the Lewisham case was the inherent jurisdiction and the duty

upon the hospital derived from common law. In *Fessi v Whitmore* (a case involving a dispute between parents as to where the child should be buried) s.116 was not referred to. The matter had been referred to the judge under RSC Ord 85 (now see CPR Part 64 which deals with the administration of estates of deceased persons and trusts) but he decided he was not dealing with a difficulty in the administration of an estate but rather deciding an issue as if in the nature of trustees bringing a dispute before the court to be decided on a balancing of contentions. While this can be argued to have been an application of the inherent jurisdiction it is not directly of assistance save to illustrate that the declaratory jurisdiction involves the court choosing the candidate who proposes what the court deems to be the most appropriate disposal.

Hartshorne v Gardner [2008] EWHC B3 (Ch), [2008] 2 FLR 1681 was a decision by a deputy High Court judge (Sonia Proudman QC as she then was) who expressly did employ the inherent jurisdiction to direct the coroner to release the body to one of two contending parties so that they might effect the burial in one, rather than another place.

In the recent case of *Re K (A Child: deceased)* (above) Hayden J was confronted in care proceedings with the problem of the body of a child who had died in the care of the parents who had failed or refused to arrange the burial for many months. Neither parent could be relied on to make such arrangements so that there was no question of choosing between the proposals of two competing parties and the judge sought jurisdiction to secure the burial. The relevant local authority was prepared to fulfil its duty under s 46 (although it did not have possession of the body). The judge reviewed his power to declare the relevant council to be the person entitled, under s 116 Senior Courts Act 1981, to the grant of letters of administration for the limited purposes of making arrangements for the disposal of the body, having regard to its statutory duty, and in the alternative pursuant to the inherent jurisdiction of the court. In this regard the judge observed:

‘It is necessary to consider the evolution of the inherent jurisdiction and wardship (which is a facet of the inherent jurisdiction). Though it is difficult to be definitive as to the nature of the inherent jurisdiction or to prescribe its parameters it can perhaps most conveniently be defined as the route by which the Court may make orders in relation to specific individuals and their affairs that are not governed by individual statute.’

Referring to his own decision in *London Borough of Redbridge v SNA* [2015] EWHC 2140 (Fam), [2016] 1 FLR 994, in which he had noted the limits on the inherent jurisdiction, he reminded himself that:

‘Precisely because it’s powers are not based either in statute or in the common law it requires to be used sparingly and in a way that is faithful to its evolution’

and that:

‘The High Court’s inherent powers are limited both by the constitutional role of the court and by its institutional capacity. The principle of separation of powers confers the remit of economic and social policy on the legislature and on the executive, not on the Judiciary. It follows that the inherent jurisdiction cannot be regarded as a lawless void . . .’

With those observations he then considered the earliest feudal origins of the wardship jurisdiction, which bestowed on the Crown the right to exercise powers and duties over orphaned children who had inherited real property. These children fell within the responsibility of the King as *parens patriae*. He referred to the establishment in the sixteenth century of the Court of Wards, set up to enforce the right of the Crown in the execution of its duties in connection with wardship and how that jurisdiction survived subsequently in the Court of Chancery and expanded its reach beyond property rights to welfare and protection of vulnerable children. He cited the judgment of Kay LJ in

R v Gyngall [1893] 2 QB 232 at 248, who commented that wardship:

‘... is essentially a parental jurisdiction, and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child. Again the term ‘welfare’ in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the court in the exercise of this jurisdiction.’

Hayden J’s view was that ‘a wise parent acting for the true interests of the [particular] child’ is integral to both the *parens patriae* and the inherent jurisdiction, and it was axiomatic that a ‘wise parent’ would attend to the burial of a child. Thus having regard to the historical base and underlying philosophy of the inherent jurisdiction and the case law he was satisfied that, pursuant to the inherent jurisdictional powers of the High Court, he could authorise the local authority to make arrangements for the appropriate disposal of the child’s body by way of burial or cremation.

A further issue which may need to be addressed in such cases will be the application of the Human Rights Act and the European Convention on Human Rights. It would seem clear that Art 8(1) applies to the rights of the surviving relatives and their wish to decide on the manner of burial of the deceased: ‘Everyone has a right to respect for his private and family life’. Article 8(2) continues that there should be ‘no interference by a public authority with the exercise of this right except such as in accordance with law is necessary in a democratic society . . . for the prevention of disorder . . . the protection of . . . health or morals, or for the protection of the rights and freedoms of others’. In *Burrows* European jurisprudence was cited to show that Art 8(1) is engaged in cases of burial but equally it is a qualified right in which

the European Court allows a wide margin of appreciation to member states. Issues such as public health are relevant considerations and while any interference with Art 8 rights must be necessary and proportionate, *Re K (Deceased)* would suggest it will be in accordance with the law.

Conclusion

It is an established principle of law (and policy) that a body should be disposed of with proper respect and decency and, if possible, without further delay. The primary duty to effect such a disposal lies on those primarily entitled to the grant of administration who will, *prima facie* be decided by reference to r 22 of the Non Contentious Probate Rules 1987. Where, however, there is an issue between these parties the court may exercise a power, whether under s 116 of the Senior Courts Act 1981 or under the inherent jurisdiction to replace two such prospective grantees with one who the court concludes will effect the most appropriate disposal, but the court cannot itself dictate the mode of disposal. It would appear (according to the *Lewisham* case) that the court may grant to a third party, in whose possession the body currently is, the authority (but there would appear to be no jurisdiction to impose the obligation) to make arrangements for the disposal. There is, however, ultimately, a duty on the relevant local authority under the 1984 Act to cause a body to be buried where suitable arrangements for the disposal of the body have not been or are not being made otherwise than by the authority.

If the jurisdiction pursuant to s 116 is employed the court must find ‘special circumstances’ (as that phrase is explained by Ewbank J in *Re Clore*), and then find that it is either necessary or expedient to exercise its powers, and grant administration to ‘some person’ other than the person otherwise entitled to the grant. A grant of administration under the section may be limited as the court thinks fit. Where the circumstances are found to be ‘special’ and it is found to be ‘necessary’ or ‘expedient’ to make an order under s 116 then it is suggested that the requirement under Art 8 for any interference by the state to be in

accordance with the law, necessary and proportionate will be satisfied.

It is not apparent, however, that the court has any jurisdiction under s 116 to direct that there shall be a burial. The power appears to be to grant a declaration as to who shall have authority to arrange the burial. However, *Re K (A Child: deceased)* indicates both that there is no requirement to employ what some judges at least have suggested is a jurisdiction designed more for

property disputes under s 116, and that the inherent jurisdiction may be employed to secure the prompt, decent and appropriate burial or cremation of a body of a child in what will (hopefully) be very rare occasions where the family do not make such arrangements themselves. In order to exercise such power it may be necessary to make such an order in the High Court and if necessary transfer the proceedings to that court.