

COMMENTS AND NOTES

WHOSE FUNERAL? CORPSES AND THE DUTY TO BURY

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INTRODUCTION

Recent media reports concerning the fate of the preserved body of Edward MacKenzie, found hidden in the Plymouth studio of controversial artist Robert Lenkiewicz, have focused attention on the question of who has the legal right to claim human remains for the purposes of burial.¹ MacKenzie, a homeless tramp better known as Diogenes,² was a friend and model for Lenkiewicz who made a pact with the vagrant before his death in 1984 that the artist would embalm MacKenzie's body rather than give it up for burial. Despite several unsuccessful attempts by the local council to locate the corpse, it was only discovered in a hidden drawer at Lenkiewicz's studio after his death in August 2002. The remains were held for several weeks by the Plymouth and South Devon Coroner before being released to the Lenkiewicz Foundation which was deemed to have a lawful right to claim the body.

Not all disputes concerning the fate of the recently deceased occur in such bizarre and high-profile circumstances. Instead, the majority occur between family members on the death of a relative. Most people assume that when they die their body will be disposed of by their immediate family, who will come together to take care of funeral arrangements and ensure that burial³ takes place in accordance with the deceased's wishes or at least in a dignified and appropriate manner. Where family members are agreed on a particular form of burial, few problems arise. However, such displays of family unity do not necessarily follow the death of a loved one. The deceased's relations may disagree on various aspects of the funeral arrangements – for example, whether the corpse should be interred in the ground or cremated,⁴ the site of

¹ "Artist Kept Tramp's Corpse in a Cupboard", *The Times*, 12 October 2002 and "Tramp's Embalmed Body Leaves Problem for Coroner", *The Guardian*, 12 October 2002.

² Named after the Greek philosopher Diogenes of Sinope, 412-322 BC, who denounced material possessions and lived as a tramp in Athens, postulating that true happiness is not reliant on wealth and power.

³ For convenience, the term "burial" is used here in a broad sense to denote the disposal of human remains either by interment in the ground or by cremation (whether or not the latter is followed by interment of the ashes).

⁴ See *Holtham v Arnold* [1986] 2 BMLR 123.

the deceased's final resting place,⁵ whether burial should be in accordance with particular religious or cultural beliefs.⁶ In the absence of a compromise solution between the deceased's "nearest and dearest", the courts must intervene to allocate responsibility for burial and ensure that disposal of the dead takes place. In these circumstances, who is entitled to custody of the deceased's remains and thus to dictate the manner of burial?

I. Burial Instructions Not Legally Binding

It has long been established that there is no property in a dead body, whether unburied⁷ or buried.⁸ One important consequence of this common law rule is that a person cannot dictate the fate of his/her remains after death, since a corpse does not constitute an item of property which can be bequeathed by will or any other instrument.⁹ Burial instructions, while perhaps imparting some sort of moral obligation, do not impose any legal obligation and cannot be enforced. The ultimate decision lies with those persons who have responsibility for burying the deceased,¹⁰ and they may completely disregard his/her wishes when deciding on an appropriate means of burial.

An individual does have a statutory right to donate his/her body or parts thereof to an authorised person or institution for research or transplant purposes under the Human Tissue Act 1961 and the Anatomy Act 1984, where such a request has been made in writing or orally in the presence of at least two witnesses.¹¹ However, no such use will be made of the deceased's remains in the event of objections from a surviving spouse or surviving relatives.¹²

II. The Duty to Bury

While there is no property in a corpse, certain persons are under a legal duty to bury the dead and this is accompanied by a right to possession of the remains for this purpose.¹³ Burial of the dead is regarded as essential not

⁵ As in *Grandison v Nembhard* [1989] 4 BMLR 140, *Calma v Sesar* (1992) 106 FLR 446 and *Burrows v Cramely* [2002] WASC 47.

⁶ See, for example, *Saleh v Reichert* (1993) 104 DLR (4th) 384, *Hunter v Hunter* (1930) 65 OLR 586, *Meier v Bell*, Supreme Court of Victoria, unreported, 3 March 1997 and *Buchanan v Milton* [1999] 2 FLR 844.

⁷ *Dr Handyside's case* (1749) 2 East PC 652 and *Williams v Williams* (1882) 20 Ch D 659.

⁸ *Haynes' case* (1614) 12 Co Rep 113 and *Re Sharpe* (1857) Dears and Bell 160. For an overview of the relevant authorities see P. Matthews, "Whose Body? People as Property" [1983] CLP 193, at 197-205 and 208-214, as well as M. Pawlowski, "Dead Bodies as Property" (1996) 146 NLJ 1828.

⁹ As established in *Williams v Williams* (1882) 20 Ch D 659. See further *Holtham v Arnold* [1986] 2 BMLR 123 and *Saleh v Reichert* (1993) 104 DLR (4th) 384.

¹⁰ See below.

¹¹ 1961 Act, s 1 and 1984 Act, s 4.

¹² *Ibid.*

¹³ This is one of two exceptions to the common law rule that there is no property in a dead body. The second relates to the application of work or skill to a dead body, so that it acquires attributes differentiating it from a mere corpse awaiting burial and thus becomes the property of the person who carried out the work – as devised by Griffith CJ in *Doodeward v Spence* (1908) 6 CLR 406, at 414, and applied by

only in terms of respect for the deceased, but in the interests of public health to avoid the spread of disease resulting from the inevitable decay of the corpse.¹⁴

To fulfil these objectives, there is a legal hierarchy of persons who have responsibility for carrying out burial and are thus entitled to custody of the deceased's body for this purpose. The persons with principal responsibility for burial are the deceased's executors as appointed by will,¹⁵ or the deceased's personal representatives who are entitled to letters of administration in respect of the estate where the deceased died intestate.¹⁶ In the latter situation, the personal representatives are the designated next-of-kin who claim in order of their relationship with the deceased, ranking from a spouse,¹⁷ children, parents and siblings to other specified family members.¹⁸ Executors are entitled to claim possession of the deceased's remains even before the grant of probate.¹⁹ In contrast, personal representatives do not take title from the date of death, but from the grant of letters of administration which will be at least 7 days later.²⁰ While the Court of Appeal in *Dobson v North Tyneside Area Health Authority*²¹ suggested that personal representatives might be unable to claim the deceased's remains before the grant of letters of administration, the respective courts in the Australian cases of *Meier v Bell*²² and *Brown v Tulloch*²³ asserted that the duty to bury nevertheless falls on the highest-ranking person who would be entitled to claim letters of administration upon making such an application. This top layer of the legal hierarchy will account for the majority of burials, at least in respect of deceased adults. As regards infant children,²⁴ the duty to bury falls jointly on the parents.²⁵ Where a dispute arises between different

the respective courts in *Dobson v North Tyneside AHA* [1996] 4 All ER 474 and *R v Kelly* [1998] 3 All ER 741.

¹⁴ See *In re Blagdon Cemetery* [2002] 3 WLR 603.

¹⁵ See *Williams v Williams* (1882) 20 Ch D 659 and *Murdoch v Rhind* [1945] NZLR 425, as well as *Schara - Tzedek v Royal Trust Co* [1951] 2 DLR 228.

¹⁶ See *Brown v Tulloch* (1992) 7 BPR 15101, *Dobson v North Tyneside Area Health Authority* [1996] 4 All ER 474 and *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

¹⁷ Excluding a judicially separated spouse, who is regarded as having predeceased the intestate – Matrimonial Causes Act 1973, s 18(2) and Matrimonial Causes (NI) Order 1978, art 20(2).

¹⁸ Administration of Estates Act 1925, s 46 and Administration of Estates Act (NI) 1955, ss 6-12.

¹⁹ *Buchanan v Milton* [1999] 2 FLR 844.

²⁰ Or 28 days in the case of a surviving spouse due to the survivorship stipulation in s 46(2A) of the Administration of Estates Act 1925 (as inserted by s 1(1) of the Law Reform (Succession) Act 1995) and s 6A of the Administration of Estates Act (NI) 1955 (as inserted by art 3 of the Succession (NI) Order 1996).

²¹ [1996] 4 All ER 474.

²² Supreme Court of Victoria, unreported, 3 March 1997.

²³ (1992) 7 BPR 15101. See further *Burrows v Cramley* [2002] WASC 47.

²⁴ Or adult children who die intestate, and without a surviving spouse or issue.

²⁵ See *Clarke v London General Omnibus Company Ltd* [1906] 2 KB 648 and *Grove v Moore* [1935] NZLR 739. If the child's parents are dead, the persons with legal responsibility for the child have the duty to bury – *Watene v Vercoe* [1996] NZFLR 193. Where the child's parents cannot agree on the mode of burial, courts will resolve the dispute on the basis of who will effect prompt burial

sets of parents, the wishes of adoptive parents will prevail over those of natural parents,²⁶ while natural parents will take priority over foster parents when making funeral arrangements for a child.²⁷ In the absence of a person with a higher ranking claim within the overall “pecking order”, responsibility for burial falls on the householder on whose premises the body lies.²⁸ Failing this, the obligation to bury unclaimed remains falls on the local authority with control over the city, town or district in which the body is found.²⁹

This legal hierarchy imposes a duty to bury on specific persons, with a concomitant right to possession of the deceased’s remains which will be protected by the courts, if necessary, in the event of unauthorised interference.³⁰ This possessory right also extends to the deceased’s ashes following cremation and to determining their ultimate fate.³¹ Where the deceased was interred in the ground, it has been suggested that the right to possession extends beyond burial, thus preventing a dissatisfied relative from

and as a matter of practicality. Thus, in *Calma v Sesar* (1992) 106 FLR 446 custody of the son’s remains was awarded to his mother who had already made arrangements for the funeral to take place in Darwin, notwithstanding her estranged husband’s wish to have the remains moved to Port Hedland, Western Australia for burial near the place where the deceased was born. In *Fessi v Whitmore* [1999] 1 FLR 767, the court refused to divide the ashes of a 12 year old child between his parents following cremation. Instead, it awarded the ashes to the mother who intended to scatter them in the area where the family had always been based and, in the court’s opinion, where the family could have some focus and come together to see a fitting memorial to the child. The father’s request to have the ashes interred near his new home was rejected as causing enormous distress to the family, this being the place of the accident which had caused the child’s death. However, contrast this with recent newspaper reports of an American court dividing the cremated remains of a Northern Ireland man who died in the September 11th terrorist attacks on the World Trade Centre between his mother, his fiancée and youngest son, and two sons living with his former wife – “Tug of War over Ulster Twin Towers Victim Ends”, *The Belfast Telegraph*, 26 June 2002.

²⁶ *Buchanan v Milton* [1999] 2 FLR 844.

²⁷ *R v Gwynedd County Council, ex p B* [1992] 3 All ER 317 and *Warner v Levitt*, Supreme Court of New South Wales, unreported, 23 August 1994.

²⁸ *R v Stewart* (1840) 12 Ad & El 773.

²⁹ Public Health (Control of Diseases) Act 1984, s 46. (There does not appear to be an equivalent Northern Ireland statutory provision). In terms of financial liability for burial, the person who is under a duty to bury can recover the costs of doing so from the deceased’s estate – see *Davey v Rural Mun. Cornwallis* [1931] 2 DLR 80, *Rees v Hughes* [1946] KB 517 and *Smith v Tamworth City Council* (1997) 41 NSWLR 680. However, a person who is not lawfully in possession of the deceased’s remains cannot recover any costs incurred in disposal of the body, even where this has been in accordance with the deceased’s wishes – *Williams v Williams* (1882) 20 Ch D 659. Here, the executors were not liable to reimburse the testator’s friend for the cost of disinterring his body and having it cremated in Italy, despite the fact that the testator’s will had expressly directed the friend to do so and requested the executors to pay any costs incurred.

³⁰ Most often by means of an injunction – *Calma v Sesar* (1992) 106 FLR 446 and *Re Lockowiak* [1997] SASC 6301.

³¹ See *Re Korda*, *The Times*, 23 April 1958 and *Robinson v Pinegrove Memorial Park*, Supreme Court of New South Wales, unreported, 5 June 1986 (deceased’s executors entitled to custody of his ashes over the deceased’s son in both cases).

disinterring the remains immediately after burial and re-burying them elsewhere.³² However, persons falling within this hierarchy cannot claim that they “own” the body of the deceased in a traditional property law sense – such persons have a mere right to possession of the corpse and for the purposes of burial only.³³

III. A Matter of Legal Entitlement, Not Emotional, Religious or Cultural Claims

The above hierarchy determines who is entitled to custody of the deceased’s remains, and thus provides the focal point for resolving family burial conflicts. In the majority of cases, responsibility for burial will fall on the executors or the deceased’s immediate family acting as his/her personal representatives. While executors and personal representatives are expected to consult with other family members over the proposed funeral arrangements, they are not under any legal obligation to do so,³⁴ and may opt for a form of burial which is opposed by the deceased’s (other) relatives.³⁵

When resolving family burial conflicts, courts have adhered strictly to the legal framework and awarded custody of the deceased’s remains on the basis of who has the duty to bury and associated right to possession of the corpse within the established hierarchy. Judges have consistently stressed the need to find a legal solution to such disputes, and to resolve the matter as quickly as possible to facilitate burial of the dead.³⁶ Arguments for a particular form of burial based on mere expressions of preference or emotional sentiment are irrelevant. Thus, in *Grandison v Nembhard*³⁷ the court held that the distress and inconvenience caused to the deceased’s daughter as a result of the executor’s decision to have the deceased buried in his native Jamaica in accordance with his wishes was irrelevant, as was the extra expense involved.³⁸ Likewise, the fact that those persons who were closest to the deceased during his/her lifetime may be denied any say in the deceased’s funeral does not affect the outcome of family burial conflicts, even where

³² *Waldman v Melville* (1990) 65 DLR (4th) 64. However, a corpse subsequently becomes part of the land in which it is buried, so that any unlawful interference with or removal of the interred body may be actionable in trespass – see *Dowse v Wynward Holdings* [1962] NSWLR 252, as well as *O’Connor v City of Victoria* (1913) 4 WWR 4 and *McNulty v Niagra Falls* (1904) 4 OWR 443. However, this may require a certain amount of decomposition to have occurred – A. Grubb, “‘I, Me, Mine’: Bodies, Parts and Property” (1998) 3 *Medical Law International* 299, at 307, citing *R v Jacobson* (1880) 14 Cox CC 522.

³³ *AW v CW* [2002] NSWSC 301.

³⁴ *Smith v Tamworth City Council* (1997) 41 NSWLR 680. However, it appears that they must provide details of the funeral arrangements to the deceased’s relatives where the latter request such information – *Sopinka v Sopinka* (2001) 55 OR (3d) 529.

³⁵ See the various cases discussed below.

³⁶ See, for example, the respective comments of Martin J in *Calma v Sesar* (1992) 106 FLR 446, at 452 and Ashley J in *Meier v Bell*, Supreme Court of Victoria, unreported, 3 March 1997, at pp 6-7 judgment, as well as those of Hale J in *Buchanan v Milton* [1999] 2 FLR 844, at 854.

³⁷ [1989] 4 BMLR 140.

³⁸ See further *Murdoch v Rhind* [1945] NZLR 425 and *Re Korda*, *The Times*, 23 April 1958 discussed at n 31 above.

such persons are seeking to uphold the deceased's wishes. For example, the legal classification of personal representatives for the purposes of intestacy is based on traditional notions of familial relations which are not always representative of the relationships which the deceased enjoyed while alive. Thus, in *Holtham v Arnold*³⁹ the court held in favour of the deceased's estranged wife who was entitled to letters of administration in respect of her husband's estate and intended to have him cremated, despite objections from the deceased's cohabiting partner of two years who sought to have him buried in accordance with his wishes.

Objections to the proposed funeral arrangements based on divergent religious or cultural beliefs are also immaterial to the resolution of burial conflicts. In *Hunter v Hunter*⁴⁰ the deceased had been a devout Protestant during his lifetime, but shortly before his death had expressed a desire to be buried beside his wife who was a devout Roman Catholic. The deceased was baptised into the Roman Catholic faith three weeks before his death, although there was conflicting evidence as regards his mental capacity at this time. The judge held in favour of the son as executor who wished his father to be buried in a Protestant cemetery, against the wishes of the deceased's wife and other three children who wanted him to be buried in a Catholic graveyard.⁴¹ In *Buchanan v Milton*⁴² and *Meier v Bell*⁴³ the respective courts also rejected suggestions that the deceased (both being of Aboriginal descent) should be buried in accordance with culturally prescribed rituals in specific burial grounds.⁴⁴ Awarding custody of the corpse to the person entrusted with administration of the deceased's estate, Ashley J in the latter case stressed that courts could not depart from established legal principles simply to accommodate particular factual disputes; the existence of religious or cultural values in this context was "simply . . . beside the point."⁴⁵

In the event of family burial disputes, courts will award custody of the deceased's remains to the person with the strongest entitlement to possession of the corpse under the established hierarchy, and thus the right to determine the manner and place of burial. Arguments from other family members, whether based on the presumed wishes of the dead or the actual views of the

³⁹ [1986] 2 BMLR 123.

⁴⁰ (1930) 65 OLR 586.

⁴¹ See further *Saleh v Reichert* (1993) 104 DLR (4th) 384 in which the court awarded custody of the deceased's remains to her husband as personal representative for cremation, notwithstanding protests from the deceased's father that the corpse should be interred in the ground in accordance with the Muslim faith in which his daughter had been raised.

⁴² [1999] 2 FLR 844.

⁴³ Supreme Court of Victoria, unreported, 3 March 1997.

⁴⁴ In *Buchanan v Milton* the deceased's adoptive parents were entitled to possession of his remains for burial against the wishes of his natural parents, while the wishes of the deceased's cohabiting partner and mother of his young daughter took precedence over those of his sister in *Meier v Bell*. Although cohabitants cannot claim as next-of-kin for the purposes of intestacy in the UK, the position is different in several Australian states where the relevant statutory provisions allow cohabitants of sufficient standing to obtain a grant of administration in respect of their deceased's partner's estate, as illustrated in *Meier v Bell*.

⁴⁵ At p 7 judgment. See further the comments of Martin J in *Calma v Sesar* (1992) 106 FLR 446, at 452.

living are irrelevant. It is simply a matter of legal entitlements arising from death and burial – not perceived emotional, moral, religious or cultural claims. Judges can only encourage mediation, and intervene to resolve the matter when families cannot find a solution.

IV. Arguments Based on the Human Rights Act?

Incorporation of the provisions of the European Convention on Human Rights into domestic law under the Human Rights Act 1998 may provide scope for disgruntled relatives to challenge the form of burial proposed by those persons with legal responsibility for this task. For example, reference has already been made to the possibility that the judicial resolution of burial conflicts may prevent the deceased's immediate family from having the final say on funeral arrangements.⁴⁶ Creative use of Article 8 of the Convention and its guarantee of a right to respect for private and family life might provide a means for such persons to challenge those decisions where, for example, the deceased's executors or personal representatives choose to bury the deceased in a place other than the family burial plot or in a manner contrary to the wishes of his/her immediate family.⁴⁷ Moreover, since Article 8 extends to families falling outside the traditional classification under domestic law,⁴⁸ it might also provide scope for challenges by persons in close personal relationships with the deceased, such as cohabitants.⁴⁹

Article 9 of the Convention and its guarantee of a right to freedom of thought, conscience and religion might be invoked where the funeral arrangements are not in keeping with the religious or cultural beliefs of the deceased or his/her family. Recent cases in which domestic courts have permitted exhumation of remains on the basis of a possible Article 9 infringement⁵⁰ suggest that judges might at least be receptive to arguments from quarrelling relatives which are based on religious beliefs. Thus, family members might insist that a particular burial practice is essential to their religious or spiritual convictions and invoke Article 9 where the proposed form of burial does not accord with these values – for example, where arrangements have been made for the deceased to be cremated and interment in the ground is preferred on religious grounds, or where the person with legal responsibility for burying the dead proposes a Christian burial, yet the deceased did not espouse any such values during his/her lifetime.⁵¹

⁴⁶ See above.

⁴⁷ Although *In re Blagdon Cemetery* [2002] 3 WLR 603 recently held that refusal of a faculty authorising parents to exhume their son's remains for reburial in a cemetery close to where the parents had chosen to retire did not constitute an interference with their rights under Article 8.

⁴⁸ See, for example, J. Liddy, "The Concept of Family Life under the ECHR" [1998] EHRLR 15.

⁴⁹ Since such persons constitute a "family" for the purposes of Article 8 – see *Johnston and others v Ireland* (1987) 9 EHRR 203.

⁵⁰ *In re Durrington Cemetery* [2000] 3 WLR 1322 and *In re Crawley Green Road Cemetery* [2001] 2 WLR 1175, but see criticisms of this approach in *In re Blagdon Cemetery* [2002] 3 WLR 603.

⁵¹ The Commission has given a broad interpretation to the words "religion or belief" in Article 9 so that it is not limited to traditional religions but extends to a wide range of convictions and philosophies, and also incorporates non-religious beliefs – see *Arrowsmith v UK* (1978) 3 EHRR 118 and *Kokkinakis v Greece* (1993) 17

However, as with Article 8, the potential impact of Article 9 is at best speculative, and its effect (if any) on family burial disputes remains to be seen.

CONCLUSION

Burial conflicts are situations in which death, instead of uniting a family, promotes deep divisions. Such disputes may be fuelled by a perceived sense of “doing right” by the deceased, or by a desire to make amends for transgressions committed during the deceased’s lifetime. Alternatively, it may simply be a case of death re-igniting old family quarrels which were being suppressed while the deceased was still alive. The common feature of family burial disputes is that they are typically due to misplaced assumptions on the part of the main protagonists as regards who is entitled to claim the deceased’s remains for the purposes of burial. The fixed hierarchy of persons with the duty to bury the dead determines who is entitled to make the necessary funeral arrangements. The person with legal responsibility for burial within this hierarchy has the final say and is entitled to possession of the corpse for this purpose.

In the majority of cases, courts will award custody of the deceased’s remains to his executors or personal representatives. Such persons are thus entrusted not only with the disposal of the deceased’s financial estate but also his bodily estate. However, family members who retained close ties with the deceased while alive may be dismayed to discover that another notionally closer family member can dictate the form of burial⁵² or, in the case of executors, that the final decision rests with someone outside the family unit and who may dispose of the remains in a manner which is opposed by the deceased’s immediate family.⁵³ Persons who enjoyed close personal relationships with the deceased may likewise find that they have no say in the deceased’s funeral by virtue of falling outside the legal hierarchy of persons entrusted with burial of the dead.⁵⁴ By establishing a hierarchy of persons with a duty to bury, the current framework ensures that family disputes are resolved quickly so that burial can take place within a short space of time. In this respect, it arguably fulfils the joint objectives of prompt disposal of and respect for the dead.⁵⁵ However, it fails to take account of the diverse factual circumstances surrounding each particular dispute, or the emotional turmoil of grief-stricken relatives often bolstered by

EHR 397. However, problems may arise in terms of demonstrating that a proposed burial ritual is a manifestation of a particular religious or philosophical conviction by a discernible practice as required under Article 9 – see *X v Federal Republic of Germany* (1981) 24 DR 137.

⁵² As with personal representatives where the person entrusted with burial ranks higher in the established order of who constitutes the deceased’s next-of-kin – see for example *Saleh v Reichert* (1993) 104 DLR (4th) 384 and *Meier v Bell*, Supreme Court of Victoria, unreported, 3 March 1997, both discussed above.

⁵³ As in *Grandison v Nembhard* [1989] 4 BMLR 140 discussed above, and *Re Korda*, *The Times*, 23 April 1958.

⁵⁴ Obvious examples include the deceased’s cohabiting partner (as in *Holtham v Arnold* [1986] 2 BMLR 123 discussed above), as well as a fiancé(e) or step-child who has not been appointed as the deceased’s executor under his/her will and does not qualify as next-of-kin for the purposes of intestacy.

⁵⁵ See n 14 and text above.

strong religious and cultural beliefs. To date, judges have slavishly adhered to the established framework and have refused to be swayed by such issues. Such a dogmatic stance has undoubtedly yielded unfair results, as illustrated by some of the cases mentioned in this article. As suggested above, the Human Rights Act 1998 may provide some scope for disenfranchised relatives to challenge the existing legal framework in certain circumstances. Whether this will persuade courts to adopt a more flexible approach and consider a wider range of factors in the resolution of family burial conflicts overall remains to be seen.