<table>
<thead>
<tr>
<th><strong>Title</strong></th>
<th>Burial of a child's remains: Resolving parental disputes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author(s)</strong></td>
<td>O'Rourke, Maeve</td>
</tr>
<tr>
<td><strong>Publication Date</strong></td>
<td>2013-02-28</td>
</tr>
<tr>
<td><strong>Publisher</strong></td>
<td>Law Week Limited</td>
</tr>
<tr>
<td><strong>Link to publisher's version</strong></td>
<td><a href="https://www.familylawweek.co.uk/site.aspx?i=ed112114">https://www.familylawweek.co.uk/site.aspx?i=ed112114</a></td>
</tr>
<tr>
<td><strong>Item record</strong></td>
<td><a href="http://hdl.handle.net/10379/15283">http://hdl.handle.net/10379/15283</a></td>
</tr>
</tbody>
</table>

Some rights reserved. For more information, please see the item record link above.
Burial of a Child’s Remains – resolving parental disputes

Maeve O’Rourke, pupil barrister, of 4 Paper Buildings and Gwen Williams, Partner, Goodman Ray offer advice where parents are in dispute over where or how to dispose of their child’s remains.

A dispute between parents as to where or how to dispose of their child's remains may seem too tragic to countenance. However, it can occur, understandably, where two parents live far apart (in different countries even), or have differing beliefs, and neither can bear the thought of being distanced permanently from their child's final resting place or being unable to mourn their child's loss in the way that they would wish.

If an application to court becomes necessary to determine the dispute, a sensitive and urgent approach is called for. It is hoped that this article might assist in navigating the limited and somewhat conflicting reported decisions on the issue so that an application can be brought as soon as possible.

Summary
The practitioner texts differ in their views as to the most appropriate application to make where
parents cannot agree where or how to dispose of their child's remains. This seems to be because the reported decisions concerning familial disputes over the burial of a relative's remains assert varying bases of jurisdiction and have been decided in all three Divisions of the High Court. The question is complicated by the fact that, although the right and duty to bury a child's remains are aspects of parental responsibility\(^1\), as explained below it is not possible to apply for a specific issue order under section 8 of the Children Act 1989 because the child in question is not alive.

Based on the reported decisions, the surest approach would seem to be to make an application for a grant of limited letters of administration of the child's estate specifically to allow the parent to take possession of the child's remains for the purpose of disposing of them. The court's inherent jurisdiction could be asserted as a basis for the court to decide the issue in the alternative.

The reasoning behind the suggestion of alternative applications is this: there is no reported case where a grant of limited letters of administration has been sought by one parent who is in dispute with another parent equally entitled to administer their child's estate under the rules on intestacy. In the two cases where equally entitled parents have been in dispute, the court has made its decision based on its inherent jurisdiction. That said, the most recent and consistent approach of the courts in familial disputes regarding disposal of a relative's remains where there is no executor has been to grant limited letters of administration. Furthermore, the grant may be necessary to obtain an injunction or provide clarity where, for example, the body is in the custody of the coroner or an undertaker or transportation out of the jurisdiction is at issue.

As to forum: where there are two parents in dispute, it appears that the application for the grant of limited letters of administration (and thus the alternative application based on the court's inherent jurisdiction) should be issued in the probate department of the Family Division of the High Court. Rule 27 of the Non-Contentious Probate Rules 1987 provides the procedure for a district judge or registrar of the Family Division to determine disputes between persons equally entitled to the grant of administration of an estate according to the order of priority on intestacy set out at r 22 of the Rules.

Disputes involving other relatives who are seeking to displace the parent or other person who would ordinarily be entitled to the grant of letters of administration (the reported cases have involved a birth mother of an adopted child, an uncle, and an estranged wife where a foreign will named the daughter as executor) are not provided for in the Non-Contentious Probate Rules 1987. They are more appropriately classed as contentious probate matters and should be determined in the Chancery Division of the High Court. Rule 64.2 of the Civil Procedure Rules gives the court the power to determine any question arising in the administration of the estate of a deceased person, or the execution of a trust; or make an order for the administration of the estate of a deceased person, or the execution of a trust, to be carried out under the direction of the court.

A specific issue order is unavailable where the child is deceased

The view expressed in both Hershman and McFarlane and Clarke Hall & Morrison on Children is that it is quite clear that the Children Act 1989 is concerned with living children only, and that a dispute between parents as to the disposal of their child's remains therefore falls outside the scope of the Act.

Hershman and McFarlane state:

"It is likely that any dispute between the parents as to the disposal of the remains of their children would be outside the scope of an application under CA 1989 as the Act is concerned with children, defined as persons under the age of 18 (CA 1989, s105), and
therefore living persons."²

Clarke Hall and Morrison state:

"This aspect of parental responsibility [that a parent, who has the means to do so, is bound to provide for the burial of his deceased child] falls outside the scope of the Children Act 1989, since that Act is properly to be considered to be confined to dealing with live children."³

In Fessi v Whitmore [1999] 1 FLR 767, parents were in dispute over the final resting place of the ashes of their 12 year-old son. Ultimately the case was decided in the Chancery Division of the High Court on the basis of the court's inherent jurisdiction, but not before two interim orders had been made under the Children Act 1989, preventing the disposal of the child's remains pending the final hearing. In his decision, HHJ Boggis QC noted:

"Johnson J, as I understand it, made orders restraining the disposal of the cremated remains of Mark under the Children Act, but neither side, before me, contends that the Children Act is the appropriate statutory vehicle by which this difficult decision has to be made."⁴

Grant of limited letters of administration

In the recent case of Ibuna & Arroyo Tantoco v Arroyo & Dignity Funerals Ltd [2012] EWHC 428 (Ch) and also in Borrows v HM Coroner for Preston & Joan McManus [2008] EWHC 1387 (QB), the judgment of Hale J (as she then was) in Buchanan v Milton [1999] 2 FLR 844 was relied on as the leading judgment in the area of familial disputes over burial of a relative's remains where there is no executor.

In Buchanan v Milton, a 26 year-old father of one died intestate as a result of a road traffic accident. He had been adopted from Australia at the age of two and had lived the rest of his life in England. A few years before his death, he had been contacted by his birth mother and had returned to Australia to meet his birth family, whereupon he had been informed that he was one of a generation of 'stolen children' who had been improperly removed from their Aboriginal parents in the 1970s.

The dispute was between the man's Australian birth mother on the one hand, and the mother of his daughter and his adoptive mother in England (who had first priority under the rules on intestacy) on the other. Soon after his death, in light of the revelations about the claimed circumstances of his adoption, the man's adoptive family and mother of his child had given permission to his Australian birth mother to arrange his funeral and bury him according to her wishes and cultural beliefs. The English family then changed their minds, but only after the Australian birth family had made arrangements with funeral services for transportation of the body.

Hale J stated the applicable law to be as follows:

"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). Certainly in this case, the persons primarily entitled to such a grant did not secure delivery of the body and had to apply for a grant. Technically
therefore, this case is about who should be granted letters of administration of the estate for this particular purpose."\(^5\)

In applying for the grant of letters of administration in this case, the Australian birth mother was seeking to displace the order of priority on intestacy, which gave the English family members the right and duty to dispose of the man's remains. Hale J refused the application, holding that the English family members should have the grant:

"...[I]t is quite clear to me that this is not a case in which there are special circumstances making it necessary or expedient to displace the persons ordinarily entitled to the grant of letters of administration of the estate. They should have the grant and the body should be released to them as soon as the appropriate funeral arrangements can be made. It is for them to decide what those arrangements should be. I hope that they will take into account Professor Layton's view that those who believe the deceased's identity to be Aboriginal should be enabled to perform appropriate funerary rituals, but I cannot and do not insist that they should do so. It is crucial to everyone's interests that this sad story be brought to an end and that everyone be allowed to mourn their loss in their own way."\(^6\)

In *Borrows*, a 15 year-old boy died in custody at Lancaster Farm Young Offenders Institution. The dispute was between his paternal uncle, who had brought him up for the previous eight years and who said that the child had wished to be cremated, and his mother, whom the child had seen only once in the previous eight years and who wanted his body to be buried (although she accepted that he had wished to be cremated). The paternal uncle was willing to give the child's ashes to the mother once the body had been cremated.

The paternal uncle initially brought an application for judicial review, but Collins J changed the proceedings to a claim before the Queens' Bench. The coroner, who was holding the child's body, was named as the defendant and the birth mother included as an interested party.

Given the special circumstances of the child's upbringing and the fact that the mother was at the time incapable of assuming the responsibility, Cranston J varied the priority given to the mother under the rules on intestacy, thereby giving the right to the paternal uncle to take the child's body and arrange the funeral. Cranston J made an order against the coroner, which is helpfully appended to the back of the decision in *Borrows*, to make a cremation order and release the body of the child to the paternal uncle for the purpose of making the funeral arrangements.

In *Ibuna*, the applicants were the daughter (and executor under the deceased's Californian will) and the partner of a Congressman from the Philippines. They wanted to repatriate the deceased to the Philippines and bury him in accordance with what they said were his wishes. The partner, having been nominated by the deceased as his next of kin while he was in hospital in London, registered his death and arranged for his body to be sent to funeral undertakers in London. The undertakers then applied to the Philippine Embassy for a certificate of repatriation, naming a particular funeral home in the Philippines as the consignee.

However, the deceased's estranged wife then intervened and the Philippine Embassy subsequently contacted the partner to say that the consignee on the certificate of repatriation had changed (to a funeral home nominated by the wife). The wife had arrived in the UK to claim the remains and she had issued statements to the press in the Philippines that it was her intention to take custody of the remains and accompany them back home.

Given these circumstances, the deceased's daughter and partner applied for and obtained an ex parte injunction restraining the wife from disposing of the remains. The funeral home in London which
had custody of the remains was also named as a defendant in the application.

At the final hearing, which took place 17 days after the first grant of the interim injunction, Smith J made a grant of letters of administration jointly to the daughter and partner to take possession of the body for the purpose of its transportation to the Philippines and its disposal in accordance with the wishes of the deceased. As to the order's effect on the Philippine Embassy, Smith J stated: "I do hope that this judgment will be recognised by the Philippine Consulate."

**Inherent jurisdiction**

Two reported cases from the Chancery Division, *Fessi v Whitmore* [1999] 1 FLR 767 and *Hartshorne v Gardner* [2008] 2 FLR 1681, have concerned a dispute between two equally entitled parents as to the final resting place of their son who died intestate (one 12 years of age, the other 44). They have both been decided on the basis of the court's inherent jurisdiction.

In *Fessi v Whitmore*, the 12 year-old son of divorced parents died in an accident only a few days after moving to a new home near Aberystwyth in Wales with his father, who had been his primary carer since the divorce. The father wanted the son's ashes to be interred near his new home, so that he could tend to the grave, whereas the mother wanted the son's ashes to be scattered in Nuneaton, where both she and father had previously lived, and where the child's grandparents' ashes had been scattered.

The mother based her application on RSC Order 85 (now replaced by Part 64 of the Civil Procedure Rules), which provided for the court to make directions in the case of a dispute arising in the administration of an estate. However, HHJ Boggis QC, sitting as a Deputy High Court Judge, rejected this basis in favour of the court's inherent jurisdiction to decide the dispute, stating that "this is not a case of difficulty in the administration of an estate".

HHJ Boggis QC held:

"It seems to me that, on analysis, the parties are rather in the nature of trustees bringing a dispute to the court and seeking the directions of the court as to the resolution of that dispute, given that there are valid contentions on both sides. It is on that basis that I propose to decide the case. I do not think I am being asked to give directions as to the administration of an estate. I am being asked to decide between the conflicting arguments of equally entitled parents as to the way in which Mark's ashes should be disposed of and I do that on the usual basis that this court is well used to exercising discretion in disputes between trustees and adjudicating on the proper course to follow when no agreement can be reached by the parties concerned."  

The court concluded that the child's ashes should be scattered at the Nuneaton Crematorium, where his paternal grandfather's ashes had been scattered. The court found that although the child had lived with his father and had died in his father's care, those facts alone did not mean that the father's voice should prevail. HHJ Boggis QC preferred the Nuneaton Crematorium for three reasons: first, it was a place where all the family could have some focus; second, it was the place where the child's paternal grandfather's ashes had been scattered and therefore had a natural focus for the father to attend; and third, taking everything into account, it seemed a place where all members of the family could come together to see a fitting memorial to the child's life.

In *Hartshorne v Gardner*, the deceased was the 44 year-old son of parents who had been divorced for 35 years. He died intestate, in a road traffic accident. The father wanted the son's body to be buried in Kington where the son had been living with his fiancée prior to his death, whereas the mother wanted the body to be cremated 40 miles away in Worcester, where she and the father both
lived.

The parents agreed that the court had inherent jurisdiction to decide the dispute. Sonia Proudman QC, sitting as a deputy district judge in the Chancery Division of the High Court, stated:

"The deceased's body is in the mortuary at Hereford Hospital under the authority of the coroner, who will not release the body to either party without the agreement of the other or an order of the court. The parties agree that this court can use its inherent jurisdiction to decide the dispute and I have to do so." 8

Deciding that the son's body should be buried in Kington, where he had been living for the previous eight years, DDJ Proudman QC held that the court had to consider the following factors:

"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."

DDJ Proudman QC held that the mother's difficulties in making the 40 mile trip to visit her son's grave in Kington, which was the only important factor weighing against Kington, were insufficient to outweigh the fact that the son had made his life in Kington for the last eight years of his life and his fiancée, father and brother wished him to be buried there.

**Conclusion**

It goes without saying that an application to court is a last resort in cases such as these. As Cranston J stated in *Borrows* as guidance to Coroners:

"Mediation will often resolve the issue, for example, as to how the funeral will be conducted. A compromise is the most desirable outcome." 9

If, however, a compromise cannot be reached, it is possible for the matter to be determined through probate law and procedure. Although HHJ Boggis QC held in *Fessi v Whitmore* that the parents' dispute was "not a case of difficulty in the administration of an estate", that reasoning has not been applied in any of the reported cases since.

It can be seen from previous cases that the court will make its decision by balancing the parents' interests, paying particular attention to where the child held the strongest connections during his or her life. The wishes and feelings of both parents will be considered, as will the wishes and feelings of the child during his or her life, insofar as these can be ascertained. In *Borrows*, Cranston J held that European Court of Human Rights jurisprudence regarding the article 8 right to respect for private and family life required the 14 year-old child's views as to funeral arrangements and the disposal of his body to be taken into account. In *Ibuna*, however, Smith J rejected the idea of "a post-mortem application of human rights in relation to a body as if it has some independent right to be heard". Smith J held that Hale J had correctly summarised the law in *Buchanan*, in that the executor has the primary duty to dispose of the body and in doing so is entitled to have regard to the expressions made by the deceased but is not bound by them. 10 This is another issue that remains to be clarified by the appellate courts.

**Footnotes:**

Hershman and McFarlane: Children Law and Practice (Jordans, 2012 edn) at A[47]

Clarke Hall & Morrison on Children (Butterworths, 2012 edn) at Division 1 [266]. The footnote to this passage provides as follows:


At 768A

Buchanan v Milton [1992] 2 FLR 844 at 846B

At 857G

[1999] 1 FLR 767 at 770B and C

[2008] 2 FLR 1681 at [1]

[2008] EWHC 1387 (QB) at [28]

[2012] EWHC 428 (Ch) at [50].

28/2/13

---

Keywords:
- children