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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 3639 (Fam)



No. FD18F00073

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 27 November 2019

Before:

HIS HONOUR JUDGE GARETH JONES
(Sitting as a Deputy High Court Judge)
(In Private)

B E T W E E N :

ND

Applicant

- and -

LD

Respondent

Re E (A Child: Burial Arrangements)

[REPORTING RESTRICTIONS / ANONYMISATION APPLIES]

DR R. GEORGE (instructed by Dawson Cornwell Solicitors) appeared on behalf of the Applicant Father.

MS H. KHAN (instructed by Coodes Solicitors) appeared on behalf of the Respondent Mother.

J U D G M E N T

JUDGE GARETH JONES:

- 1 I have before me an application by the applicant father for, firstly, a Declaration of Parentage under Section 55A of the Family Law Act 1986, and secondly a limited grant of letters of administration in relation to his deceased daughter. The first application is not opposed by the respondent mother, and the dispute revolves around the second application. The applicant father is represented by Dr George; the respondent mother is represented by Ms Khan, and the mother has been produced from custody for this hearing.
- 2 I have considered all the relevant documentation which has been filed, and I have also heard oral evidence from, firstly, the father, then from the mother, and then from the maternal step-grandfather of E. The hearing began on 26 November before me and it concludes today, 27 November 2019.

The Background to the Case

- 3 The parents lived in the Midlands prior to their separation. Their daughter, E, was born in December 2015. The father was not registered on her birth certificate and he did not acquire parental responsibility for his daughter.
- 4 In 2017 the parents separated. The mother and E moved to the Westcountry with a maternal half-sibling, L, who is now six years of age, a child from the mother's earlier relationship. There is some dispute between the parents regarding their period of cohabitation in a family unit with E. The resolution of that issue is not determinative of this application. In any event the mother accepted that they were together for approximately eight months, and in the context of a life cut short at 22 months, this period of family life was of significance. The father's last direct contact with E was in 2017.
- 5 In the Westcountry, the mother cohabited with one Mr C. In October 2017 E met her death as the victim of a homicide; she was only 22 months old. In March 2019, Mr C was convicted of E's murder; he was sentenced to life imprisonment with a 20 year minimum sentence. The mother was convicted of causing or allowing E's death and she was sentenced to three-and-a-half years imprisonment. At page D65 to 68 of the trial bundle I have the sentencing remarks of May J in relation to the mother and her culpability and the basis of the sentence imposed. I do not propose to refer to those matters in this judgment. If at all possible in this dispute I shall try and de-escalate heightened emotions. May J referred to the dignity and the restraint exhibited by the family during the criminal proceedings, which must at times have been hard to maintain.
- 6 There have been concessions and compromises made during the course of this application. On 17 September of this year Holman J encouraged the parties to:

“Build on those compromises and arrangements so that arrangements for the funeral can be made without further conflict and rancour in a way which is dignified and respectful of E's memory.”

It is with this consideration in mind that I propose to adhere to the approach outlined in *Hartshorne v Gardner* [2008] 2 FLR 1681, at page 1682, that the court should be slow to make findings as to the details of the deceased's family relationships. The allegations made by the step-grandfather in evidence about the father's role in E's life – unproven substance misuse and the description of the father as no more than a “sperm donor”, an outlook which was shared by the mother in her oral evidence – and the attribution of responsibility for E's

death to the father, reveal the intra-familial animosity which was not concealed by the step-grandfather in his evidence. The father's opinion of the mother and her conduct and responsibility for E's death emerged clearly during his oral evidence as well. It should not be forgotten that the person who was responsible for E's death was her murderer.

- 7 The parental separation and the reasons for it, and the cross-currents of acrimony and hatred essentially have been overtaken by a far greater tragedy, namely, the loss of a young life. Raking over the past history and collateral issues will not assist the resolution of this current application, and I shall concentrate on relevant matters.
- 8 In so far as I am required to consider the family life of the deceased with her mother and father under Article 8 of the Convention, as indicated by Cranston J in *Burrows v HM Coroner for Preston* [2008] 2 FLR 1225, and I refer here to para. 21, this consideration is materially affected by E's all too brief longevity, parental separation and the circumstances of her death. However, any shortcomings in parental conduct during E's lifetime does not displace the parental grief and the loss at her death, and in so far as the step-grandfather expressed a different view in the witness box, I do not accept it.
- 9 The father's application was issued in October 2018, and it was timetabled to a final hearing on 19 September this year before Holman J. Regrettably the late production of the mother from prison prevented that hearing from proceeding. The delayed funeral arrangements and their finalisation requires a prompt determination.
- 10 As I have indicated already, the mother and the father have different proposals about the funeral arrangements for their daughter, E. These differences have narrowed during the application, but no final consensus has been reached about the way forward. The paternal and the maternal family remain divided.
- 11 On 25 July 2019, Moor J decided that the mother had standing or locus to participate in the hearing as a party, and he refused the father's application for permission to appeal, based upon the decision in *Scotching v Birch* [2008] EWHC 844 (Ch). The mother had not benefitted from her crime and she had not been convicted of homicide.

Legal Issues

- 12 E died intestate as an infant. While there is no right of ownership in a body, there is a duty at common law to arrange for its proper disposal. Where there is no will, the duty falls on the administrators of the estate who have the right to possession of the body to arrange for proper disposal: *Williams v Williams* [1881] 20 ChD 659, *Buchanan v Milton* [1999] 2 FLR 844 and *Re JS* [2017] 4 WLR 1. Both mother and father are entitled to a grant of administration under Rule 22 of the Non-Contentious Probate Rules 1987, the father qualifying by reason of his now undisputed declaration of parentage. Section 116 of the Senior Courts Act 1981 and the inherent jurisdiction of the High Court can be utilised to adjudicate in disputes between administrators or those entitled to be administrators under Rule 22, but also between third parties (for example, coroners, and local authorities and potential administrators.) Section 116 deals with discretionary grants, permitting the court in special circumstances and where necessary or expedient to appoint as administrator:

“some person other than the persons who but for this section would, in accordance with the Probate Rules, have been entitled to the grant.”

In these circumstances the court:

“in its discretion appoints as administrator such person as it thinks expedient.”

In *Anstey v Mundle* [2016] All ER (D) 285, at paragraphs 18 to 20, the court accepted that Section 116 could be used to pass over a person who would otherwise be entitled to a grant, but expressed doubt as to whether Section 116 could also be deployed to select, for the purpose of a limited grant, one of the deceased’s children, all of whom would otherwise have been entitled. Accordingly, the inherent jurisdiction was the preferred route adopted in that case. However, in *Re JS* [2017] 4 WLR 1, Jackson J concluded that where, pursuant to Section 116, two persons were entitled to a grant of administration, the court could substitute one for both of them. However, the inherent jurisdiction provided an alternative and equally valid approach. This decision was followed in *Re K* [2018] 1 FLR 96 by Hayden J at paragraph 8 thereof, and on balance I accept that Section 116 does indeed allow one administrator to be substituted for another or for administrators acting jointly.

- 13 Counsel for the applicant has suggested a potential third route for the dispute resolution in this case, namely, Rule 27(6) of the Non-Contentious Probate Rules, namely,

“A dispute between persons entitled to a grant in the same degree shall be brought by summons before a District Judge or a Registrar.”

The procedural route has not been followed in this case. Furthermore, in *Fessi v Whitmore* [1999] 1 FLR 767, the location for the scattering of the deceased’s ashes was decided as an issue of directions between trustees in that case (I refer to page 770B).

- 14 How, then, should Section 116 be approached? As indicated in *Burrows v HM Coroner for Preston* [2008] 2 FLR 1225, in exercising the discretion to vary the order of priority which is set out in Rule 22, the first stage was to identify any special circumstances that might displace the Rule 22 order of priority. The second stage was to decide whether in the light of the special circumstances it was necessary or expedient for the court to vary the order of administration. In *Holtham v Arnold* [1986] 2 BMLR, special circumstances, necessity and expediency under Section 116 were restricted to issues arising in the proper and efficient administration of the estate. However, wider considerations can now be considered, as indicated by Hale J (as she then was) in *Buchanan v Milton* [1999] 2 FLR 844. In considering “special circumstances” the six factors which were identified at page 854 of the judgment in that case did overcome the first hurdle. As indicated by Hale J in relation to the first hurdle:

“This must in the end be a question of fact depending upon the nature of the alleged circumstances and the context in which they are raised.”

(I refer there to page 854G). However, in *Buchanan* on the facts, the second stage was not established. In *Burrows*, to which I have referred already, it was indicated that cases in which both hurdles would be surmounted successfully would be unusual, both hurdles in fact were overcome in *Burrows* and the paternal uncle, who was a foster carer of the 15 year-old deceased, was substituted for the birth mother principally because she (the birth mother in that case) was incapable of assuming the responsibility because of her severe substance misuse, and the assistance of the mother’s sister in relation to the funeral arrangements were, “beside the point” because she (the sister) had no standing herself. (I refer there to page 1236, paragraph 27 of the judgment in *Burrows*). Although not relevant to the current dispute, in *Burrows* it was decided that the wishes of the deceased could no longer be ignored and in that regard Article 8 of the Convention had modified domestic common law. (I refer there to page 1233 at paragraph 20 of the decision). Guidance was also provided in *Burrows* for coroners and their requirement for certainty at

paragraphs 28 and 29 by Cranston J with regard to Rule 22 and the release of a body for cremation or burial.

15 Section 116 has its limitations. In *Buchanan* itself it could not be utilised on the facts to dictate the mode of funerary rights. In *Anstey v Mundle* [2016] All ER (D) 285, the court concluded that whereas the court could declare who had the duty and power to bury a deceased among various contending parties, the court could not determine nor direct where or how the deceased would be buried.

16 As stated in *Re K* [2018] 1 FLR 96 103 paragraph 13, if the two stage test in *Burrows* is satisfied and an alternative grantee is considered, that alternative grantee must have “standing”. As indicated by Hayden J in that decision:

“A person with the necessary standing would appear to be someone who comes within the hierarchy of priority for a grant under Rule 22 of the 1987 Rules, or someone in possession of the body.”

In the latter category the court included hospitals or local authorities (and I refer there to paragraphs 14 and 15 of the judgment). The applicant in *Re K* was in fact a local authority.

17 I have referred already to the other route for dispute resolution, namely, the inherent jurisdiction. In *Hartshorne v Gardner* [2008] 2 FLR 1681 the court ordered the release of the deceased’s body of an adult child to the birth father under the inherent jurisdiction and identified a number of relevant factors which could be considered. Firstly, where known, the deceased’s wishes were a relevant factor. Secondly, the place where the deceased had the closest connection is relevant as to the ultimate resting place; (also, incidentally, a material consideration in *Fessi v Whitmore*, to which I have referred already). Thirdly, the most important consideration is that the body be disposed of with all proper respect and decency and if possible without any further delay. Fourthly, apart from the wishes of the deceased, the reasonable wishes and requirements of the surviving family are also relevant. That was also a material consideration in the case of *Burrows* under Article 8 of the Convention.

18 In *Re K*, Hayden J considered the nature of the inherent jurisdiction and its application. It was indicated that the jurisdiction was essentially a parental jurisdiction, and he referred to his earlier observations in *Redbridge LBC v A* [2015] 3 WLR 1617:

“The concept of a wise parent acting for the true interests of the child is integral to both the *parens patriae* and the inherent jurisdictions.”

This concept informing the exercise of the court’s discretion endured beyond the death of an infant because, as indicated by Hayden J:

“It is to my mind axiomatic that a wise parent would attend to the burial of a child.”

(I refer there to page 105, paragraph 19). It was by this route that the court authorised the Local Authority in that instance to make the funeral arrangements contrary to parental wishes.

The Position of the Parties and the Areas of Agreement and Disagreement

- 19 I have referred already to the difficult intra-familial conflict arising from the circumstances of E's death. The father retains the belief that E's mother was blameworthy. The mother, for her part, has been critical of the father's conduct during their relationship and the father's alleged inactivity in pursuing or maintaining his relationship with his daughter, E, after the move to the Westcountry with her mother. The father told me that the mother moved away with E without advance notice nor consultation, and in the interval of seven months or so between his last direct contact with his daughter and her death he did his best to locate her, and without Legal Aid to pursue Private Law Children Act proceedings he was attempting to keep contact with his daughter. The father admitted that following E's death a Facebook page had been set up which was still active. He maintained there were up to 30,000 social media followers, and that this support had assisted him.
- 20 The mother and the maternal family have their apprehensions about this potential public and media interest, which they maintain would endanger their safety (depending upon the nature of the arrangements made for E's funeral ceremony). E's maternal step-grandfather, assisting the mother, with the mother in prison, and E's half-sibling, L, who lived with E in the same household until her death, have apprehensions about their safety. The mother would wish L to attend any funeral ceremony; her own attendance would depend upon the approval of the Prison Authorities and she would be escorted by prison staff.
- 21 For his part the father had concerns about the maternal step-grandfather's active hostility. He averred that he has been subjected to a volume of threatening messages and calls which were exhibited to his documentary evidence. Having regard to this atmosphere of mistrust and acrimony, it is commendable that the parents have reached significant agreement about the funeral ceremony during discussions at court in September when this application was listed before Holman J, and in further discussions during the course of this hearing itself. For example, the father agreed that E should be buried rather than cremated, acceding to the wish of the maternal family. It is fitting that E should be laid to rest in the Midlands, which was the county of her birth, rather than the Westcountry, which was the county of her death, and in this regard the maternal family have compromised also. The mother and father confirmed that the funeral and the internment would be limited by written invitation to approximately 80 or so family members; 40 or 50 on the paternal side (which may include some of E's half-siblings on the paternal side; there are five of them, the oldest being 11 years of age), and 30 or so on the maternal side, and the involvement of the media would be discouraged. The father had contacted a firm of local funeral directors, which were identified, and appeared to be perfectly reputable. The mother had also made enquiries in that regard as well. Both sides of the family could meet the expense of E's funeral ceremony. I am not informed of any other financial assets which are included in E's estate. I do not propose to outline further the arrangements which have been agreed between the parties because they are intimate to the family. If necessary they can be set out in a schedule to any order made by the court, which was the format of the order approved by the court in *Burrows*, to which I have referred already. The areas remaining in dispute are as follows:-

(1) The Location of the Cemetery

- 22 The father would wish E to be buried in (Cemetery X) in relatively close proximity to his home. The mother's preference is (Cemetery Y). Maternal members of the extended family have been buried there, while paternal members of the extended family have been buried in (Cemetery X).

(2) The Hearse

- 23 The father would wish E's coffin to be carried in a horse-drawn white-coloured hearse. The mother would prefer a motor hearse, but has no preference with regard to its colour. Each hearse would be glass sided, as is usual, and E's baby pink coloured coffin would be visible (this being the colour selected by the parents jointly). The horses drawing the hearse would have pink plumes. I have seen photographs of the hearse in a document produced by the father from his selected funeral directors. The mother's apprehension centres around the level of public interest and attendant media attention which might follow a funeral in (Cemetery X) where she is known and where she would not feel comfortable, this being accentuated by the selection of a hearse which would draw attention to the funeral itself. Her return to (Cemetery X) upon her release from prison to place flowers on her daughter's grave in future years would provide a continuing risk. She feared the father would organise a "media circus" and she wanted a dignified and peaceful burial for E. (I refer there to page C108 of her evidence). I do not believe that the father's preference for the horse drawn hearse was motivated by a desire to cause any difficulty. He appeared (when giving his evidence) to be genuinely motivated in his preference and his desire to do his best for his daughter in death. White is often associated with purity, and the father's opposition to a black hearse was quite apparent in the witness box. Of itself what was proposed by the father in this regard could not reasonably be described as undignified.

The Submissions of the Parties

- 24 The mother objects to letters of administration for the father; firstly, the father's arrangements are not respectful and they draw attention to the funeral by reason of its location and the hearse selected, this being coupled with the unhappy background circumstances. Secondly, the mother's proposals are more respectful and the safety risks are reduced both to her and to members of her family. Thirdly, the mother was not convicted of homicide and she is not disqualified from obtaining a grant of administration.
- 25 The father contends for letters of administration in his favour solely. Firstly, he is a suitable person for a grant and he qualifies under Rule 22. Secondly, his proposals are respectful and the mother's apprehensions are unfounded. The father has compromised with the mother on many issues and he has acted reasonably, and he has provided assurances about withholding any information about the funeral to media and outsiders, the funeral being by invitation. Thirdly, the mother's conviction and circumstances render her unsuitable for a grant of administration in this unhappy situation.

Conclusion

- 26 Applying the criteria identified by the court in *Hartshorne v Gardner* in relation to the matters in dispute; firstly, due to her infancy at death E's wishes are not relevant to the current issues. Secondly, I have referred already to the propriety of the Midlands as E's ultimate resting place. I have referred to the extended familial connections with each preferred location. I note that when E last lived with both of her parents prior to their separation this was in (Cemetery X) and this is a valid consideration. Thirdly, any funeral must be conducted with all proper respect and decency and without further inordinate delay. Fourthly, I have outlined the wishes of the two sides of the surviving family.
- 27 In relation to Section 116, while I have two surviving parents of the deceased who would qualify under Rule 22, they are not *ad idem* about the discharge of one of their primary duties as potential joint administrators; that is to say the proper disposal of E's remains by way of agreed funeral arrangements. The unusual circumstances of this case are as follows: firstly, the unhappy circumstances of E's death. Secondly, the mother's conviction.

Thirdly, the custodial sentence imposed upon her and its practical impact upon her ability to fulfil her duties which she can only discharge with the assistance of a third party, namely, E's step-grandfather, or perhaps the grandmother. In *Burrows* the mother was disqualified by reason of her substance misuse, and the assistance available to her by a third party did not overcome the mother's disqualification. I believe that E's case, like the decision in *Burrows*, does give rise to special circumstances, and to facilitate the discharge of the duties of administration and to resolve the intractable intra-parental dispute remaining, it would be necessary and expedient to substitute the father for the mother under Section 116. Where a child is taken from this world in her infancy, in the tragic circumstances of this case, where one surviving parent is incarcerated and hampered in the practical exercise of her duty as an administrator, what could be more obvious than the substitution of the deceased's second surviving parent able and willing to discharge this responsibility? The mother does not ask for a grant to a non-parent, and on what conceivable basis should I consider any alternative grantee, for example, E's maternal step-grandfather or grandmother? This, I believe, would aggravate a situation which is already fraught, and, as indicated by Hayden J in *Re K*, whilst these third parties do in fact fall within Rule 22, they fall within a lower hierarchy of priority than does a birth parent.

28 What then about the inherent jurisdiction? I believe a wise parent in the circumstances of this case would wish to attend to E's burial without further inordinate delay and with all proper respect and decency. In general, I do not believe that I should micro-manage the funeral arrangements which are so intimately connected with family life and in this instance by parental ties. Public taste and convention in the organisation of funerals or cremations is constantly evolving, and a court should be slow to direct where or how a deceased would be buried. (I refer there to *Anstey v Mundle*). One can always envisage an extreme case where respect and decency was being totally disregarded and intervention might be required, but I have no reason to conclude that what is proposed by the father crosses that line. The burial at (Cemetery X), or the use of a horse drawn hearse, is not of itself exceptional. The mother's attendance would be constrained and limited and her safety provided for by the circumstances of her imprisonment and the arrangements made by the Prison Authorities. I have no real evidence to conclude that decency, respect or public order would be compromised by what is proposed by the father. Why should the safety of the maternal family members, or indeed L (if he attends the funeral), who are entirely blameless be compromised. Right-thinking attendees at the funeral should be sympathetic rather than hostile to all those who have suffered loss in their bereavement; that is an integral part of our common humanity. After all, no one in this case proposes a wholly secret funeral ceremony for E, and there are risks whatever the location or the hearse selected. Assurances have been provided by the father that he will not whip up media interest and attention, and I have no real basis for concluding that he intends to breach these assurances given solemnly to the court. Public memory fades with the passage of time, allowing grieving family members paying their respects to E's grave in future years to be unhindered. (Cemetery X) appears to be a reasonable base for E's family generally, who are mainly based in the Midlands, to attend and pay their respects in the future. This future apprehension is not of such significance that it materially affects the immediate decision which the court must take, namely, to facilitate a swift, decent and respectful burial for E.

29 Accordingly, I propose to make the order: -

- (i) Declaration of parentage in favour of the father
- (ii) Declaration of entitlement in favour of the applicant father under Section 116 Senior Courts Act 1981 to a grant of letters of administration for the purpose of:-

- (a) Making arrangements for the disposal of the body of the deceased;
 - (b) Making the necessary funeral arrangements.
-

CERTIFICATE

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