IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No.67 of 1998

Royal Courts of Justice
Thursday, 27th May 1999

Before:
MRS. JUSTICE HALE
(In Private)

B E T W E E N:

CHERYL ROSE BUCHANAN — Applicant

- and -

HOLLIE VIOLET MILTON
(by her Litigation friends
KIRSTEN DAWN MILTON and ANNETTE RUBY CHILDS) — Respondent

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MRS. S. WARNOCK-SMITH and MR. D. REES (instructed by Messrs. David Truex & Company) appeared on behalf of the Applicant.

MR. J. HARDY and MISS N. LANGRIDGE (instructed by Messrs. Hansell Stevenson) appeared on behalf of the Respondents.

J U D G M E N T
(As approved by the Judge)

MRS. JUSTICE HALE: In English law a person's name is that by which he himself chooses to be known. The central person in this case had been known since the age of two as Dayne Kristian Childs, and I shall refer to him in that way. He died in a road accident on 20th July 1998 at the age of 26. He left no will but he did leave a daughter, Hollie, who was born on 16th July 1997. This dispute is about what should become of his mortal remains.

The applicant is his birth mother, who is an Australian Aborigine and wishes him to be buried in Queensland in the country where he was born. The respondents are his adoptive mother and the mother of his daughter, Hollie, who wish him to be buried here, in the country where he had lived for the last 20 years of his short life and where those who knew and were close to him during that time still do live.

The law

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 Ch.659; Rees v. Hughes [1946] K.B.517). An executor appointed by will is entitled to obtain possession of the body for that purpose (see Sharp v. Lush (1879) 10 Ch.468 at 472; Dobson v. North Tyneside Health Authority [1997] 1 W.L.R.596 at 600 obiter), even before there has been a 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 deceased's estate for this particular purpose.

By virtue of s.46(1)(ii) of the Administration of Estates Act 1925, Hollie is the only person entitled to succeed to Dayne Childs' estate. If she were of full age she would be the person first entitled to a grant of letters of administration, by virtue of the Non-Contentious Probate Rules 1987 rule 22(1)(b). As she is a minor, rule 32(1)(a)(i) provides that the person who has parental responsibility for her may apply for her use and benefit. However, where a minority interest arises s.114(2) of the Supreme Court Act 1981 provides that there should be at least two administrators, although the court may appoint a single administrator if this is expedient. Hence, when Hollie's mother, Kirsten Milton, made the application she nominated Dayne's adoptive mother, Mrs. Childs, to be her co-administrator.

The applicant entered a caveat and applied under s.116 of the Supreme Court Act 1981. This 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."

What is sought in this case is the displacement of the person who would normally have both the duty and the right to dispose of the remains. That is, however, all that is sought. It would be quite wrong to displace Hollie's mother for any other purpose connected with the administration of the estate. Whatever assets her father had, including any possible claim against others as a result of his death, should be administered by those who have parental responsibility for her.

There is very little modern authority on the use of s.116 and none at all on its use in this particularly unhappy context. In Re Taylor (deceased) [1950] 2 All E.R.446 at 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 [1982] Fam.113, Ewbank J. at p.117 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 it necessary, or expedient, to pass over the executors."

I have also been referred to a number of English and Australian cases in which similar disputes arose, whether between the parents of a deceased child or between parents and foster parents, but none of them under this provision. They do not cast doubt upon the basic propositions stated above.

The evidence

I have read affidavits and heard oral evidence from the applicant, Cheryl Buchanan, and her brother, Bill Buchanan, and from the respondents, Annette Childs and Kirsten Milton, and the deceased's younger brother, Kelly Childs. The strength and the sincerity of the feelings which they all expressed were apparent to everyone who heard and saw them. There are issues of fact between them but hardly any which it is necessary for me to resolve for the purpose of these proceedings, and I shall deal with those as and when they arise.

I have also read affidavits from Geoffrey Atkinson and Fraser Power, on behalf of the applicant, and from Gregory Roberts, Police Constable Robertson, Michael Tulloch and Rachel Dwyer, on behalf of the respondents, and a file of papers relating to the adoption, released by the Queensland Department of Families, Youth and Community Care.

Finally, I have received reports and heard evidence from two people put forward as expert witnesses. Miss Nina Tullar was instructed on behalf of the applicant. She has no formal academic or professional qualifications but has some years' experience in counselling and teaching and is currently training towards professional qualifications in counselling

and psychology. She has spent two and a half years working in Australia and knows something of the Aboriginal culture and experiences. She is particularly interested in trans-racial adoption, forced separation, cultural dispossession and cultural genocide. She came into this case because she offered her services as a mediator between the parties. Her sincerity and goodwill were apparent, but her qualifications to offer expert opinion to the court were not.

Professor Layton was instructed on behalf of the respondents. He is a professor of anthropology at the University of Durham. He spent seven years in Australia working for the Australian Institute of Aboriginal Studies and the Northern [Aboriginal] Land Council. Much of his work has been in connection with land claims and in support of Aboriginal self-determination. In his opinion,

> "... the Aboriginal people of Australia have suffered a prolonged history of oppression. Their current efforts to secure self-determination deserve full support."

I regard him as qualified to offer expert opinion on those issues which are properly the subject of such opinion.

The facts

The applicant, Cheryl Rose Buchanan, was born on 30th June 1953 at the Boothville Hospital in Brisbane, Australia. Her mother was then known officially as Una Joan Branfield but is of Australian Aboriginal origin and now uses her Aboriginal name, Pondjydfljydu. The applicant was adopted by her mother and her step-father, Alan John Buchanan, on 24th March 1962.

The deceased was born to the applicant on 5th February 1972 in the Royal Women's Hospital in Brisbane. His birth was registered under the name Illych Marbuk Buchanan.

The applicant was then aged 18 and unmarried. She had worked for the tribal council as a community worker since leaving senior school and was due shortly to begin an arts course at the University of Queensland. The documents recently disclosed by the Queensland authorities contain an undated report from a hospital social worker, Carmel Brown, stating that:

> "Initially she had wanted to keep the child but now had no means of supporting it as her parents have separated and her mother is unable to look after it."

The applicant confirms that her parents had indeed recently separated. The same form states that she was an intelligent girl and had given a lot of thought to the decision.

The records also contain a consent form, signed in what has every appearance of being a less adult version of the applicant's present signature, on 9th February 1972, four days after the child was born, and witnessed by a child care officer, Eunice Feil. There is also a medical certificate from a Dr. Leslie White, certifying that she was in a fit condition, emotionally and physically, to give consent to the adoption of her recently born baby. The law then in force in Queensland, it appears, allowed for the revocation of such consents within 30 days. A note on another form states that the applicant was told that the 30 days would expire on Friday, 10th March 1972. A form dated 15th February 1972

declared the baby's admission to the care and protection of the Director of Children's Services; other records indicate that he was taken from the hospital to Warilda Children's Home on 17th March 1972.

He was placed with foster parents on 27th April 1972 for a deferred adoption. Their name has been blocked out of the records but they called him Adam. There is a note added to the form recommending transfer that:

> "The applicant has phoned since the baby was placed and was told that he had settled in with a good family. She appeared to be contented with this news."

Two years later, that foster family gave him up. They complained that he was hyperactive and had behavioural problems, as do most two year olds. He was returned to Warilda on 3rd April 1974. He was obviously unsettled for a while but they did not find the same problems. He was placed with Mr. and Mrs. Childs on 10th May 1974 under an interim adoption order. The order itself was issued on 16th December 1974. They named him Dayne.

Mr. and Mrs. Childs were English but lived in Australia from 1971 to 1979. They had one natural son, Jarrod, born on 10th March 1968. They had earlier adopted another son, Kelly, of mixed French and Tongan extraction, very soon after he was born on 4th October 1972, so he was in fact younger than Dayne. That adoption had gone very well and so they had asked to adopt another child. To their great credit they agreed to take Dayne, although he had been rejected by another family and had been labelled what we would now call "hard to place,"

and was so close in age to their other son, Kelly. To their even greater credit they obviously made a success of that adoption. All the evidence is that they were a close, loving and open-minded family.

The family came back to this country when Dayne was about six and he grew up here, going to school here, playing sports here, forming a rap-band called Citizen's Arrest, and later another one. He moved into his own flat when he was 19 but stayed in the area and in close touch with the rest of his family. He worked as a journalist with a local publisher. He was tall, dark and handsome. His image was, as his brother put it, "very cool". He was popular with women. He was aware of his Aboriginal origins but he was a fully integrated member of the Childs family and shared their grief at the death of Mr. Childs in, I believe, 1996.

The applicant contests that the records give a complete and accurate account of the circumstances of the birth and her son's removal from her. The affidavit from Gregory Roberts, which has not been tested in cross-examination because he is in Australia, and therefore must be treated with extreme caution, supports her account on one matter but not on another. Thus the forms state that the unnamed father was a 25 year old research student with blue eyes and brown hair, an Australian of English/French ancestry. The applicant states that the father was Denis Walker, a black activist, who is currently serving a long prison sentence for political activities. He was the son of Oodgeroo, Australia's most famous Aboriginal woman poet, who died in 1983. This is

confirmed by Gregory Roberts, a journalist and friend of Oodgeroo. The applicant also states that she has no memory of signing the consent form; that she was heavily sedated during labour and for some time thereafter; and that the baby was taken from her very soon after birth. She disputes several of the statements, including the one that she had given careful consideration to the decision. Mr. Roberts, however, says it was common knowledge that the child was given up for adoption.

Very properly, and greatly to her credit, the applicant has not asked me to determine the exact circumstances in which she was separated from her baby. At this distance in time and in the absence of the people who would necessarily stand accused of forgery and other crimes, it is impossible to reach a judgment upon them. It is also unnecessary to do so. But it is an important part of the history in this case that Dayne has since been described in the Australian media as one of the "stolen generation" of Aboriginal children. Professor Layton explains as follows:

> "The phrase 'the stolen generations' refers to indigenous Australian children taken from their families by compulsion, duress or undue influence. Compulsion can be 'legal, such as where a court orders a child to be removed for neglect; duress and undue influence may occur where the family didn't have any real choice because of the pressure put on them by people or circumstances to induce the surrender of their children.'"

He is here referring to **Bringing them home; a guide to the findings and recommendations of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander children**

from their families, published by the Australian Human Rights and Equal Opportunities Commission in 1997.

> "Many indigenous children but primarily those of mixed descent were forcibly removed from their Aboriginal families throughout Australia from the mid-19th century to the 1970s. The underlying policy was to assimilate such children into white Australian society by separating them from their indigenous cultural milieu. 'Discussion of this issue on the most blatant racist assumptions, as they seem to us today, of superiority for the white race preceded the adoption by the Commonwealth and States just prior to World War 2 of a scheme to absorb the half castes.'"

He is here referring to C.D. Rowley, **The Destruction of Aboriginal Society**, published in 1970.

> "Compulsion ranged from outright capture of children to subtle forms of inducement that are concealed in official adoption papers."

As I have explained, it is not possible for me to decide whether Dayne was indeed "stolen" in the sense that he was forcibly removed from his mother in pursuit of a racist policy by the Queensland government. Furthermore, it is not suggested that the adoption order made in this case was invalid under the law then in force in the place where it was made. It must therefore be recognised in this country as having in almost all respects the same effect in law as an adoption order made here. Thus it not only transferred parental responsibility for Dayne to his adoptive parents but made him in almost all respects a full member of his adoptive family for all time.

But it is possible for me to say this. Any law which accepts the consent of a young mother, given only four days after the birth, and then regards it as irrevocable after 30 days does not conform to modern expectations of full and free consent to an adoption. It gives her no time to consider matters carefully after she has fully recovered from the birth and in the light of how she feels now that the expected baby has arrived. The law may have been well meaning in the sense that it was in support of a genuinely held belief that this would be kinder for the mother and better for the child, but it was also open to the sort of abuse described in the National Enquiry report and for which, as it so happens, the Government of Queensland has apologised to the Aboriginal people only yesterday.

Furthermore, as is amply demonstrated by the dramatic fall in adoptions in this country and elsewhere, once mothers have been given a genuine choice about their own and their babies' future, few mothers give up their babies entirely willingly and few forget them thereafter. The applicant never forgot her child and always regarded him as part of her family. Her second son, Narjic, says on video:

> "When we were little kids and we were dancing, our mother said and our father said, 'You know you've got a brother. Always think of him when you are dancing, so it will give him more strength where he is to know one day that he'll see us.'"

The note I have already quoted indicates that the applicant first made enquiries about him soon after the 30 days were up. There is a letter on file as early as 1978 and she says that

she enquired on the telephone long before that. Before 1991 it appears that the law in Queensland was that a birth mother could only ask for non-identifying information. She could also place her name on an adoption contact register but a reunion could only be arranged if all three parties to the adoption triangle, birth parent, adoptive parents and adopted person, wanted it.

However, on 1st June 1991 the law in Queensland changed. Adult adopted persons and birth parents were given an unqualified right to identifying information about each other. There was a right of objection but it appears that this depended upon a positive act by the adopted person or adoptive parent. By this time the Childs family had left for England and knew nothing about the change in the law. The applicant applied promptly and on 5th June 1991 she was told the names of her son and his adoptive parents. She discovered to her dismay that they had left Australia. Very soon after that, contact was made with Mrs. Childs through an adoption counsellor, Beverley Flanagan.

On the evidence before me, this was handled very badly indeed. No letter was written in advance. The first telephone call was answered by Mrs. Childs' son Jarrod and he was told that his brother had been adopted. Fortunately this had never been a secret in the family but Mrs. Childs felt, and feels, properly aggrieved. Another telephone call was made in the early hours and it appears that the applicant was present with Ms. Flanagan at the time. Dayne had been told but was not interested in speaking to the applicant.

On 20th June 1991 Mrs. Childs wrote to the authorities expressing her concern about the way in which she had been approached. Despite this, their reply of 4th July 1991, giving her home address, was copied to the applicant. However, the applicant, wisely, did not try to get in touch again until 1996. Mrs. Childs had left it for Dayne to decide whether or not to respond. He did not do so.

In September 1996 the applicant's mother, Pondjydfljydu, and her partner, Gnarnayarrahe Waitaire, visited this country with an Aboriginal football team. They did get in touch. Dayne went to meet them in October 1996 and accepted their invitation to visit Australia. He arrived there on 25th October 1996 and left on 10th November 1996. He was introduced to his mother, her six younger children, his father and other members of his family. There was naturally much rejoicing at this reunion. There was also a good deal of publicity. An article in the Courier Mail for 29th October 1996 is headed "Tears as stolen son comes home after 24 years". It reports that Dayne was astounded and somewhat frightened by the term "stolen child". He asked what was meant by the stolen generation:

> "I don't know anything about it. My mum in England doesn't know anything about it. She's an intelligent woman. Why weren't the other children stolen?"

He also took part in a television programme in which his bewilderment at the whole situation is apparent.

It is scarcely surprising that all this had a profoundly disturbing effect upon him. He had suddenly met

his birth family. He had been introduced to a culture very different from that in which he had been brought up. He was greeted as one of a stolen generation of children of which he knew nothing. He was exposed to the full glare of publicity. It was all too much to expect of him and it is not clear to me that anybody was looking at this from his point of view, still less that of his adoptive mother, or that he was fully reassured that she was not being accused of having stolen him herself, yet obviously she had not.

Both Kirsten Milton and Kelly Childs speak of how Dayne had changed when he came back and was no longer the cool and carefree young man he had been before. Nevertheless, he resumed his relationship with Kirsten Milton, which had been broken off during her pregnancy. He helped to support their daughter and took a delight in her company. He had proposed marriage to her shortly before his death.

The applicant and Dayne were in touch on the telephone from time to time but they did not exchange letters or cards. She believed that he planned to re-visit Australia but his English family knew nothing of any such plans. It is significant that they did not find any contact address or telephone number for her after he died.

The family planned a funeral on 11th August, after which he would be cremated and his ashes buried under a spruce tree in a local cemetery next to those of his father, Bob Childs, who had died in 1996. The arrangements made, it was decided that it would be better for Mrs. Childs to go on her planned holiday in Greece. While she was away, her son Jarrod

phoned the Department of Aboriginal Affairs on 28th July 1998. He spoke to the applicant's brother, Bill Buchanan. He told him of the tragedy and also about Hollie and her mother and of the funeral arrangements. The applicant sent a fax on 30th July begging them not to proceed. This puts her feelings better than I could possibly do:

> "... cremation is not acceptable within aboriginal culture. Aboriginal people are not cremated because we believe that the spirit is interrupted ... we need your family to make a decision urgently to allow us to return Illych to his birth place. In traditional Aboriginal culture it is essential that a child's birth place is also the place where they are laid to rest ... this is not about anybody's rights, except Illych's birth right, which is for him to come home."

Kirsten Milton replied by fax that:

> "I want his spirit to be free and I will do all I can to help you. I feel you have suffered enough and I fully respect why you want your son Illych back."

Her evidence was that at this stage she had been told that there was proof that he had been stolen. The brothers seem to have felt the same way and they contacted their mother, who says that she gave way to the majority view. The Australian family therefore made arrangements with funeral services for transportation of the body. The funeral announcement which appeared in the local paper on 7th August 1998 stated that he would be returned to Australia after the funeral on 11th August.

Bill Buchanan arrived on 2nd August and stayed with Miss Milton. He explained to the court that it was his duty,

as the oldest male member of his family, to visit the place where the death had taken place, to search for explanations of the death and to conduct the traditional smoking ceremony there so that the deceased's spirit would not return and create problems for someone else. The applicant's mother and her partner arrived on 6th August. The ceremony was held on 7th August on the A11 where the accident had taken place. The police were involved because the road had to be partially closed. P.C. Robertson was there to direct traffic.

An accumulation of things happened during this time which gave Miss Milton serious misgivings about whether the burial plans were indeed in her daughter's best interests or what Dayne himself would have wanted. The important consideration in this matter is not what was actually said, done or meant but how the people involved felt about it all. Miss Milton's perception of their conversations was that it was suggested that the late Mr. Childs might have been an evil spirit and that an evil spirit might have caused Dayne to cross the road just before he died. P.C. Robertson had got the impression from a conversation he heard before the smoking ceremony that there might be an intention to raise Hollie in Australia. He told Miss Milton about this and warned her that she should be careful if she travelled to Australia with Hollie. Later on she became alarmed because it seemed that there would be arguments between the applicant and Denis Walker about where Dayne should be buried in Australia and not, therefore, what she had envisaged. She also felt that, while she had done all she could to respect the applicant's culture and welcome the birth family into her home, she

herself and her culture and the culture in which Dayne had been brought up were not being afforded equal respect.

All this caused the Childs family to reconsider matters. Mrs. Childs had always been doubtful and was particularly upset about what she understood had been said about her husband. The original plan for cremation was reinstated but the applicant's relatives promptly sought legal advice. The intervention of their solicitor prevented the arrangements being carried out as planned. Eventually these proceedings began.

Each side has shown a willingness to compromise in some respects. Mrs. Childs has agreed to forego cremation, in which she obviously sincerely believes, and thus burial next to her husband, which equally obviously means a great deal to her. Miss Buchanan has agreed to burial in a Brisbane cemetery rather than in the remote ancestral homeland or on her own property. But each remains adamant on the central question of whether Dayne should be buried here or in Queensland.

In other respects positions have been polarised. The respondents have been slow formally to admit that the applicant is indeed Dayne's mother because of the contradictions in the information that they had been given. The applicant has been slow to admit that Hollie is indeed Dayne's child. I hesitate to suggest that the lawyers have played their part in this. Hollie's existence does, of course, as I have already explained, make a very important legal and factual difference to this case. It is

understandable that the question might be raised because Dayne made no mention of Kirsten and the expected child when he met the birth family in October 1996, but there can be no doubt about the matter.

Jarrod told them about Hollie when he first telephoned to tell them about Dayne's death. He could not possibly have known at that point the significance which her existence would later come to hold. It is a clear demonstration that the Childs family knew and accepted Hollie as Dayne's child. Indeed the visitors all behaved immediately after the death as if they did so, too; they stayed in Hollie's home. There is also the evidence given by Kirsten Milton herself of the relationship between Dayne and his child and the offer of marriage, which I accept without any reservation whatsoever. Finally, there was her offer of DNA testing, which was rejected by the birth family because they did not wish the body disturbed.

The continued expression of doubt in the face of all this has driven the two families even further apart. Indeed, the proceedings have caused untold grief to everyone concerned. As Kirsten Milton wisely said, no-one has yet been able to grieve properly the tragic loss that they have all suffered in the untimely death of a much loved family member. Meanwhile Dayne's body is still awaiting its final resting place.

Special circumstances

It is argued for the applicant that a patchwork of circumstances in this history amount to the special

circumstances justifying intervention under s.116. It is not suggested that birth parenthood of an adopted person is enough in itself but that six further points do make it special:

1. The circumstances of the adoption. Although I am no longer invited to hold that Dayne was indeed a stolen child, it was a deeply flawed system.

2. The deceased's Aboriginal heritage and in particular the importance attached to the correct burial procedures so as to ensure that the deceased's true and eternal spirit will be directed and delivered so far as possible to its proper spirit home.

3. The initial agreement after his death.

4. Hollie's interests in knowing in due course that things were done properly in accordance with her father's birth right.

5. The interests of other members of the Australian family.

6. The deceased's wishes.

It is argued for the respondents that the circumstances may be unusual but they cannot in law amount either individually or together to the special circumstances required under s.116.

1. The circumstances of the adoption, although not in accordance with modern views, do not make the case any more special than many others.

2 and 6 go together because the Aboriginal heritage is undoubtedly very important, but the evidence of Professor

Layton is clear. It involves two components, acceptance by the Aboriginal family and community, which undoubtedly exists, and acceptance by the deceased of his identity as an Aboriginal man, as to which the weight of the evidence is overwhelmingly the other way, that he regarded himself as an Englishman, albeit obviously of mixed race, and that he identified closely with his English family.

3. The agreement was entered into in highly emotive circumstances and was entirely unenforceable.

4. It is a highly selective and partial view of Hollie's interests to suggest that they are best served by her father being returned to his birth land.

5. The interests of other members of the birth family can stand no higher than those of the birth mother and in any event cannot be more special than those of the adoptive family.

I accept entirely that the courts should be slow to entertain proceedings such as these. Modern methods of refrigeration may make them possible but they are certainly unseemly. They delay the proper disposal of the body and the normal processes of grieving, while bringing further grief in themselves. I further accept that the facts of birth parentage and adoption should not, without more, amount to a special reason for the birth family to intervene in the wishes of the adoptive family. But I am reluctant to hold that a combination of circumstances such as these cannot in law amount to special circumstances. 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.

In this case we have an adoption which, viewed as we see such things in 1999, clearly demonstrates all the pitfalls which this particular form of social engineering can bring. We have, for the reasons I have already explained, a highly questionable procedure for obtaining the mother's consent. We have a cultural context in which that procedure is capable of being abused and in which, whether or not it was actually abused in this case, the applicant clearly feels herself to have been abused. We have a trans-racial placement. In this case it has worked well as a placement, much to the credit of Mr. and Mrs. Childs, because Dayne had a happy and secure upbringing in which he became a fully integrated member of his adoptive family. But the reunion with his birth family, in circumstances in which he was being told that he had been stolen, clearly caused problems for him.

That reunion came about because of a very welcome change of heart on the part of the Queensland authorities, perhaps in recognition of the wrongs that had been done in the past, but they then went about it in exactly the wrong way. The adoptive family were not given a proper opportunity to reflect upon and consider the approach and whether they wanted a reunion to take place. For Dayne himself, the suggestion that he had been stolen, which may have carried the implied suggestion that his mother and father had been partly responsible for this, was deeply upsetting and confusing.

Taking the broad view of special circumstances adopted by Ewbank in Re Clore, I would be prepared to hold that this very unusual set of circumstances is also capable of amounting to special circumstances for the purposes of s.116. But do these circumstances make it either necessary or expedient that Hollie's personal representatives be displaced for the purpose of determining where the deceased should be buried?

Of course they do not make it necessary. Arrangements for the disposal of the remains had already been made before the applicant came on the scene. They would have been carried out long ago if Jarrod had not, much to his credit, thought that the applicant should know what had happened.
I understand and accept that from the applicant's point of view it is necessary because of her particular cultural imperatives. I also accept that she can articulate a spiritual belief which lends force to this imperative. Others who feel just as strongly, as many of us do, that their deceased relatives must come home to be buried might not be able to relate that as clearly to any particular religious belief in the way that the applicant and her family can do, but that does not mean that the feeling is any less worthy of respect. The law cannot establish a hierarchy in which one sort of feeling is accorded more respect than other, equally deep and sincere feelings. Nor is the applicant's point of view the only one which is deserving of respect; there are others whose views are at least equally deserving and who feel differently.

Is it then expedient to displace the otherwise normal course of events? At long last I have arrived in a territory where I feel much more comfortable, balancing a competing set of interests in a neutral but structured way. That structure leads me to consider, first, the views of the birth family; second, the views of the adoptive family; third, the interests of Hollie; and, fourth, the views of the deceased.

First, the views of the birth family: I believe that there are three components in those views. The first and most important are the imperatives of their Aboriginal beliefs. I accept entirely Professor Layton's view that the:

> "Aboriginal community itself must be the final arbiter of what constitutes an acceptable or authentic Aboriginal burial under contemporary conditions."

It is not for non-Aboriginals to say, any more than I as a member of the Church of England would dream of suggesting to a Roman Catholic what he should believe is happening during the mass. Having seen the applicant give evidence she was clearly most affected by the news that her son had been taken to England and that he had died and might be buried or, worse still, cremated here than by the circumstances of his adoption. Her beliefs obviously mean a great deal to her.

The second component is the context of colonial oppression and racism against which the applicant and others have rightly fought. The Courier Mail of 29th October 1996 described the applicant as "an articulate, aggressive freedom fighter". She questions only the "aggressive" part of that. It is no criticism to be radical in the cause of freedom and

equality. On the evidence before me, not least that of Professor Layton, the Aboriginal community in Australia have a great deal to be radical about. The only criticism which might be made is that Dayne was recruited to that cause when he was not ready for it.

The third component is the applicant's feelings as a mother deprived of her son in the circumstances I have described. That the applicant had such feelings I do not doubt for one moment. Where they stand in the hierarchy of her views is more difficult to judge, but having heard her evidence I would say that the other two components come first.

Second, the views of the adoptive family. The adoptive family are in no way to blame for any of the mistakes in this case. Mr. and Mrs. Childs adopted a little boy who had been rejected by his first prospective family. The first prospective adoptive family allegedly found him hyperactive and difficult and wondered whether he had suffered brain damage. He was not and had not. Mr. and Mrs. Childs accepted him as he was and gave him a loving and nurturing home. Even though he was adopted at a relatively late age, he became in every sense of the words a member of their family and he did well with them. It was an unusual family, with one natural son and two adopted sons. It was an accepting home, accepting of many different colours, creeds and cultures, although of course not able to give the deceased the education in the culture of his birth that his birth family would have done.

Mrs. Childs has suffered many losses in recent years, including the loss of her husband and her son. It was her

grief at the loss of Dayne as a person which was the most apparent in the witness box. No-one can doubt that according to our modern understanding of the mother/child relationship, she was this young man's mother and she had lost him. Just as the applicant's feelings are natural and important to her as a birth mother, so, too, are Mrs. Childs' feelings natural and important to her as a psychological and social parent. She is the woman who has brought Dayne up, who has loved him as a son and provided him with everything that a mother does provide for her children, as indeed did her husband provide him with everything that a father provides. Not only she but all of her family have lost a valued family member. It is a measure of how successful this adoption was that Dayne had his brothers and other family members as well as friends in the area, all of whom are grieving for what has happened.

Third, the interests of Hollie. Hollie has lost a father who loved her and might soon have become her mother's husband. Her mother now has to bring her up alone. This court deals every day with the needs of children for both of their parents, firstly as real people with whom they can have real relationships, and secondly as sources of their own sense of identity in later years. Hollie needs the knowledge of her father and of his concern for her. A focal point close to home to experience that knowledge and concern will be of benefit to her in later years.

She also needs a knowledge and acceptance of the Aboriginal part of her heritage, but that need cannot take precedence over her other, more immediate needs. Her security

depends upon her mother and her family here. Her mother feels undermined and devalued by the experiences of last summer. I cannot see how Hollie or her mother could reasonably be expected to travel to Australia for any funeral the applicant might arrange or even to visit the grave. The events of last summer and the challenge to Hollie's paternity have poisoned all that for the time being.

Furthermore, although I certainly hope that feelings will change in years to come, this court could not contemplate with any equanimity the introduction of Hollie to the sort of pressures to which Dayne was subjected when he visited Australia in 1996. The applicant herself argued, through counsel's closing submissions, that if she did not succeed Hollie might suffer from the effects of the continuing political struggle. That merely serves to reinforce the misgivings which are felt on her behalf.

Hollie's interests are not paramount in this case as the question is not one of her upbringing, to which s.1(1) of the Children Act 1989 applies. It is, however, an issue which will have a considerable importance and impact in her future upbringing. Furthermore, she is the person first entitled to a grant which would enable her or those with parental responsibility for her to determine the issue.

Fourth, the wishes of the deceased. It has not been argued on behalf of the applicant that the deceased would have wished his remains to be returned to Australia. There is no evidence to suggest that he would. Such evidence as there is suggests that he was interested but troubled by what he

encountered in Australia and was far from ready to embrace the culture and beliefs offered to him there. He had certainly not rejected the family, the culture and the values in which he had been brought up. Professor Layton concluded that:

> "... the deceased had been fully adopted into the British community in which he lived. He did not identify himself as an Aboriginal person and member of an Aboriginal community, although he had been given the opportunity to do so."

I agree with that conclusion and, although I accept that from the applicant's point of view his Aboriginality is his birth right and not a matter for him to choose, I have to balance the viewpoints of all those with a legitimate interest in this case.

Balancing those four factors, and even if none of them is given any greater weight than the others, it 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 that 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 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.

The application under s.116 is, therefore, dismissed.

MR. HARDY: My Lady, a number of ancillary matters may fall to be dealt with; certainly, of course, the issue of costs remains to be disposed of; but I wonder if your Ladyship would allow those instructing me and my lay clients to digest your Ladyship's judgment and perhaps to return to court, may I respectfully suggest by midday, to make such other applications as we believe to be appropriate.

MRS. JUSTICE HALE: That is a very proper suggestion, Mr. Hardy. I feel sure that Mrs. Warnock-Smith will also feel that is sensible.

MRS. WARNOCK-SMITH: My Lady, I was going to make a very similar submission, though in fact I was going to suggest 2 o'clock, but ---

MRS. JUSTICE HALE: Perhaps 12 would be more sensible.

MRS. WARNOCK-SMITH: I am grateful.

(Adjourned for a short time)

(In Open Court)

MR. HARDY: My Lady, I am very grateful. May I deal with four matters which my learned friend and I agree can properly be canvased in public and invite your Ladyship thereafter to go into what used to be called chambers, now go into the private forum, in order to deal with the costs applications.

MRS. JUSTICE HALE: I am still struggling with the extent to which the Probate rules actually adopt all our new terminologies. I think they do not.

MRS. WARNOCK-SMITH: I think the answer is they do not, my Lady.

MRS. JUSTICE HALE: No.

MR. HARDY: My Lady, first, I say this as delicately as I can, I understand from my learned friend, and I am very grateful to her, that she will not be making an application to this court which would have the effect of delaying the disposal of the mortal remains.

MRS. JUSTICE HALE: I understand what you say and I am very grateful.

MR. HARDY: Second, I understand that that view may partly be influenced by the fact that, although my Lady has not sought to place any limitation upon the ground, Hollie Milton's litigation friends maintain the position that they put forward in evidence and acknowledge respectfully the hope expressed by my Lady in giving judgment that Aboriginal culture can at least be respected in the disposal. For that reason the disposal will be by way of burial.

Thirdly, and again I say this in part with those in the public gallery in mind, although there has been a polarity of position between the applicant and respondents in this matter, that does not mean that there have not been efforts at compromise and it certainly does not mean that there is not respect on the part of the respondents for the position of the applicant. Because of that, those who have now received the grant will permit the applicant to visit the place at which the mortal remains presently lie, together with those who sit alongside and immediately behind her, under the supervision of P.C. Robertson who has already played a notable part in efforts at conciliation and mediation in this matter, in order that they can say farewell. I understand that that visit will take place shortly.

Fourthly, the last matter I mention in public: the litigation friends of Hollie Milton have considered the possibility of applying to your Ladyship for injunctions concerning the press reporting of the internment itself, and they bear in particular mind the interests of Hollie Milton. We do not seek injunctions at this stage. Those sitting in the public gallery are aware of the court's power, no doubt will report the matter with the discretion that has already characterised the majority of reporting in this case, and have, as it were, the full story in the judgment which my Lady has given. So, if I may do so, I, as it were, put down a marker that if it appears to those I represent that intrusive or improper press reporting is or may be likely resort will unhesitatingly be had to this court to prevent such reporting. Nevertheless, given the character of the reporting thus far in the main, it is to be hoped that no formal process will be necessary.

MRS. JUSTICE HALE: Thank you.

MR. HARDY: My Lady, those are the four matters which can properly be canvased in public. May I invite your Ladyship now to go into chambers.

MRS. JUSTICE HALE: It is common ground, is it, that that will be appropriate?

MRS. WARNOCK-SMITH: It is indeed, my Lady. May I just say one or two things. In relation to the first matter which my learned friend mentioned, the applicant is now most anxious to put an end to these proceedings with dignity and to allow matters to proceed as your Ladyship has directed, and in that case there will be no appeal. As to the other two matters which affect my client, we are grateful for those indications in relation to the burial and the opportunity to visit the body and to say farewell.

MRS. JUSTICE HALE: Shall I rise or shall I simply invite those who are not entitled to be here to leave? That would be the quickest and easiest way. We can also take our wigs off if we feel like it.