

THE HIGH COURT

PROBATE

2023 / PO 3861

IN THE MATTER OF THE ESTATE OF X.Y. (A MINOR), DECEASED AND
IN THE MATTER OF AN APPLICATION BY A.B. AND
IN THE MATTER OF SECTION 27 (4) OF THE SUCCESSION ACT, 1965

BETWEEN

A.B.

APPLICANT

AND

C.D. AND E.F.

RESPONDENTS

JUDGMENT of Ms. Justice Stack delivered the 27th day of April, 2023.

Introduction

1. This is an application pursuant to s. 27 (4) of the Succession Act, 1965, which was made to me in the most distressing and heart-breaking circumstances imaginable.
2. The deceased is a schoolgirl who recently took her own life. She had been in care since she was approximately 18 months old and, while her parents applied to lift the Care Order in 2019, this was refused. Therefore, for most of her life, she was in the care of the Child and Family Agency and she and G., her older sister who is also a minor, lived in a relative care placement with her aunt and her aunt's husband.

3. The applicant is one of a number of half-siblings of the deceased, from an earlier relationship of the deceased's mother. The respondents are the parents of the deceased, and of G. G. has also been in care for most of her life and is also in relative placement with her aunt and her aunt's husband.

4. On the tragic and premature death of the deceased, it transpired that there was a difference of opinion between the respondents and the deceased's remaining family members. The applicant stated that she brought this application on behalf of G., the deceased's aunt and her husband, and the deceased's remaining half-siblings, as well as herself. The wishes of these family members was that the deceased would be buried in the town where she lived for most of her life, so that her friends and community could attend her wake and funeral and so that she could be buried where these family members, particularly G., could visit her grave.

5. By contrast, the respondents wished for the deceased to be buried in the town where they live, and where the deceased's maternal and paternal grandparents are buried. The deceased's father stressed that the deceased was their child at the end of the day and had taken his name. There is no doubt that the respondents are the deceased's closest blood relations and of course the Care Order ceased as a matter of law on the death of the deceased: *Health Service Executive v. McAnaspie* [2012] 1 I.R. 548. As a result, the Child and Family Agency took no part in the proceedings other than to communicate the wishes of G. that the deceased would be buried in the town where they had lived for most of their lives.

The applicable law

6. There appears to be no written decision in a comparable situation since independence, but it appears to have been well established prior to that that an executor has a duty to arrange for burial and is entitled to obtain possession of the body of the deceased for that purpose: *Williams v. Williams* (1882) 20 Ch. D. 659 at 662. In *Dobson v. North Tyneside Health*

Authority [1997] 1 WLR 596 at 600, Peter Gibson L.J., *obiter*, quoted with approval the statement in *Clerk & Lindsell on Torts*, 17th ed, (1995), at para. 13-50. which stated the principle as applying to administrators also.

7. In *Buchanan v. Milton* [1999] 2 F.L.R. 844, Hale J. determined a dispute as to who had the right to arrange for the funeral and burial of a deceased by reference to s. 116 of the Supreme Court Act, 1981, which is the equivalent of s. 27 (4) of the 1965 Act. Where the dispute was between persons equally entitled to take out a grant of letters of administration, with consequent doubts as to whether s. 116 applied, the English courts have resorted to their inherent jurisdiction: see *Anstey v. Mundle* [2016] EWHC 1073 (Ch) where the dispute was between the adult children of the deceased. No such issue arises in this application as the wording of s. 27 (4) is somewhat broader than s. 116 and, in any event, the dispute is between the parents of the deceased and the deceased's half-sibling, and the parents clearly have priority under Order 79.

8. Hale J. in *Buchanan v. Milton* (at p. 846) appeared to regard *Dobson* as stating that an administrator had no right to obtain an injunction for delivery of the body before the grant of letters of administration. However, *Dobson* was not a case where there had been any application for a grant of letters of administration in order to arrange for a funeral and burial of the deceased. The facts of that case were quite different and the deceased had long since been buried before any such application was made. In any event, the comment in *Dobson* (at p. 600) was confined to the statement that the right to possession of the body existed for the purposes of interment or other proper disposition of the body. That was by way of explanation that the proceedings in that case did not concern that purpose and Peter Gibson L.J. did not address the position of a person entitled to extract a grant of letters of administration but who had not yet done so.

9. In *Burrows v. H.M. Coroner for Preston* [2008] 2 FLR 1225 at para. 13, Cranston J. accepted that a person entitled to take out a grant of letters of administration was in the same position as an executor as regards the funeral and disposal of the body and I think this is the better view. O. 79 will in most cases determine the person or persons entitled to take custody of the body of the deceased and to arrange for the wake, funeral and burial or cremation. Where there is a dispute which has been judicially determined, the person found to be entitled to take out a grant equally has a right to take possession of the deceased's body and arrange for the proper wake, funeral and burial of the deceased. Requiring the person found to be entitled to actually proceed to take out a grant would be impractical and unnecessary. Obviously, in the days immediately after a death, the need to organise the funeral and burial (or cremation) is the priority. In this case, the proceedings were resolved within three working days of the first application for interim relief to restrain the release of the body of the deceased, and within five days of the death of the deceased. But it would be difficult to justify any further delay when there has been a determination of the person with the entitlement and for practical and emotional reasons the funeral should be allowed to proceed.

10. In any event, as it appears to be well established at common law that it is the legal personal representative who has the duty and entitlement to take possession of the body and arrange for the funeral and burial, this means that the dispute in this instance fell to be determined in the context of an application pursuant to s. 27 (4) of the 1965 Act, the interim relief being granted pursuant to the inherent jurisdiction of the court.

Entitlement to extract letters of administration in this case

11. In this case, the respondents, who are the natural parents of the deceased, would be the persons first entitled to take out a grant under O.79, r.5 (1) (e) of the Rules of the Superior Courts. The applicant is in the group next entitled, being a half-sister of the deceased, and falls

within para. (f) of the same sub-rule. However, this court has jurisdiction pursuant to s. 27 (4) of the Succession Act, 1965, to a person other than that entitled pursuant to O. 79 to take out a grant. It provides:

“Where by reason of any special circumstances it appears to the High Court (or, in a case within the jurisdiction of the Circuit Court, that Court) to be necessary or expedient to do so, the Court may order that administration be granted to such person as it thinks fit.”

12. I therefore had to decide whether there were special circumstances which made it “*necessary or expedient*” for the applicant, as a half-sibling of the deceased, to be permitted to extract a grant of letters of administration of the estate of the deceased, in preference to the respondents, who had a prior entitlement.

13. I would point out that the phrase is disjunctive, and that it cannot be said in this case that the grant of an order pursuant to s. 27 (4) is “*necessary*”, as both the applicant and the respondents were in a position to and willing to fund the funeral and burial of the deceased, so the question was whether it was “*expedient*” to make the order requested.

14. Naturally, the deceased left no estate but I accept that s. 29 permits a grant to be issued in these circumstances. As the application was brought purely to determine who should be entitled to arrange for the funeral and burial of the deceased, this application required a brief consideration of the competing wishes of the applicant and the respondents on that topic.

Factors relevant to the exercise of the discretion

15. In the view of the applicant and the other family members whom she represents, the deceased should be buried in the town where she lived most of her life, among her friends and community. In particular, the applicant has said on affidavit that G. would be distraught if the deceased were not buried locally.

16. She stressed that she is instructed by the deceased's aunt that the respondents would be included in the funeral and burial rites and acknowledged that the respondents would be treated throughout in a manner reflecting their status as the deceased's parents and that they would be invited to design the deceased's headstone. In my view, this was an important concession which recognised the respondents' position as the natural parents of the deceased.

17. By contrast, the deceased's father based his position very much on the status of himself and his wife as the parents of the deceased. He stressed that they had access with her throughout her life, though this was apparently somewhat periodic and at all times supervised. I also understand that the respondents applied to terminate the Care Order in relation to the deceased in 2019 but were not successful. The deceased therefore remained, as a matter of law, in the care of the Child and Family Agency and continued to live with G. in the *de facto* care of her aunt and her aunt's husband.

18. Notwithstanding the long-term nature of the care arrangements, it should be acknowledged that the deceased's father was clearly deeply upset and shocked by his daughter's death.

19. Although the matter was capable of being dealt with on affidavit, I invited both the applicant and the deceased's father to address the court if they wished and they both availed of that opportunity. The deceased's mother did not feel able to attend the hearing. Both the applicant and the deceased's father expressed their wishes in a very emotional manner and it is clear that all family members share a very profound grief at the death of the deceased.

Decision

20. The discretion under s. 27 (4) is a wide one and, as already pointed out, can be granted on a basis of "*expediency*" rather than "*necessity*". In *Re Hannon, deceased* [2018] 3 IR 402, [2018] IEHC 482, Baker J. stated that for the circumstances to be sufficiently "*special*" to

engage the power under s. 27 (4) the making of the order must be more than a mere convenience. She also stated (at para. 49) that the “*special circumstances*” referred to in s. 27 (4) did not have to be “*extraordinary or highly unusual*”.

21. In this case, the circumstances of the life of the deceased were, in the very literal sense, extraordinary, in that it is out of the ordinary for a young girl not to live with at least one of her parents. I think the situation would be quite different where a child died and was in the custody and care of one or both parents. In those circumstances, it is difficult to see how another family member would be permitted to take control of the funeral and burial arrangements.

22. However, in this case where the deceased was not living with her parents and had not lived with either of them since she was a very, very young child, it seems to me that these are at the least circumstances which can be regarded as “*special*”, and which place the wishes of G., the deceased’s half-siblings and her foster parents above those of her natural parents.

23. In *Anstey v. Mundle*, already cited, the English High Court approved the earlier decision of *Hartshorne v. Gardner* [2008] EWHC 3675 (Ch), where the Deputy High Court Judge identified the relevant factors to the exercise of the inherent jurisdiction of the court as being: the deceased’s wishes, the reasonable requirements and wishes of the family who are left to grieve, the location with which the deceased was most closely connected, and the need to ensure that the body be disposed of with all proper respect and decency and without further delay.

24. Unsurprisingly, given her tender years, the deceased had expressed no wishes as to where she would like to be buried, but the second and third of those requirements are very much relevant here. In considering the wishes of the family, it is of course appropriate to have regard to the wishes of the natural parents, but where these are in conflict with the remaining family members with whom the deceased actually lived for the greater part of her life, it seems to me that the wishes of those other family members, being the applicant and the remaining

family members who are of the same view, must be prioritised. In particular, I place considerable weight on the fact that G. has expressed a very strong desire that her younger sister would be buried in the town where they lived together and where she can easily visit the grave.

25. I therefore decided that the special circumstances existed where, given the purpose for which the grant is sought, the grant should be extracted by the applicant as half-sister of the deceased and not by the natural parents or either of them.

26. In those circumstances, I granted an order pursuant to s. 27 (4) of the 1965 Act, limited to the purposes of taking custody of the body and arranging the wake, the funeral, and burial of the deceased, and the erection of a headstone in relation to the deceased. I also discharged the interim injunction restraining the hospital from releasing the body of the deceased and made an order directing the hospital to release the body to the applicant.

27. I directed at the outset that the proceedings would be held *in camera* and I also indicated that I would in due course record in a more formal way my reasons given *ex tempore* in court by reason of the urgency of the matter. This is in the hope that it would provide some guidance for other families who may find themselves in a similar position and might avoid the need to come to court at a time when their priorities lie elsewhere. Having said that, it hardly needs to be said that O.79 provides a clear order of priority for family members which should, in general, be adequate to identify the persons entitled to make arrangements for a wake, funeral and/or burial and I would echo the comments of the English judges in the cases cited to the effect that it would be hoped that applications such as this would be rare.

28. In *Burrows v. H.M. Coroner for Preston* [2008] 2 F.L.R. 1225, a case cited in the written submissions furnished on behalf of the applicant, the English High Court appears to have come to a similar decision in similar circumstances. Older caselaw which seems to be to the effect that parents of a deceased child have a duty to arrange for burial was - very

understandably given the time constraints - discussed at hearing. I have not therefore considered it. However, I suspect that these cases were not ones involving family disputes such as occurred here (and in *Burrows*) but were concerned with situations where, possibly for financial reasons, a funeral or burial had not been arranged.

29. Furthermore, while it was not material to this application, I would add that the statement in *Williams v. Williams* that the wishes of the deceased as to the arrangements for their funeral and burial or cremation of their body were not enforceable or binding on the legal personal representative, is no longer regarded as good law in England and Wales. Such wishes are now regarded as a material consideration under s. 116 of the 1981 Act in that jurisdiction: see *Burrows* at para. 20.

30. I would anticipate that a similar view would be taken in this jurisdiction in a case which it arises, and that weight would be attached, in an application under s. 27 (4) to the effect of the making of such an order on the deceased's wishes.

31. Again, I would stress that the circumstances in which it would be appropriate to make such an application would be rare as Order 79 will almost inevitably provide sufficient clarity on this issue in cases where no executor has been appointed by a will, and s. 27 (4) should only be utilised where the dispute is a particularly serious one and of course it should be remembered that the court will not get involved in the making of arrangements, but only in identifying the person entitled to make those arrangements.

32. I can only reiterate my very deep sympathies to all sides involved in this tragic dispute.