

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **23/12/05**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

**IN THE MATTER OF AN APPLICATION BY LL FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF NORTH DOWN AND ARDS
HEALTH AND SOCIAL SERVICES TRUST**

DEENY J

The Facts

[1] This application relates to the applicant's son R, who was born on 1 November 1994 and is dying of cancer. The facts are fully set out in the carefully drafted affidavit of LL which was before the court. I have taken this into account and the two exhibits to it and the relevant parts of a report from the deputy Official Solicitor of 12 December 2005, taken on the direction of Mr Justice Gillen with regard to an application by the mother for contact with the child, which was, I understand, unsuccessful.

[2] Given the urgency of this matter and with the consent of both parties I treat this application for leave as a full hearing, considering that the applicant had an arguable case which warranted such consideration. Counsel were, in the event, able to address me fully on the relatively net issues.

[3] The case arises in the following way. R was one of four sons of the applicant. About seven years ago the four boys were taken into care, originally as an emergency. Previous to that they had been with their mother. The father of R has had only very slight contact with him, it would appear. R was placed with Mr and Mrs M, in the latter's capacity as a childminder. Subsequently they were asked to foster R and they have continued to do so. He has therefore lived with them and their three daughters for the last seven years.

[4] The applicant apparently suffered from an addiction to prescribed medication and although consideration was given from time to time to returning the children to her this never came to fruition, save that her eldest son W, now aged 15, has returned to her. Ultimately the North Down and Ards Health and Social Services Trust applied for and obtained a Freeing Order in respect of the child on 7th January of 2003. The intention was that he would then be freed for adoption. However, tragically, the child was diagnosed with cancer in the following month. He had surgical treatment which was initially successful. He also underwent radiotherapy and chemotherapy.

[5] Sadly in February 2005 R presented with renewed abdominal pain and was found to have tumour relapse close to his left kidney. He had further treatment for this but the oncologists treating him at the Royal Belfast Hospital for Sick Children have now concluded that no further treatment would be effective or justified and this has been discontinued. His death is regarded as imminent.

[6] As indicated above the applicant has made an unsuccessful application for contact with her son. It appears from the papers that she has only seen him once in approximately three years. The Trust would say that that was due to her wishes for some time, although when her son fell ill she did, naturally, wish to see him. Apparently that meeting in August 2003 was not successful and her son appeared to be angry towards her because of his perception of her behaviour in leaving him and his brothers, whether caused by addiction or otherwise.

[7] The Trust has very properly however kept in touch with the mother in this very difficult situation for all concerned. There have been, I was informed from the Bar by Mr Mark Robinson who appeared for the Trust, lengthy discussions and indeed consultations in and about the court as to the precise location and manner of R's interment when this becomes necessary. One matter however remains in dispute. This has come before me by way of this application. The applicant wishes him to be buried in the same grave as her grandfather at Ballyvestor near Millisle in County Down. The Trust, taking into account the wishes of the foster parents, wish him to be buried at Clandeboye Cemetery at the edge of Bangor, also in County Down. This is where he has been living all these years and would be convenient for his friends and foster family to visit. The Trust also points out that it is actually nearer to the applicant's present home in Carrickfergus than the graveyard which she would prefer. The applicant objected strongly to the boy being buried in the family plot of the M family, and in deference to that, they and the Trust have agreed that he be buried in his own grave nearby. Nevertheless it is this decision by the Trust which the applicant seeks to challenge.

Applicant's Case

[8] The applicant's case was put succinctly by Mr David Schofield. He relied both on the domestic law of the United Kingdom and on a contended breach of the applicant's rights under Article 8 of the European Convention on Human Rights.

[9] As to the former his submission was that the rights and powers of the Trust with regard to the child were linked to the welfare of the child and expired on the death of the child. At that moment the right and duty to bury the child reverted to the natural or biological parents. (He informed me that the biological father did not dispute the mother's wishes in this regard, although this is not averred on affidavit.) He said that this was clearly the position where, as here, the child had not been the subject of an adoption order. He relied on a decision of the Court of Appeal in England R v Gwynedd County Council ex parte B [1991] FLR 365. In that case C had been born with Downs Syndrome and a heart defect. Her parents were unable to look after her and she was placed voluntarily in the care of the local authority when she was three and a half weeks old. They in turn placed C with foster parents, Mr and Mrs B. Four years later the council assumed parental rights and duties with respect to C under Section 2 of the Children Act 1948 (now Section 3 of the Child Care Act 1980). The natural mother visited twice a year. C died in March 1991 at the age of 14. The mother and the foster parents each wanted to undertake her burial. The council took the view that its rights and duties with respect to C ceased on her death and that the mother therefore had the right and duty to bury C. The foster parents challenged this but their claim failed both at first instance and in the Court of Appeal. The court (Balcombe, Woolf and Stuart-Smith LJJ) upheld the view of Eastham J at first instance that:

"The whole object of the legislation was to deal with the living child as opposed to a dead child. In those circumstances Parliament cannot be presumed to have intended to take away the rights of the natural parents anymore than was necessary to achieve that specific purpose." (Page 369).

[10] On page 368 Balcombe LJ, delivering the judgment of the court made express reference to the effect that Section 25 of the 1980 Act was the only section referring to the dead child. He said:

"It is consonant with this construction that Sections 25 empowers a local authority to bury 'the body of any deceased child who immediately before his death was in the care of the authority'."

This implied to him that the role of the authority ceased upon the child's death and the right and duty to bury reverted to the natural parents.

[11] Though not opened to me R v Vann [1851] 2 Den 325 was relied on as authority for the proposition that a parent had indeed the right and duty to bury a minor child. That particular case was a prosecution for failure to do so, which failed because the defendant had not the means, it appears. A number of things should be observed at this point. There was no Freeing Order in the case of C. Furthermore the words which influenced Balcombe LJ in Section 25 of the English Act do not appear in our statutory provisions. Relatively little is said about the statutory provisions otherwise in that judgment. Furthermore the context is clearly different where the foster parents were challenging the refusal of the council to act and exercise its putative power to bury the child. I also note the way the matter is put by the learned Judge ie "Parliament cannot be presumed to have intended to take away the rights of the natural parents any more than was necessary to achieve that specific purpose". For all these reasons I consider the decision distinguishable from the instant application.

[12] Mr Schofield also relied on Hershman and MacFarlane Children Law and Practice paragraph A49. Not only does it cite the cases already mentioned but goes on:

"The same principle is likely to apply to any Residence Order and perhaps any court ordered parental responsibility. It would seem, therefore, that the right to arrange the disposal of the remains of a child rests exclusively in the parents."

Human Rights

[13] The applicant's claim was that this burial in Clandeboye Cemetery interferes with her rights to family life under Article 8 of the European Convention on Human Rights. She wished her child to be buried with her family ie in a grave at Ballyvestor where her own grandfather was buried, it the great grandfather of R. R's grandfather, the applicant's own father is deceased but is buried elsewhere. R did know and has remained in contact with his maternal grandmother who would wish, understandably, to be buried with her father in Ballyvestor. Mr Schofield maintained that there was good authority for the proposition that his client retained Article 8 rights despite the Freeing Order. It was a question of fact and degree. I accept from his citation of authority that that is indeed possible. If so one has to then consider the question of fact and degree here. The applicant's only connection with the child in recent years, however painful this may now be to her, has been a single visit and some goodwill cards etc. Before that, no doubt

for reasons painful to her she had also seen, it would appear, little of the applicant who was not in her care. He is now to be buried with his great grandfather if her application is well founded. Against that are the wishes of the foster parents who have had the actual parental care of this little boy for some seven years. For the past two years that has involved caring for him when home from hospital with this grave illnesses. I was informed from the Bar that because of the destruction of his immune system the whole family had had to be extremely careful not to introduce any infection to the house which understandably significantly interfered with their own way of life. Mrs M has been staying at the hospital at night to be with him. It seems to me clearly that the family of which he has been a part in recent years has been the M family. I consider that their rights are engaged. I consider that the Trust was entirely correct in taking into account their wishes.

[14] Even if one accepts that the applicant has retained her rights, which I do for these purposes, any slight interference with her rights has, it seems to me been met with a proportionate response which is justified in the circumstances, provided it is in accordance with law. Given that the rights of the M family are engaged, as I find, an alternative decision, in effect, by me to allow the applicant to take the newly deceased child and bury her in a different graveyard, albeit not very far away, would constitute an interference with their rights. It can be seen therefore that I do not find this limb of the applicant's case to be a convincing one and I reject it. The decision of the Trust I consider proportionate.

The Trust's Case

[15] Mr Mark Robinson for the Trust carried out a careful exposition of the relevant statutory provisions which had not hitherto been opened to me. He drew attention to Article 2, the interpretation article of the Adoption (NI) Order 1987. Therein is the following definition:

“‘The Parental Rights and Duties’ means, as respects a particular child (whether legitimate or not), all the rights and duties which by law the mother and father have in relation to a legitimate child and his property; and references to a parental right or duty shall be construed accordingly and shall include any element included in a right or duty;”

The use of the words “all the rights and duties” and “any element” emphasised the universality of the rights and duties involved.

[16] He then turned to Article 17 of the 1987 Order dealing with freeing a child for adoption with parental agreement. This was not forthcoming here.

Article 18 deals with freeing a child for adoption without parental agreement. It is common case that that is what happened here ie the Family Division of the High Court of Northern Ireland did make an order under Article 18(1) without parental agreement “declaring the child free for adoption”. Article 18(3) reads:

“Paragraphs (3), (5) and (6) of Article 17 shall apply to an order made by a court under paragraph (1) as they apply to an order made by a court under Article 17(1).”

Article 17(3) reads:

“On the making of an order under paragraph (1), the parental rights and duties relating to the child vest in the Adoption Agency, and paragraphs (2) and (3) of Article 12 apply as if the order were an Adoption Order and the Agency were the adopters.”

This seems to me an important provision. Even though the child is not placed with adoptive parents the parental rights and duties, as already widely defined by Article 2 vested in the Adoption Agency when the Freeing Order was made on 7 January 2003.

[17] Furthermore Article 12(3) is highly relevant. It provides that:

“The making of an Adoption Order operates to extinguish -

(a) any parental right or duty relating to the child which -

(i) is vested in a person (not being one of the adopters) who was the parent or guardian of the child immediately before the making of the order ...”

We have therefore a position where the parental rights and duties widely defined are vested in the Adoption Agency, which in this case is the Trust at the time of the Freeing Order and simultaneously that order applies Article 12(3) as if there had been an actual adoption and operates to extinguish the parental rights and duties of the person who was the parent before the making of the order.

This language seems to me clear and unambiguous in its effect. Article 12(1) and (2) are consistent with that view.

Mr Robinson's submission was that this language is clearly very different from that in the Gwynedd case. There was no freezing order there and no extinguishment of the rights of the parents.

[18] One then turns to consider the provisions of Article 34 of the Children (NI) Order 1995 which is similar in role to Section 25 of the Childcare Act 1980 but different in language. It reads:

“Act 34-(1) If a child is being looked after by an authority dies, the authority -

(a) shall notify the Department;

(b) shall, so far as is reasonably practicable, notify the child's parents and every person who is not a patient of his but who has parental responsibility for them;

(c) may, with the consent (so far as it is reasonably practicable to obtain it) of every person who has parental responsibility for the child, arrange for the child's body to be buried or cremated ...”

[19] A number of things can be noted from these provisions. First of all the words “being looked after” by an authority are deliberately widely drawn. They are not defined in the interpretation section. It is clear they are to cover the range of circumstances in which a child might die while under the care of an authority in one way or another.

[20] The first sub-paragraphs are only duties of notification and it is interesting that the duty to notify the parents is only “so far as is reasonably practicable”. One notes that the duty is not to return the child's body to the natural parents, so far as is reasonably practicable.

[21] The use of the word “may” at 34(1)(c) is permissive clearly. It is notable that again it can be exercised firstly with consent so far as it is reasonably practicable to obtain it, not of each parent but of “every person who has parental responsibility for the child.” With regard to this case it is clear that the applicant has ceased to be such a person from the date of the Freeing Order. (I observe that she could have applied to discharge the Freeing Order when no adoption followed within 12 months but did not attempt to do so). I consider that these provisions also point strongly

towards the view that the Trust has indeed the power and role of conducting a proper and dignified burial of this child from the date of the Freeing Order, while of course seeking to do so on as consensual a basis as possible in the interests of such an outcome. I observe that the Trust is the only person with parental responsibility for the child at the present time. It is also clear that the language differs notably from that in Section 25 of that of the English Act as it speaks of a person with parental responsibility in the present tense even after the child's death.

[22] Although my attention was not drawn to it I note Article 34(4) which empowers an authority which has exercised its power under paragraph 1(c) with regard to a child under 18 to recover any expenses incurred from any parent of the child. Conceivably that might be held to be a reference to the apparent common law position that the right and duty to bury the child rests with the parent and therefore if the Trust exercises that right and duty on behalf of the parent they can recover the expense. One recollects the opening of Article 34(1), ie that this is any child "being looked after" by the authority, so it includes situations where parents have not had their parental rights and duties extinguished, or perhaps qualified in any way, eg if it is merely a short-term illness which has led to the child being taken into care. This could cover a wide range of situations. It does not seem to be inconsistent with the interpretation which the Trust seeks to put on the statutory provision overall.

[23] It is worth seeking to test the view of the legislation which each party takes by considering its possible application. In the case of the Trust we will be dealing with a public body which will have to act in accordance with the European Convention on Human Rights. If it fails to do so, eg by failing to take into account any Article 8 rights of the biological parents or foster parents or conceivably others they may seek a review of that decision, if they feel strongly enough about it. It is likely that any Trust decision will be a considered one made by persons with experience and expertise with regard to the care of children and dealing with parents and foster parents. On the other hand if Mr Schofield's interpretation is right, ie that the natural parent or parents have a unequivocal legal right to bury the child and the Trust's rights are extinguished on death, surprising consequences could follow. An abusive parent, newly released from prison, perhaps for the offence of cruelty to his own child, could march into the ward in which the child had died and snatch the lifeless body from the grieving foster parents who have loved and cared for the child for a decade and, if the applicant succeeded, this parent could remove the body to a place of burial far away without any need to disclose the location to the Trust or the foster family who had loved the child and with whom the child had been living for many years. He would not be a public authority subject to the Convention or judicial review. I doubt very much if Parliament ever intended such an outcome. It seems to me that the ordinary meaning of 'extinguished' with regard to parental rights can easily apply to

the right to determine the place of burial of a child who has been the subject of either an Adoption Order or a Freeing Order.

[24] I have already indicated that I consider that the attitude of the Trust to this issue to be a proportionate one. Mr Robinson referred to Lester and Pannick Human Rights Law 4.853 and page 288. The latter emphasised that with regard family life “fact and degree” would take into account the extent of contact, the emotional links and dependency. I accept Mr Robinson’s submission that they would all strongly favour the foster family.

[25] For completeness I note the submission of Mr Schofield in reply that Article 6 of the Children Order 1995 assisted him. It makes some express savings for parental responsibility and for parents without such responsibility including by 6(4)(b) the preservation of any rights in relation to the child’s property in the event of the child’s death. I do not feel that this assists him. On the contrary it may be thought that the principle of *expressio unius est exclusio alterius* might suggest that the burial of the child was not a right preserved to a parent whose rights and duties had been extinguished.

[26] Taking all these matters into account I conclude that the decision of the Trust herein was in accordance with law and proportionate within the meaning of the European Convention on Human Rights and I find for the Trust.