Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DOUGLAS J

No 7292 of 2009

LENORA MAY LISTON	Applicant
and	
ALAN PIERPOINT	Respondent

BRISBANE

..DATE 15/07/2009

ORDER

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: This is an application for a declaration that the applicant, Lenora May Liston, is entitled to possession and control of the body of her deceased daughter for the purpose of burial in the Charleville cemetery.

The respondent, Mr Pierpoint, is the father of the children of the deceased who are now aged four and six and for a significant period appears to have been in a de facto relationship with her but which has terminated perhaps in about January this year but which appears to have been a relationship punctuated by separations for some significant periods and also affected by, in his words, issues concerning domestic violence, alcohol and drug dependence and his mental health.

He says that both he and the deceased used illicit drugs including speed and marihuana and that he has developed schizophrenia which is dealt with by medication to treat it. He and the children presently live at Gatton. The applicant lives at Charleville, where the respondent was brought up, and where she has many relations.

There was also evidence from the great uncle of the deceased that his family belongs to the Kooma tribe which originated from New South Wales. Most of his people, he said, have moved across the border into Queensland and settled in Cunnamulla and Charleville. He says his family is traditionally and culturally attached to their place in Charleville and speaks of the relationship with that place of him and his numerous

relations most of whom he says live in Charleville. He and the applicant have expressed the wish that the deceased be returned to Charleville and buried there close to her ancestors on the basis that it assists them with the grieving and reunites the family.

The difficulty that that would cause in practical terms from the respondent's point of view is caused by the distance from Gatton to Charleville and the difficulties that that would pose in respect of his and the deceased's children visiting her grave. That is something which I regard as a significant issue and it is a distressing one and no doubt one of the principal reasons why the matter has come to Court.

As part of that concern there is evidence that to travel to Charleville the children, who were in the car at the time of their mother's death, would need to pass by the site of the accident and there is also evidence that they continue to be distressed, as is natural, by the fact of their mother's death.

The law in this area involves the consideration of a number of discretionary features which have been regarded on some occasions in a hierarchy articulated for example by Young J in Smith v. Tamworth City Council 1997 41 New South Wales Law Reports 680 starting with the person named as executor in the Will. Here there is no Will and consequently no executor.

In the absence of an executor who would normally be the person regarded as possessing the appropriate authority to arrange for the burial of the deceased's body, his Honour drew attention to the status of the person with the highest rank to take out administration as being in the same position as the executor. He had pointed out as well that the person with the privilege of choosing how to bury the body was expected to consult with other stakeholders but was not legally bound to do so.

He went on to say that the right of the surviving spouse or de facto would be preferred to the right of children and then said that, where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue.

When one looks at the question of priority for the grant of letters of administration, Mr McDougall for the respondent submitted that, although he should not be treated as the deceased's surviving spouse because of the cessation of the de facto relationship, he should be treated as the person representing the deceased's children and having the same priority as them ahead of the deceased's parent for the purposes of rule 610 sub-rule 1, and in that context drew my attention to a decision of the Victorian Supreme Court in Meier v. Bell decided on 3 March 1997 in matter No 4518 of 1997. There was some dispute as to the continued existence of a de facto relationship but his Honour appears to have decided the dispute as between the de facto husband and the sister of

the deceased on the basis that he, as the custodial parent of the children, would have a higher right to take out letters of administration.

Ms Rinaudo-Lewis for the applicant pointed out, however, that the language used by Young J was "the person with the highest rank to take out administration" and, in Meier and Bell, Ashley J also referred to the approach being to identify as best as is possible the person who is a potential administrator and to treat that person in the same way as if he or she had been appointed executor. In that context Ms Rinaudo-Lewis pointed to the potential problems that would face the respondent in applying for letters of administration stemming from the nature of his relationship with the deceased including the history of domestic violence orders referred to in the proceedings before me, his own mental health problems and his admitted problems with respect to the use of illicit drugs, and submitted that in that context the likely result of an application for the appointment of an administrator would be that he would not be appointed. There seems to me to be some strength in that submission.

She also relied upon a decision of the Full Court of the South Australia Supreme Court in Jones v. Dodd 1999 73 South Australian State Reports 328 where Perry J who wrote the major judgment counselled against wrongly elevating the approach that burial rights be accorded a person in a position to apply for a grant of letters of administration in intestacy to a

rigid proposition or principle of law, and distinguished Meier and Bell at page 334.

Later on that page at paragraph 40 he said, "There is no principle of universal application which compels such an approach in all cases" and went on to say that he could not accept that there's a right to reject consideration of emotional, spiritual and cultural factors when they are present however inconvenient it may be to do so in the short time which is commonly available to decide these cases.

There is significant evidence of the deceased's connection with her family at Charleville even though there is some evidence that it was not an entirely harmonious relationship between her and her mother. But there does seem to be other evidence also of a continuing relationship between her and other members of her family there.

Taking into account those considerations it seems to me that on the balance it is preferable that the applicant be granted the relief she seeks so that the deceased may be buried with other members of her family in Charleville. I recognise the problems that may create with respect to the ability of the children to grieve properly in respect of their mother's death but it seems to me that there will be significant problems in that respect with either alternative and that here the preferable solution is to approach the problem on the basis that the applicant may have a more likely ability to administer an estate which may have some money coming into it

and need an administrator, and also has established a significant cultural link between the deceased and the desirability of her being buried with other members of her family in Charleville. Accordingly I shall make an order in terms of paragraph 1 of the application.

What other relief do you seek?

MS RINAUDO-LEWIS: Your Honour, I wrote an order in relation to the Coroner who has to release the body pursuant to a section of the Coroner's Act. I'm unsure if your Honour's declaration as to the mother's right would be sufficient for the Coroner. It may be but I note that-----

HIS HONOUR: What other form of relief do you suggest in that context?

MS RINAUDO-LEWIS: Just an order - I've put that in my submissions, your Honour - an order that the Coroner release the body pursuant to the relevant section of the Coroner's Act which will allow the Coroner to release the body forthwith.

HIS HONOUR: Do you have anything to say about that?

MR McDOUGALL: I don't believe it's necessary but I don't oppose it.

HIS HONOUR: The Coroner's not been heard on it, has he?

MS RINAUDO-LEWIS: No, your Honour, the Coroner of course has had letters and he just wanted to wait to see what order the Court would make.

HIS HONOUR: I'm disinclined to make an order against him without him having been heard.

MS RINAUDO-LEWIS: Yes, that's fine, your Honour. I do believe that the declaration will suffice for the Coroner.

HIS HONOUR: Right.

MS RINAUDO-LEWIS: The only other-----

HIS HONOUR: If not, you might have to come back to Court with him as a respondent but I hope that doesn't happen.

MS RINAUDO-LEWIS: Yes, your Honour, I don't anticipate that happening, from the discussions I've been informed of with the Coroner.

HIS HONOUR: All right.

MS RINAUDO-LEWIS: And the only other order of course would be as to costs, your Honour.

...

HIS HONOUR: I'll make an order in terms of paragraph 1 of the application and no order as to costs.
