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Issues around the Deceased's body

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Issues around the Deceased's body

Legal issues around human remains

- Organ donation:
 - Human Tissue Act 2004
 - Conditions precedent under the will: see commentary in *WMS*
- Ecclesiastical faculties:
 - For burial: e.g. *Re St Peters* [1982] 1 W.L.R. 1283 (interment of ashes in Church, faculty refused)
 - Or exhumation: e.g. *Re Durrington Cemetery* [2001] Fam. 33 (family obtained faculty for exhumation and reburial of Deceased on religious grounds)
- Judicial Review e.g. *R(Plantagenet Alliance) v S.o.S. for Justice* [2014] EWHC 1662

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The general rule

“There is no right of ownership in a dead body. However, there is a duty at common law to arrange for its proper disposal”

Buchanan v Milton [1999] EWHC B9 (Fam) per Hale J

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Issues around the Deceased's body

A dubious rule...

- Origin hard to determine:
 - *Haynes' Case* (theft of a funeral shroud) - only establishes that dead people can't own property
 - *Dr Handyside's Case* (action to recover conjoined twin remains)
- What's the scope?
 - Preserved bodies and other examples of 'human skill': *Dobson v North Tyneside Health Authority [1997] 1 WLR 596* (brain preserved in paraffin during post-mortem)

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The general rule

- Person cannot control the disposition of their body: *Williams v Williams* (1882) 20 Ch 659
- Duty to dispose of the body falls on PRs: *Williams v Williams* (1882) 20 Ch 659
- Executor entitled to possession for the purpose of disposing before a grant : *Sharp v Lush* (1879) 10 Ch. 468
- Administrators need a grant to obtain an injunction for delivery of the body: *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596

Consequences of the general rule

- Dispute if often about who should administer the estate
- Many of the cases involve section 116 Senior Courts Act 1981
- Dispute often involves injunction (e.g. to prevent disposal of the body, or to prevent interference)
- Some cases are dealt with like trustee disputes: *Hartshorne v Gardner* [2008] 2 FLR 1681; *Fessi v Whitmore* [1999] 1 FLR 767 .
- Court will intervene to override the PRs plans in an appropriate case:
 - *Oldham MBC v Makin* [2017] EWHC 2543 (Ch) (Ian Brady case)
 - *In re K (A Child) (Disposal of Body: Court's Power to Authorise)* [2017] 4 W.L.R. 112 (parents failing to dispose of body)

Section 116(1) Senior Courts Act 1981

“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.”

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Buchanan v Milton [1999] 2 FLR 884

- Deceased was one of the “stolen children” of Aboriginal origin who had forcibly integrated into white society.
- Found his birth family during his life, and found the experience disturbing
- Died in RTA in 1998, intestate, survived by his infant daughter
- Intention was to cremate him
- Birth family objected on basis that the Aboriginal belief system was opposed to cremation, and applied for s.116 grant

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Buchanan v Milton [1999] 2 FLR 884

- Order refused on grounds that while there were arguably “special circumstances”, those circumstances did not make it “necessary or expedient” to displace the daughter
 - Birth Mother’s very strongly held beliefs were just one factor
 - Funeral arrangements had already been made.
 - Deceased had not embraced his Aboriginal background

Re JS (A Child) (Disposal of Body: Prospective Orders) [2017] 4 W.L.R. 1

- Terminally ill 14 year old girl (‘J’)
- Wanted to be cryogenically frozen in the hope a cure might be possible in the future.
- J (as a child) could not make a valid will
- Divorced parents
 - Mother supported
 - Father opposed
- Parents would have been equally entitled to administration: NCPR 1987, r.22(1)(c)

Re JS (A Child) (Disposal of Body: Prospective Orders) [2017] 4 W.L.R. 1

- Could be satisfied it could make a prospective order
- Drew a direct analogy to *Public Trustee v Cooper* applications, i.e. a 'blessing' of a particular course of action
- Family breakdown combined with child's wishes constituted "special circumstances" for the purposes of section 116 SCA 1981
- Mother was best placed to manage the situation
- Court also granted injunction against father preventing him from intervening

Oldham Metropolitan Borough Council v Makin [2017] EWHC 2543 (Ch) ('the Ian Brady case')

- Case concerned disposal of Ian Brady
- Executor faced difficulty owing to media reports about the disposal of Brady's body
 - 'Secret of Brady's Will', The Sun, 19 May 2017
- Local authority brought a claim to deal with the body

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‘[The musician] sees himself at a witches’ sabbath, in the midst of a hideous gathering of shades, sorcerers and monsters of every kind who have come together for his funeral. Strange sounds, groans, outbursts of laughter; distant shouts which seem to be answered by more shouts. The beloved melody appears once more, but has now lost its noble and shy character; it is now no more than a vulgar dance tune, trivial and grotesque: it is she who is coming to the sabbath ... Roar of delight at her arrival ... She joins the diabolical orgy ... The funeral knell tolls, burlesque parody of the Dies irae, the dance of the witches’ ...’

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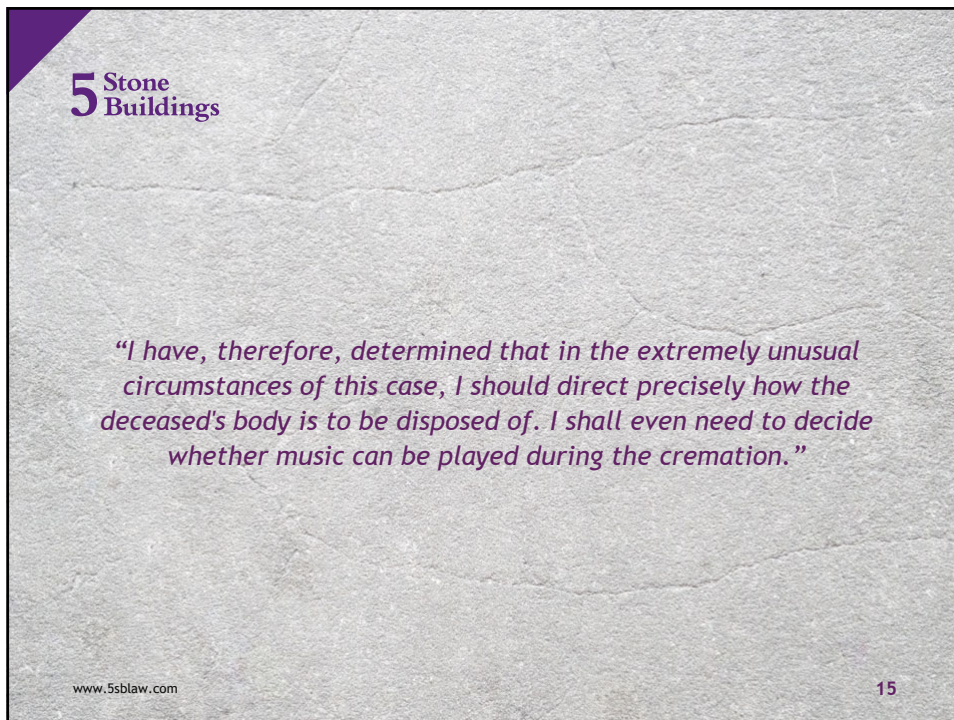
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Oldham Metropolitan Borough Council v Makin [2017] EWHC 2543 (Ch) ('the Ian Brady case')

- Court had inherent jurisdiction to direct disposal of the body
- Executor was not justified in being so secretive and it would be “dangerous and inappropriate” if he was allowed to carry out the disposal
- Court was willing to micro-manage disposal on the very unusual facts:
 - Cremated and scattered at sea

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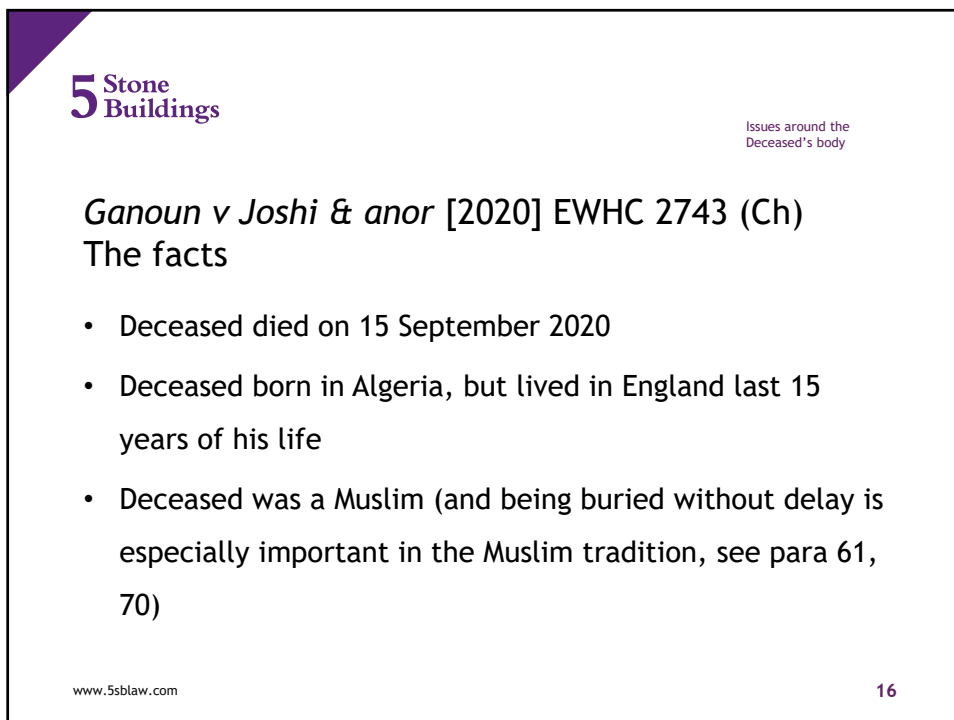


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“I have, therefore, determined that in the extremely unusual circumstances of this case, I should direct precisely how the deceased's body is to be disposed of. I shall even need to decide whether music can be played during the cremation.”

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Issues around the Deceased's body

Ganoun v Joshi & anor [2020] EWHC 2743 (Ch)
The facts

- Deceased died on 15 September 2020
- Deceased born in Algeria, but lived in England last 15 years of his life
- Deceased was a Muslim (and being buried without delay is especially important in the Muslim tradition, see para 61, 70)

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Ganoun v Joshi & anor [2020] EWHC 2743 (Ch)

The parties

- Barts NHS trust had possession of the Deceased's body
- Claimant was the Deceased's mother, and wanted body buried in Algeria
- First Respondent was the Deceased's spouse, and wanted the body buried in UK

Ganoun v Joshi & anor [2020] EWHC 2743 (Ch)

The issue

- Mother sought Injunction to stop spouse from disposing of body
- She was too late as wife had buried the Deceased already (on the advice of the Imam)
- Mother wanted an exhumation order and to repatriate the body to Algeria - for that purpose sought s.116 order
- Also sought declaration that Deceased had not been buried "*decently*"

Ganoun v Joshi & anor [2020] EWHC 2743 (Ch)

The declaration: proper burial


- Not part of any established legal test
- Rather, a factor in deciding who should dispose of the body

“The most important consideration is that the body be disposed of with all proper respect and decency and, if possible, without further delay.”

Ganoun v Joshi & anor [2020] EWHC 2743 (Ch)

The s.116 order

- S.116 required a single step rather than two steps
- Court did not think it necessary or expedient to appoint mother as administrator
 - Main reason was to pursue an exhumation application
 - Wasn't necessary for such an application




“the law in England gives that decision to a surviving spouse in priority to any other family member”

Ganoun at [75]

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“where there is a difference of opinion between a widow and other family members as to the way in which a person should be buried, it is the widow who, in the absence of other factors, would normally have the final say and who is entitled to override the wishes of other family members. ”

Ganoun at [67]

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**Thank you,
any questions?**

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