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Funeral disputes and dead bodies

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Introduction

- emotive topic: for the clients;
- quite fun for lawyers:
 - not really about the money, goes to court;
 - injunctions;
 - limited risk...

Can you own it?

While there is no property in a dead body, the law imposes a duty on various people to dispose properly of a body and such people have a right to possession and control of the body for that purpose; the primary duty is on the Deceased's personal representatives where known. See *Williams v Williams* (1882) 20 Ch D 659.

The right of the executor

Very much not determinative. Where there is a dispute the Court will determine it. See for example *Oldham Metropolitan Borough Council v Makin* [2018] Ch 543.

How will it determine it?

- s. 116 Senior Courts Act 1981

- the inherent jurisdiction of the High Court, as exercised by the Family Division

s. 116 jurisdiction

This allows the Court to appoint someone other than the person presumptively entitled as an administrator for a limited purpose, in this case for arranging the disposal of the Deceased's body where, in the statutory language, '*special circumstances*' make it '*necessary or expedient*' to do so. See for example, *Oldham Metropolitan Borough Council v Makin* at [71].

The inherent jurisdiction

- Really all the same factors, as you will see.
- I tend to make applications under both jurisdictions and explain that they are the same.
- In cases in which the body is held by a third party and it is at least possible that you might need to show them some evidence of a right to possess it, an order that a grant issue to you on your application is worth getting.

How far do they go?

- Although other views have been expressed, it is now clear that these jurisdictions extend both to determining not only who should have the right to dispose of a dead body but also how that should be done. If necessary, quite detailed instructions can be given by the court for the disposal of the body. See *Oldham Metropolitan Borough Council v Makin* at [78].

Will we win?

- Two questions – on an interim injunction and on return date. Take them backwards.
- On the substance, when determining such a dispute under the inherent jurisdiction, courts have found useful the non-exhaustive list of factors set out in *Hartshorne v Gardner* at [9] and [7]:
 - the Deceased's wishes;
 - the reasonable requirements and wishes of the family who are left to grieve;³
 - the location with which the Deceased was most closely connected;
 - that the body be disposed of with all proper respect and decency and if possible without further delay.

Further factors – the Deceased’s wishes

The Deceased's wishes are not binding as to the determination of any dispute but they are highly relevant to what should be done.

See *Williams v Williams* at 665 - cremated.

Anstey v Mundle at [45] '*particularly weighty factor*'; - **return to Jamaica**

Jakimavicuit v HM Coroner for Westminster [on the facts of that case, the] '*surest and strongest guide as to the approach that the court ought to take...*' .

Further factors – human rights

- Different courts have come to different conclusions on the role that human rights legislation has to play in this issue. In *Burrows v HM Coroner for Preston* [2008] EWHC 13874 the court held that under such legislation, the Deceased's wishes were capable of constituting special circumstances that could justify varying the order of priority for a grant under s. 116. By contrast, in *Ibuna v Arroyo* [2012] EWHC 4285, while accepting the Deceased's wishes' potential relevance, Peter Smith J could not see any application for human rights principles in such context. Both cases were considered in *Re JS* where it was said that the Deceased's wishes were '*relevant, perhaps highly so, but are not determinative and cannot bind third parties*'.

The end game

- What I often find is that once you have your injunction, the parties cool off. Most people don't want to gamble with the costs. They can then broker a deal.
- Practice points:
 - don't get an injunction against third parties;
 - do give notice and try to be reasonable asap;
 - ask the other side for an agreement not to dispose of body without reference to you.
 - If you have done all that and your client wants to roll the dice go get your order. Applications can be brought on the next day. It's the evidence that takes the time.

Limits to the jurisdiction

- not that many
- one of my cases was an Islamic charity, with actually no connection to the Deceased but acting behalf of her local Muslim community;
- **Re JS (Disposal of Body) [2016] EWHC 2859** is right there at the limits: pre-death!