

State Reporting Bureau



Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DOUGLAS J

No 1094 of 2012

KONTVAINIS-HAY

Applicant

and

HUTTON

Respondent

BRISBANE

..DATE 12/11/2012

ORDER

REVISED

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application that the applicant be entitled to the possession of the body of her late son for cremation. He died by his own hand on about the 14th of October this year and did not leave a will.

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The applicant is the person normally entitled, on the general presumptions of the law, to possession of the body, and the distressing circumstances of many of these sorts of cases support the fact that that general rule should normally be applied, in my view.

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Here, the contest is between the mother and the lady who was living in a de facto relationship with the deceased for a period of about eight months before his death. She had come to know him through online communications for some period before then. They met earlier this year and shortly afterwards commenced a de facto relationship. She also says that they became engaged in July this year.

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There seems to have been some dissension between the applicant and the second respondent during the course of her relationship with the deceased, evidenced by exchanges on Facebook which I was told were volatile on both sides.

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The mother's application is supported by her husband, who was the deceased's stepfather for all but two years of his life. The deceased died aged 41 and the stepfather married the mother two years after the deceased was born, his natural father and mother having split up.

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The mother's application is also supported by the deceased's brother and half brother. They all live in New Zealand where the deceased lived until about 10 years ago. He has been in Australia since and there is evidence that there was regular communication between him and his family members, but principally, it seems, by electronic communication rather than by visits. I was told there were about three visits during that period.

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The second respondent gave evidence that she and the deceased were in a de facto relationship, as I have said, and that it was a loving one over that period and that they had resolved to marry. There is some questioning of that in affidavits relied on by the applicant but nothing that really is able to comment directly on it. Much of it is speculation or hearsay and I am willing to operate on the basis that there was a genuine relationship between the two.

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What seems to me to be significant here is not only that the general rule of the law, that the person entitled to take out Letters of Administration is usually responsible for burial of the body of the deceased, is significant, but also, it seems to me, to be significant that there has been a lengthy relationship between the deceased and his family which deserves recognition.

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The more recent relationship between the deceased and the second respondent also deserves recognition, but I should point out that it seems to have been, to some extent, a volatile relationship, as evidenced by the making of a temporary protection order shortly before the deceased died, one where, however, his submission that the order be of a nature which allowed him to continue to have contact with the second respondent was accepted and was supported by the second respondent.

Essentially, it seems to me that the deceased was a man who came from a family which appears to have regarded him well and closely, and the prima facie assumption of the law is that in this case his mother would usually be entitled to Letters of Administration and, accordingly, be responsible for burial of the body.

The Coroner considered these matters, doubting his jurisdiction to determine them, and said on 24 October 2012 in a ruling he made that he did not believe he had power to make an order resolving the dispute. He indicated, however, that he would release the body to the second respondent unless an application for an order was made to this Court.

It seems to me that, for the reasons I have outlined, the better solution in this case, as in most cases of this nature, is that the person entitled to Letters of Administration should be entitled to possession of the body.

The brief period of the de facto relationship was not sufficient to give the second respondent rights that would have been available to her as a de facto spouse had the relationship been in existence for two years or more.

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In those circumstances, it seems to me that the applicant, therefore, should be entitled to the order she seeks, and I shall make such an order.

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Do you have a draft?

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HIS HONOUR: In this matter, it does seem to me to be a case where the normal rules should apply, and that costs should follow the event.

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Accordingly, I shall make an order in terms of paragraphs 1 and 2 of the draft.

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I have initialled it and I will place it on the file.

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