

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Campbell's (Margaret) Application [2013] NIQB 32

IN THE MATTER OF AN APPLICATION BY MARGARET CAMPBELL FOR  
LEAVE TO APPLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF DECISIONS OF DERRY CITY COUNCIL MADE ON  
22 JULY 2010 AND/OR COMMUNICATED TO THE APPLICANT'S  
SOLICITORS ON 17 DECEMBER 2010

TREACY J

**Introduction**

1. This is a sad and unusual case. The applicant is Margaret Campbell, the wife of David Campbell (deceased). She challenges a decision by Derry City Council ("the Council") whereby it granted a right of burial to Kevin Campbell the father of the deceased, when it was aware that the applicant was the deceased's next of kin. The applicant also challenges a decision of the Council to grant a permit to erect a headstone 'despite a permit having been granted to the applicant ....'.

2. So far as the first ground of challenge is concerned I observe that the right of burial has now been fully and irrevocably exercised.

**Background**

3. The applicant wishes to be buried with her deceased husband upon her own death and for her son to also be afforded the opportunity to be interred in the same plot.

4. Further, the applicant wishes the headstone erected by the deceased's parents to either be removed and replaced with a headstone selected by the applicant, with

her choice of inscription, or that the headstone presently in situ be amended to reflect that the deceased was also a much loved husband. The inscription on the headstone presently reads as follows:

“CAMPBELL  
Treasured Memories of David Kevin  
A much loved son and brother  
Died 26th February 2010 aged 31  
Always in our thoughts”

5. The applicant’s case is that the Council acted *ultra vires* by granting the right of burial of her husband to the deceased’s father and granting a permit to the deceased’s father to erect a headstone, despite such a grant already being issued to the applicant.

### **Order 53 Statement**

6. The relief sought by the applicant is as follows:

- (a) An order of certiorari to quash a decision of Derry City Council made on the 22nd day of July 2010 whereby the grant of a right of burial was issued to Kevin Campbell, father of the deceased, when the Council were aware that the Applicant was the deceased’s next-of-kin and the Applicant did not consent to the Council so doing;
- (b) An order of certiorari to quash a decision of Derry City Council (made on a date unknown and communicated to the Applicant’s solicitors by letter dated 17 December 2010) to grant a permit to erect a headstone despite a permit having been granted to the Applicant on 23 March 2010.
- (c) A declaration that the said decisions are unlawful, *ultra vires* and of no force or effect.
- (d) An order of mandamus requiring Derry City Council to remove the headstone erected by the deceased’s parents.

7. The grounds upon which relief is sought are as follows:

- “(a) The City Council erred in law by granting the deceased’s father right of burial of the remains of the deceased.

The applicant asserts that her right to be granted the right to bury the remains of the deceased is enshrined in common law.

- (b) The City Council acted in breach of the duty to act in a procedurally fair manner and did so, in particular, when acting in breach of a promise made that the issue of ownership of the grave would not be issued to the deceased's father until the dispute between the Applicant and the deceased's father was resolved, thereby acting contrary to a legitimate expectation created by the City Council.
- (c) The City Council acted under a misapprehension as to the true facts, specifically that the Applicant was the next-of-kin and not the deceased's father.
- (d) The City Council acted contrary to article 11 of The Burial Grounds Regulations (Northern Ireland) 1992, whereby they caused or permitted a headstone to be erected when they had been put on notice of the applicant's objection to this course of action. The City Council acted contrary to article 11 of the said regulations in permitting the headstone to be erected without the withdrawal of the applicant's objection."

### **Statutory Framework**

8. Section 178 of the Public Health Ireland Act 1878 ("the 1878 Act") provides:

"any burial board (now in this instance DCC), under such restrictions and conditions as they think proper, may sell the exclusive right of burial either in perpetuity or for a limited period, in such parts of any burial ground provided by such Board as may be appropriated to that purpose, and also the right of constructing any Chapel, vault, or place of burial, with the exclusive right of burial therein, in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone tablet or monumental inscription in such burial ground, subject to the provisions herein before contained".

9. Pursuant to Section 181 of the same Act (as amended) the Department of Environment for Northern Ireland ("the DOE") is empowered to make Regulations

and it did so pursuant to the Burial Grounds (Northern Ireland) Regulations 1992 (“the 1992 Regulations”).

“Maintenance of graves etc, removal of memorial, levelling, etc

11.(1) A council may put and keep in order any grave or vault or any memorial in a burial ground;

(2) Subject to Schedule 2, a council may carry out the following works-

- (a) remove from the burial ground and destroy -
  - (i) any memorial on a grave of which all material particulars are illegible or which is dilapidated by reason of long neglect;
  - (ii) any kerbs, cornerstones, fences, railings, chains or wall edges, surrounding a grave (whether containing any commemorative inscription or not) together with the foundation slabs of such kerbs, cornerstones, fences, railings, chains or wall edges;
  - (iii) except as provided in paragraph (3) any memorial, not falling within paragraph (i) or (ii), on a grave;
  - (iv) any surface fittings not falling within paragraph (i), (ii) or (iii) or any flowering or other plants, on a grave;
- (b) alter the position of a memorial on a grave or re-erect or place it at another place in the burial ground or at some other place designated in writing by the council for that purpose;
- (c) level the surface of any grave to the level of the adjoining ground;
- (d) alter the position of any kerbs, cornerstones, fences, railings, chains, wall edges or other

material surrounding a grave, vault, memorial or grave space;

- (e) re-erect or place another place in the burial ground a memorial other than one on a grave or vault.”

## Discussion

10. The applicant submitted that the Council erred in law by granting the deceased’s father right of burial of the remains of the deceased. The deceased’s father was not the next of kin and as such should not have been granted right of burial. The applicant argued that her right to be granted the right to bury the remains of the deceased is enshrined in common law as per. Clerk & Lindell on Torts (20<sup>th</sup> Ed), at para 17-41 which states:

“It should be noted that, even if there is no property in a corpse, personal representatives or other persons charged with the duty of burying a body have certain rights to its custody and possession in the interim”. (p1134)

11. The applicant further acknowledged that there is no case law specifically similar to the facts of the present case but referred the Court to Smith v Tamworth City Council & Ors (1997) 41 NSWLR 680, (New South Wales Supreme Court) in which Justice Young stated, after reviewing case law in the United States of America and in England and Wales that:

“while there is no right of private property in a dead body in the ordinary sense of the word, it is regarded as property so far as to entitle the next of kin to legal protection from unnecessary disturbance and violation or invasion of its place of burial.”

12. The applicant submitted that the Council acted in breach of the duty to act in a procedurally fair manner and did so, in particular, when acting in breach of a promise made that the issue of ownership of the grave would not be issued to the deceased’s father until the dispute between the applicant and the deceased’s father was resolved, thereby acting contrary to a legitimate expectation created by the Council. It was further asserted the Council acted under a misapprehension as to the true facts.

13. It was submitted the Council acted contrary to Art 11 of The Burial Grounds Regulations (NI) 1992 in permitting a headstone to be erected when they had been put on notice of the applicant’s objection to this course of action. The Council acted

contrary to Art 11 of the said regulations in permitting the headstone to be erected without the withdrawal of the applicant's objection.

14. The applicant submitted that this application for leave discloses an arguable case as described in Re Morrow and Campbell's Application [2001] NI 261 (QBD) in which it states at para...

"On an application for leave to apply for judicial review an applicant faces a modest hurdle. He need only raise an arguable case; or, as it is sometimes put, a case which is worthy of further investigation."

15. The respondent is impugned by the applicant for failing to follow Schedule 2 of the 1992 Regulations. I agree with the respondent that Schedule 2 relates to the removal of memorials and levelling and is of no assistance to the applicant as this has not occurred in this instance. Reg11(2) empowers a Council to remove from the burial ground and destroy various items including memorials and ancillary items associated with a graveyard such as fences and railings and so forth. As the respondent contended this is plainly not a power being exercised by the respondent in this case. The respondent acknowledged that *if* it were exercising such a power that it would undoubtedly have to respond to an objection in writing from a relative of the person commemorated on the memorial pursuant to Schedule 2, para 11 but this is not such a situation. Accordingly, I agree this aspect of the challenge does not pass the test for leave.

16. I agree with the respondent's contention that Section 178 of the 1878 Act does not compel the respondent council to adjudicate in a hierarchy between competing interests of the family of the person to be interred. A plot of burial and a right can be contracted lawfully with any person. The legitimate expectation contended for by the applicant must be seen in that context. If some hearing was granted its outcome would have been to confirm the existence of the power to enter into a contract with David Campbell and that the applicant's claim as personal representative to bury the remains of her husband had ceased, that having been effected. There was no entitlement or benefit which was withdrawn as her contractual claim was a private law matter, upon which the applicant might institute a breach of contract claim.

17. The respondent referred the Court to Dobson v North Tyneside Health Authority [1996] 4 All ER 474 which affirmed the proposition of law that there is no property in a dead body and the rights of the personal representative of the deceased is the obligation to bury the body and such personal representatives are entitled to be recompensed from the Estate for carrying out this duty. The personal representatives have the right to custody and possession until the body is buried whereupon it plainly ceases. Dobson restated the classical position set out in Williams v Williams [1882] 20 ChD 659 [affirmed by the Court of Appeal in Northern Ireland in Stewart v Moore [1997] NI 218]. The result is the applicant, while she would have been in the proper position to become the personal

representative as the wife of the deceased this entitlement, if ever exercised, would only have allowed her possession of the body until interment. Interment leads to a complete cesser of that right and her duties pertaining to the remains. She would have had a claim on the estate to be recompensed.

18. The respondent formed a contract with the deceased's father to assign him a burial plot pursuant to s178 of the 1878 Act. The father of the deceased acted through his agents, the funeral undertakers, and having formed such a contract the consequential notices and sealing were the administrative outworking of the contractual relationship formed at the time between the death of the deceased on 24 February 2010 and his funeral on 2 March 2010. The respondent correctly submitted it was entitled to so contract and that:

- (a) The applicant had no locus to challenge a private contract formed between the respondent and the deceased's father;
- (b) The respondent acted entirely lawfully pursuant to s178 of the 1878 Act;
- (c) There is no infraction of the 1992 Regulations; and
- (d) The right to erect a headstone is incidental to the grant of a right of burial and follows from it. The respondent, in permitting the deceased's father to do so was merely honouring the earlier contractual obligation it had entered into.

### **Conclusion**

19. Accordingly, for these reasons the application must be dismissed.