SUPREME COURT OF QUEENSLAND

CITATION:	*Johnson v George* [2018] QSC 140
PARTIES:	**TREVOR BAINES JOHNSON** (applicant) v **CHRISTINE GEORGE** (respondent)
FILE NO/S:	SC No 451 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	14 June 2018
DELIVERED AT:	Townsville
HEARING DATE:	12 June 2018
JUDGE:	North J
ORDERS:	**1. Pursuant to section 6 of the *Succession Act* 1981 (Qld);** **a) The body of Arthur Charles Johnson (the deceased) be released to the Applicant, Trevor Baines Johnson, for the purpose of a funeral at Townsville and subsequent burial at Charters Towers, Queensland; and** **b) The Applicant be responsible for the arrangements for the funeral and burial but it is directed that the body of the deceased be present at the funeral.** **2. The Applicant be entitled to withdraw from bank account number 41624998 held in the name of Arthur Charles Johnson or "A C Johnson" with the Queensland Country Credit Union the sum of $8,000.00 for the purpose of paying the funeral expenses of Arthur Charles Johnson and that the Applicant repay to the said account any part of the sum of $8,000.00 which is not genuinely incurred in relation to those funeral expenses.** **3. The Applicant be entitled to withdraw from bank account number 41624998 held in the name of Arthur Charles Johnson or "A C Johnson" with the Queensland Country Credit Union the sum of $304.70 to reimburse himself for filing fees paid to the Supreme Court of Queensland on account of filing fees in this proceeding.**

4. Otherwise, there be no order as to costs.

CATCHWORDS:	SUCCESSION – PERSONAL REPRESENTATIVES – RIGHTS, POWERS AND DUTIES – DISPOSAL OF BODY – burial rights – dispute between siblings – significance of Aboriginal cultural, spiritual and religious reliefs – ascertaining relevant circumstances ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES – OTHER MATTERS – burial rights – significance of Aboriginal cultural, spiritual and religious reliefs
LEGISLATION:	*Succession Act* 1981 (Qld), s 6 *Uniform Civil Procedure Rules* 1999 (Qld), r 610
CASES:	*Darcy v Duckett* [2016] NSWSC 1756, applied *Doherty v Doherty & Anor* [2006] QSC 257, cited *Frith v Schubert & Anor* [2010] QSC 444, cited *Jones v Dodd* [1999] SASC 125, cited *Keller v Keller* (2007) 15 VR 667, cited *Laing v Laing* [2014] QSC 194, cited *Roma v Ketchup* [2009] QSC 442, cited *South Australia v Smith* [2014] SASC 64, applied *Tufala v Marsden & Anor* [2011] QSC 222, cited *Ugle v Bowra & O'Dea & Anor* [2007] WASC 82, cited
COUNSEL:	M Jones for the applicant, appearing pro bono The respondent appeared in person
SOLICITORS:	Direct access brief for the applicant

Introduction

[1] **NORTH J:** The applicant seeks orders pursuant to s 6 of the *Succession Act* 1981 (Qld) that the body of his father[1] be released to him for the purposes of funeral and subsequent burial at Charters Towers, Queensland. The applicant also seeks an order entitling him to withdraw a sum of $8,000.00 from the deceased's bank account to pay the funeral expenses.

[2] According to the affidavit and other evidence[2] (no death certificate was exhibited) the deceased died on 16 May 2018 at the Townsville General Hospital and his body is currently held at the Townsville Hospital Morgue. He was an Aboriginal man and is survived by nine children. He did not have a spouse at the time of his death and died intestate. The value of the estate is approximately $10,000.00. The applicant is his son. The application is opposed by some of the applicant's siblings on the basis of cultural reasons who seek to arrange the funeral and have the burial at Townsville.

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[1] I am aware that in Aboriginal culture as a form of respect it is traditional not to name a deceased person by his or her name. Hence my use of the word 'deceased'. Regrettably the formal orders must identify the deceased.

[2] Affidavit TB Johnson filed 4 June 2018 at [2]-[3]. See also Exhibit 3 and Exhibit 4 which confirm the date of death at 16 May.

[3] The respondent is a sister of the applicant, and I infer from the material, the eldest of the siblings. In his affidavit[3] the applicant named and listed the deceased's children:

(a) Christine;
(b) A male who is deceased;
(c) Gail;
(d) A male who is deceased;
(e) Lenny;
(f) Lyle;
(g) Brian;
(h) Michael;
(i) The applicant;
(j) Shirley; and
(k) Yasmin.

In his affidavit[4] the applicant said that of the nine surviving children one (his brother Michael) has an acquired brain injury and appears to be incapable of managing his affairs, three (the applicant, his sister Yasmin, and his sister Gail) support the burial in Charters Towers, and four (his sister Christine, his brother Lyle, his brother Brian, and his sister Shirley) oppose the burial in Charters Towers and wished the burial to take place "in country" at Townsville. At the time of swearing his affidavit the applicant was unsure of the wishes of his brother Lenny. On the day of the hearing a bundle of papers were emailed to the registry by him, they comprise Exhibit 3. They make it reasonably clear that he supports the position taken by the respondent Christine though, as a man, he says men should have the carriage of burial arrangements of a deceased aboriginal man.[5]

[4] The applicant in his affidavit states that his father was an elder of the Wulgurukaba People. The Wulgurukaba People are native to the Magnetic Island region, and the applicant in his affidavit states that his father was involved in a native title claim regarding Magnetic Island. Despite this, the applicant states that his father did not seem interested in cultural issues regarding burial at Magnetic Island. In his affidavit the applicant states that his father spent significant time in Charters Towers, where he both worked and lived. The applicant states that seven of the deceased's children (including himself) were born in Charters Towers and that his father had very strong friendships with a number of people in Charters Towers from his time spent working there. One of the deceased's sons is buried in the Charters Towers Cemetery and his daughter Gail also lives there.

[5] The determination of the application carries with it some urgency, the deceased having passed away on 16 May 2018.

The legal principles

[6] It is well settled that the court derives jurisdiction to determine burial disputes from s 6 of the *Succession Act* 1981 (Qld),[6] which relevantly provides:

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[3] Affidavit TB Johnson filed 4 June 2018 at [11].
[4] Ibid.
[5] At the hearing the applicant filed by leave an affidavit sworn by Yasmin on 8 June 2018. An annexure was an email from Shirley (document 10) in which she says she had no qualms about a burial in Charters Towers.
[6] *Doherty v Doherty & Anor* [2006] QSC 257 at [15] ('*Doherty*').

> (1) "Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect."

[7] By way of a general statement, and subject to the cases discussed below,[7] in situations where a deceased executed a will, the responsibility of arranging the funeral and burial of the deceased falls to the executor named in the will.[8] Where a deceased dies intestate, as is the case here, the common law position is that the person entitled to take letters of administration in priority is responsible for the arrangement of the funeral and burial.[9]

[8] Relevantly, in the case of an intestacy, rule 610 of the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR') provides that:

> (1) "The descending order of priority of persons to whom the court **may** grant letters of administration on intestacy is as follows—
> (a) the deceased's surviving spouse;
> **(b) the deceased's children;**
> (c) the deceased's grandchildren or great-grandchildren;
> (d) the deceased's parent or parents;
> (e) the deceased's brothers and sisters;
> (f) the children of deceased brothers and sisters of the deceased;
> (g) the deceased's grandparent or grandparents;
> (h) the deceased's uncles and aunts;
> (i) the deceased's first cousins;
> (j) anyone else the court may appoint.
> …
> (3) The court may grant letters of administration to any person, in priority to any person mentioned in subrule (1).
> …
> (7) The applicant need not establish priority for a person equal to or lower than the applicant in the order of priority but the existence or nonexistence and beneficial interest of any spouse or a person claiming to be a spouse must be sworn."
>
> [Emphasis added]

[9] The persons entitled as a matter of priority to take out letters of administration in this case are the deceased's nine children equally. However a dispute has arisen within this class of persons, requiring the court to adjudicate as to the proper arrangements for and location of burial.

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[7] *Darcy v Duckett* [2016] NSWSC 1756 ('*Darcy'*); *South Australia v Smith* [2014] SASC 64 ('*SA v Smith*').
[8] *Laing v Laing* [2014] QSC 194 at [6]; *SA v Smith* at [22].
[9] *Tufala v Marsden & Anor* [2011] QSC 222 at [3]; *Roma v Ketchup* [2009] QSC 442 at [10].

[10] As noted above at paragraph [7], it has been a longstanding common law principle that where a person dies intestate, the person entitled to take out letters of administration is the proper person to take responsibility for the burial of the deceased. However in a given case there may be important cultural considerations which may be taken into account.[10]

[11] In *Darcy v Duckett* Campbell J determined a similar burial dispute which required a consideration of Aboriginal cultural, spiritual and religious beliefs, and succinctly summarised the relevant legal principles as follows:[11]

> "The applicable common law principles in this area of discourse were stated by Young J (as his Honour then was) in *Smith v Tamworth City Council* (1997) 41 NSWLR 680. So far as they are relevant to this case, his Honour summarised the relevant principles in the following way (at 693-4):
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> 1. "If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased's body, the person named as executor has the right to do so.
> 2. Apart from appointing an executor who will have the right stated in proposition 1, and apart from any applicable statute dealing with the disposal of parts of a body, a person has no right to dictate what will happen to his or her body.
> 3. A person with the privilege of choosing how to bury a body is expected to consult with other stakeholders, but is not legally bound to do so.
> 4. Where no executor is named, the person with the highest right to take out administration will have the same privilege as the executor in proposition 1.
> 5. The right of the surviving spouse or de facto spouse will be preferred to the right of children.
> 6. **Where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue."**
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> It has, however, been recognised that these principles are not fixed rules which deal exhaustively with the subject. In *South Australia v Smith*, Nicholson J, after a review of the authorities, particularly in South Australia, concluded (at 255 [34]):
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> > "The authorities decided in this State, considered to this point, suggest that no standard approach or hard and fast rule can be formulated and applied when determining a burial dispute of this nature. **The proper approach, ultimately, requires a balancing of common law principles and practical considerations, as well as attention to any cultural, spiritual and religious factors that are of importance. Further, it is the unique factual context of the dispute itself which will determine the weight which particular factors should be accorded**. This was the approach applied, more

[10] *Doherty* at [20]-[21].
[11] *Darcy* at [6]-[7]. See also *Jones v Dodd* [1999] SASC 125 at [51].

> recently, by this court in Minister for Families and Communities v Brown. In that matter, Gray J considered not only which party had a stronger claim under common law, but also the 'lifestyle, relationship and practices of the deceased', in reaching a conclusion as to burial rights."

[Emphasis added]

[12] In *South Australia v Smith* Nicholson J also determined a burial dispute which involved the consideration of Aboriginal cultural, spiritual and religious beliefs. Nicholson J questioned the common law approach as a default position[12] and considered that it was problematic where it was highly unlikely that a grant of letters of administration would be sought.[13] Nicholson J identified four major considerations for the court in the resolution of the dispute before him:[14]

(a) Who might be entitled to obtain letters of administration in the event that such an application were to be made;
(b) The Aboriginal cultural matters and concerns raised in the evidence;
(c) The deceased's own wishes; and
(d) The wishes and sensitivities of the living close relatives.

[13] The flexible balancing of common law principles with practical considerations in the particular case, while taking into account indigenous cultural and spiritual factors of importance suggested by Campbell J in *Darcy,* is appropriate in this case. To the list of considerations suggested by Nicholson J in *SA v Smith* I would add the need for the funeral and burial to be held in a timely way, and the costs and logistical difficulties attendant upon any competing ceremonies and burials.

[14] For practical reasons associated with the need I have identified that a funeral and burial be held in a timely way consistent with the flexible approach that I have adopted results in the need to avoid the hearing of an application being bogged down or complicated by an over adversarial approach to the consideration of the matters at hand. In *Ugle v Bowra & O'Dea & Anor* [2007] WASC 82 at [1] (cited with approval in *Frith v Schubert & Anor* [2010] QSC 444) McKechnie J said:

> "It is in the nature of these applications that there is often only a short time for parties to prepare their case and materials and to respond to the other side's case. This may lead to some possibility of injustice. Justice is relative not absolute and there has to be a balance between the need for prompt expedition of a matter that involves grief and loss to many people, together with the need to secure the burial of a person reasonably promptly, and the need for a full exploration of disputed matters. In this case, given much time, many issues could be ventilated and explored, but time is one thing that is simply not available. Pressures of time, stress and pain add to an already emotional situation where there are no winners and losers, only deeply held and legitimate feelings that are exacerbated by uncertainty."

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[12] Mentioned above at paragraph [7].
[13] *SA v Smith* at [23].
[14] Ibid at [46]-[47], [55], [61] and [65].

[15] In *Keller v Keller* (2007) 15 VR 667 at [9] (also cited with approval in *Frith v Schubert & Anor* [2010] QSC 444) Hargrave J said:

> "The authorities establish that the court does not, in an application such as this, embark upon a lengthy adversarial hearing to resolve the various claims and counter claims. This would delay the decision for an unacceptable period while the body remained undisposed of. Accordingly, cross-examination will usually be inappropriate."

[16] In this matter "the dispute was in substance one between competing claimants who wish to be given possession and control of the body of the deceased, to arrange for his funeral and burial. There has been no debate about the jurisdiction of the court to determine such a dispute".[15]

[17] At the hearing the applicant was represented by counsel who appeared pro bono and on a direct access brief from the applicant. The respondent, Christine George, appeared representing herself. Mr Brian Johnson also attended court, he was granted leave to sit at the bar table and participated in the hearing enjoying the same rights of audience as if he were a party joined in the application. There was no appearance by any other sibling but an affidavit of Yasmin Johnson was read before me and during the hearing, as I have said, an email with a bundle of documents from Leonard Johnson was admitted into evidence.[16] Gail Johnson did not appear but an affidavit sworn by her was read. Affidavits of service of the application or, strictly speaking notification, were read. I am satisfied that all interested siblings of the deceased (save for Michael) had notification of the hearing and the applicant's affidavit. Accordingly at the hearing I made an order pursuant to rule 117 of the UCPR that service be taken to have been made upon the remaining siblings on 6 June 2018.

Who might be entitled to obtain letters of administration?

[18] With the exception of Michael any or all of the other surviving children of the deceased have standing to apply for and would be entitled to obtain an order granting letters of administration in the circumstances that apply. But it is unlikely that letters of administration will issue. To date there has been no application for letters of administration. It is unlikely that an application will be made having regard to the size of the estate and particularly to the circumstance that the costs of any funeral and burial, whosever wish may prevail, will exhaust the only remaining asset of the estate, the proceeds of the bank account that has been identified.

[19] For this reason I do not regard this matter as significant. There is a deep divide between the children of the deceased and the resolution of the application is not assisted in circumstances where all who are interested have equal standing and are so divided.

Aboriginal cultural considerations

[20] The applicant says that the responsibility of arranging the funeral and burial of an Aboriginal man is 'men's business', that women are not allowed to view the body,

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[15] See *Frith v Schubert & Anor* [2010] QSC 444 per Peter Lyons J at [46]. See further his Honour's observations upon the relevant cases at paras [47]-[57].
[16] Exhibit 3.

but the whole family may attend the funeral. This evidence was based on his experience in the Northern Territory and Western Australia as opposed to Queensland.

[21] There is support for that evidence from Gail,[17] from Leonard's statutory declaration[18] and from Yasmin,[19] and was not challenged before me. But this aspect is not of itself decisive when evidence shows a difference of position between the brothers.

[22] Further there is the evidence of the deceased's historical connection with Magnetic Island and the connection the Wulgurukaba People have with Townsville. It is this factor that, I infer, leads the respondent and those that agree with her to favour a funeral and burial at Townsville, "in country".

The deceased's own wishes

[23] The applicant swears that he and a number of his siblings were born in Charters Towers and that after his parents separated in 1977 his father stayed in Charters Towers. It appears that he continued to live there for many years. Shortly before his death the deceased said that his wish was to be buried in Charters Towers.[20] This evidence was not challenged before me.

The wishes and sensitivities of living close relatives

[24] The preferred position of the applicant, Trevor, is for a funeral and subsequent burial at Charters Towers. The location of the funeral and burial is, he says, consistent with his father's wish, is affordable according to the quotes he has obtained from a funeral business in Townsville, and consistent with his father's connections with Charters Towers. He desires that the arrangements be under his control. This, he submits, is consistent with cultural considerations that men make arrangements for the burial of Aboriginal men and the confidence he said his father reposed in him by appointing him his Enduring Power of Attorney. Trevor's position is substantially supported by Gail, though she favours that a memorial service be held in Townsville at some time but that not necessarily should the body be at that service. Yasmin strongly favours that a funeral service be held in Townsville followed by a burial in Charters Towers, the latter consistent with her father's wishes, otherwise she supports Trevor's application. Christine, Brian and Leonard oppose Trevor having control of matters. In light of what they maintained was their father's strong cultural connection as a Wulgurukaba man with Magnetic Island and Townsville they favour a funeral and burial at Townsville.

[25] I have no doubt that the divergent wishes are strongly and honestly held by all concerned. But it is apparent, for a variety of reasons, relations are particularly strained between Trevor and his sister Christine and brother Brian. At the hearing Brian made his opinion of Trevor plain in a sustained and pointed address from the bar table. The basis for his opinion was not proven or supported by admissible evidence however. Prudently Mr Jones of counsel, for Trevor, did not object to Brian's comments made from the bar table without notice. Rather than responding

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[17] See affidavit GP Johnson filed 7 June 2018 at [28].
[18] See Exhibit 3.
[19] Affidavit YR Johnson filed by leave 12 June 2018 at [16].
[20] See affidavit TB Johnson filed 4 June 2018 at [40]; Affidavit GP Johnson filed 7 June 2018 at [18].

and turning the hearing into a catalogue of competing allegations about matters of character and family history Mr Jones was content to rely upon the admissible evidence directed to the issues I have identified from the filed affidavits.

A timely burial, the costs and logistical difficulties

[26] Trevor, Yasmin and others have taken it upon themselves to make enquiries of funeral directors in Townsville and to obtain quotes for services and burial at either Townsville or Charters Towers. The balance of the evidence suggests that a funeral service could be conducted in either Townsville or at Charters Towers followed by an interment and burial at either Townsville or Charters Towers within the budgets suggested by Trevor in his application and affidavit, and that there are sufficient funds in the deceased's bank account to meet the costs of any combination of the venue for a funeral and subsequent burial. I might mention that in the material there is a suggestion from Trevor that he has a fear that the decomposition of the body of his father might make a funeral in Townsville followed by an interment in Charters Towers unpleasant because of smell. While that may be a concern of his there is no evidence before me that persuades me that this is a likelihood.

Discussion

[27] Aboriginal cultural considerations relating to the funeral and burial of an Aboriginal man suggest that, whatever order is made, one of the sons of the deceased should have the carriage and control of the arrangements. This is acknowledged by Yasmin in her affidavit and I did not understand Christine to contest to the contrary at the hearing. There is evidence, which I accept, that late in his life the deceased reposed a degree of trust and confidence in Trevor.[21] The deceased appointed Trevor as his attorney under an Enduring Power of Attorney and asked Trevor to make arrangements for his funeral and pointedly requested that he be buried at Charters Towers. Trevor has demonstrated responsibility in seeking legal advice and seeking the assistance of the Court. This combination of circumstances, notwithstanding the strong objections of Brian, Christine and Leonard, I consider favours an order appointing Trevor as the person responsible for making arrangements for and seeing to the funeral and burial of the deceased.

[28] With respect to the issue of the place of burial the wishes of the deceased may be noted but the cases suggest that the wishes of a deceased are not decisive, and the deceased person should not be placed in a position where he or she could dictate matters to a person lawfully responsible for making arrangements. Nevertheless, in this case the deceased's wishes, as I find them to be, deserve some respect. A burial at Charters Towers is not demonstrated to be expensive nor logistically inconvenient. It is consistent with the wishes of the applicant and his sisters Gail and Yasmin. The deceased had a connection with Charters Towers for many years and one of his sons is buried there. In the circumstances the factual context of the dispute concerning burial suggests that the desires of the deceased, Trevor, Gail and Yasmin should be given affect to.

[29] Slightly different considerations apply concerning the disputed issue as to whether there should be a funeral service in Townsville. The historical and cultural connection the deceased had with Townsville and Magnetic Island as a

[21] As much is apparent from the affidavit of TB Johnson which is supported materially by the affidavit evidence of Yasmin and Gail. See also the affidavit of Barbara-Anne Gate filed by leave on 12 June 2018.

Wulgurukaba man suggests that the holding of a funeral service in Townsville would be consistent with the acknowledgment of the cultural connection the deceased had "in country" and the legitimate concerns that a majority of the children have, consistent with the expressed preference of Gail, Yasmin, Christine, Brian and Leonard, that a funeral or memorial service be conducted in Townsville. The evidence suggests that there is sufficient funds in the deceased bank account to pay for a funeral service in Townsville and a subsequent interment and burial in Charters Towers. The funeral service should be conducted consistent with the practices of Wulgurukaba men as directed by the applicant. On the evidence that I accept I see no reason why the applicant should not be directed that the deceased body be present at the funeral service and that it not be buried or interred prior to the holding of that service.

[30] My conclusion plainly will upset many of the family but as Doyle CJ in *Dodd v Jones*[22] said:

> "Sadly, the problem before me is really insoluble in one sense. It is impossible in any realistic sense to weigh the competing claims and arrive at what one would truly call a legal judgment. I understand and respect the wishes and beliefs of the plaintiff and of the defendant. There is no solution or compromise available to me that will satisfy each side. I can only make a decision and indicate my regret that it will cause pain to the unsuccessful party."

Conclusion

[31] At the hearing no person sought an order for costs in his or her favour save that the applicant sought reimbursement for some filing fees.

[32] The orders that I make therefore in light of my findings upon the evidence and these reasons are:

1. Pursuant to section 6 of the *Succession Act* 1981 (Qld);
   a) The body of Arthur Charles Johnson (the deceased) be released to the Applicant, Trevor Baines Johnson, for the purpose of a funeral at Townsville and subsequent burial at Charters Towers, Queensland; and
   b) The Applicant be responsible for the arrangements for the funeral and burial but it is directed that the body of the deceased be present at the funeral.
2. The Applicant be entitled to withdraw from bank account number 41624998 held in the name of Arthur Charles Johnson or "A C Johnson" with the Queensland Country Credit Union the sum of $8,000.00 for the purpose of paying the funeral expenses of Arthur Charles Johnson and that the Applicant repay to the said account any part of the sum of $8,000.00 which is not genuinely incurred in relation to those funeral expenses.
3. The Applicant be entitled to withdraw from bank account number 41624998 held in the name of Arthur Charles Johnson or "A C Johnson" with the Queensland Country Credit Union the sum of $304.70 to reimburse himself

[22] [1999] SASC 458 at [36].

for filing fees paid to the Supreme Court of Queensland on account of filing fees in this proceeding.

4. Otherwise, there be no order as to costs.