COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Civil Division
2021/CLE/gen/01410

BETWEEN:

MONALISA VERONICA WALKER

Plaintiff

AND

DENO ALEXANDER SMITH JR.

Defendant

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Bjorn Ferguson, Ciji Smith-Curry and Rhodreka Strachan for the Plaintiff Ms. Maria Daxon and Mr. Benjamin McKinney for the Defendant.
Hearing dates:	29, 30 November 2021

RULING

Intestacy—Right to bury infant child—Dispute between mother and presumed father over who should have custody and carriage of the funeral of the deceased —Factors to be considered at common law—Mother charged with offence in connection with child's death—Probate Rules 2011, Rule 9, order of priority for grant in case of intestacy—Status of Children Act, ss. 3,7—Presumption of Paternity—Whether mother and presumed father have equal ranking—Practice and Procedure—Suing by Attorney—Declaratory Relief

Introduction

[1] This is a very distressing application. It concerns a dispute between the parents of a deceased four-year-old girl as to who should have the right to bury her—a dispute made more heartrending because of the tragic circumstances in which the toddler met her demise.

[2] The child, D'onya Bella Walker, whom I shall refer to mainly as "Baby Bella" as she has affectionately been referred to publicly (or at times "the deceased"), is reported to have died from blunt force trauma. At the time of her death, she was living with her mother, Ostonya Logan Walker ("Ostonya"), and a male, Darion Smith, described as the mother's live-in boyfriend. The boyfriend has been charged with her murder and the mother has been charged with exposing a child to grievous bodily harm and cruelty to children contrary to the Child Protection Act. Both were remanded into custody at the Department of Corrections, Fox Hill, to await trial. However, the mother was released on $20,000 bail, subject to various reporting and other conditions, on the morning of the 30 November 2021, while the hearing of this matter was in train. Incidentally, the named plaintiff—Monalisa Veronica Walker ("Monalisa")—is the child's maternal grandmother, even though (as will be explained further) it is the mother who is agitating this application.

[3] The criminal charges are matters for the criminal courts, and the allegations against the persons allegedly responsible for Baby Bella's untimely demise are only stated here as background facts. The issue for this court to decide is who of the disputing parents is entitled to have possession of the body of Baby Bella for the purposes of making funeral arrangements and determining her final resting place.

[4] Having said that, I will indicate at the outset that it is not the province of the courts to determine or direct where or how a deceased person ought to be buried (see *Anstey v Mundle* [2016] EWHC 1073 (Ch.), per Deputy Judge Johnathon Klein). But the court has a power and indeed a duty to determine based on the law and legal principles who is entitled to bury the deceased where there is a dispute among family members or other persons entitled to make a claim.

[5] It is not a task that the court delights in, considering the deep personal and painful emotions evoked in such situations, and many of the reported cases indicate that the Courts are astute to impress on the parties that the best outcome would be a compromise. As has been adverted to in several of the cases, such matters require the "wisdom of Solomon", which no judge can profess to have. Therefore, both at the outset of these proceedings and after hearing the parties' claims, I entreated them to explore the possibility of an agreed position. To their credit, I must commend the parties for attempting to settle the issues, and just before the weekend it was brought to my attention that an agreement in principle was in the works. However, it did not appear as if the parties were ultimately able to resolve their differences, and the court must therefore resolve the matter.

The application

[6] The application was commenced by an originating summons filed 25 November 2021, seeking a number of declarations and other relief, which in material part are as follows:

> "1. A Declaration that OSTONYA LOGAN WALKER is the mother of the deceased child D'ONYA BELLA WALKER;
> 2. A Declaration pursuant to section 21 of the Child Protection Act Chapter 132 that D'ONYA BELLA WALKER was born out of wedlock and OSTONYA LOGAN WALKER is the guardian of the said deceased child;
> 3. A Declaration that only the Plaintiff has the authority at law to conduct the affairs for and on behalf of OSTONYA LOGAN WALKER;
> 4. A Declaration that the Defendant is the putative father pursuant to section 7 of the Status of Children Act;
> 5. A Declaration that the Coroner erred in law by releasing the body of D'ONYA BELLA WALKER to the Defendant as he is not so entitled;
> 6. An Injunction pursuant to Order 29 of the Rules of the Supreme Court refraining (*sic*) Serenity Funeral Home & Crematorium from obtaining and acting upon instructions from the Defendant;
> 7. An Injunction pursuant to Order 29 of the Rules of the Supreme Court refraining (*sic*) Serenity Funeral Home & Crematorium from arranging and preparing the body of the deceased child D'ONYA BELLA WALKER for burial and/or cremation; and
>
> [….]

> AND, as a consequence an Order that the body of D'ONYA BELLA WALKER be handed over to the maternal grandmother, MONALISA VERONICA WALKER."

[7] This was supported by a certificate of "extreme" urgency. Mr. Ferguson for the plaintiff was at pains to explain the impetus for the application and the reasons for its urgency. It appears that after the child's death, the maternal grandmother identified the body at the morgue, dealt with police and other authorities in respect of the deceased, and was in the process of giving instructions to a particular funeral home for burial. However, unbeknownst to her, the child's body was released to the presumed father, Deno Alexander Smith Jr. ("Deno"), who had it taken to another funeral home with a view to making burial arrangements.

[8] It was also indicated to the court that an investigation into the circumstances in which the body was released from the morgue to the father is afoot, and this may explain the declaration sought at paragraph 5 of the originating summons (a matter I will return to later in this ruling). Concerned, however, because of reports apparently circulating on social media and elsewhere (although no evidence of this was before the court) that an imminent funeral was being planned by the paternal family, the mother was spurred into making the application through the grandmother, and to seek injunctive relief. The mother executed a power of attorney on 24 November 2021, which, *inter alia*, granted power to the grandmother to see to the child's burial.

[9] The application first came before me on Friday 26 November 2021 in the urgent list. At that point, counsel for the Defendant had only just been instructed, and had not yet had an opportunity to file any response on his behalf. I therefore gave leave to counsel for both parties to file additional affidavit evidence and to lodge skeleton submissions. The matter was adjourned to the afternoon of Monday 29 November 2021. I also made an interim order to preserve the status quo by restraining either party from taking any steps to obtain or procure the release of the body of Baby Bella from the funeral home in whose custody it was for the time being for burial and/or cremation pending the hearing and determination of this matter.

[10] Monalisa and Baby Bella's maternal aunt, Oscara Logan Walker ("Oscara"), who is the twin sister of Ostonya, attended the hearings in person, while Deno participated via Zoom. As indicated, Ostonya was granted bail on the 30 November 2021, but did not attend that day's hearing. I should say for completeness, also, that because of the enormous public interest generated in this case, several members of the media were present at the start of the hearings on the afternoon of 29. However, I indicated that I would be hearing the application in camera, both to protect the privacy of the parties and the dignity of the deceased, and also because there were criminal proceedings extant which could be impacted by any inordinate publicity or disclosure of allegations made in the dispute over burial rights.

The Background to the case

[11] Baby Bella was born on 2 June 2017 at the Rand Memorial Hospital in Freeport, Grand Bahama. Her mother Ostonya was not married to Deno, but it appears that they were in a cohabiting relationship which lasted from some point in 2016 to a few months before the child

was born in 2017. The father is not registered on her birth certificate, and she carries her mother's surname, but it does not appear that the father's paternity has ever been disputed.

[12] I will examine the evidence in more detail a little later in this judgment, but for now it suffices to say that for much of her short life, Baby Bella lived in Freeport with her father, paternal grandmother, aunts and other relatives, being cared for by them. According to the affidavits filed by the defendant, the father's family had Baby Bella from two weeks after her birth, while her mother pursued various job opportunities in Grand Bahama, Marsh Harbour Abaco and New Providence. It seems she was content to leave the child in the care of her father and paternal relatives, although her evidence is that she did on a few occasions assume custody and care of Baby Bella. In what turned out to be a cruel twist of fate, she was returned to her mother in New Providence on 31 August 2021, apparently at the mother's request. Two months and 5 days later she was dead.

[13] As adverted to, her death generated much public furore, and it has been reported by police authorities that she died as a result of blunt force trauma. However, I did not have before me a death certificate and I am therefore only able to indicate what has been reported.

The Court's jurisdiction

[14] An early issue to be disposed of in this matter is locating the court's jurisdiction to decide a dispute over who is entitled to bury a deceased person, or who has sepulchral rights, as it is sometimes called. There is no direct statutory basis for resolving such a question. For example, although the right and duty to bury a child may be considered part and parcel of parental responsibility, as defined under the Child Protection Act, no order can be made for this purpose under that Act, because the definition of child in the Act ('a person under the age of eighteen') refers to a live child: see *R v Newham London Borough Council, ex p. Dada* [1996] QB 507, interpreting the same definition under the UK Children Act 1989. Thus, it is rather clear that the Child Protection Act is intended to deal with the rights and obligations of parents in respect of a living child until that child turns 18. Parental responsibility is also terminated on the death of a child, although there may be separate rights in respect of burial (*R v Gwynedd, ex p. B* [1992] 3 All ER 317). It is has also long been settled at common law that a parent who is able to do so is obligated to provide for the burial of a deceased child (*R v Vann* (1851) 2 Den. 325.) However, as will be presently seen, several statutes are of some relevance and do provide some rules that are helpful in deciding the issues.

[15] I have had cited to me (and indeed I have also referred counsel to) a number of reported decisions, from the UK and other parts of the Commonwealth, in which similar issues have been decided by the Courts. These issues have been decided mainly on an application by the person entitled to a grant of limited letters of administration of the child's estate to allow them to take possession of the remains for burial, or where there are no personal representatives, the person with the best claim to be appointed as administrator. Alternatively, and especially when there are equally entitled persons (such as parents, or siblings), the dispute has been decided on the court's inherent jurisdiction, based on various principles set out in the case law.

[16] Neither the research of counsel nor the court yielded any written decisions on this area of the law in The Bahamas. (The court is aware that the Supreme Court in 2007 denied a last-minute application by the mother of celebrity figure, Anna Nicole Smith, for custody of her daughter's body to have her buried in Texas, as opposed to Nassau, where she was about to be buried beside her son Daniel, in accordance with her wishes. This was after a protracted legal battle in the U.S. courts over who had the right to determine the disposition of the body, and the US court had granted the right to the guardian *ad litem* of Ms. Smith's infant daughter. However, there does not appear to be any written decision of the application before the Bahamian court.)

The legal principles

[17] A good account of the framework of the general law is set out by Mr. Justice Cranston in the case of *Burrows v Her Majesty's Coroner for Preston* [2008] 2 FLR 1225 as follows:

> "12. It is said that at common law there is no proprietary interest in a deceased person's body. That can be traced back as far as Blackstone's Commentaries and was stated very emphatically in *Williams v Williams* (1822) 20 Ch. D. 659, 46 JP 726, 51 LJ Ch. 385. In *Smith v Tamworth City Council* [1997] NSWC 197 Young J., after a thorough review of the Commonwealth decisions and United States jurisprudence, stated that a more sophisticated analysis of this proposition is needed. However, it suffices for the purposes of the present action to adhere to the *Williams v. William* view of the common law.
>
> 13. At common law if there is no property in the body of a deceased person, various people have rights and duties in relation to it. First the deceased's personal representatives, the executors of the will or the administrators of the estate when the deceased dies intestate, have the right to determine the mode and place of the disposal of the body, even where other members of the family object. The personal representative's claims to the body ousts other Claimants, although in some cases statute might entitle, as in this case, the Coroner, or possibly in other cases, a hospital or a local authority, to make claims on the deceased's body. Where personal representatives have not been appointed, the person with the best right to the grant of administration takes precedence; where two or more persons rank equally, then the dispute will be decided on a practical basis: Jervis on Coroners (ed) Paul Matthews, 12th ed., 2002, para 7-03, n. 40; 7-05, n 41. The person with the best right to the grant of administration, and hence to the deceased's body, is set out in r. 22 of the Non-Contentious Probate Rules 1987 SI 2021, r. 22.1:…".

[18] A very instructive summary of the approaches and review of the case law is contained in the decision of His Honour Judge Gareth Jones in *ND v LD* [2019] EWHC 3639 (Fam), which is worth setting out at some length. Before doing so, however, something should be said about the facts of this case, which incidentally to some extent mirrors the sad features of this case.

[19] In *ND v LD*, a toddler E, met her death in October 2017 as a victim of a homicide when she was only 22 months at the hands of a Mr. C, a person with whom the mother cohabited. Mr. C was convicted of the child's murder and sentenced to a minimum 20-year sentence. The mother was convicted of causing or allowing E's death and sentenced to three-and-a half years imprisonment. E was born in 2015 and her mother separated from her birth father in 2017. After the child's death, the father presented an application for a declaration of parentage under the Family Law Act and a limited grant of letters of administration in relation to his deceased

daughter for the purposes of her burial. The mother did not oppose the first declaration, but opposed the second application, as the parties had very different preferences for where the child was to be buried and how the funeral ceremony was to take place. The court granted the declaration of paternity, and the declaration of entitlement to a grant of administration for the purposes of making the necessary funeral arrangements for the child's burial.

[20] One of the factors the Judge took into consideration in coming to his decision was the impracticability of the mother carrying out administration, as she was incarcerated, although released from custody for the hearing [at para. 27]:

> "Where a child is taken from this world in her infancy, in the tragic circumstances of this case, where one surviving parent is incarcerated and hampered in the practical exercise of her duty as an administrator, what could be more obvious that the substitution of the deceased's second surviving parent able and willing to discharge this responsibility?"

[21] I set out below the summary of the relevant principles discussed in that case as follows:

> "12. […] While there is no right of ownership in a body, there is a duty at common law to arrange for its proper disposal. Where there is no will, the duty falls on the administrators of the estate who have the right to possession of the body to arrange for proper disposal: *Williams v Williams* [1881] 20 Ch. D. 659, *Buchanan v Milton* [1999] 2 FLR 844 and Re JS [2017] 4 WLR 1. Both mother and father are entitled to a grant of administration under Rule 22 of the Non-Contentious Probate Rules 1978, the father qualifying by reason of his now undisputed parentage. Section 116 of the Senior Courts Act 1981 and the inherent jurisdiction of the High Court can be utilized to adjudicate in disputes between administrators or those entitled to be administrators under Rule 22, but also between third parties (for example, coroners, and local authorities and potential administrators.) Section 116 deals with discretionary grants, permitting the court in special circumstances and where necessary or expedient to appoint as administrator:
>
> > 'some person other than the persons the persons who but for this section would, in accordance with the Probate Rules, have been entitled to the grant.'
>
> In these circumstances the court:
>
> > 'in its discretion appoints as administrator such person as it thinks expedient."
>
> In *Anstey v Mundle* [2016] All ER (D) 285, at paragraph 18 to 20, the court accepted that Section 116 could be used to pass over a person who would otherwise be entitled to a grant, but expressed doubt as to whether Section 116 could also be deployed to select, for the purpose of a limited grant, one of the deceased's children, all of whom would have otherwise been entitled. Accordingly, the inherent jurisdiction was the preferred route adopted in that case. However, in *Re JS* [2017] 4 WLR 1, Jackson J. concluded that where, pursuant to Section 116, two persons were entitled to a grant of administration, the court could substitute one for both of them. However, the inherent jurisdiction provided an alternative and equally valid approach. This decision was followed in *Re K* [2018] 1 FLR 96 by Hayden J at paragraph 8 therefore, and on balance I accept that Section 116 does indeed allow one administrator to be substituted for another or for administrators acting jointly."

[22] Then coming to the inherent jurisdiction, His Lordship said:

> "17. I have been referred to the other route for dispute resolution, namely, the inherent jurisdiction. In *Hartshorne v Gardner* [2008] 2 FLR 1681, the court ordered the release of the deceased's body of an adult child to the birth father under the inherent jurisdiction and identified a number of factors which could be considered. Firstly, where known, the deceased's wish were a relevant factor. Secondly, the place where the deceased had the closet connection is relevant as to the ultimate resting place; (also, incidentally, a material consideration in *Fessi v Whitmore*, to which I have referred already). Thirdly, the most important consideration is that the body be disposed of with all proper respect and decency and if possible without any further delay. Fourthly apart from the wishes of the deceased, the reasonable wishes and requirements of the surviving family are also relevant. That was also a material consideration in the case of *Burrows* under Article 8 of the Convention.
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> 18. In *Re K*, Hayden J considered the nature of the inherent jurisdiction and its application. It was indicated that the jurisdiction was essentially a parental jurisdiction, and he referred to his earlier observations in *Redbridge LBC v A* [2015] 3 WLR 1617:
>
> > 'The concept of a wise parent acting for the true interest of the child is integral to both the *parens patriae* jurisdiction and the inherent jurisdictions.'
>
> This concept informing the exercise of the court's discretion endured beyond the death of an infant, because as indicated by Hayden J:
>
> > "It is to my mind axiomatic that a wise parent would attend to the burial of a child.'

[23] Inevitably, the majority of the disputes which require judicial intervention arise when there are claims by persons equally entitled to a grant, and the court normally breaks the impasse by recourse to factors which have been set out in case law. In *Calma v Sesar and anor* (1992) 2 NTLR 37, one of the cases relied on by the defendant, Martin J [at 42] observed:

> "It requires that the Court resolve the argument in a practical way paying due regard to the need to have a dead body disposed of without reasonable delay, but with all proper respect and decency."

[24] In the Australian case of *State of South Australia v. Smith* (2014) 119 SASR 247, Nicholson J. noted [at 34]:

> "The authorities decided in this State, considered to the 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 the 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."

[25] To make the reference to s. 116 of the UK Senior Courts Act and s. 22 of the UK Non-Contentious Probate Rules more intelligible and relevant to the case at bar, it should be appreciated that very similar provisions are to be found in Bahamian law:

s. 24 (4) of the Probate and Administration of Estates Act 2011 similarly provides that:

> "If by reason of the insolvency of the estate of the deceased or of any other *special circumstances*, it appears necessary to the court to appoint as administrator some person other than the person who, but for this provision, would by law be entitled to the grant of administration, the court may, in its discretion, notwithstanding anything in this Act, appoint as administrator such persons as its thinks expedient and any administration granted under this provision may be limited in any way the court thinks fit." [Emphasis supplied.]

[26] Additionally, Rule 9(1) of the Probate Rules 2011 provides for virtually the identical order of priority as appears in the UK rules, and prescribes as follows:

> "(a) the surviving spouse of the deceased;
> (b) a child of the deceased and where no such child of the deceased is willing or able to act, grandchildren of the deceased;
> (c) *the father or mother of the deceased;*
> (d) a brother or sister of the deceased and where no such brother or sister is willing or able to act, children of any brother or sister of the deceased;
> (e) *a grandparent of the deceased;*
> (f) an uncle or aunt of the deceased and where no such uncle or aunt is willing or able to act, children of the any uncle or aunt of the deceased." [Emphasis supplied.]

[27] It is perhaps to state the obvious to say that Baby Bella died intestate. Although it is possible to seek a grant of administration even where there is no estate (s. 31 of the Supreme Court Act and s. 5 of the Probate and Administration of Estates Act), there is no application before the court for that purpose.

[28] I am therefore satisfied that, not only does the court possess the inherent jurisdiction as an extension of its *parens patriae* jurisdiction to decide this matter, but it is perhaps the most suitable (if not the only route) for resolution, having regard to the facts of this case. I will also gratefully adopt the principles that have been set out in the case law referred to above, as in my judgment they are applicable to the determination of this dispute. I also find some comfort in the fact that Skyes J, in the Jamaican Supreme Court case of *Adasa Blair and others v. Neville Blair and another* [2015] JMSC Civ 3, also had recourse to common law principles, after reviewing several of the English and Commonwealth authorities, in refusing an injunction sought by 11 of 12 children of the deceased to delay her funeral a day before it was due to take place, on the basis that one of the surviving sons had arranged an early date for the funeral.

Preliminary considerations: Are Ostonya and Deno equally entitled to apply for administration?

[29] Before examining the case law principles and applying them to the facts of this case, I have to consider the status of the parties. In the majority of cases where the inherent jurisdiction of the court was resorted to, it involved persons who were equally entitled to apply for a grant of administration. Mr. Ferguson contends, on behalf of the plaintiff, that in fact this is not such a case, as the natural mother must rank above a "putative" father.

[30] In response, Ms. Daxon and Mr. McKenzie for the defendant contended that Deno should rank equally, pursuant to the Probate Rules. Alternatively, if anything, he has a superior claim, as

on the face of the pleadings the plaintiff in the matter is the maternal grandmother, and it was clear she occupied a much lower place in the totem pole of priority for the grant of administration.

[31] In my judgment, I do not think the contention that the father does not have an equal status to the mother for the purpose of making an application for a grant of administration can succeed in this case. In fact, this contention is wholly inconsistent with the plaintiff's request for a declaration that the father is the "putative" father under s. 7 of the Status of Children Act 2002. The whole purpose of the Act, subject to certain exceptions (most notably it does not apply to citizenship matters), was to put children on an equal footing vis-à-vis their fathers, and thereby mitigate the harshness of the common law position with respect to a putative father. In this regard, s. 7 sets out a list of circumstances in which the father of a child born out of wedlock is presumed at law to be the father, unless the presumption is rebutted.

[32] Section 3 of the Act provides in material part as follows:

> "(3) (1) Subject to the provisions of sections 6 and 16, for all the purposes of the law of The Bahamas the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all relationships shall be determined accordingly.
>
> (2) The rule of construction whereby in any instrument words of relationship signify only legitimate relationships in the absence of a contrary expression of intention is hereby abolished."

[33] Section 7 sets out a number of circumstances in which there is a presumption, unless the contrary is proven on a balance of convenience, "*that a male person is, and shall be recognized in law to be, the father of a child*…". As indicated, the Defendant did not sign the child's birth certificate, but based on the evidence before the court, including that of the plaintiff, he would fall within at least two of the categories:

> "(d) the person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child, or the child is born within 280 days after they ceased to cohabit.
> (j) a person who is alleged to be the father of the child has by his conduct implicitly and consistently acknowledged that he is the father."

[34] A statutory presumption of paternity is very different from the status of a putative father at common law, who had little to no parental rights in respect of a child (see *Knowles v. Knowles* [1926] P. 161). The statutory presumption can be displaced by specific evidence for that purpose in a claim for paternity, but the paternity of Deno has never been disputed, nor is it now being disputed. Indeed, the application by the plaintiff for a declaration that the defendant be declared the "putative" father implicitly recognizes him as the birth father. I would therefore hold that, having regard to s. 3(1) of the Status of Children Act, the defendant qualifies as a "father" for the purposes of an application for administration, and would rank equally with the mother. The provisions in the Probate and Administration of Estates Act and Rules must be read subject to the Status of Children Act, which is meant to be a law of general application,

and it light of such legislation one cannot turn back the clock to common law views of the disabilities of illegitimacy (see, also, the decision of Winder J. in *Rolle v. Attorney General* [2017/PUB/con/00021]).

The Agency Issue

[35] The other issue, as the defendant rightly points out, is that the action is intituled in the name of the grandmother, not in the name of the mother for whom she is the attorney. This is not a proper manner of commencing such an application: according to *Atkins Court Forms* (2nd ed., 1999 Issue, "Parties to Actions"), "*an attorney sues in the name of his principal; the existence of the power of attorney is not mentioned in the title*". If the agent sues in his own name he acts improperly, even though the action is not thereby a nullity: *Jones and Saldanha v. Gurney* [1913] W.N. 72. In *Jones and Saldanha*, Swifen Eady J. struck out the name of the agent who had been joined to the proceedings: "*Proceedings taken by an attorney ought to be taken in the name of his principal. In my opinion the statement of claim shows no action at all in Saldanha and his name was improperly joined…*".

[36] Mr. Ferguson sought leave at the conclusion of the hearing to join the mother, which was resisted by the Defendant. Obviously, the better application would have been to substitute her as plaintiff, as opposed to joining her. I do not think such an application would have caused any prejudice to the defendant, as it was appreciated all along that the proceedings were being brought on behalf of the mother, even if the application was improperly intituled. In any event, in my view it would be wrong in principle to decide a matter with such irrevocable consequences on technicalities, and I would have allowed the amendment.

[37] It is to be noted that the grandmother has standing in her own right to have applied for administration, although she would rank lower than a father or mother (Rule 9 of the Probate Rules). That said, it must be remarked that the affidavit evidence filed by the plaintiff grandmother does create some confusion as to whether she was applying in the capacity of attorney or on her own behalf. However, I have approached this application and decided it as if the mother were the named plaintiff.

[38] I now turn to consider the evidence.

Evidence

[39] The application was supported by affidavits of Monalisa and Oscara filed 25 November 2021. These were later supplemented by the affidavit of Ostonya and a supplemental affidavit of Monalisa filed 29 November 2021. In response, the Defendant laid over the sworn (subsequently filed on 1 December 2021) affidavits of Denise Smith (the grand-aunt of Baby Bella), Meredith Grant (the paternal grandmother) and the Defendant himself, Deno.

[40] I do not intend to refer to the individual affidavits in any great detail, but will look at them in the round and refer to particular passages as may be relevant. I also do so in advertence to the sentiment expressed in *Harthorne* [at para. 3] that the court should be "*slow to make findings*

as to the details of the deceased's family relationship". Further, because of the urgent context in which these cases are heard, there is little opportunity for cross-examination and testing the evidence. In fact, Ms. Daxon sought leave to cross-examine the Plaintiff's witnesses on several aspects of their affidavits, but I did not think this was necessary to resolve the issues.

[41] The first affidavit of Monalisa simply identifies her as the mother of Ostonya and Oscara, twin sisters. She indicates that "*since my granddaughter's birth, my daughter had sole custody and responsibility for my granddaughter and they initial[ly] resided in Grand Bahama*". It then recounts the event of Baby Bella's death, the plaintiff's dealings with the police force, the fact that she identified the body at the morgue, and indicated to persons there that after making funeral arrangements she would authorize the release to a mortuary and crematorium of her choice. Apparently, she had a conversation about funeral arrangements with Evergreen Mortuary on 16 November 2021, but at some point thereafter became aware that the child's body had been released to Deno and handed over to Serenity Funeral Home & Crematorium. She concludes by seeking an order to have "*my granddaughter's body official released to me as I am the rightful person and a prohibitory injunction preventing the purported father…from any further action relative to my granddaughter's body and burial*."

[42] Monalisa filed a supplemental affidavit on 29 November 2021, which exhibited the child's birth certificate, and in which she indicates:

> "It is my desire to bury my granddaughter on the island of New Providence, as her brother Jaydenn Tonio Walker, resides on the island of New Providence and loves it here, and she was happy here."

[43] The affidavit of the aunt, Oscara, does not add much to the narrative of the grandmother, and nothing more need be said of it.

[44] The affidavit of Ostonya was provided while she was still incarcerated at the Department of Corrections. She deposes that when her daughter was three months old, she took her to her maternal grandmother Meredith Grant as she was seeking employment on the island of Abaco, and that "*when I got strong on my feet, I would take my daughter back*." She got a job in Abaco at Chances Web Shop, and according to her saw her daughter again on 26 March 2018 (when she returned to Freeport to register her birth and had her for that day); on 1 June 2018 (when she visited for the child's birthday); and between August 2019 to December 2019, when she returned to Nassau and when she alleges the child lived with her and her boyfriend Darion Smith. (This period is disputed by the defendants.) She further averred that on 27 January 2020 she began working at the Registrar General's department and that "*As a result of obtaining new employment, I sent my daughter to Deno because I was not financially stable and I wanted her to be comfortable in a stable environment*." In August of 2021, Baby Bella was fatefully returned to her.

[45] She later recounts that she was called on 5 November 2021 while at work and informed that Baby Bella was unresponsive. As is now known, Baby Bella was dead. She indicates she was later charged by the police, and that on 24 November 2021, she gave a power of attorney to

"*my mother Monalisa Veronica Walker to conduct the burial arrangements of my deceased daughter, D'yona Bella Walker, as I am still on remand and presently unable to ensure proper interment of my daughter*."

[46] Significantly, as to wishes for her daughter's funeral, she states:

> "…That I would like my daughter to be buried in either Woodlawn Gardens or Lakeview Memorial Gardens at a private funeral with no video cameras or photographs and both sides of her family present. I would also like my daughter to be buried with a nightlight I purchased from Walmart for her as a few weeks ago she said to me 'Mommy it dark in here'."

[47] In his affidavit, Deno recounts that he met Ostonya while students at the Jack Hayward High School, reconnected through Facebook in around 2016, and later ended up in a cohabitational relationship with her. She became pregnant with Baby Bella during this period, although their personal relationship broke down at about the eight month of pregnancy. He admits that he is the father of the child but indicates that he was not present at the time of the registration of the birth, and therefore his name could not be added. He states that when Baby Bella was 2 weeks old, Ostonya sought assistance from his mother to look after her during the day while she worked. However, after two days of this arrangement Baby Bella was left overnight in the care of the maternal grandmother where she remained.

[48] I also set out below several of the significant passages from his affidavit:

> "10. […] Ostonya did not return for our daughter, and she remained in my mother's care and it became evident to me that Ostonya had given the responsibility of the control, and care of our daughter to my mother and me.
>
> 11. That without hesitation I assumed the shared responsibility for our daughter with my mother by providing financial, emotional and practical support. That I would visit our daughter at my mother's house almost daily and I would assist in her care. That I was able to forge a close bond with our daughter during my frequent interactions with her. Our daughter was a happy and loving child and she always wore a smile on her face.
>
> 12. That my family is very close knitted and as a result I had the full support of my mother Meredith Grant, my aunt Vienna Woodside and Sharon Grant, my grandparents Wheatly and Mary Grant, my aunt on my father's side Denise Smith and her entire family and the community as a whole in the raising of our daughter.
>
> 13. […] My mother informed me that Ostonya requested access to our daughter for the summer of 2019 and such access was readily granted to her, however after only three weeks our daughter was returned to Grand Bahama to my primary care and control. She began to live with me and my girlfriend upon her return. I now assumed full responsibility financial and otherwise for our daughter's care. I enrolled her in We Care Preschool located on Explorer's Way, Freeport, Grand Bahama. I would personally drop her to and pick her up from school daily. I would assist her with her learning exercises, we would go riding in the car, visit the beach as she loved to play in the sand and to visit our family members and I enjoyed our family life. During this period my bond with our daughter grew even more. […]

23. That I wish for the Honourable Court to grant me the opportunity [to] arrange, prepare and complete the process to bury our daughter in a decent and respectable manner and would like to have her remains sent back to Grand Bahama, where she was born, grew up, had a family bond and was loved by the entire community.

24. […] I wish for her to be dressed in a pink princess dress and for her body to be churched at St. Vincent De Paul Catholic Church located in Hunters, Grand Bahama where she attended on many occasions with her great grandmother and thereafter her body laid to rest in the Pinders Point Cemetery. She spent many days playing and enjoying her life in the settlement of Pinder Point and was happy there."

[49] I will only set out a few passages from the affidavits of Meredith Grant, the paternal grandmother, and Denise Smith, the paternal grand aunt. Meredith Grant states:

"8. […] I willingly took on the responsibility for Bella along with my son. We established a routine around the care of Bella in which she would live with me and my son would visit and would also provide financial assistance to me to assist with her care. …Bella lived with me at my home on a continuous basis for two years along with my sons…

9. That I witnessed Bella taking her first steps and the progression and the process of her getting her first tooth. All of her first milestones were achieved in my care. Every birthday that Bella had in her short life was spent with her paternal family. On her second birthday she celebrated her birthday in grand style with a party put on and attended by her paternal family. She also attended St. Vincent de De Paul church with her paternal grandmother and was warmly embraced by the community.

10. My family and I loved Bella and she was an important part of our family. My sister Vienna Woodside stepped in and took care of Bella when I was unable to after my home was damaged in Hurricane Dorian. Bella continued to stay with our family, was never in jeopardy or unwanted. It was only after her mother insisted on her being returned to her that she was turned over to her.
[…]

17. […] I concur with my son that Bella should be buried in Grand Bahamas among those that loved and raised her. She spent all her entire life in Grand Bahama where she was born and flourished before her life was taken away from her."

[50] The affidavit of Denise Smith, who counsel for the defendant was at pains to point out is related also to the child's maternal family, also supported the basic facts in the affidavits of Deno and Meredith Grant, as to the care for the child by the paternal family, and she also concurs that "*Bella should be buried in Grand Bahama among those that loved and raised her*".

Court's analysis and conclusions on discretionary factors

[51] Having come to the conclusion that, pursuant to the Status of Children Act, the defendant ranks equally to the mother in the order of intestacy as to eligibility to apply for a grant of administration, I now have to decide in whose favour the balance should tilt. As indicated, the

court should conduct this balancing exercise having regard to the factors which have been set out in *Hartshorne* and the other cases.

Deceased's wishes

[52] Obviously, this is not a case where the deceased's wishes would be relevant, due to her infancy. It is likely that at such a tender age Baby Bella had no contemplation of her mortality, let alone any capacity to articulate such wishes.

Closest connections

[53] As to the place of her closest connections, this is obviously a factor of some significance. In *Hartshorne v Garnder*, the deceased was an adult child of parents who had been divorced for 35 years, and who was killed in a traffic accident. The father wanted the son to be buried in Kington where the son had been living with his fiancée for 8 years before his death. The mother wanted him to be cremated some 40 miles away in Worcester, where she and the father both lived. The judge held that the 40-mile trip that would be required for the mother to visit his grave in Kington did not outweigh the fact that the son had spent his life in Kington, where his fiancée, father and brother wished him to be buried.

[54] The evidence is overwhelming as to where Baby Bella had the closest connections during her life, both temporally, geographically, and in terms of relationships. Although there are some minor disputes (and on this point I prefer the defendant's evidence), it would appear that Baby Bella spent roughly two months and three weeks out of the four years of her tragically short life in Nassau. Even accepting the evidence of the mother, at most the period would be 6 months. In fact, counsel for the Defendant pointed out to the court that none of the affidavits filed on behalf of the plaintiff was able to speak to any significant time spent with Baby Bella, over which any relationships or bonds were formed, for reasons that appear obvious.

Reasonable wishes of surviving family members

[55] As to the reasonable wishes of the surviving family, I do not doubt that either side of the family is sincere in their expression of wishes for the burial of Baby Bella. The mother wishes a private ceremony in New Providence, with both sides of the family in attendance, and would like the child buried with a night light. Incidentally, no reason has been proffered as to why a private funeral is desired, and this also seems to be a unilateral decision. The maternal grandmother wishes the child buried in Nassau because there is apparently an older brother who also lives in Nassau. I must say I found the reference to being buried where the brother is rather obscure, as there is nothing in any of the affidavits from the plaintiff to suggest that Baby Bella spent any time with or had any real relationship with her maternal brother.

[56] On the other hand, the paternal family would like the child to be funeralized in a church which she attended and buried in the community where she grew up among family and supposedly friends. There is also no suggestion that the funeral if held in Grand Bahama would be private, and it would be surprising if there would not be persons from the community who would wish

to pay final respects to Baby Bella, considering how the tragedy has captured the public imagination.

[57] I must say that with respect to the reasonable wishes of the surviving family, I would have to prefer those expressed by the paternal family. As indicated, they wish for Baby Bella to be buried where she lived for virtually all of her life, and apparently flourished. They are speaking from the perspective of persons who have had the chance to personally care for, interact with and watch Baby Bella grow up, by most accounts from she was two weeks old. In fact, it is a startling and somewhat sobering realization that the paternal caretakers have spent significantly more time with Baby Bella than her mother: all told, Baby Bella has been with her mother during the first two weeks of her life (from her birth on 2 June 2017 to the ending part of that month); 3 weeks during August of 2019 (alternatively, four months from August to December if the mother's account is to be believed); and from the 26 August to 5 November 2021.

Expedition of dignified burial

[58] The final and most important consideration is that the burial of Baby Bella should be attended to without inordinate delay and with all proper respect and decency. As Hayden J. observed in *Re Redbridge*, this is what a wise parent would wish to do, and it must therefore also be the result that the court exercising its inherent and *parens patriae* jurisdiction would seek to achieve. It is obvious that neither parent is shirking from this duty. Mr. Smith has jumped to attend to his responsibility to Baby Bella in death, as he and his family did during her lifetime.

[59] In the case of the mother, she has attempted to exercise responsibility through the instrumentality of the grandmother, as at the time of the commencement of the action she was incarcerated and would have been unable to discharge the responsibility of arranging the child's burial. Mr. Ferguson sought to remind me that the fact that the mother in *ND v NL* was incarcerated and serving a sentence was a significant reason why the court made the order in favour of the father. Now that Ostonya was on bail, he contended that she no longer faced any practical challenges in attending to her daughter's burial.

[60] The court pauses here to make a significant observation: Ostonya is not on trial here, and neither is this a character contest between her and Deno. As Mr. Ferguson rightly points out, she is entitled to the constitutional presumption of innocence. Therefore, the common law principle that criminal conduct associated with the death of a person might disentitle the offender from applying for a grant (see, for example, *Re Crippen* [1911] P. 108]) has no place to play here.

[61] Whatever decision I make, however, will be intended to provide the *imprimatur* for the respectful and dignified burial of Baby Bella without further delay. I asked both parties what timeframe they were looking at once the court had made its decision, and they indicated that they were considering the upcoming weekend (11 December) or as soon as practicable afterwards.

[62] It should be clear from the Court's analysis of the discretionary factors that it is of the view that the father has made out a more cogent and compelling case to be entitled to bury the infant child, as between two equally entitled parents. However, even if I were wrong that the defendant is equally entitled in law, I would be prepared to fall back on s. 24(4) of the Probate and Administration of Estates Act [the equivalent of s. 116 of the UK Senior Courts' Act] to find that there are "special circumstances" that would have made it more expedient to appoint the Defendant as the administrator in place of the mother on an application. In particular, I have taken into consideration the evidence that has been set out above, that for virtually the entirety of her life, the defendant and his family had the primary day to day care and control of the infant. Whatever the status of the mother might have been in law, Deno and the paternal side of the family nurtured and reared Baby Bella in place of her.

[63] In any event, it has been stated that the priority to apply for administration is not an inflexible rule for determining the release of a person's remains (*Jones v Dodd*, 1999, SASR 328, at [46], [47]). Further, as Ewbank J. said in *Re Clore* [1982] Fam. 113 at 116, special circumstances (as appears in the s. 116 of the UK Senior Courts Act) should be given a wide meaning:

> "…since this section is giving discretion to the court, I would not impose any limitation on the words 'special circumstances'. I would say that the words 'special circumstances' are not necessarily limited to circumstances in connection with the estate itself or its administration, but could extend to any other circumstances the court thinks are relevant."

Conclusion and disposition

[64] I must now formally dispose of the various declarations and orders sought in the plaintiff's originating summons. Having regard to the peculiar nature of several of the declarations sought, it might be useful to state some of the general principles regarding declaratory relief. Firstly, the power of the court to grant such relief is discretionary. Secondly, there must be some dispute between the parties as to the existence and extent of a legal right between them. Thirdly, the court will only grant a declaration where it would be of some practical purpose (see, for a summary of the principles, *Rolls-Royce PLC v Unite the Union* [2009] EWCA Civ 387). Against this backdrop, I approach the declarations sought as follows:

(1) I decline to make the declaration sought at para. 1 that Ostonya Logan Walker is the mother of the deceased child for the simple reason that it serves no useful purpose. It is not an issue in dispute between the parties and it is beyond axiomatic that the mother of a child is the person who gives birth to the child (*Ampthill Peerage Case* [1977] AC 547).

(2) I decline to make the declaration sought at para. 2 that pursuant to s. 21 of the Child Protection Act that D'onya Bella Walker was born out of wedlock, as neither is there any dispute between the parties on this issue. I will make the declaration, however, that Ostonya Logan Walker was the guardian of D'onya Bella Walker pursuant to s. 21 at the time of her death, as a result of being born out of wedlock.

(3) I decline to make the declaration sought at para. 3 that only the Plaintiff has the authority at law to "conduct the affairs for and on behalf of Ostonya Logan Walker". The question

of the remit of the plaintiff's power of attorney was not argued before the court. Further, it is plain from the terms itself that the power is a limited one, extending only to the collection of Ostonya's personal documents and the conduct of burial arrangements. It does not extend to her "affairs", whatever that may encompass.

(4) I decline the declaration sought at para. 4 that the Defendant is the putative father pursuant to s. 7 of the Status of Children Act, but would grant a declaration that he is the presumed father pursuant to s. 7 (d) or (f) of the Status of Children Act.

(5) I refuse the Declaration sought at para. 5 that the Coroner erred in law by releasing the body of D'onya Bella Walker to the Defendant. Firstly, the coroner is not a party to this action. Secondly, the issue has not been argued before the court, and neither has any evidence been tendered in this regard. The law is clear that persons should be made parties before a declaration which affects their rights or by which they are or may be prejudiced is made: *London Passenger Transport Board v Moscrop* [1942] AC 332 (per Lord Maugham at 345).

(6) The injunctions sought under paragraphs 6 and 7 restraining Serenity Funeral Home from obtaining and acting on instructions from the Defendant with respect to arranging and preparing the body of the deceased child for burial/cremation are refused.

[65] Finally, having regard to all the circumstances of this case and for the reasons that have been given, I would order that Serenity Funeral Home and Crematorium shall be entitled to act on the instructions of the Defendant Deno Smith Jr. for the purposes of making funeral arrangements and for burial of the deceased D'onya Bella Walker, and shall release her body to him for that purpose. As indicated, I do not propose (and it would be improper) to micro-manage the specific details of Baby Bella's final arrangements by condescending to time, place and manner of burial. Her remains are being entrusted to her father for burial, which the Court hopes and expects will be carried out generally in the manner indicated.

[66] I hasten to add that it is also hoped that such arrangements do include the plaintiff's side of the family, who are also entitled to say their goodbyes in a respectful and dignified manner. During the hearing before me, the idea of a suitable memorial being conducted in Nassau prior to her final interment in Grand Bahama was mooted as a possible compromise, but that is a matter for the parties.

[67] I thank counsel for their helpful oral and written submissions, even though it was not possible to specifically refer to all of their contentions in a ruling compressed by time as this was. To be sure, several aspects of the application before the court elicited passionate and hard-fought arguments. But I must say that overall the proceedings were conducted in a manner that was reverential and dignified, and fittingly so in light of the real objective of these proceedings—to determine who should carry out the sacred and cherished right to bury Baby Bella, with all proper respect and dignity.

[68] I do not consider that the circumstances of this case justify an order as to costs.

Dated the 6 December 2021

Loren Klein
Justice