

2(b)
12-15-01

MEMORANDUM

DATE: DECEMBER 14, 2001

TO; THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: BARBARA L. CARTER, ASSISTANT TO THE CITY CLERK *BC*

SUBJECT: DOCKET ITEM #2 - PUBLIC DISCUSSION PERIOD

The City Attorney asked that this be provided to you in advance because Mr. Dale Warren Dover is signed up to speak under the public discussion period tomorrow.

2(b) 12/15/01



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December 14, 2001

Dale W. Dover, Esquire
228 South Washington Street
Suite 210
Alexandria, VA 22314

Re: Katelyn Frazier Headstone

Dear Dale:

This letter is a follow-up to our recent meeting concerning your generous offer, made together with Bruce Adams and announced at the Saturday, November 17 public hearing of City Council, to provide a headstone for the grave of Katelyn Frazier. As we discussed during our meeting, representatives from DSS contacted Katelyn's grandmother, Billie Frazier, immediately after the Council hearing. DSS staff were informed that the family had made their own arrangements for a headstone, and expressly did not wish the City or other parties to become involved in this matter. My staff confirmed with Mrs. Frazier that these were the family's sentiments, and she herself subsequently articulated the family's position to the television press. Since the family provided a dignified burial for Katelyn, without the City's proffer of assistance, I have no basis to disbelieve her statements.

Given these circumstances, I concluded that it would be prudent for the City to allow the family a reasonable period of time within which to act. At your request, however, I agreed to look into the issue of whether the City had the authority to intervene and, itself or in conjunction with you and your associates, provide a suitable grave marker for the child, should that become necessary.

I asked Jill Applebaum from my office, as well as Mary Elliott, the City's Special Counsel for DSS matters, to research this issue. As stated in the attached memorandum, we have concluded that the City does not have the authority to place a marker at Katelyn's grave, contrary to her family's wishes.

Accordingly, I do not believe that it would be fruitful to pursue the issue of a grave marker further.

Dale W. Dover, Esquire
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In the alternative, recognizing the travails Katelyn's three surviving siblings have endured and the challenges that these children will face in their new life, and mindful of our community's desire to commemorate the life of Katelyn Frazier, I would suggest that the establishment of a fund to provide educational and other assistance to her brothers and sister would constitute an equally suitable tribute to the memory of Katelyn.

The City Attorney's Office would be pleased to work with you and other interested members of the community to establish such a fund, and I look forward to discussing this proposal, as well as any other alternatives you might suggest.

Yours very truly,



Ignacio B. Pessoa
City Attorney

Enclosure

cc: The Honorable Mayor and Members of City Council
Phil Sunderland
Lori Godwin
Meg O'Regan
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MEMORANDUM

TO: Ignacio Pessoa, Esq.
FROM: Mary Elliott, Esq.
DATE: December 13, 2001
RE: Authority of City of Alexandria to place memorial
on grave of Katelynn Frazier

FACTS

On December 29, 2000, Katelynn Frazier died in the District of Columbia. At the time of her death, Katelynn Frazier was in the legal custody of the City of Alexandria. However, the residual parental rights and responsibilities of Pennee Frazier, Katelynn's mother, had not been terminated. Children's Hospital discussed organ donation with Pennee Frazier and the records reflect they obtained "parental consent" for organ donation. Katelynn Frazier's organs were donated after her autopsy.

The body of Katelynn Frazier was released to her mother, Pennee Frazier, by the District of Columbia Medical Examiner's Office. Katelynn Frazier was buried in Maryland by Pennee Frazier. However, no headstone or other memorial has yet been placed on Katelynn's burial plot.

ANALYSIS

I was unable to find any court cases which dealt specifically with the issue of authority to bury a child and/or place a memorial as between a parent and a government entity. Much of the case law involving human remains relate to improper care of the body, disinterment of the body, improper care and interference with the burial site and the

like. However, I have attempted to make inferences from the case law and statutes that do exist in this area.

I. Although the City of Alexandria had legal custody of Katelynn Frazier at the time of her death, Pennee Frazier had the right, under Virginia law, to control the disposition of Katelynn's remains.

At the time of Katelynn's death, Pennee Frazier's parental rights had not been terminated, although the City of Alexandria was the legal custodian of the child. Code of Virginia Sec. 16.1-228 defines legal custody as a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities. The definition of legal custody clearly implies actions performed related to a living child. A decedent's body is not a person; that which constitutes a person is separated from the body by death and that which remains is "dust and ashes," sacred to kin and friends, whose feelings and rights in this regard receive the protection of the law. Rooks v. Boston & Northern Railroad, 211 Mass. 277 (1912)

Pennee Frazier retained her residual parental rights and responsibilities, defined as all rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including but not limited to the right of visitation, consent to adoption, the right to determine religious affiliation and the responsibility for support. Therefore, at the time of Katelynn's death, Pennee Frazier still had significant rights relating to her child. It is believed that Pennee Frazier had the right and continues to have the right to the possession, control and disposition of the body of Katelynn Frazier, even though she played some part in the death of the child.

As to the issue of which person or entity controls the disposition of human remains, Code of Virginia § 32.1-290.1, provides that a parent has a higher authority than a "guardian of the person of the decedent at the time of death" to make an anatomical gift of the decedent's body. If a guardian of the person of the decedent does not wish to allow anatomical gifts, yet the parent wishes to make anatomical gifts, the parent's wishes control.

Also, Code of Virginia § 32.1-288 (A) provides that the sheriff is to identify the “next of kin of the decedent” and that the body of the decedent “may be claimed by the relatives or friends of the deceased person for disposition.” No provision in the Code of Virginia provides that a parent who has played a part in the death of a child has reduced rights as to the disposition of such child’s body after death.

II. Case law from other jurisdictions provides that the right to the possession, control and disposition of a relative’s body shall be protected from interference

Many courts have recognized that the nearest *relatives* of the deceased have a quasi-property right in the deceased’s body that arises from their duty to bury the deceased. See, e.g., Travelers Ins. Co. v. Smith, 991 S.W.2d 591, 595 (Ark. 1999); Bauer v. North Fulton Med. Ctr., Inc., 527 S.E.2d 240, 243 (Ga. App. 1999); Massey v. Duke Univ., 503 S.E.2d 155, 158 (N.C. App. 1998); Coleman v. Sopher, 499 S.E.2d 592, 604 (W. Va. 1997); In re Estate of Medlen, 677 N.E.2d 33, 36 (Ill.App. 1997). In Unterstützung Verein v. Posner, 176 Md. 332 (1939), the Maryland Court of Appeals found that a brother and nephew of a decedent did not have standing to intervene in a action to disinter the decedent since the decedent’s surviving spouse was deemed to be the “next of kin”.

Courts have recognized that interference with the rights of person to bury the body of her kin is an actionable wrong. Travelers Ins. Co., 991 S.W. at 595. In Painter v. U.S. Fid. & Guar. Co., 123 Md. 301, 308 (1914), the Maryland court held that “. . .the surviving husband or wife or next of kin have a quasi property right in the body in the absence of testamentary disposition. . . [a]nd Courts of Equity will protect those having this right from unreasonable disturbance.” By way of example, in Snyder v. Holy Cross Hosp., 30, MD. App. 317 (1976), the Maryland court held that a father had a right to request that the State not autopsy his son’s remains, although the Maryland law requiring autopsy was eventually upheld.

The rights to possession, custody, and control of the body for the purpose of burial are within the protection of the law, and a willful violator of such rights may become liable for damages. 22A Am.Jur.2d Dead Bodies § 35 (1988). By inference, the modification of a gravesite in a manner not approved by the family of the decedent could be deemed a violation of the rights of such relatives to possession and control over the

decedent's body. Therefore, the City's attempts to place such a marker may result in liability to the Frazier family for emotional distress related to such action.

III. The placement of a memorial on Katelynn's grave without the permission of her relatives is a trespass on private property

In addition, Katelynn is buried in Maryland, in a burial plot which is believed to be owned by the Frazier family. The Supreme Court of South Carolina held that one who buried his dead in a cemetery acquires such possession over such burial plot such that he is entitled to maintain a trespass action against those who, without his consent, disturb such site. Kelly v. Tiner, 74 S.E. 30.

Any placement of a headstone without the family's approval and agreement would arguably be a trespass on the property owned by the family. See, Matthews v. Forrest, 235 N.C. 281 (1952), Growth Properties I v. Cannon, 282 Ark. 472 (1984). In the Matthews case, a florist removed floral arrangements from the gravesite, and such removal was deemed to be a trespass on the burial plot. Matthews, id. In the Growth Properties case, the company who maintained the cemetery was sued for trespass for operating heavy equipment over the burial plots of the plaintiffs' relatives. Growth Properties, id.