

Matter of Kearns v Kearns

2010 NY Slip Op 31048(U)

April 28, 2010

Sup Ct, Wayne County

Docket Number: 70426/2010

Judge: Daniel G. Barrett

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At a term of the Supreme Court held in and for the County of Wayne at the Hall of Justice at Lyons, New York on the 21st day of April, 2010

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

In the matter of the Petition of Amy Kearns

-vs-

DECISION AND ORDER
Index No. 70426

Carol Kearns, Paul Kearns, Neil Kearns,
Nolan Kearns, Edward Kearns, Elizabeth Kearns
and the Marion Cemetery Association,

2010

Respondents

Appearance for Petitioner - Karl Obine, Esq.
Appearance for Respondent - Kearns - Robert A. DiNieri, Esq.
Appearance for Respondent - Marion Cemetery Association -
Paul F. Bender, Esq.

The above matter having been brought on by Petitioner pursuant to Section 1510 (e) of the Not-For-Profit Corporation Law. In relevant part said section provides that the body interned in a cemetery lot can be removed with the consent of the Cemetery Corporation, written consent of the owners, the surviving wife, the children if of full age and parents of the deceased. If the consent of any such person or the corporation cannot be obtained, permission by the County Court of the County or by the Supreme Court where the cemetery is situated shall be sufficient.

Said section does not provide any guidelines or details as to when

the removal will be allowed and/or is appropriate. Said guidelines and principles have been developed by case law.

In this particular case, the mother of the decedent and the children oppose the Petition, therefore permission from the Court is necessary. Oral argument was presented to the Court by all parties through their attorneys.

The decedent, Shawn Kearns died on April 14, 2009. The decedent was buried in Marion Cemetery in the Cook family plot next to his father and grandfather. There is an unoccupied lot next to the decedent.

Petitioner claims in her Petition that decedent expressed his wish to be buried in Marion, New York next to her and that she believed that she could be buried in the unoccupied lot next to her husband.

However, Carol Kearns, the mother of the decedent, is the owner of all of the remaining unused plots within the family plot and she has refused to allow Amy Kearns to be buried in the plot next to her husband. Said permission was first sought by the Petitioner several months after decedent's death.

In October, 2009 Petitioner purchased two burial plots in the Marion Cemetery Association. Petitioner first approached the Marion Cemetery Association to have Shawn Kearns removed from the current plot to one of the plots that she bought in October, 2009. At the Marion Cemetery Association's annual meeting on March 29, 2010, the board denied the request of Amy Kearns.

On October 2, 2009 said Petitioner e-mailed Paul Kearns, son of the decedent, regarding the removal of Shawn Kearns. In said e-mail Petitioner claimed that she misunderstood when decedent died that the unoccupied plot next to him was reserved for the decedent's sister. She also states in said e-mail " I, in my heart, think that your dad planned on me being buried next to him."

In a subsequent e-mail from Amy Kearns to Paul Kearns dated March 31, 2010 she stated the following "Please know that I do not want your dad moved either." She also states in said e-mail, "If you children agree that you don't want your dad moved, I will honor that but I feel I should be buried next to him." In an e-mail from Paul Kearns to Amy Kearns on March 31, 2010 he replied that all the children and the siblings of the decedent did not want Shawn Kearns moved. And further the decedent told Paul Kearns directly that his wishes were to be buried with Grandpa Kearns and Grandpa Cook.

In the original Petition the Petitioner stated in paragraph 5 that Shawn Kearns expressed his wish to be buried in Marion, New York next to Amy Kearns. However, that wish did not in any way mean that Shawn Kearns did not want to be buried in the Cook family plot next to his father and grandfather .

In Petitioner's Reply Affidavit she stated that the decedent never mentioned to her that he wanted to be buried near his grandfather.

However, the answering papers in opposition state that the decedent told Paul Kearns that he wanted to be buried next to his grandparents. In addition, the Petitioner, consented to the burial place and never raised the

issue of burial next to the decedent in a plot, which she did not own. Prior to the burial of the decedent Petitioner did not discuss with the owner of the plot, Carol Kearns, about being buried there. Petitioner apparently assumed that she could be buried next to the decedent.

In an Affidavit in Opposition by Dawn Kearns, who is the sister of the decedent, she states that her brother told her that he wanted to be buried in the Cook family plot. She also goes on to state that the Petitioner, Amy Kearns, had advised her that Shawn, the decedent, wanted a funeral mass at the Catholic Church in Sodus and then to be buried in the Cook family plot.

Carol Kearns Affidavit in Opposition states it was well known that it was decedent's wish to be buried with his father, Lawrence Kearns and his grandfather, Cornelius Cook.

An Affidavit in Opposition by Scott Kearns, brother of the decedent, stated that the decedent advised that he wished to be buried in the family plot with his father and grandfather.

Further, Affidavits in Opposition by Elizabeth Kearns and Nolan Kearns, children of the decedent, both state they object to the disinterment of their father's body.

Neal Kearns, another son of the decedent, stated in his Affidavit in Opposition that his father advised that he wanted to be buried in the Cook family plot. He further states at no time did he make any representation to the Petitioner that she could be buried in the plot next to him.

There is case law on this issue, Currier v. Woodlawn Cemetery, 300 N.Y. 162, 1949. Said case provides that there must be good and substantial reasons before disinterment is allowed and the wishes of the decedent are an important factor.

The quiet of the grave, the repose of the dead are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned, Matter of Ackermann, 124 A.D. 684.

While the disposition of this case is dependant upon its own peculiar facts and circumstances and while no all-inclusive rule is possible the Courts, exercising its benevolent discretion, will be sensitive to all those promptings and emotions that men and women hold sacred in disposition of their dead, Yome v. Gorman, 242 N.Y. 395.

The issue before the Court is whether there are good and substantial reasons for it to exercise its benevolent discretion to permit Petitioner to disturb the quiet of the decedent's grave. A great measure of the resolution of this issue is governed by the wishes of the decedent, Matter of Dutcher, 217 A.D. 2d 774.

A hearing is only necessary if the papers and pleadings raise a material issue of fact concerning the burial wishes of the decedent. Petitioner states that there is conflicting evidence as to the decedent's intentions.

The issue before the Court is whether the Petitioner raises a material issue of fact. The Court finds that it does is not.

As mentioned in the Petition there is only a conclusory statement that the decedent wished to be buried in Marion, New York next to Amy Kearns. That statement is completely contrary to every other statement of the decedent's brother, sister, children and mother.

In addition, there is at least a tacit agreement and acknowledgment by the Petitioner that in fact the decedent wanted to be buried where in fact he was buried as she is the one that made the arrangements.

If a hearing was ordered, proof would be set forth on the current papers and pleadings, that is the Petitioner stating the decedent told her one thing and all of the siblings, mother and children of the decedent saying another. However, circumstantially due to the fact that the Petitioner had the decedent buried in the family plot and never inquired of any one of the Kearns family if she could be buried next to him indicates she certainly intended for him to be buried there.

In addition the Petitioner sends an e-mail to Paul Kearns on March 31, 2010 wherein she stated the following, "If you children agree that you do not want your dad moved, I will honor that but I feel I should be buried next to him." It is notable to the Court that the Petitioner stated she feels she should be buried next to the decedent but there is no other person or family member of the decedent that indicated that is what the decedent wanted. The only thing that is certain is that he in fact stated he wanted to be buried in the Cook family plot with his father and grandfather which of course, is logical and reasonable. It is the decedent's wishes or intentions that are relevant, not that of the Petitioner. The decedent is buried where he wanted to be buried. The only question was by the Petitioner as to whether she could be buried next to him. However, the Petitioner either

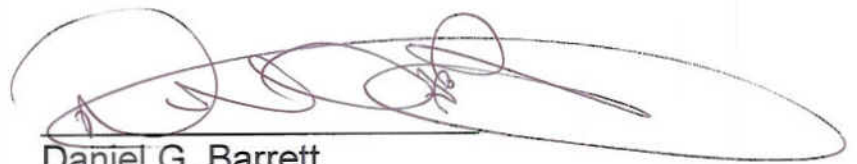
actually did not intend to be buried next to the decedent or she just assumed that she could be and failed to check with the Kearns family regarding the same. The decedent did not in any conversations with his mother, brothers, sisters or children ever state that it was imperative that he be buried next to his wife in the Cook family plot. The only issue raised did the decedent intend for the Petitioner be buried next to him. There is nothing indicating that is a material issue of fact. The decedent is buried where he intended to be buried but Petitioner could not be buried where she intended to be buried. However, that is not a reason to remove decedent's body.

Therefore, no hearing is necessary, the Petition is hereby denied and the Court denies the request to remove the body of the decedent.

It is hereby,

ORDERED, Petition is hereby dismissed and the relief requested is denied.

Dated: April 28, 2010
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice

WAYNE COUNTY
SUPREME AND COUNTY COURT
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