

[Emblem]

In the Supreme Court as High Court of Justice

CA 7918/15

Before: The Honorable Justice N. Hendel
 The Honorable Justice U. Shoham
 The Honorable Justice A. Baron

Jane Doe

versus

1. Gal Friedman
2. The Attorney General
3. Israel Police

Appeals of judgment handed down by the Jerusalem District Court
on November 18, 2015 in CC 32812-11-15

Date of session: 12th Kislev 5776; November 24, 2015

Adv. Itzhak Dahan, Adv. Daniel Ben Shlush
on behalf of the Appellant

Adv. Yossi Wolfson, Adv. Gilad Barnea
on behalf of the First Respondent

Adv. Ruth Gordin
on behalf of the Second and Third Respondents

Judgment

Justice N. Hendel

1. Before us is an appeal against the decision of the Jerusalem District Court (CC 32812-11-15, Hon. J. A. Darel,) which accepted the request by the First Respondent (hereinafter: **the Respondent**) and ordered to cremate the body of the deceased, May Peleg (hereinafter: **Peleg**), according to her wishes.

Factual Background

2. In March 2014 Peleg retained the services of the “Aleí Shalechet” company, which deals with cremating dead bodies, and the parties agreed that upon her death, the company would cremate her body. On November 10, 2015 Peleg

signed her last will. In it, she again expressed her wishes that her body be cremated and her ashes be mostly scattered at sea. This, as she explained in her signed affidavit three days later, in light of her ideological opposition to burial in general, and her objection to religious burial in particular – as, in her words, “Judaism does not acknowledge me as a woman and a female despite the fact that I did undergo sex reassignment surgery. This violates my dignity and erases my identity.” Additionally, Peleg requested that some of her ashes be scattered under a tree which she requested by planted in her memory in Jerusalem “because I have the interests of my children at heart, and I recognize the need they may have for a place where they can honor my memory.” In another affidavit signed that day, Peleg explicitly requested that the Appellant be prevented from receiving her body for fear that the latter would bury her in a religious ceremony. At the same time, Peleg requested in her will that the Respondent act to fulfill her wishes – this, among others, in light of her concern that members of her biological family would object to her body’s cremation. She made a similar request to the Respondent’s attorney, Adv. Wolfson. Several days later, on November 14, 2015, Peleg took her own life.

Loyal to Peleg’s last request, the Respondent approached the Jerusalem District Court on November 15, 2015 and requested that Respondents 2-3 be ordered to deliver her body to the “Aleí Shalechet” company in order to be cremated. The following day, Peleg’s mother (hereinafter: **the Appellant**) asked to join the proceeding, objected strongly to the body’s cremation and asked that it be buried. The Second Respondent (hereinafter: **the Attorney General**) did not take a position on the merits of the dispute, but clarified that in his view realizing Peleg’s wishes is not unlawful or inconsistent with the public interest.

On November 18, 2015, the District Court handed down its decision in favor, as noted, of the Respondent’s request, however the decision’s execution was stayed until November 22, 2014, the date on which the appeal before us was filed along with a petition for a temporary injunction. The hearing in the appeal was set for November 24, 2015, and I ordered a stay on the District Court’s decision until a decision be handed down in the appeal. The time for this has come. Time is of the essence.

Discussion and Decision

2. After hearing the parties’ arguments, reviewing the submitted materials and closely reading the clear and reasoned decision by the District Court, it seems we must focus on three central issues.

The Jurisdiction Issue

3. The Appellant argues that the exclusive jurisdiction to adjudicate the dispute as to what ought to be done with Peleg’s body is granted to the family court,

and thus the District Court acted without authority when deciding the matter. I believe that in the circumstances of the case before us, it is unnecessary to address this issue in depth. It would suffice to say that this Court, as an appeal level, is authorized to adjudicate Peleg's matter regardless of which trial court considered it, so that the difficulties raised by the jurisdiction issue had been resolved, for the most part, by bringing the dispute to our door. Beyond the scope, I will add that in light of the nature of the concrete dispute and the general questions it raises – as will be detailed further below – it seems the District Court was correct in its findings in terms of jurisdiction (see and compare CA 1835/11, *Avni v. The State of Israel* (November 17, 2011) para. 6 (hereinafter: the second *Avni* case) and the District Courts' decisions brought in para. 5, below.)

The Deceased's Wishes Versus The Family's Status

4. A more significant issue that the Appellant has raised goes to the balance between honoring the deceased's wishes and her family's status. She claims that heavier weight should have been placed on the position of the family, who objects to the cremation. However, there is not much to this argument, because –

“At the heart of the deceased's right to dignity is the deceased's interests while still alive, in protecting his dignity when he passes. This interest is rooted in a person's legitimate expectation, while he is still alive, that his dignity, expectations, wishes and legacy would be preserved and honored even after his death” (HCJ 52/06, *Alaksa Company for Developing Muslim Holy Properties in Israel Inc. v. Simon Wiesenthal Center Museum Corp.*, para. 139 of Justice Procaccia's opinion (October 29, 2009) (hereinafter: the *Alaksa* case.))

I will add that the roots of the duty to protect the dignity of the deceased – from which the requirement to realize their wishes stems – are in one's constitutional right to dignity and personal autonomy (see also CC 4660/94, *The Attorney General v. Lishitzki*, IsrSC 55(1) 88, 115 (1999)). The constitutional nature of this duty gives it normative superiority over the family members' interests and leads to preferring the wishes of the deceased in case of a conflict. This can also be inferred from different pieces of legislation – such as section 6A of the Anatomy and Pathology Act 1953, which stipulates that had a person agreed for an autopsy to be performed on their body after death, no weight should be given to the family's objection to the autopsy – and vice versa. The principle at the foundation of wills, which allows a person to control how their assets may be distributed after death also instructs us to prioritize the deceased's wishes over their family's interests. I understand a family member who wishes to take part in decisions about a relative who passed. At times, the family may also assist the court in identifying the real

wishes of the deceased. But make no mistake. Basic Law: Human Dignity and Liberty places the will of the deceased's at center stage – where it ordinarily stands alone.

In light of the superiority given to the wishes of the deceased, we are then only left with examining whether the documents detailed above reflect Peleg's free and actual will. This is the factual level of the legal issue at hand. Even in this aspect I believe that the deceased's wishes were expressed in several ways, and the District Court was correct in finding that there was no meaningful factual foundation to point to flaws in her will. It should be noted that the parties agreed – both due to time constraints and the sensitivity of the matter – not to question their own witnesses. This procedural agreement increases the weight of the documents that were submitted. The medical documentation presented to the trial court demonstrates that Peleg suffered difficulties such as depression, but at the same time it was maintained that her “cognition, memory and thought process are functional. There are no delusions or hallucinations.” This documentation means that Peleg had capacity to make decisions. Beyond this, the calculated and planned manner in which she worked toward guaranteeing her wishes be followed – from her early contact with “Aleí Shalechet” about a year and a half ago, in March 2014, through a string of documents she prepared in her last days, including setting up the “memorial mechanism” to ease her children – clearly indicates the existence of a firm and free will. Her suicide, a short time after preparing the documents, does not undermine the conclusion regarding her mental capacity. Under these circumstances, there is a solid foundation for the holding that Peleg was capable of making the decision as to her fate. Her free will outweighs, therefore, her family's position.

Before ending the discussion regarding this issue, I will shortly comment on two additional sub arguments raised by the Appellant. First, I shall clarify that the Respondent's standing, though he is not a relative, is a result of the normative weight that must be given to the deceased's wishes. The identity of the person to serve as her voice is a direct result of Peleg's wishes. Second, the argument that “the children's best interest” requires, in the Appellant's view, Peleg's burial, was made as if out of thin air, without any factual substantiation. The children's mother and their natural guardian – who used to be married to Peleg, before she transitioned – did not approach the courts to join the proceedings, on her own behalf or on behalf of their children. This is sufficient to dispose of the arguments in this regard.

Once we have found that Peleg's wishes to be cremated are valid, we must examine whether there is any legal bar to these wishes being realized. With all the significance of the principle of respecting the wishes of the deceased, this principle is not absolute. Of course to the extent that such prohibition is in place, the deceased's will cannot be followed.

5. The Appellant argues that Jewish law prohibits cremation, and that in the absence of an explicit authorization in Israeli law, our decision must follow Jewish law. Indeed, Jewish law prohibits bodies' cremation, for two reasons: on the positive level, there is an obligation to bury the deceased – even despite any position expressed while still alive: “whoever instructs not to be buried from their assets, must not be heard. Rather the heirs must be responsible to furnish all the needs of the burial despite them... Even those who have no wealth to bequeath and instructs not to be buried – must not be heard.” (Shulhan Aruch, Yoreh De'ah, §60, sections b-c; see also HCJ 6167/09, *Avni v. The State of Israel*, (November 18, 2009) para. 7 of then Justice E. Rubinstein's opinion (hereinafter: the *Avni* case)). On the negative level, cremating bodies is considered “dishonoring the dead and contempt toward them” and is forbidden for other reasons as well (for more on this see Michael Vigoda, *Burning Bodies in Religion and Law*, PARASHAT HASHAVUA 250; Ruling by Rabbi David Tzvi Hoffman, leader of German Jewry in the 19th and 20th centuries, in *Responsa Melammed Leho'il*, part b, sign 114 (Frankel Edition 123.))

However, I believe it would not be new to say that Israeli law does not prohibit personal liberty to stray from the rules of Jewish law in various situations. Application of this can be seen in *Avni* in both its incarnations. The first judgment there held – while drawing inspiration from Jewish law – that abandoning a body to be eaten by animals is in conflict with public interest and human dignity. However, as I noted in a later round of that case, this holding can not be seen as negating lawful categories of “any form of non-burial.” Indeed, any such practice – for instance, throwing a body into the sea – requires a case by case examination, while balancing the duty to fulfill the wishes of the deceased and considerations of public interest and human dignity – all this in light of existing law (the second *Avni* case, para. 6.) This is apt also in regard to the practice of cremation – while Jewish law may serve as a guide at times, it cannot be determinative in each and every case. As was held by Justice Procaccia:

“The religious aspect of this value illuminates the constitutional content of the deceased's dignity, but it does not define the scope of the constitutional right, nor does it define the scope of its protection” (*Alaksa*, para. 157.)

After this review, I have concluded that the Attorney General's position – as presented before us and before the trial level court – that there is no prohibition in existing law against cremation of bodies is correct. Indeed, it would have been better for the sensitive issue of care for the deceased would be regulated in legislation (see *Avni* para. 5.) However in the absence of any legislative provision that requires bodies to be buried or prohibits their cremation, the principle of legality instructs that there is no bar to do so.

Of course, the court – and not the Attorney General – is to determine the interpretation of the law and establishing the current legal situation. Still, in this case it seems the Attorney General’s position that cremation is not inconsistent with the public interest should be given weight. First, there is no statutory prohibition of the practice. Second, it appears that cremation is not a new issue and that the courts that have addressed it in the last decade repeatedly found that there is no prevailing public interest that gives rise to a prohibition to do so. In this context, we turn to the decisions by Honorable Judge M. Sobel in Mot.Civ (Dist. Jerusalem) 4230/06, *Fried v. Rozen*, (December 28, 2006), para. 6; and Honorable Deputy President G. Ginat in Mot.Civ. (Dist. Haifa) 6082/08, *Farkash v. Sharf*, (April 7, 2008) para. 6, which permitted cremation of bodies. The Attorney General’s position as laid before us is not novel, and is also familiar. Under the circumstances, and in the absence of any prohibition in statute, it seems that in order to prohibit bodies from being cremated explicit legislation by the Knesset would be necessary.

Although the author of this opinion holds a different view in regard to the dignity of the deceased and the proper care for it, the analysis above leads to a conclusion that there is no legal basis to intervene in the opinion of the District Court, which relies on the existing legal situation in Israel.

6. Finally, in the absence of any legal bar to fulfilling Peleg’s free will that her body be cremated, this will must be respected and her body must be delivered to “Aleí Shalechet” – despite the family members’ objection.

On a personal note, I will say that this proceeding as a whole is disturbingly sad on its entire circumstances – from May Peleg’s tragic death to the dispute around caring for her body after her death. More than that the sensitive issue before us challenges the mind of the jurist, it tugs at his heart causing human sentiment as deep as the abyss. I can only end this judgment by expressing condolences to the deceased’s family members and to her many loved ones.

7. My opinion is that the appeal must be rejected.

Justice

Justice U. Shoham:

I join.

Justice

Justice A. Baron:

I join in the outcome reached by my colleague Justice N. Hendel. I fully agree with him on the issue of the authority and the supremacy of the deceased's wishes – what should be done with a body after death – even in conflict with the will of the family. This, as long as there is no legal prohibition and this is not against public interest, such is the case here as expressed even in the position of the Attorney General. Honoring the wishes of the deceased, including their rights over their body, is enshrined in Basic Law: Human Dignity and Liberty. It is part of one's right to dignity and autonomy. One must be respected in life and in death. May Peleg expressed her wishes explicitly and with conviction, with a clear, consistent and unequivocal voice – she wished that her body be cremated after her death. Most of her ashes were to be scattered at sea, and some of it buried under a tree to be planted in her honor in Jerusalem. In doing so, May Peleg set up, with much sensitivity, a place for her remembrance for anyone who wished to do so, and in particular considered her children. We do not come to judge May Peleg's will or her ways, but only to honor them. May her memory be a blessing.

Justice

It was therefore decided to order the rejection of the appeal, as said in the opinion by Justice N. Hendel.

The stay of the judgment of the District Court is hereby lifted.

Given today, 12 Kislev 5776, November 24, 2015.

Justice

Justice

Justice