IN THE SUPREME COURT OF NEW ZEALAND

SC 131/2011
[2012] NZSC 116

BETWEEN	JOSEPHINE TAKAMORE Appellant
AND	DENISE CLARKE First Respondent
AND	NEHUATA TAKAMORE AND DONALD TAKAMORE Second Respondents

Hearing: 17-18 July 2012

Court: Elias CJ, Tipping, McGrath, William Young and Blanchard JJ

Counsel: J P Ferguson, H K Irwin and M M Tuwhare for Appellant
G J X McCoy QC, M Starling and K J McCoy for First Respondent

Judgment: 18 December 2012

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The first respondent is entitled to proceed under the exhumation licence to have Mr Takamore reburied in a place of her choosing.

C The matter is remitted back to the High Court in case any consequential orders are necessary.

D Costs are reserved.

REASONS

Para No

ELIAS CJ

[1] There is important public interest in the disposal of human remains. That is not only for reasons of public health and decency (considerations which underlie the provisions of the Burial and Cremation Act 1964). The public interest is also engaged because in all societies and in all cultures the disposal of the dead is of great significance to the living and to the religious and cultural traditions to which the deceased and those who care about the deceased belong. Conflict about the disposal and treatment of the dead is inevitably distressing for all because it stirs deep feelings. Proper disposal of bodies engages the human rights to dignity, privacy and family.

[2] In most cases, decisions as to interment or other disposal of human remains are taken by the immediate family of the deceased. Any disagreements between family members are either resolved or overtaken by the disposal achieved in result by those who carry the day. Those who prevail in fact may do so for a number of reasons: perhaps because they are deferred to on the basis of social or cultural ideas as to what is fitting (as is common in respect of the wishes of the spouse); perhaps because of their personal standing or the strength of their personalities; perhaps because they can invoke the deceased's own wishes in support of their position; or perhaps because they can invoke the authority of cultural or religious tradition to which the deceased or the family belongs. Such outcome may entail the wishes of some family members being overborne. They may remain deeply unhappy and unreconciled to the result. Although in the present case cross-cultural issues have exacerbated the differences between family members of the deceased, it should be recognised that deep differences as to the disposal of the dead arise without any such cross-cultural dimension.

[3] The appeal concerns a claim to the High Court by Denise Clarke for orders for the recovery by her of the body of her long-term partner, James Takamore. He was buried without her consent by members of his Whakatohea and Tuhoe family in a family urupa at Kutarere in the Bay of Plenty in accordance with the tikanga

observed by their hapu.[1] Ms Clarke and the two adult children of her relationship with Mr Takamore wish to have his body buried in Christchurch, where the family has lived for the last 20 years. Ms Clarke, who was appointed executor by Mr Takamore in his will, was successful in the High Court and on appeal to the Court of Appeal in her claim to be entitled as executor to determine where Mr Takamore is buried, although questions of remedy remain reserved in the High Court. Josephine Takamore, the sister of the deceased, appeals to this Court.

[4] It is accepted by the parties that entitlement to bury someone who has died is not prescribed by any enactment and that the claims fall to be decided according to the common law of New Zealand. The appellant and two other family members who do not appeal (Mr Takamore's mother and brother) opposed Ms Clarke's application to the High Court on the basis that New Zealand law does not recognise an exclusive right of an executor to determine disposition of the body when the deceased is Tuhoe. In such circumstances, it is said that the common law gives effect to Tuhoe custom or tikanga. By it, the question of disposal is determined by the whanau pani (the wider bereaved family) according to cultural values and practices. Those values and practices take into account the views of the wife and children (who participate as members of the whanau pani) but have a strong preference, based on the importance of whakapapa, for the return of a deceased to the hapu to be buried with those linked to him by whakapapa.

[5] Since Mr Takamore was buried in the urupa in accordance with the Tuhoe tikanga observed by his hapu, the appellant contends that the executor has no possessory right to his body for reburial, although she acknowledges the executor has standing to make application to the Court for reinterment of the deceased if proper grounds are made out. She says there is no proper basis in the present case to interfere with the burial of Mr Takamore.

[6] Ms Clarke, for her part, maintains that under New Zealand law she has the right as executor to possession and disposal of Mr Takamore's body, as was recognised in the lower Courts. She acknowledges that her discretion as executor is

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[1] Mr Takamore is of Whakatohea and Tuhoe descent, his hapu being Ngati Ira and Te Upokorehe respectively. The family marae at Kutarere is Te Upokorehe and observes the tikanga of Tuhoe.

in the nature of a trust and subject to the supervisory jurisdiction of the High Court for abuse of power or unreasonableness, conditions which she says are not made out here.

[7] For the reasons that follow, I am of the view that neither opposing position taken by the parties is correct in law. In circumstances where there is dispute as to burial, either party has standing to bring the dispute to the High Court for resolution. Their claims are of competing right which fall to be resolved according to law by the High Court in its inherent jurisdiction.

[8] The executor does not have the exclusive discretion to determine how the body is to be reburied or otherwise disposed of. Rather, Ms Clarke both as executor and as Mr Takamore's partner has standing to seek from the Court the right to disinter his body for reburial. On such application, her views as executor will be highly influential and may well be accepted by the Court in result.

[9] Nor is it correct, as the appellant maintains, that because of the deceased's whakapapa the decision as to his burial lies with the whanau pani or the hapu to which it belongs, if their claims are challenged by others with standing to seek the determination of the Court (as Ms Clarke has both as executor and as Mr Takamore's partner). As is the case with the executor, those representing the whanau pani and seeking to maintain the burial already undertaken have standing to oppose Ms Clarke's application for exhumation and reinterment. Claims based on whakapapa and the tikanga observed by the hapu of the deceased are entitled to great weight in New Zealand law and may well prevail in a particular case. But the claim itself, like the claim of the executor, does not give rise to a possessory right in law against competing interests without Court resolution.

[10] Claims in relation to burial have been extremely rare in New Zealand. In other common law jurisdictions there are reported decisions concerning disputed claims to the right to bury, including some with cross-cultural dimensions comparable to those arising in the present case. Although, as is discussed in what follows, there are statements in some cases that executors (or, in the absence of an executor, those entitled on intestacy to administration) have the right in law to

determine questions of burial or other disposal, I conclude that there is no hierarchy of rights to possession of the body and its disposition. The responsibility to decide as to the disposal of the body where there is dispute is inescapably that of the Court on application made to it. In discharging its responsibility, the Court may choose to defer to one of the claimants. Alternatively, it may give specific directions.[2]

[11] When the jurisdiction of the Court is invoked in such disputes, the cases are uncomfortable not only because they usually involve deeply held differences between close family members, all of whom may sincerely believe that they are fulfilling a duty or otherwise doing the right thing by the deceased or the wider family. As importantly, the values behind the different positions may be very difficult for the Court to balance in reaching a fair and just result if they are taken from registers which are not commensurable. That will often be the case if the differences of view arise out of distinct religious or cultural value systems. A court-imposed result in such circumstances may not convince the disappointed party or indeed be universally convincing in its own terms. Although the position of a court asked to resolve such differences is not a comfortable one, there is nothing particularly unusual in that. Courts not infrequently have to decide between positions that are not readily comparable.

[12] For the reasons given below, I have come to the conclusion that the claim for reinterment put forward by Ms Clarke and her children is to be preferred in all the circumstances. This is not because, as executor, Ms Clarke has the right to decide and her views must prevail as a matter of law except where shown to be unreasonable or improper, as was argued on her behalf. It is not because the tikanga by which Mr Takamore has been buried cannot be recognised in law because inconsistent with fundamental values of the common law (as Fogarty J in the High Court[3] and the majority in the Court of Appeal[4] thought to be the case, although on different grounds). Cultural identification is an aspect of human dignity and always an important consideration where it is raised, as are the preferences and

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2 As in *Burrows v HM Coroner for Preston* [2008] EWHC 1387, [2008] 2 FLR 1125 (QB) where the Court ordered that the foster parents of the deceased be allowed to arrange his cremation but that the ashes of the deceased were to be delivered to his natural mother.

3 *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [86]–[88].

4 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [163]–[165].

practices which come with such identification, as s 20 of the New Zealand Bill of Rights Act 1990 affirms. In the case of indigenous people, the preference for repatriation of the dead is recognised by the Declaration of the Rights of Indigenous Peoples as a matter of great moment.[5] Nor is the result I reach because the wishes of the deceased are clear and to be preferred over interment in accordance with his Tuhoe heritage (as Fogarty J in the High Court[6] and Chambers J in the Court of Appeal[7] thought to be the case but, as I think in agreement with the majority in the Court of Appeal,[8] wrongly). Rather, weighing up the different and valid claims of the parties as best I can, I have concluded that Ms Clarke and her children should in the circumstances of the case be left to decide where Mr Takamore is to be buried.

Background

[13] James Junior Takamore died suddenly on 17 August 2007 in Christchurch, where he had lived with Ms Clarke and their children for the last twenty years of his life. He has been buried at the urupa at Kutarere, in the Bay of Plenty, close to the farm where he was born and his pito is buried. He was the eldest son of his parents. His mother and other members of the family live at Kutarere still. His father and other family members are buried in the urupa.

[14] Expert evidence accepted in the High Court and Court of Appeal described the importance of maintaining continuity of whakapapa and whenua in the place of burial to Whakatohea and Tuhoe and to Maori more generally. It matters very much to the family at Kutarere and in terms of the Tuhoe tikanga observed by his hapu that Mr Takamore returns to rest in the family urupa, near the place where his life began. Such preferences are not unusual. They are widely shared in different communities and cultures, as is illustrated by cases in the United Kingdom[9] and in Australia.[10] Analogous claims arise where there are divided views arising out of religious belief.

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5 See art 12(1).
6 At [88].
7 At [322].
8 At [156]–[162].
9 *Burrows v HM Coroner for Preston*, above n 2, (regarding funeral arrangements); *Buchanan v Milton* [1999] 2 FLR 844 (Fam); and *Grandison v Nembhard* (1989) 4 BMLR 140 (Ch).
10 *Calma v Sesar* (1992) 106 FLR 446 (NTSC); *Jones v Dodd* [1999] SASC 125, (1999) 73 SASR 328 (SASCFC); *Minister for Families and Communities v Brown* [2009] SASC 86; and *Frith v Schubert* [2010] QSC 444.

[15] The burial at Kutarere was contrary to the wishes of Ms Clarke and the children. They have had little contact with the family at Kutarere since Ms Clarke moved with their first child from Kutarere (where the couple had lived in the early stages of their relationship) to her home town of Christchurch. Her departure seems to have been abrupt and there is evidence which suggests it may have been a unilateral decision. Mr Takamore followed his family to Christchurch shortly afterwards. It seems that his move was made for the sake of his relationship with his partner and their child.

[16] There are suggestions in the evidence in the High Court that the Kutarere family was disappointed that Mr Takamore had moved away from home; and perhaps a coolness, real or perceived, on the part of Ms Clarke towards the Kutarere family. Mr Takamore spoke to his mother regularly all his life, but Ms Clarke said that he did not discuss their conversations with Ms Clarke. When Mr Takamore's mother visited Christchurch she stayed with her sister, rather than with Mr Takamore and his family. There does not seem to have been any overt breach in family relations: Mr Takamore went home for his father's tangi, and named his brother as co-executor in his will with Ms Clarke's sister, should Ms Clarke predecease him. But the opportunities for contact were inevitably diminished and the focus of Mr Takamore's life and his loyalty were to his Christchurch family, of whom he was extremely proud, as is clear from the evidence of his friends and work colleagues.

[17] Mr Takamore left no instructions in his will as to the place of his burial. Nor did he discuss his preferences with Ms Clarke, beyond indicating that he wanted to be buried rather than cremated. Shortly before his death, and after the burial of a cousin at Ruru Lawn Cemetery in Christchurch, he told work friends he would like to be buried there, although he did not communicate this to Ms Clarke. (It was, by coincidence, where she decided Mr Takamore should be buried.) On the other hand, Mr Takamore's mother said that he had told her that he wanted to go home on his death. Glazebrook and Wild JJ were in my view correct to be cautious about the evidence as to Mr Takamore's wishes. It is impossible to recapture the context in which his remarks were made. It would be unsafe to conclude that Mr Takamore expressed any settled wishes as to his place of burial, just as it would be unsafe to take the view that he did not value and respect his Whakatohea and Tuhoe heritage.

[18] On Mr Takamore's death, his mother, sister, and other family members travelled to Christchurch to claim his body for return to Kutarere for burial. The parties met at a hall beside the Te Whare Roimata Marae in Christchurch, where Ms Clarke had arranged to have Mr Takamore's body lie pending the funeral she proposed in Christchurch. Ms Clarke and Mr Takamore's son resisted the request but Mr Takamore's Kutarere family continued to press into the night the claim that he should return with them to the Bay of Plenty for burial. The discussion was heated and, for Ms Clarke and her son, distressing.

[19] After the son appeared to acquiesce reluctantly, Mr Takamore's paternal uncle (who also lived in Christchurch) intervened to say that the son was being pressured and that the discussion should be continued the following day. At least one member of the Kutarere family stayed with Mr Takamore's body while Ms Clarke and their son went home. The next day, after some delay and after it appeared that Ms Clarke was reluctant to return to resume the discussion, the Kutarere family, now with the support of the uncle who had intervened the night before, took Mr Takamore back to Kutarere. The Kutarere family believed their actions to be justified according to tikanga. They may have considered that the son (whose views were culturally of particular importance) had sufficiently acquiesced to give them the moral authority according to tikanga to take Mr Takamore home, at least when there was no resumption of discussion the next day and they were left with Mr Takamore's body. If so, there was significant cross-cultural misunderstanding. For their part, Ms Clarke and her children were completely at a disadvantage, since they had no understanding of the process being followed and the risk they ran in appearing to withdraw from contending for their rights.

[20] Mr Takamore was buried in the urupa on 21 August before the police could serve an interim injunction obtained in the Christchurch High Court by Ms Clarke restraining the burial and authorising the police to take Mr Takamore's body into their custody. There have been some suggestions that the transportation of the body and the circumstances of its burial were an indignity, perhaps even an offence in terms of s 150(b) of the Crimes Act 1961. It is clear however that the Kutarere family intended and accorded deep respect to Mr Takamore and that removal of his body and burial of it after full tangihanga was fully in accordance with tikanga and

no indignity. That is not to minimise the shock and distress undoubtedly caused to Ms Clarke and the children. But it compounds the damage all around to characterise the removal as disrespectful to Mr Takamore.

[21] On 22 August, Ms Clarke obtained a licence from the Minister of Health under s 51 of the Burial and Cremation Act authorising disinterment of Mr Takamore's body. After obtaining probate of the will and unsuccessfully seeking return of Mr Takamore's body at a meeting held at the marae at Kutarere, she brought the present proceedings in April 2008 in the High Court at Christchurch. In them, Ms Clarke sought orders authorising her to enter the urupa and remove the deceased for disposal according to her wishes. She also sought an order restraining the Kutarere family and others from interfering with her actions.

The decisions in the High Court and Court of Appeal

[22] When the matter came on for hearing before Fogarty J in July 2009, it was presented as a conflict between the executor's "prima facie duty" in law to dispose of the body and Tuhoe custom, by which it is for the whanau pani (which includes the wife and children) to determine burial according to tikanga.[11] Fogarty J held that the executor had the right to determine the manner of disposal of the deceased's body. Her discretion was however subject to fiduciary duties:[12]

> Persons are appointed executors by the maker of a will in order that the dispositions in the will are carried out. They hold the legal estate in the character of fiduciary or trustee. None of their actions as executors can be taken for their own self-interest. All actions are justified ultimately as a fiduciary.

[23] Fogarty J summarised the "relevant common law in New Zealand, as it pertains to executors" as:[13]

> (1) If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased's body, the person named as the executor has the right to possession of the body against all other persons.

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11 *Clarke v Takamore*, above n 3.
12 At [46].
13 At [47].

> (2) If there is any issue about it such a person who has been named as an executor must decide how the burial is to be arranged.
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> (3) An executor will, as a fiduciary, take into account the wishes of the deceased, whether expressed in the will or otherwise known, and will listen to the surviving spouse or partner, children and other relatives and where appropriate friends and confidants of the deceased, without being legally bound to carry out the wishes of the deceased or the wishes of his spouse, family and other persons.
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> (4) Rather, having taken all these matters into account the person who is executor then makes what he or she considers to be the best and right decision, as executor. This decision can include leaving it to other persons, likely family, to make the arrangements.

[24] In applying these principles to the case, Fogarty J considered that it was necessary for Ms Clarke, in deciding what to do, "to distinguish between her status as the intended executor and her position as a life-long partner":[14]

> As executor she was entitled to take into account the stated wish of Jim to be buried, her own views as his life-long partner as to where he should be buried, the views of his son and daughter and obliged to listen to views of his mother, and brothers and sisters, with a discretion as to how far she would listen to other more remotely connected members of the family. But at the end of that exercise she was entitled to make the final decisions as to the funeral arrangements. In that context she was entitled to claim possession of the body at all times until its final and proper burial.

[25] Fogarty J rejected the contention that matters changed after burial. He considered that a temporary burial or burial that was not "proper" did not displace the executor's right to possession of the body of the deceased.[15] The executor's right to possession of the body was to achieve "proper burial". And it was "offensive to any suggestion of justice" that an executor could be "denied that right by other persons taking the body unlawfully and burying it in a place other than where the executor, with the support of the immediate family, would have had the body buried".[16] There was, therefore, "a continuing course of action available to Ms Denise Clarke", subject only to the effect of "whether and how Tuhoe tikanga collides with the common law".[17]

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14 At [48].
15 At [52].
16 At [53].
17 At [53].

[26] Fogarty J considered that New Zealand authorities accept that the common law of England will adapt to reflect the customs and practices of local people and in particular indigenous peoples.[18] He pointed to cases in which Maori custom had been recognised in New Zealand common law, and accepted to be capable of evolution according to customary procedures.[19] On the evidence available to the Court, however, he concluded that Tuhoe custom had not evolved to allow Mr Takamore or his family to opt out of the application of Tuhoe custom and practices as to the manner and place of his burial.[20] The "ultimate question" then was whether application of Tuhoe tikanga in the whole of the circumstances of the case was "reasonable"[21] (a necessary condition he drew from the decision of Cooper J in *Public Trustee v Loasby*[22]).

[27] Fogarty J concluded that the application of Tuhoe tikanga was not reasonable because it was inconsistent with the underlying principles of the common law to limit Mr Takamore's "*individual* freedom" (conferred by Article 3 of the Treaty of Waitangi by reason of his rights and privileges as a subject) by "the *collective* decision making of tribal custom"[23] unless that freedom had been relinquished by him during his lifetime by adherence to the customs, obligations and conditions of the "tribal community".[24]

> In this case it is beyond doubt that the late Mr Jim Takamore chose to live outside tribal life and the customs of his tribe. Under the common law he was entitled to expect the choices he made during his life to be respected by the executor of his will when it came to the decision as to his funeral. This is even more so because he chose as the executor of his will his life-long partner. He has personal rights as a New Zealand subject to the benefits of the common law of New Zealand. The collective will of the Tūhoe cannot be imposed upon his executor and over his body, unless he made it clear during his life that he lived in accord with Tuhoe tikanga.

The Judge considered that this "reasoning process of the common law" brought him to the conclusion that "the Tuhoe tikanga does not apply to Ms Clarke's funeral arrangements for the late Mr Takamore's body", without the need to "formally

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18 At [62].
19 At [62]–[68].
20 At [73].
21 At [82].
22 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).
23 At [86].
24 At [87]–[88].

decide" either the content of the relevant Tuhoe tikanga or whether it is part of the common law of New Zealand.[25] Ms Clarke was "entitled to possession" of the body of Mr Takamore.[26] Questions of remedy were reserved for further application and with leave to add additional parties (as may be necessary because the urupa is vested in trustees who may need to be joined in any remedies hearing).[27]

[28] On appeal to the Court of Appeal, the appeal was dismissed.[28] The Court was however divided as to the reasons it gave. And the majority opinion of Glazebrook and Wild JJ differed from the reasons given by Fogarty J in the High Court in significant respects.

[29] The reasons given by Chambers J in his minority opinion were consistent with the view taken in the High Court that Mr Takamore's choices in life precluded application of Tuhoe tikanga in the manner of disposition of his body (although Chambers J expressed no view on whether the tikanga was reasonable in its own terms, if applicable). Chambers J considered that Fogarty J had been right to conclude that Mr Takamore had chosen to live outside Tuhoe custom and tribal life and that, in those circumstances, "Tūhoe customary law, even if valid, did not apply to him and does not apply to his body": "the pure common law should apply".[29] Under it, "his executor was the person entrusted with the duty to dispose of his body"[30] and those responsible for taking the body away "committed the tort of conversion" because, as executor, Ms Clarke had the right to possession of the body and the right to dictate how it was to be disposed of.[31] Chambers J also expressed the view that the owners of the urupa would commit the tort of detinue if they refused to deliver up the body.[32]

[30] Glazebrook and Wild JJ did not accept that the evidence showed that Mr Takamore had rejected his Tuhoe heritage,[33] even though they accepted it showed

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25 At [89].
26 At [102].
27 At [103].
28 *Takamore v Clarke*, above n 4.
29 At [322].
30 At [322].
31 At [323].
32 At [326].
33 At [156].

that he intended to live permanently in Christchurch.[34] They did not consider that the evidence indicated that he had expressed any "single clear view" about where he wanted to be buried.[35] They thought it significant that although Mr Takamore had told some work friends that he would like to be buried in the Ruru Lawn Cemetery in Christchurch, he had also told his mother that when he died he wanted to "come back home" and the mother was not challenged in this evidence.[36] Glazebrook and Wild JJ observed that, in the conditions of modern New Zealand society where "many Māori do not live within their traditional tribal lands or practice the traditional customs and ways of their indigenous group", "it is important not to jump to the conclusion that a Māori person has lost their connection with their indigenous culture simply because they live outside traditional tribal lands and do not practice the traditional customs and ways of their indigenous group".[37] Mr Takamore's comments to his work colleagues may have been casual remarks which had taken on more significance than was intended simply because they were made shortly before his death.[38]

[31] Glazebrook and Wild JJ accepted that the acquisition of British sovereignty in New Zealand did not displace the customs that continued to govern relations between Maori, including as to burial, and which were able to be taken into account in the common law of New Zealand because not abrogated by statute.[39] They also rejected the view taken by Fogarty J that Tuhoe custom failed the test of reasonableness because it was inconsistent with the principle of individual freedom which underlies the common law.[40] They pointed out that, on such basis, no communal or whakapapa-based custom would survive the arrival of the common law.[41]

[32] The majority judgment in the Court of Appeal held however on a different basis that the Tuhoe custom was unreasonable. The Judges summarised their finding on the expert evidence of the content of the custom as follows:

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34 At [157].
35 At [162].
36 At [160].
37 At [158].
38 At [161].
39 At [112].
40 At [150].
41 At [151].

> [92] In summary, according to Tūhoe tikanga, the right to make the decision as to where somebody is buried falls to the living. That decision is a collective one to be made by the whānau pani, the relations of the deceased who are suffering the loss and are in mourning.
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> [93] The choice of an appropriate burial place can be a matter giving rise to conflict and negotiation among the members of the whānau pani. Considerations which may assist to form a conclusion include where the person is born and where the person's whānau, hapū and iwi are. When Tūhoe people die outside of their tribe or territory, there is a sincere effort to repatriate that person. Decisions on burial location seek to avoid the severing and breaking of continuity of the whakapapa. Other considerations include where the person was physically, intellectually, spiritually and emotionally sustained, whether the person has children or partners or parents that they have left behind and the views of the whānau pani. The wishes of the deceased as to burial will be taken into account, but may be overridden by what the whānau pani are seeking.
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> [94] Where a resolution or agreement does not arise out of the consultation process, the burial location may come down to a contest of who has the greater influence and will. There have been instances where this has occurred through one party taking the body of the deceased without consultation. The party who takes the body would be required to then provide some form of compensation to satisfy the aggrieved party from whom the body has been taken.

[33] Glazebrook and Wild JJ considered that this custom was "contrary to the principle of 'right not might'", a "fundamental proposition in our law":[42]

> The custom contended for provides that, if agreement cannot be reached, then it is permissible simply to take the body. This essentially authorises the use of force and allows the stronger party to win.
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> …
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> … As was acknowledged by Mr Kruger in cross-examination, the taking of a body has in the past caused wars. Although in modern times the extent of this risk has lessened, the taking of a body nevertheless has the ability to escalate into violence, particularly where there is (perhaps because of a mix of cultures) no access to the type of cultural rituals set out by Professor Temara for defusing such situations.
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> … In summary, we consider that Fogarty J was wrong to hold that the Tūhoe custom relating to burial is incompatible with the common law by reason of the denial of individual autonomy. Rather, in our view, the custom in this case of allowing the taking of a body is incompatible with the proposition in our law of "right not might", an application of the fundamental principle of the rule of law.

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42 At [163] and [165]–[166] (footnotes omitted).

[34] Glazebrook and Wild JJ also questioned whether the custom contended for was sufficiently certain. It provided not for "a clear allocation of legal rights to the body" but, rather, "a process for debate and negotiation".[43] And they pointed to a tension between common law and custom as to application of customary law on two counts. First, because the case involved a clash between those of Tuhoe descent and Ms Clarke who is not (a clash they tentatively suggested gave rise to "conflict of laws issue[s]").[44] Secondly (and on the different assumption that it was Mr Takamore's status that determined the application of Tuhoe tikanga), because it was unclear "whether the common law or tikanga determines the personal application of customary law".[45] These matters they did not need to resolve because of their view that the custom could not be recognised by the common law because it failed the test of reasonableness.

[35] Finally, Glazebrook and Wild JJ considered at some length whether Ms Clarke's decision as executor as to the burial of Mr Takamore was one to which she was entitled to come, in application of common law principles as developed in conformity with human rights norms, the Treaty of Waitangi, and the Declaration of the Rights of Indigenous Peoples (which recognises the interest of many indigenous peoples in the repatriation of human remains and which emphasises the collective nature of the rights of indigenous peoples). They considered that at common law the ultimate decision is that of the executor,[46] but that he or she is required to take into account the views and interests of "other stakeholders" such as relatives of the deceased.[47] The executor is on this view entitled to opt for a form of burial opposed by relatives. He or she is entitled to act on the wishes of the deceased, but is not obliged to do so. The executor's obligation to consider and if necessary consult was, they considered, a legal obligation which could be enforced by the Court if necessary.[48] Where there is no executor, Glazebrook and Wild JJ considered that the hierarchy of those entitled to take out administration should be followed (with practicalities dictating how conflict between those equally entitled would be

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43 At [167].
44 At [196].
45 At [191].
46 At [220] citing as authority the decision of the Court of Appeal in *Tapora v Tapora* CA 206/96, 28 August 1996.
47 At [237].
48 At [219].

resolved).[49] In the present case, they held that Ms Clarke was entitled to consider her own preferences as Mr Takamore's long-term partner and was not to be criticised for deciding in accordance with her own views and those of the children (who were "arguably to be accorded the highest priority" at common law).[50]

[36] On this approach, Glazebrook and Wild JJ considered that Tuhoe custom regarding burial was a relevant cultural consideration to be taken into account.[51] Participation by the whanau pani should be facilitated, but its views would probably not outweigh contrary views by the deceased.[52] Tuhoe values could therefore be taken into account but ultimately could not dictate the decision because "the common law requires an executor to make the final decision as to the method and place of burial" whereas "Tūhoe custom permits the taking of the body without agreement".[53] Where consensus was not reached, "the common law position will prevail and the executor or executor should make the final decision".[54]

[37] Glazebrook and Wild JJ made it clear they did not disagree with Chambers J on the question of remedy.[55] They returned the question of remedy to the High Court however without expressing any concluded view because the matter of remedy had not been argued.[56]

The appeal

[38] The appellant, Mr Takamore's sister, appeals from the decision of the Court of Appeal with leave of this Court. The ground approved was whether the Court of Appeal was correct to hold that New Zealand law entitled the executor of Mr Takamore's will to determine the place of his burial and to take possession of his remains for reburial. The arguments advanced on the appeal follow those made in the lower Courts and sufficiently appear from the reasons which follow.

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49 At [221]–[223].
50 At [225].
51 At [255].
52 At [256].
53 At [257].
54 At [258].
55 At [264].
56 At [264].

The statutory background

[39] In New Zealand, the Burial and Cremation Act provides the conditions for the lawful disposal of human remains and their removal from any place of burial. Burial in the urupa at Kutarere conforms to the Act and is not an "unlawful burial" under s 46.

[40] The Act does not, however, specify who has the authority to determine the manner of such disposal or removal. Under s 46E "[a] person having charge of a body" must dispose of it "within a reasonable time of taking charge of it" or arrange for disposal or transfer the body to someone else for disposal. This provision replaces a similar one formerly contained in s 39 of the Births, Deaths, Marriages, and Relationships Registration Act 1995. It enacts the duty formerly imposed as a matter of common law upon those having custody of a body to attend to prompt disposal. "Having charge of a body" is not further defined or explained and seems from the content of s 46E to refer simply to the fact of physical control at any time.

[41] Removal of a body from "any cemetery, Maori burial ground, or other burial ground or place of burial" requires a licence from the Minister of Health on application under s 51 of the Act. The provision is not limited to removal for any particular cause, nor is it limited in terms of who may apply. Under s 51(3) however it is specifically envisaged that "a relative or friend of the deceased" will be granted a licence without fee where the body is buried in a cemetery or burial ground that has been closed to further burials. This provision seems to respond to the common human concern that the disposal of the dead should allow them to be associated in death with those with whom they identified in life. Where the closure of a burial ground would prevent such association with those who have not yet died but with whom the deceased is closely connected by reasons of blood or friendship, the legislation is clearly sympathetic to reburial. The reference to "a relative or friend" under s 51(3) is legislative indication of the associations that matter. There is no reference to executors or administrators in the Act.

[42] No other legislation provides authority for the disposition of those who have died, although the Coroners Act 2006 provides for custody of the dead by coroners

and police in specified circumstances and indicates to whom bodies may be released by coroners. The legislation envisages release to "family members".[57] Although that term is not defined, the Act provides for notification and consultation with "immediate family" which is defined to include those identified by cultural links (including "whānau" and those with an interest in and responsibility towards the deceased "in accordance with customs or traditions of the community of which the [deceased] was a part") as well as close personal and blood relationships (spouse, de facto partner, child, parent, brother, sister and so on).[58] Again, there is no reference to executors or administrators in the legislation. And the Law Commission report on which it is based considered it important to avoid notions of rights of possession of bodies as culturally troubling.[59] There is no suggestion in the Coroners Act that a body must be released to an executor or to someone entitled to a grant of administration, as might have been expected if the assumption of the legislation was that there was any property in a body or that the executor is entitled in law to arrange for disposal of the body.

[43] Section 150(a) of the Crimes Act 1961 makes it an offence to neglect to perform duties imposed by law or undertaken by a person "with reference to the burial or cremation of any dead human body or human remains". And s 150(b) makes it an offence to "improperly or indecently" interfere or offer any indignity to any dead human body or human remains, "whether buried or not". These offences are contained in the subpart of the Crimes Act dealing with "Crimes against … public welfare", a pointer to the public, rather than private, interests that lie behind the law on disposal of human remains.

[44] These provisions are the meagre statutory background against which the common law must resolve questions of entitlement and responsibility for the disposition of human remains, in the absence of statutory prescription.

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57 Coroners Act 2006, s 42. Similar provisions, indicating preference for the claims of relatives are to be found in the Maritime Transport Act 1994, s 25(2).

58 Sections 9 and 23.

59 Law Commission *Coroners* (NZLC R62, 2000) at [217]–[218].

[45] The fact that legislation in New Zealand (unlike for example the legislation in British Columbia[60] or that proposed by the Queensland Law Reform Commission[61]) has not attempted prescription of those entitled to the custody and disposal of a human body is itself of significance in considering the common law position. If Parliament has not adopted any statutory order of preference or entitlement in such matters, it prompts some caution in judge-made prescription, such as is urged here in favour of a power in the executor to decide on disposal of bodies to the exclusion of others with claims. Such rules may prove too inflexible to meet all circumstances (as indeed I conclude below).

[46] The statutory context is also of some assistance, because it indicates contemporary New Zealand values concerning the interests of family and the importance of cultural context when considering how the deceased are treated. Under the legislation, a coroner must release a body "as soon as he or she is satisfied that it is no longer necessary to withhold it *from family members*".[62] "Family members" is a term not defined in the Act but would seem to be a wider concept than that of the "immediate family" (who must be notified and consulted under different provisions of the Act). "Immediate family" is defined by cultural links as well as personal and blood relationships:[63]

> **Immediate family**, in relation to a dead person,—
>
> (a) means members of the dead person's family, whanau, or other culturally recognised family group, who—
>
> (i) were in a close relationship with the person; or
>
> (ii) had, in accordance with customs or traditions of the community of which the person was part, responsibility for, or an interest in, the person's welfare and best interests; and
>
> (b) to avoid doubt, includes persons whose relationship to the dead person is, or is through 1 or more relationships that are, that or those of—
>
> (i) spouse, civil union partner, or de facto partner of the dead person;

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60 Cremation, Interment and Funeral Services Act SBC 2004 c 35, s 5.

61 Queensland Law Reform Commission *A Review of the Law in Relation to the Final Disposal of a Dead Body* (Report No 69, December 2011) at 200–205.

62 Coroners Act 2006, s 42 (emphasis added).

63 Section 9.

(ii) child, parent, guardian, grandparent, brother, or sister of the dead person;

(iii) stepchild, stepparent, stepbrother, or stepsister of the dead person.

[47] Also of significance in the present case is the provision made in the Coroners Act to permit family to remain with the body while it is under the control of the coroner.[64] As appears from the report of the Law Commission which led to enactment of this legislation, these and other provisions were prompted in particular by the need to respect and facilitate Maori practices and preferences and the involvement of the wider whanau grouping with respect to the treatment of those who have died.[65] Such provisions indicate legislative recognition of Maori cultural practices which also properly influence the judge-made common law.

Does the executor have a right in law to decide the manner of burial?

[48] The judgments in the High Court[66] and Court of Appeal[67] proceed on the basis that the common law position, if not displaced by custom, is that the executor is entitled to determine the place and manner of burial of the deceased. Both Courts treated the matter as being no different because of Mr Takamore's burial, on the basis that the executor in the present case had not consented to such disposal or acquiesced in it. They therefore considered that Ms Clarke as executor had a continuing discretion to determine final disposition, subject only to supervision for reasonableness and subject to the necessary approvals under the Burial and Cremation Act.

[49] In the High Court, Fogarty J considered that, by reason of what he regarded as an "unlawful" taking, the body was not "properly buried".[68] In those circumstances, he accepted that the executor's "right" to determine the manner of disposal remained and would be enforced by the Court. The Court of Appeal did not

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64 Section 25.
65 Law Commission, above n 59, at [275]–[286].
66 *Clarke v Takamore*, above n 3, at [47].
67 *Takamore v Clarke*, above n 4, at [199] and [201].
68 *Clarke v Takamore*, above n 3, at [90].

endorse this point distinctly, but proceeded on the assumption that the executor continued to have the ultimate decision.

[50] I doubt that "proper" burial is a useful concept beyond the constraints imposed for "lawful" disposal under the Burial and Cremation Act for public interest purposes. More importantly, I do not accept that there is an exclusive right in the executor to determine disposal of the body of the deceased. The case-law does not I think provide a secure foundation for such right, as it is necessary to explain.

(i) Duty and right

[51] The common law as to control of burial is obscure.[69] That has been attributed to two circumstances: the burial of bodies was in England the concern of the ecclesiastical courts; and the pressing public interest was formerly in speedy burial for reasons of public health and decency, rather than the right to control the manner and place of disposal.[70]

[52] As a result of the first circumstance, early English cases commonly relied on for statements of principle did not arise out of disputes about who among different claimants had the right to control the manner and place of disposal. The often-quoted common law principles that there is "no property in a corpse" and that, in consequence, a deceased cannot compel how his body is to be disposed of by way of testamentary or other direction, rest on limited authority, decided in very different cases which, although often repeated, are not generally much analysed. Two such cases concerned a gaoler's refusal to give up the body of a prisoner for burial until debts incurred by the deceased had been paid.[71] The influential case of *Williams v Williams* (which itself drew on the gaoler cases) concerned the liability of an estate to pay for the exhumation and cremation abroad of the deceased in accordance with

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69 *Halsbury's Laws of England* (3rd ed, 1953) vol 4 Burial and Cremation, at [3] considers that the law as to who has the right to possession of the body for the purposes of burial is "imperfectly developed".

70 *Smith v Tamworth City Council* (1997) 41 NSWLR 680 (NSWSC) at 685–687. See also *R v Stewart* (1840) 12 Ad & E 773, 113 ER 1007 at 778 and 1009 per Lord Denman CJ.

71 *R v Fox* (1841) 2 QB 246, 114 ER 95; and *R v Scott* (1842) 2 QB 248.

directions he had given in his lifetime (cremation then being against the law in England).[72]

[53] These early cases, most frequently cited as the source of a common law right of the executor to dispose of the body of the deceased, provide no clear basis for the proposition that an executor has an exclusive right to possession and disposition against the claims of others rightly interested in the question of the proper disposal of the body of the deceased.[73] As was recognised early in American case-law (where there were no ecclesiastical courts and which has therefore been looked to as a helpful source of authority in other common law jurisdictions) a rule which excludes the claim of the spouse or a close relative of the deceased in all cases in favour of the executor would strike most people as repugnant.[74]

[54] The second circumstance (the need for prompt disposal) led the common law to impose a duty to dispose of a body on the householder of the place where the deceased died, it being often impractical to delay disposition while identifying the personal representatives of the deceased or next of kin.[75] Where personal representatives of the deceased were ready to undertake burial, the duty devolved upon them.[76] A practical consequence of this duty of burial on the executors was to enable those who in fact attended to burial to recover the costs from the estate.[77]

[55] It is difficult to reconcile the authorities on disputed burial in common law jurisdictions or to extract from them any settled rules. From the decision in *Williams* most seem to have extrapolated (without much in the way of analysis) a rule that an executor has not only the duty but also the right to possession and disposal of the body of the deceased. By analogy, similar rights have been held to devolve, in the absence of an executor, on those entitled to administration in the case of intestacy.

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72 *Williams v Williams* (1882) 20 ChD 659.

73 Points made by Percival E Jackson in *The Law of Cadavers and of Burial and Burial Places* (Prentice-Hall Inc, New York, 1936) at 54, and by Young J in his extensive review of the case-law in *Smith v Tamworth City Council*, above n 70.

74 See the authority referred to in 25A CJS Dead Bodies at §12 (2012).

75 *R v Stewart*, above n 70, at 778 and 1009 per Lord Denman CJ.

76 Jackson, above n 73, at 40.

77 *Rees v Hughes* [1946] 1 KB 517 (CA) at 524 per Scott LJ and 528 per Tucker LJ referring to *Tugwell v Heyman* (1812) 3 Camp 298, 170 ER 1389.

[56] It may be doubted whether such correlative right is properly derived from what seems to have been treated in early cases as a residual and non-exclusive responsibility. In a 1936 American text, Percival E Jackson explained that the duty to bury was distinct from the privilege of burial and sprung from different imperatives:[78]

> The duty of conveying the corpse, decently covered, from the place of death to the place of interment was and is a primary, a positive, and an active one. It springs from and is created by the right of the dead to burial and the right of the survivors, the next of kin and strangers, constituting the community, to enforce the right of burial in the public interest. It is likewise distinct from the privilege of care, custody, and disposition of the corpse. It is distinct from the obligation to defray or repay the cost thereof. Its enforcement rests upon the necessity of affording expeditious burial, originating at a time when embalming was not common practice, in the interests of the dead and by reason of solicitude for the health and feelings of the next of kin and of the community.

This is also the view of Hardcastle[79] and was accepted in New South Wales by Young J in *Smith v Tamworth City Council*.[80]

[57] As importantly, and as was recognised in United States cases early on, inflexible rules as to entitlement to bury are impractical and may not accord with community expectations of how the disposal of the dead should be arranged in particular cases. Similar concerns about inflexibility in a rule-based approach have more recently been expressed in England.[81]

[58] There are a number of interests which self-evidently must be considered in such cases. In the United States, a "quasi-property" approach gives standing to relatives and those closely connected with the deceased to seek from the Court regulation of the disposal of the body or a change in its custody for the purposes of burial.[82] The spouse is sometimes said to have a "paramount" interest, followed (where there is no surviving spouse) by the next of kin in order of closeness to the deceased, although such preferences are not inflexible and vary according to the

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78 Jackson, above n 73, at 39–40 (footnotes omitted).

79 Rohan Hardcastle *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, Oxford and Portland, 2009) at 50.

80 *Smith v Tamworth City Council*, above n 70, at 690.

81 *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch) at [16].

82 *Pierce v Proprietors of Swan Point Cemetery* 10 RI 227 (1872) (RISC).

circumstances.[83] In some cases a remote relative or friend may have a superior right to a next of kin; in others the public good or the interests of justice may require departure from the usual scheme of preference for those closely connected by relationship or blood. The extent to which the views of the deceased will be given effect varies in the case-law but they are increasingly considered to be important, reflecting increasing emphasis on human rights.[84] More generally, earlier authority is shifting under more recent affirmation of human rights and the willingness of legal systems to accommodate some measure of plurality especially in terms of cultural and religious preferences.

(ii) New Zealand authority

[59] Such authority as there is in New Zealand has relied on *Williams* in treating the executor as having the right to dispose of the body of the deceased. Thus in *Murdoch v Rhind*, Northcroft J, in an oral judgment, held that a dispute as to place and manner of burial between the widow and the executor must be resolved in favour of the executor simply because "it is for the executor to decide".[85] Despite this, there are suggestions that the Court considered it possessed a discretion to interfere (which if satisfied of the deceased's wishes in that case, it might have done).[86]

[60] *Re Clarke (Deceased)* was a case concerning dispensing with sureties on the grant of administration.[87] McGregor J referred to *Williams* and *Murdoch* in making passing reference to the "prima facie" entitlement and responsibility of executors or administrators for the burial of a dead body.[88]

[61] *Tapora v Tapora*, a decision of the Court of Appeal, did concern a dispute over the place of burial.[89] The executor obtained an injunction to prevent the widow burying the deceased in Auckland when his will, which the executor supported,

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83 *Corpus Juris Secundum*, above n 74, at §12.
84 *Burrows v HM Coroner for Preston*, above n 2, at [20].
85 *Murdoch v Rhind* [1945] NZLR 425 (SC) at 427.
86 At 426.
87 *Re Clarke (Deceased)* [1965] NZLR 182 (SC).
88 At 183.
89 *Tapora v Tapora*, above n 46.

directed burial in his home village in the Cook Islands. The Court cited *Re Clarke*,[90] *Murdoch v Rhind*,[91] and *Halsbury*[92] in holding that "the right and the duty lies on the executors, to the exclusion of other persons" to dispose of the body in "circumstances such as these".[93] It is not clear whether the "circumstances such as these" which were determinative were the testator's direction as to burial (which the executor sought to carry out) or whether the Court was adopting a more general view that the executor has an exclusive right to decide on the manner and place of burial.

[62] The New Zealand authorities are few and sparsely reasoned. They proceed on a questionable view of the connection between the duty to bury and the right to possession and disposition. They do not engage with the modern legislative background or recent case-law pointing out that human rights are affected by such decisions. They make no mention of cultural values in New Zealand society which rightly bear on the treatment of the dead, and in particular do not deal with Maori values and cultural preferences. They do not consider the public interest and practical considerations which (for the reasons to be developed) make adoption of the rule suspect. I do not regard them as authoritative in the present case.

(iii) Some practical considerations

[63] The duty of the executor to deal with the body of the deceased which is recognised by the common law is a residual responsibility. Such responsibility ensures that the reasonable costs of interment or cremation are costs in the estate able to be claimed by the person who attends to burial in fact.[94]

[64] A will made many years before the death of the testator may be out of date with the family and other circumstances. A rule of the law that the executor has the right to decide what happens to the body of the deceased may then prove embarrassing.

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90 *Re Clarke (Deceased)*, above n 87.
91 *Murdoch v Rhind*, above n 85.
92 *Halsbury's Laws of England* (4th ed, 1998) vol 10 Cremation and Burial.
93 At 3.
94 *Rees v Hughes*, above n 77, at 524 per Scott LJ and 528 per Tucker LJ.

[65] A common law rule that where there is an executor he has the right to determine the manner of disposal in all cases would be highly inconvenient and not in accordance with the way in which such matters are usually arranged. In very many cases, perhaps the overwhelming majority, responsibility for burial or cremation will be undertaken by close family or the whanau pani, without recourse to the executor, whose existence may not be known at that stage. In his review of the common law applicable in New South Wales in 1997 in *Smith v Tamworth City Council* Young J pointed out that in Australia executors obtain authority not immediately on the death of the deceased but only after grant of probate,[95] making it largely impractical to treat them as possessing an exclusive right to take possession of the body and attend to burial. It is not clear in the present case whether Ms Clarke asserted her right as executor rather than as Mr Takamore's partner at the time she resisted the claims of the Kutarere family. In most cases it would seem unlikely that such authority would be invoked ahead of the claims of relationship.

[66] In addition to difficulties in identifying the executor on death, any question as to the validity of the will may make it inappropriate for the executor to act until his status is resolved.[96] Co-executors may disagree between themselves. In cases of intestacy there will be no executor and the ability to obtain grant of administration will not answer the immediate question of disposition of the body of the deceased. Although it is sometimes suggested that the rules as to the order in which grants of administration may be made are a guide, there are often people with equal claims. The apparent certainty provided by a rule will often be illusory.

[67] A right to possession for the purposes of disposal would also cut across the practical solutions adopted by families without thought of who has the legal right by requiring identification of those who can determine according to law. It could well impede the achievement of prompt and decent disposal, which was the original justification for the duty recognised by the common law.[97] Where burial or other disposition is undertaken before an executor is identified or administration granted, it would be unacceptably disruptive and distressing if the arrangements made were

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95 *Smith v Tamworth City Council*, above n 70, at 688.

96 Injunctive relief to this effect was sought in *Abeziz v Harris Estate* [1992] OJ No 1271 (ONGD), although relief was declined on the facts.

97 *R v Stewart*, above n 70, at 778 per Lord Denman CJ. See also Hardcastle, above n 79, at 50.

liable to be undone because the executor or administrator had not acquiesced in them.

(iv) The nature of the executor's responsibility

[68] The case for Ms Clarke is that the decision as to disposal where there is dispute is for the executor, because the executor has the exclusive right to possession and disposal of the body of the deceased. She acknowledges that the executor's discretion is subject to supervision by the courts on the application of those with sufficient standing. Such supervision does not however entail determination of the competing merits of the claim but only the reasonableness of the executor's conduct. Within the margin of discretion bounded only by what is unreasonable, the executor's decision is said to be "non-justiciable". This suggestion is comparable to the supervisory jurisdiction of courts of equity in some United States jurisdictions and is the approach adopted by Fogarty J in the High Court.[98]

[69] In the United States, the supervisory jurisdiction of the courts is sometimes grounded on what has been described as a "quasi-property right" to the body. By it, relatives and others legitimately interested may seek to displace the privilege of disposal in the executor and have standing to seek protection of the body from disturbance, as by way of disinterment.[99] It is clear from the United States authorities that this "quasi-property right" is not proprietary in nature.[100] It is rather the basis on which those with legitimate interests can make application to the court for determination of disputes about disposal of the body of the deceased.

[70] In the Court of Appeal in the present case Chambers J seems to have treated the executor as being entitled to a proprietary interest that would support tortious claims in conversion and detinue.[101] Such approach is contrary to the long-standing

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98 *Clarke v Takamore*, above n 3, at [40], [47] and [48].

99 *Pettigrew v Pettigrew* 207 PA 313, 56 A 878 (1904) (Supreme Court of Pennsylvania); and *Pierce v Proprietors of Swan Point Cemetery*, above n 82. See also Jackson, above n 73, at 54 and *Corpus Juris Secundum*, above n 74, at § 2.

100 *Corpus Juris Secundum*, above n 74, at §3 referring to *Stewart v Schwartz Brothers-Jeffer Memorial Chapel Inc* 159 Misc 2d 884, 606 NYS 2d 965 (Sup Ct 1993).

101 *Takamore v Clarke*, above n 4, at [323] and [326].

common law position that there is no property in a body.[102] Nor has it featured in the case-law of New Zealand, the United Kingdom and Australia.[103] It has no support in the United States authorities.[104] It would cut across the practical solutions adopted in the vast majority of cases if it were necessary for the person assuming responsibility to ensure that he was not in jeopardy of civil claim by someone recognised in law as entitled to possession of the body. The approach is inconsistent with the views expressed by the Law Commission in the *Coroners* report and the legislation which resulted from it, which avoid the concept and language of possessory entitlement as troubling to many groups in New Zealand society.[105] It is also difficult to reconcile with the approaches implicit in s 46E of the Burial and Cremation Act 1964 and s 150(a) of the Crimes Act 1961 which envisage that the obligation to dispose of human remains is imposed on anyone in a position to attend to it in the circumstances. In the absence of statutory identification of who is entitled to the custody of a human body for the purposes of proper disposal, the imposition by judge-made law of a hierarchy of possessory rights able to be vindicated by claim in tort seems overbold.

[71] On the other hand, there is some disconnect between the proposition that there is no property in a human body and an exclusive right to take possession and arrange for its disposal. That seems to be behind the suggestions of a "quasi-property" but non-proprietary interest in some of the American jurisdictions.[106] In others it has led to the executor's rights of burial to be treated as a trust for the benefit of those properly concerned about the disposition of the deceased because of their connection to the deceased through friendship or family ties.[107]

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102 See *R v Kelly* [1999] QB 621 (CA) at 630 where Rose LJ affirmed that "it has now been the common law for 150 years at least that neither a corpse nor parts of a corpse are in themselves and without more capable of being property protected by rights".

103 This rule was recognised in *Doodeward v Spence* (1908) 6 CLR 406 at 411. The High Court held at 414 that property rights in human bodies have only been recognised where the lawful exercise of work or skill with a body could differentiate it from a mere corpse awaiting burial. See also *Re Organ Retention Group Litigation* [2004] EWHC 644, [2005] QB 506 at [148].

104 *Corpus Juris Secundum*, above n 74, at §2.

105 Law Commission, above n 59, at [217]–[218].

106 See for example *Pierce v Proprietors of Swan Point Cemetery*, above n 82.

107 See for example *Teasley v Thompson* 204 Ark 959, 165 SW 2d 940 (1942); and *Corpus Juris Secundum*, above n 74, at § 11.

[72] While explicitly avoiding the trust basis, Vinelott J in the English case of *Grandison v Nembhard* thought "it would be surprising to find that the court had no power in any circumstances to interfere" with the discretion of the executor as to burial.[108] He suggested that interference by the Court would be warranted if the executor had failed to weigh properly factors "which ought to have been taken into account" or had acted unreasonably.[109] This is in substance the approach taken in the present case by Fogarty J in describing the executor's right as subject to fiduciary duties.[110]

[73] On behalf of Ms Clarke it is accepted that the common law right of the executor, on which she relies, is subject to the supervisory jurisdiction of the Court for reasonableness on equitable principles. Such fiduciary responsibilities may not be easy to identify or to fulfil in a particular case. Fogarty J considered they could properly be discharged only by taking into account the views of those closely connected with the deceased, including those with distinct cultural or religious expectations.[111] In any case there may be a number of people with legitimate claims to consideration in determining the manner and place of disposal of the deceased's body, perhaps religious or cultural, which may be recognised by the Court to impact upon the responsibilities of the executor. In New Zealand they include those who have interests by reason of whakapapa and tikanga, as Mr McCoy in his arguments for Ms Clarke accepted. Recognition of custom in the matter of tangihanga was accepted in *Public Trustee v Loasby*.[112] Such recognition was necessary in the New Zealand legal system where the laws of England applied only "so far as applicable to the circumstances of the … colony".[113]

[74] In many cases, the executor is appointed and more suited to carry out the administration of the deceased's property, rather than the disposition of his body. Usually, that decision is left to the immediate or wider family or will be resolved in accordance with religious or cultural precepts. The responsibilities of the

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108 *Grandison v Nembhard*, above n 9, at 143.
109 At 143.
110 *Clarke v Takamore*, above n 3, at [46]–[47].
111 At [47].
112 *Public Trustee v Loasby*, above n 22.
113 The English Laws Act 1858, s 1; and English Laws Act 1908, s 2; the effect of these provisions is now preserved by s 5 of the Imperial Laws Application Act 1988.

administrator are similarly to deal with the estate. It is entirely understandable that the law treats the executor or administrator as a fiduciary for those whose benefit he administers the estate (those who take under the will or on intestacy). That is very different from imposing fiduciary responsibilities on executors and administrators in relation to the disposal of the body of the deceased. It is by no means clear to whom such duties would be owed. When asked, Mr McCoy first suggested the duties would be owed to the deceased, but then modified his answer to acknowledge they would have to extend to the family. At least in cases where the deceased has left no instructions in his will as to the disposal of his body, it is not easy to identify the scope of the fiduciary duty owed to him, or its source if the deceased's body is not property in the estate. If duties are owed to those connected with the deceased, it may be difficult for the executor to identify the range of those whose interests should be considered. Imposing fiduciary duties in such matters upon executors and administrators sets up the conditions for continuing dispute over disposal when interests have not been taken into account or given the weight reasonable in the circumstances.

(v) The executor does not have exclusive power to decide

[75] The cases indicate a tension between two different legal policies: the desirability of a clear rule which saves the courts from entering into the merits of a disputed claim; and the need to maintain flexibility in order to respond to the justice of the case. The first policy seems to have dictated the approach adopted in *Murdoch v Rhind*[114] and is frankly admitted as the policy preferred by the courts in the Australian cases of *Calma v Sesar*[115] and *Meier v Bell*.[116] The second policy was perhaps not excluded in *Tapora*[117] but was explicitly developed for the Full Court in the South Australian case of *Jones v Dodd* by Perry J,[118] in conscious departure from the approaches taken in *Calma v Sesar* and *Meier v Bell*, and was followed by Doyle CJ in the subsequent (and apparently connected) case of *Dodd v Jones*.[119] A number of the cases discussed in what follows are concerned with intestacy, but I consider

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114 *Murdoch v Rhind*, above n 85.
115 *Calma v Sesar*, above n 10.
116 *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997).
117 *Tapora v Tapora*, above n 46, at 4.
118 *Jones v Dodd*, above n 10, at [40] and [51]–[53].
119 *Dodd v Jones* [1999] SASC 458.

the reasoning in them is helpful also in cases where there is an executor appointed under a will to administer the estate of the deceased.

[76] The South Australian cases rejected the view that there is a rule of law that confers the right to determine how the deceased's body is to be treated on a putative administrator (identified in accordance with the order in which administration can be obtained). It was acknowledged that the rules of administration might help, but held that they could not lay down a rule of general application determinative of entitlement to choose the place and manner of burial.[120] That was a matter for the Court to decide in all the circumstances of the case.[121] Perry J described the approach taken by Young J in *Smith v Tamworth City Council*:[122] that a named executor has "the primary privilege" and where there is no executor the person entitled to administration is "usually" the person responsible for attending to burial.[123] This was, Perry J said, a statement of "a common or usual approach, not an approach which is to be rigidly applied".[124] It was held that the first instance Judge had been in error in deciding the case upon "common law principles [as to the order of administration] to the exclusion of considerations stemming from the deceased's aboriginality".[125] Such "so-called principles are no more than a convenient method of approach to some cases, rather than a hard and fast rule".[126]

[77] The proper approach in cases of dispute over burial was described by Perry J as one that had "regard to the practical circumstances, which will vary considerably between cases".[127] It was necessary, too, to "have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question".[128] Although "pragmatic features" (such as had been treated by Martin J in *Calma v Sesar* as decisive[129]) had their place, Perry J considered that "the court must nonetheless proceed as best it can to pay due regard

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120 *Jones v Dodd*, above n 10, at [46].
121 At [51].
122 *Smith v Tamworth City Council*, above n 70, at 691.
123 *Jones v Dodd*, above n 10, at [45]–[46].
124 At [46].
125 At [66].
126 At [67].
127 At [51].
128 At [51].
129 *Calma v Sesar*, above n 10, at 452.

to whatever cultural or spiritual factors arise",[130] as was consistent with international legal instruments:[131]

> True it is that the international instruments to which I have referred have as their primary application the protection of the rights of living persons. But it seems to me that common considerations of decency and respect for human dignity should lead those responsible for the burial of a corpse to recognise, and where possible give effect to, the cultural, spiritual and religious beliefs, practices and traditions of the deceased. Furthermore, for similar reasons, an appropriate degree of sensitivity and respect should be accorded the feelings of the surviving members of the deceased's family.

[78] The South Australian cases were ones where there was intestacy, but I do not think the approach should properly be different on that account. The reasons given by Perry J seem to me equally appropriate in any case where there is dispute about disposition of the body. Where the deceased has appointed an executor and the circumstances indicate that he reposed confidence in the executor to make such determinations, the views of the executor are likely to be given particular weight. But they are not determinative.

[79] I would follow the approach taken in *Jones v Dodd.* It is consistent with the views expressed by Hart J in *University Hospital Lewisham NHS Trust v Hamuth* that, although the executor "in general" has the right to make arrangements for the disposal",[132] where there is dispute his is one of a range of views that must be considered, although entitled to a "high priority".[133] This seems to me to be the better view of the law and is supported by Hardcastle.[134] It means that the executor's right to determine disposal of the body and to take possession of it for the purposes of disposal is not an exclusive right.

(vi) A rule of law is not appropriate

[80] A rule of law (whether "hard and fast" or rebuttable) which sets up a primary decision-maker (whether the executor named or a person entitled to administration on intestacy) is suggested as necessary to prevent the courts from being drawn into

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130 *Jones v Dodd*, above n 10, at [55].
131 At [60].
132 *University Hospital Lewisham NHS Trust v Hamuth*, above n 81, at [13].
133 At [16].
134 Hardcastle, above n 79, at 50.

controversies about the merits of the decision in cases of dispute. For the reasons already given, I do not think such a rule has been established on the authorities and I consider it is inconsistent with the long-expressed common law position that there is no property in a body. Nor, in my view, should any such rule be adopted by judicial decision. Parliament is of course free to provide such rules (as the legislature of British Columbia has done). It can do so after wider consideration of the policies in play than can be attempted by the courts. In that connection, it should be noted that the question of entitlement to bury has been referred to the Law Commission for consideration and report.[135]

[81] My reasons for considering that no such rule should be adopted as a matter of common law have been largely foreshadowed and may be summarised here. They need to be supplemented by reference to wider considerations of cultural diversity and in particular Maori tikanga.

[82] The law in this area must meet the public interest, including in the decent treatment of those intimately connected with the deceased. They may include the executor or administrator, but will also usually include family members.[136] In modern conditions I think it is also unacceptable to say that the views of the deceased are views that can be ignored. Human rights are engaged because the disposal of human remains touches on matters of human identity, dignity, family, religion and culture.[137] Disempowerment in decisions of great personal moment may be as emotionally distressing as an outcome that is contrary to religious or cultural values. I do not think it accords with social expectations and the way the dead are dealt with in New Zealand society for the executor to have control over the disposal of the deceased to the exclusion of others with claims. Moreover, such a rule will be impractical or inconvenient in many cases for reasons, already mentioned, such as the will being out of date, dispute between co-executors, doubt as

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135 See Law Commission "Terms of Reference: Review of the Burial and Cremation Act 1964" (1 July 2010) <www.lawcom.govt.nz>. The terms include consideration of whether the Act is meeting public expectations and needs in connection with the handling and burial or cremation of the dead, in particular with respect to the care and custody of the body after death and the responsiveness of the Act to the beliefs, customs and practices of Maori.

136 Hardcastle, above n 79, at 50.

137 Jackson, above n 73, at 52, as well as Hardcastle, above n 79, at 50 refer to the need to have respect for the dead and the importance of the dignity of individuals even after their death. Further, at 59, Hardcastle considers that this may be an area where the right to respect for private and family life is engaged.

to the appointment, and uncertainty as to identity of the executor at the time decisions as to disposal of the deceased have to be made.

[83] Families do commonly attend to disposal of their dead without ascertaining the wishes of the executor. And a rule by which executors determine the disposal of the body of the deceased is inconsistent with traditions of tangihana which are central to Maori society. The common law in my view properly permits responsibility for burial or other disposition to be undertaken by families and according to tikanga. New Zealand statutes do not seek to recognise any status of executors in relation to disposal of human bodies, but rather look to family, whanau, and to those having charge of the body in fact.[138]

[84] It is not sufficient answer to the legitimate interests of others that the decision of the executor will be subject (as is conceded) to the supervisory jurisdiction of the Court. The conceptual basis for such supervision is shaky because, again, it seems to assume some proprietary interest which is not easy to reconcile with the cases (leading to the suggestions of "quasi-property"[139] or trust). More importantly, I do not think deference to a primary decision-maker (even one subject to the supervision of the court) is sufficient response to the strength of the other interests affected in such cases. The supervision of the Court in the manner described by Fogarty J (as set out in [23] above) emphasises formality of decision-making which seems likely to lead to disputes about process and which may be difficult for the executor to apply in practice.[140] It may well result in outcomes which, although reached in a matter which is formally correct, seem out of step with general public expectations, as perhaps *Murdoch v Rhind* illustrates.

[85] It may be doubted whether such supervision is sufficient to meet community expectations in outcome in circumstances where there is someone or a group with

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138 Discussed at [39]–[47] above. They include the Burial and Cremation Act 1964, s 46E; Coroners Act 2006; Human Tissue Act 2008, s 12; and the Maritime Transport Act 1994, s 25.

139 This concept has been recognised in a number of United States authorities beginning with *Pierce v Proprietors of Swan Point Cemetery*, above n 82. However, some United States jurisdictions have now begun to reject "quasi-property" as a basis of protection of corpses. See Hardcastle, above n 79, at 52.

140 It would put the Judge in the executor's head, in the manner criticised in another context by Thomas Poole in "Of headscarves and heresies: the *Denbigh High School* case and public authority decision-making under the Human Rights Act" [2005] Public Law 685 at 695.

higher moral claim in the particular circumstances than the executor set up to administer the estate (and who in many cases may be a professional person rather than someone closely connected with the deceased). In such cases, judicial indifference within the margins of a wide discretion to something of such moment as the treatment of human remains seems increasingly out of step with acknowledgements that human rights are engaged in such decisions.[141] The position of the executor may gain added strength where the executor seeks to carry out instructions left by the deceased as to the disposal of his body. But in the absence of such directions it is by no means clear that the right of an executor, appointed to deal with the property of the deceased, should prevail as a matter of law over the interests of a spouse or de facto partner, the interests of children, or the interests of those with legitimate and pressing cultural and religious obligations in relation to the deceased.[142] The will may be well out of date at the time of death and out of step with the current family conditions and attachments of the deceased.

[86] Although it may be tempting for courts to look for rules which obviate the need for them to engage with highly charged considerations of importance to the deceased and those close to him, such rule-making may be of doubtful legitimacy in circumstances where Parliament has not provided for such prescription despite legislation on the topic of custody and disposal of human bodies. And it is for the courts in our system to resolve civil disputes about things that matter. I agree with Perry J that it cannot be right for the courts to avoid consideration of emotional, spiritual and cultural factors when they are present, "however inconvenient it may be to do so in the short time which is commonly available to decide these cases".[143]

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141 A point made by Cranston J in *Burrows v HM Coroner for Preston*, above n 2, at [18] and [20]. Cranston J noted that the authorities to that date had not considered the impact of the European Convention on Human Rights. He considered that "in as much as our domestic law says that the views of a deceased person can be ignored it is no longer good law".

142 This has long been the approach adopted by the South African courts: *Mankahla v Matiwane* [1989] (2) SA 920 at 924 (CkGD); *Goniwe v Mawindi* HC South-Eastern Cape, Case No 853/07, 18 May 2007; and *Mahala v Nkombombini* HC South-Eastern Cape, Case No 10861/2005, 9 December 2005.

143 *Jones v Dodd*, above n 10, at [40].

(vii) Reinterment

[87] If there is no rule of entitlement to dispose of a body, it is not necessary to consider separately whether there is any difference between the authority of an executor with respect to initial disposal and with respect to re-interment. As a consequence, it is also unnecessary to consider further whether the executor's original privilege of burial remains unexhausted because of "impropriety" in the initial disposal where the executor has not consented to it. (I have however indicated doubt as to whether the concept of "improper burial" is useful if it goes beyond burial in accordance with the statutory conditions.)

[88] For completeness, however, it should be noted that even where it is thought that the executor has the right to determine initial disposal, the authorities in other jurisdictions generally maintain that the executor (as well as others who may apply) requires court approval for disinterment in order to effect reburial. Thus in *Dobson v North Tyneside Health Authority* it was held that the right to custody and possession of those with the legal duty of interring a body ended when it was properly buried.[144] The United States authorities referred to in *Corpus Juris Secundum* are consistent in denying any right to the body of a deceased once buried.[145] The only interest remaining is one sufficient to support a challenge to or application for disinterment. The view expressed in the Court of Queen's Bench in Saskatchewan by MacLeod J in *Re Waldman* suggesting that the right of the executor to possession of the body continues after its burial is out of step with the general line of authority.[146]

[89] Reinterment in itself raises public interest issues because of the widely held view that human remains once laid to rest should not generally be disturbed.[147] (This cannot be maintained as an absolute position and, indeed, the specific power under s 51 of the Burial and Cremation Act that a "relative or friend of the deceased" may

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144 *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 (CA) at 600. See also *Re Organ Retention Group Litigation*, above n 103, at [296].

145 *Corpus Juris Secundum*, above n 74, at § 4.

146 In *Re Waldman* (1990) 65 DLR (4th) 154 (SKQB) the executor was resisting disinterment. There is New Jersey authority of 2002, referred to in the Corpus Juris Secundum that once buried, custody over a body vests in the superior court: see *Corpus Juris Secundum*, above n 74, at § 4, referring to *Lascurain v City of Newark*, 349 NJ Super 251, 793 A2d 731 (App Div 2002).

147 Hardcastle, above n 79, at 50 and Jackson, above n 73, at 91–96. See also *Re Blagdon Cemetery* [2002] 3 WLR 603 (Arches Ct) at [18].

apply to remove a body when a burial ground has been closed to further burials indicates legislative sympathy towards reinterment in those particular circumstances.) But even if of the view that the executor has exclusive right to determine initial disposal, I would reject the more extreme argument put forward for the executor here under which she requires no authority from the court for reinterment but only licence under the Burial and Cremation Act. That Act is concerned with matters of public health and decency. Wider interests are engaged in disinterment. Those directly affected are entitled to be heard on the executor's proposal. Entitled to consideration, too, is the public interest. The views of the executor may be highly influential (and it is a relevant consideration here that the initial disposal was contrary to her wishes). But in my view the court must determine whether reinterment is appropriate.

(viii) Conclusion that the executor has no exclusive right to bury

[90] For these reasons, I conclude that there is no rule of the common law in New Zealand that an executor has the right to determine the burial or other disposition of the body of the deceased. The responsibility of burial is a shared responsibility and falls to be exercised according to the circumstances. The law has no role to play except to ensure decent and prompt burial, and where dispute arises. In the absence of dispute, the executor has sufficient authority to proceed to bury the deceased. In the absence of objection by others, including the executor, the privilege of burial may equally be exercised by other close family members. That is the consequence of the common law refusal to recognise property in a human body, an approach which I consider cannot be changed without great disruption to the normal course of social conduct in such matters. An exclusive right in the executor, even subject to the supervisory jurisdiction of the courts, seem to me inconsistent with this basic position and to be an impractical position for the law to take. Where however disputes arise, parties affected must be able to have access to the Court for determination of their claims in its inherent jurisdiction.[148]

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148 As in *Pierce v Proprietors of Swan Point Cemetery*, above n 82, at 243.

Resolving dispute

[91] The High Court of New Zealand has "all judicial jurisdiction which may be necessary to administer the laws of New Zealand".[149] The application made by Ms Clarke in the present case invokes this inherent jurisdiction which is available to resolve disputes potentially disruptive of civil society. So, the inherent jurisdiction has been invoked to grant administration of an estate in circumstances not provided for by statute[150] and has been held to provide authority for the Court to make an order determining who would decide the manner of disposal of the body of a child still living, but not expected to survive (although the application was ultimately declined as premature).[151] In the first case the jurisdiction was invoked to remedy the deficiency that, otherwise, there was a risk that the estate would not be administered. In the second case, it was held that the jurisdiction was available to forestall unseemly dispute over the manner of disposal of the body, in circumstances where there was bitter division in the family between the paternal grandmother and the mother (who had caused the injuries to the child that were likely to lead to death). The jurisdiction is properly invoked in the present case where the dispute about the interment of Mr Takamore has not been able to be settled either through family processes (as happens in most cases of dispute) or through tikanga processes (by which disputes in respect of cultural claim may usually be resolved). It must therefore be resolved according to the method of the common law. In exercising this responsibility, the Court may make specific orders as to disposition but, in many cases, may find it more appropriate to decide which of the claimants should be left to undertake the disposition in accordance with their preferences.

[92] On the view I take that the law does not provide a rule which is determinative as to who may bury or dispose of a deceased person, the case has perhaps proceeded on a false antithesis between what Chambers J called "the pure common law" and tikanga.[152] Rather, the clash between the values of Ms Clarke and Mr Takamore's children on the one hand (based on their relationship to the deceased and his

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149 Judicature Act 1908, s 16.

150 *Re Jones (deceased)* [1973] 2 NZLR 402 (SC).

151 *Re JSB (A Child)* [2010] 2 NZLR 236 (HC): determining that the High Court had authority to make such an order, although it was ultimately declined in the exercise to discretion as being premature in the circumstances.

152 *Takamore v Clarke*, above n 4, at [268].

appointment of Ms Clarke as his executor) and the values of the Kutarere family and the hapu on the other (based on whakapapa and tikanga) has to be resolved by the Court because neither decision-making according to the usual processes of family nor resolution by processes of tikanaga has resolved the dispute.

[93] The case before the Court is not properly characterised as imposing the processes of tikanga on Ms Clarke. Indeed, Professor Temara, an expert witness on tikanga, explicitly said that "Maori tikanga is not forced on non Maori who will not accept it". The case is rather one in which the Court has to resolve competing claims based on different values raised by parties with standing to seek the determination of the court.

[94] Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only "so far as applicable to the circumstances of the … colony".[153] It is the approach adopted i*n Public Trustee v Loasby*[154] and, in Australia, in *Manktelow v Public Trustee*.[155] Maori custom according to tikanga is therefore part of the values of the New Zealand common law.

[95] What constitutes Maori custom or tikanga in the particular case is a question of fact for expert evidence or for reference to the Maori Appellate Court in an appropriate case.[156] A court asked to identify the content of custom by evidence is not engaged in the same process of interpretation or law-creation, as is its responsibility in stating the common law. As in all cases where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law. But it is necessary for the Court to take care in identifying the custom or values truly relevant to its determination. In that connection, I consider that the majority in the Court of Appeal were wrong to

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153 See above n 113.
154 *Public Trustee v Loasby*, above n 22, at 807.
155 *Manktelow v Public Trustee* [2001] WASC 290, (2001) 25 WLR 126 at [19].
156 Te Ture Whenua Maori Act 1993, s 61.

see the custom or values here invoked as requiring the Court to accept determination according to tikanga, including by forcible removal of the body of the deceased.

[96] Although Professor Temara and Mr Kruger gave illustrations of how in tribal dispute there have been famous cases where the taking of the body of a deceased against the wishes of others of the family has occurred because of competing claims of whakapapa and cultural association, it has not been suggested that the Court on application to it by someone with standing to seek its help should defer to such outcome. The relevance of such evidence is to show that the Kutarere family in taking Mr Takamore home were acting in conformity with their tikanga, not to pre-empt the decision of the Court on the present application, which is an application for delivery of Mr Takamore's body to Ms Clarke. The description in the evidence of cultural contest over deceased in other cases does not overwhelm the underlying values of whakapapa and custom in burial which are relevant to the present claim. That would be to define the important customs and traditions of burial by one observed aspect (which, as the evidence given shows, does not in the event resolve disputes even in cultural terms, until harmony is restored). These underlying values in burial (of connection with whenua and whakapapa) are properly to be taken into account in New Zealand law. They are not unreasonable in law and are rightly weighed by the courts, as can be seen in comparable claims in Australia concerning Aboriginal people.[157]

[97] The role of the Court is not to judge the validity of traditions or values within their own terms. It is concerned with the application of established traditions and values in fulfilling the Court's own function of resolving disputes which need its intervention. The determination of the Court says nothing about what is right according to the value systems themselves. Indeed, the determination of the Court can only settle the immediate legal claim. The family and tikanga processes may well continue.

[98] Once it is accepted that neither claimant has the right in law to determine burial, the values which are truly in contention in the present case are the

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[157] See for example *Minister for Families and Communities v Brown*, above n 10; and *Jones v Dodd*, above n 10.

understandable wish of the spouse and children to have Mr Takamore with them in Christchurch, and the understandable obligation felt by the Kutarere family to have Mr Takamore at home with those to whom he is connected by whakapapa and in the place where he was born. Both preferences are based on important values derived from different and equally valid cultural frameworks. It is necessary in this connection to say something further about the manner in which the tikanga-based considerations were treated in the lower Courts.

[99] I have already indicated my agreement with the view taken by the majority judgment in the Court of Appeal, in disagreement with the approach of Chambers J in that Court and Fogarty J in the High Court, that on the evidence it would be quite unsafe to conclude that Mr Takamore had repudiated his heritage. As Glazebrook and Wild JJ pointed out, the circumstances in which many Maori today must live away from their tribal lands in ways which make it difficult to keep up traditional practices make it dangerous to jump to conclusions about the strength of their connection, particularly in matters of life and death, so central to human identity.[158] Comments made by Mr Takamore to work friends in Christchurch are difficult to assess. Even in that context, he referred to being Maori (if a "South Island Maori") and Ms Clarke clearly considered that it was appropriate, given his heritage, for him to be taken to an urban marae before his burial. The expert evidence given to the High Court by Professor Temara acknowledged the increasing difficulties of maintaining tribal links in urban lifestyles. It may be that tikanga too will evolve under these pressures. But for present purposes it is sufficient to accept that there is no secure basis for the inference of fact that Mr Takamore had severed his tribal links and that the imposition of the values of tikanga in those circumstances would be inconsistent with his "individual freedom" under the common law, as Fogarty J thought.[159]

[100] Moreover, even if there had been evidence of repudiation, that would not in itself have made the values of the hapu irrelevant. The Kutarere family would still have had standing to invoke tikanga in a claim that Mr Takamore should be buried at Kutarere. His views, if clearly expressed, would have to be taken into account. But

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158 *Takamore v Clarke*, above n 4, at [158].
159 *Clarke v Takamore*, above n 3, at [87]–[88].

they are not determinative as a matter of law. That is so even in a case without a cultural dimension. In the present case, as Glazebrook and Wild JJ in my view were correct to point out, the recognition of a principle of "individual freedom" as essential at common law would mean that no communal custom would survive its introduction, a result inconsistent with the terms of the Imperial Laws Application Act and the common law itself.[160] The Court has to consider the wider interests in the claim, which, on the expert evidence before the Court, arise not out of the personal preferences of the living, but out of their obligation to the dead and to those still to come (including Mr Takamore's descendants), the connections with whom will be diminished in cultural terms by burial away. Because in Maori thinking the dead are always present and always acknowledged, decisions in such matters affect the enjoyment of the culture of the hapu in a way which engages s 20 of the New Zealand Bill of Rights Act and makes the interest of this minority group a proper matter to be weighed, whatever the wishes of the deceased. They also engage the principles of the Treaty of Waitangi and its protection of Maori society, in which the dead are so important.

Result

[101] It is the case that many – perhaps most – New Zealanders may believe strongly that the most important view in a case of disputed burial is that of the spouse of the deceased. That is, as has been indicated, the general approach in the United States cases. It would however be paying lip service to the importance of culture recognised by the New Zealand Bill of Rights Act and in particular the importance of Maori society and culture in New Zealand (derived from the Treaty of Waitangi and recognised in modern New Zealand legislation) to conclude that the wishes of the spouse will always prevail over other interests. It depends on the wider circumstances.[161] Where traditional identity and important cultural values are at stake, preference for the spousal connection may properly yield, as has been recognised in Australia in relation to Aboriginal customary law notions of kinship.[162]

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160 See, for example, *Baldick v Jackson* (1910) 30 NZLR 343 (SC); *Public Trustee v Loasby*, above n 22; and *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

161 Illustrated by *Frith v Schubert*, above n 10.

162 In *Jones v Dodd*, above n 10, at [64]–[69] Aboriginal notions of kinship were there said to favour the father and his wish to bury the deceased within the geographical area of the tribe.

[102] In the present case, the cultural claims are powerful. The loss to the culture the appellants seek to prevent is grave because it loosens the links of whakapapa, not only in the case of Mr Takamore but his descendants. As the eldest son of the family, his loss is of particular significance. His removal from Kutarere will cause great grief, particularly to his mother. It also affects the practice of the culture of the hapu. On the other hand, as the expert witnesses accepted, tikanga itself may be evolving as more Maori live their lives in cities away from the lands of their hapu. And resolution by the Court of the present dispute does not preclude reconciliation in accordance with tikanga for the future.

[103] I have concluded that Ms Clarke should be given the right to determine where Mr Takamore is to be. He made his life with her for more than twenty years and they have two children together. During their time together Kutarere was left behind. That may not have been Mr Takamore's personal preference – it is impossible to know – but it was the choice he made in his life out of commitment to Ms Clarke and his children. Ms Clarke therefore has no affinity with Kutarere; indeed it appears that she may have been unhappy in her brief time there. Mr Takamore's burial at Kutarere separates him from her. Her reluctance to agree to the burial at Kutarere is not therefore mere preference at the point of decision; it follows a course set by the way the couple lived.

[104] The children support their mother. As adults, they may be thought to be in a position to make this choice for themselves and for their children. They have almost no connection themselves with the Kutarere family. Indeed, perhaps reflecting the choices made by Mr Takamore in his lifetime, the son in his evidence says that he grew up not knowing what iwi he was from.

[105] In these circumstances, preventing Ms Clarke from deciding where Mr Takamore is to be buried divides the partner and the children from him. That result is not consistent with the choices he made in life, which were to put them first. Had the family connections with Kutarere been maintained, even slightly, the claim based on whakapapa, identity, and hapu may well have prevailed. I do not think that Mr Takamore's regular telephone contact with his mother, conversations not shared with his partner, were sufficient connection to overcome the interests of Ms Clarke

and the children and their own discomfort in the world that Mr Takamore did not share with them.

[106] These are the sort of considerations that led to the different results in the South Australian cases of *Jones v Dodd* and *Dodd v Jones*. They seem to have concerned two brothers. One maintained contact with his tribal land,[163] the other had been content to live in Port Augusta.[164] The brother who had maintained his connections was given to his father to bury, against the claims on behalf of his children (whom he had visited regularly in Port Augusta and with whom he had a close relationship). The brother who had moved away was buried against the wishes of his father, close to his children and partner.

[107] The conclusion I come to here is dictated by similar contextual considerations. I would dismiss the appeal but for reasons that differ from those expressed in the Court of Appeal. I consider that there is no rule of the common law which entitled Ms Clarke as executor of the will to determine the place of Mr Takamore's burial or entitles her to obtain his remains for reburial. Rather, I consider that, on the facts, Ms Clarke should be permitted to rebury her partner in accordance with her own wishes.

[108] The appeal is dismissed. The case is remitted to the High Court so that any consequential orders may be made.

TIPPING, McGRATH AND BLANCHARD JJ

(Given by McGrath J)

Introduction

[109] We agree that the appeal should be dismissed.

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163 *Jones v Dodd*, above n 10.
164 *Dodd v Jones*, above n 119.

[110] We adopt those parts of the judgment of the Chief Justice which outline the background facts[165] and summarise the judgments of the Court of Appeal[166] and High Court.[167] We also take no issue with the Chief Justice's summary of legislative provisions concerning burial and release of bodies.[168] We do not, however, see the statutory background as indicating that the Court should exercise caution or restraint in ascertaining the common law of burial and cremation to be applied in this case.[169] Indeed, the Burial and Cremation Act 1964 appears to leave the meaning of a person "having charge of the body" to be spelt out by the common law.

[111] We differ also from the Chief Justice on the content of the common law in relation to the rights and duties of a named executor or potential administrator relating to disposal of the body of a deceased person. The conclusion we reach as to the outcome of the appeal, however, is generally the same as that reached by the Chief Justice.

The New Zealand common law position

[112] It is convenient to summarise the common law position as it presently stands in New Zealand and relevant developments overseas before considering whether adjustment to the law is required to deal with the special circumstances of Tūhoe burial custom that arose in this case.

[113] In most common law jurisdictions, the judgment of Kay J, in 1882 in *Williams v Williams*,[170] has been treated as the authoritative seminal discussion of the responsibilities of personal representatives in relation to the body of a deceased person. The Judge first acknowledged that it was clear law that "there can be no property in the dead body of a human being" but recognised that duties arose in this

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165 At [13]–[21].
166 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573.
167 *Clarke v Takamore* [2010] 2 NZLR 525 (HC). See [22]–[37] of the Chief Justice's reasons.
168 At [39]–[47].
169 As suggested by the Chief Justice at [45] above.
170 *Williams v Williams* (1882) 20 ChD 659.

context.[171] In this respect Kay J approved this passage in the sixth edition of *Williams on Executors*:[172]

> It is now proposed to consider the duties of an executor or administrator. And first, he must bury the deceased in a manner suitable to the estate he leaves behind him.

The Judge cited *Blackstone* as the "high authority" for the existence of this duty.[173] He rejected the suggestion it was confined to the allowance of burial expenses.[174] Rather, the duty meant that:[175]

> *[P]rima facie* the executors are entitled to the possession and are responsible for the burial of a dead body… .

And, after referring to supporting authority, Kay J concluded:[176]

> Accordingly the law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried.

[114] *Williams v Williams* was adopted and applied in New Zealand in 1945 in *Murdoch v Rhind*.[177] That case was an action for an injunction to restrain an undertaker and the deceased's widow from burial of a deceased other than in a family burial plot. Northcroft J said that *Williams v Williams* had made the law clear.[178] He stated the law in these terms:[179]

> Not only has the executor the right, he has the duty, of disposing of the body of the deceased. It is for him to say how and where the body shall be disposed of.

The dispute concerned the place of burial between two members of the family of the deceased, one of whom was his executor. *Murdoch v Rhind* thereby established that the manner of burial was at the discretion of the executor.

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171 At 662–663.
172 At 664.
173 At 664.
174 That had been the context in which the duty was referred to in William Blackstone *Commentaries on the Laws of England: a reprint of the first edition with supplement: Vol II* (Dawsons of Pall Mall, London, 1765) at 508.
175 *Williams v Williams*, above n 170, at 664 (emphasis in original).
176 At 665.
177 *Murdoch v Rhind* [1945] NZLR 425 (SC).
178 At 426.
179 At 427.

[115] Northcroft J also recognised that the Court was able in some circumstances to intervene in the exercise of the executor's discretion. He did not, however, spell out when intervention might be appropriate. The Judge confined himself to saying that matters relating to the deceased's wishes in the particular case, which might have affected the exercise of the Court's discretion, had not been satisfactorily proved by either party. Neither had established superior merits.[180]

[116] A judgment of McGregor J in 1965[181] addressed a question of probate practice concerning dispensing with sureties to an administration bond where all debts of an estate other than funeral expenses had been paid. The Judge applied *Williams v Williams*, and *Murdoch v Rhind*, in referring to the prima facie right and duty of the executor or administrator to bury the deceased, adding that a volunteer employing and paying an undertaker to conduct the funeral is entitled to recover the expense so incurred from the estate.[182]

[117] McGregor J's observation reflects common practice at least in New Zealand where arrangements for disposal of the body are nearly always settled by the family or friends of the deceased. *Nevill's Law of Trusts, Wills and Administration* makes this point when stating the common law position:[183]

> There is by the common law no property in a dead human body, but the executor of a deceased person is entitled to the custody of the body and has a duty to bury it. The manner of burial is at the discretion of the executor, although in practice he or she will consider the wishes of the immediate family, and even leave them to make arrangements if they appear to be agreed among themselves.

[118] But the common law position assumes importance where there is disagreement in the immediate family. In a judgment of the Court of Appeal delivered in 1996,[184] the deceased had directed in an annexure to his will that he be buried at his home village in the Cook Islands. His widow wished the burial to be in Auckland. Cultural issues, not specified in the judgment, were involved on both sides. The Court of Appeal held that the right to dispose of a dead body, in such

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180 At 426.
181 *Re Clarke (Deceased)* [1965] NZLR 182 (SC).
182 At 183.
183 N Richardson *Nevill's Law of Trusts, Wills and Administration* (9th ed, LexisNexis, Wellington, 2004) at [20.1] (footnotes omitted).
184 *Tapora v Tapora* CA 206/96, 28 August 1996.

circumstances, lay with the executors to the exclusion of all others, including the widow. *Murdoch v Rhind* and *Re Clarke* were cited in support.[185] The Court decided there was no reason to interfere with the discretion of the High Court Judge under whose order the executors would shortly be free to proceed.[186]

[119] The relevant statutory context is confined but, while the executor has a duty to dispose of the body, so too does the local authority if no suitable arrangements have been made.[187] There are other provisions dealing with emergency situations.[188]

[120] We turn to consider whether the developments in the common law in other jurisdictions warrant reappraisal of the position in New Zealand and, in any event, the position where no executor is appointed.

The common law in other jurisdictions

(a) England

[121] The common law principles stated above are generally reflected in England in relation to the duties and power of executors. *Williams v Williams* remains the core authority.[189] The same position is reflected in current Australian law. In both jurisdictions there have, however, been developments in relation to aspects of the common law that assume importance in this case.

[122] In England it has been recognised that the Court may exercise oversight on decisions of personal representatives. In 1989 Vinelott J said[190] of a submission that relatives were in a position to enforce performance by the executor of a "sacred trust" to the right and duty to dispose of a deceased's body:[191]

> I do not find it necessary to consider how far the (to my mind) rather extravagant language of this passage represents English law or whether or in what circumstances a near relative has a right to apply to a court for

185 At 3.
186 At 4.
187 Health Act 1956, s 86(2).
188 See *Laws of New Zealand* Burial, Cremation and Cemeteries (online ed) at [3].
189 *Halsbury's Laws of England* (5th ed, 2010) vol 24 Cremation and Burial at [1103] and [1105].
190 *Grandison v Nembhard* (1989) 4 BMLR 140 (Ch).
191 At 143.

> directions overriding or supplanting a decision of an executor as to the place or mode of burial or if an executor neglects his duty. It would be surprising to find that the court had no power in any circumstances to interfere, save only where questions of expense are involved, and where the relative has an interest in the estate.

[123] This dictum was recently referred to by Hart J in a case[192] in which there was a bona fide dispute over the validity of a will, casting doubt on a person's claim to be the executor. In the circumstances, the Judge made a declaration leaving arrangements for disposal of the body of the deceased to the hospital which was in lawful possession.[193]

[124] In England, consideration has also been given to the common law applicable where no executor has been appointed or available. The recent judgment of Cranston J in *Burrows v HM Coroner for Preston*,[194] concerned a dispute between the natural mother of a deceased, a 15 year-old who had committed suicide, and his paternal uncle who had brought him up over the previous eight years. The Judge summarised the legal position in England and discussed who had precedence where there was an intestacy:[195]

> 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 disposal of the body, even where other members of the family object. The personal representative's claims to the body oust 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: The person with the best right to the grant of administration, and hence to the deceased's body, is set out [references to the Non Contentious Probate Rules 1987 (UK) followed].

[125] The order of priority for grant of administration in cases of intestacy in England gives those having beneficial interests in an estate entitlements according to a hierarchy of classes of priority.[196] Heading the list is the surviving husband or

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192 *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch).
193 At [1] and [18].
194 *Burrows v HM Coroner for Preston* [2008] EWHC 1387, [2008] 2 FLR 1225 (QB).
195 At [13].
196 Non-Contentious Probate Rules 1987 (UK), r 22.

wife, followed by children of the deceased and issue of any children who have died before the deceased.[197] The parents and then siblings follow.[198] But the High Court has an overriding power to grant administration outside of such priority to a person if "by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint" such a person.[199]

[126] There is a helpful illustration of the operation of the special circumstances provision in what Cranston J describes as the leading case on s 116 of the Supreme Court Act 1981 (which was later renamed the Senior Courts Act 1981).[200] In *Buchanan v Milton*,[201] the natural mother of a deceased Australian Aborigine sought the grant of letters of administration of his estate under s 116. The respondents were the adoptive mother of the deceased and the mother of his daughter, who had entitlement to priority under the Non-Contentious Probate Rules 1987 (UK). At issue was the applicant's request, refused by the respondents, that the deceased's body be transported to Australia for burial in accordance with Aboriginal custom.

[127] Hale J identified six "special circumstances" which, under s 116, had to be considered in combination in determining the application. They were:[202]

> (1) the circumstances of the adoption; ...
>
> (2) the deceased's Aboriginal heritage and in particular the importance attached to the correct burial procedures 'so as to ensure that [the deceased's] true and eternal spirit will be directed and delivered so far as possible to its proper spirit home';
>
> (3) the initial agreement after his death;
>
> (4) [his daughter's] interests in knowing in due course that things were done properly in accordance with her father's birthright;
>
> (5) the interests of other members of the Australian family; and
>
> (6) the deceased's wishes.

After discussion of these special circumstances, Hale J concluded it was not

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197 Rule 22(a) and (b).
198 Rule 22(c)–(e).
199 Senior Courts Act 1981 (UK), s 116(a) (originally named the Supreme Court Act 1981).
200 *Burrows v HM Coroner for Preston*, above n 194, at [15].
201 *Buchanan v Milton* [1999] 2 FLR 844 (Fam).
202 At 854.

expedient to exercise the discretion to displace the respondents as persons entitled to the grant.[203]

[128] Cranston J summarised the English position in cases of intestacy as follows:[204]

> In the light of *Buchanan v Milton*, the domestic law is clear. If there are no personal representatives, then it must be asked: who has the best claim to be appointed as administrator of a deceased person's estate. Rule 22 lays down the order of priority. If there is a dispute, then s 116 may come into play if no compromise is possible. That requires an answer to two questions. First, are there special circumstances which may displace the order of priority set out in Rule 22; secondly, is it necessary or expedient by reason of those special circumstances to displace the normal order of priority. As demonstrated by the result in *Buchanan*, the situations where the order of priority will be varied will be rare indeed.

[129] Cranston J also considered the impact of the right to private and family life under art 8 of the European Convention on Human Rights, and held that, to the extent that the law had said that views of a deceased person could be ignored, it was no longer good law.[205] The right to respect for private and family life required that the views of a deceased person as to funeral arrangements and disposal of his or her body be taken into account.[206]

[130] In *Burrows*, the statutory provision enabling the Court, in special circumstances, to appoint as administrator a person who did not have priority under the Rules was applied, conferring on the uncle rights of administration for the purposes of making funeral arrangements and disposing of the deceased's body. This judgment may be seen as articulating common law principles as to how statutory powers are to be applied in such a context.

(b) Australia

[131] As indicated, in Australia, the common law principles are well established concerning the duty of the executor to dispose of the deceased's body and therefore

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203 At 857.
204 *Burrows v HM Coroner for Preston*, above n 194, at [17].
205 At [20].
206 At [18]–[20].

the right to its possession for the purposes of disposal.[207] There is a helpful summary in the recent report of the Queensland Law Reform Commission.[208] The Commission said that:[209]

> The duty to dispose of the body and the associated right to possession generally entitle the executor, above all other persons, to determine the method and place of disposal of the body of the deceased.

The Commission also observed[210] that where an executor was able and willing to act, he or she had an absolute right of possession of the body for the purpose of disposal, not merely a priority. Where a person is named as executor, the closeness of other parties' relationship to the deceased is irrelevant. The situation is different, however, if the executor's ability to arrange the disposal of the body is in doubt. It also recognised that in practice it was the family of the deceased that tended to make arrangements for final burial.[211]

[132] *Smith v Tamworth City Council*[212] involved a dispute between natural and adoptive parents of a deceased concerning ownership rights over a burial plot in a cemetery for the purposes of choice of a headstone. While the case was not directly concerned with rights to burial, there is a comprehensive survey by Young J of the authorities. Young J states a number of propositions, as to the current law in New South Wales, including:[213]

> 1. If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased's body, the person named as executor has the right to do so.
>
> 2. Apart from appointing an executor who will have the right stated in proposition 1, and apart from any applicable statute dealing with the disposal of parts of a body, a person has no right to dictate what will happen to his or her body.

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207 *Smith v Tamworth City Council* (1997) 41 NSWLR 680 (NSWSC) at 691; and *Keller v Keller* [2007] VSC 118, [2007] 15 VR 667 at [6].

208 Queensland Law Reform Commission *A Review of the Law in Relation to the Final Disposition of a Dead Body* (Report No 69, December 2011).

209 At [4.5] citing, among other cases, *Williams v Williams*, above n 170; *Murdoch v Rhind*, above n 177; and *Keller v Keller*, above n 207.

210 At [4.6] citing *Re Boothman; Ex parte Trigg* (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999).

211 At [4.7].

212 *Smith v Tamworth City Council*, above n 207.

213 At 693–694.

3. A person with the privilege of choosing how to bury a body is expected to consult with other stakeholders, but is not legally bound to do so.

4. Where no executor is named, the person with the highest right to take out administration will have the same privilege as the executor in proposition 1.

5. The right of the surviving spouse or de facto spouse will be preferred to the right of children.

6. Where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue.

…

[133] In cases of intestacy, or where there is no named executor willing to act, this approach has seen the Supreme Court of Queensland identify the person with best claim to be appointed as administrator of an intestate's estate, and to treat that person as having the same rights and duties as if he or she were executor.[214] The proposition that consultation with other stakeholders is expected but not required finds support in other Australian cases.[215] The main justifications for this approach are that the person with authority to resolve differences concerning the manner of disposal of the deceased's body is identified quickly, competing views are considered and decisions required are made so that burial or cremation takes place promptly.

[134] Other judgments, however, have expressed concern that the choice of a potential administrator has an air of unreality, as in many instances it is unlikely that there will be a grant of administration as the intestate person's estate does not require one. Furthermore, some courts have seen a compelling need for the decision on disposition of the body to take account of factors that are specific to a deceased, including considerations of Aboriginal custom.

[135] In *Jones v Dodd*,[216] the issue concerning place of burial of a deceased was between the father of the deceased, who was of aboriginal descent, and a former de

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214 *Frith v Schubert* [2010] QSC 444 at [27] and [53]; and *Keller v Keller*, above n 207, at 699.
215 *Keller v Keller*, above n 207, at [6].
216 *Jones v Dodd* [1999] SASC 125, (1999) 73 SASR 328 (SASCFC).

facto spouse who was mother of the deceased's children. Perry J, in a judgment concurred in by other members of the Full Court, said the issue was:[217]

> ... upon what principles does the Court determine, as between competing claims by family members, none of whom is the surviving spouse of the deceased, who has the right to possession of the body for the purpose of burial, the deceased having died intestate?

The appellant, the former partner of the deceased, contended the issue should be resolved in accordance with her wishes, being the person best placed to obtain an order for administration in the intestacy. She argued that she stood in the shoes of her children, who had highest priority but who were minors.

[136] The Court cited *Smith v Tamworth City Council* and indicated its acceptance of the statement of the law it contains where the deceased person had named an executor.[218] But in relation to the more difficult issue of where no executor was named, the Court did not agree with the approach taken in earlier cases. Perry J, in delivering the judgment of the Court in *Jones v Dodd*, said:[219]

> In my opinion, the proper approach in cases such as this is to have regard to the practical circumstances, which will vary considerably between cases, and the need to have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question.

[137] In resolving that dispute the Court had to have regard to both practical considerations and whatever cultural and spiritual factors arose.[220] Rights, under the International Covenant on Civil and Political Rights, to freedom of religion and rights of cultural minorities were to be respected.[221] They required that effect be given to the cultural, spiritual and religious beliefs, practices and decisions of the deceased.[222] The Full Court held that when they are raised in litigation, such factors should be given appropriate weight.[223]

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217 At [33].
218 At [45].
219 At [51].
220 At [53]–[55]. See also *Frith v Schubert*, above n 214, at [57].
221 International Covenant on Civil and Political Rights, arts 18 and 27.
222 At [60].
223 At [68]–[69].

[138] More recently, in the state of Victoria, there have been attempts to reconcile the need for consideration of religious cultural and spiritual values, where they are raised, with the desirability of prompt resolution of body disposal disputes. On occasion, in cases involving intestacy, when the issue has been litigated, the potential administrator test is treated as having prima facie application, but not to the exclusion of cultural or religious facts which arise on the evidence. Other cases treat such considerations as relevant only where the deceased's attitude to them is not in dispute. That restrictive approach reflects judicial concern over the appropriateness of judicial determination of the merits of disputes in this area and the delay that full investigation of facts would create.[224]

(c) Canada

[139] In Canada, the common law position generally applies with executors having the right to determine the manner and place of disposal. It is recognised that, as there is no property in a body, the executor is not bound by the deceased's expressed wishes as to disposal of his or her body.[225] An executor, in carrying out his or her duty, may not, however, act capriciously.[226]

[140] In *Sopinka v Sopinka*,[227] the Ontario Supreme Court of Justice observed that the duty of the trustee of an estate to dispose of the deceased's body included the right to possession for that purpose. That right necessarily continued after burial, otherwise those opposed to the executor's decision could disinter the body.[228]

(d) The United States

[141] The common law has taken a different direction in some jurisdictions in the United States with the emergence of a view, based on equitable principles, that, although there was no right of property in a dead body in the ordinary sense of property, the rights and duties of persons in relation to a body were a sort of

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224 See the discussion of competing approaches in *Keller v Keller*, above n 207.

225 *Halsbury's Laws of Canada* (reissue, 2012, online ed) Wills and Estates at [262].

226 Kimberly Ann Whaley and Dina Stigas *The Body, Ashes and Exhumation – Who has the Last Word?* (Whaley Estate Litigation, 2009) at 8.

227 *Sopinka v Sopinka* (2001) 55 OR (3d) 529 (ONCJ).

228 At [31]. See also *Re Waldman* (1990) 65 DLR (4th) 154 (SKQB) at 156.

"quasi-property". Those having charge of the body held it "as a sacred trust for the benefit of all who may from family or friendship have an interest in it".[229] They were trustees for a purpose and a court of equity could enforce that purpose if something untoward happened to a body. This was:[230]

> ... property subject to a trust and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.

[142] On this view of the common law, the executor's right to determine the manner of burial was of a prima facie nature but was not absolute or conclusive.[231]

The position on intestacy

[143] While we are satisfied that the common law rules concerning the executor's right and duty to determine the manner and give effect to the disposal of the deceased's body have been well-settled in New Zealand by the decisions summarised earlier in this judgment, our common law has not yet addressed the position where there is an intestacy.

[144] This clear rule concerning the duty of the executor to arrange for disposal of a body serves the need for a prompt decision on the manner of disposal when differences arise among those who were close to the deceased. The common law imposes the duty on the person to whom the deceased entrusted responsibility for the administration of property in his or her estate. The executor, being chosen for that purpose, is seen as appropriate to decide the question of disposal. That person is also in a good position to decide on the manner of disposal, having regard to the extent of the estate which bears the cost. The common law approach also has the advantage of clarity and certainty over who has the responsibility if there is disagreement.

[145] Such duties and rights of the executor are generally extended, by the common law in England and Australia, to the person with the highest claim to be appointed administrator of the estate. Because it achieves the need for clarity in identifying a

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229 *Pierce v Proprietors of Swan Point Cemetery* 10 RI 227 (1872) (RISC) at 243.
230 *Pettigrew v Pettigrew* 207 PA 313, 56 A 878 (1904) (Supreme Court of Pennsylvania) at 879 per Mitchell CJ.
231 At 879.

person who has power to make the decision, we would apply that extension of the rule in New Zealand. This requires reference to the law governing appointment of administrators if no executor has been appointed.

[146] The High Court Rules set out an order of priority for grant in cases of intestacy.[232] The list of priorities is spelt out in terms of residual beneficiaries although in most cases they are likely to be those with closest family connections to the deceased. In general terms, the list is headed by the surviving spouse, civil union or de facto partner, followed by children of the deceased, then parents, siblings, uncles and aunts. The priority regime is accordingly very similar to that in England.

[147] In New Zealand, however, under the Administration Act 1969, the Court has a discretion as to whom administration is granted. Section 6(1) relevantly provides:

> **6 Discretion of court as to person to whom administration is granted**
>
> (1) In granting letters of administration ... in respect of the estate of any deceased person or any part thereof, the court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with a will annexed may be granted to a devisee or legatee; and any such administration may be limited in any way the court thinks fit:

[148] The statutory regime in New Zealand for grant of rights to administer the estate is similar to that in England discussed in *Burrows*. The right to priority for a grant under the High Court Rules is subject to the Court's powers under s 6 of the Administration Act, which confers a wide discretion. It would be open to the High Court in New Zealand as in England[233] to appoint a person not having a right to priority if, in all the circumstances, it appeared to the Court necessary or desirable to do so. The common law principles stated by Cranston J as to how the statutory powers are to be applied[234] in New Zealand settle any dispute over the appointment of an administrator.

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232 High Court Rules, sub-r 27.35(3) and (4).

233 As explained in *Burrows v HM Coroner for Preston*, above n 194.

234 See [130] above.

Māori custom and the common law

[149] This brings us to the question of whether the established common law position in New Zealand, in relation to the duties and rights of executors and potential administrators, together referred to as "personal representatives", requires adjustment to better reflect the traditional burial customs of Māori.

[150] The English common law has always applied in New Zealand only insofar as it is applicable to the circumstances of New Zealand.[235] Consequently, the evolution of the common law in New Zealand reflects the special needs of this country and its society. The New Zealand common law can never be in conflict with its statute law, but with that qualification, our common law has always been seen as amenable to development to take account of custom.[236] Such development may occur in different ways. In this instance the appellant, who is the sister of the late Mr Takamore, seeks recognition of Tūhoe burial customs by the Court as an element of the common law of disposal of bodies of deceased persons, that is in substitution for the existing common law recognised by the New Zealand courts.

[151] In her reasons for judgment, the Chief Justice concludes that there is no common law rule recognising the role of personal representatives as the persons responsible for determining how and where the body of a deceased person should be disposed of.[237] Executors merely have a privilege, along with members of the deceased's family and others, to arrange burial or cremation. They have no overriding duty or right to do so.

[152] As will be apparent, we disagree with this view of the New Zealand common law of burial and cremation. We are satisfied that there is a common law rule under which personal representatives have both the right and duty of disposal of the body of a deceased. This rule has been established by the New Zealand authorities we have discussed, drawing on the decisions of courts in other jurisdictions, all of which

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235 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18] per Elias CJ and [105] per McGrath J.

236 *Baldick v Johnson* (1910) 30 NZLR 343 (SC); and *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

237 At [90].

have addressed a variety of factual situations. It was endorsed in the important judgment in *Jones v Dodd*.[238] The common law rule has accordingly been built on experience over many years with regard to perceived social necessities and changing public policies. In particular it has been developed by requiring the personal representative to take into account different cultural, religious and spiritual practices as well as the views of immediate and wider family. Such development is consistent with the relevant statutory context in New Zealand.[239] It ensures that due weight is given by the common law to the tikanga concerning Māori burial practices, where they arise and are brought to the attention of decision-makers. In New Zealand the existence of a common law rule in this form is well-established.

[153] We also see the continuation of the rule as to the personal representative's role as highly desirable. It serves the need for a person with authority to decide on the manner and place of disposal of the body when differences arise amongst those who were close to the deceased or who, for other reasons, might be expected in the normal course to make the necessary arrangements. Having such a rule providing for a decision-maker is both practical and convenient. It will often avoid anyone going to court over their differences because the parties accept or acquiesce in what the personal representative decides. In this way, the rule will often serve the desirability of expedition in a matter which is the occasion of feelings of great grief and loss, while also allowing relevant matters to be addressed.

[154] The rule becomes operative where there is no agreement or acquiescence on what is to be done, where arrangements have broken down, or where nothing is happening. The person appointed as personal representative then has the common law duty to attend to the disposal of the body and right to possession for that purpose.

[155] We also conclude that where no executor has been appointed or is available or willing to act, the right to decide becomes that of the person who is the potential administrator, in the sense of having the priority right to claim administration under New Zealand law. By imposing the duty on personal representatives, the law places

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238 See [136] above.
239 Identified by the Chief Justice at [46] above.

the responsibility on the person appointed by the deceased or under the law to administer the property in his or her estate. The personal representative is likely to be in as good a position as anyone to decide on the manner of disposal, having regard to all relevant matters, including the means of the estate which will usually bear the cost.

[156] In exercising that power, the personal representative should take account of the views of those close to the deceased, which are known or conveyed to him or her. These will include views that arise from customary, cultural and religious practices, which a member of the deceased's family or whanau considers should be observed. Any views expressed by the deceased on what should be done are an important consideration. There is no requirement, however, for the personal representative to engage in consultation. That may not be practical in circumstances of urgency. If the will was executed many years before the testator's death and is out of date in relation to the family or other circumstances, that may be taken into account by the Court in proceedings we shall shortly refer to. The personal representative is also entitled to have regard to practicalities of achieving burial or cremation without undue delay.

[157] This approach builds on the common law in other jurisdictions. It allows a range of values to be weighed without presuming, in advance, which cultural position will prevail, while also ensuring that decision-making will be expeditious for reasons of public health and decency.

[158] For avoidance of doubt, a personal representative, particularly one who is a member of the deceased's family, who has a personal view of what is appropriate is not precluded from acting in accordance with that view, provided consideration has been given to all relevant factors and viewpoints.

[159] The power of the personal representative to ensure proper disposal of the body of the deceased continues following burial. Where the personal representative seeks disinterment, an order of court authorising that step will be required, independently of seeking a licence to disinter under the Burial and Cremations Act 1964. Where a burial has already occurred, the Court will consider whether, taking

account of all the circumstances, the decision of the personal representative is, or remains, appropriate.

[160] The common law in New Zealand has now also reached the position where a person who is aggrieved with the decision of the personal representative may challenge it in the High Court. As well, if the executor does not take action to resolve a dispute, or in other circumstances mentioned by William Young J,[240] an interested person can approach the Court. But if such a person applies prematurely, unnecessary cost may be incurred which the applicant may have to bear.

[161] Mr McCoy for the respondent submitted that the Court should not interfere with the discretion of an executor unless it was exercised improperly, capriciously or wholly unreasonably. In his oral submissions he sought to have the Court adopt a reasonableness standard. The source of the power of review was said to be equity, permitting the courts to monitor the exercise of an executor's discretion, but only intervene when a fiduciary breach was established.

[162] We accept that clarification of the basis on which a court can intervene under the common law rule is required but we do not accept Mr McCoy's submission. The review process should be a straightforward one that is capable of providing a prompt decision. But the Court's approach to review must also respect and permit the recognition of different cultural and other practices, as well as different family and other personal interests within the rubric of the common law decision-making process. We have decided what is required is that the Court must address the relevant viewpoints and circumstances and decide, making its own assessment and exercising its own judgment, whether an applicant has established that the decision taken was not appropriate.

[163] This brings us to the submission of Mr Ferguson, for the appellant, that the common law applies only to the extent it is not inconsistent with the tikanga.

[164] The common law is not displaced when the deceased is of Māori descent and the whanau invokes the tikanga concerning customary burial practices, as has

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[240] At [211]–[212].

happened in this case. Rather, the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation. Personal representatives are required to consider these values if they form part of the deceased's heritage, and, if the dispute is brought before the Court because someone is aggrieved with the personal representative's decision, Māori burial practice must be taken into account. Consideration of the tikanga is accordingly required by the common law in this area. In the end, it is on the assessment of all the circumstances of the case that, where it becomes necessary, the Court will reach its determination on whether the personal representative's decision was not appropriate. In this way, the common law enables all relevant values and circumstances to be taken into account by those who have the responsibility of decision-making. The decision is for the personal representative, subject to the Court's ability to intervene if that decision is inappropriate. The Chief Justice accepts that position for the Court, but we say it is also the position for the personal representative, subject to the Court's ability to substitute the appropriate decision.

Decision in this case

[165] In the present case Ms Clarke is the executrix of the late Mr Takamore. She had power under the common law rule to determine how and where he was to be buried which she was required to exercise once she was apprised of the views of the deceased's sister and Bay of Plenty family. She discussed with them their preferences and the tikanga underlying them. Ms Clarke did not acquiesce in the wishes of whanau who took the body to Kutarere. In believing there was such acquiescence, the whanau were mistaken. Accordingly, what the whanau did was in accordance with tikanga but the act of taking and interring the body was not authorised by Ms Clarke, who at all times had legal power to determine how and where the body was to go.

[166] It is the Court's responsibility now to consider all the circumstances in light of the applicable common law. They include, first, the fact that Mr Takamore made his life in Christchurch with his partner and their children, living there with them for over 20 years until his death in 2007 at the age of 55 years. Their urban life means

that, following Mr Takamore's death, his partner and now adult children have little relationship with Kutarere. Secondly, Kutarere is the place of central importance to Mr Takamore's Māori family and their custom. Thirdly, different views were expressed in the High Court as to Mr Takamore's own wishes. The evidence was that burial in Christchurch was in accord with what Mr Takamore told friends there but not what he gave his mother to believe his intention was. Fourthly, and importantly, burial in Christchurch is in accord with the wishes of Ms Clarke and the children of Mr Takamore, who are adult. Finally, Mr Takamore is now buried in Kutarere but that factor carries little weight in this case because Ms Clarke, as the person with power to decide at law, did not agree or acquiesce in that course that led to his burial there.

[167] Where two families from separate localities are in dispute over the appropriate place for interment of a deceased, and the issue is brought before the Court, the common law requires the Court to examine the nature and closeness of the relationship of the deceased with each family and each location at the time of death. The sensitivities of family and others close to the deceased are relevant along with the familial feelings of cultural, religious or other circumstances that underlie them.

[168] Consideration must also be given to the wishes expressed by the deceased as the law has moved on from its early rejection of the significance of this factor. Often, however, as here, the true wishes of a deceased may be debatable, particularly if the deceased has said different things at different times to different people. A court may of course need to consider the possibility that something was said out of a desire to please the person to whom the deceased was speaking. In this case, however, we do not find it necessary to resolve the question of Mr Takamore's wishes as to where he was buried.

[169] This is a case where there are deeply held views that are in conflict. But when all relevant matters are assessed, it is Mr Takamore's life choices, in relation to living in Christchurch with his partner and now adult children, that carry greatest weight and, ultimately, are determinative. The decision taken by Ms Clarke that Mr Takamore should be buried in Christchurch reflects her own views and those of her children. For these reasons, it was an appropriate decision. We would uphold it.

It goes without saying that if Ms Clarke adheres to her decision and Mr Takamore's body is to be disinterred, this should be done in a manner which, as far as possible, respects the sensitivities of his Kutarere family and relevant Tūhoe custom.

Conclusion

[170] For these reasons, we agree that the appeal should be dismissed and the matter remitted to the High Court in case there are any matters that have to be resolved before Ms Clarke's final determination is given effect.

WILLIAM YOUNG J

Overview

[171] This appeal requires the Court to determine the rights and processes associated with disputes as to the disposal of human remains. For ease of reference, I generally refer to such disposal, including by cremation, as "burial". Many of the authorities reviewed in the reasons given by the Chief Justice, and by Tipping, McGrath and Blanchard JJ, proceed on the basis that an executor has a right to determine how the deceased person should be buried. Under the strong form version of this rule, the right of the executor is absolute. The rule is now more commonly expressed in a weaker form which contemplates the possibility of review by the High Court if it can be shown that the decision of the executor was unreasonable, capricious or perhaps otherwise erroneous. There is also authority which supports the view that the rights of administrators in relation to burial are the same as those of executors. In these reasons I will refer to the principles of law just discussed as the "executor rule". So in general, when discussing the executor rule, I will treat it as extending to the rights of administrators and as encompassing the two versions I have described.

[172] Tipping, McGrath and Blanchard JJ favour what is, in a sense, a development of the weak form version of the executor rule. They consider that where there is a disagreement amongst family members as to the disposal of the remains of the

deceased, the personal representative of the deceased (that is, a named executor or administrator) has the role of "first decider" so that his or her decision stands unless successfully challenged in the High Court.[241] This may seem similar to the weak form version of the executor rule but it differs from it in two important respects: (a) the personal representative's role is only likely to be engaged if the family of the deceased cannot agree on burial arrangements;[242] and (b) the challenge in the High Court would proceed largely on the basis of a de novo assessment by the Judge of what is appropriate with no – or perhaps limited – deference being paid to the determination of the first decider.[243]

[173] In company with the Chief Justice,[244] I do not consider that the personal representative of the deceased has a first decider role as postulated by Tipping, McGrath and Blanchard JJ, albeit that I consider that the practical differences between the two approaches may not be very great, particularly as both provide for ultimate determination by the High Court.

[174] Tipping, McGrath and Blanchard JJ would also accord first decider status to those with presumptive entitlement to appointment as administrator.[245] This extension is very much predicated on the conclusion that the personal representative of the deceased has first decider status, a conclusion with which I disagree. I also note in passing that the rationale of the executor rule (which is that an executor is under a duty to bury[246]) is not applicable to those who have not taken out letters of administration.

[175] In agreement with the views of the Chief Justice, I consider that the High Court is required to decide issues as to the disposal of human remains which cannot be resolved by the family of the deceased and that this extends to disinterment.[247] As well, in agreement with the result she has arrived at and for reasons which are

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241 See [154] and [160] of the majority judgment.
242 See [154] of the majority judgment.
243 See [160]–[162] of the majority judgment.
244 See the Chief Justice's judgment at [90].
245 See the majority judgment at [145] and [155].
246 See below at [177].
247 See the Chief Justice's judgment at [87]–[90].

similar to those of Tipping, McGrath and Blanchard JJ, I would dismiss the appeal.[248]

[176] In the balance of these reasons, I deal only with the first decider issue.

The early common law cases as to the rights and duties of executors

[177] From at least as far back as Blackstone,[249] it has been said that it is the duty of an executor to bury the body. In *Williams v Williams*,[250] Kay J concluded that an executor's entitlement to possession of the body was the correlative of this duty although he also drew support for his conclusion from *R v Fox*[251] and *R v Scott.*[252] These three cases warrant brief discussion.

[178] *Fox* and *Scott* were sequels to a refusal by Francis Scott, who was the keeper of a prison, to release the body of Henry Foster to his executors. Foster had died in prison. Scott claimed that Foster had owed him money and would not release his body to the executors unless repaid. When the executors declined to pay, Scott began digging a hole in the prison yard and threatened to bury Foster's body in it. In *Fox*, the Court of Queen's Bench, on the application of the Solicitor-General, awarded peremptory mandamus requiring Scott (and three other men) to release the body. *R v Scott* is a note of the subsequent prosecution of Scott at the York Assizes for misconduct in public office, a charge to which he eventually pleaded guilty.

[179] In *Fox*, the focus was on Scott's role as a public official. So, in current parlance, it was a public law case.[253] Both cases turned on the impropriety of Scott's actions, rather than on anything akin to a possessory title vested in the executors. As keeper of the prison in which Foster died, Scott was under a residual obligation to

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248 See the Chief Justice's judgment at [101]–[108] and the majority judgment at [165]–[170].

249 See William Blackstone *Commentaries on the Laws of England: a reprint of the first edition with supplement: Vol II* (Dawsons of Pall Mall, London, 1765) at 508. See also *Stag v Punter* (1744) 3 Atk 119, 26 ER 872.

250 *Williams v Williams* (1882) 20 ChD 659.

251 *R v Fox* (1841) 2 QB 246, 114 ER 95.

252 *R v Scott* (1842) 2 QB 248.

253 What must be the same case is reported as *Re Jewison* (1841) 5 Jur 959 where the Solicitor-General's argument is recorded as turning on the fact that the prison keeper was a public officer.

ensure that Foster received a proper burial;[254] a duty which he could discharge by releasing the body to someone who was prepared to provide (and pay for) such a burial. By his conduct he put himself in breach of this duty. I think that it is very likely that if it had been Foster's widow, rather than his executors, who had sought release of the body, the case would have been decided the same way.

[180] *Williams* involved facts which were just as striking as those in *Fox* and equally well-removed from those of the present appeal. Eliza Williams had been a friend of Henry Crookenden. In a codicil to his will, he had directed that his body be given to her to be dealt with as previously indicated to her by letter. His request entailed cremation, then illegal in England, with his ashes to be put in a particular Wedgwood vase which he bequeathed to Miss Williams. After Crookenden's death, his body was buried by his family in a cemetery. They acted with the assent of the executors who met all related costs. Miss Williams subsequently obtained a disinterment licence by deceit. She proceeded to disinter the body, remove it to Italy (where cremation was lawful) and have it cremated. The ashes were duly placed in the Wedgwood vase and buried in consecrated ground. The litigation concerned a rather optimistic attempt by Miss Williams to recover the costs of all of this from the executors.

[181] The judgment of Kay J covers a good deal of ground, including the inability of the testator to give binding directions as to the disposal of his body, the difference between what was envisaged by the testator (cremation following death) as opposed to what happened (death, interment, disinterment and then cremation), the illegality of cremation in England and the fraud of Miss Williams in obtaining the licence to disinter. He also addressed – albeit comparatively briefly and in a reasonably conclusory way – the entitlement of an executor to possession of the body. He treated this as flowing from the duty of an executor to bury the deceased and he considered that his conclusion was supported by *Fox* and *Scott* (which he mistakenly considered to have involved separate incidents and, more importantly did not turn on the private law rights of executors). There is scope for some uncertainty as to the nature and basis of the executor's right to possession as he envisaged it because on one occasion he referred to it as a "prima facie" entitlement (an expression of the

[254] By analogy with the cases cited at n 261–262 and 265–266 below.

executor rule in its weak form)[255] and on another in apparently absolute, and thus strong form, terms.[256]

The practical content of the executor's duty to bury

[182] The practical content of the executor's duty to bury warrants some brief explanation:

(a) Such a duty undoubtedly encompassed financial obligations. Thus an executor who is in control of the estate funds was (and is) required to reimburse a third party for funeral expenses appropriately incurred. The executor is also entitled to be reimbursed for such costs (whether incurred personally or by way of reimbursement) as a first charge on the estate (that is, ahead of creditors).[257]

(b) Given the nature of the duty, a breach could not give rise to a claim for damages. So to the extent that the duty went beyond the purely financial, it can only have been enforced through the criminal law.

(c) Although the authorities on this point are limited, I am prepared to accept that a breach of an obligation to bury was an offence at common law.[258] I am, however, not aware of any reported prosecutions. This is not surprising as a nominated executor who was not prepared to accept responsibility for burial would presumably not accept appointment, meaning that the circumstances where such a prosecution would have been feasible would be rare. For the purposes of the criminal law, the obligation of an executor to bury can only have been residual, that is, as arising only in default of someone else doing so.

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255 At 664.

256 At 665.

257 See *Rees v Hughes* [1946] 1 KB 517 (CA). This is provided for in s 393(1)(b) of the Insolvency Act 2006 under which funeral expenses are to be paid after administration expenses but ahead of all claims on the estate.

258 See JW Cecil Turner *Russell on Crime: Volume 2* (12th ed, Stevens & Sons, London, 1964) at 1416.

Are administrators subject to a duty to bury?

[183] There is authority for the view that an administrator, like an executor, has a duty to bury. This was certainly the assumption of Kay J in *Williams v Williams.*[259] But it seems to me to be distinctly open to question whether the duties of an administrator as to burial have a practical component which goes beyond the obligation of an administrator who is in possession of funds to reimburse third parties who have properly incurred burial expenses. I am not aware of any cases where it has been held that an administrator has been in breach of any wider burial duty and find it difficult to envisage circumstances where such breach might be alleged.

[184] The powers and thus, necessarily, the duties of an administrator depend on the grant of letters of administration. There is no obligation to seek letters of administration which, in normal circumstances,[260] are not obtained until long after the burial of the deceased. To my way of thinking, there is no logical reason why someone would seek letters of administration (or an interim grant) before the burial unless he or she was willing to provide an appropriate burial. So it is unsurprising that there are no cases on point.

Others who may be subject to a duty to bury – the common law position

[185] The father of a dead child is obliged to bury the body, subject to having the means to do so.[261] And, at common law, a widower (rather than the executor if any) was required to bury his wife's body and meet burial expenses if incurred by a third party.[262] The latter aspect of the rule – the exclusion of the liability of executors – was a function of the particular status at common law of married women in relation to property and testamentary capacity and was thus abrogated by the married

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259 See *Williams*, above n 250, at 664 where he cites with obvious approval a passage from Williams on Executors (6th ed) at 906, which records that an administrator is subject to such a duty. The passage from Williams on Executors is set out in the reasons of McGrath J at [113].

260 I do *not* regard as "normal", circumstances where a dispute over burial comes to the court in the guise of an argument as to who should be the administrator, as in *Buchanan v Milton* [1999] 2 FLR 844 (Fam).

261 See *R v Vann* (1851) 2 Den 325, 169 ER 523; and *Clark v London General Omnibus Co Ltd* [1906] 2 KB 648 (CA) at 659–660 per Lord Alverstone CJ.

262 *See Ambrose v Kerrison* (1851) 10 CB 776, 138 ER 307.

women's property legislation of the late nineteenth century.[263] But where there is not an executor who has the funds available to meet burial expenses, it is distinctly arguable that a widower remains subject to burial obligations.[264]

[186] The common law rules just discussed must now be taken to encompass the position of mothers in relation to their children, widows in relation to their husbands and de facto partners in respect of each other.

[187] Burial obligations at common law are also imposed on non-family members. Thus in the case of a dead body lying in a house, a common law obligation to bury is imposed in the first instance on the householder.[265] By logical extension, where a body lies in a hospital, or other public institution, the common law rule was that those who operate that institution are obliged to ensure an appropriate burial.[266] As I will indicate, this aspect of the law of burials is now on a statutory footing in New Zealand.

The general statutory context in New Zealand

[188] Section 46E of the Burial and Cremation Act 1964 requires a "person having charge of a body" to accept initial responsibility for its proper disposal. Interestingly, the offence-creating provisions in that Act (ss 54AA–58) do not encompass breaches of the s 46E duty. Presumably this is because s 150 of the Crimes Act 1961 provides:

> **150 Misconduct in respect of human remains**
>
> Every one is liable to imprisonment for a term not exceeding 2 years who—
>
> (a) neglects to perform any duty imposed on him by law or undertaken by him with reference to the burial or cremation of any dead human body or human remains;

The offence thus created would obviously apply to anyone under the s 46E duty to

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263 *Rees v Hughes*, above n 257.

264 A point left open in *Rees v Hughes*, above n 257.

265 *R v Stewart* (1840) 12 Ad & El 773, 113 ER 1007.

266 As discussed in *Stewart*, above n 265, at 779 and 1009. For a modern case in which it was held that the hospital in which the deceased died was under a duty to bury, see *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch).

bury and, subject to the possibility of argument as to the effect of s 9 of the Crimes Act, may apply to those under common law obligations to bury (such as executors, parents and spouses).

[189] Section 49 of the Burial and Cremation Act also makes provision for the burial or cremation of "poor persons" (an expression which is not defined) and of those whose bodies are in a hospital, prison or other public institution free of charge. This is subject to a Justice of Peace being satisfied:

> ... that the deceased person has not left sufficient means to pay the charge [for burial or cremation], and that his relatives and friends are unable to pay the same.

In similar vein (in terms of the reference to "friends"), the provisions of the Act as to disinterment and reburial are intended to accommodate relatives and friends of the deceased.[267]

[190] Also relevant is the Coroners Act 2006 which in ss 18–56, addresses, inter alia, the custody, removal, viewing and release of bodies, post-mortems as well as the retention, disposal and release of body parts and bodily samples. What is striking about these provisions is that they throughout refer to, and provide for rights in favour of, members of the deceased's family but make no mention of the executor or administrator (actual or likely) of the deceased. The clear implication is that once the coroner no longer has any need to retain custody of the body, it is to be released to "family members".[268]

[191] Deaths at sea are addressed by the Maritime Transport Act 1994, s 25 of which provides:

> **25 Body and effects of deceased seafarer**
>
> (1) Subject to subsection (2), every employer of seafarers on a New Zealand ship shall make suitable arrangements for the body and effects of any seafarer who dies in the course of a voyage, which may include the return of the body to the deceased's next of kin or the burial or cremation of that body.

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[267] As discussed at [41] of the Chief Justice's judgment.

[268] This is what seems to be contemplated by s 42.

(2) The employer shall endeavour to ascertain the reasonable wishes of the deceased's next of kin and shall, where practicable, comply with those wishes.

(3) For the purpose of this section, a person's **next of kin** may include that person's civil union partner or de facto partner.

Again there is no mention of executors.

[192] The Human Tissue Act 2008 deals with the collection and use of human tissue for educative, investigative and therapeutic purposes. This Act proceeds on the basis that the consents to the taking and use of a dead person's human tissue for educative or therapeutic purposes and associated consultation are required to come from, or be with, the family of the deceased. As with the Coroners Act, there is no mention of executors. There is nothing in the Act to suggest that an executor could rely on his or her right to possession of the body to override a consent given by family members.

[193] For the sake of completeness, I note that local authorities have the final and default responsibility for the disposal of human remains.[269]

The New Zealand cases

[194] There are two New Zealand cases[270] which directly address the rights of executors in relation to burial decisions.

[195] *Murdoch v Rhind*[271] involved a dispute between the widow of the deceased and his executor (who was the deceased's brother). The dispute was whether the deceased was to be buried in a family plot in Hokitika, as the executor wanted, or cremated in Christchurch, which was what his widow proposed. The executor claimed that the deceased's wish had been for a Hokitika burial while his widow maintained that he had told her, shortly before dying, that he wished to be cremated. The topic was not addressed in the deceased's will. In issue was an application by

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269 See the Health Act 1956, s 86.

270 There are other cases which are peripherally relevant, for instance, *Re Clarke (Deceased)* [1965] NZLR 182 (SC). But the two cases which I discuss are the only ones which are directly on point.

271 *Murdoch v Rhind* [1945] NZLR 425 (SC).

the executor for an injunction to prevent cremation. The case was tried at short notice and resulted in an oral judgment in which Northcroft J observed:[272]

> The only relevant matter, that the plaintiff is the executor of the deceased, is admitted. The other matters relating to his wishes which might have affected the exercise of the Court's discretion are not satisfactorily proved by either party. Neither has established anything entitled to be regarded as superior "merits". In these circumstances the Court is appealed to to declare the law upon this dispute.

Then, after discussing *Williams v Williams*, and in particular citing the passage from the judgment of Kay J in which he referred to the executor's "prima facie" rights, the Judge went on:[273]

> Not only has the executor the right, he has the duty, of disposing of the body of the deceased. It is for him to say how and where the body shall be disposed of. I can do no more than pronounce accordingly.

[196] The other case is *Tapora v Tapora*.[274] The executors proposed to bury the deceased in the Cook Islands, in accordance with his wishes as recorded in the will executed on his behalf about six weeks before his death. His widow would have preferred a burial in Auckland. The deceased died on 4 August 1996. Probate in common form was obtained on 8 August 1996 and in proceedings commenced on 12 August, the executors sought declarations as to the validity of the will and their rights to dispose of the body as they thought fit. They obtained an interim injunction preventing the widow burying the deceased and requiring her to deliver the body to them for burial. The widow, having surrendered the body to the executors, sought a discharge of the interim injunction and an order that the body be returned to her for burial. The result was an interim order upholding the status quo pending the filing by the widow of an application to recall the grant of probate. Before the Court of Appeal was an appeal by the executors against the status quo decision. In the course of dismissing this appeal (in a judgment delivered on 28 August), the Court observed:[275]

> The express purpose of [the status quo order] was to allow the [widow] the opportunity to apply for recall of probate, that being the procedure prerequisite to any possible entitlement for an order for return to her of the

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272 At 426.
273 At 427.
274 *Tapora v Tapora* CA206/96, 28 August 1996.
275 At 3.

> body. No such application has yet been made. We observe that in the circumstances it seems unlikely that if such steps had been or are taken there would be a further restraint on the appellants, when regard is had to the time which would be required to resolve all those issues which would necessarily be involved. The problems resulting would appear to be almost insuperable.
>
> In her judgment the Judge correctly summarised the law as it relates to the disposal of a dead body in circumstances such as these. Both the right and the duty lies on the executors, to the exclusion of other persons – including here the respondent. See *Re Clarke deceased* [1965] NZLR 182; *Murdoch v Rhind & Murdoch* [1945] NZLR 425; Halsbury 4th Ed Vol 10 para 1017; Theobald on Wills 15th Ed 129 and Nevill's Law of Trusts, Wills and Administration in New Zealand 8th ed 407.
>
> We note also that the financial consequences of the manner of carrying out the duty may well here impact on the appellants, because the only asset in the estate of the deceased is the former matrimonial home which passes to the respondent by survivorship.

[197] The judgment in *Murdoch* is not explicit as to what the Judge would have done if the evidence in support of the view that the deceased had expressed a wish to be cremated had been indisputable. It is possible that he may have seen such evidence as displacing the "prima facie" entitlement of the executor to determine the burial arrangements. There is, however, little or no ambiguity about *Tapora.* The Court considered that the executors would prevail unless the grant of probate was recalled and thus adopted the strong form version of the executor rule. There may have been a basis for a recall application as the testator had not personally signed the will.[276] But because such proceedings would not be resolved within an acceptable time frame, the Judges thought it unlikely that the executors could be subject to "further restraint" even if an application to recall probate was made.

[198] I note that disputes as to the validity of the will have arisen in two other cases. In one, the Judge saw the fact of the dispute as sufficient to displace the entitlement of the executor to determine the burial arrangements.[277] In the other, the Judge addressed the likely validity of the wills under which the executor was appointed, in terms of whether there were suspicious circumstances which would warrant injunctive relief.[278]

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276 This point must have been addressed in the affidavits filed in support of the application for probate in common form, but there may been scope for argument as to the testator's knowledge and approval of the will.

277 *University Hospital Lewisham NHS Trust v Hamuth*, above n 266

278 *Abeziz v Harris Estate* [1992] OJ No 1271 (ONGD).

[199] There is a second aspect of *Tapora* which warrants comment. It will be recalled that on the reasoning of Kay J in *Williams v Williams* the right of an executor to possession of the body and to determine burial arrangements is founded on the duty to bury. As is apparent from the Court of Appeal judgment in *Tapora*, there were no funds in the estate. The executors were thus not under a duty to bury the deceased. On the other hand, it must have been distinctly arguable that the widow was under a common law duty to bury the deceased. The implications of these considerations are not addressed in the judgment.

Judgments from other jurisdictions

[200] Relevant judgments from other jurisdictions, namely, England and Wales, Canada, Australia and the United States, are reviewed at length in the reasons given by the Chief Justice[279] and by Tipping, McGrath and Blanchard JJ.[280] There is no point in me carrying out a similar exercise.

[201] I accept that the predominant view outside of the United States is in favour of the soft form version of the executor rule. I am content to say that, like the Chief Justice, I found the judgment of the Full Court of Supreme Court of South Australia *Jones v Dodd*[281] to be the most persuasive.

Taking stock

[202] The common law foundations for the executor rule are pretty flimsy. *Williams v Williams* has generally been treated as the controlling authority. But the cases relied on by Kay J – *Fox* and *Scott* – did not turn on the private law rights of executors and *Williams* itself did not involve a dispute as to burial, at least in any orthodox sense.

[203] As well, there is not much logic to the executor rule. As formulated by Kay J, it is based on an executor's burial obligations. These involve financial responsibility for burial, conditional upon there being sufficient funds in the estate,

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279 At [51]–[58], [63]–[77], and [88] of her judgment.
280 At [121]–[142] of the majority judgment.
281 *Jones v Dodd* [1999] SASC 125, (1999) 73 SASR 328 (SASCFC).

and theoretical exposure to criminal liability for neglect of this duty. These considerations do not provide a cogent basis for an executor to have a right to possession of the body against close relatives who are also prepared to bury the deceased in an appropriate way. Still less is there an obvious logic to the approach favoured in *Tapora* under which executors who were not under a duty to bury (because of lack of funds) were seen as having priority over the widow.

[204] A testator's choice of an executor is sometimes based on a well-founded belief that the executor will organise a burial which corresponds to the testator's wishes. If established, this will be of considerable and probably decisive significance.[282] But in other cases, there does not seem to me to be much justification for according primacy to the wishes of the executor over those of others.

[205] I see even less logic to a rule that an administrator is entitled to control burial arrangements. An administrator will not usually have been entrusted by the deceased with the making of burial arrangements. The occasion for an administrator to make a decision as to burial will usually only arise where letters of administration have been sought as a way of resolving a pre-existing dispute.

[206] The rules as to the priority of applicants for a grant of administration where the will is annexed operate by reference to how the property of the deceased has been disposed of under the will[283] and are thus unlikely to be of practical assistance in resolving a burial dispute. Where there is an intestacy, the priority rules provide for those interested in the estate to have the first priority, with their rights inter se determined in accordance with a hierarchy.[284] These rules are subject to the overarching operation of s 6(1) of the Administration Act 1969 which provides:

> **6 Discretion of Court as to person to whom administration is granted**
>
> (1) In granting letters of administration with or without a will annexed, or an order to administer with or without a will annexed, in respect of the estate of any deceased person or any part thereof, *the Court*

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[282] *Abeziz v Harris Estate* above, n 278, involved a situation in which the testator's choice of executor was directly associated with his view that she would honour his wishes as to burial which he must have known were contrary to the religiously derived preferences of his mother.

[283] High Court Rules, r 27.26.

[284] High Court Rules, r 27.35.

> *shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with a will annexed may be granted to a devisee or legatee*; and any such administration may be limited in any way the Court thinks fit:
>
> Provided that, subject to the provisions of subsection (2) of this section, where the deceased died wholly intestate as to his estate, *administration shall be granted to some one or more persons beneficially interested in the estate of the deceased*, if they make an application for the purpose. (Emphasis added)

There are cases where burial disputes have been resolved through the proxy of deciding who the administrator should be,[285] but the language of the relevant statutes and rules (with their focus on succession to property) are not entirely appropriate for these purposes.[286] In such circumstances, common sense suggests that a dispute as to burial should be addressed directly on its merits.

The practical advantages of the first decider rule

[207] The first decider rule proposed by Tipping, McGrath and Blanchard JJ provides a mechanism for prompt decisions to be made in respect of some burial disputes. Once the personal representative (actual or presumptive) has made a decision, arrangements for burial can be put in hand and, subject to a successful challenge in the High Court, can be implemented. Some disputes which might otherwise have required litigation will presumably be resolved quickly, informally and cheaply.

Countervailing considerations

[208] Some of the considerations I am about to mention arise more acutely with the executor rule than in the case of the first decider rule proposed by Tipping, McGrath and Blanchard JJ. They are, however, material to the way a first decider rule would be likely to operate in practice.

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[285] Examples are *Buchanan v Milton*, above n 260; and *Burrows v HM Coroner for Preston* [2008] EWHC 1387, [2008] 2 FLR 1225 (QB).

[286] As pointed out by Hoffmann J in *Holtham v Arnold* (1986) 2 BMLR 123 (Ch) at 124.

[209] A first decider rule would not always apply. Many people die intestate. There may not be anyone prepared to apply for administration. The will may not be found in the immediate aftermath of the death. The nominated executor may not be able to be immediately located or may decline office. An executor who has accepted office may not be prepared to make a burial decision.[287] If there are an equal number of executors, they may disagree. So too might those appointed – or presumptively entitled to appointment – as administrators. There may be no funds in the estate. It follows that there has to be a default regime applicable to burial disputes where there is no actual or presumptive personal representative prepared to make a decision. This default regime must logically turn on resolution by the High Court. Recognising that there must be a default regime raises the question whether there needs to be, or should be, a separate regime where the actual or presumptive personal representative is prepared to assume the role of first decider.

[210] Circumstances which give rise to a burial dispute may also give rise to disputes as to whether the will was properly executed, as well as the existence of testamentary capacity and any undue influence.[288] The executor rule has proved to be hard to apply where there is such a dispute and this would also be true of a first decider rule.

[211] I see another set of problems as to the criteria by which an executor should make a decision. Non-familial executors may not be well-placed to resolve conflict between family members as to burial. Indeed such executors may decline to do so.[289] A familial executor can be expected to decide the issue in accordance with personal preference. But unless that preference accords with the wishes of the testator, there is no obvious reason why it should have a status which is superior to those of other family members. This is particularly so where the executor has been chosen because of particular business, legal or accounting expertise which is not shared by other members of the family. Such expertise may well be of assistance in the administration of an estate but of no materiality to a burial decision.

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287 In *Keller v Keller* [2007] VSC 118, (2007) 15 VR 667, the sole and independent executor declined to make a decision as to burial.

288 See the cases referred to from [194] above.

289 As illustrated by *Keller v Keller*, above n 287.

[212] The various statutory provisions to which I have referred provide for familial input and, to some extent, control over what happens to human remains. While I see them as inconsistent with the executor rule, I accept that they are not necessarily inconsistent with the first decider rule as proposed by Tipping, McGrath and Blanchard JJ, which I see as operating, at least primarily, where the affected family members are not able to agree. That said, these statutory provisions are not really congruent with a common law rule under which a decision-maker not referred to in the statutes has rights which are superior to the family members who are specified.

[213] The final – and I think decisive – consideration is Māori (in this case Whakatohea and Tūhoe) custom. The Chief Justice's solution does not fully accommodate custom because it provides for a decision-maker (in the form of the High Court) in lieu of a process under which there is no ultimate decision-maker and which can, in the end, only be resolved by consensus, acquiescence or submission. It does, however, involve a substantial concession to custom in that it precludes any single participant (who may not be a family member) determining the outcome. In saying this, I accept that the reasons of Tipping, McGrath and Blanchard JJ also accommodate custom but this is to a lesser extent.

A conclusion

[214] For the reasons given, I agree with the Chief Justice that the personal representatives (actual or presumptive) of a deceased person do not have a first decider role in relation to burial.

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