



Supreme Court of New Zealand

18 December 2012

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

JOSEPHINE TAKAMORE v DENISE CLARKE (SC 131/2011) [2012] NZSC 116

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

James Junior Takamore died suddenly on 17 August 2007 in Christchurch, where he had lived with Ms Clarke and their children for the previous twenty years. 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. Ms Clarke and Mr Takamore's son resisted the request but Mr Takamore's Kutarere family pressed their claim that his body should return with them to the Bay of Plenty for burial. The discussion became heated and was distressing for Ms Clarke and her son.

The next day, after some delay, it appeared that Ms Clarke was reluctant to return to resume the discussion. The Kutarere family then took Mr Takamore back to Kutarere where he was buried on 21 August in an urupa alongside his father and other family members.

The Kutarere family believed their actions to be justified according to tikanga. They may have considered that Mr Takamore's son 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. If so, there was a significant cross-cultural misunderstanding.

On 22 August, Ms Clarke obtained a licence from the Minister of Health, under 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. Ms Clarke sought orders authorising her to enter the urupa and to 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.

Ms Clarke succeeded in the High Court and Ms Takamore's appeal to the Court of Appeal was dismissed. The majority held that the common law rule that the executor had the duty and the right to determine where and how the body of a deceased would be disposed of was not displaced in this case.

The Supreme Court has unanimously dismissed Ms Takamore's appeal. Three Judges of the Supreme Court (Tipping, McGrath and Blanchard JJ) have held that there is a common law rule under which personal representatives have both the right and duty to attend to disposal of the body of a deceased. The rule becomes operative where there is no agreement or acquiescence among the family on what is to be done, where arrangements have broken down, or where nothing is happening. 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. Any views expressed by the testator on what should be done are an important consideration.

Those three Judges have also decided that under New Zealand's common law a person who is aggrieved with the decision of the personal representative may challenge it in the High Court. 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 an appropriate one.

The Chief Justice and William Young J agreed that Ms Takamore's appeal should be dismissed but would not have recognised the role of personal representatives. On their view, any disputes about what should be done with the body of the deceased can only be resolved by the Court.

The appeal is accordingly dismissed.

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