

# SUPREME COURT OF QUEENSLAND

CITATION: *Reid & Ors v Crimp & Ors* [2004] QSC 304

PARTIES: **TANYA REID, SONIA WICK AND MELINDA CRIMP**  
(applicants)  
v  
**CHERRIE CRIMP AND NEIL JUDGE**  
(first respondents)  
and  
**AUSTRALIAN HERITAGE FUNERALS**  
**TOOWOOMBA**  
(second respondent)

FILE NO: BS7669 of 2004

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 3 September 2004

DELIVERED AT: Brisbane

HEARING DATES: 1 & 3 September 2004

JUDGE: Wilson J

ORDER: **That the respondents be restrained from proceeding with the cremation of Peter Crimp (deceased).**

CATCHWORDS: SUCCESSION – EXECUTORS AND ADMINISTRATORS – RIGHTS, POWERS AND DUTIES – CREMATION – where application for injunction to prevent cremation of deceased – where applicants objected to cremation under *Cremations Act 2003* s 8 – where applicants adult children of deceased – where first respondents deceased’s executors – where deceased left no written instructions as to disposal of body – executors right to choose how to dispose of remains – where dispute as to deceased’s wishes – effect of common law – where first respondents advised of applicants’ objection to cremation – where first respondents intended to proceed with cremation – whether cremation could lawfully proceed after objection.

*Coroners Act 1958 s 23C*  
*Cremations Act 1913*  
*Cremations Act 2003* ss 5, 6, 8

COUNSEL: PW Hackett (1 September 2004) and KS Howe (3 September 2004) for the applicants  
DA Skennar (3 September 2004) for the first respondents

SOLICITORS: Barry & Nilsson for the applicants  
Doyle Wilson Solicitors for the first respondents

## Alroe &amp; O'Sullivan for the second respondent

- [1] **WILSON J:** Peter John Crimp died on 30 August 2004, aged 75. His death resulted from stomach, prostate and testicular cancer. This is a dispute between the applicants, three of his adult children, and the first respondents, who are another adult child and her de facto, as to the disposal of his remains. The first respondents are his executors. The second respondent is a funeral home to which his body has been taken.
- [2] The first respondents intend, unless restrained, to have his body cremated. The applicants wish the body to be buried. The second respondent would not itself perform the cremation; rather it would be performed at a public crematorium.
- [3] The deceased never expressed his wishes in relation to burial or cremation in writing. There is conflicting evidence as to what his wishes were. On its face, this reflects simply different wishes expressed at different times. To the applicants he expressed a firm preference for burial. To the first respondents he expressed a firm preference for cremation. It seems that his preference for cremation was repeated very close to his death.
- [4] Under the common law, the deceased's executors (the first respondents) have the right to choose how to dispose of the remains. They have that right, of course, so long as they choose a lawful means of disposal.
- [5] The *Cremations Act 2003* is "an Act to regulate the process of cremating human remains".
- [6] Pursuant to section 5, a person must not cremate human remains unless he has permission to do so in the approved form, issued, if there was an autopsy, by the Coroner, or otherwise by an independent doctor.
- [7] Pursuant to section 6, the following persons may apply for a permission to cremate:
  - (a) a close relative (either personally or through an agent such as a funeral director);
  - (b) a personal representative (either personally or through an agent); or
  - (c) if no-one mentioned in (a) or (b) applies, another adult with a satisfactory explanation as to why those persons did not apply and why that adult is applying.
- [8] The application for permission must be in the approved form and it must be accompanied by a cause of death certificate and, in the usual case, a cremation risk certificate.
- [9] A cremation risk certificate is a certificate in the approved form or a notation on a copy of the cause of death certificate, stating whether the deceased person's human remains pose a cremation risk and signed either by the doctor who signed the death certificate or another doctor. Human remains pose a cremation risk if they contain something that, if cremated, might expose someone to the risk of death, injury or illness: for example, a cardiac pacemaker or a radioactive implant.

- [10] The common law right of a personal representative to decide how to dispose of the deceased's remains is qualified by both sections 7 and 8 of the Act. Section 7 deals with the situation where the deceased left signed instructions for cremation and the person arranging the cremation is aware of those instructions. In such circumstances, the personal representative must ensure that an application for permission to cremate is made and, if the permission is issued, that there is a cremation in accordance with the signed instructions.
- [11] Section 8 is in the following terms:

**"Objections to cremation**

(1) This section does not apply if the deceased person has left signed instructions that his or her human remains be cremated.

(2) A coroner or independent doctor must not issue a permission to cremate if the coroner or independent doctor is aware that any of the following persons object to the cremation -

- (a) a spouse, adult child or parent of the deceased person;
- (b) a personal representative of the deceased person.

(3) The person in charge of a crematorium must not allow a deceased person's human remains to be cremated at the crematorium if the person in charge is aware that any of the following persons object to the cremation -

- (a) a spouse, adult child or parent of the deceased person;
- (b) a personal representative of the deceased person.

Maximum penalty - 100 penalty units.

(4) Subsection (3) applies even if the person in charge has received a permission to cremate.

(5) This section overrides the common law to the extent that it qualifies a personal representative's right to decide how to dispose of the deceased person's human remains."

- [12] In the present case, the applicants, who are adult children of the deceased, object to the cremation. The first respondents and the second respondent are aware of that objection and so, too, is the person in charge of the crematorium where the cremation is to take place.
- [13] An issue was raised on the material as to whether the applicants are indeed natural or adopted children of the deceased. However, that was not pursued.
- [14] In my view, the effect of section 8(3) is to impose a prohibition on the person in charge of the crematorium and a penalty if that prohibition is breached.

[15] Counsel for the first respondents submitted in effect that subsection (3) merely stops a cremation from proceeding until the Court can decide how the remains are to be disposed of. This would then, of course, involve consideration of whether the Court has jurisdiction to determine how the remains should be disposed of.

[16] In considering the proper interpretation of subsection (3) it is helpful to look at the earlier provision first contained in the *Cremations Act* of 1913 and subsequently relocated to the *Coroners Act 1958* as section 23C. It provided:

"**23C.(1)** It shall not be lawful, except as hereinafter mentioned, to cremate the body of any deceased person if the deceased person's surviving spouse or any of the deceased person's next of kin, whether under or above the age of 18 years, or the deceased person's executors or any of them, shall object thereto.

**(2)** However, in all cases where a deceased person shall have left an attested memorandum directing that his or her body shall be cremated, it shall be the duty of the deceased person's executors or administrators to carry out the directions.

**(3)** An application for a permission and certificate under section 5 shall be in the approved form.

**(4)** Such application shall be made and signed by an executor or by the nearest surviving relative of the deceased or an agent of the executor or nearest surviving relative."

[17] Clearly section 8(3) of the present Act is differently worded. It imposes a prohibition on an individual. It is not expressed in terms that the cremation itself would be unlawful.

[18] It is helpful to look at the explanatory notes which accompanied the *Cremations Bill* 2002. They describe the bill as having two objectives, the primary one being to ensure that the body of a person whose death is suspicious or should otherwise be reported to a coroner is not cremated without discovery, and the secondary one being to ensure as much as possible that bodies which still contain cremation risks such as cardiac pacemakers not be cremated.

[19] The notes go on to say:

"The bill, like the current provisions, also overrides the common law regarding the disposal of bodies by -

requiring a deceased person's wishes that his/her body be cremated are to be carried out; and

providing that a cremation cannot occur when certain people object.

The bill, like the current provisions, places obligations on the person in charge of a crematorium in respect of the return of ashes."

- [20] While those explanatory notes are of assistance in understanding the objectives of the legislation, they do not throw light on why section 8(3) is differently worded from the preceding section 23C of the *Coroners Act 1958*.
- [21] There is nothing express in section 8 to the effect that the restraint is a temporary one only. I can see no reason to imply that. The executors have a duty to dispose of the remains. There is a corresponding right for them to decide the place and manner of disposal. Cremation is now considered to be equivalent to burial, subject to the *Cremations Act*.
- [22] If a cremation cannot lawfully be carried out, the executor's freedom to choose is thereby restricted. To my mind that is what subsection (5) of section 8 means when it says that the common law is overridden to the extent that the section qualifies a personal representative's right to decide how to dispose of the remains.
- [23] In all of the circumstances I have concluded that the cremation could not lawfully be carried out in the face of the objections of the applicants, and that accordingly an injunction in terms of paragraph 1 of the originating application ought to be granted.
- [24] I am going to reserve the question of costs and I am going to ask the parties to prepare short written submissions, exchange them, and to get them to me by 4 o'clock on Tuesday.