

SUPREME COURT OF QUEENSLAND

CITATION: *Tufala v Marsden & anor* [2011] QSC 222

PARTIES: **ALEFOSIO TUFALA**
(applicant)
v
PAUL GEORGE MARSDEN
(first respondent)
ASHLEY BERGH PROPERTY PTY LTD
(second respondent)

FILE NO/S: SC No 5974 of 2011

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: Delivered ex tempore 12 July 2011

DELIVERED AT: Brisbane

HEARING DATE: 12 July 2011

JUDGE: Atkinson J

ORDERS: **The application to withdraw the application is granted.**

CATCHWORDS: SUCCESSION – EXECUTORS AND ADMINISTRATORS – RIGHTS, POWERS AND DUTIES – BURIAL, CREMATION AND ERECTION OF TOMBSTONES – where the applicant sought orders restraining the respondents from proceeding with the cremation of his deceased daughter – where the applicant argued that cremation was not in accordance with the traditional beliefs and customs of his family – whether the application should be granted

Cremations Act 2003 (Qld), s 7, s 8

Manktelow v Public Trustee [2001] WASC 290, cited
Meier v Bell, unreported, Supreme Court of Victoria, Ashley J, No 4518 of 1997, 3 March 1997, cited
Saleh v Reichert (1993) 104 DLR (4th) 384, cited
Sullivan v Public Trustee for the Northern Territory, unreported, Supreme Court of the Northern Territory, Gallop AJ, No 107 of 2002, 24 July 2002, cited
Williams v Williams (1882) 20 Ch D 659 at 665, cited

COUNSEL: J M Peters with P D Tucker for the applicant

SOLICITORS: The respondent did not appear
 Australian Law Group for the applicant
 The respondent did not appear

HER HONOUR: This was an application to the court for orders pursuant to section 8 of the *Cremations Act 2003* (Qld) that the respondents be restrained from proceeding with the cremation of the deceased, Lepeka Marie Marsden, and that the body of the deceased be transported to New Zealand to have a traditional burial in Auckland at the family burial site situated at Mangere Lawn Cemetery.

The applicant is the father of the deceased. The first respondent was her husband and the second respondent a funeral firm, Ashley Bergh Property Pty Ltd trading as Academy Funerals and also trading as Polynesian Funerals.

The circumstances arise out of a family tragedy where the deceased died as a relatively young woman from cancer and there was a dispute between her husband, the first respondent, and the applicant, her father. She died intestate so there was no executor; however, the first respondent as her widower would be first in line to obtain letters of administration of her will, and as such to have custody of the body in order to arrange for the lawful disposal of the body.

Both the deceased and her husband were born in New Zealand, however the deceased comes from a family where her parents were born in the Tokelau Islands, a Polynesian island group north of Samoa. While the deceased was raised in New Zealand, her family maintained the system of beliefs from the Tokelau Islands' tradition and custom. The deceased married Mr Marsden in 2006 and in 2007 they moved to Brisbane.

It is in accordance with Tokelauan custom that deceased persons be buried rather than cremated and there is a traditional process for grieving, funeral service and burial. Before her death there were discussions with her, her birth family and her husband about how her body would be disposed of after death and she expressed the wish to be buried in the family plot in accordance with Tokelauan tradition and custom. That is a matter of great moment to her birth family because unless she is buried in that way they believe it will have an impact on the peacefulness of her death and an impact on her future after death.

The Tokelauan traditions for burial are quite detailed and involve the deceased's body being given back to the family and placed on traditional mats, the body being prepared in accordance with their customs and for at least two days the relatives coming and sitting around the body to grieve and holding a family mass and praying together. After the grieving process the body is taken to a church. The deceased's body is buried and not cremated. It is important in Tokelauan tradition that the deceased is not buried alone. The deceased and her husband had no children, and in accordance with her custom, she would be buried in the family plot, otherwise her family fear she will have a restless spirit.

After her death the relationship between her birth family and her husband broke down and he arranged, as he was entitled to, for a funeral to be held and her body to be cremated.

There are a number of legal principles that apply to this situation.

First of all a person's directions, oral or written, about the disposal of that person's body do not have legal effect at common law and, therefore, the person's legal representative is not obliged to act in accordance with any such directions given: see *Williams v Williams* (1882) 20 Ch D 659 at 665; *Meier v Bell*, unreported, Supreme Court of Victoria, Ashley J, No 4518 of 1997, 3 March 1997; *Saleh v Reichert* (1993) 104 DLR (4th) 384; *Manktelow v Public Trustee* [2001] WASC 290; *Sullivan v Public Trustee for the Northern Territory*, unreported, Supreme Court of the Northern Territory, Gallop AJ, No 107 of 2002, 24 July 2002.

However there has been a modification to that common law position in Queensland, but only with respect to the question of cremation. Under the *Cremations Act*, section 7, if the deceased person's representative is arranging for the disposal of the deceased person's remains and knows that the deceased has left signed instructions for those remains to be cremated, then the deceased's personal representative must ensure that an application for permission to cremate is made, and if permission to cremate is issued, the deceased person is

cremated in accordance with the signed instructions. This explicitly overrides the common law.

However, section 8 of the Cremations Act applies if the deceased person has not left signed instructions that the deceased's remains be cremated. In such a circumstance, a coroner or independent doctor must not issue a permission to cremate if the coroner or independent doctor is aware that a spouse, adult child or parent of the deceased person, or a personal representative of the deceased person objects to the cremation. Further, a 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 the spouse, adult child or parent of the deceased person, or a personal representative of the deceased person objects to the cremation. Curiously the obligation or prohibition appears to fall on the coroner, independent doctor or person in charge of a crematorium, rather than upon a personal representative.

Fortunately in this case after the application was brought the parties engaged in further discussion and were able to resolve their differences. A funeral ceremony was held on 11 July 2011 in accordance with the wishes of the deceased's husband and he agreed that her body be transported at the applicant's cost to New Zealand to be buried in accordance with the beliefs and traditions of the people of the Tokelau Islands.

Accordingly, I grant the application to withdraw the application since it is no longer necessary for the applicant to seek the relief sought in the application.
