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CASE NOTE

Recognizing Collective Cultural Property Rights in a Deceased—*Clarke v. Takamore*

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Abstract: The recent New Zealand Supreme Court decision in *Clarke v Takamore* raises issues about how Maori society views deceased tribal members as belonging to the extended family and tribal group collective. This conflicts with English common law understandings that a closer, legally protected individual relationship exists with an executor, if the decedent has left a will, or with a spouse, if there is no will. This note examines the conflict and suggests a solution that would be fairer to Maori than that unanimously reached by three of New Zealand's general courts.

INTRODUCTION

Definitions of cultural property vary, depending on the academic discipline from within which we approach the subject. These definitions are rarely indigenous, because Western academia has traditionally defined them according to its own historical cultural precepts. Anthropologists have highlighted the way geographically based social relationships are formed around things that are considered valuable enough for group members to claim as "ours," either collectively or as individuals;[1] sociologists examine the power relationships between competing claimants in a group,[2] and linguists have often beguiled us into believing that terms such as "ownership" have an intrinsic capacity to define our relationships to the things we want to claim as our own.[3] And finally, the law has circumscribed the idea of cultural property with notions of owners of tangible and intangible objects and rights that attach to certain individuals. These are either real people or legally constructed ones such as ships and corporations to whom the law is willing to attribute a commercial human value.[4]

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These conflicting approaches to cultural property are all apparent in the recent case decided by the New Zealand Supreme Court in *Takamore v. Clarke*.[5] The single legal point at issue in *Takamore* was who was legally entitled to decide where a deceased Maori person whose spouse was non-Maori, would be buried. The available legal choices were the spouse, Ms. Clarke, or the Maori *whanau* (extended family). The High Court, Court of Appeal, and the Supreme Court of New Zealand were unanimous in finding that Ms. Clarke's right, as executor, to bury her partner prevailed over that of his *whanau* (extended family) and *hapu* (subtribe).

FACTS OF THE CASE

James Takamore was a member of *Tuhoe Iwi* (tribe), a large *iwi* whose *mana whenua* (tribal territory) is located on the eastern side of Aotearoa, New Zealand. His partner, Ms. Clarke, is *Pakeha* (non-Maori). When she decided to move from the North Island to the South Island, Takamore followed her and they lived together in Christchurch for 20 years and raised their children. Takamore died, suddenly, in 2007 of a brain aneurism. After his death, and at the request of members of his Tuhoe whanau, Ms. Clarke permitted him to lie in state on the local *marae* (communal Maori meeting place) in Christchurch, in accordance with Maori customary practice. A dispute then arose as to whether Takamore should be finally laid to rest in Christchurch or be repatriated to his home territory in the North Island, as is common practice for many Maori who die away from home. Having failed to reach any agreement, Takamore's mother and sisters uplifted him from the Christchurch marae, claiming they had a customary right to do so under *tikanga Maori* (Maori customary law). They returned him to his whanau cemetery in Kutarere, Opotiki, where he is buried alongside his relatives. Ms. Clarke petitioned the High Court to order that Takamore be exhumed and returned to her for burial in Christchurch, claiming that she had been illegally dispossessed of his body and therefore, it had not been "properly" buried according to law. The High Court, Court of Appeal, and Supreme Court all agreed that the burial was illegal, because, as the executor of his will, Ms. Clarke had the superior legal right to decide where to bury her spouse. The Court ordered the whanau to return the body to her possession for burial in Christchurch. The remains have yet to be exhumed because the extended family believe that now that Takamore is back home where he belongs, among generations of his own whanau, and exactly where he should rightfully remain for all eternity.

ISSUES RAISED BY THE *TAKAMORE* CASE

Takamore raises several issues regarding the nature and content of Maori cultural property rights from a uniquely Maori perspective. The court has not been able to

resolve the dispute satisfactorily, and has in fact, made it worse by entrenching the common law position derived from English law without giving any real regard to tikanga Maori. This case note explores some of the concerns raised by the case and looks at what can be done to resolve burial disputes in Aotearoa, New Zealand, in a way that upholds the collective, cultural property rights of Maori.

Defining "Cultural Property" in Maori Terms

Indigenous cultural contexts in British colonial states are always vulnerable to exploitation by the majority, English-based, culture. Their presence is rarely acknowledged in state public forums except as ritualistic window-dressing to authenticate state ceremony, or when indigenous persons of huge individual *mana* (prestige) such as revered hapu and iwi community leaders are farewelled in public ceremonies that are treated as state occasions. Generally speaking, however, Maori burial practices are found nestled away in safe, local geographic spaces where reality is viewed through the prism of what the local people take for granted in their daily lives and share with others on a day-to-day basis.[6] In these spaces, they are part of the natural rhythm of life and are often shared with non-Maori community members who also hold similar values.

Early European anthropologists often described Maori society as a "collective" and "primitive" society and loved studying the barbaric practices of our culture through their own myopic cultural lenses. Practices such as flensing of the dead, repeatedly digging up and displaying deceased remains for newly arrived relatives to grieve over for weeks, months, and sometimes even years; spousal laceration as part of the grieving process; and female suicide, were found to be disgusting and repugnant to any form of British justice.[7] These practices quickly died away after colonization, when the wholesale adoption of Christianity throughout Aotearoa-New Zealand provided a more sanitized, formalistic approach to death and burial by Maori. Several new Maori religions arose as variants of the Christian ones Maori had been exposed to. These included the Hauhau, Pai Marire, Ringatu, and Ratana Religions, all of which operated within localized hapu and iwi boundaries. The adaptation of new religious practices, and the retention of Maori territorial *hapu* and *iwi* (tribal) bases relatively intact since 1840, has meant that Maori ideas, principles, and practices associated with death, burial, and the afterlife have remained remarkably stable, despite the introduction of a totally alien system of laws within those territories.[8]

The *tangihanga* (Maori funeral) is the single, most fundamental traditional institution of Maori society to survive the ravages of colonization. It has not had an easy run. Following a period of bitter warfare in the mid-1800s, Maori funereal practices were essentially disengaged from those of mainstream British-based, New Zealand society.[9] Christian influences and European social norms reduced the form and duration of the tangihanga further, but did not undermine its underlying ideological significance to Maori.[10] Many of its associated practices were maintained

only within the context of the communal marae setting presided over by local Maori and outside of any interference from New Zealand law.

Localization of customary practice in Aotearoa-New Zealand should not be too narrowly construed. Common ancestry with other Pacific peoples means that the Maori experience is echoed in a series of song lines that resonate across the Pacific, where public sharing of grief and death within the community is the norm.[11] This leads to common understandings between the peoples of the Pacific, their processes, their formalities, and the respect with which they treat their deceased as their own, exclusive, cultural property.

Furthermore, in a modern world that is still coming to terms with its colonial past, the need to promote global standards to which societies can aspire, requires a rethink of old, foreign European-based norms that are no longer appropriate for the societies onto which they have been strait-jacketed in the past.[12] It is time for Europeans to learn from their fellow human beings that the way they have constructed their reality is not always best for those onto whom they have forcibly gifted their knowledge. It is time for them to learn from us.

In Aotearoa-New Zealand there are several reasons why this is so. Maori, as a nation, were never conquered by the British, and have never fully accepted that our customary institutions are not valid or without status within broader New Zealand society. In 1840, the Maori version of the Treaty of Waitangi, entered into between Maori leaders and the British Crown, specifically preserved a number of important cultural definitions of property that are still relevant today. Under Article 2 of the treaty, Maori retained all the properties they currently possessed, as well as the right to develop them in the future:[13]

> The Maori version of the Treaty uses the phrase "wenua o ratou kainga me o ratou taonga katoa." W(h)enua signifies lands and kainga habitation; and the last three words can be literally translated as "all things valued or all things treasured. Taonga may be tangible (such as fisheries) or intangible (such as the Maori language).

Furthermore, the British Crown had already officially recognized the Maori Declaration of Independence in 1835, and guaranteed to protect those rights under the English version of the Treaty of Waitangi. Article 2 of the treaty states:[14]

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forest Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession. . .

Maori versions of *te Tiriti* (the Treaty) were signed by more than 500 *rangatira* (chiefs) throughout Aotearoa. The Maori text uses the phrase *tino rangatiratanga*, which is often translated as "absolute chieftainship," to convey that Maori retained authority over themselves and the properties they possessed at the time, according to their own cultural values. This stance was initially respected by British lawmak-

ers. British law provided for districts where Maori law could apply to all those who lived there, including non-Maori. However, the potential for Maori autonomy was never officially implemented, and the English common law is applied to settlers and Maori alike as "one law for all."[15]

A renewed push to include Maori property values as part of the legal system of Aotearoa-New Zealand has recently reasserted itself. This development gained impetus with the establishment of the Waitangi Tribunal in 1975. The tribunal is a quasi-judicial forum in which Maori can bring claims against the Crown for breaches of the Treaty of Waitangi and the tribunal can suggest redress for any grievances it considers justifiable. The tribunal process provided the first national forum in which Maori could tell our own story, assert our truth in terms of our own cultural understandings of life, and be heard by the entire nation.

Several unique customary principles uphold a system of Maori cultural property, and united they form the backdrop of the Maori reality presented to the tribunal during hearings. They include *whakapapa* (genealogical connections to relatives and land), *whanaungatanga* (reciprocal obligations owed between relatives), *mana* (individual and collective whanau and hapu authority and prestige), *tapu* (recognition of the inherent value and sacredness of all things), *kaitiakitanga* (the obligation to nurture and care for one's relatives), and *mauri* (the protection of the life force that all things possess during their lifetime). This is not a finite list and one of the unique features of Maori understandings of reality is the way that these and other principles can be formed into a matrix of fundamental principles to facilitate collective decision making by groups of people who may have remarkably different agendas.

In terms of forming finite property relationships, the central principle around which Maori groups cohere is whanaungatanga:[16]

> Of all of the values of tikanga Maori, whanaungatanga is the most pervasive. It denotes the fact that in traditional Maori thinking relationships are everything—between people; between people and the physical world; and between people and the atua (spiritual entities). The glue that holds the Maori world together is whakapapa or genealogy identifying the nature of relationships between all things. That remains the position today. In traditional Maori society, the individual was important as a member of a collective. The individual was defined through that individual's relationship with others. It follows that tikanga Maori emphasised the responsibility owed by the individual to the collective. No rights enured if the mutuality and reciprocity of responsibilities were not understood and fulfilled.

In property terms, this meant that hapu and whanau members were treated as "belonging to" the group and as "belongings of" the group. When an individual died, there were rigid protocols that applied to reinforce the exclusivity of that belonging along cultural lines and to ensure that the relationships shared in one's lifetime with human relatives remained linked to the specific lands to which individuals were directly connected by human blood. Only very rarely, and generally

in situations of warfare where it was impractical to repatriate individuals, were hapu and whanau members ever buried outside of their home territories.[17] The norm was for relatives to reclaim the bodies of family members, and, having publically farewelled the deceased several times over a number of months or years, to place the skeletal remains in a safe, secluded spot known only to a selected few from within the hapu, where they might rest for eternity in peace.[18] The surrounding areas were considered highly tapu, or off-limits to members of the group, and severe sanctions including the death penalty were imposed against those who trespassed, either accidently or on purpose, into those sacred areas.

With the introduction of Christianity into Aotearoa-New Zealand after 1840, and after the Land Wars ended hostilities between hapu and iwi, Maori began to bury their dead in cemeteries. Tangihanga funereal practices continued largely as Maori-only affairs, operating outside of the purview of the law and according to age-old local Maori community values and practices.

Tikanga Principles Applying to the Burial of Tuhoe Whanau and Hapu Members[19]

A clear set of clear tikanga (customary law) principles associated with the burial of whanau and hapu members was set out by members of Tuhoe iwi in the first *Takamore* hearing. It is essential to understand from the outset that the tikanga set out describes the continuing existence of a "living entity" over many generations. It is not a dormant process that stops and starts with the arrival of new individuals. Neither does it privilege foreigners into being able to unilaterally disrupt its repetitive processes for their own, English-god-and-law-derived, individualistic, convenience.

In summary, two *kaumatua* (experts), stated that Tuhoe individuals are born linked into a collective group of human individuals by whakapapa. Their *whenua* (placenta) is buried in the land to symbolize their ongoing links to their whanau, hapu, and iwi domain. This forging of life-to-life, whenua-to-whenua, marks the beginning of the strengthening of the mauri (life force), that maintains an individual throughout his or her lifetime.

When people die, their mauri departs and they return again to the whenua that sustained them throughout their lives, having now taken on a different status within the collective, that of an ancestor who is part of the whakapapa belonging to the group. For this reason, when a person dies it is incumbent on the living to reinforce the collective whakapapa and identity of the whanau and hapu by claiming possession of the deceased for repatriation to his or her *kainga* (home territory).

The right to decide where exactly, within the tribal territory, the person is to be buried, is a decision for the collective. If there is a dispute between the living and the dead, then the living collective take priority, the underlying principle being to maintain the continuity of whakapapa to whenua, and whenua to whenua. Those

who are not strong in their tribal tikanga can also be claimed as part of the collective, the key factor being the right of the living to decide according to tikanga. When Tuhoe die outside of their territory they are, generally, repatriated. When disputes occur, tikanga provides for ongoing discussion and for a win-win situation to emerge through discussion, debate, compromise, and compensation, or some other satisfactory arrangement that the parties can live with.

In an ideal world, the above will provide a practical solution to disputes about where a person is to be buried, because there is only one real option, the presumption being that, unless there are *exceptional circumstances* preventing it, the deceased will always return to their whenua and their whakapapa for burial. This being the case, there should have been no dispute about taking Takamore from Christchurch for burial with his extended family in the whanau cemetery at Kutarere, because in customary whakapapa and whenua terms, that is exactly where he belongs.

The Reasoning of the New Zealand Courts in the Three Takamore Decisions

In their hearts and minds, competing individuals often wage excruciating war against each other in their desire to trample each other's mana by gaining an "I won"–"You lost" pronouncement from a court. Litigants are trapped within an adversarial system that reinforces such behavior, as are the judges who exercise the Weberian power to choose the victor. Everyone must die and most humans grieve. When burial disputes occur, professionalism is no savior from the emotional pain of losing a loved one, or sharing someone else's loss. There is no escape. Yet a clinical approach often masks the pain of compassion that judges feel for grieving spouses and children who are arguing over the disposal of human remains:[20]

> It is an area of law where one can read in the reported decisions an anguish in the judges seeking to accommodate the concerns of those interested; and their embarrassment at having to deal, often in some haste, with bitter conflicts within families over the remains of a recently deceased relative or friend, which conflicts, although arising out of genuinely held feelings, are perceived as being unseemly.

Evidence of a clinical, administrative approach is found in all three *Takamore* decisions, which show little tolerance for Maori concepts of cultural property being held collectively by members of a whanau and hapu over their family members, or of the emotional relationships that they consider have to be protected in order to ensure the survival of whanau and hapu cultural cohesiveness over time. Instead, the judges intentionally undermine Maori cultural property norms while reinforcing the administrative strait-jacketing of those of the introduced legal system.

The New Zealand decisions relied on in all three courts draw their original authority from the English case of *Williams v. Williams*,[21] in which three rules were laid down that have been reinforced in successive New Zealand cases.[22] The first is

a legal rule that no property can be held in a deceased person by anyone else; the second is that no person can claim that he or she has property in his or her own body after death; and the third is that the executor of a will has the primary right to decide where a deceased person is to be buried.

The High Court Decision

The first decision reinforces the common law of England, which initially treated deceased individuals as potentially toxic waste that might create a public health hazard if not quickly disposed of. Early Christian legal niceties surrounding burial held that the spirit departed into the spiritual realm of God to await judgment day while the body, once believed to be needed for rehousing the physical body on resurrection day, was later accepted as rotting back into the ground.[23] Respect was not always paid to the dead. The finite existence of any individual lasted only until those who remembered them had passed on, whereupon they were left in public cemeteries that have now become dead spaces dotted around big cities. Throughout Europe, bones were sometimes dug up and left in ossuaries near churches to make room for new burials, buried in catacombs, or used as decorative adornments in local churches.[24] The longer the bones lay in the ground, the less value they were attributed, until they could become the property of a farmer on whose land they were found and dealt with as he saw fit.[25] Christians, for all their moral pontificating, were quite pragmatic in their dealings with burial and preserved the best for the rich, while leaving the poor and criminal faction to the vagaries of body snatching and medical research—the law having accepted that they should serve some useful public service after all.[26]

In the High Court of New Zealand, Justice Fogarty was influenced by two main factors. The first was that he decided as a matter of fact, and based on very weak and uncontested evidence, that Takamore had chosen to live outside of his tribal territory, and had therefore, actively given up his Tuhoe membership. He justified this stance by saying that Takamore had to elect to remain part of the Tuhoe collective under Article 2 of the Treaty of Waitangi, otherwise he would be held to have exercised his Article 3 right to be an *individual* New Zealand citizen, free of any *collective* Tuhoe tikanga. Thus he would be subject to the ordinary laws of New Zealand attaching to individuals.

Having taken Takamore out of the collective framework, Justice Fogarty then held that local custom had to be consistent with other principles of the English common law of New Zealand in order to be judicially recognized. Unsurprisingly, these principles were also individually based.[27]

> In my view, whatever the bounds of consideration of the reasonableness of Maori tikanga, before any tikanga is recognised as part of common law in New Zealand, there come some considerations as to its implications on individual freedom.
>
> 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 Tuhoe 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.[28]

Following this reasoning, Justice Fogarty concluded that[29]

> there was no legal authority for the defendants and other members of Tuhoe to dispossess Ms Denise Clarke of the body. The taking of the body was unlawful, and so it is not properly buried. Ms Denise Clarke is entitled now to possession of the body, as the executor.

The assertion of the hegemonic power of the law by the High Court and the power to define what is "proper" burial in linguistic terms, as well as the anthropological relationships that are privileged by law, illustrate the point made at the beginning of this note that what is considered "cultural property" and what is considered "normal" in terms of the prevailing status quo are themselves, cultural constructs.

The Court of Appeal Decision

The three judges in the Court of Appeal also upheld the executor's right to decide place of burial. In both lower courts, Tuhoe custom failed the test of "reasonableness." In the High Court, it was because collective customary decision making overrode individual autonomy and the right of a testator to choose not to be bound. In the Court of Appeal, two judges found that the use of force to dispossess the executor of the body was an illegal display of "might is right" that was repugnant to the fundamental idea of rule by law and not by bullying. Justice Chambers also found that the ability to move in and out of an indigenous culture was a "fundamental freedom" that could not be restricted by superimposing hapu views on to a deceased.

Two judges in the Court of Appeal found that there was not sufficient evidence to show that Takamore had rejected Tuhoe custom. This is significant because it meant that the person with the burial duty had to be mindful of whanau wishes and had to properly consider whanau views as mandatory considerations. However, if there was still conflict as to where to bury then the final decision rested with the executor and his or her say was final.

A caution was expressed by Justice Chambers, who felt that two Tuhoe expert opinions were insufficient for the court to make a major decision that could permanently outlaw a customary practice that had existed from time immemorial. There was no guarantee that others would hold similar views to those expressed by the experts and the Court should not pronounce on the custom because it could declare it invalid on an erroneous base, and, unwittingly perhaps, undermine the entire customary system.

The Supreme Court Decision

In the Supreme Court, a majority of three out of five judges upheld the status quo common law rule that the executor, as the personal representative chosen by the

deceased to disperse their worldly possessions after death, also has the right and duty to choose where to bury the deceased. This has been the practice since at least the early 1880s when Married Women's Property Acts were passed in Britain and the United States to end "coverture,"[30] which treated women as a type of "spare rib" property of their male spouses. The legislation enabled women to hold property of their own, have wills, become executors, and pay for their own funerals.[31] Building further upon this historical individual female emancipation, the three judges decided that the closeness of the legally sanctioned marital relationship at the time of death should prevail over other relationships, particularly if the deceased had chosen his partner for the role of executor.

The court went beyond the *Williams rule* by deciding that the deceased has a say in his or her own burial. It held that the deceased's individual wishes, expressed before his death, *continue to operate after his death*.[32] It reinforced this further by saying that the court had to look at the life choices made *at the time of death*.[33] This being the case, in my view Takamore's spouse and children's wishes ought to prevail.[34] This was held to be consistent with the development of succession law in other English common law jurisdictions. The Court did not stop there. It extended the personal representative rule *to continue on after death* in order to prevent interference by others (meaning whanau members) and to prevent them uplifting their relatives later on and taking them home.[35] Finally, in order to ensure that Maori do not interfere in the legal mechanics of the law, the Court stated that it would use its power to ultimately review the behavior of the parties and weigh all the material considerations if there is an unresolvable dispute. Its decision would be final.[36]

Chief Justice Elias and Justice Young provided individual judgments. They rattled the executor rule a little by pointing out that it was based on weak precedent,[37] and supported its downgrading from "absolute" to a weaker form that was reviewable by the court, but neither seriously challenged the views of the majority.[38] According to Justice Elias, the rule that executors have the final say on burial is built on a very shaky factual basis that bears little resemblance to the reasons for the rule.[39] This being the case, in my view, it is simply convenient to say that the person the deceased has chosen to divvy up and deliver his or her worldly goods to others after he or she dies, should also dispose of the body.

In Maori cultural property terms, there is no serious connection between distributing personal acquisitions, and burial of one's body. Giving away the things one has accumulated during one's lifetime as "stuff" is not the same as breaking the living linkages that are shared with others during one's lifetime and which ought to continue on after death. If you are born a Tuhoe, or any other hapu or iwi member for that matter, then you also die a Tuhoe. That is not a choice that can be individually made by a person who is part of a whakapapa and whanaungatanga that existed before he or she was born and continues to exist well after he or she departs this life. It is certainly not a choice that should be made by a stranger with whom a temporary emotional attachment is formed during one's lifetime and with whom one may have produced children.

A "Proper" Forum for Deciding Where Hapu and Iwi Members Are Buried

The Supreme Court does not provide a solution to the problem of who should decide where a deceased Maori is to be buried when there is a dispute. It simply reinforces old common law rules and its own hegemony over Maori. A better solution was suggested by the New Zealand Law Commission after it conducted a series of interviews with Maori groups around Aotearoa-New Zealand in the mid-1990s, and made tentative conclusions about further work that needed to be done on Maori succession.[40]

Concerns Expressed by Maori

The main concern expressed by Maori at the time was the desire to keep the whanau together and the whakapapa intact as a single living cultural construct that belonged to them.[41] This is consistent with recognizing cultural property in individuals as being the possession of whanau, hapu, and iwi. A second concern was that owners of property should be able to control any individual property that they had acquired during their lifetime.[42] A third concern was to have disputes regarding succession settled efficiently in a quick, cheap and Maori-friendly forum that was controlled by Maori people and which used Maori processes.[43]

Disputes over burial easily fit within this framework. The Commission stated that in order for any dispute resolution to be successful, it must have accepted rules that are known to all the participants.[44] In this instance, the principles relating to whakapapa, whenua, and whanaungatanga that are set out above are fundamental, although not the only ones for consideration and/or to be used in any negotiation. These principles will act as guidelines, and provide a flexible process that can produce a variety of respectful customary law outcomes according to the many different local situations in which claimants find themselves. One essential aspect of the process that is a radical departure from the New Zealand common law status quo, is the need to take burial disputes away from the executor's control, and to limit the executor's role only to ensuring the proper dispersal of property acquired during a deceased's lifetime.

Hearing Forum

The ideal hearing forum for burial disputes is the Maori Land Court. The judges in that court must have facility in *te reo Maori* (Maori language) and an understanding of tikanga Maori.[45] Most judges in the general courts do not possess such expertise, relying instead on the authority of their positions to produce enforceable pronouncements. Furthermore, the jurisdiction of the Maori Land Court to hear a wide range of matters relating to tikanga Maori already exists and is regularly used by both the general courts and the Waitangi Tribunal to resolve questions of tikanga relating to lands, fisheries, group membership, and other matters.[46] It is a very short step to extend this to include mediation on burial matters. The

Maori Land Court may also appoint local elders who have knowledge, wisdom and the respect of the community, to sit with judges and make final determinations that are binding.[47] This makes the process familiar and reinforces the mana of local elders. The need for finality while retaining unity among members of the whanau requires wise counsel rather than the bald assertion of authority over the disputants as occurred in *Takamore*. At present the Te Ture Whenua Maori Act also allows for 3 Maori Appellate Court judges and 2 Maori elders to provide advice to the High Court by way of case stated.[48] "Providing advice" falls far short of having the final say. For this reason, Maori Appellate Court decisions regarding burial should be final, with High Court oversight being restricted to judicial review.

Maori Individuals Opting Out of Hapu Processes

One very clear new direction to emerge from *Takamore* is that there has to be some mechanism for allowing individual Maori to opt out of collective processes and to elect, instead, to be buried as individuals under Pakeha law. Individual rights and individual autonomy are strengthening around the world and Maori society is not immune from that. Therefore, the deceased ought to have the final say as to where he or she is buried. In addition, Maori must also be respectful of others who have legitimate claims, such as spouses and children who want the deceased buried near them. The easiest way to achieve this is to abandon the "no property in your own body after death" rule and to allow decedents to make an election before they die that is binding after their deaths. This will allow Maori to opt in or out of customary law processes during their lifetimes. While the High Court held that Maori had to *opt into* the collective process, something that had to be supported with clear evidence, or be treated as Pakeha under the existing laws of succession, this is far more democratic because it enables individual choice.

Maori also want to control the processes that allow us to preserve all the identifiers that make membership of an iwi an ongoing and coherent experience; burial being one of them. Maori cemeteries exist throughout Aotearoa New Zealand where whanau members have been laid to rest together. Allowing spouses to be buried in those cemeteries is another issue that has to be addressed, as it is not easy to lock out significant others, particularly when couples have shared long lifetimes together. When the deceased is a younger person, the partner is more likely to form a new relationship and the emotional turmoil of death to be short-lived. In such cases, the initial grief is temporary, and permanently dispossessing hapu and iwi of their cultural property is nothing more than an indulgent mischief. In such instances, a process with clear rules that is conducted under the auspices of wise counsel, is the best way forward. Finally, if the decedent decides that his or her body is not the cultural property of the whanau and hapu then it should not be taken on to the marae and subjected to hapu and iwi protocols because that is an abuse of process and a waste of whanau resources.

Protecting Burial Rights as Part of Modern Hapu and Iwi Governance Structures

The new treaty settlement governance structures that have been established by hapu and iwi in Aotearoa-New Zealand since the mid-1990s can also facilitate the avoidance of burial disputes. All of these groups now have iwi membership registers. It is a simple step to locate existing Maori cemeteries and to solicit where members wish to be buried. There is room for radical developments to occur here. Maori burial places do not have to be cemeteries like in the old days. Indeed, lack of space and regional topography may force new developments that are only restricted by the collective hapu and iwi imagination—so long as it maintains the traditional inclusiveness and sharing of whakapapa that keeps the whanau united. The use of new technology across the Pacific has made "online tangihanga" and "tangihanga by videoconference" possible. Radical new thinking is required to reflect the pragmatism of a changing and developing Maori society. Although the spaces and places may still need to reflect strong identity and links to significant traditional landmarks, new technology provides new ways of defining what "cultural property" might look like in the future.

It is time that the old common law fiction gave way and accepted that the executors *are* exercising a property right when they exercise the right to decide burial place. In the United States this is recognized as a "quasi-property" right.[49] Inch forward a little and how much simpler it is to admit that it is a property right, held by someone in the deceased's body. There are many instances where bodies and parts are already recognized as legal property that belongs to researchers and hospitals—family relationships have not always been the most important things to be protected by law.[50]

For Maori, what is important is that we provide signposts for the future to let our children know who they are and where they fit in the wider scheme of things—and to overtly show that they remain an integral part of the living marae processes necessary to ensure the survival of Maori hapu and iwi into the future. Each local group will do it their way, and maintain control of it as part of their own governing processes. Those processes should be protected as part of the Maori local government planning for each district as was initially intended in the 1800s. And those who opt not to be part of that process will be able to live as Pakeha if they want to, in every sense of the word.

Legislative Protection of Burial Rights

Finally, there is a need to construct a legislative framework to protect the result.[51] The new governance frameworks that are part of the treaty settlement process put the onus on Maori hapu and iwi to keep track of their members and to ensure that they make decisions during their lifetime about burial, or, if they choose not to, are at least clear about how their burial will be dealt with under the general law. The choice they make will have to be protected by law against interference

from the general courts to ensure that the Maori Land Court has the final supervisory oversight. This is absolutely essential if Aotearoa-New Zealand is ever going to move beyond the cultural imperialism that is currently being perpetuated by the general courts and which permits judges in those courts to continue to impose their mono-cultural values on to Maori society.

ENDNOTES

1. Theodorson, *A Modern Dictionary of Sociology*, 13.
2. Described by Weber, *Economy and Society*: "as the chance of a man or a number of men to realise their own will even against the resistance of others," 926.
3. Flew, *A Dictionary of Philosophy*, 204.
4. This European construction is no less culturally contrived. See, for example, the case of *Hui Malama v. Dalton*, US District Court of Hawaii, 25 July 1995, unreported decision of Judge David Ezra. Judge Ezra states that while "allowing [ships and corporations] to act as parties to lawsuits facilitates business and commerce, which in turn furthers societal interests and benefits individual persons," treating human remains as having legal standing would provide no "comparable identifiable benefit to living members of society."
5. *Takamore v. Clarke* SC 131/2011 [2012] 18 December 2012.
6. Mutu, "Cultural Misunderstanding or Deliberate Mistranslation," 57–103; Tomas, "Implementing Kaitiakitanga under the RMA," 39.
7. Best, "Notes on Customs, Ritual and Beliefs," 6–30.
8. Oppenheim, *Maori Death Customs*, 21–22.
9. Oppenheim, *Maori Death Customs*, 22.
10. Oppenheim, *Maori Death Customs*, 21.
11. Tomas, ed., *Collective Human Rights of Pacific Peoples*.
12. Durie, *Constitutionalising Maori*, 10.
13. New Zealand Law Commission, *Maori Custom and Values*, 79.
14. Orange, *The Treaty of Waitangi*, 257–59.
15. Joseph, "Recreating Legal Space," 74–97.
16. New Zealand Law Commission, *Maori Custom and Values*, 30–31.
17. Firth, *Economics of the New Zealand Maori*, 368.
18. Servant, *Customs and Habits of the New Zealanders*, 28.
19. Taken from affidavit evidence provided by Tuhoe elders in the High Court in *Clarke v. Takamore*, (unreported) HC Christchurch, 29 July 2009, Fogarty J, CIV 2007-409-001971. The added commentary is mine.
20. *Leeburn v. Derndorfer*, [2004] VSC 172.
21. *Williams v. Williams* (1882) 20 Ch D 659.
22. Tomas, "Who Decides Where a Deceased Person Will Be Buried," 81.
23. Perry, "The Right of Ecclesiastical Burial," 315; Provost, "Canonical Aspects of the Treatment of the Dead," 203–13.
24. Hubert, "Dry Bones or Living Ancestors?," 128 at 119.
25. Matthews, "Whole Body? People as Property," 193–229.
26. Interfering with a grave was a misdemeanor and not a felony, so it was punishable by fine and imprisonment rather than execution or transportation. See *Rex v. Lynn*, 1728. Richardson, *Death. Dissection, and the Destitute*.
27. Para. 87.
28. Para. 88.
29. Para. 90.
30. Nwabueze, "Legal Approaches to the Burial Rights of a Surviving Wife," 12.
31. Nwabueze, "Legal Approaches to the Burial Rights of a Surviving Wife," 12.

32. Paras. 168 and 169.
33. Para. 169.
34. Para. 169.
35. Para. 159.
36. Para. 162.
37. Paras. 8 and 9, 52 and 53.
38. Para. 175.
39. Para. 55 and 56.
40. New Zealand Law Commission, *Maori Custom and Values*, 87–96, 98.
41. New Zealand Law Commission, *Maori Custom and Values*, 67.
42. New Zealand Law Commission, *Maori Custom and Values*, 67.
43. New Zealand Law Commission, *Maori Custom and Values*, 67 and 88.
44. New Zealand Law Commission, *Maori Custom and Values*, 92.
45. Section 7 (2A) Te Ture Whenua Maori Act 1993 states: "A person must not be appointed a Judge unless the person is suitable, having regard to the person's knowledge and experience of te reo Maori, tikanga Maori, and the Treaty of Waitangi."
46. Sections 27 and 28 of Te Ture Whenua Maori Act 1993.
47. Sections 30–37 of Te Ture Whenua Maori Act 1993.
48. Sections 61 and 62 of Te Ture Whenua Maori Act 1993.
49. Magnasson, "The Recognition of Proprietary Rights"; Also discussed in *Smart v. Moyer* 577 P. 2d 108 (1978) 110, in which *Williams* is rejected in favor of upholding the testamentary instructions of the deceased so long as they are not absurd, wasteful of property, or indecent.
50. Thomas, "The Retention of Body Parts," 33–42.
51. New Zealand Law Commission, *Maori Custom and Values*, 91.

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