Determining a place of burial

Benjamin Goodyear reports on *White v Williams* [2019] NSWSC 437

A person dies. The deceased's surviving loved ones cannot agree on where the deceased should be buried. How does the Court assess where burial should occur? To what extent are Aboriginal cultural and spiritual beliefs of the deceased and of the survivors accommodated in determining the place of burial? These are the challenging issues that arose for consideration by Sackar J in *White v Williams* [2019] NSWSC 437.

The issue

The Deceased was an Aboriginal man with strong ties to the Redfern and Waterloo area. He died suddenly, on 7 February 2018, without having left a will or instructions as to his wishes concerning burial. His partner, with whom he had two children, wished for him to be buried in Sydney at the La Perouse/Botany Cemetery. His mother opposed that course. She wished for him to be buried on country in Cherbourg, Queensland, where she and the Deceased's father (a Wakka Wakka man) had once lived.

The Court proceedings

In the days following the Deceased's death, his partner (Plaintiff) became aware that the coroner had released the Deceased's body to his mother (Defendant) for burial in Queensland.

The Plaintiff brought an urgent application against the mother before the Equity Duty Judge. The Plaintiff sought orders that she be appointed administrator of the Deceased's estate and that she be entitled to take possession of the Deceased's body and to bury him in the Sydney cemetery.

As an interim measure, Rein J ordered that the body of the Deceased be released to the Plaintiff for burial in the Sydney cemetery, but his Honour made it clear that this was not a final decision. Accordingly, a three day hearing took place shortly thereafter, in the Expedition List before Sackar J, to determine the Deceased's permanent resting place.

The law on burial rights

Justice Sackar canvassed the authorities concerning burial rights, noting the following in particular:

- In the ordinary course, if a deceased has left a will, a named executor has the right to arrange the burial: at [16] citing *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 691.
- If, however, a deceased made no will, then 'usually the person with the best claim to the letters of administration [has] the right to determine the place and manner of burial' at [18], quoting Doyle CJ in *In the Estate of Jones (deceased); Dodd v Jones* (1999) 205 LSJS 105 at [30].
- But there is no hard and fast rule. Furthermore, there may be no likelihood of an application for a grant of administration in intestacy. The deceased may have no assets to administer. In those circumstances, 'an approach based on extent of interest, or entitlement to apply for a grant, takes on an air of unreality': at [19] quoting Perry J in *Jones v Dodd* (1999) 73 SASR 328 at [50].
- Ultimately, the proper approach requires a balancing act. On the one hand, the common law is inclined to grant burial rights towards the person with the best claim to the letters of administration. On the other hand, a Court will have regard to 'practical considerations' and any 'cultural, spiritual and/or religious factors that are of importance': at [22] citing Campbell J in *Darcy v Duckett* [2016] NSWSC 1756 at [27].

Evidence and findings

His Honour received a range of evidence from the Plaintiff, extended family, friends and expert evidence from a Court-appointed anthropology expert, who gave evidence on Aboriginal burial customs in Redfern and Cherbourg: at [75]-[80], [104]-[106].

His Honour accepted that the Plaintiff had been in a de facto relationship with the Deceased at the time of his death: at [97], [100]. In respect of religious, cultural, and spiritual matters, his Honour noted evidence of the Deceased's blood ties to Cherbourg, and of the traditional significance of burial on country for Aboriginal people. His Honour found, however, that notwithstanding the Deceased's visits to Cherbourg and his respect for his ancestors from that area, the Deceased had 'a much more intense and passionate attachment to the Redfern/Waterloo area' in light not only of his 'urban lifestyle' but also due to the fact that his children, the Plaintiff, the Defendant, and other family members lived there: at [106]. The ability of family members to visit and tend to the grave (which would be enhanced if the Deceased were buried locally) was 'extremely important and awarded considerable weight': at [108]. The needs of the children in that regard were 'of the utmost importance': at [113].

Ultimately, his Honour accepted that the Plaintiff and her two children were best able to deal with the Deceased's remains in a manner consistent with his background, some of his wishes, and the importance of his Aboriginal culture: at [114].

The Plaintiff's application, therefore, was successful and the Deceased remained undisturbed in his resting place in the Sydney cemetery. His Honour, therefore, did not need to determine the further difficult question as to whether, had his Honour found against the Plaintiff as to who was best able to deal with the remains of the Deceased, exhumation should be ordered: at [115].

Postscript

It may be noted that his Honour made no order as to costs. The legal practitioners appeared pro bono with the Court recording its 'gratitude for their generosity and professionalism': at [7].