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PUTTING THE LAW OF BURIAL TO REST: *SOUTH AUSTRALIA V KEN* [2021] SASC 10

'The circumstances are tragic. The Court is not King Solomon. Whatever happens, one or other party will be disadvantaged.'[1]

I Introduction

In the biblical tale of the Judgement of Solomon, King Solomon was required to decide which of two women had the superior claim as mother of a child. King Solomon revealed the identity of the true mother by suggesting the child be cut in two. The woman who begged for her child to be spared and given to her rival was the true mother, while the other woman who approved of the proposal was not.[2] When disputes arise between family members as to the funeral or burial of a deceased person, such as the dispute which arose in *South Australia v Ken* ('*Ken*'),[3] the court is required to make a discretionary decision on similarly intractable issues. However, as Rothman J poignantly observed in *Abraham v Magistrate Stone* ('*Abraham*'),[4] '[t]he Court is not King Solomon'.[5] The court must be guided by principles of the common law.

In Australia, these principles largely resemble the ecclesiastical law from which they were inherited.[6] It is therefore unsurprising that the existing law has proven ill-adapted to the needs of Aboriginal and Torres Strait Islander people.[7] Concerningly, a disproportionate number of funeral and burial disputes involve Aboriginal and

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1 *Abraham v Magistrate Stone* [2017] NSWSC 1684, [45] (Rothman J) ('*Abraham*').

2 *1 Kings* 3:16–27 (King James Version, Floating Press, 2008).

3 [2021] SASC 10 ('*Ken*').

4 *Abraham* (n 1).

5 Ibid [45].

6 Prue Vines, 'Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1, 1 ('Consequences of Intestacy').

7 Victorian Law Reform Commission, *Funeral and Burial Instructions* (Report, September 2016) 19 [3.20].

Torres Strait Islander people.[8] This is particularly problematic given the significant cultural importance of burial on Country for many Aboriginal people.[9]

Following a 2017 review of succession laws in South Australia,[10] the South Australian Law Reform Institute ('SALRI') recommended that 'approval be given for more detailed consultation and a separate report on funeral rites and the disposal of human remains'.[11] Work on such a report will only be commenced if there is significant interest from the South Australian Aboriginal community. The recent decision of the Supreme Court of South Australia ('Supreme Court') in *Ken* provides a new impetus to re-examine the law of burial disputes in South Australia. This case note examines Stanley J's decision from a law reform perspective and discusses its implications for future reform.

II Background

A *Facts*

Ken concerned a dispute regarding the burial place of a young Aboriginal man, who died on 4 July 2018 aged 24. The deceased[12] remained at the mortuary of the Royal Adelaide Hospital from 6 September 2018 until the time Stanley J delivered the final judgment in *Ken* on 19 February 2021.[13] The delay in burial emphasises the intractable nature of the dispute.

In general terms, the burial dispute was between the maternal and paternal sides of the deceased's family. The deceased died intestate, leaving no assets and without a surviving spouse or de facto partner. The deceased's father urged that the man be buried at Pukatja (Ernabella), where the deceased spent the vast majority of his life.[14] The man's mother sought orders to the effect that he be buried in Port Augusta, where the deceased was born and frequently visited in the last five years of his life.[15]

The deceased's paternal side adduced evidence demonstrating that the deceased lived the first 20 years of his life on the Anangu Pitjantjatjara Yankunytjatjara Lands ('APY Lands').[16] During this time, the deceased underwent 'men's business'

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8 Vines, 'Consequences of Intestacy' (n 6) 5.

9 See, eg, Victorian Law Reform Commission (n 7) 19 [3.22].

10 Dianne Gray, *South Australian Rules of Intestacy* (Report No 7, South Australian Law Reform Institute, July 2017).

11 Ibid 61.

12 The authors have decided not to include the name of the deceased out of respect for the deceased's family members.

13 *Ken* (n 3) [1].

14 Ibid [15]–[16].

15 Ibid [19].

16 Ibid [14].

with his paternal grandfathers and 'became a fully initiated man, a wati'.[17] The deceased's father emphasised the importance of the man being buried on Country. The deceased's paternal grandmother also emphasised the importance of her duty, as paternal grandmother, to oversee his burial.[18] The deceased's mother relied on the deceased's desire, expressed while in hospital, to return home to Port Augusta to be looked after by his mother. She also expressed an earnest desire that she did not want her children 'scattered all over Australia'.[19]

When considering the oral arguments made by each of the parties, Stanley J additionally accepted evidence of academic research and writing on Pitjantjatjara burial practices.[20] Having weighed the evidence before the Court, his Honour made orders favouring the burial wishes of the deceased's paternal family that the deceased be buried at Pukatja on the APY Lands.[21]

B *Issue*

The legal issue in *Ken* was determining the appropriate burial place for the deceased, and fundamentally to whom the decision-making right accrued. More broadly than this, however, *Ken* also elucidates the inaptitude of the common law in resolving burial disputes involving an Aboriginal person who died intestate.

C *Relevant Law*

Neither the *Burial and Cremation Act 2013* (SA) nor the *Administration and Probate Act 1919* (SA) could answer the question of where the deceased was to be buried in *Ken*. Neither statute deals with the issue of who is entitled to make decisions about or manage the funeral and burial arrangements of a person who dies intestate. Instead, one must turn to the common law.

First, it should be noted there can be no property in a dead body.[22] A person cannot therefore make provision for the disposal of their body through a will.[23] A person is entitled to leave instructions as to burial or funeral arrangements, however these are merely declaratory.[24] Burial instructions given by a person who leaves a valid will do not bind an executor, who by virtue of their appointment, has sole discretion

17 Ibid [15].

18 Ibid [17].

19 Ibid [19].

20 Ibid [28].

21 Ibid [30].

22 *Williams v Williams* (1882) 20 Ch D 659, 663–4 (Kay J) ('*Williams*'); *Jones v Dodd* (1999) 73 SASR 328, 332 [27] (Perry J, Millhouse J agreeing at 328 [1], Nyland J agreeing at 339 [72]) ('*Jones*').

23 *Williams* (n 22) 665 (Kay J).

24 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693–4 (Young J) ('*Tamworth City Council*').

over the disposal of the corpse.[25] A deceased's capacity to determine what happens to their body after death is limited to their right to appoint an executor.[26] While 'it can be expected that a person will choose an executor who will give effect to their wishes as to burial',[27] an executor holds the discretion to dispose of the body in any manner that they wish, provided it is not unlawful,[28] unreasonable,[29] or prevents loved ones from expressing their affection for the deceased.[30] This is coined the 'executor rule'.[31]

When a person dies intestate, as did the man in *Ken*, the right of disposal will ordinarily be awarded to the person most likely to be granted the right to administer the deceased's estate under the order of priority established by statute.[32] This is known as the 'likely administrator rule'.[33] In South Australia, the order of priority for granting letters of administration is established by r 34 of the *Supreme Court of South Australia Probate Rules 2015* (SA) ('*Probate Rules*'). The order is as follows:

1. the spouse or domestic partner of the deceased;
2. the children of the deceased, or the issue of any such child who died before the deceased;
3. the father or mother of the deceased;
4. brothers and sisters of the deceased, or the issue of any such sibling who died before the deceased;
5. grandparents of the deceased; then
6. uncles and aunts of the deceased and the issue of any deceased uncle or aunt who died before the deceased.[34]

However, as Stanley J noted in *Ken*, in circumstances where a grant of letters of administration is unlikely to be sought, or the deceased has left no estate over which an administrator could be appointed, 'the historical common law approach to assigning a right of burial assumes "an air of unreality"'.[35] The exercise of

25 Ibid 693 (Young J).

26 Ibid.

27 *Takamore v Clarke* [2012] 1 NZLR 573, 603 [149] (Glazebrook and Wild JJ).

28 *Leeburn v Derndorfer* (2004) 14 VR 100, 104 [16] (Byrne J).

29 *Grandison v Nembhard* (1989) 4 BMLR 140, 143 (Vinelott J).

30 *Tamworth City Council* (n 24) 694 (Young J).

31 Victorian Law Reform Commission (n 7) 6 [2.5].

32 *Jones* (n 22) 333–6 [33]–[51] (Perry J, Millhouse J agreeing at 328 [1], Nyland J agreeing at 339 [72]).

33 Victorian Law Reform Commission (n 7) 7 [2.6].

34 *Supreme Court of South Australia Probate Rules 2015* (SA) rr 34(1)(a)–(f).

35 *Ken* (n 3) [24], quoting *Jones* (n 22) 336 [50] (Perry J, Millhouse J agreeing at 328 [1], Nyland J agreeing at 339 [72]).

discerning the person most likely to receive a grant of letters of administration then becomes a legal fiction.

So what happens when the common law 'executor rule' and 'likely administrator rule' cannot apply? This was the difficulty faced by Stanley J in *Ken*.

III Judgment

In deciding the proper burial place, Stanley J adopted the considerations formulated by Nicholson J in *South Australia v Smith* ('*Smith*'):[36]

1. [the wishes of the person] who might be entitled to obtain letters of administration in the event such an application were to be made;
2. Aboriginal cultural matters and concerns raised in the evidence;
3. the deceased's own wishes; and
4. the wishes and sensitivities of living close relatives.[37]

Considering each of these factors in turn, Stanley J first noted that it was unlikely any application for letters of administration would be made in this case.[38] His Honour then considered the evidence of cultural practice and custom presented by the parties. His Honour noted the deceased's status as a wati, that Pukatja was his Country, and the significant amount of time he had spent there throughout his life.[39] Further, his Honour observed how the division of views concerning the deceased's place of burial was loosely between the paternal and maternal branches of the deceased's family, noting the paternal family's assertion of 'cultural authority' to decide where the deceased was to be buried.[40]

Addressing whether the deceased had expressed any wishes as to his burial place, Stanley J held that the fact the deceased had expressed a desire to return to his mother's home to be cared for was not equivalent to the deceased expressing a wish to be buried in Port Augusta.[41]

Justice Stanley gave considerable weight to the deep spiritual connection Aboriginal Australians have with Country by reference to the landmark decision of the High Court of Australia in *Love v Commonwealth*,[42] in which this connection was

36 (2014) 119 SASR 247 ('*Smith*').

37 *Ken* (n 3) [10]–[11], citing *Smith* (n 34) 260 [47], 261 [55], 262–3 [61], 263 [65] (Nicholson J).

38 *Ken* (n 3) [24].

39 Ibid [26].

40 Ibid.

41 Ibid.

42 (2020) 375 ALR 597 ('*Love*'), discussed in ibid [27].

explicitly observed and described by the Court.[43] Justice Stanley also considered the wishes of the deceased's paternal family members in this context.[44] In addition to affidavit evidence, his Honour received evidence of academic research regarding the customs and beliefs of the Pitjantjatjara people in respect of burial practices.[45] Justice Stanley's consideration of this material was novel in the sense that few courts deciding similar cases in the past have considered such evidence.[46] The academic research provided a useful aid for his Honour to better understand the connection between Anangu creation mythology and burial customs, in particular:

> [T]hat for Anangu men the primary Tjurkurpa connection is the relationship to their father's and grandfathers' country confirmed through initiation ceremonies into manhood. On death their spirit returns to the country of their Tjurkurpa totemic ancestor of their spirit. In this case, that is Pukatja.[47]

Thus, the common law position as adopted by Stanley J, in the absence of a grant for letters of administration, involves a 'balancing of common law principles and practical considerations, as well as attention to cultural, spiritual and religious factors'.[48] Taking this approach, his Honour decided that Pukatja had the stronger claim as the appropriate place of burial of the deceased.[49]

Importantly, in reaching this decision, Stanley J noted the impossibility of finding that greater weight should be given to the wishes and sensitivities of one side of the deceased's family over another.[50] His Honour ultimately reached this decision by weighing the Aboriginal cultural matters and concerns against the other considerations formulated in *Smith*.[51] Justice Stanley consequently acknowledged the pain of the losing parties, quoting Doyle CJ in *Dodd v Jones*:

> [T]he problem before me is really insoluble … It is impossible … to weigh the competing claims and arrive at what one would truly call a legal judgment. I understand and respect the wishes and beliefs of [the parties]. There is no solution … that will satisfy each side. I can only make a decision and indicate my regret that it will cause pain to the unsuccessful party.[52]

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43 *Ken* (n 3) [27], citing *Love* (n 42) 613–14 [70] (Bell J).

44 Ibid [28]–[30].

45 Ibid [28].

46 See, eg: *Johnson v George* [2018] QSC 140; *Darcy v Duckett* [2016] NSWSC 1756.

47 *Ken* (n 3) [28].

48 Ibid [29].

49 Ibid.

50 Ibid [30].

51 Ibid [10], [30].

52 *Dodd v Jones* [1999] SASC 458 [36] ('*Dodd*'), quoted in ibid [31].

IV The Law of Burial Disputes and Implications for Law Reform

The challenges faced by the law in resolving burial disputes, particularly those involving an Aboriginal deceased, have been addressed by a number of law reform bodies in other jurisdictions.[53] Despite this, at the time of writing, the authors are not aware of any recommendations from these reports that have been implemented. This Part discusses the key issues of the 'no property' rule, the inherent jurisdiction of the Supreme Court to hear burial disputes in South Australia, and the lack of recognition of non-traditional notions of kinship in probate legislation.

A *The 'No Property' Rule*

The law of burial disputes is complicated by the 'no property' rule, which prohibits individuals from leaving binding burial instructions.[54] The 'no property' rule evolved in an era where it was presumed that everyone desired a Christian burial.[55] In a society with high levels of religious and cultural diversity such as modern Australia, the rule appears increasingly inappropriate. Although the 'no property' rule did not complicate matters in *Ken* as the deceased left no will, under different circumstances the 'no property' rule may have impeded the effective resolution of the dispute. The rule denies the fundamental premise of testamentary freedom and is difficult to justify under the 'modern autonomy trajectory',[56] which describes the increasing value placed by society on self-autonomy.[57]

The Victorian Law Reform Commission ('VLRC') have recommended introducing legislation to overturn the common law position and allow people to leave binding funeral instructions.[58] However, the Queensland Law Reform Commission ('QLRC') has recognised that upholding directions left by a deceased may have its own difficulties. For example, individual autonomy may need to be restricted in the public interest where the costs of compliance with burial instructions would be unreasonable.[59] The desire to secure individual autonomy and legal certainty is also challengeable by the competing proposition that funeral and burial is principally for

53 See, eg: Victorian Law Reform Commission (n 7); Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body* (Report No 69, December 2011); Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report, September 2006); New Zealand Law Commission, *Death, Burial and Cremation: A New Law for Contemporary New Zealand* (Report No 134, October 2015).

54 See above nn 22–4 and accompanying text.

55 *R v Price* (1884) 12 QBD 247, 250 (Stephen J).

56 Tanya K Hernández, 'The Property of Death' (1999) 60(4) *University of Pittsburgh Law Review* 971, 1022.

57 New Zealand Law Commission (n 52) 194–5.

58 Victorian Law Reform Commission (n 7) 48.

59 Queensland Law Reform Commission (n 52) 115 [5.89].

the bereaved.[60] This was pertinent in *Ken*, where the parties held strong cultural beliefs. In this context, the competing policy desires of effecting greater legal certainty and maintaining the rights of the bereaved would need to be carefully weighed in law reform efforts.

B *Jurisdiction*

In South Australia, burial dispute hearings currently fall under the inherent jurisdiction of the Supreme Court.[61] Concern as to the appropriateness of this jurisdiction was expressed by the Law Reform Commission of Western Australia ('LRCWA'), which emphasised the need for a cost-effective and accessible dispute resolution process.[62] The importance of timely resolution of disputes was also raised by the VLRC, which noted the practical implications of storing human remains in the event of delay or where parties do not have the financial means to access the courts.[63] This was a live issue in *Ken*, where the deceased's body was stored for two years before an application was filed by the State to bring an end to the dispute.

There are apparent benefits of hearing burial disputes in the Supreme Court which cannot be ignored. The domain of the Supreme Court has the benefit of judicial officers experienced in hearing probate matters,[64] and ensures that a losing party feels they have been properly heard and given a fair trial by an impartial and authoritative decision maker. In this sense, it would appear that the Supreme Court is an appropriate domain for the resolution of burial disputes involving Aboriginal persons. However, burial disputes do not necessarily involve the same level of complexity and consequences as probate and estate administration matters, and thus the Supreme Court's expertise may not always be required.[65] A lower court or body may in some cases be adequate, as well as more accessible to the bereaved. Alternative formal bodies that could be tasked with making the final decision in South Australian burial disputes include the Magistrates Court of South Australia, the South Australian Civil and Administrative Tribunal,[66] or a public official such as the Coroner[67] or Public Trustee. Noting that family matters are at the heart of most burial disputes, the Federal Circuit and Family Court of Australia could also be a viable forum.[68] The advantages

60 Heather Conway and John Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34(3) *University of New South Wales Law Journal* 860, 873.

61 *Smith* (n 36) 249 [5] (Nicholson J).

62 Law Reform Commission of Western Australia (n 53) 263.

63 Victorian Law Reform Commission (n 7) 30 [4.17]–[4.20].

64 See *Supreme Court Act 1935* (SA) ss 8, 18.

65 Victorian Law Reform Commission (n 7) 107 [8.76].

66 Ibid.

67 That the Coroner have regard to the cultural sensitivities of families in deciding whether or not to order a post-mortem examination of an Aboriginal deceased was contemplated by the Law Reform Commission of Western Australia (n 53) 253–5.

68 See New Zealand Law Reform Commission (n 52) 18 [76]–[77].

of expanding jurisdiction to lower courts to hear burial matters, however, should be measured against the prospect for appeal to the Supreme Court. In this respect, extending jurisdiction may instead create further delay.

Devising an alternative to the Supreme Court's jurisdiction in such matters therefore entails some practical obstacles, but that should not preclude alternatives and potential solutions from being explored. There will always be cases such as *Ken* where the dispute has reached a deadlock such that it cannot be resolved through mediation. In such cases, the dispute will ultimately fall to the Supreme Court to decide. Accordingly, increasing the accessibility of the Supreme Court may be another worthwhile reform aimed at improving the process of burial dispute resolution. Notwithstanding the recommendations of a number of law reform bodies, no other Australian jurisdiction has tasked a lower court or tribunal with the jurisdiction to hear burial disputes. Reform in the South Australian context would therefore require extensive consultation. Perhaps an intermediate approach, which would introduce legislation requiring parties to engage in mediation with specialised mediators prior to invoking the Supreme Court's inherent jurisdiction would offer a partial solution.

C *Kinship Obligations*

The next of kin hierarchy established by r 34 of the *Probate Rules* is based firmly on a Western idea of kinship that favours lineage founded in blood relations. This conception of kinship is inappropriate for communities that do not necessarily share a Western definition of family.[69] In particular, r 34 does not adequately provide for the extended kin relationships present in Aboriginal society. While not all Aboriginal kinship patterns are the same, they tend to share common emphases.[70] As Prue Vines explains:

> [T]o give a simplified example, the persons to whom I refer as my 'aunts' would be regarded as my 'mothers' and would behave accordingly towards me. My cousins born of my parents' siblings of the same sex would be my 'siblings' — 'sisters' in my case, while those born of siblings of the opposite sex would be 'cousins'.[71]

The *Probate Rules* fail to recognise social relationships that are not defined solely by reference to biological status and genetic proximity. Existing law reform suggestions to tackle this issue have already been made by SALRI and include extending the classes of people who may make an application to administer an estate to people to whom the intestate owed kinship obligations.[72] Those consulted by SALRI reached consensus in support of this suggestion.[73] The QLRC has reported that recognition of kinship within a statutory hierarchy of persons holding the right to burial was

69 Vines, 'Consequences of Intestacy' (n 6) 2.

70 Ibid 1.

71 Ibid 2.

72 Gray (n 10) 56 [7.6.5].

73 Ibid 4 [1.3.5].

supported by the Queensland Aboriginal and Torres Strait Islander Legal Service.[74] The QLRC recommended such a hierarchy be implemented,[75] however, again, this recommendation has not been actioned. The closest attempt was the Burial and Cremation Bill 2019 (NT), which included a definition of 'senior next of kin'. For an Aboriginal deceased with strong cultural ties, this meant a person who, according to the custom of the relevant Aboriginal community, is appropriate to perform that role.[76] Under the Bill, the 'senior next of kin' would have been given decision-making power regarding the deceased's remains.[77] This particular clause did not face express criticism,[78] however, the Bill was controversial due to its regulation of Aboriginal burial practices[79] and was consequently withdrawn.[80] Beyond the Burial and Cremation Bill 2019 (NT), it does not appear that the QLRC's recommendation has otherwise been publicly considered.

In the context of *Ken,* it is unclear whether such reform would have assisted Stanley J in reaching a decision. While the deceased's paternal grandmother emphasised the importance of her cultural duty to oversee the deceased's burial,[81] his Honour's reluctance to apply the common law 'likely administrator' rule in the absence of an estate suggests that such reform would not have affected the exercise of his Honour's discretion. In circumstances where the deceased leaves an estate however, such reform may assist the court in reaching a culturally appropriate decision.

V Observations from Other Jurisdictions

A *New South Wales and the Succession Act 2006 (NSW)*

Legislation requiring the court to take into account Aboriginal customary law, such as SALRI's proposed reforms to the kinship provisions,[82] is not a novel suggestion. New South Wales ('NSW') and Tasmania are two notable examples of Australian states which have implemented legislation that attempts to recognise customary law

74 Queensland Law Reform Commission (n 52) 156 [6.70]–[6.72].

75 Ibid 163 [6.102].

76 Burial and Cremation Bill 2019 (NT) cl 8(1)(a).

77 Explanatory Statement, Burial and Cremation Bill 2019 (NT) 3.

78 See, eg, Social Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, *Inquiry into the Burial and Cremation Bill 2019* (Report, October 2019).

79 Ibid 26 [3.52], 31 [3.68]–[3.71]; Chelsea Heaney, 'Burial Bill "the Worst Form of Disrespect in the World" for Aboriginal Communities', *ABC News* (online, 16 October 2019) <https://www.abc.net.au/news/2019-10-16/burial-bill-criminalises-aboriginal-traditional-ceremonies-nt/11604590>.

80 'Burial and Cremation Bill 2019', *Northern Territory Government: Northern Territory Legislation* (Web Page) <https://legislation.nt.gov.au/en/LegislationPortal/Bills/~/link.aspx?_id=417E14BAF8CF4099B855F3CBFBA51DB1&_z=z>.

81 *Ken* (n 3) [17].

82 Gray (n 10) 56.

in the context of Aboriginal persons' estates.[83] Part 4.4 of the *Succession Act 2006* (NSW) provides that a person with a customary law claim may apply for an order for distribution of an Aboriginal person's intestate estate in accordance with a plan of traditional distribution, that is, 'a scheme for distribution … in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged'.[84] Under the Act, the court has discretion but must consider the plan and traditions of the group.[85] Though the legislation does not make provision for the right to bury the deceased, its application to date demonstrates that any provision obliging the court to consider Aboriginal customary law must be research-based and carefully drafted, with guidance and leadership from Aboriginal parties.

The NSW provision has been most notably criticised in *Re Wilson*.[86] In that case, Lindsay J observed that '[t]he expression "laws, customs, traditions and practices" … invites uncertainty mired in obscure formality'.[87] Most relevantly, his Honour suggested that one of the perceptions from which the provision originated, namely that there is a 'difference between the general law governing intestacies in Australia and how Indigenous communities operate', is flawed.[88] In Lindsay J's view, the very case before his Honour challenged the universality of that perception, as in *Re Wilson*, the deceased's Aboriginal family sought to emphasise their 'blood relation' with the deceased in order to claim priority over the 'collateral relationship' enjoyed by the deceased's adoptive family.[89]

Re Wilson therefore demonstrates the challenges in drafting and implementing culturally appropriate legislation which equally acknowledges the diversity of the Aboriginal community with respect to the level of adherence to traditional lifestyle.

B *New Zealand and Takamore v Clarke*

New Zealand, as a common law jurisdiction and with a comparable colonial history, also offers lessons for South Australia. Burial disputes were examined at length in the case of *Takamore v Clarke* ('*Takamore*'),[90] which led to an extension of the common law position in New Zealand.

83 See *Succession Act 2006* (NSW) pt 4.4; *Intestacy Act 2010* (Tas) pt 4.

84 *Succession Act 2006* (NSW) s 133(2).

85 Prue Vines, 'Testamentary Freedom and Customary Law: The Impact of Succession Law on the Inheritance Needs of Aboriginal and Torres Strait Islanders in Australia' (2017) 91(5) *Australian Law Journal* 360, 362.

86 (2017) 93 NSWLR 119.

87 Ibid 123–4 [15].

88 Ibid 138 [109].

89 Ibid [110].

90 [2012] 1 NZLR 573.

At issue in *Takamore* was whether traditional Tūhoe burial custom had any effect on the common law duties of an executor.[91] The Supreme Court of New Zealand ('NZ Supreme Court') found that Tūhoe burial custom could not be recognised at common law, but instead opted for a 'more modern' approach to integration.[92] This 'workable compromise' between customary law and the common law involved creating a common law obligation on executors to consider burial custom in determining the method and place of burial.[93] The obligation additionally requires an executor to facilitate culturally appropriate discussion and negotiation as to the place of burial among family members in an attempt to reach consensus.[94] Where consensus is reached it would be unreasonable for the executor to refuse to bury the deceased in accordance with that consensus unless the deceased has expressed wishes to the contrary.[95]

The first limitation of the New Zealand approach can be seen when a consensus cannot be reached. The NZ Supreme Court found that in such circumstances the common law position would prevail, and ultimate discretion over burial would continue to vest in the executor.[96]

Further, the New Zealand approach does not elucidate how the court should address the question of burial where no executor has been left. Thus, this approach would not have assisted Stanley J in *Ken*, where the deceased died intestate. The evolution of the common law in New Zealand therefore provides limited guidance for Australian courts in dealing with the type of burial dispute raised in *Ken*. At best, adopting New Zealand's approach might limit the number of cases that reach the Supreme Court through mandated mediation. Where the dispute is intractable as in *Ken*, the New Zealand approach may simply delay the inevitable intervention of the courts. Nevertheless, the approach should not be entirely discounted. The New Zealand approach, by providing a forum for the bereaved to be heard, may bring additional closure to the grieving parties and would further encourage out of court resolution.

VI Conclusion

Justice Stanley echoed the lament of Doyle CJ in describing the dispute in *Ken* as an 'insoluble' one.[97] His Honour confirmed that the appropriate approach to dealing with burial disputes of the kind raised in *Ken* is to undertake 'a balancing of common law principles and practical considerations, as well as attention to

91 Ibid 593 [105] (Glazebrook and Wild JJ).

92 Ibid 625–6 [254] (Chambers J).

93 Ibid 626 [255].

94 Ibid.

95 Ibid 626 [256].

96 Ibid 626–7 [258].

97 *Ken* (n 3) [31], quoting *Dodd* (n 51) 458 [36].

cultural, spiritual and religious factors'.[98] However, at the heart of this exercise is the requirement to make a difficult value judgement, and as Rothman J declared in *Abraham*, '[t]he Court is not King Solomon'.[99] While Stanley J's judgment in *Ken* demonstrates a greater willingness to adopt a pragmatic approach to matters of this kind, addressing issues such as the 'no property' rule, the inherent jurisdiction of the Supreme Court, and Aboriginal kinship obligations in succession legislation through law reform may go some way towards easing the discretionary burden on the courts. The suggestions for reform outlined in this case note are far from exhaustive, and further consultation is necessary to secure greater legal certainty and culturally appropriate reform in South Australia. Reform initiatives which have been implemented in NSW and New Zealand offer some guidance on how both the legislature and the courts could approach this problem. However, in both instances they appear to leave important questions open. The issue therefore presents an opportunity for South Australia to partially dissolve this seemingly 'insoluble' issue through measured and well-researched law reform. The goal of law reform in this context is not to find a hard and fast solution to resolving all disputes of this kind, but rather to elucidate better legal processes to ensure the satisfactory resolution of burial disputes. The importance of doing so for Aboriginal communities was echoed by Stanley J in *Ken*:

> [C]entral to the traditional laws and customs of Aboriginal communities was, and is, an essentially spiritual connection with 'country', including a responsibility to live in the tracks of ancestral spirits and to care for land and waters to be handed on to future generations.[100]

Burial and funeral forms an important part of this connection that the law is yet to fully embrace.

98 *Ken* (n 3) [9], [29], quoting *Smith* (n 36) 255 [34] (Nicholson J).

99 *Abraham* (n 1) [45].

100 *Ken* (n 3) [27], quoting *Love* (n 42) 666 [276] (Nettle J).