

## THE HONOURS OF HADES: DEATH, EMOTION AND THE LAW OF BURIAL DISPUTES

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The calm serenity that surely accompanies the eternal sleep of death deposits in its earthly wake the potential for a calamitous dispute between those left behind: what to do with the deceased's body?<sup>1</sup>

### I INTRODUCTION

Legal philosophers have long been fascinated by Sophocles' *The Antigone* and its central theme of the conflict between human and divine law, or, as some would frame it, between the laws of the state and private conscience.<sup>2</sup> The plot is a simple one. Polyneices, the brother of Antigone, has been killed in the course of a treacherous attack on the city of Thebes; Creon, the King of Thebes, has issued an order forbidding, on pain of death, the burial of Polyneices. Antigone, however, defies the order, on the ground that as next of kin it is her solemn duty to carry out the burial rite. As she declares to her sister Ismene at another point of the play, we have only a little time to please the living, but all eternity to love the dead.<sup>3</sup> In an angry confrontation with Creon, Antigone admits that she has broken the law, but claims that no mortal decree can override the unwritten and unailing statutes of heaven.<sup>4</sup> When challenged as to whether it is proper to give equal honour to traitor and to patriot, Antigone replies that Hades, ruler of the country of the dead, demands these rites.<sup>5</sup>

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1 Brian L Josias, 'Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies' (2003–4) 79 *Notre Dame Law Review* 1141, 1141.

2 Sir Richard Jebb (ed), *Sophocles: The Plays and Fragments – Part III: The Antigone* (Cambridge University Press, 1928) xvii, xx.

3 Sophocles, *Antigone, The Theban Plays* (E F Watling trans, Penguin Classics, 1947) 128 (lines 74–5) [trans of: *Antigone*].

4 *Ibid* 138 (lines 453–5).

5 *Ibid* 140 (line 519).

The determination of the heroine in *Antigone* to do the right thing by her brother's body, even at the cost of her own life, is perhaps difficult to understand. Yet the honours of Hades continue to cause conflict and division even in the 21<sup>st</sup> century. In November 2007, seven members of the same family were killed when a fire was started deliberately at their home in the town of Omagh in Northern Ireland.<sup>6</sup> The finger of suspicion quickly began to point at the father of the family, Arthur McElhill, a registered sex offender with a dubious past; indications were that he had decided to commit suicide and to take his partner Lorraine McGovern and their five children with him.<sup>7</sup> The custom throughout Ireland is for the funeral to take place within a short time of death, and in the normal course of events the whole family would have been buried together. However, once it emerged that McElhill may have been responsible for the deaths of his family, Lorraine McGovern's parents refused to allow their daughter and grandchildren to be buried in the same grave as their suspected murderer.<sup>8</sup> Nearly three weeks after the tragedy, Arthur McElhill was laid to rest in County Fermanagh; his partner and children were buried on the same day in neighbouring County Cavan.<sup>9</sup>

The tragic circumstances surrounding this case are an extreme example of the type of conflict which can emerge within families following the death of a loved one. Yet, insisting that the body is disposed of in a certain place or manner, or on conducting a particular type of funeral, has been a central theme of numerous legal contests throughout the common law world.<sup>10</sup> Most of us probably assume that when we die the necessary funeral arrangements will be made by our closest family members who, united by a combination of grief and ties of affection to the dead, will ensure that burial takes place in a dignified and appropriate manner. However, consensus is not always possible as different individuals fight for custody of the deceased's body. For example, siblings may clash over the fate of a parent's remains; separated parents may have different views on where a dead child should be buried; an estranged spouse and a new partner may quarrel over the deceased's final resting place, as may the deceased's parents and his or her spouse or partner. Meanwhile, recent high profile contests involving dead celebrities have also raised public awareness of death's divisive and destructive powers within families. For example, in February 2007 the former Playboy model Anna Nicole Smith lay decaying in her coffin while a protracted legal

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6 Clare Weir, 'Ulster Mourns as Seven Perish in Blaze Tragedy', *Belfast Telegraph* (online), 14 November 2007 <<http://www.belfasttelegraph.co.uk/news/local-national/ulster-mourns-as-seven-perish-in-blaze-tragedy-13493787.html>>.

7 Lesley-Anne Henry, 'Omagh: Dad Is Prime Suspect', *Belfast Telegraph* (online), 15 November 2007 <<http://www.belfasttelegraph.co.uk/news/local-national/omagh-dad-is-prime-suspect-13494217.html>>.

8 Clare Weir, 'McElhill Won't be Buried with Tragic Family', *Belfast Telegraph* (online), 30 November 2007 <<http://www.belfasttelegraph.co.uk/news/local-national/mcelhill-wont-be-buried-with--tragic-family-13498435.html>>.

9 'Fire Death Family to Be Buried Separately', *Belfast Telegraph* (online), 1 December 2007 <<http://www.belfasttelegraph.co.uk/news/local-national/fire-death-family-to-be-buried-separately-13498745.html>>.

10 See the various cases noted throughout this article, and in particular Part III below.

battle was pursued in the Florida courts between her relatives as to where Anna Nicole should be buried.<sup>11</sup> Around the same time, a similar fate befell James Brown, the self-styled ‘Godfather of Soul’, whose body was refrigerated at an undisclosed location for almost three months as his family fought over his final resting place.<sup>12</sup>

Burial disputes are a classic example of death fracturing family bonds or, more often, acting as a catalyst for the implosion of relationships which were already strained.<sup>13</sup> Such conflicts are becoming more frequent as the decline of the baby boom generation coincides with the movement away from the traditional nuclear family model, while increasingly pluralist and secular Western societies ensure that competing religious and cultural sentiments form another focal point for contests over the fate of the dead. Where the key protagonists fail to reach a compromise, the court must intervene to resolve the issue. The purpose of this article is to analyse burial disputes from a law and emotions perspective, looking at the emotional factors which drive the deceased’s relatives to litigation and the way in which judges respond and react to these in the legal resolution of family conflicts.<sup>14</sup> Despite the considerable body of literature on the emotions of death<sup>15</sup> and a distinct body of scholarship on the legal issues surrounding family burial disputes,<sup>16</sup> the intersection of these two themes has been overlooked until now.

The article begins by examining the psychology of bereavement and associated significance of the funeral, as well as the internal and external impacts of death on families. It then goes on to consider how these and other factors come to the fore in burial disputes by identifying the situations in which such intra-familial conflicts typically occur and the complex motives behind them. In doing so, the article draws heavily on English and Australian case law, as well as

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11 *Arthur v Milstein*, 949 So 2d 1163 (Fla, 2007).

12 Frances H Foster, ‘Individualized Justice in Disputes over Dead Bodies’ (2008) 61 *Vanderbilt Law Review* 1351, 1352. See also the synopsis at 1352–4.

13 For convenience, the term ‘burial dispute’ as used throughout this article denotes some form of disagreement over the fate of human remains, whether confined to the type of funeral ceremony or the more difficult question of whether the deceased should be interred or cremated (including disputes over the place of interment of the body and the committal of the ashes where the parties have initially agreed on the specific manner of disposal). There are other legally permissible methods of dealing with a dead body: see Queensland Law Reform Commission, ‘A Review of the Law in Relation to the Final Disposal of a Dead Body’ (Information Paper WP No 58, June 2004) ch 2. However, the focus throughout this article is on interment and cremation as the most common methods of disposing of a corpse, and featuring in the majority of family burial conflicts.

14 Law and emotions is a relatively new interdisciplinary area which examines the relevance of human emotion to legal analysis. For a flavour of the scholarship see Susan A Bandes, *The Passions of Law* (New York University Press, 1999); Terry A Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 30 *Law and Human Behavior* 119; Kathryn Abrams and Hila Keren ‘Who’s Afraid of Law and the Emotions?’ (2010) 94 *Minnesota Law Review* 1997.

15 See below Part II.

16 See, eg, Heather Conway, ‘Dead, but Not Buried: Bodies, Burial and Family Conflict’ (2003) 23 *Legal Studies* 423; Rosalind F Croucher, ‘Disposing of the Dead: Objectivity, Subjectivity and Identity’ in Ian Freckelton and Kerry Petersen (eds), *Disputes and Dilemmas in Health Law* (Federation Press, 2006) ch 16. See also Foster, above n 12; Josias, above n 1.

decisions from Canada and the United States. Despite their unique histories, these jurisdictions are linked by a similar legal framework for resolving burial disputes (not surprising, given their shared common law heritage), and display similar socio-cultural attitudes towards issues surrounding death and burial.<sup>17</sup> After reviewing the legal framework for resolving family burial disputes and suggesting that this facilitates an emotionally detached stance, the article goes on to identify the judicial emotions which are nevertheless displayed when courts are deciding who is legally entitled to custody of the deceased's remains. It suggests that predominantly negative sentiments reflect a sense of personal and societal distaste for the family's actions, and that, as a result, judges have failed to appreciate properly the complex psychological and emotional dynamics of family burial disputes. The article concludes by questioning whether a more sensitive and informed approach would produce better outcomes when dealing with such an emotive and divisive issue. It argues that judges should pay attention to the underlying emotional dynamics of such disputes so as to facilitate an expression of empathy, but that judges should refrain from allowing their own emotions to take the form of sharp criticism of the parties, because such critical expressions will worsen the underlying emotional dynamics within feuding families.

## II THE EMOTIONS OF BEREAVEMENT

Behind all grief lie experiences shared with the one who is now dead.<sup>18</sup>

The loss of a loved one is a tragedy unequalled by any other,<sup>19</sup> and is an experience that occurs at some time in nearly everyone's life.<sup>20</sup> Despite this, it is only in relatively recent years that the subject of death and bereavement has been extensively analysed by academics and practitioners from a social, psychological and cultural perspective.<sup>21</sup> In 1969, Elisabeth Kübler-Ross published her seminal work *On Death and Dying*<sup>22</sup> in the United States, to be followed three years later by Colin Murray Parkes in England with his pioneering study *Bereavement*.<sup>23</sup> Since then a plethora of books and articles has appeared.<sup>24</sup> Although debates

17 A small number of New Zealand cases are also cited for similar reasons.

18 Douglas J Davies, *Death, Ritual and Belief* (Continuum, 2<sup>nd</sup> ed, 2002) 45.

19 Margaret S Stroebe, Wolfgang Stroebe and Robert O Hansson (eds), *Handbook of Bereavement: Theory, Research and Intervention* (Cambridge University Press, 1993) 3.

20 Ibid.

21 See, eg, W Sydney Callaghan, *Good Grief* (Harper Collins, 1990); Davies, above n 18, 59.

22 Elisabeth Kübler-Ross, *On Death and Dying* (Macmillan, 1969).

23 Colin Murray Parkes, *Bereavement: Studies of Grief in Adult Life* (Tavistock Publications, 1972).

24 See, eg, Kathy Charmaz, *The Social Reality of Death: Death in Contemporary America* (Addison-Wesley, 1980); John S Stephenson, *Death, Grief and Mourning: Individuals and Social Realities* (Free Press, 1985); Froma Walsh and Monica McGoldrick (eds), *Living Beyond Loss: Death in the Family* (W W Norton, 1991); John Archer, *The Nature of Grief: The Evolution and Psychology of Reactions to Loss* (Routledge, 1999); Alexander Levy, *The Orphaned Adult* (Perseus Books, 1999); Dewi Rees, *Death and Bereavement: The Psychological, Religious and Cultural Interfaces* (Whurr, 2001); Glennys Howarth, *Death and Dying: A Sociological Introduction* (Polity Press, 2007).

within 'death scholarship' are as fractious as elsewhere, the general consensus amongst scholars is that death produces a range of emotions which manifest themselves through the grieving process.<sup>25</sup> The relevant literature highlights a number of different psychological and emotional factors which are often apparent in family burial disputes.

### A Anger and the Grieving Process

The expression of anger as an aspect of grief has often featured in literature,<sup>26</sup> but has in recent years also been studied from a psychological perspective. Eric Lindemann famously identified grief as a syndrome comprising five elements: somatic disturbance, preoccupation with the image of the deceased, guilt, hostility and disorganised behaviour.<sup>27</sup> In similar vein, John Bowlby and others have analysed the grieving process as involving numbness and disbelief, anxiety and anger, depression and despair, and finally acceptance.<sup>28</sup> While some psychologists disagree on the manner in which the grieving process proceeds,<sup>29</sup> all concede that anger and hostility are common features.

The expression of anger can be a functional response to separation, in that it can serve to achieve reunion and prevent a repetition of the occurrence.<sup>30</sup> However, in the case of grief this is no longer possible, and here the resentment felt by the bereaved must find another outlet. Driven by an 'irrational yet understandable ... urge to strike out, to do something in response to the loss felt',<sup>31</sup> such anger can be expressed in numerous ways: as a protest against the unfairness of life, resistance to the suggestions of others, an endeavour to blame others for the death, or as a general mood of bitterness and irritability.<sup>32</sup> It might be directed towards those judged responsible for the death, the dead person, against God or certain friends and relatives.<sup>33</sup> The inevitable and inescapable sense of change for those who are left behind results in postmortem stress, a sense of 'sheer pressure [which] bereavement places upon the body and mind as

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25 Erich Lindemann, 'Symptomatology and Management of Acute Grief' (1944) 101 *American Journal of Psychiatry* 141; John Bowlby, 'The Process of Mourning' (1961) 42 *International Journal of Psychoanalysis* 317; John Bowlby and Colin Murray Parkes, 'Separation and Loss within the Family' in E James Anthony and Cyrille Koupernik (eds), *The Child in His Family* (Wiley, 1970) 197–216.

26 Archer cites the example of Achilles, in Book XXII of the *Iliad*, who cuts the throats of 12 Trojan youths in response to the death of Patroclus: Archer, above n 24, 69.

27 Lindemann, above n 25, 142.

28 Bowlby and Parkes, above n 25, 197–216; Archer, above n 24, 24–6; Levy, above n 24, 23.

29 Namely, the uniformity of grief emotions and whether they are experienced in any linear fashion: see, eg, John Bowlby, *Attachment and Loss* (Hogarth, 1981) vol 3 85.

30 Ibid 13.

31 John S Stephenson, 'Grief and Mourning' in Robert Fulton and Robert Bendiksen (eds), *Death and Identity* (Charles Press, 3<sup>rd</sup> ed, 1994) 136, 147. The same author also notes a certain loss of control as individuals are overcome by 'monstrous waves of emotion' and 'the familiar and secure landmarks of life are no longer in their usual places': at 136.

32 Parkes, above n 23, 80–8.

33 Stephenson, above n 24, 133–5.

an integrated whole'.<sup>34</sup> This, in turn, provides a ready breeding ground for the sort of tensions and conflicts with which this paper is concerned.

### **B Funerals and the Disposal of the Dead**

It has been said that the physical, spiritual and intellectual experiences of grief and bereavement cannot be understood in isolation, but only in the context of social norms, personal styles and cultural prescriptions.<sup>35</sup> Nowhere is this more marked than in relation to customs surrounding funerals and the disposal of the dead. As Therese Rando points out, virtually all societies and cultures have been found to have some form of funeral rites,<sup>36</sup> and while these differ significantly throughout the world, there is enough similarity to suggest such rituals meet critical universal needs which exist at the time of the death.<sup>37</sup>

The key function of a funeral, according to Stephenson, is 'to restate the image of death held by the society's members' and 'to define death in such a way as to comfort the living'.<sup>38</sup> It carries out this function in different ways for the deceased, the mourners and the community at large.<sup>39</sup> For the deceased, the funeral is not just a matter of disposing of the body (though that is important), but also a significant rite of passage.<sup>40</sup> Thus the funeral serves to mark the death of the deceased in a social sense,<sup>41</sup> and where it takes place in a specific religious or cultural context it may also symbolise the safe transmission of the soul to some kind of afterlife.<sup>42</sup> For the mourners, the funeral provides a sense of structure to the difficult days immediately following death and helps to foster community support.<sup>43</sup> It also facilitates the grieving process by providing an outlet for feelings (allowing the bereaved to move towards accepting death's reality), and provides a focus for family solidarity and healing.<sup>44</sup> Of course, such therapeutic benefits will be lost in burial disputes with all their potential for intra-familial

34 Davies, above n 18, 59.

35 Allan Kellehear, 'Grief and Loss: Past, Present and Future' (2002) 177 *Medical Journal of Australia* 177, cited in Howarth, above n 24, 203.

36 Therese Rando, *Grief, Dying and Death: Clinical Interventions for Caregivers* (Research Press, 1984) 173.

37 Ibid 174. See also Vanderlyn R Pine, 'Comparative Funeral Practices' (1969) 16 *Practical Anthropology* 49.

38 Stephenson, above n 24, 199.

39 This three-fold function has been noted elsewhere: see, eg, Peter C Jupp, 'Religious Perspectives on the Afterlife' in Belinda Brooks-Gordon et al (eds), *Death Rites and Rights* (Hart Publishing, 2007) 95.

40 Stephenson, above n 24, 199–201; Robert Hertz, *Death and the Right Hand* (Rodney Needham and Claudia Needham trans, Free Press, 1960) [trans of: *La représentation collective de la mort* and *La prééminence de la main droite* (first published 1907)] 81–2; Arnold van Gennep, *The Rites of Passage* (Monika B Vizedom and Gabrielle L Caffé trans, University of Chicago Press, 1960) [trans of: *Rites de passage* (first published 1909)].

41 Parkes, above n 23, 156–7.

42 Jupp, above n 39, 111. See also Bronna D Romanoff and Marion Terenzio, 'Rituals and the Grieving Process' (1998) 22 *Death Studies* 697.

43 Funerary rituals provide 'structure and comfort at ... [a time] of chaos and disorder': Romanoff and Terenzio, above n 42, 698.

44 See Stephenson, above n 24, 201–2; Alicia Skinner Cook and Kevin Ann Oltjenbruns, *Dying and Grieving: Lifespan and Family Perspectives* (Holt, Rinehart and Winston, 1989) 112.

bitterness and rancour. From a community perspective, the funeral gives an opportunity for its members to give support which may some day be reciprocated, to restate the society's collective image of death, and to emphasise group solidarity in other ways.<sup>45</sup> In this way, in the words of Stephenson, 'an equilibrium is achieved in the group which has been assaulted by death. The larger social group reorientates itself to life as it bears witness to the existence of death'.<sup>46</sup>

### C Bereavement and Families

While much has been written about the effect of bereavement on individuals, there is a comparative dearth of comment about its effect on families as a whole. Most models of bereavement (and much of the associated literature) fail to take the individual's immediate social context – the family – into account.<sup>47</sup> However, in recent times efforts have been made to study the family as a dynamic institution in its own right, as 'a living *system* which is distinct from, yet connected to, the life of its individual members'.<sup>48</sup> One writer who has studied the effects of bereavement from a family systems perspective is Murray Bowen, who argues that the emotional equilibrium of a family can be upset both by the loss of existing members and the addition of new ones.<sup>49</sup>

Death irrevocably alters intimate bonds and relationships, its tectonic shifts threatening any sense of stability and security which previously existed as the family struggles to adapt to the loss of a key figure and to reconstruct itself accordingly.<sup>50</sup> Relationships which anchored 'normal' family life are destroyed, established patterns are disrupted and familiar routines disappear. Charmaz has observed that 'the death of an intimate shakes the foundations on which the self is constructed and known'.<sup>51</sup> However, the family unit itself goes through a similar process as natural realignments and adjustments occur,<sup>52</sup> thus adding to the sense of posthumous disarray. Meanwhile, the dead body itself is a powerful representation of the person who has died and their social being;<sup>53</sup> the deceased

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45 Stephenson, above n 24, 203.

46 Ibid.

47 Sheila Payne, Sandra Horn and Marilyn Relf, *Loss and Bereavement* (Open University Press, 1999) 40–1.

48 Ibid 45, quoting Sarah Robinson, 'The Family with Cancer' (1992) 1(2) *European Journal of Cancer Care* 29, 30 (emphasis in original).

49 Bowen has observed that such events can cause an 'emotional shock wave', the effects of which can be felt over months or even years: Murray Bowen, 'Family Reaction to Death' in Froma Walsh and Monica McGoldrick (eds), *Living Beyond Loss: Death in the Family* (W W Norton, 1991) 78, 82. See also Colleen I Murray, Katalin Toth and Samantha S Clinkinbeard, 'Death, Dying and Grief in Families' in Patrick C McKenry and Sharon J Price (eds), *Families and Change: Coping with Stressful Life Events* (Sage Publications, 3<sup>rd</sup> ed, 2005) 75.

50 See Howarth, above n 24, 189; Clive Seale, *Constructing Death: The Sociology of Dying and Bereavement* (Cambridge University Press, 1998) 65.

51 Charmaz, above n 24, 297.

52 Murray, Toth and Clinkinbeard, above n 49.

53 The corpse is 'biologically dead, but socially alive': Elizabeth Hallam, Jenny Hockey and Glennys Howarth, *Beyond the Body: Death and Social Identity* (Routledge, 1999) 3.

still ‘exists’ in the sense of the lifeless yet lifelike entity,<sup>54</sup> and is a site upon which to focus all the painfully raw emotions which death has unleashed.

Where families are already divided and prone to conflict, bereavement can act as a ‘stress amplifier’,<sup>55</sup> putting additional strain on already fragile relationships.<sup>56</sup> In these circumstances, old jealousies and childhood rivalries may re-emerge, and seemingly minor issues about the distribution of parental effects turn into a symbolic battlefield for resolving claims on parental affection.<sup>57</sup> Even the grieving process itself may become a theatre of rivalry, with different members of the family vying with one another for priority. It has been said that age, sex and family position affect the family’s response to the death of a member in ‘predictable ways’,<sup>58</sup> and that the severity of grief in any given case depends to some extent on the emphasis which a society places on different relationships.<sup>59</sup> Allied to this is Peskin’s notion of a ‘ranking of grief’, in which some family members claim the right to express more grief than others on the basis that they had a closer relationship with the deceased.<sup>60</sup> In most cases this ranking is at least tacitly accepted by those concerned, but sometimes there can be bitter disagreements between rival contenders, as for instance between a wife and a mistress, or between two siblings. Thus death and bereavement can bring out the worst, as well as the best, in families.<sup>61</sup>

#### D The View of the Outsider

So far we have been concentrating on the emotional effects of bereavement on those most closely involved – namely, the family of the deceased. We have argued that there are a number of different factors which, taken together, militate strongly towards the emergence of conflict in and around these situations. However, there is another factor which cannot be ignored, and that is the emotional reaction of the outsider. This is of particular significance in relation to judges and others who have to adjudicate on the type of burial dispute that we are presently considering, and a number of different emotional factors come into play in this context.

54 The deceased’s body will frequently have been reconstructed to resemble its former and more ‘life-like’ self by funeral directors as part of the mortuary process: Howarth, above n 24, 187.

55 Levy, above n 24, 90. See also Beverly Raphael and Matthew Dobson, ‘Bereavement’ in John H Harvey and Eric D Miller (eds), *Loss and Trauma: General and Close Relationship Perspectives* (Brunner-Routledge, 2000) 50–3.

56 Elaine Schoka Traylor et al, ‘Relationships between Grief and Family System Characteristics: A Cross Lagged Longitudinal Analysis’ (2003) 27 *Death Studies* 575.

57 Levy, above n 24, 110.

58 Charmaz, above n 24, 158.

59 Peter Marris, *Loss and Change* (Routledge and Kegan Paul, 1974) 38.

60 Harvey Peskin, ‘The Ranking of Grief: Death and Comparative Loss’ in John H Harvey and Eric D Miller (eds), *Loss and Trauma: General and Close Relationship Perspectives* (Brunner-Routledge, 2000) 102–11. Meanwhile Stephenson draws a contrast between ‘appropriate’ and ‘inappropriate’ loss, the former denoting a death which was anticipated (for example, because the individual was elderly) in contrast to the latter which denotes a sudden or unexpected death (for example, in a child or young person) and where grief reactions within families will be much stronger: Stephenson, above n 31, 140.

61 Parkes, above n 23, 161.



The first is a sense of discomfort with regard to issues of death and bereavement generally. Modern Western society is not comfortable with the idea of death;<sup>62</sup> in the words of Philippe Ariès, death, once ‘so omnipresent ... that it was familiar’, has been ‘effaced’, and has become ‘shameful and forbidden’.<sup>63</sup> Most people do not die at home, but are shunted off to hospitals, so sanitising the process of death and detaching members of the public from its reality.<sup>64</sup> The living are now insulated from the perception of death and do not know how to react,<sup>65</sup> and therefore tend to avoid contact with the bereaved.<sup>66</sup> Aligned with this is the sense that burial disputes are undignified and show a lack of respect to the dead. Such reverence has been rationalised in many different ways,<sup>67</sup> and it is taken for granted that any ‘decent’ person would not have to think twice about treating the remains of the dead with respect.<sup>68</sup>

One of the most important functions of a funeral is to validate the life of the deceased; where funeral rites are denied, this can be taken as an insult to the deceased,<sup>69</sup> and the same applies, albeit to a lesser degree, where the dignity of the funeral is marred by unseemly squabbles of the sort we are presently considering. There is also a sense of annoyance at the failure of the parties to these disputes to settle their differences in a ‘mature and adult’ manner. Though a certain amount of grief and emotional disturbance is to be expected, the classic 20<sup>th</sup> century approach has been to see the grieving process as a means by which the mourner is enabled to disengage from the deceased and ‘let go’ of the past, thereby freeing the survivor to ‘move on’, make new relationships and reassimilate with the living.<sup>70</sup> Where members of a family are involved in a dispute about the funeral, this process is obviously held up.<sup>71</sup> Such conflicts aside, outsiders may also feel a sense of impatience (what we might term ‘compassion fatigue’) where external displays of grief persist beyond the ‘normal’ mourning period and the bereaved cannot or simply refuse to move on. This can also be linked with the aforementioned notion of ranking of grief –

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62 Stephenson, above n 24, 35.

63 Philippe Ariès, *Western Attitudes towards Death: From the Middle Ages to the Present* (Patricia M Ranum trans, John Hopkins University Press, 1974) [trans of: *Essais sur l'histoire de la mort en Occident* (first published 1975)] 85.

64 Stephenson, above n 24, 35; Ariès, above n 63, 87.

65 Robert Kastenbaum and Ruth Aisenberg, *The Psychology of Death* (Duckworth, 1974) 206.

66 Parkes, above n 23, 162.

67 For a useful summary see Robert J Kastenbaum, *Death, Society and Human Experience* (Allyn and Bacon, 8<sup>th</sup> ed, 2004) 387–8.

68 For example, it is a well-established feature of humanitarian law that dead combatants should be treated in an appropriate manner: see H Wayne Elliot, ‘The Third Priority: The Battlefield Dead’ (1996) 3 *Army Law* 3.

69 Hence, for example, the insults heaped on the corpse of Oliver Cromwell: Kastenbaum, above n 67.

70 Dennis Klass, Phyllis R Silverman and Steven L Nickman (eds), *Continuing Bonds: New Understandings of Grief* (Taylor and Francis, 1996) 4–5.

71 This expectation of a speedy resolution to grief is particularly marked where the death was not an untimely one. Writing about the death of an aged parent, Sanders comments that there appears to be some impatience with the grief of a bereaved adult child; after all, the death of the elderly is to be expected, and adult orphaned children are therefore expected to keep their feelings to themselves and to mourn in secret: Catherine Sanders, *Grief: the Mourning After* (Wiley, 1989), cited in Levy, above n 24, 9.

society expects certain family members to be more upset than others because of the nature of their relationship with the person who has died. Where the relationship is less valued or is not socially recognised,<sup>72</sup> attitudes towards the bereaved may be less tolerant.<sup>73</sup>

### III BEREAVEMENT EMOTIONS IN THE CONTEXT OF FAMILY BURIAL DISPUTES

Although the death of a loved one often brings the survivors closer through the inevitable grieving, the emotions associated with death can also tear survivors apart.<sup>74</sup>

We have seen that grief is a complex and subjective emotional response to the death of a loved one which ‘expresses death’s rupturing of relationships’<sup>75</sup> and manifests itself in various ways. Where burial disputes occur, such feelings are intensified; the overwhelming sense of anger and despair will often be fuelled by other emotions stemming from family histories, past relations with the deceased and the factual circumstances surrounding death to list but a few. The resultant emotional maelstrom makes consensus difficult to achieve, especially when set against a backdrop of disarray and disorder as the family unit struggles to cope with the disruptive force of death, and individuals vie for priority within the family itself (acutely aware of the symbolic and social significance of the funeral in this respect). There is also something of a ‘ripple effect’ throughout the entire family since the key protagonists will often be supported by other relatives, heightening tensions while adding to the sense of familial division as individuals invariably take sides.

Taking all this into account, it is hardly surprising that so many burial disputes end up before the courts; the feelings we have described are not consistent with rational thought and conciliatory gestures, and feuding relatives will often refuse to shift from a particular stance.<sup>76</sup> We now go on to identify the key scenarios in which burial disputes occur, and how the various emotional and psychological traits already described are displayed alongside others in the relevant case law.

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72 The mistress example used above is a good illustration.

73 ‘While grieving is an intensely personal emotional experience, it takes place within a social reality that defines appropriate grieving behavior as well as the significance of the loss itself’: Stephenson, above n 24, 122.

74 Eloisa C Rodriguez-Dod, ‘Ashes to Ashes: Comparative Law Regarding Survivors’ Disputes Concerning Cremation and Cremated Remains’ (2008) 17 *Transnational Law and Contemporary Legal Problems* 311, 312.

75 Davies, above n 18, 5.

76 As Byrne J observed in *Leeburn v Derndorfer* (2004) 14 VR 100, 102 [10]: ‘these competing pressures may be difficult to resolve, especially where they are based on feelings which are strongly held at a time of great emotional stress and which are difficult to justify, or even explain, in any rational way. This makes decision or compromise difficult.’

### A 'Doing Right' by the Deceased

Burial disputes may be motivated by a sense of 'doing right' by the deceased, with individuals arguing for a specific form of disposal because that is what the deceased asked for or would have wanted.<sup>77</sup> The recent English case of *Burrows v HM Coroner for Preston*<sup>78</sup> provides a useful illustration. Faced with deciding whether the deceased's funeral arrangements should be made by his estranged mother or by an uncle with whom the deceased resided before committing suicide, the Court ruled in favour of the uncle. One of the factors influencing the decision was the fact that the mother was intent on burial despite acknowledging that this was contrary to her 15 year old son's wishes. The deceased had made it clear on several occasions that he wanted to be cremated (he had mentioned, amongst other things, a fear of worms), and the uncle intended to fulfil his nephew's wishes.<sup>79</sup>

### B Atonement for Past Failings

A desire to take charge of funeral arrangements may be driven by a perceived need to make up for past failings, which can take one of two forms. The first is where the individual seeks some sort of personal atonement for what they regard as prior transgressions against the deceased – for example, a spouse who walked out on the deceased years earlier, or a parent who feels that they neglected or abandoned their child in life and attempts to rectify this in death.<sup>80</sup> Organising the funeral is more than an expression of regret about how relations ended with the dead person; it is about making restitution.<sup>81</sup> It allows the estranged party to assuage their own sense of guilt about perceived past mistreatments and to be publicly seen to be fulfilling their obligations to the deceased (albeit posthumously), while at the same time perhaps restoring some nominal sense of order to a fractured family unit. However, this often offends those who were devoted to the deceased in life, and feel that they should have decision-making authority.<sup>82</sup>

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77 See, eg, *Robinson v Pinegrove Memorial Park* (1986) 7 BPR 15,097; *Grandison v Nembhard* (1989) 4 BMLR 140; *Keller v Keller* (2007) 15 VR 667.

78 [2008] EWHC 1387 (QB) (16 May 2008).

79 While custody of a dead body would normally be awarded to the mother in these circumstances as the closest ranking kin (see below Part IV), the court was also influenced by the fact that the uncle and his wife had been the deceased's 'psychological parents' for many years given the mother's heroin addiction and inability to look after her son.

80 See, eg, *Burrows v HM Coroner for Preston* [2008] EWHC 1387 (QB) (16 May 2008). Similar patterns can be found where natural parents confront a child's adoptive parents over funeral arrangements: see *Buchanan v Milton* [1999] 2 FLR 844; *Waskewitch v Hastings* (1999) 184 Sask R 79. In relation to disputes between natural parents and foster parents see *R v Gwynedd County Council; Ex parte B* [1992] 3 All ER 317; *Warner v Levitt* (1994) 7 BPR 15,110.

81 See generally Lily Pincus, *Death and the Family: The Importance of Mourning* (Faber and Faber, 1974) 119–20.

82 For example, the deceased's uncle in *Burrows v HM Coroner for Preston* [2008] EWHC 1387 (QB) (16 May 2008).

The second and perhaps more common reason for family burial disputes of this nature is a sense of vicarious atonement for the deceased's own alleged failings in life which can now be mitigated by an 'appropriate' funeral.<sup>83</sup> This often happens where the deceased's lifestyle choices did not meet familial expectations – for example, where the deceased was in a same-sex relationship and 'blood relatives' try to exclude the deceased's partner from the funeral arrangements as a means of reiterating their opposition to the relationship and ensuring that traditional family values are restored on death.<sup>84</sup> For example, in the US case of *Stewart v Schwartz Brothers-Jeffers Memorial Chapel Inc.*,<sup>85</sup> a dispute arose between the deceased's long-term partner and his mother, the former seeking to cremate the deceased in accordance with his expressed wishes<sup>86</sup> while the mother insisted on burying her son's body in accordance with the Jewish faith in which he had been raised. It has been noted elsewhere that funerals are 'fraught with potential conflicts between biological families and families of choice'.<sup>87</sup> However, the mother's desire to substitute her own burial preferences in *Stewart* highlights another important sense in which the deceased may be expected to conform with family values in death – namely, where there is a clash of religious or cultural ideals.

### C Religious and Cultural Dimensions

Religious and cultural beliefs often lead family members to take a particular view of what should happen to the body on death, arguing that the deceased should be buried in accordance with the teachings of a particular faith or the ethnic traditions in which the deceased was raised so as to facilitate the transition into the spiritual afterlife and, in certain instances, to safeguard the continuing bond between the living and the dead.<sup>88</sup>

Burial disputes of this nature typically arise in two situations. The first is where the person who takes charge of funeral arrangements is not acting in accordance with the deceased's own religious or cultural beliefs, and other family members insist that the deceased would, for example, have preferred burial to cremation because of his or her faith, or that specific funeral rites should be followed for the same reason. For example, the deceased in *Hunter v Hunter*<sup>89</sup> had been a staunch Protestant all his life, yet had converted to Catholicism one month before his death, apparently to enable him to be buried beside his wife

83 This is often closely aligned with notions of reclaiming the deceased and fixing their social memory: see below Part III(G).

84 See Jennifer E Horan, "'When Sleep at Last Has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples' (1999) 2 *Journal of Gender, Race and Justice* 423; Mark E Wojcik, 'Discrimination after Death' (2000) 53 *Oklahoma Law Review* 389.

85 606 NYS 2d 965 (NY Sup Ct, 1993) ('*Stewart*').

86 The deceased had stated on a number of occasions that he wanted to be cremated.

87 Tanya K Hernandez, 'The Property of Death' (1999) 60 *University of Pittsburgh Law Review* 971, 983.

88 See generally Rees, above n 24. See also William J Wagner 'Death, Dying, and Burial: Approaches in Religious Law and Practice' (1999) 59 *The Jurist* 135; John Avery, 'Rights to Mortuary Rites' (2002) 5(14) *Indigenous Law Bulletin* 15.

89 (1930) 65 OLR 586.

who was a devout Catholic. The deceased's son opposed the widow's plans to bury the deceased in a Catholic cemetery, on the basis of his father's hitherto unwavering faith and the fact that there was conflicting evidence as to the deceased's mental state before his death.<sup>90</sup>

The second and much more problematic scenario is where certain family members insist on a particular form or place of disposal based on their own specific religious beliefs or cultural traditions. In these circumstances, the deceased may have consciously rejected such teachings and practices while alive; alternatively, family members may object where the deceased has requested a funeral which is not in keeping with religious or cultural norms, despite having subscribed to all other material beliefs and values in life. The question of religious preferences has arisen in several cases, including *Saleh v Reichert*,<sup>91</sup> in which a husband's decision to honour his wife's wishes by cremating her remains was challenged by the deceased's father who wanted to inter his daughter's body in accordance with the Muslim faith in which she had been raised.<sup>92</sup> At the heart of such disputes is the sense of comfort and solace which the living derive from a particular faith in death – not just for themselves but for the deceased as well. Religion operates as a type of 'insurance against mortality'.<sup>93</sup> It consoles family members with the knowledge that there may be a reunion with the dead at some time in the future,<sup>94</sup> and helps the bereaved to make sense of death and their own grief.<sup>95</sup> However, such beliefs may make discordant relatives even more determined to secure a specific form of burial with all attendant religious rites, in stark contrast to those who regard a religious funeral as inappropriate given the deceased's ambivalence or non-adherence.

Cultural beliefs about death and burial provide another reference point for such disputes, and raise similar issues. Yet, while often (though not invariably) interlinked with religious practices, cultural values tend to encompass a much broader range of ideals which will impact on burial disputes – for example, extended notions of kinship, hierarchical and patriarchal family structures, and a deep-rooted sense of the deceased individual as 'belonging' to his or her cultural

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90 The court ruled in favour of the son as executor under the deceased's will (see Part IV) and because of doubts about the deceased's mental state on the evidence before it. See also *Re Lochowiak (Deceased)* [1997] SASC 6301 (8 August 1997) in which the deceased's adult son challenged the deceased's partner, the former arguing that his Catholic father would not have wanted to be cremated because of religious objections.

91 (1993) 104 DLR (4th) 384.

92 The court ruled in favour of the husband as administrator of his wife's estate, observing that that his having converted to the Muslim faith at the time of his marriage to the deceased did not engender any legal obligation to dispose of her remains accordingly. See also *Abeziz v Harris Estate* [1992] OJ 1271 (17 June 1992); *Privet v Vovk* [2003] NSWSC 1038 (7 November 2003).

93 Howarth, above n 24, 22.

94 Margaret S Stroebe, 'Religion in Coping with Bereavement: Confidence of Convictions or Scientific Scrutiny' (2004) 14 *International Journal for the Psychology of Religion* 23, 26.

95 Howarth, above n 24, 98. However, religious beliefs can also complicate the grieving process and fuel the sense of anger felt on death; while 'belief in "God's plan"' can help a bereaved individual create meaning from loss, ... it can also lead to anger towards God for unfairly allowing the death, which can isolate the individual from his or her spiritual roots': Murray, Toth and Clinkinbeard, above n 49, 88.

community.<sup>96</sup> Once again, problems arise where the deceased moved away from this community in life with a resultant weakening of ties or discarding of cultural traditions, yet the family insists on specific funerary rites as a means of re-establishing those links on death. Such issues have arisen in a number of cases involving members of the Aboriginal community. For example, in *Meier v Bell*<sup>97</sup> the deceased's partner quarrelled with the deceased's sister over the place of burial – the latter arguing that the deceased should be buried alongside family members so that his spirit could find eternal rest. However, the deceased's partner questioned the importance of such beliefs to the deceased, and insisted that he be buried in a nearby cemetery which would make it easier for her and the couple's young daughter to visit the grave. A similar factual scenario arose in *Jones v Dodd*,<sup>98</sup> the deceased's father wanting his son to be buried with other relatives in his geographical and spiritual homeland, while the deceased's former partner claimed that he should be buried in a cemetery close to where she resided so that the couple's children would be able to visit their father's grave. Custody of the deceased's body was awarded to the partner in *Meier*, while the opposite conclusion was reached in *Jones*.<sup>99</sup>

In these circumstances, insistence on a particular funerary ritual is not simply about the fate of the physical body; it is about the fate of the deceased's soul.<sup>100</sup> There is a sense in which ingrained religious and cultural beliefs raise the emotional ante in disputes of this nature; yet the focus is not simply on the dead but on the funeral as a form of solace for living. Adopting specific religious and cultural burial practices allows the living to safeguard the deceased's posthumous spiritual welfare, while attempting to compensate for any perceived failings in life where the deceased had previously rejected these beliefs – again, a sense of vicarious atonement on the part of the deceased's family.<sup>101</sup> Such rites may also be seen as important markers of the deceased's familial and social identities, effectively operating as a means of 'reclaiming' the deceased on death.<sup>102</sup>

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96 See Caroline Bridge, 'Religion, Culture and the Body of the Child' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *Body Lore and Laws* (Hart Publishing, 2002) 267. The intersection between common law and customary law will also be an important feature of such disputes: see *Clarke v Takamore* [2009] NZHC 901 (29 July 2009).

97 (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997).

98 (1999) 73 SASR 328.

99 Even where the various protagonists have all been of Aboriginal descent, disputes have still arisen over the place of burial with conflicting accounts of the deceased's attachment to a particular area and the importance of certain family ties: see, eg, *Dow v Hoskins* [2003] VSC 206 (10 June 2003); *Calma v Sesar* (1992) 106 FLR 446; *Reece v Little* [2009] WASC 30 (16 February 2009). For similar disputes involving the Maori peoples, see *Doherty v Doherty* [2006] QSC 257 (16 August 2006); *Clarke v Takamore* [2009] NZHC 901 (29 July 2009). See also the factual background to *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590.

100 Lindsay Prior notes that the 'hypothesised duality of body and soul' creates two specific problems for the living: the disposal of the corpse and the transition of the deceased's soul: Lindsay Prior, *The Social Organisation of Death: Medical Discourses and Social Practices in Belfast* (Macmillan Press, 1989) 154.

101 See above Part III(B).

102 See below Part III(G).

### D Replicating Existing Power Struggles and Reigniting Tensions

Burial disputes often replicate existing power struggles within families, reigniting simmering tensions and internal family feuds where the emotional wounds have been festering for years. Reference has already been made to the fact that death acts as a 'stress amplifier', heaping further pressures on already strained or fractured family relationships.<sup>103</sup> Here it also generates a channelling of emotions, not just those which are associated with death and grieving, but negative feelings experienced during the deceased's life. Many burial disputes are dominated by what has been described as 'collateral issues'<sup>104</sup> of this nature. The actual fight is not over the deceased, though there are certain notions of territory; instead, the dispute stems from particular problems within the family itself as death exposes existing family rifts and the deceased's body becomes a site for emotional transference.

Disputes of this nature tend to take one of three forms. The first is that of sibling rivalry or allegations of parental favouritism between the deceased's children in life which resurface on death.<sup>105</sup> There is a sense in which death makes traditional family hierarchies resurface, as elder (and therefore notionally more 'senior') members of the family automatically take control of the situation while everyone else reverts to their habitual roles within this notional hierarchy.<sup>106</sup> Thus it is hardly surprising that the death of a parent triggers a return to childhood patterns as old jealousies and resentments resurface, and the person who would have been in the best position to curb such behaviour (the deceased parent) is no longer around to do so. Insofar as burial disputes are concerned, an ingrained sense of responsibility and natural desire to assume the role of head of the family by the eldest child may be challenged as persistently controlling behaviour by his or her siblings ('you always had to get your way'). Alternatively, there may be allegations of parental neglect which denies a particular child any say in the funeral arrangements – for example, the return of the prodigal child who ignored all responsibilities towards a parent while alive yet insists on taking charge on death will stir up resentments where another child has cared for an elderly or sick parent.<sup>107</sup> The complexities of sibling relationships and rivalries have been acknowledged by the courts, as in *Leeburn v*

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103 See above n 55.

104 Josias, above n 1, 1164.

105 The 'sibling rivalry' phenomenon has been well-documented throughout human history, with the biblical story of Cain and Abel providing an early example. For a more recent psychological analysis, see Dorothy Rowe, *My Dearest Enemy, My Dangerous Friend: Making and Breaking Sibling Bonds* (Routledge, 2007).

106 In these circumstances, younger members of the family (even if adults themselves) often seek solace by retreating into childhood roles while older members assume the role of 'head' of the family: see Bowen, above n 49.

107 Looking after an elderly or terminally ill relative will frequently strain familial relationships, especially where one person accuses another of not making a sufficient contribution or 'renegeing on promises to help': Charmaz, above n 24, 156–7. Once again, such tensions will invariably 'spill over' into burial disputes following the deceased's death.

*Derndorfer*<sup>108</sup> where a brother and his two sisters quarrelled over the fate of their father's ashes. The sisters had interred the ashes in a cemetery contrary to their brother's wishes; the brother argued that the ashes should be disinterred and divided between the siblings so that he could dispose of his notional one-third share in the manner he felt was appropriate. Before addressing the legal issues, Byrne J remarked:

It was apparent to me that [the brother] ... is very upset at the prospect that his father's remains are in a place not of his choosing ... [His elder sister], for her part, expressed the view that the division of the ashes as her brother proposed was disgusting, even sacrilegious. I suspect, too, that the division between them on this matter represents a manifestation of some more deep-seated hostility which I cannot resolve.<sup>109</sup>

Meanwhile, problems which persist in families where the parents remained together in a committed relationship are amplified in stepfamilies, or where there are feuding children from second marriages and subsequent relationships.<sup>110</sup>

This brings us to the second type of family burial dispute falling within the 'power struggle' category: those which occur between adult children and a step-parent or a deceased parent's partner.<sup>111</sup> In these circumstances, the children's desire to take charge of the funeral arrangements may be seen as a means of expressing (yet again) their dislike of the step-parent or partner,<sup>112</sup> driven also perhaps by the lingering sense of resentment that the latter took the place of the children's natural parent or was the focus of the deceased's affections in life. The deceased's children may also be trying to assert their (presumptively more important) status as the offspring of a first marriage or previous relationship, as well as registering their resentment of the adjustments which were previously forced on them as they struggled to adapt within a reconstituted family. Such tendencies might also be accompanied by a desire to punish the step-parent or partner for perceived slights against the children in the past.<sup>113</sup>

The final and often most acrimonious type of burial dispute which occurs in this context is that of separated parents fighting over the remains of a dead child. Having tussled over their offspring in life, death effectively prompts one final and decisive posthumous custody dispute between the parents and irrespective of

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108 [2004] VSC 172 (4 June 2004).

109 *Ibid* [9]. Similar views were expressed in *Keller v Keller* (2007) 15 VR 667, [2]: 'At the heart of the dispute is a history of conflict between the two children.'

110 See generally Katrina McClintic-Pann and Margaret Crosbie-Burnett, 'Remarriage and Recoupling: A Stress Perspective' in Patrick C McKenry and Sharon J Price (eds), *Families and Change: Coping with Stressful Events and Transitions* (Sage Publications, 3<sup>rd</sup> ed, 2005) ch 11.

111 See, eg, *Burnes v Richards* (1993) 7 BPR 15,104; *Re Lochowiak (Deceased)* [1997] SASC 6301 (8 August 1997) and *Ugle v Bowra* [2007] WASC 82 (16 March 2007).

112 Similar tensions can also be seen in burial disputes between the deceased's spouse or partner, and the deceased's parents or siblings: see, eg, *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997).

113 See, eg, *Manktelow v Public Trustee* [2001] WASC 290 (19 October 2001).



whether the child is an infant or an adult at the time of death.<sup>114</sup> The nature of parental grief itself means that there is an added emotional dimension to contend with here – death is contrary to the natural order of things, and the resultant sense of injustice creates an innate tendency to apportion blame which also fuels the parental dispute.<sup>115</sup> However, other emotions are triggered where the death of a child occurs within a ‘fractured’ family. For example, separated parents may be consumed by feelings of bitterness towards each other, stemming from the failure of their own relationship and events which followed.<sup>116</sup> There may also be a sense of guilt associated with perceived parental failings towards a child in life, while a non-custodial parent may be struggling to cope with a sense of alienation from their child in life which will persist in death if the custodial parent has the final say on funeral arrangements. Where the latter party has formed a new relationship, there may also be a sense of fear that the child’s identity will be permanently subsumed into that of a new family.

Many of these factors were evident in *AB v CD*<sup>117</sup> which involved a dispute between separated parents over the funeral arrangements for their 14 month old son. The child had lived with his mother who wanted to bury her son in a cemetery close to where she was now living with her new fiancé and where some of the fiancé’s relatives were buried. However, the father (supported by the child’s maternal grandmother) wanted his son to be buried close to where both the father and relatives on the mother’s side of the family lived. Aside from the practicalities of visiting his son’s grave if the mother’s wishes prevailed, the father also appears to have been driven by the fear of losing his connection with his son given that the child was going to be buried with another family. Custody of the remains was awarded to the mother, on the basis that the child had lived with her throughout his short life. However, the Court was conscious of the emotional complexities at the heart of the conflict:

Notwithstanding that both the mother and the father of the child conceded that the particular circumstances of this case called for its determination by reference to

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114 See, eg, *Joseph v Dunn* [2007] WASC 238 (20 September 2007); *De Festetics v De Festetics*, 79 NJEq 488 (NJ Ct Ch, 1911) (dispute between separated parents over the funeral arrangements for their young children); *Fessi v Whitmore* [1999] 1 FLR 767; *Derwen v Ling* [2008] FamCA 644 (22 July 2008) (dispute over where to scatter child’s ashes). See also *Calma v Sesar* (1992) 106 FLR 446; *Burrows v Cramley* [2002] WASC 47 (15 March 2002); *Gillott v Woodlands* [2006] VSCA 46 (8 March 2006) (separated parents fighting over where to bury their adult child).

115 See generally Gordon Riches and Pamela Dawson, “‘Shoring Up the Walls of Heartache’: Parental Responses to the Death of a Child” in David Field, Jenny Hockey and Neil Small (eds), *Death, Gender and Ethnicity* (Routledge, 1997) 52. Riches and Dawson make the point that, even where death occurs within a normal marital relationship, the death of a child inevitably ‘present[s] a major challenge to parents’ capacity to agree on the significance and meaning of their loss’: at 53.

116 See, eg, *Tully v Pate*, 372 F Supp 1064 (D SC, 1973) and discussed in Josias, above n 1, 1164–5. Here, the husband challenged his estranged wife’s sister over the intended form of burial for the couple’s two children who had been tragically killed in a fire which left their mother seriously injured. The parents had been embroiled in a particularly spiteful custody battle at the time. However, the level of bitterness surrounding the burial dispute prompted Hemphill J to remark that the case had ‘shocked the sensibilities of the court’ and that the parties were almost certainly more interested in ‘vindictive pursuit’ than seeking justice: at 1065–6.

117 [2007] NSWSC 1474 (17 December 2007).

matters of practicality and convenience, arguments in support of their respective contentions inevitably invited a consideration of significantly more arcane matters such as love, sentiment, grief, responsibility and even anger. It would in my opinion have been curious if these matters had not become prominent in the present proceedings, and wrong to exclude consideration of them when they did.<sup>118</sup>

Disputes of this nature invariably involve claims as to who was the better parent in life, suggesting that this carries with it the ultimate right to decide what happens to the child in death. Such allegations are, to some extent, inevitable. However, when resolving disputes of this nature, judges have been at pains to stress that they are not making a determination on who was the better parent; any decisions are based on the legal merits of the case.<sup>119</sup>

### **E The Punitive Element**

In some instances, funeral arrangements can serve as a form of posthumous retribution for physical or emotional harm which the deceased inflicted on others in life. Centuries ago, certain types of convicted felon were ‘hung, drawn and quartered’ as part of their sentence, the public desecration of the body serving as an additional punitive element for the offence committed.<sup>120</sup> While bodily remains are unlikely to be subjected to such extremes in modern familial burial disputes, certain parallels can nevertheless be drawn. Those who are arguing for a particular method of disposal may decide to contradict the deceased’s express wishes (or those of other family members) as a means of punishing the dead for past transgressions. In doing so, they may be driven by a desire to inflict some sort of notionally equivalent metaphysical ‘pain’ on the deceased, while publicly admonishing them as part of this process.

In *Holtham v Arnold*<sup>121</sup> the deceased’s wife insisted on cremating his body despite the fact that he had left her and his six children years earlier and was living with another woman. His partner wanted to bury the deceased in accordance with what she claimed were his wishes and on the basis of an assumed ‘moral duty’ to do so as the person who was closest to the deceased in the final years of his life. Although the wife claimed to be motivated by purely altruistic reasons,<sup>122</sup> her actions could equally be seen as a form of retribution against her husband and his new partner. Similar behavioural patterns can be

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118 Ibid [59].

119 See, eg, *AB v CD* [2007] NSWSC 1474 (17 December 2007): ‘It is very important to emphasise that the result in this case is not, and should not appear to be, a prize for who was the better parent. It would be difficult to imagine circumstances more difficult for these young parents ... than the circumstances that confronted the mother and the father in this case’: at [66] (Harrison J). Similar views were expressed in *Burrows v Cramley* [2002] WASC 47 (15 March 2002) and *Calma v Sesar* (1992) 106 FLR 446.

120 See Kieran McEvoy and Heather Conway, ‘The Dead, The Law, and the Politics of the Past’ (2004) 31 *Journal of Law and Society* 539, 552–4 and the various sources cited therein.

121 (1986) 2 BMLR 123.

122 The wife (supported by the couple’s children) wanted the deceased to be cremated so that his ashes could be deposited in the same grave as the deceased’s parents. As the deceased’s legal next of kin (the couple had never divorced), the wife’s wishes were final: see below Part IV.

identified in *Betty Brannam v Edward Robeson Funeral Home*<sup>123</sup> in which the deceased's estranged wife wanted to bury her husband's remains, contrary to a stipulation in the deceased's will that he be cremated and the ashes given to his long-term partner with whom he had three children.<sup>124</sup> Aside from punishing her husband, there is a sense in which the wife was reasserting her status on death as his (still lawfully wedded yet estranged) spouse. The wife's actions could also be seen as an attempt to 'take' the deceased from his second family in perhaps the same way as she perceived that they had taken the deceased from her – a punitive role reversal of sorts, in which equivalent pain and suffering is inflicted on the second family for replacing the earlier partner as the focal point in the deceased's life.

Moving beyond the spousal context, similar patterns can be seen in the dispute surrounding the fate of the McElhill family who were killed by their father in a house fire in Northern Ireland in 2007.<sup>125</sup> The fact that the children and their mother were buried together in one county while the father was buried alone in another at the insistence of the mother's relatives, suggests a punitive element for one of the greatest crimes imaginable: a father killing his entire family. However, it could also be seen as a form of posthumous protection for the mother and her five children – another factor which often drives family burial disputes.

#### **F A Posthumous 'Deliverance from Evil' or Protection from Harm**

Situations in which the deceased died violently or in suspicious circumstances will often generate protectionist urges amongst surviving relatives, who are driven by a need to ensure that the deceased is shielded from further 'harm' in death. Since protection from physical injury is impossible at this stage, it is instead confined to securing a peaceful repose far from the scene of death or away from the individual who inflicted pain and suffering on the deceased. By denying that person any say in the funeral arrangements, family members are able to achieve a degree of exclusion or separation which was not possible during the deceased's life but might have protected the deceased if others had acted sooner.

Once again the McElhill dispute provides a good illustration of this, the McGovern family ensuring disassociation with and physical separation from Arthur McElhill on death as a means of protecting their daughter and grandchildren. Similar traits are apparent in *Scotching v Birch*<sup>126</sup> where a mother had pleaded guilty to the unlawful killing of her son yet wanted to bury the child in a particular cemetery, the father insisting on burial elsewhere because he did not want his son to be interred close to where he was killed. Other examples have arisen in the domestic violence context, even where the victim died from natural causes as opposed to injuries inflicted by her partner. Thus in *Burnes v*

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123 (NY Sup Ct, No 43141/96, 14 November 1996).

124 In this case, however, the deceased's wishes prevailed.

125 See above Part I.

126 [2008] EWHC 844 (Ch) (18 March 2008).

*Richards*<sup>127</sup> where the deceased had endured numerous assaults during a 17 year relationship with her partner and had left him two months before her death in circumstances which prompted her to seek an apprehended violence order, the deceased's adult children sought custody of their mother's remains for burial.<sup>128</sup> Even more sinister motives were apparent in the US case of *Maurer v Thibeault*<sup>129</sup> in which the deceased's persistently violent, estranged husband who had threatened to kill her several times wanted to cremate his wife's remains contrary to her wishes. The husband seemed intent on continuing his mistreatment in death, despite the wife's insistence that she be buried separately from him; in these circumstances, it is hardly surprising that custody of the body was granted to the wife's family.<sup>130</sup>

### **G Monopolising Ties on Death: Fixing Social Identities and 'Reclaiming' the Deceased**

Death results in an inevitable physical and emotional separation from the deceased, which must be confronted as part of the grieving process. The resultant need for the bereaved and their respective families to reconfigure themselves in some way is often seen as having a therapeutic benefit in terms of 'reintegrating one's life and one's self-image *without* the person who died'.<sup>131</sup> However, many burial disputes are prompted by a desire to do the opposite, with certain individuals seeking control of the funeral as a means of ensuring that their own identity is comprehensively and irrevocably subsumed within that of the deceased's, and vice versa.

Death and its associated rituals result in a fixing of the deceased's social identity, often by reference to the living. As Jupp has remarked:

Individual deaths ... challenge survivors to identify and to articulate the values and relationships that survive death, undefeated. Thus death, in exposing transience, effects an affirmation of what is permanent.<sup>132</sup>

The funeral itself acts as a public manifestation of this, constructing a particular image not only of the deceased but of those persons who oversee the arrangements.<sup>133</sup> In doing so, the latter are claiming to have been the focal point

127 (1993) 7 BPR 15,104.

128 See also *Reid v Love and North Western Adelaide Health* [2003] SASC 214 (4 April 2003) (dispute between the deceased's son and her de facto partner, the former arguing that the deceased and the defendant were alcoholics and had an extremely volatile relationship).

129 860 NYS 2d 895 (NY Sup Ct, 2008).

130 See also *Spanich v Reichelderfer*, 628 NE 2d 102 (Ohio Ct App, 1993) in which the court awarded custody of the deceased's remains to her parents rather than her spouse. The deceased had been living with her parents at the time of her death, the court remarking that the husband had shown no 'love, honor or respect for his wife', and was guilty instead of 'conduct [which] was "egregious, greedy, and a gross infringement of any form of decency": at 107, quoting in part from the opinion of the lower court.

131 Charmaz, above n 24, 297 (emphasis added).

132 Peter C Jupp, 'Virtue Ethics and Death: The Final Arrangements' in Kieren Flanagan and Peter C Jupp (eds), *Virtue Ethics and Sociology: Issues of Modernity and Ethics* (Palgrave, 2001) 217, 217–18.

133 'Rites performed for the dead generally have important effects for the living. A funeral ceremony is personal in focus and societal in its consequences': David G Mandelbaum, 'Social Uses of Funeral Rites' in Robert Fulton (ed), *Death and Identity* (Charles Press, 1976).

of the deceased's life; they are effectively seeking 'public acknowledgement'<sup>134</sup> of their importance to the deceased while also embracing the privileged societal support and recognition which this bestows on them.<sup>135</sup> Thus, instead of marking a relinquishing of relationships with the dead and the bereaved's transition to a different social status<sup>136</sup>, the funeral essentially becomes a public affirmation or recasting of certain relationships and intimate bonds with the deceased. Here, the funeral has a socially-defining element: it fixes the deceased's identity in relation to the family which is left behind, or certain members thereof. This attempted 'monopolisation of death'<sup>137</sup> invariably centres on the deceased's conjugal or 'blood' family, yet often overlooks the actual state of intra-familial relations at the time.

This particular theme cuts across most of the areas which we have been considering in this section. For example, both *Holtham v Arnold*<sup>138</sup> and *Betty Brannam v Edward Robeson Funeral Home*<sup>139</sup> could equally be seen as examples of estranged spouses attempting to reinstate themselves publicly as the deceased's next of kin, despite what has happened in the past. Aside from using the funeral as a means of permanently asserting ownership and control over the deceased's identity, there is also something of an attempt to rewrite history in these cases by denying other intimate relationships which the deceased had formed before death. Disputes between a 'new' spouse or partner and the deceased's children from a previous relationship might also be viewed as a means of openly 'reclaiming' the deceased,<sup>140</sup> as could conflicts between different sets of parents where each is permanently claiming the child as their own by insisting on the 'right' to make the funeral arrangements.<sup>141</sup> Similar traits are apparent in burial disputes fuelled by divergent religious or cultural beliefs, or familial disapproval of the deceased's lifestyle choices<sup>142</sup> – in these circumstances, the protagonists are often keen to ensure that the deceased's posthumous identity is publicly framed within a 'traditional' set of family values and beliefs. Meanwhile, individuals who are denied a say in the funeral arrangements as a consequence of such disputes will have to endure what is known as 'disenfranchised grief' – in other words, a loss which is 'not publicly acknowledged or socially supported'<sup>143</sup> because others are assumed to have been closer to the deceased in life through controlling the fate of the body in death.

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134 Hernandez, above n 87, 991.

135 See Howarth, above n 24, 201–2 and the sources referenced therein. See also Charmaz, above n 24, 284.

136 Romanoff and Terenzio, above n 42, 698.

137 Prior, above n 100, 146.

138 (1986) 2 BMLR 123.

139 (NY Sup Ct, No 43141/96, 14 November 1996). See above Part III(E).

140 See above Part III(D).

141 See, eg, above n 80 and the various cases cited therein.

142 See above Part III(C).

143 Howarth, above n 24, 201–2, citing Kenneth J Doka (ed), *Disenfranchised Grief: Recognizing Hidden Sorrow* (Lexington Books, 1989).

#### IV FACILITATING EMOTIONAL DETACHMENT: THE LEGAL FRAMEWORK FOR RESOLVING BURIAL DISPUTES

A court is, understandably, reluctant to enter into sensitive disputes of this kind which, clearly, involve emotional issues of a high degree.<sup>144</sup>

Where family conflicts prevent the disposal of the dead the court must intervene, and notions of ‘ownership’ become synonymous with controlling the fate of the body.<sup>145</sup> As part of this process, the deceased is effectively transformed from a person into an object<sup>146</sup>, as judges apply a strict legal framework which effectively ignores the wishes of the dead and merely acknowledges the conflicting desires of the living.<sup>147</sup> The framework itself is based on succession law and who would be entitled to administer the deceased’s estate, irrespective of whether such an application has actually been made or the value of the estate in question. Possession of the body<sup>148</sup> will be awarded to the executor where the deceased has made a will; failing that, it will be granted to the deceased’s next of kin as defined by the pecking order of persons entitled on intestacy.<sup>149</sup> In the latter situation, family members claim in order of their relationship with the deceased, ranking from a spouse, then children, parents and siblings through to other specified family members under the relevant intestacy statute.<sup>150</sup> Just as there is a perceived ‘ranking of grief’ within families,<sup>151</sup> notionally ‘closer’ kin are similarly entrusted with decision-making authority in respect of the deceased’s remains. Yet, there is also scope for certain individuals to be excluded under this categorisation, with ‘blood’ relatives having the authority to trump the wishes of the same-sex partners or cohabiting partners of

144 *Re Lochowiak (Deceased)* [1997] SASC 6301 (8 August 1997) [8] (Debelle J).

145 See McEvoy and Conway, above n 120, 540–2. However, the term ‘ownership’ is not being used here in a strict private law sense as encompassing a series of specific rights and corresponding obligations; instead, it denotes decision-making authority over the body which carries with it a qualified and transient right to possession for funerary purposes only. It has long been established that a dead body is not property in any legal sense: see Paul Matthews, ‘Whose Body? People as Property’ (1983) 36 *Current Legal Problems* 193, 197–205, 208–14 for an excellent critique of the ‘no property’ rule.

146 This process of objectification was noted in McEvoy and Conway, above n 120, 540.

147 The fact that burial instructions do not, as a general rule, carry any legal weight in Australia, England and Canada is a consequence of the ‘no property’ rule; as a dead body is not property, it cannot be bequeathed by will according to *Williams v Williams* (1882) 20 Ch D 659. Contrast this with the United States, where courts will strive to give effect to an individual’s burial instructions: see Percival E Jackson, *The Law of Cadavers and of Burial and Burial Places* (Prentice Hall, 2<sup>nd</sup> ed, 1950) 41–55. See also, Kimberly E Naguit, ‘Letting the Dead Bury the Dead: Missouri’s Right of Sepulcher Addresses the Modern Decedent’s Wishes’ (2010) 75 *Missouri Law Review* 249.

148 Or the deceased’s ashes following cremation, since the same principles apply. See *Re Korda (No 2)*, *The Times*, 23 April 1958 (Vaisey J); *Robinson v Pinegrove Memorial Park* (1986) 7 BPR 15,097.

149 For a more detailed overview of this framework, see Conway, above n 16; Queensland Law Reform Commission, above n 13, ch 6. See also *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

150 Where two or more persons fall under the same category of kinship, the court will consider extraneous factors such as the practicalities surrounding burial in a particular place, and the state of relationships with the deceased. See, eg, *Burrows v Cramley* [2002] WASC 47 (15 March 2002); *Keller v Keller* (2007) 15 VR 667.

151 See above Part II(C).

the deceased where the latter do not qualify as next of kin for intestacy purposes.<sup>152</sup>

The application of this legal framework does have certain advantages from a judicial perspective. By seeking solace in notions of ‘owning’ the dead and strict succession law entitlements, judges can effectively ignore the underlying emotional dynamics and inter-familial tensions analysed in the previous section, despite the fact that these are such an integral part of the conflict. As Conway and McEvoy have argued:

ownership [as an organising concept] provides a familiar template around which to shape competing claims. It denotes important notions including status, possession, control, and the exercise of legitimate authority to the exclusion of all others. It facilitates a necessary process of detachment from contests which are often socially and emotionally fraught and a retreat to legal formalism traditionally associated with such private law concepts.<sup>153</sup>

Case law suggests a certain judicial reticence about having to deal with such highly charged issues; to do otherwise would be to unleash a Pandora’s box of emotions on which the lid is best kept firmly shut.<sup>154</sup> In addition, the existing legal framework ensures that judges do not have to unravel complicated family histories or make difficult subjective value judgments about the state of relations between the living and the dead. For example, judges do not have to decide who loved the deceased more and vice versa, or who was the favourite (or more attentive) child, sibling or paramour – such implicit moral reasoning is arguably beyond the proper scope of judging,<sup>155</sup> and, in any event, this is not what courts

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152 Much depends on the prevailing laws in each jurisdiction, as well as the relevant intestacy framework. For example, under the *Civil Partnership Act 2004* (UK) c 33 same-sex civil partners in Britain now have exactly the same legal rights as spouses and would qualify as such on intestacy, though this practice varies significantly with obvious consequences for a surviving same-sex partner on death: see Horan, above n 84; Wojcik, above n 84. In contrast, unmarried cohabitants in Britain do not have any rights on intestacy and therefore would not fall within this legal hierarchy, irrespective of the duration of the relationship. This and other aspects of intestacy law are currently under review: Law Commission for England and Wales, *Intestacy and Family Provision Claims on Death* (Consultation Paper No 191, 30 September 2009). In contrast, all Australian jurisdictions now recognise cohabiting or de facto partners as next of kin for intestacy purposes, which influences the legal resolution of burial disputes. See, eg, *Reece v Little* [2009] WASC 30 (16 February 2009), where the de facto partner was granted custody of the deceased’s remains as a person entitled to seek letters of administration in respect of the estate under the *Administration Act 1903* (WA) ss 15, 25. In addition, the legal classification of next of kin may not correspond to certain cultural notions of kinship and authority, particularly in Aboriginal disputes: see, eg, Prue Vines, ‘Consequences of Intestacy for Indigenous People: The Passing of Property and Burial Rights’ (2004) 8 *Australian Indigenous Law Reporter* 1.

153 McEvoy and Conway, above n 120, 541.

154 See, eg, *Re Lochowiak (Deceased)* [1997] SASC 6301 (8 August 1997) [8].

155 See Jeremy Waldron, ‘Judges as Moral Reasoners’ (2009) 7 *International Journal of Constitutional Law* 2.

are being asked to do in burial disputes.<sup>156</sup> Of course, such decisions must also be reached within a compressed timeframe,<sup>157</sup> since the dictates of public health combined with the fundamental tenets of human dignity and respect for the dead mean that there is an overwhelming sense of disposing of the body as quickly as possible.<sup>158</sup> Constraints of time, however, contrast sharply with the finality of the decision;<sup>159</sup> judicial determinations cannot be undone, and there is no prospect of the parties coming back to court and asking for a variation of the order.<sup>160</sup> At a cursory glance, it might seem that these two factors increase the pressure on judges when resolving family burial disputes. Yet, the fact that judges can seek solace in a strict legal hierarchy of entitlement alleviates many of the stresses which might otherwise be associated with reaching hasty and decisive conclusions.

It could also be argued that the prevailing legal framework benefits the deceased's family in some way. A prompt and largely predictable outcome reduces the amount of (additional) damage being inflicted on an emotionally vulnerable yet volatile family 'unit' which has already been pushed to breaking point. As McKechnie J remarked in *Ugle v Bowra*:

there has to be a balance between the need for prompt expedition of a matter that involves grief and loss to many people, together with the need to secure the burial of a person reasonably promptly, and the need for a full exploration of disputed matters. In this case, given much time, many issues could be ventilated and explored, but time is one thing that is simply not available. Pressures of time, stress and pain add to an already emotional situation where there are no winners and losers, only deeply held and legitimate feelings that are exacerbated by uncertainty.<sup>161</sup>

Damage limitation aside, a swift resolution of family burial disputes facilitates the disposal of the deceased's remains so that the healing process can effectively begin for the living. However, some might argue that a legal framework which ignores (or, at best, pays lip-service to) the complex sentiments and family histories underpinning such conflicts is fundamentally flawed, given

156 Dicta from a number of cases suggests that judges are well aware of their limitations in this respect. See, eg, *Hartshorne v Gardner* [2008] EWHC B3 (Ch) (14 March 2008) where Proudman J admitted that: 'a decision between the earnest wishes of two grieving parents requires the wisdom of Solomon, which I do not profess to have ... the court should be slow to make findings as to the details of the deceased's family relationships': at [2]–[3]. Reference was also made to *Calma v Sesar* (1992) 106 FLR 446 and *Holtham v Arnold* (1986) 2 BMLR 123. In the latter case Hoffmann J acknowledged that the relationship between the deceased and his partner on one hand, and the deceased and his estranged wife and family on the other, was 'in the nature of things extremely difficult for an outsider to penetrate': at [125].

157 'Time acts as a secret third party in all of the issues that develop over disposal of bodies': Josias, above n 1, 1145.

158 Where the dispute relates to custody of the deceased's ashes, the time pressure is removed. However, it appears that judges are still reluctant for families to be embroiled in prolonged and emotionally damaging litigation, while fundamental notions such as respect for dead will ensure a speedy resolution: see below Part V(A).

159 Josias notes a 'great irony' in the fact that the rush to bury the body in such disputes often leads to the situation where the deceased's remains are placed somewhere for all eternity: above n 1, 1145.

160 Contrast this with decisions over the fate of the living, such as custody disputes involving children which can be revisited in the future and as family circumstances change.

161 [2007] WASC 82 (16 March 2007) [1].



the centrality of such factors to the actual dispute. The judicial tendency towards objectification of the dead and language of disassociation contrasts strongly with the deceased's relatives for whom the 'subjective, or subject-ness of the body is the driving focus: the deceased person is seen as family, not as a corpse'.<sup>162</sup> Meanwhile, the antagonistic nature of court proceedings is unavoidable yet extremely harmful, and, unlike other litigation where the key protagonists can avoid future contact, this is not always possible within families.<sup>163</sup> It has been suggested that the determination of burial disputes not only fails to consider the interests of all persons involved, but also results in a 'winner-take-all outcome and consequential damage to close relationships'.<sup>164</sup> While the court's decision should not be treated as affirmation that the 'victor' was closest to the deceased in life, or that he or she was the person who loved the deceased more (and vice versa), this is how it is likely to be interpreted. In this respect, the outcome of burial disputes can entrench existing familial divisions while inflicting permanent and irrevocable damage on future relations.<sup>165</sup>

It is important to bear in mind that, when resolving family burial disputes, judges cannot insist that the deceased's remains are dealt with in a particular way; quite simply, 'it is not within the power of the court to control the means of disposition'.<sup>166</sup> Instead, the judicial process only determines who gets custody of the deceased's remains, after which the successful party is free to make whatever funeral arrangements they choose.<sup>167</sup> There have been recent instances of judges departing from this strict legal framework and displacing the rights of those who would otherwise be the highest ranking next of kin, where the particular circumstances suggest that burial should be determined by someone else – often where that individual is seeking to uphold the wishes of the deceased<sup>168</sup> or the

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162 Croucher, above n 16, 325.

163 The 'animosity and adversarial current that drenches the traditional adjudicative model is especially poisonous in the burial dispute paradigm ... In most cases, the disputants are family members ... who will remain family members for a long time': Josias, above n 1, 1167.

164 Ibid 1166.

165 In some cases, judges do attempt to be conciliatory and have stressed that their decision should not be interpreted as 'taking sides.' For example, in *Hartshorne v Gardener* [2008] EWHC B3 (Ch) (14 March 2008), which involved a dispute between separated parents over the funeral arrangements for their adult son, Proudman J prefaced her judgment with the following comments: 'This is an exceptionally distressing and painful case ... Any decision will be hard to take for the losing party but I must make it absolutely clear at the outset that the decision I am making involves no criticism of either parent and no endorsement of any criticism that has been made on one side or the other in the course of the evidence': at [2].

166 *Privet v Vovk* [2003] NSWSC 1038 (7 November 2003) (Bryson J) [17]. Similar views were expressed by Patten J in *Scotching v Birch* [2008] EWHC 844 (Ch) (18 March 2008): 'The court has no power to direct what form anybody's funeral should take': at [7].

167 Even if they contravene the deceased's expressed wishes: see, eg, *Holtham v Arnold* (1986) 2 BMLR 123; *Privet v Vovk* [2003] NSWSC 1038 (7 November 2003).

168 See, eg, *Burrows v HM Coroner for Preston* [2008] EWHC 1387 (QB) (16 May 2008).

deceased's religious or cultural preferences.<sup>169</sup> For the most part though, the resolution of family burial disputes is a formulaic legal exercise which contrasts sharply with the familial outpouring of grief. However, this has not prevented judges from expressing strong views on these contests and the actions of the protagonists, as judicial emotions also come to the fore.

## V LAW AND THE PORTRAYAL OF JUDICIAL EMOTION IN BURIAL DISPUTES

A significant factor in burial disputes is the emotional reaction of outsiders,<sup>170</sup> which includes those who have to determine disputes of this nature. Of course, the formulation of a coherent and consistent theory of the proper role of emotion in judging is beyond the scope of this article.<sup>171</sup> Instead, this section highlights the use of inappropriate judicial emotion in burial disputes and its damaging effects, before going on to suggest how judges might respond to the parties' emotional outpourings in a more thoughtful and sensitive manner.

### A Dialogues of Dispassion and Disapproval: The Portrayal of 'Negative' Emotion

The traditional view, as described by Maroney and others,<sup>172</sup> is that emotional factors should play no part whatsoever in judicial reasoning. In contemporary Western jurisprudence, a 'good judge should feel no emotions; if she does, she should put them aside and insulate the decision-making process from their influence'.<sup>173</sup> Burial disputes are conflicts in which we might prefer judges to remain detached and impassive as they attempt to diffuse an emotionally volatile situation and impose some sense of order on the spiralling intra-familial chaos. There is a sense in which the legal framework for resolving such conflicts facilitates a non-expressive stance, since judges must embark on a formulaic and mechanical exercise when determining who gets custody of the deceased's remains. This in turn might prevent (or at least discourage) an ultimately futile outpouring of grief and sentiment by the deceased's family, while cementing the

169 See, eg, *Jones v Dodd* [1999] SASC 125 (1 April 1999) [60] (Perry J), though compare this with the more religiously and culturally sanitised approaches of the courts in *Calma v Sesar* (1992) 106 FLR 446; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Privet v Vovk* [2003] NSWSC 1038 (7 November 2003).

170 See above Part II(D).

171 See generally Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99 *California Law Review* 629; Richard Posner, 'Emotion versus Emotionalism in Law' in Susan A Bandes (ed), *The Passions of Law* (New York University Press, 1999) 309; Laura Little, 'Adjudication and Emotion' (2002) 3 *Florida Coastal Law Journal* 205.

172 Maroney, above n 171, 102–14 and the various sources cited therein.

173 *Ibid* 102. Note also the striking words of Thomas Hobbes that the ideal judge is a person 'divested of all fear, anger, hatred, love and compassion': Thomas Hobbes, *Leviathan* (Dutton, first published 1651, 1950 ed) 242. See also Dan Simon, 'A Psychological Model of Judicial Decision Making' (1998) 30 *Rutgers Law Journal* 1, 40.

judge's role as the embodiment of legal order.<sup>174</sup> As a result, judges can maintain some semblance of courtroom order and authority – as Dahlberg notes, 'where emotion stands for disorder and unreason ... law stands for order and reason'.<sup>175</sup>

Some of the judgments handed down in these cases are dispassionate in the sense that judges merely set out the bare facts before making an appropriate determination and familial or other sentiments play absolutely no part in the legal process.<sup>176</sup> Of course, Dahlberg might also suggest that judges are not only obliged to 'step back from the emotion and commotion of the proceedings',<sup>177</sup> but that such an approach 'constitutes a counter-mood rather than an emotionless state of mind'.<sup>178</sup> Thus, to cite such cases as examples of emotionless judging is to ignore the underlying rationale. Yet, in most instances judges are not simply impartial observers when adjudicating burial disputes. A number of judgments reveal a clear understanding of the plight of the deceased's family and what has driven the parties to litigation,<sup>179</sup> though such judicial empathy will not alter the outcome of the case, and the limited time for deliberation prevents the emotional and familial complexities of these disputes from being considered in any meaningful way. Much more striking, however, are the cases in which judges have expressed their own extremely negative views on being forced to determine the fate of the dead where feuding relatives cannot agree. Such strong feelings provide a fascinating insight into judicial (and arguably societal) attitudes towards family burial disputes.

The more disapproving judgments are characterised by what we might term a 'discourse of revulsion', whereby judges struggle to hide their disdain for

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174 See Terry A Maroney, 'Emotional Regulation and Judicial Behaviour' (Working Paper No 11–16, Vanderbilt University Law School Public Law and Legal Theory, 2011) 10 and the various sources cited therein.

175 Leif Dahlberg, 'Emotional Tropes in the Courtroom: On Representation of Affect and Emotion in Legal Court Proceedings' (2009) 3 *Law and Humanities* 175, 176. See also Mary Lay Schuster and Amy Proppen, 'Degrees of Emotion: Judicial Responses to Victim Impact Statements' (2010) 6 *Law, Culture and the Humanities* 75, 93 where the authors comment that 'excessive expressions of grief ... threaten judicial control of the courtroom or their neutral personae'.

176 See, eg, *Grandison v Nembhard* (1989) 4 BMLR 140; *R v Gwynedd County Council; Ex parte B* [1992] 3 All ER 316; *Escott v Brikha* [2000] NSWSC 458 (26 May 2000); *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch) (23 January 2006). However, in *R v Gwynedd County Council; Ex parte B* [1992] 3 All ER 317, Balcombe LJ at least acknowledged that 'underlying [the] argument were the human and emotional feelings of the parties, and I would not wish it to be thought that this court was ignorant of, or unsympathetic to, those feelings merely because they form no part of this judgment': at 320.

177 Dahlberg, above n 175, 204.

178 Ibid.

179 See, eg, *Joseph v Dunn* [2007] WASC 238 (20 September 2007), which involved a dispute between separated parents over the funeral arrangements for their eight year old son: 'The tragic circumstances of this case are only too apparent to everyone. I have the most profound respect and sympathy for both the plaintiff and the defendant who face the tragic situation of the sudden and unexplained death of their young son': at [2]. However the judge did go on to admonish the parties somewhat for their actions: at [24]. In *Hunter v Hunter* (1930) 65 OLR 586 McEvoy J described the proceedings as 'one of those unfortunate cases where honest sentiment and honest religious conviction have brought about an intensely sad struggle between two factions of a family': at 587. See also *Derwen v Ling* [2008] FamCA 644 (22 July 2008): 'This heart-rending tragedy affects everyone': at [7].

families who bring burial disputes before the courts, and admonish all concerned. For example, while recognising the anguish felt by parents fighting for custody of their dead infant son, Em Heenan J, in *Joseph v Dunn*, reprimanded both parties, stating that:

If ever there was an occasion when there should be peace among members of the community, and mutual respect and regard for all members of the family, it is on such an occasion as the important but sad funeral of a young boy.<sup>180</sup>

The decision in *Keller v Keller* provides a more vivid illustration. Here the plaintiff daughter wished to have her mother's remains cremated in accordance with what she argued were her mother's last wishes, while the defendant son demanded that the body be buried in accordance with traditional Jewish law and custom. Justice Hargrave began his judgment with the following comments:

[The deceased] ... died peacefully ... aged 81 years. The aftermath of her death has been anything but peaceful. A bitter and spiteful dispute between her two children has led to the wholly undesirable situation – disrespectful of the deceased and offensive to ordinary standards of common decency – that [the deceased's] ... body has yet to be disposed of, by burial or cremation.<sup>181</sup>

Justice Hargrave accepted that cultural and religious factors could be relevant where the deceased's attitude towards such issues was not in dispute. Failing that, the existing legal framework for resolving burial disputes should be applied, such an approach being:

consistent with the need to resolve issues such as this in a prompt fashion and in a fashion which does not descend into the unseemly airing of family disputes such as in this case.<sup>182</sup>

Repeated judicial references have been made to family contests such as these being 'unseemly',<sup>183</sup> while one judge went so far as to describe a fight for custody of the deceased's ashes between his family as 'all very sordid and unpleasant'.<sup>184</sup>

It is suggested that this overwhelming sense of revulsion is prompted by two things. First, when dealing with human remains,<sup>185</sup> the fact that the deceased's body must be placed 'on ice' or stored in some appropriate manner to prevent decomposition while relatives squabble over its fate seems inherently repulsive. While judges have stressed the need for urgency in resolving burial disputes, delays of several weeks from the date of death are not uncommon and it may

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180 *Joseph v Dunn* [2007] WASC 238 (20 September 2007) [24].

181 *Keller v Keller* (2007) 15 VR 667, 668 [1].

182 *Ibid* 670 [15].

183 See, eg, *Murdoch v Rhind* [1945] NZLR 425, 426 in which Northcroft J described the proceedings as being 'from every point of view ... very unseemly', sentiments which were echoed by Hale J in the English case of *Buchanan v Milton* [1999] 2 FLR 844, 854.

184 *Re Korda*, *The Times* (London), 23 April 1958 (Vaisey J).

185 As opposed to the deceased's ashes following cremation.

even be several months before a determination is made.<sup>186</sup> Secondly, there is a sense that the deceased's family are 'bad people' for fighting over this, since death is often perceived as something which should unite a family as opposed to dividing it, and close ties of kinship combined with the basic premise of respect for the dead should prevail. The fact that the various protagonists are usually only in court because each one loved the deceased in equal measure tends to be obscured by a disdain and contempt for what they are doing.<sup>187</sup> However, closely aligned with the discourse of revulsion is an element of judicial squeamishness towards family burial disputes – a sense in which judges are uncomfortable dealing with such cases and the issues which they raise. For example, in Byrne J in *Leeburn v Derndorfer*<sup>188</sup> described feelings of 'embarrassment at having to deal ... with bitter conflicts within families over the remains of a recently deceased relative or friend',<sup>189</sup> sentiments which were echoed by Hargrave J in *Keller v Keller* when referring to the 'difficulties and embarrassment' which such cases cause for judges.<sup>190</sup>

Such negative reactions are understandable, and are closely linked to the 'outsider' reactions to bereavement discussed earlier in this article.<sup>191</sup> Attitudes towards death are also characterised by an underlying sense of fear.<sup>192</sup> From a basic human level, judicial responses to family burial disputes are also more pronounced because death is the lot of us all; it is the one thing we cannot escape, and judicial mortality is as inevitable as that of other courtroom actors. In this respect, judges are influenced by their own feelings – this is not something which should happen within families, and they would be horrified if a similar dispute occurred within their own domestic sphere. As a result, such judgments can never be value-neutral. More importantly perhaps, there is a strong sense in which judges are reflecting social attitudes towards death and burial in the resolution of these disputes. It has been suggested elsewhere that judicial decision-making is premised on broader notions of societal obligation and associated constructs of moral reasoning.<sup>193</sup> The same theories apply to conflicts over the dead. As one author has remarked:

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186 See, eg, *Mourish v Wynne* [2009] WASC 85 (2 April 2009) which involved a delay of two months, and the dispute mentioned in Naguit, above n 147, in which a man's body lay in cold storage for 14 months while his two daughters fought for custody. However, compare this with the litigation which began as *Tkaczyk v Gallagher*, 222 A 2d 226 (Conn, 1965) in which the deceased's body remained frozen for five years while her family embarked on a course of litigation which eventually ended up before the United States Supreme Court.

187 Similar views have been expressed where the parties are fighting for custody of the deceased's ashes even though the dead person is no longer present in any human form: see, eg, *Re Korda*, *The Times* (London), 23 April 1958 (Vaisey J).

188 [2004] VSC 172 (4 June 2004).

189 *Ibid* [10].

190 (2007) 15 VR 667, 670 [15].

191 See above Part II(D).

192 'Of all the things that move men, one of the principal ones is his terror of death': Ernest Becker, *The Denial of Death* (Free Press, 1975) 11.

193 See Waldron, above n 155: 'judges ... [are not] deciding what to do as individuals. When they deliberate ... they are deciding what is to be done in the name of the whole society': at 7.

Judges beneath the juridical robes react more or less as do average citizens, and so it is not strange that some of this reverence has found a residuum in the decisions of the various courts concerning the rights in dead bodies. We are here concerned with a field of law wherein human emotions, sentiment and a feeling of morality are more apt to play an important part.<sup>194</sup>

Although the death of a family member is a 'typically private affair',<sup>195</sup> there is a public element which extends beyond the nature and function of the funeral ritual itself.<sup>196</sup> Individuals are expected to grieve for their dead, yet burial disputes provoke widespread feelings of disgust because they offend the fundamental concept of treating the dead with respect, while encouraging the airing of dirty linen in public. In chastising family members for quarrelling over funeral arrangements, judges are giving legal voice to what they believe society would find unseemly and offensive as well as reflecting an overwhelming sense of public unease with such disputes. For example, in the US case of *Burnett v Surratt*,<sup>197</sup> the Court stressed that:

Public policy and due regard for the public health, as well as the universal sense of propriety, require that dead bodies ... be decently cared for and disposed of at the very earliest moment ... The delay in the interment of dead bodies unnecessarily is repugnant to the sentiment of humanity and should not be permitted ...<sup>198</sup>

Likewise, Martin J in *Calma v Sesar* remarked that:

The conscience of the community would regard fights over the disposal of human remains such as this as unseemly. It requires that the Court resolve the argument in a practical way paying due regard to the need to have a dead body disposed of without unreasonable delay, but with all proper respect and decency.<sup>199</sup>

Of course, judicial (and societal) reactions are much less pronounced when families are fighting over the deceased's material wealth. Inheritance disputes are within the judicial 'comfort zone', and are deemed to be more acceptable, not least because the dispute centres on mere possessions and inanimate objects. There is infinitely greater scope for judges to appease the various parties by dividing wealth amongst them,<sup>200</sup> and it is much easier to maintain a sense of judicial detachment where the dispute centres on an individual's 'worldly goods' as opposed to human remains.

While undoubtedly constrained by the current legal framework for resolving burial disputes,<sup>201</sup> there is little evidence of judges actively seeking to engage in the wider issues surrounding them or the underlying motives. Public health concerns are important, yet the emphasis placed on this factor is misleading.

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194 Berman Swartz, 'Property – Nature of Rights in Dead Bodies – Right of Burial' (1939) 12 *Southern California Law Review* 435, 436.

195 Charmaz, above n 24, 13.

196 The fact that the internal dynamics of grief and family bereavement do not exist within an exclusively private sphere was discussed above in Part III(G).

197 67 SW 2d 1041 (Tex Civ App, 1934).

198 Ibid 1041.

199 (1992) 106 FLR 446, 452. See also *Warner v Levitt* (1994) 7 BPR 15,110.

200 Of course, this is not possible in disputes over human remains, although there are instances of courts splitting ashes in burial disputes: see below n 206.

201 See above Part IV.

There is no real legal or scientific impairment to a corpse being placed in cold storage in order to halt the inevitable process of decay and allow courts more time for reflection in burial disputes. However, this sense of judicial reticence could simply be a further example of judges reflecting what they believe society would be prepared to tolerate. The spectre of human remains being held in cold storage while relatives engage in an ugly legal battle and judges debate the relative merits of competing claims is something which most citizens would find distasteful. Once again, the fundamental precepts of respect for the dead and human dignity will prevail, as public decency considerations come to the fore. For example, in the English case of *Buchanan v Milton*<sup>202</sup> Hale J remarked:

courts should be slow to entertain proceedings such as these. Modern methods of refrigeration may make them possible but they are certainly unseemly. They delay the proper disposal of the body and the normal processes of grieving while bringing further grief in themselves.<sup>203</sup>

In a similar vein, Bryson J in *Privet v Vovk*<sup>204</sup> stated that:

it is the court's duty in the public interest to see to the decent disposal of human remains and to do so as early as may be possible, so as to avoid or minimise scandal and indecency associated with delay.<sup>205</sup>

Where a dispute centres on custody of the deceased's ashes, the public health element is removed though notions of respect and decency are still important.<sup>206</sup> This paves the way for greater reflection, yet both the judicial sentiments and final outcome are largely the same as in disputes over a corpse itself. While courts have occasionally ordered a division of ashes between feuding relatives,<sup>207</sup> custodial rights are usually awarded to the deceased's executor or next of kin according to the testate/intestate death distinction.<sup>208</sup>

In portraying such openly negative feelings in burial disputes, judges are influenced by their own perceptions of events, as well as public sentiment. This is hardly surprising; judging cannot take place in a vacuum, and those who engage in it are bound to be affected to some degree by the 'prejudices and

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202 [1999] 2 FLR 844.

203 Ibid 854.

204 [2003] NSWSC 1038 (7 November 2003) [6].

205 See also *Burnett v Surratt*, 67 SW 2d 1041, 1041 (Tex Civ App, 1934) in which the court remarked that 'delay in the interment of dead bodies ... is repugnant to the sentiment of humanity'.

206 See the comments of Byrne J in *Leeburn v Derndorfer* (2004) 14 VR 100, 107 [27]: 'ashes are, after all, the remains of a human being and for that reason they should be treated with appropriate respect and reverence.'

207 See, eg, *Stewart v Schwartz Brothers-Jeffer Memorial Chapel Inc*, 606 NYS 2d 965 (NY Sup Ct, 1993); *Leeburn v Derndorfer* (2004) 14 VR 100. However, contrast these decisions with *Doherty v Doherty* [2006] QSC 257 (16 August 2006), in which the court refused to divide the deceased's ashes on the basis this would be distressing for his wife and children and *Fessi v Whitmore* [1999] 1 FLR 767, where a proposal to split the ashes of a 12 year old child between its parents was described as 'wholly inappropriate': at 770.

208 See the cases cited at above n 148. However, a number of Australian states and territories have enacted legislation stipulating who is entitled to custody of the deceased's ashes following cremation: see generally Queensland Law Reform Commission, above n 13, 58–62.

passions of common humanity'.<sup>209</sup> However, the issue is not *whether* judicial emotion has a role to play in burial disputes – since judges are human and emotions are human, we cannot simply insist that they put their feelings aside.<sup>210</sup> Instead, the question which needs to be addressed is that of *how* judges should respond to and articulate emotion in conflicts of this nature.

### **B Framing an 'Appropriate' Emotional Response: The Need for Expressive Empathy?**

The traditional notion that judging is or ought to be an 'emotion-free zone' has come under increasing challenge in recent years.<sup>211</sup> This is partly in response to the growing recognition by philosophers and psychologists alike of the close relationship between cognition and emotion.<sup>212</sup> Emotions are no longer necessarily seen, in the words of Martha Nussbaum, as mere 'animal energies or impulses that have no connection with our thoughts, imaginings, and appraisals', but rather as 'intelligent responses to the perception of value'.<sup>213</sup> As she goes on to say:

If emotions are suffused with intelligence and discernment, and if they contain in themselves an awareness of value or importance, they cannot, for example, easily be sidelined in accounts of ethical judgment ... Instead of viewing morality as a system of principles to be grasped by the detached intellect, and emotions as motivations that either support or subvert our choice to act according to principle, we will have to consider emotions as part and parcel of the system of ethical reasoning. We cannot plausibly omit them, once we acknowledge that emotions include in their content judgments that can be true or false, and good or bad guides to ethical choice. We will have to grapple with the messy material of grief and love, anger and fear, and the role these tumultuous experiences play in thought about the good and the just.<sup>214</sup>

If this is so, Abrams and Keren are right in arguing that emotions have a vital role in judicial thought and should not just be viewed as a challenge to legal rationality because:

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209 Charles Grove Haines, 'General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges' (1922) 17 *Illinois Law Review* 96, 115 quoted in Maroney, above n 171, 654.

210 Maroney, above n 174, 50–70.

211 *Ibid.*

212 There is a vast literature relating to this, and it would take many pages even to list the main examples, but see Robert M Gordon, 'Emotions and Knowledge' (1969) 66 *Journal of Philosophy* 408; William Lyons, *Emotion* (Cambridge University Press, 1980); John Deigh, 'Cognitivism in the Theory of Emotions' (1994) 104 *Ethics* 824; Ronald Alan Nash, 'Cognitive Theories of Emotion' (1989) 23 *Noûs* 481; Martha Craven Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2001); Robert C Solomon, *Not Passion's Slave: Emotions and Choice* (Oxford University Press, 2002).

213 Nussbaum, above n 212, 1.

214 *Ibid.* 1–2.



emotions already infuse decisionmaking whether or not they are recognized by legal actors ... Legal decisionmaking is [also] enriched and refined by the operation of emotions because they direct attention to particular dimensions of a case, or shape decisionmakers' ability to understand the perspective of, or the stakes of a decision for, a particular party.<sup>215</sup>

In short, judges will often portray emotion in both judgments and legal language, and this can have benefits for all concerned. Of course, the latter observation depends on the types of emotion being expressed – something which is of vital importance in family conflicts surrounding the fate of the dead.

There is little doubt that judges are reacting emotionally when expressing negative sentiments in burial conflicts. However, it is important to note that this poses no threat to the outcome of the case or associated process of judicial reasoning; the legal framework for resolving burial disputes ensures 'rational' decision-making.<sup>216</sup> Of course, there is a curious paradox here, in that judges could avoid expressing any emotion in such disputes by focusing solely on this legal framework, yet feel compelled to wear their emotional hearts on their judicial sleeves by such overt displays of negative emotion. To some extent, this is understandable since judges are reflecting their own personal (as well as societal) views on burial disputes, which may be amplified when set against a backdrop of intra-familial disorder that prevents the proper disposal of the dead. However, while perhaps excusable to some degree (judges cannot simply put their feelings to one side), the more fundamental question is whether such strong outpourings of emotion are justifiable. Is it correct for judges to brand family burial disputes as 'unseemly', 'disrespectful', 'embarrassing' and 'unpleasant', to list but of a few of the adjectives used?

As Maroney and others have stressed,<sup>217</sup> we must expect judges to react emotionally and it is not necessarily wrong that they should. Yet while emotional judging is not in itself a bad thing, much depends on the emotions being expressed and whether or not these are appropriate. The negative emotions which feature in many burial dispute judgments cannot be classed as fitting or proper. Although these sentiments are extraneous to the decision itself and have no distorting effect on the final outcome, they are both inappropriate and unhelpful in many respects. Judges are expressing feelings of disgust, discomfort and revulsion towards members of the deceased's family when deciding the fate of the body; in doing so, they are making a public statement of condemnation as incidental to the decision-making process. This is likely to have an adverse impact on an already difficult family situation, while the very fact that the parties are engaged in litigation may deny them the community support network which

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215 Abrams and Keren, above n 14, 2004 and the various sources cited therein.

216 The contrast between situations in which a judge is reacting emotionally or simply making a judgment in emotional terms is important, since the former poses a potential threat to rational decision-making in a way that the latter does not. This distinction is brought out well by Nussbaum when she proposes that a judge should be an 'impartial spectator', sensitive to the emotional aspects of the case but not becoming personally involved in it: Martha C Nussbaum, 'Emotion in the Language of Judging' (1996) 70 *St John's Law Review* 23, 28–9, cited in Maroney, above n 171, 644.

217 See above n 210.

is an integral part of most funerary rituals<sup>218</sup> – members of the community at large are likely to react in a way which reflects a societal dislike of such conflicts. The latter stance may be an inevitable consequence of families litigating the fate of their dead, but how should judges react when confronted with these situations?

Given that burial disputes are suffused with emotion, it would be foolish to argue that dispassionate judging is the way forward. Even if judges were able to switch off their feelings (which we suggest would be impossible), an emotionless judgment which is nothing more than a mechanical application of the rules would not benefit the deceased's family beyond answering the basic question of who gets custody of the remains for the purposes of burial. Dahlberg, for example, has cautioned against the 'danger that the dispassionate voice of law does not appear to the parties as the voice of a human law' but as a 'faceless legal discourse'<sup>219</sup> – a comment which we suggest is particularly relevant in the burial dispute context. Instead, when tasked with resolving these disputes, judges should recognise the emotional aspects of the task at hand. This involves more than simply acknowledging what has driven the parties to litigation (though this might be a useful starting point); instead, judges must be mindful of the emotions which they are projecting and the consequences of those emotions for the deceased's family. In short, judges need to cultivate an appropriate emotional response, and to resist an innate temptation to rebuke and chastise families through such negative sentiments.

Most burial disputes are driven by the fact that each individual or side of the family feels a strong emotional attachment to the deceased and has a fervent belief that they are doing the right thing.<sup>220</sup> Of course, such views are often clouded by grief and its natural by-products, where individuals are consumed by feelings of anger, loss, hostility and a desire to apportion blame.<sup>221</sup> Yet this volatile emotional matrix is often disregarded by courts, as is the fact that overt displays of negative judicial emotion will exacerbate the destructive feelings which have already been generated amongst members of the deceased's family. Conflicts fuelled, for example, by underlying motives of sibling or parental rivalry, religious or cultural sentiments, or notions of 'reclaiming' the deceased (to name but a few), will probably be aggravated by such strong judicial pronouncements even if the court also addresses the basic question of who is entitled to custody of the deceased's remains. Instead of pouring judicial oil on troubled family waters, negative sentiments are liable to inflict even more emotional harm on the parties while causing permanent and irreversible damage to fractured kinship networks. By focusing on the 'scandal' and 'indecent'

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218 See above Part II(B).

219 Dahlberg, above n 175, 205.

220 Of course, situations do arise in which the motives of certain parties are at best 'questionable': see, eg, *Betty Brannam v Edward Robeson Funeral Home* (NY Sup Ct, No 43141/96, 14 November 1996); *Burnes v Richards* (1993) 7 BPR 15,104; *Maurer v Thibeault*, 860 NYS 2d 895 (NY Sup Ct, 2008) discussed in Part III above.

221 See above Part II.

surrounding such disputes, judges are ignoring their own obligations towards the parties and in particular the consequences of ‘attacking’ family members in this way.

Judges should bear in mind that the resolution of burial disputes serves a function beyond determining the fate of the deceased’s physical remains. There is the question of how the family functions afterwards; its members may still have to interact with each other at some level in the future, and judges are in a position to influence this by channelling appropriate emotions through their judgments. At a more fundamental level, there is also the issue of what impact negative judicial emotion might have on the grieving process itself. It was noted at the beginning of this article that grief is a process with certain key stages, as the bereaved confront death’s emotions and try to come to terms with their loss before eventually reintegrating with society.<sup>222</sup> However, grief is not just about the individual who has suffered the death of a loved one; it involves the family as that person’s immediate social network.<sup>223</sup> It has already been noted that the healing function of the funeral is severely diminished in family burial disputes given the adversarial nature of the process.<sup>224</sup> Where the judicial resolution of such disputes actively condemns the parties for what they have done, the outcome is potentially much worse. A channelling of negative sentiment not only fuels the natural grief emotions which we have already mentioned; it also impedes the normal grieving process as familial harmony and reintegration become increasingly elusive, individuals are marginalised, and the aftermath is one of open (and publicly acknowledged) bitterness and resentment. Such outcomes may be unavoidable in the most bitterly contested burial disputes, and regardless of judicial attitudes towards the litigation. Yet a judicial responsibility exists to understand the harmful consequences of their own comments on both the individual and the familial grieving process, and to refrain from uttering negative sentiments in all but the most exceptional of burial dispute cases.<sup>225</sup>

The emphasis in such disputes should be on expressive empathy with judges recognising what has prompted the litigation, the sense of grievance and legitimately held beliefs on each side, as well as the ties of affection which existed between the respective parties and the deceased. We are not suggesting that judges should attempt to unravel complex family histories and hear vast swathes of evidence about the state of intra-familial relationships; this would simply not be possible in the limited time available, and would be of no real

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222 See above Part II(A).

223 See above Part II(C).

224 See above Part II(B).

225 One such example is *Boyd v Gwyn*, 6 Pa D & C 275 (Pa Com Pl, 1925). Here the deceased’s adult sons who had not spoken to their father for 20 years wished to inter his ashes in a Philadelphia cemetery where the deceased had no natural allegiance, against the wishes of his daughter who had cared for her father for the last 17 years of his life and wanted to inter the remains in a cemetery in his childhood home of Nashville, next to the deceased’s parents. In these circumstances, it is hardly surprising that the court was highly critical of the sons’ behaviour, describing them as ‘vengeful and unworthy’ and motivated by a ‘burning desire to wreak a posthumous vengeance upon [their father] by preventing his ashes from resting peacefully beside his parents and among his own people’: at 277–8.

benefit to anyone. The point has already been made that the current legal framework has certain benefits for both judges and the families of the dead in terms of avoiding a lengthy and protracted analysis of the underlying circumstances and sentiments of these conflicts.<sup>226</sup> Indeed, it is argued by Posner that judicial empathy, as properly conceived, demands a certain degree of emotional detachment by the judge, so as to allow consideration for the interests of all of those who may be affected by the decision.<sup>227</sup> While infusing the decision-making process with some measure of empathy would not alter the legal outcome, judges could at least ensure that minimal damage is inflicted on the protagonists and the wider family circle during what is already an emotionally difficult period and that each individual feels that their views are being heard. Of courses, judges have at times been more empathetic, acknowledging the ‘tragic circumstances’ and ‘heart-rending tragedy’ of such ‘unfortunate’ conflicts.<sup>228</sup> There have also been conscious attempts to stress that the outcome of a particular case should not be viewed as a passing of judgment on the quality of relationships between the respective parties and the deceased.<sup>229</sup> By behaving in a manner which might bring some degree of comfort to the living, judges may also be able to encourage reconciliation within families that have been torn apart by burial disputes.

In short, judges should be aware of the insights of therapeutic jurisprudence when resolving conflicts of this nature.<sup>230</sup> The key contribution of the therapeutic jurisprudence movement over the last 20 years has been its insight into the extent to which, in the words of Bruce Winick, legal rules and procedures and the roles of legal actors constitute social forces that, whether intended or not, can often produce therapeutic or anti-therapeutic consequences.<sup>231</sup> What therapeutic jurisprudence does is therefore use the insights of social science to examine the impact of the law on the mental and physical health of the people it affects, and to take these findings into account in the context of law reform and in the practice of the law generally.<sup>232</sup> The relevance of this to the present context is obvious. The human side of the law is an important aspect of family burial disputes and should at least be factored into the judging process. This need not, as some suggest, involve any sacrifice of the values of due process and judicial

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226 See above Part IV.

227 Posner, above n 171.

228 See, eg, above n 179.

229 See above Part IV.

230 See generally David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); Bruce J Winick and David B Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003).

231 Bruce J Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (1997) 3 *Psychology, Public Policy and Law* 184, 185.

232 Ibid 187. Originally this was done in the context of mental health law, but the same insights have now been used over a wider field, including criminal law, accident compensation, evidence and the law of succession. The field of literature is a vast one, but for a general introduction see David B Wexler, ‘Therapeutic Jurisprudence: An Overview’ (2000) 17 *Thomas M Cooley Law Review* 125.

impartiality,<sup>233</sup> still less the substitution of ‘therapy’ for a reasoned decision.<sup>234</sup> All that is asked is that, *other things being equal*,<sup>235</sup> it is better for a judge to take the emotional aspects of the case into account than to ignore them. In applying the law in such a manner, judges could achieve a positive and ultimately more beneficial effect on the emotional life and psychological well-being of the persons affected by such disputes. Thus the exercise of judicial empathy can be used to help both individuals and families, and may prevent an emotionally bad situation from becoming irretrievably worse. In the words of the old song, ‘[i]t ain’t what you do, it’s the way that you do it; that’s what gets results!’

## VI CONCLUSION

[T]here is nothing that touches more intimately the feelings and sensibilities of people than controversies relating to the disposal and control of the remains of their dead. And such methods should be adopted in dealing with these unfortunate disputes as are best calculated to reach just and equitable results, and to inflict the least trouble and distress upon the parties.<sup>236</sup>

At the end of the day, the key to all of this is surely what is now called ‘emotional intelligence’.<sup>237</sup> This is said to comprise not only knowing and managing one’s own emotions, but also recognising and dealing with emotions in others.<sup>238</sup> As we have seen, death and burial are compelling and emotive subjects which arouse strong feelings, something which is all too apparent in family burial disputes. Set against a backdrop of time constraints, inter-familial turmoil and emotional volatility, such conflicts are a destructive force within families as well as being a difficult and distressing subject for courts to deal with.

The purpose of this paper has been to look more closely at the emotional factors surrounding burial disputes, and at the way in which the courts respond to them. Our argument has been that proper awareness of these factors would help judges to respond to them in an appropriate way, and thus to reach better decisions not just in terms of damage limitation for all concerned but as a means of encouraging reconciliation and healing within families. In this context the emotional approach of the judge is of crucial importance. Though the emotions surrounding burial disputes can sometimes create barriers of understanding between the judge and the parties involved, the answer does not lie in trying to

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233 Arthur G Christean, *Therapeutic Jurisprudence: Embracing a Tainted Ideal* (January 2002) Sutherland Institute <<http://psychrights.org/articles/TherapeuticJurisprudenceTaintedIdeal.htm>>. See also Christopher Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ (1995) 1 *Psychology, Public Policy and Law* 193.

234 Astrid Birgden, ‘Crime-Prevention Jurisprudence? A Response to Andrews and Dowden’ (2009) 51 *Canadian Journal of Criminology and Criminal Justice* 93, 100.

235 Winick, above n 230, 188 (emphasis in original).

236 *Lavigne v Wilkinson*, 116 A 32, 33 (NH, 1921) (Plummer J), quoted in Josias, above n 1, 1163.

237 Daniel Goleman, *Emotional Intelligence* (Bloomsbury, 1996).

238 *Ibid* 43–4; Peter Salovey and John D Mayer, ‘Emotional Intelligence’ (1990) 9 *Imagination, Cognition and Personality* 185. The classic story of the judgment of Solomon in 1 Kings 3:16–28 is an excellent example of emotional intelligence in the judicial context.

adopt a cold and emotionless approach to the issues, while negative judging only adds to the sense of personal and familial tragedy associated with burial disputes. On the contrary, dealing with cases of this sort requires empathy and emotional intelligence of a very high degree. An emotional judge is not necessarily a bad judge; it all depends on the manner in which he or she is emotional. All in all, cases involving burial disputes could be said to provide a textbook illustration of the proper role of emotion in judging, though that is a matter beyond the scope of the present article.

The outcome of the burial dispute in *Antigone* is a grim one. Antigone is condemned to death by starvation. King Creon is then persuaded to reprieve her, but it is all too late; by the time the message gets through, she has hanged herself. Creon's son Haemon, who was betrothed to Antigone, then kills himself after spitting in his father's face. On hearing the news of Haemon's death his mother, Queen Eurydice, also commits suicide, but not before cursing her husband Creon for the deaths he has brought about. At the end of the play Creon is left in total despair. Very often in Greek tragedy a god or goddess appears – the *deus ex machina* – to sort things out, but there is no *deus ex machina* in *Antigone*. Instead, the Chorus leave the stage declaring that true happiness lies in wisdom, and that is all we get.

The sort of burial disputes we have been describing may not have such dire consequences, but the emotional conflicts they throw up are no less complex and challenging. Such cases cannot be dealt with by a mechanical application of black letter rules, any more than by Hobbes's ideal judge 'divested of all fear, anger, hatred, love and compassion'.<sup>239</sup> One of the first challenges to this grim paradigm came from Karl Llewellyn and the American Realists, for whom it has been said that the primary function of jurisprudence was to serve as a conduit, and to 'channel into the intellectual milieu of the law, concepts, techniques, insights and information from neighbouring fields'.<sup>240</sup> Of Llewellyn himself it has been said that his most important characteristic was his empathy, 'a Protean quality, which enabled him to project himself imaginatively into the position of other people and to assimilate and work with the atmosphere and values of his immediate milieu'.<sup>241</sup> It is to be hoped that this paper will steer the courts away from the approach identified in the first of these quotations, and that in the light of the exercise set out in the second they may seek to emulate the values of the third.

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239 See Hobbes, above n 173.

240 William L Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson, 1973) 387.

241 *Ibid* x.