

**IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY**

**CIV-2014-409-000447  
[2017] NZHC 338**

BETWEEN CHEYENNE RANA BIDDLE  
Plaintiff

AND BRUCE POOLEY, CHARLOTTE  
POOLEY, DANIEL POOLEY and  
FRANCES POOLEY  
First Defendants

AND CHRISTCHURCH CITY COUNCIL  
Second Defendant

Hearing: 31 October - 2 November 2016

Appearances: P N Allan for the Plaintiff  
G P Tyrrell for the First Defendants  
P L Leeming for the Second Defendants

Judgment: 6 March 2017

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**JUDGMENT OF NATION J**

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**The issues**

[1] A young man, who identified strongly with his Ngāti Porou whakapapa, died suddenly and in tragic circumstances at the age of just 26. He was survived by his three young children, his partner who is the mother of his two younger children, his parents, a brother and a sister. His family had to deal with the immediate demands of his death.

[2] From the hospital and then the funeral home, his body was brought back to his parents' home. His casket was carried into the home from the hearse with the appropriate karanga under the oversight of Ngāti Porou elders, a kuia and a koroua. His body and casket lay at his parents' home for people to be with him and to pay their respects as on any marae.

[3] After a funeral service, his body was laid to rest in its casket and buried within the Māori section of a Council cemetery in the city where all his family, including his partner, still live. They have all often visited the grave.

[4] Two years after his death, his partner told his family, through a letter from her lawyer, it was important to her that his body be exhumed so that his remains could be disposed of in a manner more in keeping with his wishes and her own.

[5] Approximately three years after his death, his partner began proceedings in the High Court against his parents, brother and sister as defendants asking the Court for judgment for orders requiring the exhumation of the deceased's remains.

[6] Approximately a year later, on a without notice application, his partner was appointed administrator of the deceased's estate.

[7] Some five and a half years after his death, I must decide whether his remains should be disturbed in this way.

[8] As a boy aged about nine, the deceased was one of the best in his class or wānanga at using the taiaha. In recognition of this, the young man was given an intricately carved taiaha by a Ngāti Porou elder. While at school, he carved another taiaha and tewhatewha.<sup>1</sup> All in the family accept that these items have always been taonga. In the intervening years of his life, regardless of where he lived, these taonga were displayed in a special place in his parents' home. They were there at the time of his death and remain there still.

[9] At the same time as she asked for his body to be exhumed, his partner asked for these items to be returned to her. In these proceedings she seeks an order that the items be put under her control. His parents say that it is for them, as guardians of the taonga, to decide what should happen to them.

[10] What orders can or should this Court make as to the future of these taonga?

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<sup>1</sup> A long wooden weapon with a flat section at one end like an axe.

## **An observation**

[11] The hearing of this trial concluded on 2 November 2016. Both during the hearing and afterwards, I urged the parties to try and resolve these issues by agreement and, if necessary, through mediation.

[12] I also noted the plaintiff was not present in Court when the sexton gave detailed evidence as to just what would be involved in the exhumation of the deceased's body. I considered it unfortunate that she was not present when counsel presented their final submissions. She did not thus have the benefit of hearing the discussion which then took place between myself and counsel as to the merits of the arguments which were being presented. Had she been present, that may have assisted her in making decisions required of her as the administrator of the deceased's estate.

[13] Unfortunately, it appears there is no prospect of the parties resolving the issues by agreement. It is thus necessary for me to address the issues referred to in this judgment.

## **Exhumation**

### *Background*

[14] The deceased, Jamie Robert Pooley (Jamie), was born on 9 August 1983. His parents were Charlotte Pooley (Mrs Pooley) and Bruce Pooley (Mr Pooley). His older brother is Daniel Pooley (Daniel) and the eldest child in the family is Frances Pooley (Frances).<sup>2</sup>

[15] For most of his life, Jamie must have been an impressive young man. The photograph which accompanies the taiaha and tewhatewha shows him wearing the uniform of a New Zealand under-18 rugby league representative. As a young man, he began a relationship with Charmaine Shaw (Charmaine). He and Charmaine are the parents of his eldest son Tuhaka David Pooley (Tuhaka) born on 28 March 2002.

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<sup>2</sup> I am using the names for this generation that are used within the family and to make this judgment easier to read, not because I am intending to show any lesser respect for any of these people or the others I refer to by their first names.

Jamie and Charmaine raised Tuhaka, together with the support of Jamie's family, in Christchurch and later for a time with the help of Charmaine's relatives in Hamilton. Jamie and Charmaine separated when Tuhaka was about 18 months old. However, both remained involved in Tuhaka's care with Tuhaka spending time with Jamie and Jamie's new partner on a regular basis.

[16] In 2005, Jamie began a new relationship with the plaintiff in these proceedings, Cheyenne Rana Biddle (Cheyenne). Cheyenne is also Ngāti Porou but members of her family, including her mother (Mrs Biddle), were living in Christchurch at the time of Jamie's death.

[17] Jamie clearly grew up within a close family. Before he was born, his parents had their home in Mairehau, the home to which Jamie's body was taken after he died. It was where Jamie lived as he grew up.

[18] His mother, Mrs Pooley, identified strongly with the Ohinewaiapu Marae from where her family came, at Rangitukia, north of Gisborne. It was in that place where, in accordance with customary practice, the remnants of each of her babies' umbilical cords (pito) were placed in a tree, beneath which Mrs Pooley's own placenta had been buried. That, in itself, is a way of ensuring that that place can always be a home to those children.

[19] Mr Pooley is Ngāti Apa from Whanganui. He was, however, brought up in the Pākehā way and was much less aware of Māori culture and practices than Mrs Pooley. When the children were growing up, it was to Rangitukia and Mrs Pooley's whānau there that the whole family went regularly for holidays. It must have been a place special to Jamie as it was and is to others in his family.

[20] Cheyenne's family connection was with a different marae, Manutuke, closer to Gisborne. Both Jamie and Cheyenne identified strongly with their Ngāti Porou heritage and respect for tikanga. Obviously with the support and encouragement of his parents, particularly his mother, Jamie demonstrated this from an early age with the commitment he showed to learning and becoming skilful at the wielding of the taiaha. He also demonstrated it through the respect he required his family to accord

the taiaha and tewhatewha, with them not to be touched by any female and with no food to be eaten near them. Those items were displayed within the family home in a way which respected those protocols.

[21] Jamie and Cheyenne had two children. They were aged two years and six months respectively at the time of Jamie's death.

[22] In her evidence as briefed, Cheyenne said there were ups and downs in their relationship but they were trying to work their way through them. She said that not long before Jamie's death she had made a complaint to the police that led to Jamie facing a charge.

[23] It was not necessary or appropriate for any of the parties to have used these proceedings as an opportunity to speculate as to the background or reasons for Jamie taking his own life, an event which was a tragedy for everyone. Indeed, to have done so would have intensified the damage done to family relationships which, as could have been expected, has already been a consequence of these proceedings.

[24] Nevertheless, for the Court to understand how people acted as they did in the immediate aftermath of this tragedy, I did need to know something of the context in which it occurred. Plainly, there had been major challenges for Jamie and Cheyenne in their relationship in the months, and perhaps longer, before his death. The complaint which Cheyenne had made to the police was of a serious criminal offence. It led to his being bailed on a condition that he was to have no contact with Cheyenne. Through cross-examination, Cheyenne's counsel, Mr Allan, sought to emphasise the hurtful comment which Frances had already acknowledged she had made to Cheyenne on seeing her at Cheyenne's home where many family members had gone on hearing of the tragedy that had occurred there. Frances explained that one of the reasons for her comment was the distress which Jamie had conveyed to her at Cheyenne's absences from the family home and his not knowing or understanding where she had gone. But, consistent with the decision which he ultimately made, Jamie was not well for a significant time before his death. He suffered from depression. He was having serious difficulties with the way he used alcohol. He was not employed at the time of his death.

[25] Despite the tensions that must have existed with all the problems they were facing, Jamie and Cheyenne's relationship was nevertheless continuing. Despite the bail conditions, Cheyenne continued to be with Jamie, presumably also with the young children at Mrs Biddle's home where Jamie was initially staying. When bail conditions were changed so Jamie had to live at his parents' home, Cheyenne and their two youngest children went to stay with him there. This was for about a month. Mrs Pooley said she had not known of Jamie originally having to go to the police station.

[26] A few days before his death, the bail conditions had been varied and Cheyenne, Jamie and their two youngest children were able to return to their own home.

[27] Obviously the difficulties and challenges which Cheyenne and Jamie faced did not suddenly disappear. Cheyenne said in her evidence that she was not at their home on the morning of 14 May 2011 when Jamie had contacted her making statements that caused her to be gravely concerned as to what he might do. She contacted her mother and asked her to go to the home. Mrs Biddle did so but it was too late.

[28] At around 9.30 am on 14 May 2011, Jamie and Charmaine's son, Tuhaka, discovered his father's body. He wanted to make sure his little half-brothers did not see what he discovered. Tuhaka telephoned Jamie's parents. He told his grandmother that Jamie was dead. He told his mother.

*Did Cheyenne have no say in the decisions that were made as to what should happen to Jamie after his death?*

[29] In an affidavit filed with the Court just a short time before the hearing, Cheyenne's mother said "Chey and our family were not involved at all" in the Pooley family's discussions after Jamie's death. In Cheyenne's affidavit of 7 June 2016, she said she was "excluded from all decisions regarding the deceased" following the embalming process and her dressing of Jamie's lower half for burial. In a further affidavit, Cheyenne said she "had no voice" and that "from the moment

of Jamie's death, his family had taken over with no thought towards me and our family".<sup>3</sup>

[30] It was apparent from the straightforward but nevertheless thoughtful way Mrs Pooley responded to propositions put to her by Cheyenne's counsel, Mr Allan, that she accepted she had decided it would be appropriate to use Geoffrey Hall Funeral Services Limited, Rangiora. She accepted that she had decided Jamie's body and casket should be brought back to the family home as the marae or meeting place in which whānau and people could gather to pay their respects and his body could lie "in state" before the funeral. She accepted she had wanted to involve the priest from the church with which Jamie had an association, Te Rangimarie.

[31] It was necessary for someone appropriate to make a decision as to which funeral home would be used in the immediate aftermath of Jamie's death. The police involved a kaumātua. He spoke to Mrs Pooley at Jamie's home. Cheyenne may well not have been approached by the police kaumātua at that stage. That would not have been surprising, given that the police would have known Jamie was facing a charge following a complaint made by Cheyenne.

[32] In accordance with tikanga, it was appropriate for Jamie's parents to be responsible for such arrangements that had to be made, although it would also have been normal for the arrangements to be discussed within the whānau so that decisions could be reached by consensus.

[33] Mrs Alamein Connell, a kuia, gave evidence as an expert as to relevant tikanga protocols. So too did Mrs Ira Harpeti Mahuika. She is Ngai Tahu, has a BA in Māori and education and lectured at the University of Canterbury in Māori from 2011 for two years. Both these people said that, where parents are alive when one of their children died, it would be the parents who would ultimately have authority to make the required decisions.

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<sup>3</sup> Although these were originating proceedings begun with a statement of claim, the evidence for the plaintiff was filed with the Court as an affidavit but then read in the ordinary way at trial as if a brief of evidence.

[34] Cheyenne accepted that, in accordance with tikanga, his parents would have had the ultimate authority in priority to his partner in terms of the decisions which had to be made.

[35] Mr Pooley was content to defer to his wife to make the decisions. He said, in the time following Jamie's death, he simply wanted to provide comfort for his wife. Also, he did not himself know just how things should be done according to tikanga. He said that in his family it was Mrs Pooley who made the big decisions.

[36] The police kaumātua mentioned the name of a particular funeral home to Mrs Pooley but she said she wanted to use Geoffrey Hall Funeral Services. There was no evidence that she discussed this choice with anyone other than the police kaumātua.

[37] Given the circumstances, I do not consider there was anything insensitive, unreasonable or wrong about the way Hall Funeral Services came to be engaged as the undertakers. All the family were fortunate that, despite what must have been her grief, Mrs Pooley was able to discuss this with the police kaumātua and made a choice. There was no criticism or controversy as to the choice she made at any time afterwards. At no point has there been any criticism of the way the undertaker dealt with Jamie's body or any of the family, including Cheyenne.

[38] Jamie's body had to be taken to Christchurch Hospital. Because of his sudden death, the coroner required that an autopsy be performed. The family, including Cheyenne, gathered at the Pooley home where they waited until they were permitted to see Jamie at the hospital. Cheyenne said in her affidavit that the family made her wait at the hospital until the rest of the family was ready to see Jamie's body.

[39] A neighbour, who had a van, drove the family to the hospital. Cheyenne was with them. In a way which was consistent with other evidence I heard, how the family came together to deal with their tragedy, despite what must have been conflicting emotions, grief and shock, Frances sat in the van next to Cheyenne. Frances recalled how they held hands on the way to the hospital. There, everyone had to wait until they were told the hospital was ready for them to see Jamie. Even



then, because an autopsy was required, they were permitted to touch only his hair and hands. There was no evidence that priority was given to any particular family members. I find that, however Cheyenne may perceive this now, they all shared in that opportunity, such as it was.

[40] Jamie's death had occurred on Saturday morning. Jamie's body could not be released from the hospital to the funeral home until Sunday because a pathologist had to come down from Wellington to carry out the autopsy. Throughout this time, his parents' home was the place for people to gather and no doubt offer support and sympathy for each other. Cheyenne was included in this.

[41] Over that time, Frances asked Cheyenne if she had suitable clothes for Jamie to be dressed in. She did not. Frances offered to and did buy clothes for him to be dressed in. Frances said that, after she had bought the clothes she thought were suitable, she hung them up, showed them to Cheyenne and asked if she was happy with the choices she had made. She said, as I accept was true, had there been any suggestion that they were not acceptable, she would have bought other clothes. Cheyenne was content with the choices Frances made.

[42] It was also not surprising and objectively reasonable that, after opportunity for discussion, it was decided Jamie would be buried in the Council cemetery at Christchurch. Mrs Pooley had a strong desire for her son to be buried in Christchurch. Her desire was, to a significant extent, emotionally driven. She wanted him nearby so she could grieve for him. It was also an objectively reasonable decision with Jamie's immediate family being in Christchurch and his unexpected death having occurred when he was so young and in such tragic circumstances. It was understandable that his family would want him to be buried near where they were living. Apart from such discussions Jamie had with Cheyenne, he had not conveyed to anyone in his immediate family how he wished for his remains to be dealt with. In contrast to the *Takamore* case, there was no suggestion before me that people from Rangitukia wanted Jamie's remains to be returned to that area or that, in all the circumstances, this would be appropriate.<sup>4</sup>

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<sup>4</sup> *Takamore v Clarke* [2012] NZSC 116; [2013] 2 NZLR 733.

[43] On Sunday afternoon, they were able to go to the funeral home to be with Jamie. Frances, Daniel and Cheyenne all went to the home. Again, they had to wait for some hours before they could see Jamie, probably because the embalmers were still preparing Jamie's body for them to see. Frances recalled it as a time where they sat together quietly, each preparing the notices they wished to put in the newspaper. Frances said they would pay for the notice which Cheyenne wished to put in the newspaper.

[44] When Jamie was ready, Cheyenne said she wished to go in and dress the lower half of Jamie's body. Frances and Daniel agreed that this was appropriate. Cheyenne did this before they went in and dressed his upper body.

[45] Jamie was then taken back in his casket to the Pooley home at Mairehau in the hearse. Frances, Daniel and Cheyenne all wanted to be with Jamie but only two of them could travel in the hearse. In evidence, Cheyenne said there was no way that she was not going to be one of them but there was no issue or controversy over this. Frances travelled in a car immediately following the hearse. Daniel and Cheyenne were in the hearse.

[46] At some point over this time, the funeral director came to the Pooley home to discuss the arrangements that would be made for Jamie's funeral. The funeral director had to know what sort of service there might be and what was to happen to Jamie's remains. Despite the numbers of people visiting, the family were able to have a private discussion with the funeral director. Both Frances and Mrs Pooley said in evidence that Mrs Pooley made sure Cheyenne joined them for the discussion with the funeral director in the same way as she also did on a separate occasion with the priest. I accept their evidence. There is no evidence to suggest that, at the time of those discussions, there was any area of disagreement, difficulty or controversy.

[47] It was understandable that Mrs Pooley initially chose the Pooley home at Mairehau to be the marae to which Jamie's body and casket would be brought. A marae can be any meeting place. There are few established marae in Christchurch with the meeting house, whare kai<sup>5</sup>, and all the other facilities which are needed to

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<sup>5</sup> Eating place.

cater for visitors. There would also have been an expense in using such a facility which this family could not afford.<sup>6</sup> Cheyenne accepted that the home could be treated as a marae in the sense of being a meeting place where all the formalities could be observed.

[48] It was also not surprising that, at that time, there was no controversy over whether Jamie would be buried. That is what tikanga required, although there can be flexibility over this and it is not uncommon for Māori, including Ngāti Porou, to choose cremation. As Frances said, if there had been any issue raised over this, it would have been discussed.

[49] The priest from Te Rangimarie went to the home to discuss arrangements. Again, there was nothing controversial about this nor was there any suggestion that there was anything insensitive or unreasonable about the way he came to be involved. The priest had officiated at the baptism of Cheyenne and Jamie's youngest child just several weeks before Jamie's death. All of Jamie's children had been baptised at that church. I accept Frances and Mrs Pooley's evidence that the immediate family gathered to discuss matters with the priest and that, again, Mrs Pooley called Cheyenne to join in the discussions.

[50] There was no real dispute that Cheyenne said little, if anything, in the discussions with the funeral director and the priest. That was understandable given all her emotions and because of what had happened. I do not consider it was because of any inherent weakness or vulnerability on her part. She had responded strongly to the initial hurtful comment made by Frances in the extremely emotional situation when they both arrived at Jamie's home soon after his body was discovered. She had been able to make sure she dressed the lower half of his body at the funeral home. She had made sure she was travelling in the front of the hearse when he was taken back to the Pooleys home. Despite the advice I had been given as to the way she would find it difficult giving evidence at the hearing, once she began giving her evidence and responding to questions, she was strong, assertive and articulate.

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<sup>6</sup> They were assisted with the funeral costs by a means-tested WINZ grant.

[51] In her affidavit, Cheyenne said that on Monday she mentioned to Mrs Pooley that Jamie had said, upon his death, he would like his body to be taken to the marae at Rangitukia and that he would like to be cremated.

[52] Mrs Pooley said Cheyenne told her that Jamie wanted to be buried in Rangitukia if he died when he was old. She said that it was too late because all the arrangements were in place, the Council was preparing the plot and it would be expensive to take Jamie to Rangitukia. Mrs Pooley said this discussion was on Tuesday morning, the day of Jamie's burial, although she said it could also have been on either Monday or Tuesday. Under cross-examination, Cheyenne said that she told Mrs Pooley that Jamie wanted to be buried up north. She accepted that she did not say anything at that stage about cremation.

[53] I am satisfied that this discussion took place at some time after the discussions the family had about the arrangements at the home. While Cheyenne raised the matter in this way, I do not consider that she was asking for the agreed arrangements to be changed. She had been present when the arrangements had been put in place with the family. She was then fully involved, as Jamie's partner, in the implementation of those arrangements, accepting that his body and casket were lying in state at the family home as the marae or meeting place where family could be with him and also where all those who wanted could come to pay their respects.

[54] Whenever this discussion took place and whatever was said, everyone concerned continued to act in accordance with the agreed arrangements.

[55] On the day of Jamie's funeral, his casket had to be taken in the hearse from the Pooley home in Mairehau to the church at Te Rangimarie and then to the cemetery for the interment. Te Rangimarie is also a marae.

[56] Jamie had been an accomplished rugby league player. Before heading to Te Rangimarie Church for the service, the funeral director agreed that his brother Daniel and Cheyenne could take Jamie's casket around various rugby league grounds in Christchurch. Daniel was allowed to drive the hearse. The only other family member who could travel with the casket was Cheyenne.

[57] Despite the allegation made in her statement of claim as to the position Cheyenne and the children occupied in the church, in evidence, no complaint or criticism was made by anyone as to how Jamie's funeral was conducted or as to how ultimately his casket was interred at the Memorial Park Cemetery. I was told that hundreds of people attended the commemoration. Jamie's family, Cheyenne and members of her family were at the graveside as the casket was lowered to its resting place. They all, including Cheyenne, joined in symbolically placing soil on the casket. Jamie's body had been returned to the earth, returned to Papatūānuku (the Earth Mother).

[58] There was no evidence that the Pooley family discouraged or inhibited Cheyenne in expressing a view as to what should happen to Jamie after his death. I accept that Cheyenne would have been hurt by the comments made by Frances immediately after his death. I accept that, some significant time after his funeral, a conflict developed between the parties which became unnecessarily antagonistic. I am nevertheless satisfied that, at the time all the arrangements had to be made, the Pooley family demonstrated real sympathy and understanding and provided real support for Cheyenne in what they understood to be also her loss. Jamie and Cheyenne had lived in the Pooley home for a time immediately before Jamie's death. Cheyenne and her children lived in the home in the month after his death. There was no challenge to Frances' evidence that this was a time when the Pooleys wanted for all of them to be together so they could care for each other, and that included Cheyenne and her children.

[59] I thus reject Cheyenne's assertion that she had no say in the decisions that were made as to what should happen to Jamie after his death. I do not accept that Jamie's family made arrangements without any thought towards Cheyenne or her family.

*Was Ngāti Porou protocol and tikanga properly respected in the way Jamie's body was dealt with after his death?*

[60] There is no doubt that the family, but especially Mrs Pooley, wanted to ensure that the arrangements respected tikanga. Soon after Jamie's death, Mrs Pooley contacted two respected Ngāti Porou elders and asked them to be involved.

Reverend Wharekawa Kaa is a respected kaumātua of the Ngāti Porou in Christchurch. He came out of hospital in order to help the family. As was the practice, he was helped by a kuia, Alamein Connell. Mrs Connell explained that, while their role was to ensure that tikanga was followed and to give advice when necessary, it was for the family to decide on the arrangements they would put in place.

[61] Mrs Connell gave evidence as to what tikanga required. Her standing to give such evidence was not questioned. When she gave evidence, she demonstrated that she was endeavouring to assist the Court where she could with her knowledge of tikanga and with the independence required of anyone giving evidence as an expert in the High Court.

[62] Both Mrs Connell and the Reverend Kaa were at the Pooley home at Mairehau when Jamie's body in its casket was first brought back to the property. As was appropriate when the deceased comes back to the marae or meeting place, Mrs Connell performed a karanga to bring him into the home.

[63] From that point on, Cheyenne has suggested there was only one way in which tikanga was breached. She said that, when six people were needed to carry Jamie's casket from the hearse into the home, among the people who went to assist was Jamie's sister, Frances. Cheyenne said that, on past occasions when women had been shown on television carrying a casket, Jamie had observed to her that women were not permitted to carry the casket. She must have recalled this because she called out to Frances that women must not touch the casket. Frances then asked Mrs Connell and Reverend Kaa if she could assist in carrying the casket. Mrs Connell had not heard Cheyenne's remark but she responded by saying that it was permissible because Frances was Jamie's sister. Mrs Connell did say that she may not have said this had she heard Cheyenne's remark or if what was happening had been occurring on a more formal marae with the casket being taken to the meeting house. Despite this, she said she considered it appropriate in the particular circumstances for Frances to do what she did. Reverend Kaa told Frances she could help carry the coffin.

[64] Mrs Connell explained that, with Ngāti Porou, there is more flexibility in the way they observe protocol than with some other iwi. It is likely that Jamie's observation was made in the context of seeing on television a casket being taken onto a formal marae. Mrs Mahuika said that, even on a formal marae, there can be flexibility over whether a woman should assist in carrying a coffin although the protocol against this was more likely to be followed on a formal marae. She also said it was understandable, unremarkable and acceptable for people who are grieving at the loss of the deceased to touch the coffin as a way of connecting with the person who has died.

[65] Before me, Frances said that she wished she had never helped carry her brother's casket given it had led to the issue having to be discussed by the family in the High Court. In all the circumstances, her wish to help carry the casket was reasonable and understandable. In first obtaining the approval of the kuia and kaumātua present, she showed respect for tikanga.

[66] Jamie had expressed a wish to be cremated although this was in anticipation of his death occurring when he was much older. He must have appreciated that tikanga could be observed or departed from with some flexibility.

[67] Although Cheyenne initially voiced her concern at a woman touching the casket, there was nothing else in the evidence to suggest that, at the time, what happened was a major concern for her. At the time, for Cheyenne personally, respect for tikanga was not all-important. On one of the nights Jamie's body was lying in his casket at the home with his family, including Cheyenne, sleeping around the casket, Frances woke to see that Cheyenne had climbed into the casket and was lying on top of Jamie's body. Mrs Connell said this was a serious breach of tikanga as it is disrespectful to the deceased, trampling on their mana. Frances said her reaction was that what she observed was strange but understandable in the circumstances. No one made an issue of it at the time.

[68] Cheyenne acknowledged that, given Jamie's body has, through burial, been returned to Papatūānuku and his grave is now sacred ground or tapu, to disinter or exhume him would itself breach tikanga. She nevertheless said this was justified

because of the breach of tikanga that occurred when Jamie was brought back to the Pooley home.

[69] The first any of the Pooley family knew of Cheyenne's concern that Frances' handling of the casket involved a breach of tikanga so serious as to require the exhumation of Jamie's body was when it was mentioned in the first statement of claim filed in these proceedings on 3 July 2014. Given the matters I have referred to and given Cheyenne's desire to pursue these proceedings as a means of healing herself, it is unfortunate this allegation had to be the subject of so much evidence. I do not accept that, in the particular circumstances, Frances helping to carry the casket into the family home was a breach of tikanga.

*What were Jamie's wishes?*

[70] Jamie left no will. To the extent he expressed a wish as to what might happen to his body after his death, it was through informal discussion with Cheyenne and was not a wish that he communicated to others in his family. I accept he valued his connection with Rangitukia and that being Ngāti Porou was important to him. He would have been aware of the status and recognition that would have been afforded him if, on his death, his body had been taken to a marae. I accept he would have expressed a wish that after his death his body and casket be taken to a whare or meeting house on an established marae.

[71] In her lawyer's letter of 7 March 2013, which first put the Pooley family on notice of what Cheyenne wanted, Mr Allan said that Cheyenne was "concerned that Jamie's body was taken and buried in a place that was not in keeping with his wishes or of her own". Mr Allan said in that letter that he had advised Cheyenne she "may have grounds to bring a claim in Court to order the disinterment of Jamie's body and the disposal of his remains in a manner more in keeping with his wishes".

[72] In the first statement of claim filed on 3 July 2014, Cheyenne said:

6. The deceased had expressed the following wishes to the plaintiff prior to his death regarding any funeral arrangements made for him (the 'Deceased's wishes'):



- 6.1 Being a follower of Tikanga Maori the deceased had expressed the wish that any arrangements made after his death follow said protocol; and
- 6.2 It was the wish of the deceased that following his death he would lie at the Marae.
- 6.3 The deceased had said that his [sic] wished his body to be cremated; and
- 6.4 The deceased had said that he wanted his ashes [to] be held by his children for them to decide whether the ashes were to [be] scattered; and
- 6.5 The deceased wished for the plaintiff to be responsible for making all other arrangements and decisions relating to his funeral and disposition.

...

14. The plaintiff told the first defendant's of the deceased's wishes on a number of occasions but they did not follow them.

Particulars:

- 14.1 Tikanga Protocol requires that women are not to touch or carry a coffin once a body is placed within it. Despite the plaintiff informing the 1<sup>st</sup> defendants of these matters this requirement was ignored.
  - 14.2 The deceased was taken to the home of the first defendants prior to his funeral in breach of his expressed wishes.
  - 14.3 Following the service the deceased was buried at a plot at the Memorial Park, Block 39 Plot 24 and is not surrounded by any family of either side.
  - 14.4 The first defendants made their own arrangements regarding the funeral and disposition of the deceased's body and did not include the plaintiff in any of those decisions notwithstanding that the plaintiff knew of the deceased's wishes and informed the 1<sup>st</sup> defendants of same.
  - 14.5 At the funeral service held at the deceased's parent's home the deceased's former partner and eldest son were acknowledged and sitting up the front however the plaintiff [sic] and the deceased's other two children were not acknowledged or otherwise involved in the service.
15. As a consequence of the above the deceased's body has not be [sic] properly disposed of.

[73] In her amended statement of claim filed on 4 December 2015, Cheyenne repeated these particulars, adding that each constituted a breach of Jamie's wishes as expressed to her.

[74] In her first affidavit, Cheyenne said that during their relationship she and Jamie had spoken about their wishes regarding funeral arrangements. As they each had differing opinions as to where they wanted to be buried, they reached a mutual decision that they would both be cremated and their children could decide what to do with the ashes. Cheyenne said that Jamie was a follower of tikanga Māori and had expressed the wish that any arrangements made after his death should follow said protocol, with the exception of cremation. She listed Jamie's other wishes in much the same terms as in the statements of claim.

[75] In her second affidavit, Cheyenne said "while Jamie had a strong cultural belief, he also reserved his right to form his own understanding and existence of that culture". As a consequence of this, she said, he wanted to be cremated. Cheyenne doubted that Jamie would have shared his burial wishes with anyone else, as this was an unpleasant topic for him and something only discussed in the private confines of their house and relationship. Their understanding was that they would take care of each other in death, so there was no need to tell anyone else.

[76] While acknowledging it was Jamie's wish that their children would ultimately decide what to do with his ashes, Cheyenne said that, due to the age of the children, she wanted to take his ashes back home to the east coast. That way, she said, he could be with his ancestors.

[77] In evidence, Cheyenne accepted that, to the extent she and Jamie discussed what they wanted to happen after their deaths, they were speaking of deaths in their old age. The understanding they reached was that, because Cheyenne would want to return to her family at Manutuke and Jamie would want to be at Rangitukia, they would be cremated, with their children then deciding where their ashes should go. The three children were aged only nine years, two years and six months at the time of Jamie's death. Such understanding as Jamie and Cheyenne reached did not

contemplate that either of them might die when their children were still young and Jamie's parents and siblings were all still alive and based in Christchurch.

[78] It is understandable that, in the circumstances surrounding Jamie's unexpected death, Cheyenne did not make Jamie's expressed wish for cremation a matter of importance to her.

[79] I do not accept that Jamie had told Cheyenne she was to be responsible for making all arrangements and decisions relating to his funeral and disposition, and certainly not in the circumstances in which his death occurred. That would have been contrary to the requirements of tikanga, which were important to Jamie. It would also have been inconsistent with Cheyenne's evidence that she and Jamie had decided that, because they could not agree on where their remains would go after their death, they would leave that decision to their children.

[80] Through the claim Cheyenne is making in these proceedings and through her evidence, it is clear that she is being selective in how she wants Jamie's wishes to be respected. I accept her evidence that, in the context of their discussions, he did say that he would want to be cremated but he also said he would want his children to decide where his ashes would end up after his death. Through these proceedings, Cheyenne is asking that his body be exhumed not only so it can be cremated but also so that she can take control of those ashes and take them back to the east coast. To the extent Jamie expressed a wish, it was that his children should decide where his ashes should go. His two younger children are now aged just five and seven. Tuhaka, who is now aged 14, does not want his father's remains to be disturbed.

[81] I also accept the evidence of Mrs Mahuika that, in accordance with tikanga, to the extent that Jamie might have expressed a wish as to the arrangements which should be made for his funeral and the disposal of his remains, that wish would not necessarily have determined what ultimate arrangements would be made. To the extent those wishes were known, it could be expected they would be considered in the discussions that took place within the whānau over what should happen. Just how important those wishes would be would depend on the circumstances in which his wishes had been expressed, the way they were expressed and then all the

circumstances in which those wishes had to be considered. That is consistent with what the law in New Zealand requires.<sup>7</sup>

*What happened after Jamie was buried?*

[82] Consistent with the family having come together and having agreed on all matters connected with Jamie's funeral and burial, they also came together in the weeks immediately after Jamie's death. Cheyenne and the children stayed with the Pooley family at their home in Mairehau.

[83] Jamie's burial place was important and accepted by all of them. Mrs Pooley said she went there often, first to share and try to lift from him the pain he must have been suffering at the time of his death and because she needed to be near him. She said that need had lessened with time.

[84] Until about a year ago, Cheyenne said she was also a regular visitor at Jamie's grave. She left gifts at his grave. His children also regularly visited the grave. Despite this, Cheyenne said she did not value being able to visit Jamie's grave. Instead, she said it has made things hard on her.

[85] However, I consider that, through their actions, all the family including Cheyenne had come to accept that Jamie's grave was where his body had been returned to Papatūānuku.

[86] Over this period, the relationship between Cheyenne and the Pooley family became strained almost to the point of having broken down. It was not necessary for me to identify all the reasons for this or to trace how it developed. As was to be expected in all the circumstances, Cheyenne's request of the family that they agree to the exhumation of Jamie's body must have caused serious anguish to the Pooley family, particularly Jamie's parents, but tensions must have arisen before that. Jamie's father was in tears as he spoke of the difficulties he faced in seeing his grandchildren and of the pain he suffered at having lost his son and having then not been able to see two of his grandsons for three months. There have been

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<sup>7</sup> *Takamore v Clarke*, above n 6.

proceedings in the Family Court. In February 2016, certain consent orders were made which provide for Mr and Mrs Pooley to have some contact under certain conditions with those grandchildren. One of the conditions was that the children have no contact with Frances and Daniel. Given Mrs Pooley's fragile state of health, the young age of the children and other conditions attached to contact, this made the parents' contact with the grandchildren difficult. Mr Pooley said that, although it was not what his family wanted, he kept communicating with Cheyenne.

[87] These proceedings began when there was no executor or administrator of the estate. It is of significance to my consideration of the issues that, on 24 September 2015, Cheyenne was appointed as the administrator of Jamie's estate on a without notice application on the basis she was his de facto partner at the time of his death.

[88] That application was made and granted at a time when there had been correspondence from the solicitors for the Pooley family suggesting that a solicitor associated with Christchurch Community Law be appointed as administrator. Cheyenne did not agree to this. She said this was because the person nominated was not Māori, although acknowledged that she did not actually know whether that was the case. Neither she nor her solicitor communicated a concern over this to the Pooleys solicitor. Cheyenne said she went ahead with her application after her stepfather said "that they need to remain with family". Given that this statement was made after she had said she saw her obtaining letters of administration "as a way to protect Jamie's belongings", I infer she made the ex parte application as a way of putting herself at an advantage over the Pooley family with regard to the dispute over the taonga.

[89] In about February 2016, Mr and Mrs Pooley reconnected Jamie with Rangitukia through a kawe mate. It was explained to me that this happened through family members arranging for people from the Rangitukia marae to accept Jamie back to the marae. This was symbolically achieved through Mr and Mrs Pooley walking onto the marae with a photograph of their son facing towards the marae. They were brought on to the marae by people from Rangitukia. In this way, Jamie's spirit was returned to Rangitukia.

[90] This happened when it did because Mrs Pooley's siblings had arranged to have a kawē mate returning a member of her family in this way to Rangitukia. Some relatives were travelling from Australia to participate in this. Around Christmas 2015 they suggested that Mr and Mrs Pooley should join what was happening and at the same time take Jamie back to Rangitukia in this way. Mr and Mrs Pooley decided they would do this. It did not appear from the evidence that this was something which was much discussed within the wider family. Neither Frances nor Daniel joined in the kawē mate.

[91] Cheyenne was neither consulted nor given real notice of what was going to happen. Under cross-examination, Mrs Pooley said she had not thought this was relevant because Cheyenne was not then Mrs Pooley's "friend". There was however an opportunity to tell her what was happening. Mr and Mrs Pooley and Cheyenne were at the Family Court when parenting orders were made by consent in February 2016. Mr and Mrs Pooley were travelling to Rangitukia for the kawē mate the following day. At the Family Court, Mr Pooley told Cheyenne what was happening. He showed her Jamie's photograph and photographs of the wider family members whose spirits were going to be returned to Rangitukia as part of the kawē mate. I, however, accept that it was not anticipated that Cheyenne would be involved in the kawē mate or that anyone gave her the opportunity to do so.

[92] Mrs Connell said this was understandable given the conflict associated with the Court proceedings. She said that, in the circumstances, it was not necessary for Cheyenne to be involved in the kawē mate. She said it was appropriate for the parents to participate in the kawē mate and to be the ones returning Jamie's spirit to Rangitukia as they did.

[93] The people from Rangitukia do not permit photographs to be left at the marae following a kawē mate but Mr and Mrs Pooley did place a plaque beside the grave of Mrs Pooley's mother as a memorial to Jamie.

[94] Mrs Connell said it would be illogical to have a further or successive kawē mate for others to be involved in returning Jamie's spirit to Rangitukia in this way. There is thus no opportunity now for Cheyenne to participate in an event which may

have been helpful to her. Nevertheless, in the context of these proceedings and what she wanted to achieve, it is of some significance that, through a kawe mate, Jamie's spirit has been returned to Rangitukia. There is a physical memorial to him at the urupā or cemetery at Rangitukia which she would be able to visit.<sup>8</sup>

*The exhumation*

[95] I received detailed evidence from the sexton in charge of the Memorial Park Cemetery where Jamie is buried. He detailed all that would happen if Jamie's body were to be exhumed. It is not necessary for me to go through all the detail other than to say it is likely that, after this length of time, the lid on Jamie's casket will have collapsed into the casket and that, except for Jamie's skeleton, hair and clothes, the rest of his body will have decomposed. For most people, the actual process of exhumation would be deeply distressing. I accept that would be particularly so for family and friends for whom the burial was symbolically a way of putting the deceased to rest and coming to terms with his death. Exhumation would require interference with the ground around and on top of Jamie's casket. The sexton and funeral directors do what they can to ensure the process occurs with respect for the remains and sensitivity towards all present. The sexton nevertheless said that, because the process can be distressing for the people present, the disinterment and all associated work is carried out at night.

[96] With the Council charges and the further extensive involvement of a funeral director, the expense involved in exhumation and cremation would be significant. Cheyenne has said she has an aunt who would give her \$5,000 to put towards the cost. Although I was not given information as to all the precise costs involved, it would be more than this.

[97] The Council advised that their costs for the disinterment would total around \$1,528. The funeral director's costs for the original burial were \$6,021.50.

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<sup>8</sup> Mr Pooley said that he has to go back there at some time to put concrete around the plaque for Jamie. Perhaps there is an opportunity for him and Cheyenne to do something together which would help them both to remember and recognise that the kawe mate did take place and part of Jamie has been returned to Rangitukia.

[98] Mrs Connell said exhumation would not be in accordance with tikanga. Both she and Reverend Kaa said that Jamie's body has now been returned to Papatūānuku and should not be disturbed. Where he is buried is tapu. Reverend Kaa said there could be appropriate karakia, blessings and a lifting of the tapu if disinterment was to take place. Neither Mrs Connell nor Mrs Mahuika knew of any ceremony which, in accordance with tikanga, would make disinterment of a body, which has been properly laid to rest, acceptable.

[99] Cheyenne acknowledged that to remove Jamie's body from where it has been put to rest in Papatūānuku would be a breach of tikanga.

*The family's views*

[100] Cheyenne has made it clear that she wants exhumation and then cremation of Jamie's remains. Jamie's parents, brother and sister are firmly and strongly opposed. It is clear that Jamie's grave has become an important place which they still visit and connect with.

[101] Through the agreement of counsel for both Cheyenne and the Pooley family, Tuhaka's views were conveyed to me in a statement he had written and which was typed up by his mother. It was read out to me as part of counsel's opening submissions. Tuhaka says in that statement that the day he discovered what his father had done when he died was the worst day in his life but for him to have to face the removal of his father's remains from where they now lie would be even worse.

[102] Before her lawyers wrote to the Pooley family advising them of what Cheyenne wanted, Cheyenne sought an assurance from Tuhaka's mother that she would not allow Tuhaka to be turned against her as a result of what she was going to do.

[103] In that initial email, she said her lawyers had sent a letter to the Pooley's requesting the return of Jamie's taiaha to her. She also said she was considering having him exhumed. She explained what she was doing by saying:



But i truly feel that my rights as his partner have been disregarded [sic] in all aspects. Im sorry if this hurts u, thats not what i want. But ive been unable to heal & move forward.

[104] The Pooley family had bought the plot beside Jamie's grave for someone else to be buried there if appropriate. Jamie's plot is a double plot so another casket could also be placed on top of his. Relatives of the wider Pooley whānau are buried in the same section of the cemetery.<sup>9</sup>

[105] Because of the uncertainty created by these proceedings, no headstone has been erected at his grave and there has been no unveiling.

### *Consideration*

[106] That is the background against which the High Court has been asked to make orders permitting the exhumation and cremation of Jamie's remains that Cheyenne desires.

[107] For Cheyenne, based on the particulars set out at [64]-[65] above, Mr Allan seeks orders:

- (a) authorising Cheyenne and/or her representatives or agents to enter the cemetery and remove the coffin and Jamie's body;
- (b) authorising Cheyenne to deal with the coffin and Jamie's body in any way she sees fit following its removal from the cemetery; and
- (c) restraining the first defendants and any other persons acting at their request or direction from taking any action that would obstruct the plaintiff and/or her representatives and agents from doing anything pursuant to the above orders.
- (d) Cheyenne also seeks any further orders required to give effect to these specific orders.

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<sup>9</sup> Although it was not the subject of any application to present further evidence, the Court learnt that Mrs Pooley died on 24 November 2016. Counsel have now confirmed that she is buried next to her son.

[108] In their statement of defence to the amended statement of claim, the Pooley family deny the factual allegations which are the basis for Cheyenne's claim.

[109] The Pooleys are opposed to disinterment and say that disinterment without the blessing of whānau would breach tapu and disturb the spirits of Jamie and his ancestors.

[110] As further and alternative defences, the Pooleys say that Cheyenne is estopped from prosecuting this claim on the basis of waiver, laches and acquiescence.

[111] In the circumstances of this case, the issue as to whether an order should be made requiring Jamie's body to be exhumed can be made through an assessment of all the circumstances of the case, including a consideration of tikanga and Māori burial practice.

[112] Counsel for both the plaintiff and the first defendants referred to the legal position as set out in the *Takamore* case.<sup>10</sup> In the Supreme Court, McGrath J for himself, Blanchard and Tipping JJ stated:

[164] The common law is not displaced when the deceased is of Maori descent and the whanau invokes the tikanga concerning customary burial practices, as has happened in this case. Rather, the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation. Personal representatives are required to consider these values if they form part of the deceased's heritage, and, if the dispute is brought before the Court because someone is aggrieved with the personal representative's decision, Maori burial practice must be taken into account. Consideration of the tikanga is accordingly required by the common law in this area. In the end, it is on the assessment of all the circumstances of the case that, where it becomes necessary, the Court will reach its determination on whether the personal representative's decision was not appropriate. In this way, the common law enables all relevant values and circumstances to be taken into account by those who have the responsibility of decision-making. The decision is for the personal representative, subject to the Court's ability to intervene if that decision is inappropriate. The Chief Justice accepts that position for the Court, but we say it is also the position for the personal representative, subject to the Court's ability to substitute the appropriate decision.

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<sup>10</sup> *Takamore v Clarke*, above n 6.

[113] Even before Mrs Pooley's death and burial, exhumation of Jamie's body would have been deeply distressing to all of his immediate family, other than his two youngest children who are of an age, even now, when they would not understand all that was happening and Cheyenne who has sought exhumation because of her own emotional needs. Tikanga and Māori burial practices were observed and respected in the arrangements that were made for Jamie's burial. Jamie had not expressed any wishes as to how his body should be dealt with if he died in circumstances such as occurred. Although arrangements for Jamie's funeral and burial were made by the Pooley family, particularly by his mother, those decisions were reached with an acknowledgement of Cheyenne's importance as his de facto partner, with her being given an opportunity to express any opinions that she may have held at the time.

[114] I am accordingly satisfied that the decision then made to bury Jamie in the cemetery at Christchurch was an appropriate decision to make in all the circumstances that then existed. With that decision having been made, it would not be appropriate for Cheyenne, as the administrator of his estate, to now require the exhumation of his body for the purpose of cremation so that his ashes can be scattered near Rangitukia or for any other reason.

## **The Taonga**

### *The parties' positions and evidence*

[115] Legally, Mr Allan argued that the taonga were Jamie's personal property and Cheyenne was entitled to them as the administrator of his estate. He also argued that she was entitled to inherit those items as part of his estate under the Administration Act 1969.

[116] Cheyenne was adamant that each child must "earn" the taonga and she remained adamant that this should be through the skill they demonstrated in using these items.

[117] The position of Mr and Mrs Pooley, Frances and Daniel was that, as the taonga had always been left in the care of Mr and Mrs Pooley in their home, Jamie's parents had the right to make the decision as to who would inherit those items and

when that would happen. Their decision, I accept, made mainly by Mrs Pooley was that ultimately Jamie's oldest son should receive the taiaha which was given to Jamie when he was at the taiaha school (the "taiaha wānanga"), his second son the further taiaha which Jamie had carved and the third son the tewhatewha which Jamie also carved while at school.

[118] In closing submissions, Mr Tyrrell for the Pooley family said that, to resolve the conflict over these items, Mr and Mrs Pooley would be willing to place the second taiaha and the tewhatewha under the control of Cheyenne but they wished to retain control of the first taiaha for the benefit of Tuhaka. That proposal was not accepted and, in the circumstances, I treat it as having been made on an open but "without prejudice" basis.

[119] For the Pooley family, Mr Tyrrell argued that taonga, such as these items, had a special status and could not be treated as the personal property of Jamie at the time of his death. He said taonga had a special status under the Property (Relationships) Act 1976 but he could not refer me to any judgment where it had been held the taonga could not be the personal property of the person who had control of the items. He suggested that any rights which Cheyenne had to take possession of the items, as the administrator of Jamie's estate or as a person entitled under the Administration Act, should not be considered absolute. This is because, in the particular circumstances of this case and given her conflicted position, it was likely an application to have her removed as administrator would be granted. Any rights which Cheyenne might have had under the Administration Act could be defeated through his parents or any of his children making a claim under the Family Protection Act 1955. He acknowledged that no such applications had been made to the Court. He also argued that, in the particular circumstances of this case, with Jamie having decided to leave these items in his parents' home where they were under the actual control of his parents, as a matter of law, those items should be treated as being held by his parents under a constructive trust for them to determine how the items should ultimately be distributed within the family.

[120] In her evidence, Mrs Pooley said Jamie had been given the taiaha after attending three classes at the wānanga and the gift of the taiaha had been a surprise

for him and his family. She said Jamie was clear about protocol. Women were not to touch these taonga. Food was not to be eaten in front of them and they were tapu. She said she had ensured they were respected in this way.

[121] Cheyenne also said that, in accordance with tikanga, these taiaha should not be handled by a female. There was no evidence that the taonga was disrespected in such a way.

[122] Mrs Pooley said it was important to her that the Pooley family be involved in the passing of the taonga to her grandchildren and this should happen with a blessing. In this way, taonga that had been part of their family would be passed down a generation. She said she would like them to pass to Jamie's children after her death and she had explained her wishes in this regard to her husband. Mrs Pooley said that in the meantime she regarded it as her responsibility and obligation to care for these taonga. She did not see them as property but as whānau taonga. I note that she had not indicated that the taonga should pass to her grandsons *on* her death.

[123] Under cross-examination, Mrs Pooley acknowledged that Jamie had said to his mother that one day he would be taking the taonga with him. She said that, although this had made her "a bit sad", she did not try and stop this. Nevertheless, she pointed out that he had not in fact taken them when he was alive. She said they were Jamie's taonga. Mrs Pooley said that Jamie had never said anything to her about his children having to earn the taiaha. He had never said that he wanted Tuhaka to have the first taiaha.

[124] Mrs Pooley had seen Jamie practicing with the taiaha with Tuhaka when Tuhaka was a very small boy. Jamie was using the taiaha and had given Tuhaka a broomstick to practice with.

[125] Mrs Pooley said she had told Cheyenne that she would be promising the first taiaha to Tuhaka and the other two items to the other grandsons in accordance with their age.

[126] She did not accept the items should have to be earned in the same way as Jamie had earned them. She considered all her children were doing very well but, in saying that, observed that Tuhaka was not in any cultural group and, at this stage, did not want to do that. She said that, while he has taha Māori in his heart, his passion for the moment was for rugby league at which he was doing well.

[127] Mr Pooley agreed with Mrs Pooley's wishes as to how these taonga should be dealt with. He considered that these items should remain in their care, as they had done since they were awarded and carved, until after Mrs Pooley had passed away. They would then be passed on to Jamie's children "when the time is right". He agreed with Mrs Pooley's wishes as to how they would be distributed between the children. He also agreed that, when it happened, this should be with a blessing.

[128] In cross-examination of Mr Pooley, it was suggested by Mr Allan that there was agreement that these items should go to Jamie's children. In a discussion with me over whether or not that was Cheyenne's position, Mr Allan said it was Jamie's intention that the children would have these items but that they be earned, not just simply given. In the context of that discussion, Mr Pooley said that he considered Tuhaka had earned his taiaha through being picked for the Canterbury under-16 rugby league team, through finding his dad and showing he was a brave boy. Mr Pooley said Jamie had never talked to him about his children having to earn these taonga. He acknowledged that he did not know whether tikanga required anything specific in this regard.

[129] Tuhaka's mother, Charmaine Shaw, was content for Mr and Mrs Pooley to make a decision about who should receive the taonga. She said that, as far as she knew, Tuhaka was not pushing to have possession of the taiaha. To her knowledge, Jamie had never told Tuhaka that he would be receiving the taiaha. She did not wish to speak for Tuhaka but said, from her point of view, "what will be will be". She was questioned as to whether the taiaha should have to be earned in the way that Cheyenne suggested. She suggested that Jamie's enthusiasm and skill for rugby league might also be part of the context which could be considered in deciding whether any of the sons had earned the right to have guardianship of the taonga. She

also said that, in her opinion, Tuhaka had earned the taiaha or tewhatewha from his father the day his father died.

[130] Jamie's brother, Daniel, acknowledged he was not an expert as to how taonga could be transferred but said he thought of them as gifts. He regarded his mother as the guardian of these taonga because Jamie had left them in her trust and they were still in his mother's care at the time Jamie died. He did not accept the taonga had to be earned in the way Cheyenne suggested because they can be given. He had never heard Jamie say anything about these taonga having to be earned.

[131] Daniel said there had been one incident when he had eaten food in the presence of the taiaha and Jamie had been annoyed with him. Daniel said he had not repeated this.

[132] Frances said she had been present when Jamie had been teaching Tuhaka how to use the taiaha. She said that Jamie had taken a photograph (which she had not been able to find) of Tuhaka holding the taiaha wānanga. She accepted the proposition that it was Jamie's intention that the taonga would go to his children. She said the Pooley family had discussed within themselves what should happen to these taonga. She said they considered these taonga to be different from his property such as his two cars, his motorbike and his TV. She said that Cheyenne had not been involved in the discussions because they had not thought of the taonga as property. She said they had not heard anything of her wish to have these items until they received the letter from Cheyenne's solicitors of March 2013.

[133] Frances said she considered these taonga to have a life-force within them, that they were not property and they were tapu. To her, it was important that the taonga not leave the family home in which they had been without the blessing of her family, that it would not be right for them to be taken from the house without their blessing.

[134] Frances' evidence as to how the taonga should ultimately be distributed was consistent with the evidence given by other members of the Pooley family.

[135] Mrs Alamein Connell was questioned as to how tikanga impacted on what should happen to taonga. She said that, while there was tikanga, a lot of it was also common sense. In that context, she said that, from where she was sitting, there was sense in the oldest son getting the first taiaha, the second son the next item and the third and youngest son the third item. She said that it should not be necessary for one of the sons to go to a taiaha wānanga to earn the item. It was through whakapapa<sup>11</sup>, and the items should go down automatically.

[136] Mrs Connell said that a taonga was treasure and not material property in the Pākehā sense, and that there was a particular need to treat them with respect, not just for the sake of the present generation but for the next generation to come. She said that, in tikanga Māori, if things were not done properly, something could happen to the next generation. She said that, if one family has guardianship of taonga, it would be important that the family approve of the transfer of taonga to the next generation. She said it could bite future generations if taonga, which had been in the possession of the parents, were suddenly taken away from them. In her view, Mr and Mrs Pooley were the guardians of these taonga because they had been left in the parents' place all the years after Jamie had acquired or carved them.

[137] Mrs Mahuika said, according to tikanga, the taonga had a guardian instead of an owner. She said that when they are earned or carved there is a process in which they are blessed and given a mauri (spirit/life-force). If they were entrusted into the care of someone, those people were responsible for protecting and caring for them and for making decisions about what would happen to them. It was her opinion that, because the taiaha and tewhatewha were taonga and had been in the Pooley home since they were earned and/or carved, in accordance with tikanga, the responsibility for their care and disposition was for the Pooley family.

[138] Under cross-examination Mrs Mahuika said that a person with guardianship of taonga should make a deliberate choice as to who should have guardianship in the event of their death but in reality that did not always happen. She said that possession would not necessarily equate to guardianship but for herself, if she had given possession of taonga to someone, it would be very likely that she would want

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<sup>11</sup> Those connected to Jamie by genealogical descent.



that person to look after that taonga if she was not able to do so. She said that, dealing with the specific situation, if Jamie had made his wishes as to the disposition of the taonga clear to his family, as the guardians of those taonga, she would have expected his wishes to be respected.

[139] In an affidavit, Cheyenne said Jamie had spoken of the taiaha and tewhatewha passing to his children as they earned them.

[140] In an affidavit, Cheyenne said these taonga were the property of Jamie and therefore were part of his estate, not the property of the family. She said, as the administrator, she wished to hold onto these items to fulfil Jamie's wishes so she could distribute them to the children as they earned them. She said she intended to set up a room in her house where the taonga could be stored and protocol for them respected. She said this had not always been the case with the items kept in the Pooleys lounge or in Jamie's bedroom at that house. She specifically claimed that, in breach of tikanga, food had been eaten in the presence of these taiaha.

[141] In her initial statement of claim, Cheyenne sought an order that she have possession of these items. Her claim was subsequently amended so that she sought to have the items put under her control.

[142] Under cross-examination, although Cheyenne said that these taonga were Jamie's, she also said they "do not belong to anyone".

[143] She said, if the items were put under her control, she would arrange for them to be put in the possession of a male, someone expert in how they should be used, for him to decide how these items should be distributed amongst any of Jamie's children once such children had been given the opportunity to demonstrate they were worthy of holding such an item through the prowess they exhibited in using these weapons.

[144] Although in her affidavit she said that it should be for her, as administrator, to decide what should happen to these taonga, under cross-examination she said her position is "that they should be kept in safe keeping and not be handed out". When asked as to who should decide who has earned them and which child should get

which item, she said it should not be her who made that decision. She had not thought about who would decide. She said she did not think she was in a position “to decide who gets what”. She had considered the possibility of the children going to a taiaha tutor and for that tutor deciding. She said, as administrator, she would put this in place. She did not know who, according to tikanga, would have the right and responsibility to decide where the taonga would go after someone’s death. She said she would have to talk to a tutor about that. She repeated that she was not in a position to make a decision about who gets what but she said neither were the Pooleys. She said that she wanted to be in a position where she could implement Jamie’s wishes. She accepted that there was no evidence Jamie had ever talked to her about what should happen to these items if he died unexpectedly before his children were old enough to earn them.

[145] Cheyenne said that she had been happy for these items to remain in the Pooley home until Mrs Pooley had phoned her and said she was giving the taiaha to Tuhaka. She said that she and Mrs Pooley had disagreed over whether the children needed to earn them first.

[146] Cheyenne was asked if it would be acceptable for these items to remain in the guardianship or care of the Pooley family if there was an agreed protocol as to how they might earn them. She said she could not answer that right now. It was something she needed to think about because she felt she could not trust them.

[147] Cheyenne said that these items had not been entrusted to Jamie’s parents and they were simply in storage at the family home because, in the six years she had been living with Jamie, they did not have anywhere suitable to keep them. On that basis, she did not accept that the Pooley family had been entrusted with them. However, she did accept, as a statement of principle, that if items such as these had been entrusted to someone and the owner passed away, then it would become the role of that person entrusted with their care to care for them and to decide what should happen with them.

[148] Cheyenne agreed there had been no dispute about her receiving items such as a motorbike that were acknowledged as Jamie's property. The motorbike had been at the Pooley residence.

### **Consideration**

[149] Although there may have been isolated occasions when food was eaten in the presence of the taonga when it should not have been, I consider that Jamie wanted these taonga to remain in the Pooley home because he knew tikanga as to the taonga would be respected. For the six years that he was in a relationship with Cheyenne, Jamie chose to leave them there because he knew that would continue. Cheyenne acknowledges that she would not be able to have the items in her possession and treat them with the respect that tikanga requires.

[150] I consider that both Mr and Mrs Pooley would have respected tikanga with regard to the way they cared for the taonga before Mrs Pooley died. With her death, I consider that Mr Pooley would also look after them as required. Although his knowledge of tikanga and the importance of it to him were not as great as for Mrs Pooley, he impressed me as someone who would be mindful of his responsibilities in this regard. That would be particularly so if, with Mrs Pooley's death, he must now take a lead in demonstrating that responsibility. Mr Pooley had personally done what was required to have these items formally displayed in the Pooley family home in the hall.

[151] In the particular circumstances of this case, I find that Jamie did entrust these taonga to his parents to care for in their home. Although this was not done in a formal way and while he was alive, he still regarded the taonga as being his responsibility, he made a conscious decision through the six years that he was living with Cheyenne to leave those items in the care of his parents. In doing so, I consider he entrusted Mr and Mrs Pooley to make a decision as to how they should be ultimately dealt with after his death.

[152] Consistent with that trust, I find that Cheyenne was content for a considerable period after Jamie's death for the items to remain in the Pooley home. I find Cheyenne's claim has been made, not because of any dispute over whether or not

these items should remain in the care of Mr and Mrs Pooley, but because Mrs Pooley had indicated that it was her intention to give the first taiaha to Tuhaka without any commitment that he must earn the item through demonstrating a passion and skill in wielding the taiaha in the way that Jamie had.

[153] Although Jamie had expressed a wish that each of his sons should earn the taiaha in this way, this was a wish only. I find that Jamie, his parents and siblings, and Charmaine always understood and accepted that these items would one day go to his children. Although Jamie hoped they would earn them in the way he had, there was no suggestion in the evidence of Cheyenne that his wish for the taonga to pass to his children should be conditional on their earning the taonga in this way. As Cheyenne put it, the children were to receive these items *when* they had earned them. It was not *if* they had earned them.

[154] Tikanga was important to Jamie. In accordance with tikanga, on Jamie's death, it was for Mr and Mrs Pooley, as the people entrusted with the care of the taonga, to continue to care for them and to ultimately decide how they should be distributed.

[155] I do not consider that either tikanga or Jamie's stated wishes with regard to these taonga require that the ultimate decision, as to how these items should be distributed within the family, should be conditional on their being earned in the way Cheyenne suggests is necessary. It is for those who are entrusted with the care of the taonga to decide how they should be given to someone else, as happened with the elder who decided to give his taiaha to Jamie because of the skill Jamie had demonstrated in learning how to use the taiaha wānanga. It was for Mr and Mrs Pooley, as the persons entrusted with the guardianship of the taonga, to decide how they should be distributed and on what basis. It was important that, in ultimately making a decision as to this, they showed due respect for all these items as taonga and the importance of whakapapa. With the importance of whakapapa, it was appropriate for them to take the view that ultimately the people with the strongest claim to continued guardianship of these items would be Jamie's sons. That also accorded with Jamie's wishes.

[156] As there are three sons, there had to be a way of distributing these items between the three sons. Mrs Pooley's wish to ultimately distribute the items in the way she had indicated was appropriate, particularly so because, in one sense, it avoided the need for them to prefer any of their three grandsons against another on some subjective preferential basis.

[157] I do not accept that Cheyenne is entitled to control of these items as administrator. That is particularly so when she has indicated she would not personally be able to take possession of them. She has made it clear that, if she were to obtain control of them, she would not and could not decide how or on what basis the taonga should be distributed between Jamie's sons. She gave no assurance that, as administrator, she would hold these taonga for the benefit of those entitled to them on an intestacy under the Administration Act 1969.

[158] Cheyenne made it clear that she did not consider these items to be Jamie's property in the material sense. She made it clear in her evidence that she was not seeking to control the ultimate destiny of these items on the basis they were her property.

[159] Cheyenne thus cannot rely on any rights she might have had to the taonga through his intestacy and the fact she was Jamie's de facto wife at the time of his death.

[160] These taonga are not just culturally important weapons. Possession of them will also be important to Jamie's sons because of the special connection these items have to their father, something which will be of great significance to them when the sons are older, especially so because their father was lost to them when they were so young.

[161] I find that, in all the particular circumstances of this case, these taonga did not fall into Jamie's estate after his death. I find that these items had been, while belonging to Jamie, put in the care of Mr and Mrs Pooley on a trust. That trust was to hold them for Jamie until his death. On his death, pursuant to that trust, Mr and

Mrs Pooley were under an obligation to continue caring for those items and to ultimately decide to whom they should be distributed and when that should happen.

[162] The trust was on terms that Mr and Mrs Pooley would hold possession of these items and care for them with respect for tikanga. It was a further term of that trust that ultimately the three items would be distributed between the three grandsons in such a manner and at a time they considered appropriate but, if not distributed earlier, then once both Mr and Mrs Pooley have died. Mr Pooley should formally resolve and record now how the items should be distributed between his three grandsons on his death if he has not previously distributed them while he is alive.

[163] In accordance with the obligation for these items to be distributed to whakapapa, if any of Jamie's children die before a distribution has taken place but leaving a grandchild of Jamie who could receive an item in place of his father, that grandchild should be considered as one of the beneficiaries entitled to the taiaha or tewhatewha that would otherwise have gone to that child's father.

[164] The terms of the trust provide sufficient certainty as to the trustees' obligations and as to the ultimate beneficiaries for that trust to be recognised at law.

[165] With Mrs Pooley's death, the responsibility of the trustees now lies with Mr Pooley. It is for him to decide when and how these items should be distributed amongst Jamie's whakapapa.

[166] The Court recognises the particular life-force or mauri associated with these taonga and how important it is that the ultimate distribution be made with the blessing and goodwill of the people who Jamie entrusted to care for these taonga. With Mrs Pooley's death, it is now Mr Pooley's blessing that is important.

[167] While it will be appropriate for Mr Pooley to have regard to the wishes expressed by Mrs Pooley following her death, Mr Pooley must exercise his independent judgment as to what should happen to these items. It is important that he makes his ultimate decision on the basis of his own judgment and that he does not allow his continued guardianship of the taonga to be used by either other members of

the Pooley family or Cheyenne as a way of perpetuating or intensifying what has been an unfortunate breakdown in relationship between Cheyenne and the Pooley family.

[168] It is not a term of the trust that any of the sons can have one of the taonga only if he learns how to use that particular item. Mr Pooley will have to decide when any of the sons should receive one of these particular taonga, conscious of the circumstances of each of his grandsons. Those circumstances should include the way they would value and respect any item they might be given. One of the matters he might but does not have to consider is any involvement they have in cultural activities, particularly the way they might demonstrate the importance to them of the item they might receive through becoming skilled in the wielding of it for cultural purposes. It will be easier for Mr Pooley to exercise that judgment if he has contact with his grandchildren to an extent that gives him that knowledge. As there is an issue before the Family Court as to his having contact with his grandchildren, I am directing that a copy of this judgment is made available to that Court.

[169] I am confident Mr Pooley will be able to demonstrate the independence and strength of character required to exercise independent judgment in this regard. There was a demonstration of that with the way he commented during the hearing that he had been determined to maintain some contact with Cheyenne, despite the way others in his family were opposed to this.

### **Conclusion**

[170] Cheyenne Biddle's application for an order permitting the exhumation of the body of Jamie Robert Pooley and associated orders is dismissed.

[171] Cheyenne Biddle's claim for an order that the taiaha and tewhatewha be put under her control is denied.

[172] There is thus judgment for the defendants in these proceedings.

[173] If there is any issue as to costs, a memorandum for the defendants' is to be filed within four weeks. Any memorandum in response is to be filed within two

weeks of the filing of the defendants' memorandum. The memoranda are to be no longer than five pages.

[174] Although all parties may be legally aided, I appreciate this is a case where the parties and the Court may have to consider ss 45 and 46 of the Legal Services Act 2011.

Solicitors:  
Phillip Allan, Barrister, Christchurch  
Weston Ward & Lascelles, Christchurch  
P L Leeming, Christchurch City Council.