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**DISPUTES OVER WHAT REMAINS:
Bodies, Burial, Ashes, and New Developments**

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INTRODUCTION

The issue of human remains is one that carries with it significant emotional, cultural, religious and legal implications. It is an issue that drafting solicitors and executors often face when assisting testators with their planning considerations, including the future treatment of their own remains. Estate litigators too, often deal with the issue when family members disagree over the ultimate treatment of their relative's remains. It is one that lawyers, legislators and judges alike often must confront, to ensure, from a policy perspective, that remains are dealt with in a respectful, lawful and hygienic manner, while addressing those disputes that relate to the proper disposition of remains.

Although the law on the treatment of remains is relatively straight-forward and well-settled, prioritizing the role of the executor, and the dignity of the Deceased's remains, it is also an area that is subject to subtle pressures from a societal perspective as times and practices are ever-changing. An increasingly culturally and religiously diverse population means that different practices are uniquely followed, while at the same time priorities are shifting toward practical considerations of costs, and environmental and efficiency concerns. These cultural shifts affect the direction the law will take to address the thorny and sensitive issue of human remains.

THE CURRENT LEGISLATION

In Ontario, the applicable legislation to the disposal of human remains is the *Cemeteries Act (Revised)*¹ and the *Funeral Directors and Establishment Act*.²

The *Cemeteries Act* sets out the requirements to establish, maintain and operate cemeteries and crematoria.³

¹ R.S.O. 1990, c. C. 4 [hereinafter *Cemeteries Act*]

² R.S.O. 1990, c. F. 36 [hereinafter *Funeral Directors and Establishment Act*]

³ Sections 2 to 7 and 44 to 61, *Cemeteries Act*

Section 1 of the *Cemeteries Act* provides the following definitions relating to the disposal of human remains which warrant direct transcription:

“**burial site**” means land containing human remains that has not been approved or consented to as a cemetery in accordance with this Act or a predecessor to this Act;

“**cemetery**” means land set aside to be used for the interment of human remains and includes a mausoleum, columbarium or other structure intended for the interment of human remains;

“**columbarium**” means a structure designed for the purpose of interring cremated human remains in sealed compartments;

“**crematorium**” means a building fitted with appliances for the purpose of cremating human remains and includes everything incidental and ancillary thereto;

“**human remains**” means a dead human body and includes a cremated human body;

“**inter**” means the burial of human remains and includes the placing of human remains in a lot;

“**interment rights**” includes the right to require or direct the interment of human remains in a lot;

“**interment rights holder**” means a person with interment rights with respect to a lot and includes a purchase of interment rights under the *Cemeteries Act*, being chapter C.3 of the Revised Statutes of Ontario, 1990, or a predecessor of that Act;

“**lot**” means an area of land in a cemetery containing, or set aside to contain, human remains and includes a tomb, crypt or compartment in a mausoleum and a niche or compartment in a columbarium;

“**mausoleum**” means any building or structure, other than a columbarium, used as a place for the interment of the human remains in sealed crypts or compartments;

The *Cemeteries Act* requires that burials are only to be carried out in cemeteries as licenced under the legislation and approved of by the Registrar who is appointed under the legislation. The legislation also requires that burials be carried out in a proper and orderly fashion. The relevant statutory provisions which govern, are as follows:

Good order

46. Every cemetery owner shall ensure that all interments in the cemetery are carried out in a decent and orderly manner and that quiet and good order are maintained in the cemetery at all times.

Interment in cemetery only

47. No person shall inter human remains except in a cemetery that has been consented to by the Registrar and is owned by an owner licensed under this Act.

Similarly, the *Cemeteries Act* requires that cremations are to be carried out in a “decent and orderly manner”:

Good order

57. Every crematorium owner shall ensure that all cremations in the crematorium are carried out in a decent and orderly manner and that quiet and good order are maintained in the crematorium at all times.

The *Cemeteries Act* also addresses the disinterment of remains at section 51:

Disinterment

51. (1) Subject to subsection (2), no person shall disinter any human remains without,
(a) the prior consent of the interment rights holder; and
(b) notifying the proper medical officer of health.

Where consent not required

(2) Subsection (1) does not apply to a disinterment ordered by,
(a) a court of competent jurisdiction;
(b) a coroner appointed under the *Coroners Act*;
(c) the Attorney General or Solicitor General for Ontario; or
(d) the Registrar under section 9.

Idem

(3) For the purpose of clause (1) (a), the consent of the Registrar may be substituted for that of the interment rights holder if,
(a) the whereabouts of an interment rights holder are not known;
(b) the interment rights holder is not readily ascertainable; or
(c) the interment rights holder is not able to consent.

As for restrictions on cremation, those are outlined in Regulation 130/92 to the *Cemeteries Act*. Section 5 of Regulation 130/92 prohibits (without written consent of the purchaser of the cremation services) the cremation of more than one person at the

same time, of human remains with animal remains, or following cremation to comingle cremated remains:

5. (1) The by-law in subsection (2) is prescribed as a by-law that applies to all Cemeteries and crematoria.
- (2) The owner shall not, without the written and signed consent of the purchaser of the crematory services,
 - (a) cremate the remains of more than one person at once;
 - (b) cremate human remains together with animal remains; or
 - (c) comingle cremated remains.

THE NEW LEGISLATION

The *Funeral, Burial and Cremation Services Act, 2002*⁴ (“FBCSA”) will come into force on July 1, 2012 and will consolidate and replace both the *Cemeteries Act* and the *Funeral Directors and Establishment Act*.

As in the *Cemeteries Act*, subsection 4(3) of the FBCSA prohibits interment of human remains outside of a “cemetery” as defined in the legislation. The FBCSA provides an expanded definition of “cemetery” that includes “land that, in the prescribed circumstances, has been otherwise set aside for the interment of human remains.” The wider definition of cemetery in the new legislation is as follows:

- “**cemetery**” means,
- (a) land that has been established as a cemetery under this Act, a private Act or a predecessor of one of them that related to Cemeteries, or
 - (b) land that was recognized by the registrar as a cemetery under a predecessor of this Act that related to Cemeteries, and includes,
 - (c) land that, in the prescribed circumstances, has been otherwise set aside for the interment of human remains, and
 - (d) a mausoleum or columbarium intended for the interment of human remains;⁵

⁴ S.O. 2002, c. 33

⁵ Section 1

The definition of “crematorium” is expanded to provide that it is a facility that “has been approved as a crematorium or established as a crematorium in accordance with the requirements of this Act or a predecessor of it...”:

“**crematorium**” means a building that is fitted with appliances for the purpose of cremating human remains and that has been approved as a crematorium or established as a crematorium in accordance with the requirements of this Act or a predecessor of it and includes everything necessarily incidental and ancillary to that purpose;

The definition of “burial site” is modified somewhat to “land containing human remains that is not a cemetery.”

The definition of “interment rights holder” is changed somewhat to “the person who holds the interment rights with respect to a lot whether the person be the purchaser of the rights, the person named in the certificate of interment or such other person to whom the interment rights have been assigned.” The concept of a certificate of interment is an addition to this legislation.

The definitions of “columbarium”, “human remains”, “inter”, “interment rights”, “lot” and “mausoleum” remain as set out in the current *Cemeteries Act*.

As with the *Cemeteries Act*, the *FBCSA* requires that the disposal of human remains be undertaken in a “decent” and proper manner. Specifically subsection 5(3) of the *FBCSA* provides that interment and scattering of cremated remains are to be “carried out in a decent and orderly manner and that quiet and good order are maintained in the cemetery at all times.”

The *Funeral, Burial and Cremation Services Act, 2002* effectively consolidates the *Cemeteries Act* and the *Funeral Directors and Establishment Act*, with minor changes to the provisions.

The provisions of the *Cemeteries Act*, the *Funeral Directors and Establishment Act* and the *Funeral, Burial and Cremation Services Act, 2002* in large part govern the actions of operators of cemeteries and crematoria. The legal role of other parties, including Estate

Trustees and family members, are set out in more detail in the common law, as outlined below.

THE HISTORICAL TREATMENT OF HUMAN REMAINS

Possession versus Property

A fundamental question that has been canvassed over several centuries is whether one can have a right of “property” over a human body.

While there is no doubt that one cannot have a right of possession or ownership over a live human body,⁶ the debate over a dead human body is more complicated.⁷

Halsbury's *Laws of England*, vol. 3, tit. “Burial and Cremation” provides simply:

The law in general recognises no property in a dead body.⁸

Historically the principle that one cannot own a human body has been upheld. Its roots lie in ecclesiastical law which saw that the body “was the temple of the Holy Ghost and it would be sacrilegious to do other than bury it and let it remain buried.”⁹

In *Institutes of the Laws of England*, published in 1641, Sir Edward Coke wrote that a cadaver “belongs to ecclesiastical cognisance.”¹⁰

In the 1867 English decision of *Foster v. Dodd*¹¹ Byles J. wrote:

A dead body belongs to no one, and is, therefore, under the protection of the public. If it lies in consecrated ground, the ecclesiastical law will interpose for its protection, but, whether in ground consecrated or unconsecrated, indignities offered to human remains in improperly or indecently disinterring them, are the grounds of an indictment.

⁶ *Yearworth v. North Bristol NHS Trust* (CA) [2010] QB at paragraph 30 [hereinafter *Yearworth*]

⁷ *Miner v. Canadian Pacific Railway*, 1911 CarswellAlta 23, 3 Alta. L.R. 408, 18 W.L.R. [hereinafter *Miner v. Canadian Pacific Railway*]

Justice Beck's decision which was overturned by the Alberta Supreme Court on the issue of the quantum of damages, provides a comprehensive survey on the state of the law on the rights attaching to human remains

⁸ At p. 405

⁹ Cited in *Yearworth*, *supra* note 6 at paragraph 31

¹⁰ *Yearworth*, *supra* note 6 at paragraph 31

¹¹ (1867), L.R. 3 Q.B. at p. 77, 8 B. & S. 842, 37 L.J.Q.B. 28, 17 L.T. 614

In *Williams v. Williams*,¹² an 1882 decision of the English court, Kay J. wrote of English law:

It is quite clearly the law of this country that there can be no property in the dead body of a human being.

...

Accordingly the law in this country is clear that, after the death of a man, his executors have a right to the custody and possession of his body (although they have no property whatever in it) until it is properly buried.

So while there is no ownership of a body, an executor has possession of the body of the Deceased. The executor's right of custody and possession is distinct from the right of ownership or property rights.

In the 1911 decision of *Miner v. Canadian Pacific Railway*,¹³ the Alberta Supreme Court considered an appeal of a decision by Justice Beck's ruling that ordered damages payable to the mother of a Deceased whose son's remains were transported to the wrong town, and whose bag was lost by the railway company. The Alberta Supreme Court allowed the appeal of the decision on the issue of damages. However, Justice Beck's decision provides a useful survey of the case law on the treatment of human remains, and that overview is not disputed by the Alberta Supreme Court.

In that decision Justice Beck notes that while there is at law "no property" in a corpse, there are exceptions to that rule, for instance, in the case of mummies which can be the subject of property, that is, owned. Justice Beck, further notes that, there can be a right of property over "skeletons or anatomical preparations of bodies or parts of bodies; and I shall take the liberty of adding – outside the range of the ecclesiastical law of the Church of England – bodies or parts of bodies preserved and venerated as the relics of saints."¹⁴

¹² (1882) 20 Ch. D. 659, 51 L.J. Ch. 385, 46 L.T. 275, 46 J.P. 726, 15 Cox 39 [hereinafter *Williams v. Williams*]

¹³ *Supra* note 7

¹⁴ *Supra* note 7 at paragraph 18

Justice Beck also noted that while English decisions are mostly determined by the ecclesiastical law of the Church of English, that basis of law has no application in Canada.¹⁵

Still, Justice Beck cites a range of English cases on the issue of the treatment of remains in his decision. Justice Beck summarized the view that there is a somewhat restricted right of property in a corpse, as follows:

..the law recognizes property in a corpse, a property, of course, which is subject, on the one hand, to the obligations, e.g. of proper care and *prima facie* of decent burial appropriate to its condition and the condition of the individual in his lifetime...and to the restraints upon its voluntary or involuntary disposal and use provided by law (e.g. the existence of the conditions authorising its use for anatomical purposes) or arising out of the fact that the thing in question is a corpse..and, on the other hand, the nature and extent of the right or obligation of the person for the time being claiming property (e.g. an executor, a husband, wife, next of kin, medical institute, etc.)¹⁶

Justice Beck also made notable and favourable reference to the 1908 decision of the High Court of Australia in *Doodeward vs. Spence*.¹⁷ In that case, the plaintiff sought to recover the body of a still-born fetus that had been preserved by a physician and later purchased by the plaintiff's father. The plaintiff had put the preserved body on public display. He had been prosecuted for indecent exhibition and pleaded guilty to the charge. In the course of the criminal proceedings, a police officer had taken possession of the body and intended to dispose of it. The plaintiff requested that the trial judge order the body returned to the plaintiff. The trial judge denied that request, and the plaintiff sued the defendant police officer for possession of the body. In spite of the criminal conviction, the majority of the High Court ruled that the body should be returned to the plaintiff. Griffith C. J. wrote for the majority as follows:

...In my opinion, there is no law forbidding the mere possession of a human body, whether born alive or dead, for purposes other than immediate burial...If the requirements of public health or public decency are infringed, quite different considerations arise...If, then there can, under some

¹⁵ *Miner v. Canadian Pacific Railway*, *supra* note 7 at paragraph 19

¹⁶ *Miner v. Canadian Pacific Railway*, *supra* note 7 at paragraph 22

¹⁷ (1908), 6 Commonwealth Law Reports 406 [hereinafter *Doodeward vs. Spence*]

circumstances, be a continued rightful possession of a human body unburied, I think, as I have already said, that the law will protect that rightful possession by appropriate remedies. I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constituted property, a human body, or a portion of a human body, is capable by law of becoming the subject of property.

Therefore, despite being convicted in criminal court of indecently displaying a human body, a person could still successfully claim possession, and even property, of that human body.

There was a dissenting opinion by Higgins J who disagreed on the basis that there could be no ownership of a human corpse.

The principles in *Doodeward vs. Spence* are upheld in recent case law. The decision was referred to favourably in *Yearworth*,¹⁸ a 2010 English decision. It was also referred to favourably by the English Court of Appeal in the 1999 decision of *R. v. Kelly*.¹⁹ In that case, the English Court of Appeal was asked to overturn a conviction for theft of human body parts held at the Royal College of Surgeons for use in training. The defendants argued that they should not have been convicted of theft, as human body parts could not be considered property and therefore could not be the subject of theft. The appeal was dismissed. At pages 630 to 631 of the judgment, Rose LJ wrote, referring to *Doodeward vs. Spence*, that while there could be no property in a corpse, parts of a corpse could be considered property if they had “acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes..”

Therefore, it appears that while the law generally states that there is “no property” in a human body, there are rights of possession, that resemble property rights, and in cases where the corpse or parts of it have been transformed for a specific use, there can be a right of property over such body or body parts.

¹⁸ At paragraphs 31 and 33

¹⁹ [1999] QB 621

Rights versus Obligations

Another way of considering the issue of possession or custody of a human body, is to view it through the prism of obligations, rather than rights. That is, rather than determining that the executor has the right to deal with the Deceased's body, Courts have characterized the executor's relationship with the corpse as one guided by duties. Generally, therefore, once a person dies, there are obligations, and not rights, that arise, with respect to that person's remains.

In the 1904 Pennsylvania decision of *Pettigrew v. Pettigrew*²⁰ the Court wrote the following on the issue of possession of a corpse:

It is commonly said, being repeated from the early cases in England, where the whole matter of burials was under the jurisdiction of the Ecclesiastical Courts, that there can be no property in a corpse. But **inasmuch as there is a legally recognized right of custody, control, and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.**²¹

In the case of *Abeziz v. Harris Estate*,²² outlined in more detail below, Justice Farley explained as follows:

...I understand that there is no legal right in a corpse (absent possibly some interim element under the *Anatomy Act*, R.S.O. 1990, c.A.21 for medical research). **Rather than rights there are only obligations.** This is an obligation the law places on the executor if there is one...²³

Addressing the competing claims by the Deceased's mother and the named executor, Justice Farley continued at paragraph 28:

...While one cannot be human if one were to ignore the distress [the Deceased's mother] has in the circumstances, it does not seem to me that in the legal sense any of her rights are being affected. Rather she is being relieved of a legal obligation of [her son's] body, an obligation that would fall to her as parent pursuant to *Vann*. (I do appreciate that she would gladly

²⁰ (1904), 207 Pa. 313, 64 L.R.A. 179

²¹ Emphasis added

²² 1992 CarswellOnt 3803, 3 W.D.C.P. (2d) 499, [1992] O.J. No. 1271 (Gen.Div.) at paragraph 28 [hereinafter *Abeziz v. Harris Estate*]

²³ Emphasis added

bear this obligation.) [The Deceased's] executrix..does have the legal obligation to attend to this using estate funds..

In *Lajhner v. Banoub*,²⁴ referred to in more detail below, Justice Gunsolos reiterated the point made in *Abeziz v. Harris Estate*,²⁵ above, and wrote as follows:

There is no legal right in a corpse. Rather than rights, there are only obligations. This is an obligation that the law places on the estate administrator.²⁶

THE OBLIGATION TO DEAL WITH REMAINS

Where there is a Will

The obligation to deal with a Deceased's remains falls squarely on the executor or Estate Trustee.²⁷ In cases where the Deceased has a Will that names an Estate Trustee and that Estate Trustee accepts the responsibility, he or she is then charged with disposing of the remains of the Deceased person.

Intestacy or No Estate Trustee Willing to Act

In cases of intestacy, or where the named Estate Trustee declines to act, the Court may appoint an Estate Trustee pursuant to section 29 of the *Estates Act*.²⁸

Section 29 of the *Estates Act* lists the parties who may be named as Estate Trustee where a Deceased dies without a Will, or where the Estate Trustee named in a Will refuses to act:

29. (1) Subject to subsection (3), where a person dies intestate or the executor named in the will refuses to prove the will, administration of the property of the deceased may be committed by the Superior Court of Justice to,

²⁴ 2009 CarswellOnt 1745, 49 E.T.R. (3d) 87 at paragraph 22 [hereinafter *Lajhner v. Banoub*]

²⁵ *Supra* note 22.

²⁶ Emphasis added

²⁷ *Williams v. Williams*, *supra* note 12

While this paper attempts to use the term Estate Trustee, many of the relevant cases use the terms "executor" or "administrator" and therefore those terms are also used

²⁸ R.S.O. 1990, c. E.21 [hereinafter *Estates Act*]

(a) the person to whom the deceased was married immediately before the death of the deceased or person with whom the deceased was living in a conjugal relationship outside marriage immediately before the death;
(b) the next of kin of the deceased; or
(c) the person mentioned in clause (a) and the next of kin, as in the discretion of the court seems best, and, where more persons than one claim the administration as next of kin who are equal in degree of kindred to the deceased, or where only one desires the administration as next of kin where there are more persons than one of equal kindred, the administration may be committed to such one or more of such next of kin as the court thinks fit.

Appointment at request of parties interested

[\(2\)](#) Subject to subsection (3), where a person dies wholly intestate as to his or her property, or leaving a will affecting property but without having appointed an executor thereof, or an executor willing and competent to take probate and the persons entitled to administration, or a majority of such of them as are resident in Ontario, request that another person be appointed to be the administrator of the property of the deceased, or of any part of it, the right that such persons possessed to have administration granted to them in respect of it belongs to such person.

General power as to appointment of administrator under special circumstances

[\(3\)](#) Where a person dies wholly intestate as to his or her property, or leaving a will affecting property but without having appointed an executor thereof willing and competent to take probate, or where the executor was at the time of the death of such person resident out of Ontario, and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the property of the deceased, or of any part of such property, other than the person who if this subsection had not been enacted would have been entitled to the grant of administration, it is not obligatory upon the court to grant administration to the person who if this subsection had not been enacted would have been entitled to a grant thereof, but the court may appoint such person as it thinks fit upon his or her giving such security as it may direct, and every such administration may be limited as it thinks fit.

Subsection 29(4) of the *Estates Act* provides that a Trust Company “may be appointed as administrator under subsection (2) or (3), either alone or jointly with another person.”

The legislation does not set out a priority or hierarchy as to who is to be appointed Estate Trustee by a Court. In *Lajhner v. Banoub*,²⁹ Justice Gunsolos wrote:

²⁹ *Supra* note 24 at paragraph 18

18. Section 29(1) of the *Estates Act* does not provide spouses, or those living in a conjugal relationship with the deceased at the time of death, priority to the appointment over the next of kin. Such a priority scheme would fetter or be a constraint upon the court's role and would detract from the court's *parens patriae* jurisdiction. Subsection 29(3) clearly indicates that the court has the ultimate discretion to appoint the administrator when a person dies intestate.

The Court is afforded wide discretion to appoint an Estate Trustee pursuant to section 29 of the *Estates Act* and is not bound to name a spouse in priority of next of kin.

A person (or persons or Trust Corporation) named as Estate Trustee pursuant to section 29 of the *Estates Act* bears the responsibility of dealing with the Deceased's remains.

Estate Trustee During Litigation

In *Buswa v. Canzoneri*,³⁰ the Deceased had died prematurely, at age 42, without a Will. The Deceased did not have a spouse but was survived by seven siblings, an adult daughter and minor son.

The Court heard a motion in which siblings of the Deceased and the daughter of the Deceased separately sought appointment as Estate Trustee(s) During Litigation.

The main issue in dispute was the treatment of the Deceased's remains. The Deceased's siblings wanted his remains to be buried in accordance with Anishnabek traditions as he had been a member of the Whitefish River First Nation. The Deceased's daughter disagreed, and claimed that the Deceased wanted to be cremated. The siblings of the Deceased disputed the daughter's relationship with the Deceased. The Deceased's name was not on her birth certificate and she only met him two years before the Deceased passed away. The daughter produced evidence of her relationship with the Deceased, which Justice Stinson found satisfied her on a balance of probabilities that she was the natural daughter of the Deceased.

³⁰ 2010 CarswellOnt 9888, 2010 ONSC 7137, 65 E.T.R. (3d) 312

Justice Stinson applied section 29 of the *Estates Act* to determine the appointment of an administrator. As the Deceased did not have a spouse, only subsection 29(1)(b) which allows the appointment of “next of kin” applied. Justice Stinson reviewed definitions of “next of kin” and determined that the Deceased’s daughter was more closely related to the Deceased, and therefore entitled in priority to appointment. As the parties only sought the appointment of an Estate Trustee During Litigation, the Deceased’s daughter was appointed in that capacity.³¹

In her role as Estate Trustee During Litigation, the Deceased’s daughter was authorized as personal representative to dispose of the remains of the Deceased in a dignified manner.³² Her authority is identical to that of an Estate Trustee otherwise named or appointed.

Intestacy and No Spouse or Next of Kin

If a person dies without a Will, and/or there is no person who can be appointed pursuant to section 29 of the *Estates Act*, then the Court may, pursuant to the *Crown Administration of Estates Act*³³ appoint the Public Guardian and Trustee to act as Estate Trustee.³⁴

PGT may administer certain estates

1. (1) The Superior Court of Justice may, on the Public Guardian and Trustee’s application, grant to the Public Guardian and Trustee letters of administration or letters probate with respect to a person’s estate, if the following conditions are satisfied:

1. The person dies in Ontario, or is a resident of Ontario but dies elsewhere.
2. The person dies intestate as to some or all of his or her property, or dies leaving a will without naming an executor or estate trustee who is willing and able to administer the estate.
3. There are no known next of kin who are residents of Ontario and are willing and able to administer the estate, or the only known next of kin are minors and there is no other near relative who is a resident of Ontario and is willing and able to administer the estate or to nominate another person to do so.

³¹ At paragraph 23

³² At paragraph 24

³³ R.S.O. 1990, c. C.47 [hereinafter *Crown Administration of Estates Act*]

³⁴ Section 1, *Crown Administration of Estates Act*, R.S.O. 1990, Chapter C.47

As the party authorized to act as Estate Trustee, the Public Guardian and Trustee would then bear the responsibility of disposing of the Deceased's remains. Section 3 of the *Crown Administration of Estates Act* provides that the Public Guardian and Trustee may make arrangements for the Deceased's funeral even before being appointed Estate Trustee by the Court:

Power to safeguard estate, etc.

2. (1) While the Public Guardian and Trustee is conducting an investigation to determine whether the conditions set out in subsection 1 (1) are satisfied, and until letters of administration or letters probate are granted, the Public Guardian and Trustee may,

- (a) arrange the person's funeral;
- (b) make an inventory of, take possession of, safeguard and dispose of the person's property; and
- (c) exercise all the powers of a personal representative with respect to the person's property.

DUTIES OF THE ESTATE TRUSTEE

As stated above, the obligation to deal with the remains of a Deceased falls to the Estate Trustee, whether he or she is named in the Will, or otherwise appointed by the Court, or named as Estate Trustee During Litigation.

At common law, the duties of the Estate Trustee in respect of the possession, custody and disposal of the remains of a Deceased have been identified as follows:

1. To dispose of the body in a decent and dignified manner;³⁵
2. To dispose of the body in a manner befitting the Deceased's station in life;³⁶ and
3. To provide particulars of the disposal of the Deceased's remains to the Deceased's next of kin.³⁷

³⁵ *Abeziz v. Harris Estate*, *supra* note 22 at paragraph 28; *Saleh v. Reichert* (1993), 1993 CarswellOnt 567 (Ont. Gen. Div.) at paragraph 8 [hereinafter *Saleh v. Reichert*]

³⁶ *Schara Tzedek v. Royal Trust Co.*, [1953] 1 S.C.R. 31, [1952] 4 D.L.R. 529 at paragraph 12 [hereinafter *Schara Tzedek v. Royal Trust Co.*]

³⁷ *Sopinka (Litigation Guardian of) v. Sopinka*, 2001 CarswellOnt 3234, 55 O.R. (3d) 529, 42 E.T.R. (2d) 105 [hereinafter *Sopinka (Litigation Guardian of) v. Sopinka*]

1. Duty to dispose of the body in a decent and dignified manner

Treating and disposing of the body in a dignified fashion, is the fundamental obligation of an Estate Trustee.³⁸ As for a “dignified manner”, both cremation and burial are considered to be appropriate means of disposing of corpses in Ontario.³⁹

Generally, there is a duty to treat a corpse with dignity. Justice Farley wrote in *Abeziz v. Harris Estate* on the duty of an executor:

..The fundamental obligation is that the body be appropriately dealt with – that is disposed of in a dignified fashion. Burial and cremation come to mind as being specifically sanctioned in Ontario...

The *Cemeteries Act* and the *Funeral, Burial and Cremation Services Act, 2002* specifically provide for both cremation and burial.

While the case law indicates that either burial or cremation are dignified and acceptable means of disposing of a Deceased’s remains, it does not provide further details of those methods of disposal.

The issue of the specifics or meaning ascribed to “dignified fashion” was raised in the decision of *Bastien v. Ottawa Hospital (General Campus)*.⁴⁰ In that case, the plaintiffs, a couple whose premature twins had died shortly after birth, and had been buried by the hospital, sought to have the bodies of their babies disinterred so that they could be reburied. The plaintiffs were informed by the hospital that the babies’ bodies had been buried in a single casket with other babies, still births and possibly fetuses such that it would be impossible to disinter the two bodies. The plaintiffs brought an action in negligence against the hospital and funeral home for failing to provide a proper burial. The defendants moved for summary judgment.

³⁸ *Lajhner v. Banoub*, *supra* note 24 at paragraph 22

³⁹ *Abeziz*, *supra* at paragraph 28, *Lajhner*, *supra* at paragraph 21

⁴⁰ 2001 CarswellOnt 3561, 56 O.R. (3d) 397 [hereinafter *Bastien v. Ottawa Hospital*]

The plaintiffs' counsel argued that it was undignified to "bury strange bodies in the same casket"⁴¹ and that burials typically take place with a single body in a casket, and that the burial in question was "callous, undignified and disrespectful."⁴²

The Court agreed that the hospital was obliged to bury or dispose of remains in a decent and dignified manner but noted that there was little case law to expand on what that constituted.⁴³ The Court ruled that what the standard of care was for a "decent and dignified" burial and whether that standard of care had been met were triable issues and denied the defendants' motion for summary judgment.

In an unreported endorsement in *Carter v. Thompson*⁴⁴ Justice Bielby noted the argument of counsel for the common law spouse of the Deceased that the Estate Trustees had abused their authority to deal with the Deceased's remains such that they "ought to lose the right to dispose of the remains." Justice Bielby noted that "the law is well established that the executors or estate trustees are the one entitled to deal with the remains and have possession of same." Bielby J. found however, that the manner in which the Estate Trustees had exercised their authority, and whether they should lose that authority was a triable issue. The matter did not ultimately proceed to trial but the endorsement reflects a recognition that the manner in which Estate Trustees execute their obligations respecting remains can be reviewed by a Court.

2. Duty to dispose of the body in a manner befitting the Deceased's station in life

In deciding how to dispose of a Deceased's remains, an Estate Trustee may abide by the wishes of the Deceased, as long as the expenses are not extravagant or unreasonable and do not unfairly affect the creditors of the Estate.⁴⁵

⁴¹ At paragraph 37

⁴² At paragraphs 38 to 39

⁴³ At paragraphs 47 and 48

⁴⁴ Superior Court of Justice file number CV70-1809-ES

⁴⁵ Donna C. Cappon and Robyn M. Hawkins, "Funeral" in *Widdifield on Executors and Trustees* (Toronto: Thomson Carswell, 2008) 1-1

In *Declava, Re.*⁴⁶ the Deceased had made an assignment into bankruptcy some two weeks before he passed away. The Trustee had made arrangements for a funeral and the issue of payment for those expenses was heard by the Court. It was argued that the funeral expenses were a first charge against the Estate. The Court ruled, however, that although Section 136 of the *Bankruptcy and Insolvency Act*⁴⁷ provides that “in the case of a deceased bankrupt” all reasonable funeral and testamentary expenses are to be paid in priority, the provision only applied in cases where individuals had not claimed bankruptcy prior to death, and whose Estates were bankrupt after their death. The Court ruled that the provision providing priority to funeral and testamentary expenses did not apply to individuals who claimed bankruptcy during their lifetimes. The provision applies to bankrupt Estates, not to the Estates of bankrupt individuals.

The result is stark: an Estate Trustee has no authority to pay for a funeral for an undischarged bankrupt from the Estate. At paragraph 14, Reg. S.W. Nettie writes:

14 Thus, in Ontario, if there are insufficient assets to bury an undischarged bankrupt, and no person, consequently, steps forward to claim the remains, and become burdened with burial costs, the city will provide a pauper's funeral.

In *Schara Tzedek v. Royal Trust Co.*⁴⁸ the Deceased had named a trust company as her executor. The Deceased's Will had directed the terms of her burial. The Board of the cemetery set the burial fee at \$3,000.00 but did not contact the trust company about the fee until after the burial. The trust company refused to pay the amount set by the cemetery on the basis that the amount was exorbitant and had not been agreed upon. The Deceased's Estate was valued at \$105,000.00.

In reviewing the case, the Supreme Court stated that at common law, there is a duty upon an executor to bury a Deceased in a manner that is fit for his or station in life.⁴⁹

⁴⁶ 2008 CarswellOnt 2106, 42 C.B.R. (5th) 80, 40 E.T.R. (3d) 144

⁴⁷ R.S.C. 1985, c. B.3

⁴⁸ *Supra* note 36

⁴⁹ At paragraph 12

As there had been no agreement as to fees, and the manner in which the fee had been set was unclear, the Court upheld the reduced amount of \$450.00, as ordered by the trial judge, as just and reasonable.⁵⁰

3. Duty to provide particulars of the disposal of the Deceased's remains to the Deceased's next of kin

From a practice perspective this issue often arises. Family members complain that the named executor failed to inform them of the details of a burial or cremation until after the ceremony has been completed. While Estate Trustees have significant authority to decide about the manner in which a Deceased's remains are to be disposed of, they are also obliged to inform the next of kin of such arrangements.

In *Sopinka (Litigation Guardian of) v. Sopinka*⁵¹ the defendant's son and husband both died of cancer within three months of each other. The son had been divorced, and had two children who were minors.

The son had named his father as executor but since the father died while acting as executor, the defendant took over the role of personal representative.

The son was cremated and later placed in the father's coffin and buried. The details of the burial were not provided to the son's ex-wife or children until the following year.

The son's ex-wife brought an action seeking damages on the basis on which the body had been disposed of, and the delay in informing her of the disposal of the remains.

There was a difficult history in the family, and the defendant stated that she was afraid of the son's ex-wife as she had a pattern of violence.

On the issue of informing family members of the disposal of remains, Justice Quinn wrote at paragraphs 35 and 36:

35 Although I was not provided with any authority on point, I am prepared to hold that there is a duty on an estate trustee, upon request, to provide

⁵⁰ At paragraph 14

⁵¹ *Supra* note 37

particulars to the next of kin of the deceased regarding his or her burial. I would define next of kin to generally include the mother, father, children, brothers, sisters, spouse and common law spouse of the deceased. Where next of kin happen to be minors, I think that the duty is owed to them through their custodial parent or guardian.

36 The specific request must be reasonable and the nature of the particulars provided must be appropriate in the circumstances.

Based on the particular facts of the case, and the defendant's undisputed fear of the plaintiff, and the fact that to inform the Deceased's children, the defendant would have had to inform the plaintiff who was known to be violent and obstructive, Justice Quinn found that there was no breach of duty on the part of the defendant.⁵²

Nevertheless there is a positive duty on an Estate Trustee to inform the next of kin of the disposal of the remains, when so requested. As such, Estate Trustees should be informed of the importance of this duty.

LIMITS ON THE AUTHORITY OF AN ESTATE TRUSTEE

Although an Estate Trustee is entitled to dispose of the remains of a Deceased so long as he or she does so in compliance with the duties set out in law, the authority of an Estate Trustee can be circumscribed by the law on organ donation, coroner's enquiries and the authority of an interment rights holder.

Organ Donation

Organ donation in Ontario is governed by the *Trillium Gift of Life Network Act*⁵³ ("*TGLNA*").

Section 4 of the *TGLNA* provides that a person over the age of sixteen, may direct that his or her body or parts thereof may be used after death for "therapeutic purposes, medical education or scientific research." The consent must be in writing and signed by

⁵² At paragraph 37

⁵³ R.S.O. 1990, c. H.20 [hereinafter *TGLNA*]

the person, or in the alternative, orally in the presence of at least two witnesses, during the person's last illness.⁵⁴

In cases where a person has not given consent to donate his or her body or parts, the person's spouse, or in some cases, children, parents, siblings, next of kin, or "the person lawfully in possession of the body" may give consent to the use of the person's body or parts thereof for "therapeutic purposes, medical education or scientific research."⁵⁵ That consent may be given after the person in question dies, or before death if the person is deemed incapable of consenting by reason of injury or disease and the person's death is imminent.⁵⁶ Consent by an authorized party may be given in writing, orally in the presence of at least two witnesses, or by "telegraphic, recorded telegraphic, or other recorded message..."⁵⁷

Consent that is given in accordance with the *TGLNA* to donate a body or parts thereof for transplant, research or education is binding and constitutes full lawful authority for determining the use of the body, or removal of the specific body part(s).⁵⁸ The only exception is where there is cause to believe that consent given by the Deceased was subsequently withdrawn, or in the case where another person consents to the donation, there is an objection to the donation by a person of the same or closer relationship to the Deceased.⁵⁹

Therefore a person during his or her lifetime, or a spouse or family member after or just before death, may provide binding consent for the use of a person's body or parts thereof, which consent is to be adhered to by the Estate Trustee.

⁵⁴ Section 4, *TGLNA*

⁵⁵ Section 5, *TGLNA*

⁵⁶ Subsection 5(2), *TGLNA*

⁵⁷ Subsections 5(2)(g),(h) and (i), *TGLNA*

⁵⁸ Subsections 4(3) and 5(4), *TGLNA*

⁵⁹ Subsections 4(3) and 5(4), *TGLNA*

Coroners Act

Pursuant to the *Coroners Act*,⁶⁰ where a coroner has the jurisdiction to investigate a death he or she may take possession of the body to examine the body and conduct an investigation:

15. (1) Where a coroner is informed that there is in his or her jurisdiction the body of a person and that there is reason to believe that the person died in any of the circumstances mentioned in section 10,⁶¹ the coroner shall issue a warrant to take possession of the body and shall examine the body and make such investigation as, in the opinion of the coroner, is necessary in the public interest to enable the coroner,

- (a) to determine the answers to the questions set out in subsection 31 (1);⁶²
- (b) to determine whether or not an inquest is necessary; and
- (c) to collect and analyze information about the death in order to prevent further deaths in similar circumstances.

Investigative powers

16. (1) A coroner may,
(a) examine or take possession of any dead body, or both; and

⁶⁰ R.S.O. 1990, c. C.37 [hereinafter *Coroners Act*]

⁶¹ Section 10 of the *Coroners Act* provides: Duty to give information

10. (1) Every person who has reason to believe that a deceased person died,

- (a) as a result of,
 - (i) violence,
 - (ii) misadventure,
 - (iii) negligence,
 - (iv) misconduct, or
 - (v) malpractice;
- (b) by unfair means;
- (c) during pregnancy or following pregnancy in circumstances that might reasonably be attributable thereto;
- (d) suddenly and unexpectedly;
- (e) from disease or sickness for which he or she was not treated by a legally qualified medical practitioner;
- (f) from any cause other than disease; or
- (g) under such circumstances as may require investigation,

shall immediately notify a coroner or a police officer of the facts and circumstances relating to the death, and where a police officer is notified he or she shall in turn immediately notify the coroner of such facts and circumstances.

⁶² Section 31(1) of the *Coroners Act* provides:

Purposes of inquest

31. (1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,

- (a) who the deceased was;
- (b) how the deceased came to his or her death;
- (c) when the deceased came to his or her death;
- (d) where the deceased came to his or her death; and
- (e) by what means the deceased came to his or her death.

(b) enter and inspect any place where a dead body is and any place from which the coroner has reasonable grounds for believing the body was removed.

Even after interment, the Chief Coroner may order that a body be disinterred for an investigation or inquest:

24. Despite anything in the *Cemeteries Act*, the Chief Coroner may, at any time where he or she considers it necessary for the purposes of an investigation or an inquest, direct that a body be disinterred under and subject to such conditions as the Chief Coroner considers proper.

The authority of a coroner or the Chief Coroner pursuant to the *Coroners Act* supersedes that of an Estate Trustee in respect of a Deceased's body.

Interment Rights Holder

While the Estate Trustee has the obligation to dispose of the Deceased's body, and that right of possession remains and continues after burial, the Estate Trustee's authority is limited by the rights of the interment rights holder.

The interment rights holder is defined under the *Cemeteries Act* as the person who possessed "interment rights." This person is the owner of the lot in which the remains are to be interred.

Remains cannot be interred in a specific lot without the consent of the interment rights holder. Similarly, remains cannot be disinterred without the consent of the interment rights holder. Subsection 51(a) of the *Cemeteries Act*, requires the prior consent of the interment rights holder if remains are to be disinterred. (Notification must also be given to the appropriate medical officer of health.) Therefore, while the Estate Trustee has possession of the Deceased's remains, that right of possession is limited by statute, to require the consent of the interment rights holder for interment and disinterment.

In *Heafey v. McRae*⁶³ the Court of Appeal for Ontario heard an appeal of a decision of the Superior Court of Justice⁶⁴ which had dismissed an application for a disinterment order. The Deceased had been buried in a plot owned by his common-law wife's daughter, who was the interment rights holder. The burial had been agreed upon by the Deceased's sister in her capacity as executrix. The executrix later sought to have the Deceased's remains disinterred and moved to a family graveyard in Quebec, however the interment rights holder refused to consent to the disinterment.

The executrix brought an application to the Superior Court of Justice seeking an Order for the disinterment of the remains. The applicant relied on the principle that the Estate Trustee has the right of possession over the Deceased's remains and that such right continues after burial. The respondent relied on the provision of the *Cemeteries Act* that requires the consent of the interment rights holder to be provided for disinterment.

Justice O'Neill of the Superior Court of Justice found that while the Court had jurisdiction to order a disinterment pursuant to subsection 51(2) of the *Cemeteries Act*, there was no provision in the legislation to dispense with the requirement for the interment rights holder's consent for a disinterment. The Court declined to order the disinterment.

The Court also noted that the wishes of the Deceased which were to be buried in a plot where his spouse would also be interred, and posited that "[a]s much as possible, the wishes of [the Deceased] should be respected and honoured in death."⁶⁵

WHO DETERMINES THE DISPOSITION OF REMAINS

The obligation of the Estate Trustee to deal with the Deceased's remains is accompanied by decision-making authority on the part of the Estate Trustee.

⁶³ 2000 CarswellOnt 4415, 5 E.T.R. (3d) 125 (C.A.)

⁶⁴ 1999 CarswellOnt 5263, 5 E.T.R. (3d) 121 (Ont. S.C.J.)

⁶⁵ At paragraph 15

As outlined above, the common law requires that the Estate Trustee treat the body of a Deceased with dignity, dispose of the remains in a decent manner, and inform family members of the disposal. Beyond those duties (and the potential limitations on authority outlined above) an executor may dispose of the Deceased's remains in the manner he or she sees fit.

The expressed wishes of a Deceased may be taken into consideration by an Estate Trustee, but do not bind the Estate Trustee.

In the 1882 English decision of *Williams v. Williams*,⁶⁶ referred to above, Kay J. ruled that the wishes of a testator respecting the disposition of his or her body expressed in a Will cannot be enforced in law.

In that case, the Deceased had written in a codicil to his Will that he wished for his executors to give his body to a Miss Williams and that his body was to be cremated with specific instructions given to Miss Williams. Following the Deceased's death, his body was buried at the direction of his executors. Miss Williams then had the body disinterred and sent to Milan where it could be legally cremated, as cremation was not legal in Britain at that time. Miss Williams followed the Deceased's instructions as set out in the codicil and subsequent letter and then claimed the expenses from the executors. The court declined to uphold the Deceased's wishes, even though they were expressed in a codicil. The Court relied on the premise that there are no property rights over a body such that a person cannot direct the disposition of a body - even one's own - by Will. The court dismissed Miss William's claim for reimbursement of her expenses.

The decision of *Williams v. Williams* is cited favourably in Ontario case law for the premise that a Deceased's wishes in respect of his or her remains are not enforceable.⁶⁷

⁶⁶ *Supra* note 12

⁶⁷ *Saleh v. Reichert*, *supra* note 35 at paragraph 7

The case law in Ontario clearly provides that while an executor *may* abide by the expressed wishes of the Deceased, he or she is not bound to do so.⁶⁸ At paragraph 20 of *Lajhner v. Banoub*,⁶⁹ referred to in more detail, below Justice Gunsolos explained:

Even in circumstances where a deceased expresses the wish to be cremated that is not dispositive of the issues, as an expressed wish of a person directing the disposition of his or her body cannot be enforced in law. Rather, the duty to dispose of the remains falls upon the administrator of the deceased's estate...

Thus an Estate Trustee is obliged to deal with the Deceased's remains, but has no obligation to abide by the wishes of the Deceased in that regard. The decision is entirely that of the Estate Trustee, as long as he or she abides by his or her duties in law.

DISPUTES RELATING TO REMAINS

As noted above, it is the duty of the Estate Trustee to dispose of the remains of a Deceased person in a dignified and appropriate manner and to inform family members of such disposal.

Disputes often arise after death when family members, who are not named as executor, disagree or where co-executors cannot agree as between themselves with the overriding intentions of the executor to dispose of the remains of the Deceased.

In the cases of *Abeziz v. Harris Estate*,⁷⁰ *Saleh v. Reichert*⁷¹ and *Lajhner v. Banoub*⁷² the executors intended to cremate the remains of the Deceased persons, while family members objected to cremation on religious, but legally unenforceable, grounds.

⁶⁸ *Abeziz v. Harris Estate*, supra note 22 at paragraph 23 *Saleh v. Reichert*, supra note 35 at paragraph 27; *Lajhner v. Banoub*, supra note 24 at paragraph 21

⁶⁹ *Supra* note 24

⁷⁰ *Supra* note 22

⁷¹ 1993 CarswellOnt 567, 50 E.T.R. 143, 104 D.L.R. (4th) 384 (Gen. Div.)

⁷² (2009), 2009 CarswellOnt 1745, 49 E.T.R. (3d) 87 (Ont.S.C.J.)

Abeziz v. Harris Estate⁷³

In *Abeziz v. Harris Estate*,⁷⁴ the Deceased died of cancer at 31. Shortly before his death, the Deceased met with a family friend, Jane Devlin, a non-practicing lawyer, to discuss preparing a Will. After obtaining instructions, Ms. Devlin prepared a handwritten Will that the Deceased executed. Two days later, the Deceased executed a formally prepared Will that was identical to the first Will but for one section that provided for additional Estate expenses. Both Wills named Ms. Devlin as the executor. Ms. Devlin indicated that she intended to have the Deceased's remains cremated as the Deceased had expressed those wishes to her. The Deceased's mother sought an Orthodox Jewish burial service for her son, and brought an application challenging both Wills on the grounds of suspicious circumstances and undue influence.

After reviewing the evidence, Justice Farley dismissed the Will challenge. As a result, the named executor was charged with disposing of the Deceased's remains. The judge made no ruling on how the body was to be disposed of, noting that that responsibility fell to the executor. As the real issue in dispute was the proposed cremation, Justice Farley noted that the executor was not bound to abide by the Deceased's wishes, but since she was named executor, she could also not be prevented from abiding by those wishes. Specifically, Farley J noted:

...While it is true that testator cannot force his executor to comply with his or her wishes there is nothing to prevent a valid executor from carrying out a testator's lawful wishes concerning the disposal of the testator's body.⁷⁵

Saleh v. Reichert⁷⁶

In *Saleh v. Reichert* a similar issue was raised. The Deceased who died in an accident had been raised a Muslim. She died intestate and her husband was appointed administrator of her Estate. The Deceased's husband expressed the intention to have

⁷³ *Supra* note 22

⁷⁴ *Supra* note 22

⁷⁵ At paragraph 23

⁷⁶ *Supra* note 35

her remains cremated. The Deceased's father brought an application to prevent the cremation on the grounds that it was against the tenets of Islam. The Deceased's husband indicated that he intended to have the remains cremated as such had been the Deceased's expressed wishes. In spite of evidence of the religious and family background, Justice Bell found that the duty to dispose of the Deceased's remains fell to the appointed administrator who was the Deceased's husband.

Justice Bell concluded that "the fundamental duty or obligation is that the remains be disposed of in a decent and dignified fashion. Further, as burial and cremation are both specifically sanctioned in Ontario, disposal by either means would meet the requirement for disposal in a decent and dignified fashion..."⁷⁷

As for the religious concerns, Justice Bell found that, as in *Abeziz*, above, "religious law had no bearing on the case," and that "there are only legal obligations." Justice Bell also ruled that none of the rights of the Deceased's father had been affected.⁷⁸

Lajhner v. Banoub⁷⁹

In *Lajhner v. Banoub* the Deceased, who suffered from schizophrenia, took his own life at the age of 24. The Deceased had been in a tumultuous conjugal relationship with Ms. Banoub, in which both faced domestic violence charges. They had a child together but the child had been removed from their care. At the time of his death, they were not residing together, but Ms. Banoub asserted that they were in the course of reconciling. They had attempted to make arrangements for their son to be cremated but Ms. Banoub delivered a statutory declaration to the funeral home to block the cremation on the basis that the Deceased had converted to Islam and that cremation was not in compliance with Muslim beliefs. The Deceased's parents brought an application to be appointed Estate Trustees and Ms. Banoub also sought appointment as Estate Trustee. As the Deceased died intestate, the Court was charged with appointing an Estate Trustee pursuant to the *Estates Act*. The Court reviewed the criteria for appointing an Estate

⁷⁷ At paragraph 25

⁷⁸ At paragraph 25

⁷⁹ *Supra* note 24

Trustee, and determined that Ms. Banoub did not meet the criteria to be appointed Estate Trustee as she had not been residing with the Deceased in a conjugal relationship “immediately before the death.” Justice Gunsolos also found the evidence of potential reconciliation conflicting. In the end, Justice Gunsolos appointed the Deceased’s parents as Estate Trustees such that they were authorized to deal with the Deceased’s remains.

The issue of competing religious beliefs was at the forefront of the case. Justice Gunsolos recognized the centrality of the religious differences to the parties but noted that they are not relevant to the Court’s deliberations. At paragraph 29, Justice Gunsolos wrote:

29 The court is cognizant of the religious beliefs that motivate the Applicants and the Respondent Ms. Banoub in relation to this matter. **The law is clear, however, that such religious laws or beliefs are not a factor that the court may take into consideration. Ultimately, it is up to the estate administrator or trustee to assume the obligation to dispose of the deceased's remains in an acceptable and dignified fashion.**⁸⁰

LEGISLATION IN OTHER JURISDICTIONS

Both British Columbia and Quebec have notably different legal frameworks for decision-making respecting remains, from Ontario.

British Columbia

The *Cremation, Interment and Funeral Services Act*⁸¹ sets out a framework for decision-making respecting a Deceased’s remains that is markedly distinct from that in Ontario.

Section 5 of the legislation provides a priority list for those who have a right to control the disposition of human remains or cremated remains. The first priority falls to the personal representative named in the Will, then followed by family members:

⁸⁰ Emphasis added

⁸¹ SBC 2004, Chapter 35

Control of disposition of human remains or cremated remains

5 (1) Subject to this section and section 8 (3) (b) (i) [*requirement for authorization before funeral services or disposition*], the right of a person to control the disposition of the human remains or cremated remains vests in, and devolves on, the following persons in order of priority:

- (a) the personal representative named in the will of the deceased;
- (b) the spouse of the deceased;
- (c) an adult child of the deceased;
- (d) an adult grandchild of the deceased;
- (e) if the deceased was a minor, a person who was a legal guardian of the person of the deceased at the date of death;
- (f) a parent of the deceased;
- (g) an adult sibling of the deceased;
- (h) an adult nephew or niece of the deceased;
- (i) an adult next of kin of the deceased, determined on the basis provided by sections 89 and 90 of the *Estate Administration Act*;
- (j) the minister under the *Employment and Assistance Act* or, if the official administrator under the *Estate Administration Act* is administering the estate of the deceased under that Act, the official administrator;
- (k) an adult person having a personal or kinship relationship with the deceased, other than those referred to in paragraphs (b) to (d) and (f) to (i).

Subsection 5(4) of the legislation provides that a “person claiming that he or she should be given the sole right to control the disposition of the human remains or cremated remains may apply to the Supreme Court for an order regarding that right.” When hearing such applications, the Court is to consider the “rights of all persons having an interest” and to take into consideration the feelings of individuals related to, or associated with the deceased, and in particular the deceased’s spouse, rules, practices and beliefs, including religious beliefs respecting remains, directions given by the deceased, and whether the dispute is driven by family conflict “or a capricious change of mind” respecting the remains.

A person ordered by the Court to deal with the Deceased’s remains supplants any other party otherwise prioritized in the legislation, including the named executor.

Section 6 of the legislation provides that the Deceased's wishes with respect to disposition of remains are to be complied with if they are expressed in a Will, or funeral services contract, are in compliance with legislation and are not unreasonable, impracticable and would not cause hardship.⁸²

This is in marked distinction to the common law in Ontario which provides executors with the sole authority to direct the disposition of a Deceased's remains, and the discretion to do so as long as he or she does so in a dignified manner, which corresponds with the Deceased's means, and informs the Deceased's family members of such disposition. The law in Ontario is also clear that religious priorities and the wishes of the Deceased need not be adhered to by an Estate Trustees, and are not to be considered by the Court in dealing with disputes. The British Columbia legislation by contrast factors in the wishes of the Deceased, and even includes the rules and beliefs of those who shared the Deceased's religion.

Quebec

Article 42 of the Civil Code⁸³ provides that a person may direct the nature of his or her funeral and the manner in which his or her remains are to be disposed:

42. A person of full age may determine the nature of his funeral and the disposal of his body. A minor may also do so with the written consent of the person having parental authority or his tutor. Failing the expressed wishes of the deceased, the wishes of the heirs or successors prevail; in both cases, the heirs and successors are bound to act; the expenses are charged to the succession.

Therefore in Quebec, a person may direct the disposal of his or her remains, and even a minor can do so if his parents or guardians consent.

⁸²A written preference by a deceased person respecting the disposition of his or her human remains or cremated remains is binding on the person who under section 5 [*control of disposition of human remains or cremated remains*], has the right to control the disposition of those remains if

(a) the preference is stated in a will or preneed cemetery or funeral services contract,
(b) compliance with the preference is consistent with the *Human Tissue Gift Act*, and
(c) compliance with the preference would not be unreasonable or impracticable or cause hardship.

⁸³ 1991, c. 64, a. 42

The ability to direct the disposal of one's own remains is in contrast to the law in Ontario which relies on the presumption that no one can direct the disposal of his or her own remains.

CRIMINAL SANCTIONS FOR MISTREATMENT OF REMAINS: SECTION 182 OF THE *CRIMINAL CODE*

The *Criminal Code*⁸⁴ underscores the duty of proper and dignified treatment of human remains. Section 182 of the *Criminal Code* criminalizes neglect of one's duty with respect to a corpse, and the improper or indecent interference with or the indignity of a corpse. These are indictable offences that can carry prison terms of up to five year.

Dead body

182. Everyone who

(a) neglects, without lawful excuse, to perform any duty that is imposed on him by law or that he undertakes with reference to the burial of a dead human body or human remains, or

(b) improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

In the New Brunswick case of *R. V. Murray*⁸⁵ a funeral home owner was charged with four counts of improperly or indecently offering an indignity to a human body by failing to keep the body in appropriate facilities while awaiting cremation or burial. The funeral company owned by the accused had been experiencing financial difficulties and unable to carry out cremations immediately, and instead stored bodies for several days in a garage. The garage had windows that allowed others to see into the garage.

Justice Rideout of the New Brunswick Court of Queen's Bench reviewed the issue of what constitutes an "indignity" to human remains. Justice Rideout noted at paragraph 17:

While there is little authority on what constitutes offering an indignity to human remains, the thread of the authorities suggests that **an indignity**

⁸⁴ R.S.C., 1985, c. C-46

⁸⁵ 2007 CarswellNB 268, 2007 NBQB 214, 829 A.P.R. 177, 322 N.B.R. (2d) 177 (N.B.C.Q.B.)

does not have to be physically done to the human remains and, if what occurs is offensive, disrespectful, callous or unworthy treatment in the minds of memory of the family and the community, this would constitute an indignity under subsection 182(b) of the *Criminal Code*....⁸⁶

Justice Rideout declined to offer a definition of an “indignity” on bodies, noting that the concept could change with time, but that, even without a precise definition, an indignity can be intuitively recognized as having taken place. At paragraph 29, Justice Rideout wrote:

It is not my intention to establish a test to determine what is an indignity. As well, what may constitute an indignity today, may not tomorrow, as practices change. However, I believe that we can take a page out of the determination of obscenity by saying, while I have great difficulty in describing what constitutes an indignity to a dead human body or human remains, I know it when I see it.

Justice Rideout found that the facts, where bodies were stored in a garage with windows, for several days, supported a finding beyond a reasonable doubt that an indignity had been offered on the bodies.⁸⁷ Rideout rules that the accused’s actions “tarnishe[d] the memory of the dead, leaving the families with negative memories about their loved ones.”⁸⁸

BEYOND BURIAL AND CREMATION: MODERN MEANS OF DISPOSING OF REMAINS

While the case law and the *Cemeteries Act* as well as the *Funeral, Burial and Cremation Services Act, 2002* and the case law provide that burial and cremation are accepted means of disposing of human remains, new technology is constantly being developed to find alternate means of disposing of remains. Environmental and costs concerns have led to the exploration of innovative means of dealing with human remains that use less land, fewer chemicals and produce fewer greenhouse gases.

⁸⁶ Emphasis added

⁸⁷ At paragraph 30

⁸⁸ At paragraph 31

Natural or Green Burial

While regular burial often requires embalming chemicals, and interment in a casket that is made of non bio-degradable material such as steel, natural or “green” burial seeks to minimize the environmental impact of burial. Natural burial is defined as placing a body in a simple biodegradable shroud, or placing it in an unadorned pine box for interment in a natural space, without a gravestone.⁸⁹ Typically, a plant, tree or indigenous stone is used as a marker, and all interred bodies are tracked with a Geographic Information System, GPS or scannable microchip so that they can be located.

The practice is increasingly common in the United Kingdom where there are more than 200 natural burial grounds. It is on the rise as well in Canada, where existing Cemeteries have specific areas set aside for natural burials. Since natural burials are conducted in existing cemeteries, they are undertaken in a manner that is in compliance with the *Cemeteries Act*. Similarly if new natural burial grounds are established outside of existing cemeteries, they are required to comply with the relevant legislation on interment, which will soon be the *Funeral, Burial and Cremation Services Act, 2002*.

Resomation

Resomation is also known as “bio-cremation” and is promoted as a more environmentally friendly option than regular cremation.⁹⁰ In this process, the coffin is placed into a Resomator which is comprised of a high pressure apparatus, in which the body is exposed to a water and alkali combination to break the body down chemically, by alkaline hydrolysis. Once the process is complete, a sterile liquid and bone ash remain. The sterile liquid is returned to the water cycle, and the bone ash can be placed in an urn, as with cremated remains.

⁸⁹ <http://www.naturalburialassoc.ca/>

⁹⁰ www.resomation.com

The process was developed in Scotland. Transition Science Inc. holds the distribution rights for Resomation in Canada.⁹¹ The process has been accepted in Saskatchewan and Ontario.

The process has been approved in Ontario. The definition found in the *Cemeteries Act*, which is not substantially changed in the new legislation, defines a “crematorium” as a “building fitted with appliances for the purposes of cremating human remains, and includes everything incidental and ancillary thereto.”⁹² This definition includes a Resomator as it is a building that is designed for cremation, or bio-cremation, in this case. It is worth noting that the term “cremation” is not defined in the *Cemeteries Act*, nor in the *Funeral, Burial and Cremation Services Act, 2002* or its regulations, such that it may include “bio-cremation” as defined by Resomation, and a Resomator can be defined as a crematorium under the legislation.

Another legal issue that arises with Resomation is the disposal of the liquid product. While the process is defined as producing a sterile liquid that can be returned to the water cycle, that requires compliance with the applicable municipal legislation. The City of Saskatchewan has allowed the addition of the effluent to their water treatment system, while the City of Toronto has not authorized such to date.

Cryomation

This process involves using liquid nitrogen to freeze the body to 196°C, then fragmenting the brittle body and removing metal objects to produce a sterile powder. The product is then suitable to be interred in green burial sites.⁹³

The benefits of the process include the conservation of space, and the reduction of mercury emissions.

There is no indication that the process is in use in Canada. If it were to be used in Ontario, it would have to be in compliance with the applicable legislation. There may be

⁹¹ www.transitionsscience.com

⁹² Section 1, *Cemeteries Act*.

⁹³ www.cryomation.co.uk

a challenge, however, as the legislation contemplates Cemeteries, crematoria, interment and cremation, and the process of cryomation does not appear to apply to those methods.

Promession

Promession is promoted as another environmentally friendly option for disposal and burial.⁹⁴ It is a process which through freezing and vibration, breaks down human remains into a fine powder, with no release of toxins into the air or high energy use usually associated with cremation.

The process was developed in Sweden. There is no indication that the process has been approved in Canada. As with cryomation, promession would have to be in compliance with Ontario legislation which at present does not appear to contemplate these alternative means of disposing of human remains.

For more information on Environmentally Friendly Alternatives to Burial and Traditional Cremation to Burial, see Whaley Estate Litigation Newsletter No. 6, September 2011, Archive: whaleyestatelitigation.com/blog/newsletterarchive - Number 6

CONCLUSION

The disposal of human remains is a sensitive topic, and one that has received significant judicial attention. Historically, the law on human remains flowed from ecclesiastical traditions, and those roots still strongly affect the law in Ontario. Interestingly, although the origins of the law are church-based, the law has developed to conclude that religious values are unenforceable in the Courts.

The law on the duties of an Estate Trustee with respect to remains is well-settled, and the obligations on an Estate Trustee are clear: he or she is to dispose of the remains with dignity, to ensure that the disposal reflects the Deceased's station in life, and to inform family members of the disposal of the remains. However, the case law

⁹⁴ www.promession.org.uk

demonstrates that disputes between family members and executors persist, when family members object to the decisions made by Estate Trustees. In practice there are also frequently disputes between co-executors on the disposal of remains that can be intractable. These disputes are extremely difficult and involve the most basic and sensitive of human emotions and touch on notions of dignity, propriety, and inclusiveness as well as religious considerations. These conflicts are also difficult for the Estate litigator to navigate.

The case law is also clear on the point that the Estate Trustee is solely responsible for disposing of a Deceased's remains, subject to restrictions of organ donation, coroner's enquiries, and the rights of interment rights holders. The observation that an Estate Trustee may, but is not required to, abide by the wishes of the Deceased is consistently reiterated in the case law. From a practice perspective, it is important that a planning solicitor informs a testator of such, and that the testator assure him or herself of the choice of Estate Trustee who will be charged with making the decision about the disposal of the Deceased's remains.

While the law is well-settled on the duties of an Estate Trustee with respect to a Deceased's remains, the particulars of those duties still warrant attention. For instance, in the case of *Bastien v. Ottawa Hospital*⁹⁵ it is clear that the details of what defines a "dignified" and "decent" disposal have not been set out in the case law. It is also not clear from the case law whether an Estate Trustee can be removed from failing in his her duties respecting the Deceased's remains.

From a practical perspective, it will be interesting to see how the disposal of remains is carried out in the future. Environmental and cost concerns are driving many to contemplate non-traditional means of disposal of remains, as outlined in this paper. It will be worth observing, as new methods of disposal proliferate, how they will fit into the legislative framework, and whether they will be deemed to meet the requirement for a "decent" and "dignified" disposal.

⁹⁵ *Supra* note 40

Technology, environmental concerns and societal shifts may ultimately alter how the law on the disposal of remains is applied.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Please visit our new website at <http://www.whaleyestatelitigation.com>

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