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DISPUTES OVER HUMAN REMAINS

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INTRODUCTION

Issues surrounding human remains carry significant emotional, cultural, religious, ethical and legal implications. Issues that drafting solicitors and Estate Trustees often face, when assisting testators with their planning considerations, include the future treatment of their own remains. Estate litigators too often deal with issues of the disposition of human remains and of burial and plot ownership when family members disagree over the ultimate treatment of the remains of a deceased person. It is one that lawyers, legislators and courts alike must address so as to ensure, from a policy perspective, that remains are disposed of in a respectful, lawful, hygienic, and appropriate manner.

Though the law concerning the treatment of remains is relatively straightforward and well settled, prioritizing the role of the Estate Trustee, and the dignified treatment of the deceased's remains, is also an area subject to subtle pressures from a societal perspective as times and practices continue to evolve. Our culturally and religiously diverse population means that different practices are followed, while at the same time priorities are shifting toward practical considerations of cost, as well as environmental and efficiency concerns. These cultural shifts affect, to a limited degree, the direction the law will take in addressing the thorny and sensitive issues surrounding human remains, yielding substantially to the common law treatment of who has ultimate authority to deal with the remains.

PREVIOUS AND CURRENT LEGISLATION: ONTARIO

For many years, in Ontario, the legislation relevant to the disposal of human remains was 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 R.S.O. 1990, c. C.4 (repealed).
2. R.S.O. 1990, c. F.36 (repealed).

Collectively, these statutes were repealed and as of July 1, 2012, were replaced by the *Funeral, Burial and Cremation Services Act, 2002*[4] (the "*FBCSA*"), which consolidated both statutes and created further regulations.

Section 4(3) of the *FBCSA* prohibits interment of human remains outside a "cemetery" as defined in the legislation. The *FBCSA* provides a definition of "cemetery" (somewhat broader than that contained in the prior legislation) that includes "land that, in the prescribed circumstances, has been otherwise set aside for the interment of human remains". This definition of cemetery in the *FBCSA* provides 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,
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> 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]

The definition of "crematorium" has also been expanded:

> "**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" has been modified somewhat to "land containing human remains that is not a cemetery".

The definition of "interment rights holder" has been changed somewhat from the previous legislation to mean: "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.

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3. *Cemeteries Act*, ss. 2 to 7 and 44 to 61.
4. S.O. 2002, c. 33 (the "*FBCSA*").
5. *FBCSA*, s. 1.

The definitions of "columbarium", "human remains", "inter", "interment rights", "lot" and "mausoleum" remain as provided for in the prior *Cemeteries Act*.

Consistent with the *Cemeteries Act*, the *FBCSA* requires that the disposal of human remains be undertaken in a "decent" and proper manner. Specifically, s. 5(3)(a) of the *FBCSA* provides that interment of human remains 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" (emphasis added).

The provisions of the *FBCSA*, in large part, govern the actions of operators of cemeteries and crematoria. The *FBSCA* is primarily administered and enforced by the Bereavement Authority of Ontario (the "BAO"), an independent, not-for-profit, delegated administrative authority acting on behalf of and subject to oversight by the Ministry of the Government and Consumer Services.

According to its website, the BAO was established on January 16, 2016 as a "result of the mutual desire of the Ontario government and the bereavement industry to enhance professionalism, increase consumer protection and provide an effective, efficient and responsive regulatory framework".[6] Effective April 1, 2016 the licensing and enforcement responsibilities previously exercised by the Board of Funeral Services have been transferred to the BAO, and the Board of Funeral Services was dissolved as a corporation.

The legal role of other parties, including Estate Trustees and family members, are found in the common law.

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,[7] the debate over a dead human body is more complicated.[8]

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6. The Burial Authority of Ontario: https://thebao.ca/home/about-the-bao (accessed on 12.02.19).
7. *Yearworth v. North Bristol NHS Trust* (2009), [2009] EWCA Civ 37, [2009] 2 All E.R. 986, [2010] Q.B. 1 (Eng. & Wales C.A. (Civil)) at para. 30 ("*Yearworth*").
8. *Miner v. Canadian Pacific Railway* (1911), 3 Alta. L.R. 408, 18 W.L.R. 476, 1911 CarswellAlta 23 (Alta. S.C.) ("*Miner v. Canadian Pacific Railway*"). Justice Beck's decision, which was overturned by the Alberta Supreme Court

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

> The law in general recognises no property in a dead body.[9]

Historically, the principle that one cannot own a human body has been upheld. Its roots lie in ecclesiastical law which held 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".[10]

In *Institutes of the Laws of England*, published in 1641, Sir Edward Coke wrote that a cadaver "belongs to ecclesiastical cognisance".[11]

In the 1867 English decision of *Foster v. Dodd*,[12] 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.

In *Williams v. Williams*,[13] 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 Estate Trustee has the right of *possession* of the body of the deceased. The Estate Trustee's right of custody and possession is distinct from rights of ownership, or property rights.

In the 1911 decision of *Miner v. Canadian Pacific Railway*,[14] the Alberta Supreme Court considered an appeal of a decision by Justice Beck ordering 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 on the issue of damages alone. Justice Beck's

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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.

9. *Halsbury's Laws of England*, Vol. 3 at p. 405.
10. Cited in *Yearworth*, *supra*, footnote 7, at para. 31.
11. *Yearworth*, *supra*, at para. 31.
12. (1867), LR 3 QB at p. 77, 8 B. & S. 842, 37 LJQB 28.
13. (1882), 20 Ch. D. 659, 51 LJ Ch 385, 46 LT 275 ("*Williams*").
14. *Supra*, footnote 8.

decision remains a sound overview of case law on the treatment of human remains.

Justice Beck noted 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 in fact, owned. Justice Beck further noted 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".[15]

Notably, while English decisions are mostly determined by the ecclesiastical law of the Church of English, that basis of law has no application in Canada.[16]

Justice Beck cited a range of English cases on the issue of the treatment of remains in his decision, and 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.).[17]

Justice Beck also made notable and favourable reference to the 1908 decision of the High Court of Australia, in *Doodeward v. Spence*.[18] In that case, the plaintiff sought to recover the body of a stillborn 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 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,

15. *Miner v. Canadian Pacific Railway*, *supra*, footnote 8 at para. 18.
16. *Miner v. Canadian Pacific Railway*, *supra*, footnote 8 at para. 19.
17. *Miner v. Canadian Pacific Railway*, *supra*, at para. 22.
18. (1908), 6 C.L.R. 406 (Aust. H.C.) ("*Doodeward*").

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 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 v. Spence* have been upheld in more recent case law. The decision was referred to favourably in *Yearworth v. North Bristol NHS Trust (CA)*,[19] a 2010 English decision. It was also favourably referred to by the English Court of Appeal in the 1999 decision of *R. v. Kelly*.[20] In *Kelly*, 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 since human body parts could not be considered property and therefore could not be the subject of theft. The appeal was dismissed. Referring to *Doodeward v. Spence*, Rose L.J. wrote[21] 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".

As such, 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.

19. *Supra*, footnote 7 at paras. 31 and 33.
20. [1999] Q.B. 621, [1999] 2 W.L.R. 384 (C.A.).
21. *Supra*, at pp. 630-631.

There has been some advancement in Canada by the court, relying on the *Yearworth* decision in its analysis of whether certain genetic reproductive material, such as sperm and ova, is considered "property" in specific situations.

In *Yearworth*, the English Court held that stored sperm was property for the purposes of an action for negligent damage to property. The appellants were all diagnosed with cancer. Before undergoing chemotherapy, they produced sperm samples which were being stored at the respondent's facilities. Before any of the appellants could use the sperm, the respondent's freezing system failed and the sperm perished. The court recognized that historically, the common law did not permit any property interest in the human body, or body parts, living or dead. However, it referred to *Doodeward v. Spence* which created an exception to this rule and held that developments in medical science "now require a re-analysis of the common-law's treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (*viz.* an action for negligence) or otherwise". The court in *Yearworth* held that for the purposes of their negligence claims, the appellants had ownership of the sperm which they generated for the sole purpose of its later use for their own benefit. Their rights to use the sperm were limited by legislation and no person other than the appellants had any right in relation to the sperm.

In the 2015 case of *Lam v. University of British Columbia*,[22] the British Columbia Court of Appeal upheld the trial judge's finding that frozen human sperm is property for the purposes of the *Warehouse Receipt Act*.[23] The facts in *Lam* were similar to *Yearworth*, in that it was a class action on behalf of men who had frozen their sperm in the University's freezer. As a result of a power failure, the stored sperm was damaged or destroyed. In the concurring reasons by Bennett and Frankel JJ.A., the court emphasized that it was determining whether human sperm was property in a very narrow context, and was not determining whether sperm in other contexts such as in estate or matrimonial law could be considered property.

In Canada, s. 8 of the Federal *Assisted Human Reproduction Act*,[24] and ss. 3(1) and 4(1) of the *Assisted Human Reproduction Regulations*[25] require an individual to give written consent before that

22. 2015 BCCA 2, 382 D.L.R. (4th) 253, [2015] 4 W.W.R. 213 (B.C. C.A.).
23. R.S.B.C. 1996, c. 481.
24. S.C. 2004, c. 2 (*AHRA*).
25. SOR/2007-137.

individual's reproductive material can be used for the purpose of creating an embryo. This includes posthumous use of the reproductive material.

In the 2016 British Columbia case of *W. (K.L.) v. Genesis Fertility Centre*,[26] a widow brought an unopposed petition seeking a declaration that she was the legal property owner of her deceased husband's reproductive material stored at the fertility centre. However, the husband had not provided written consent before he died, as is required pursuant to the *AHRA*. The fertility centre continued to store the reproductive material but refused to release the material without the deceased's written consent. The wife argued she was the owner of the reproductive material since her husband had died intestate and under intestacy legislation she was the only beneficiary of his estate. She also presented to the court sufficient evidence to prove that it was the deceased's intention for his wife to use his frozen sperm to conceive a child, even if he died.

The first question addressed by the court was: does the reproductive material constitute "property"? As a preliminary note, Justice Pearlman observed the distinction between leaving someone your genetic material under a Will, and the required consent under the federal *AHRA* legislation. Justice Pearlman noted that "rather than requiring any kind of testamentary grant or consent, s. 8(1) of the *AHRA* requires a donor to provide his written consent in accordance with the Regulations, to the use of the human reproductive material (in this case by his spouse), for the purpose of creating an embryo".[27] Justice Pearlman went on to confirm that "in particular contexts, courts in various jurisdictions have held that human sperm or ovum for reproductive purposes are property".[28] Justice Pearlman found that the sole purpose for extracting and storing the sperm was to preserve it for later use by the deceased and his wife to attempt to conceive a child. While the deceased could not sell the stored sperm, only he could authorise its reproductive use by

26. 2016 BCSC 1621, 23 E.T.R. (4th) 100, 83 R.F.L. (7th) 150 (B.C. S.C.).
27. *Supra*, at para. 45.
28. *W. (K.L.) v. Genesis Fertility Centre*, 2016 BCSC 1621, 23 E.T.R. (4th) 100, 83 R.F.L. (7th) 150 (B.C. S.C.) at para. 60, citing *C. (C.) v. W. (A.)*, 2005 ABQB 290, 2005 CarswellAlta 502, 50 Alta. L.R. (4th) 61 (Alta. Q.B.); *M. (J.C.) v. A. (A.N.)*, 2012 BCSC 584, 349 D.L.R. (4th) 471, 16 R.F.L. (7th) 269 (B.C. S.C.); *Lam v. University of British Columbia*, 2015 BCCA 2, 382 D.L.R. (4th) 253, [2015] 4 W.W.R. 213 (B.C. C.A.); *Yearworth v. North Bristol NHS Trust* (2009), [2009] EWCA Civ 37, [2009] 2 All E.R. 986, [2010] Q.B. 1 (Eng. & Wales C.A. (Civil)); *Kate Jane Bazley v. Wesley Monash IVF Pty. Ltd.*, [2010] QSC 118 (Queensland SCTD); *Edwards Estate, Re*, [2011] NSWSC 478, 81 N.S.W.L.R. 198 (New South Wales S.C.).

his wife after his death or donate it for the reproductive use of a third party. Therefore, Justice Pearlman concluded that the deceased had rights of use and ownership of the reproductive material sufficient to make it "property".

The next question was whether the reproductive material passed to his wife as the sole beneficiary of his intestate estate. Justice Pearlman concluded that though its use was restricted by legislation, the reproductive material was the deceased's "personal property" as defined by s. 1 of the *Wills, Estates and Succession Act*.[29] No one other than the wife claimed any right in the property. Following the husband's death, the property in the reproductive material vested in the wife, the sole beneficiary of his intestate estate.

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, 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*,[30] 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.* [Emphasis added.]

In the decision of *Abeziz v. Harris Estate*,[31] Justice Farley commented:

> *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.[32]

29. S.B.C. 2009, c. 13.
30. 207 Pa. 313, 64 L.R.A. 179 (Pa., 1904).
31. (1992), 34 A.C.W.S. (3d) 360, 1992 CarswellOnt 3803, [1992] O.J. No. 1271 (Ont. Gen. Div.) ("*Abeziz*").

Addressing the competing claims by the deceased's mother and the named executor, Justice Farley continued at para. 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 bear this obligation). [The Deceased's] executrix . . . does have the legal obligation to attend to this using estate funds.

In *Lajhner v. Banoub*,[33] referred to in more detail below, Justice Gunsolos reiterated the point made in *Abeziz v. Harris Estate*, and noted:

> *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. [Emphasis added.]

THE OBLIGATION TO DEAL WITH HUMAN REMAINS: ONTARIO

Where There Is a Will

The obligation to deal with a deceased's remains falls squarely on the Estate Trustee.[34] In cases where the deceased has a Will that names an Estate Trustee and that Estate Trustee accepts the responsibility, he/she is then charged with disposing of the remains of the deceased person.

On an Intestacy or Where 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 s. 29 of the *Estates Act*.[35]

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

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32. *Abeziz*, *supra*, at para. 28.
33. (2009), 49 E.T.R. (3d) 87, 176 A.C.W.S. (3d) 572, 2009 CarswellOnt 1745 (Ont. S.C.J.) at para. 22 ("*Lajhner*").
34. *Williams*, *supra*, footnote 13. While this paper attempts to use the term Estate Trustee, many of the relevant cases use the terms "executor" or "administrator" and therefore, sometimes those terms are also used.
35. R.S.O. 1990, c. E.21 (*Estates 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,

(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*, Justice Gunsolos wrote:

> 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.[36]

The court is afforded wide discretion to appoint an Estate Trustee pursuant to s. 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 s. 29 of the *Estates Act* bears the responsibility of dealing with the deceased's remains.

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 s. 29 of the *Estates Act*, then the court may, pursuant to the *Crown Administration of Estates Act*,[37] appoint the Public Guardian and Trustee to act as Estate Trustee.[38]

> *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

36. *Lajhner*, *supra*, footnote 33 at para. 18.
37. R.S.O. 1990, c. C.47 (*Crown Administration of Estates Act*).
38. *Crown Administration of Estates Act*, R.S.O. 1990, c. C.47, s. 1.

> Ontario and is willing and able to administer the estate or to nominate another person to do so.

As the entity authorized to act as Estate Trustee, the Public Guardian and Trustee (the "PGT") would 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.

According to the PGT's website, the Office of the PGT will administer an estate if:

- the deceased was an Ontario resident *or* owned real estate here; *and*
- the deceased did not make a Will *or* the deceased did make a Will but the executor has since died or become incapable; *and*
- there are no known next-of-kin living in Ontario *or* the next-of-kin are minors or mentally incapable adults; *and*
- the estate is valued at a minimum of $10,000 after payment of the funeral and all debts owing by the estate.[39]

The PGT is the "Estate Trustee of last resort". The Office of the PGT (OPGT) actively tries to locate appropriate people to serve as Estate Trustees and encourage them to seek appointment.

With respect to burial and funeral arrangements, PGT states that:

> The OPGT can sometimes arrange the funeral and burial. The OPGT must first determine whether or not it is the appropriate party to be administering the estate and whether the estate is solvent. It is not always possible to determine this by the time the funeral and burial must take place.

39. Ministry of the Attorney General, Estate Administration: The Role of the Public Guardian and Trustee at: https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/estatesadmin.html.

> Municipal Social Services will arrange a funeral if a person dies without the money to cover the cost. There is also a special fund to pay for the funerals of deceased veterans and military personnel – The Last Post Fund – which may be approached. As a last resort, the Coroner's Office is responsible. It has the legal duty to arrange the burial of deceased persons when no one else is available to do so.[40]

In Ontario, when the regional supervising coroner is satisfied that due diligence has occurred and no one has been found to take on the duty to bury, they sign a "warrant to bury" and the municipality where the person died is then responsible for burying the person. The province gives the municipality money for the funeral and burial – sometimes from the estate of the deceased – and the city finds a local funeral home willing to take care of the body.

Estate Trustee During Litigation

While there is litigation involving the validity of a Will and the Estate Trustee's authority under challenge, an Estate Trustee During Litigation may be appointed for the duration of the litigation. In this case, it is the obligation of the Estate Trustee During Litigation to make the burial arrangements of the deceased's remains. An Estate Trustee During Litigation in this circumstance would have the authority of an Estate Trustee in respect of dealing with the remains.

In the 2010 case of *Buswa v. Canzoneri*,[41] the deceased had died 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 Anishinabek tradition since 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, on a balance of probabilities, that she was the natural daughter of the deceased.

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40. *Ibid.*
41. 2010 ONSC 7137, 65 E.T.R. (3d) 312, 2010 CarswellOnt 9888 (Ont. S.C.J.) ("*Buswa*").

Justice Stinson applied s. 29 of the *Estates Act* to determine the appointment of an administrator. As the deceased did not have a spouse, only s. 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 her in priority to appointment. As the parties sought only the appointment of an Estate Trustee During Litigation, the deceased's daughter was appointed in that capacity.[42]

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.[43] Her authority is identical to that of an Estate Trustee otherwise named or appointed.

DUTIES OF THE ESTATE TRUSTEE

The obligation to deal with the remains of a deceased falls to the Estate Trustee, whether 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;[44]
2. to dispose of the body in a manner befitting the deceased's station in life;[45] and
3. to provide particulars of the disposal of the deceased's remains to the deceased's next of kin.[46]

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.[47]

As for disposal in a "dignified manner", both cremation and burial are considered to be appropriate means of disposing of

42. *Supra*, at para. 23.
43. *Supra*, at para. 24.
44. *Abeziz, supra* footnote 31 at para. 28; *Saleh v. Reichert* (1993), 104 D.L.R. (4th) 384, 50 E.T.R. 143, 1993 CarswellOnt 567 (Ont. Gen. Div.) at para. 8 ("*Saleh*").
45. *Schara Tzedeck v. Royal Trust Co.* (1952), [1953] 1 S.C.R. 31, [1952] 4 D.L.R. 529, 1952 CarswellBC 141 (S.C.C.) at para. 12 ("*Schara*").
46. *Sopinka (Litigation Guardian of) v. Sopinka* (2001), 42 E.T.R. (2d) 105, 55 O.R. (3d) 529, 2001 CarswellOnt 3234 (Ont. S.C.J.) ("*Sopinka*").
47. *Lajhner, supra*, footnote 33 at para. 22.

corpses in Ontario.[48] The *Cemeteries Act* and the *FBCSA* specifically provide for both cremation and burial.

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 following:

> 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.[49]

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.

Further, in the case of *Saunders v. Saskatoon Funeral Home Company*, Meschishnick J. observed that "if the disposition is to be done in a dignified manner, it must be done in a *timely fashion*".[50]

This issue of the specifics or meaning ascribed to "dignified fashion" was also raised in the decision of *Bastien v. Ottawa Hospital (General Campus)*.[51] 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.

The plaintiffs' counsel argued that it was undignified to "bury strange bodies in the same casket"[52] and that burials typically take place with a single body in a casket, and that the burial in question was "callous, undignified and disrespectful".[53]

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.[54] The court ruled

48. *Abeziz*, *supra*, footnote 31 at para. 28, *Lajhner*, *supra*, footnote 33 at para. 21.
49. *Abeziz*, *supra*, footnote 31.
50. *Saunders v. Saskatoon Funeral Home Co.*, 2016 SKQB 217, 268 A.C.W.S. (3d) 681, 2016 CarswellSask 446 (Sask. Q.B.) at para. 17, emphasis added.
51. (2001), 56 O.R. (3d) 397, 108 A.C.W.S. (3d) 812, 2001 CarswellOnt 3561 (Ont. S.C.J.) ("*Bastien*").
52. *Bastien*, *supra*, at para. 37.
53. *Bastien*, *supra*, at paras. 38-39.
54. *Bastien*, *supra*, at paras. 47 and 48.

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*,[55] 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.

In a 2011, regulatory proceeding before the Health Professions Appeal and Review Board (the "HPARB"), *MS v. JNE*,[56] the parents of a 15-year-old girl who died unexpectedly at home filed a complaint against a coroner involved in the investigation of their daughter's death for what they felt was an undignified disposal of their daughter's heart.

The coroner's investigation into their daughter's death was inconclusive, and the coroner made a note in his initial Investigation Statement which read: "The heart was kept for further study, and her family was made aware of this, and supported this approach." After receiving the toxicology results, the final Report of Post-mortem Examination was completed and there still was not a precise cause of death determined. The report was sent to the parents. The coroner then contacted the funeral home that handled the funeral arrangements for the daughter and asked the funeral home to determine if the family wanted the heart returned. The coroner made a note which said that an individual at the funeral home advised him that the "family doesn't want the heart returned and that we are OK to discard it". The individual at the funeral home did not recall this conversation. The heart was subsequently cremated through the Coroner's Forensic Pathology Unit, without any notice to the parents.

The parents subsequently wrote to the coroner, asking about the heart, saying: "It is imperative that we treat an organ such as the heart according to our traditions and culture. It must not be

55. Doc. CV70-1809-ES (Ont. S.C.J.).
56. (August 23, 2011), Doc. 09-CRV-0066 (Ont. H.P.A.R.B.) ("*MS*").

discarded in any case. Please confirm as soon as possible." When the parents found out that the heart had been cremated, they filed their complaint about the coroner's actions. One particular concern was that the coroner had ordered the destruction of their daughter's heart against their express wishes and in a manner that was not consistent with the culture and traditions of their daughter and the parents. Further, the coroner disposed of the heart to a crematorium in a "batch" with other persons' body tissues and was not disposed of, in the parents' opinion, in a "respectful and dignified manner".

While the HPARB observed that the parents and the coroner "obviously had very different perceptions as to what constituted 'a respectful and dignified manner' of disposition",[57] it did not reach a conclusion on this point. The coroner was counseled to ascertain before an autopsy, if possible, the family's wishes with respect to organs or tissue and that he should speak with the family directly with respect to the disposition of any retained material.

A Note on "Extreme Embalming"

No case law or commentary has appeared in Canada on whether "extreme embalming" is considered "dignified". Extreme embalming occurs where bodies are embalmed and then manipulated into poses, such as sitting on a couch with a drink and cigarettes, or on a motorcycle, or partaking in the deceased's favourite pastime.[58] The practice first started in Puerto Rico and has been very popular in Louisiana in the United States.[59] It does not yet appear to be available in any province in Canada.

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.[60]

57. *MS v. JNE* (August 23, 2011), Doc. 09-CRV-0066 (Ont. H.P.A.R.B.) at para. 33.
58. See https://abcnews.go.com/US/dead-people-life-poses-funerals/story?id=23456853.
59. https://www.vice.com/en_ca/article/9kmqy7/inside-the-funeral-homes-posing-the-dead-like-theyre-still-alive.
60. Donna C. Cappon and Robyn M. Hawkins, "Funeral" in *Widdifield on Executors and Trustees* (Toronto: Thomson Carswell, 2008) 1-1.

In *Decleva Re*,[61] the deceased had made an assignment into bankruptcy some two weeks before he passed away. The Estate 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 s. 136 of the *Bankruptcy and Insolvency Act*[62] 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 para. 14, Reg. S.W. Nettie writes:

> 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 Tzedeck v. Royal Trust Co.*,[63] 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 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.

In reviewing the case, the Supreme Court of Canada 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 her station in life.[64]

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, as ordered by the trial judge, as just and reasonable.[65]

61. (2008), 42 C.B.R. (5th) 80, 40 E.T.R. (3d) 144, 2008 CarswellOnt 2106 (Ont. S.C.J.).
62. R.S.C. 1985, c. B.3.
63. *Schara*, *supra*, footnote 45.
64. *Schara*, *supra*, footnote 45 at para. 12.
65. *Schara*, *supra*, footnote 45 at para. 14.

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

From a practice perspective, this next issue often arises: Family members complain that the named Estate Trustee failed to inform them of the details of a burial or cremation until after the ceremony had been completed, if at all. 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*,[66] the defendant's son and husband died of cancer within three months of each other. The son was 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 paras. 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 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

66. *Sopinka*, *supra*, footnote 46.

found that there was no breach of duty on the part of the defendant.[67]

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 it is done 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*[68] (the "*TGLNA*").

Section 4 of the *TGLNA* provides that a person over the age of 16 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 the person, or in the alternative, orally in the presence of at least two witnesses, during the person's last illness.[69]

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".[70] 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.[71] 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".[72]

67. *Sopinka*, *supra*, at para. 37.
68. R.S.O. 1990, c. H.20 ("*TGLNA*").
69. Section 4, *TGLNA*.
70. Section 5, *TGLNA*.
71. Subsection 5(2), *TGLNA*.
72. Subsections 5(2)(g), (h) and (i), *TGLNA*.

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).[73] 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.[74]

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.[75]

Coroners Act

Pursuant to the *Coroners Act*,[76] 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.[77]

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.

Coroner's Authority where Death Investigation Ordered

For certain deaths, a coroner will conduct a death investigation. A coroner will be called (by either police, health care workers, etc.) to investigate a death that appears to be from unnatural causes or natural deaths that occur suddenly or unexpectedly. Certain types of deaths *must* be reported to a coroner. These "reportable deaths" include, but are not limited to:

73. Subsections 4(3) and 5(4), *TGLNA*.
74. Subsections 4(3) and 5(4), *TGLNA*.
75. For more information on this topic see: Louise M. Mimnagh, "The Disposition of Human Remains and Organ Donation: Increasing Testamentary Freedom while Upholding the No Property Rule" (2017), 7:1 Western J. Leg. Stud. 3, at http://ir.lib.uwo.ca/uwojls/vol7/iss1/3.
76. R.S.O. 1990, c. C.37 ("*Coroners Act*").
77. *Coroners Act*, ss. 15-16.

- deaths that occur suddenly and unexpectedly;
- deaths during or following pregnancy;
- deaths at a construction or mining site;
- deaths while in police custody or while a person is incarcerated in a correctional facility;
- deaths when the use of force by a police officer, special constable, auxiliary member of a police force or First Nations Constable is the cause of death; and
- deaths that appear to be the result of an accident, suicide or homicide.[78]

If a person has died under any of the circumstances listed above, no one "shall interfere with or alter the body or its condition in any way until the coroner so directs by a warrant".[79] If someone has died in a manner listed above, the coroner will issue a "warrant to take possession of the body" and will complete a death investigation.

Once the death investigation is completed, in most cases the family or Estate Trustee will make arrangements to have the body transported to the service provider chosen. However, the coroner may choose to have the body transported to a hospital or forensic pathology unit for further examination, such as an autopsy/post mortem examination. In this situation the coroner will issue a warrant pursuant to s. 28 of the *Coroners Act* for a pathologist to perform a post mortem examination of the body. Upon completion of the post mortem, the body can be released to the funeral home service provider.

Medical Assistance in Dying: Coroner Involvement

Federal Bill C-14 received Royal Assent in 2016 which provided for exemptions to the *Criminal Code* for Medical Assistance in Dying (MAiD) when administered according to certain established criteria. In Ontario, the *Medical Assistance in Dying Statute Law Amendment Act* received Royal Assent in 2017. One of the statutes that was amended was the *Coroners Act*. Section 10.1 now reads:

> 10.1(1) Where a person dies as a result of medical assistance in dying, the physician or nurse practitioner who provided the medical assistance in dying shall give notice of the death to a coroner and, if the coroner is of the opinion that the death ought to be investigated, the coroner shall investigate the circumstances of the death and if, as a result of the

78. *Coroners Act*, s. 10.
79. *Coroners Act*, s. 11.

> investigation, the coroner is of the opinion that an inquest ought to be held, the coroner shall hold an inquest upon the body."
>
> 10.1(2) The physician or nurse practitioner who provided the medical assistance in dying shall provide the coroner with any information about the facts and circumstances relating to the death that the coroner considers necessary to form an opinion about whether the death ought to be investigated, and any other person who has knowledge of the death shall provide such information on the request of the coroner.

A process is in place for a coroner contacted in a MAiD situation. The physician or nurse practitioner who administers or prescribes the legal medication completes the medical certificate of death and calls the dispatch centre of the Office of the Chief Coroner immediately after death is pronounced. A dedicated nurse investigator calls the physician or nurse practitioner back (within 10-15 minutes) to review details of the case, including medical background of the patient, confirmation that the patient had capacity to consent to MAiD. The nurse investigator also speaks with next of kin if available. If MAiD was requested due to a naturally occurring medical condition and the investigator has no significant concerns the body can then be transported to the funeral home or cremation centre and burial can take place.[80]

However, if MAiD is requested due to a non-natural cause (such as injuries from an accident) the nurse investigator will speak with a coroner to determine if there is a need for an examination or autopsy. The coroner will prepare a death certificate and a report that the family can request.[81]

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", or in other words, 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)

80. See Dr. Edward Weiss and Dr. Dirk Huyer, "Legal Issues Around MAiD in Ontario", Law Society of Ontario Practice Gems: Administration of Estates 2018, September 21, 2018 (Weiss).
81. *Ibid.*

of the *Cemeteries Act* requires the prior consent of the interment rights holder if remains are to be disinterred.

Under the *FBCSA*, no specific reference to the consent of an interment rights holder is made, but s. 162 of the *Regulations* (General) created under the Act addresses this issue. This section states:

> 162. (1) No person shall disinter human remains except in accordance with the Act and one of the following: this section, section 178 or 179 or a site disposition agreement mentioned in section 184. O. Reg. 30/11, s. 162 (1).
>
> (2) No person shall remove scattered cremated remains from a scattering ground except in accordance with this section. O. Reg. 30/11, s. 162(2).
>
> (3) No person shall disinter any human remains unless,
>
> (a) the prior consent of the interment rights holder has been obtained; and
>
> (b) except if the remains are cremated human remains, prior notification has been given to the medical officer of health. O. Reg. 30/11, s. 162(3).
>
> (4) No person shall remove scattered remains without the prior consent of the scattering rights holder. O. Reg. 30/11, s. 162(4).
>
> (5) Subsections (3) and (4) do not apply to a disinterment or removal that is,
>
> (a) made pursuant to a direction under section 102.1 of the Act; or
>
> (b) ordered by the registrar under subsection 88(7) of the Act pursuant to a cemetery closure. O. Reg. 30/11, s. 162(5).

In the event that an interment or scattering rights holder cannot be located to provide consent, the *Regulation* permits the Registrar to consent to the disinterment in question:

> (6) The registrar may consent under subsection (3) or (4) in the place of the interment or scattering rights holder if,
>
> (a) the whereabouts of an interment or scattering rights holder are not known;
>
> (b) the interment or scattering rights holder is not readily ascertainable; or
>
> (c) the interment or scattering rights holder is not able to consent. O. Reg. 30/11, s. 162(6).
>
> (7) Before consenting under subsection (6), the registrar shall consider whether any known person may have an interest in the disposition of the remains, and if there is such an interested person, shall order that the person proposing to do the disinterment or removal give notice of it to the interested person in the form and manner that the registrar specifies. O. Reg. 30/11, s. 162(7).

Disinterment pursuant to s. 162 of the *Regulation* (General) also requires the involvement of and notice to a medical officer of health:

(16) A medical officer of health may attend at, supervise or direct a disinterment or removal. O. Reg. 30/11, s. 162(16).

(17) If a medical officer of health determines that remains are those of a person who died of a communicable disease within the meaning of the *Health Protection and Promotion Act*, the remains shall be dealt with in accordance with that Act. O. Reg. 30/11, s. 162(17).

(18) No person shall remove a dead human body from a cemetery unless a certificate of a medical officer of health or the cemetery operator has been obtained and affixed to the container holding the body, confirming that the Act and the regulations have been complied with. O. Reg. 30/11, s. 162(18).

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.

Significantly, once the remains are deposited into an interment plot, it appears that absent intervention from a court, the Estate Trustee's authority to deal with the remains terminates.

CONSIDERATION OF DECEASED'S WISHES

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.

The common law requires that Estate Trustees 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 any potential limitations on authority) an Estate Trustee may dispose of the deceased's remains in a manner seen to be befitting of the deceased's station.

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*,[82] referred to above, Kay J. ruled that the wishes of a testator respecting the disposition of his/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

82. *Williams*, *supra*, footnote 13.

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 for the premise that a deceased's wishes in respect of remains are not enforceable.[83]

The case law in Ontario clearly provides that while an executor *may* abide by the expressed wishes of the deceased, he/she is not bound to do so.[84] At para. 20 of *Lajhner v. Banoub*,[85] 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.

As such, 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, while abiding by the duties imposed at law.

DISPUTES RELATING TO REMAINS

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 Estate Trustee, disagree, or where co-Estate Trustees cannot agree as between themselves on the means of disposal of the remains of the deceased.

In the cases of *Abeziz v. Harris Estate*,[86] *Saleh v. Reichert*,[87] and *Lajhner v. Banoub*,[88] the Estate Trustees intended to cremate the remains of the deceased persons, while family members objected to

83. *Saleh*, *supra*, footnote 44 at para. 7.
84. *Abeziz*, *supra*, footnote 31 at para. 23, *Saleh*, *supra*, footnote 44 at para. 27; *Lajhner*, *supra*, footnote 33 at para. 21.
85. *Lajhner*, *supra*, footnote 33.
86. *Abeziz*, *supra*, footnote 31.

cremation on religious, but legally unenforceable, grounds. The case of *Mouaga v. Mouaga*[89] deals with a dispute over the timing of a burial, and *Saunders v. Saskatoon Funeral Home Company*,[90] *Miller v. Miller*,[91] and *Kelly Estate*,[92] deal with family disputes over the final resting place of human remains.

Abeziz v. Harris Estate[93]

In *Abeziz v. Harris Estate*, the deceased died of cancer at 31. Shortly before his death, the deceased met with a family friend, Jane Devlin, a non-practising 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 since 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 the testator cannot force his executor to comply with his or her wishes there is nothing to prevent a valid executor from

87. (1993), 104 D.L.R. (4th) 384, 50 E.T.R. 143, 1993 CarswellOnt 567 (Ont. Gen. Div.).
88. (2009), 49 E.T.R. (3d) 87, 176 A.C.W.S. (3d) 572, 2009 CarswellOnt 1745 (Ont. S.C.J.).
89. (2003), 50 E.T.R. (2d) 253, 2003 CarswellOnt 2128, [2003] O.J. No. 2030 (Ont. S.C.J.).
90. 2016 SKQB 217, 268 A.C.W.S. (3d) 681, 2016 CarswellSask 446 (Sask. Q.B.).
91. 2018 ONSC 6625, 42 E.T.R. (4th) 148, 2018 CarswellOnt 18393 (Ont. S.C.J.).
92. 2019 NSPB 1, 2019 CarswellNS 118 (N.S. Prob. Ct.).
93. (1992), 34 A.C.W.S. (3d) 360, 1992 CarswellOnt 3803, [1992] O.J. No. 1271 (Ont. Gen. Div.).

carrying out a testator's lawful wishes concerning the disposal of the testator's body.[94]

Saleh v. Reichert[95]

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 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 in accordance with the deceased's expressed wishes. In spite of evidence of the religious and familial 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".[96]

As for the religious concerns, Justice Bell found that, as in *Abeziz*, "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.[97]

Lajhner v. Banoub[98]

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

94. *Abeziz*, *supra*, footnote 31 at para. 23.
95. (1993), 104 D.L.R. (4th) 384, 50 E.T.R. 143, [1993] O.J. No. 1394 (Ont. Gen. Div.).
96. *Saleh*, *supra*, footnote 44 at para. 25.
97. *Saleh*, *supra*, footnote 44 at para. 25.
98. (2009), 49 E.T.R. (3d) 87, 176 A.C.W.S. (3d) 572, [2009] O.J. No. 1327 (Ont. S.C.J.).

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 an appointment as Estate Trustee. Since 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 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 this case and though Justice Gunsolos recognized the centrality of the religious differences to the parties, noted that they were not relevant to the court's deliberations. At para. 29, Justice Gunsolos wrote:

> 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.* [emphasis added]

Mouaga v. Mouaga[99]

This decision involved an urgent application to stop a funeral and the burial of a body, planned for the same day. The deceased died five days earlier and had not been embalmed. The wife of the deceased had planned and organized his funeral; however, members of the deceased's family sought to stop the funeral. The family members wanted the deceased's parents and two sisters to be able to travel to Canada later the following week to see his body and touch it, according to their wishes and custom. The evidence, however, was that the body's state of natural deterioration was such that if it was not embalmed that day, an open casket opportunity would not be possible. Justice Rutherford tried to find a compromise that would include embalming and delay to wait for the other family members.

99. (2003), 50 E.T.R. (2d) 253, 2003 CarswellOnt 2128, [2003] O.J. No. 2030 (Ont. S.C.J.).

However, the wife was not prepared to compromise due to the friction and conflict between her and her late husband's family. Noting that there was no compromise and "in the belief that [the wife] would most likely be appointed administrator of the estate without a will" and it is the "lawful administrator that has authority to dispose of and make decisions as to the disposal of the human remains", the "Court should defer to the lawful spouse to have priority in that regard".[100] The temporary order stopping the funeral to permit the hearing to take place was suspended and the wife was allowed to proceed as she saw fit.

Saunders v. Saskatoon Funeral Home Company[101]

This decision from Saskatchewan involved a dispute over the remains of the parties' daughter who passed away only five months after birth due to medical complications. Their daughter's body was delivered into the care of the funeral home and it was cremated. A funeral service was held. However, the parents separated, and they could not agree on how to deal with the cremated remains.

The father brought an application asserting that pursuant to the priority list of authorized decision-makers with the right to control the disposition of human remains in the applicable legislation,[102] that he had the authority to direct the disposition of the cremated remains. He asked the court to make an order directing the funeral home to deliver the cremated remains to him.

Their daughter obviously had no Will, no spouse or children; and no one had applied to administer the daughter's estate. The authority to control the disposition of her human remains fell to her parents pursuant to the hierarchy listed in the legislation. Section 91(2)(b) of the Saskatchewan legislation authorized the eldest of the parents to be the "authorized decision-maker" with "the right to control the disposition of the human remains". Since the father was older than the mother, the father held the authority to control the disposition of the human remains.

The issue before the court, however, was whether the legislative scheme empowered the authorized decision-maker to control the disposition of not only human remains but also *cremated* human remains. "Human remains" is defined in the applicable legislation as

100. *Mouaga v. Mouaga* (2003), 50 E.T.R. (2d) 253, 2003 CarswellOnt 2128, [2003] O.J. No. 2030 (Ont. S.C.J.) at para. 6.

101. 2016 SKQB 217, 268 A.C.W.S. (3d) 681, 2016 CarswellSask 446 (Sask. Q.B.).

102. *The Funeral and Cremation Services Act*, S.S. 1999, c. F-23.3 (the "*FCSA*") and *The Funeral and Cremation Services Regulations*, R.R.S. c. F-23.3 Reg. 1.

a "dead human *body, but does not include cremated human remains*".[103]

The hierarchy in the legislation included an executor appointed in a Will but then skips to family members bypassing a court-appointed administrator. Justice Meschishnick noted that the *FCSA* appoints authorized decision-makers who are immediately identifiable to avoid the delay in being able to dispose of human remains if authorization to do so had to wait on an application to court for the appointment of an administrator.[104]

Justice Meschishnick also observed that the legislation:

> . . . recognizes that there are practical concerns associated with the disposition of human remains, and if the disposition is to be done in a dignified manner, it must be done in a timely fashion. As such, therefore the need to ensure that someone is immediately authorized to make decisions regarding the disposition of human remains. On the other hand, after cremation the urgency is not so apparent.[105]

Other sections of the legislation allow the authorized decision-maker to "claim" the cremated human remains, but "do not go so far as to authorize the authorized-decision maker to make decisions for the permanent disposal of those remains".

Justice Meschishnick concluded that the father was authorized by the legislation to direct the funeral home to deliver the human remains of his daughter to the crematorium for cremation; direct the crematorium to return the cremated human remains to the funeral home; and direct the funeral home to deliver those cremated remains to him. However, he had "no authority to dispose of those cremated remains". Justice Meschishnick held that unless the parents agreed otherwise, that decision had to be left to the person authorized to administer their daughter's estate. Justice Meschishnick ordered that if either parent made an application to be the administrator of her estate, they must bring the application on notice to each other. The cremated remains were to be held by the father until an administrator was appointed.

This decision is interesting as it turns on the very specific language in the applicable legislation in Saskatchewan.

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103. Emphasis added. Note that in the corresponding Ontario legislation, the *FBCSA* "human remains" is defined as meaning "a dead human body or the remains of a cremated human body".

104. *Saunders*, *supra* footnote 101, at para. 15.

105. *Saunders*, *supra*, footnote 101 at paras. 17-18.

Miller v. Miller[106]

This decision involved a motion before the Ontario Superior Court of Justice for an urgent interim injunction preventing the burial of a body. The applicants (siblings) brought the motion seeking to prohibit their brother from burying their deceased mother's body in Toronto. The mother died without a Will. They asserted it was always their mother's wish to be buried with her late husband in Jamaica and alleged that their brother "almost completely prevented them from seeing their mother" before she died. He also never advised them of their mother's death. They found out through an aunt.

The siblings moved without notice to their brother. They sought an injunction prohibiting their brother from burying their mother until they could apply to assert "their entitlement to administer their mother's estate".

Justice Myers first confirmed that our law does not recognize any legal rights in a corpse and that rather than rights, the law imposes obligations on those who deal with a deceased person's body.[107]

Since the mother died without a Will, Justice Myers observed, "where a person dies without leaving a Will, and where there is no surviving married or common law spouse, the court has discretion to appoint an Estate Trustee without a Will from among the next of kin who occupied an equal degree of relationship to the deceased". In this decision, all of the parties were children of the deceased and all "enjoyed the same first-degree legal relationship to her".

Justice Myers went on to apply the test respecting injunctive relief as set out in *RJR-MacDonald Inc. v. Canada*. First, he concluded that there was a serious issue to be tried as to who should be appointed administrator. As for the irreparable harm part of the test, Justice Myers noted that:

> . . . *even if Ms. Miller's burial wish had been contained in a will, the law would not necessarily enforce it. Rather, the duty to act, including the manner of acting, would fall to the Estate Trustee (with or without a will)*. Legally speaking therefore, the applicants are asserting a right to bring a proceeding under s. 29 of the *Estate Act* to name [a sister] as Estate Trustee without a will of their mother's estate. *The irreparable harm that they claim is really their loss of the entitlement to try to enforce that legal right due to their brother's unilateral acts without having been appointed Estate Trustee without a will.*

106. 2018 ONSC 6625, 42 E.T.R. (4th) 148, 2018 CarswellOnt 18393 (Ont. S.C.J.).

107. *Supra*, at para. 3.

> The question for the court is whether, instead of granting an injunction now, it would be just in all the circumstances to hold the applicants to a remedy in damages if they later succeed in this application. In my judgment, it would not be just to do so. It is true that if burial proceeds now, Ms. Miller's body could be exhumed and moved to Jamaica if a lawful representative of her estate is appointed later and decides to do so.[108] Money can pay the costs of re-burial. But if the respondent conducts a burial, the applicants will be prevented from having their legal rights determined in time to prevent that very burial. *I do not see how money can remedy the harm caused by a sibling proceeding without lawful authority to deny family members of equal rank of the opportunity to impose the proper legal order while ostensibly desecrating a parent's last wish.*[109] [Emphasis added.]

Justice Myers found that there would be irreparable harm if the injunction was not granted. Finally, Justice Myers concluded that the balance of convenience favoured a short delay and he granted the injunction with these final words of advice:

> It is equally or more important to note as well that whatever family issues may exist between or among the parties, they do not have to play out as a continuation of this dispute. *There is no weakness or prejudice to anyone in finding a way to agree on Ms. Miller's burial arrangements and then referring any remaining issues among the parties for resolution.* The court can look later at the power of attorney or any allegations among the parties that may subsist after Ms. Miller is buried by all of her children and family with the dignity that she deserves. *I dare say that it is in everyone's interest to bring complaints against each other rather than using Ms. Miller's final arrangements as a proxy for their inter-sibling issues.*[110] [Emphasis added.]

Kelly Estate[111]

In this Nova Scotia decision, a daughter who was appointed her mother's Estate Trustee sought the return of the urn containing her mother's ashes, which had been in her sister's possession for over 13 years. The mother's Will stated: "I give my [Estate Trustee] the powers to decide what will happen with the said ashes." The Estate Trustee argued that a final disposition must involve a greater degree

108. While this is *obiter*, this comment appears to confirm that Estate Trustees have the authority to disinter a body; however, it fails to address the statutory requirement of consent from the interment rights holder for disinterment. See "Interment Rights Holder".

109. *Miller*, *supra*, footnote 106, at para. 21.

110. *Miller*, *supra*, footnote 106, at para. 30.

111. 2019 NSPB 1, 2019 CarswellNS 118 (N.S. Prob. Ct.).

of permanency and certainty and that she, as Estate Trustee, was the appropriate person to make decisions about her late mother's ashes.

The Registrar of the Nova Scotia Court of Probate agreed, noting that there was "no question" that the disposition of the deceased was one of the most fundamental tasks an Estate Trustee can undertake and that she had "the power to decide what will happen".

However, the Registrar also went on to observe that "it seems odd" that the Estate Trustee was seeking to undertake this task now "13.5 years after [the mother's] passing and 8 years after probate was granted" and other Estate Trustee responsibilities remained incomplete.[112] There was no evidence that the Estate Trustee had tried to obtain control over the ashes previously. By allowing the urn and ashes to remain with her sister for 13.5 years, the Registrar found that the Estate Trustee had already "determined their disposition and final resting place with [her sister]". A change in the Estate Trustee's decision seemed "capricious at best or malicious at worst".[113] The application was dismissed.

DISINTERMENT / EXHUMATION

Once the body or remains have been disposed of through burial or cremation, who has the authority or right to exhume or disinter those remains?

Waldman v. Melville (City)[114]

In this Saskatchewan decision, the sister of the deceased applied for an order to disinter her brother's corpse so he could be cremated in accordance with his wishes and buried in a religious cemetery. The deceased had named his common-law spouse as his Estate Trustee and she had chosen to bury him in the Melville cemetery. In Saskatchewan, a regulation allowed the Minister of Public Health to issue a disinterment permit for the purpose of reburial of a body "or for any other laudable purpose".[115] Justice MacLeod accepted that the purpose for which the sister sought disinterment was "laudable" in the broad sense of the term, but held the regulation had to be read in "a public health context" in accordance with the enabling legislation.

Justice MacLeod concluded that it was the Estate Trustee who had the right to deal with the corpse of the deceased and pointed to

112. *Supra*, at para. 7.
113. *Supra*, at para. 16.
114. (1990), 65 D.L.R. (4th) 154, 36 E.T.R. 172, [1990] 2 W.W.R. 54 (Sask. Q.B.).
115. *Waldman*, *supra*, at para. 10.

Williams as authority for that proposition: "after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried" (p. 665). MacLeod J. concluded as follows:

> The right of the executor continues after burial of the body, otherwise it would be an empty right and (subject to the regulations) those who oppose the executor could disinter the body as soon as it was buried.
>
> The executor's right may be reduced or eliminated by provincial legislation, but the legislation must unambiguously show that to be its intention.[116]

The sister's application for an order to disinter the body was dismissed.

Polak v. Muccilli[117]

The Alberta Court of Queen's Bench denied a request to disinter the body of a woman who was killed by her husband, who then committed suicide, in part on public policy grounds. Civil litigation had been commenced over the husband's $1 million estate. In order to determine the rightful heirs, it had to be determined who died first: the wife, or the husband. The couple did not have children. Relatives of the husband argued the wife died first and sought to disinter her body for forensic testing. The court concluded that it did not have jurisdiction to issue a disinterment permit, which fell under the jurisdiction of the Chief Medical Officer or the Director of Vital Statistics. The court went on to conclude that even if it did have jurisdiction, it would not do so in this case. There was no question that the husband murdered the wife. The objective of the motion by the husband's family was to protect his estate and that there was "a repugnance to using the body of a murder victim to provide evidence for the murderer's benefit in a money claim".[118]

Heafey v. McRae[119]

In this decision, the Court of Appeal for Ontario heard an appeal of a decision of the Superior Court of Justice[120] which had dismissed an application for a disinterment order. The deceased had been

116. *Waldman*, at paras. 17-18.
117. (1993), 15 C.P.C. (3d) 216, [1993] 5 W.W.R. 697, 9 Alta. L.R. (3d) 439 (Alta. Surr. Ct.).
118. *Polak*, *supra*, at para. 32.
119. (2000), 5 E.T.R. (3d) 125, 2000 CarswellOnt 4415 (Ont. C.A.).
120. (1999), 5 E.T.R. (3d) 121, 1999 CarswellOnt 5263 (Ont. S.C.J.).

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 Estate Trustee. The Estate Trustee later sought to have the deceased's remains disinterred and moved to a family graveyard in Québec. 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 s. 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 the wishes of the deceased, 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".[121]

Catto v. Catto[122]

This decision examined a request to exhume ashes and have them split between family members.

When the deceased died suddenly in Kingston without a Will, his mother made plans, with the deceased's wife's agreement communicated through her sister, to have a funeral in Québec and to bury his ashes in the family plot in Québec. However, after the funeral and before the ashes were buried, the wife advised the funeral director that she wished to take the ashes with her back to Peterborough. The funeral director gave her the ashes. Eventually the wife had the ashes interred at a cemetery in Peterborough without telling the deceased's family in Québec. The deceased's mother sought to have his ashes exhumed and for half of his ashes to be returned to her for burial in Québec.

121. *Heafey*, *supra*, footnote 119 at para. 15.

122. 2016 ONSC 3025, 20 E.T.R. (4th) 324, 267 A.C.W.S. (3d) 498 (Ont. S.C.J.), additional reasons 2016 ONSC 5047, 20 E.T.R. (4th) 341, 270 A.C.W.S. (3d) 224.

Justice Smith found that the court had jurisdiction to hear the application and to decide the issues of who should be named as administrator of the Estate, who has authority to decide on the burial of the ashes, and whether the ashes should be exhumed and half of them returned for burial in the family plot in Québec.

Justice Smith found that the wife should be given priority over the mother to be named as the administrator of the estate (the mother resided in Québec, there was no conflict of interest between the wife and the Estate, there were no children, and the married spouse was entitled to receive all of the property of the deceased). From this position, Justice Smith concluded that the wife was entitled to make the decision on the disposition of his ashes. The mother's request to have the ashes exhumed and sent to Québec was denied.

Layes v. AGNS[123]

In this decision, a son sought to have his father's remains exhumed (for a second time) and to have bodily samples obtained and examined by experts of his choice. The son believed that his family members, including his mother, sisters and brothers, drugged his father, causing his death. The father died at the age of 79 in 2014 in the hospital. The son raised concerns at the time, and the father's death became the subject of a medical examiner's investigation. Three months after his death, the father's remains were first exhumed, and a post-mortem examination was conducted. The post-mortem report determined the cause of death to be "pneumonia complicating: Emphysema". The examiner found that the death was natural, and that ischemic heart disease was a factor.

Despite the medical examiner's findings, several months later the son commenced an action arguing that family members, his father's doctor, and others were responsible for his father's death by poisoning him. The son commenced a separate action against the medical examiner alleging that he "obstructed the autopsy of the remains" and that he "refused exhumation of the body so further fluid and tissue samples could be obtained". The son also argued that the medical examiner acted in concert with his family members to "obfuscate and otherwise cover up the murder of" his father.

In Nova Scotia, the *Nova Scotia Health Protection Act*[124] is relevant with respect to who may order the exhumation of a body. The legislation provides that no person shall disinter or remove a buried human body without the written permission of the medical

123. 2018 NSSC 29.
124. S.N.S. 2004, c. 4 (as amended).

officer or with the consent of the Attorney General. The son brought an application against the Attorney General seeking a second exhumation.

The court noted that:

> While on its surface, the Application is framed as merely the request for an exhumation order, contained within the Application is the allegation that essentially alleges tortious behaviour on the part of [the medical examiner].
>
> I agree with counsel for the Crown that if a Court determines that an exhumation is warranted, then the clear implication is that the autopsy was botched. There is no reason to dig up a body which has been interred for over four years, in the absence of a finding that the autopsy was negligently carried out. Such a finding could have potential adverse consequences for both [the medical examiner] and the Crown.[125]

Ultimately though, since the son had not given notice as required under the *Proceedings Against the Crown Act*, his application was a nullity and was dismissed.

Mason v. Mason[126]

In this New Brunswick decision, a surviving spouse fought to have the remains of her husband moved from their original burying place. The wife had initially agreed to a location for the burial -- next to the remains of deceased's father. Later, the wife felt that, as her husband did not have a good relationship with his father, his remains should be interred elsewhere. There was no Estate Trustee or administrator appointed following the husband's death and before his burial. After the wife changed her mind about the burial spot, she applied and was appointed administrator of his estate.

The corporation that oversaw the operation of the cemetery where her husband's remains had been buried refused to facilitate the disinterment without the consent of the deceased's mother, the owner of the plot. The mother refused her consent. The wife then brought an application pursuant to the *Cemetery Companies Act*,[127] and sought an order giving her sole custody over the remains of her late husband and an order allowing her to disinter the remains and bury them in a plot of her choosing.

The application judge refused to grant the wife's application. The judge noted the absence of a legislative regime in New Brunswick to

125. *Layes*, *supra*, footnote 123, at paras. 33-34.
126. 2018 NBCA 20, 35 E.T.R. (4th) 182, 291 A.C.W.S. (3d) 221 (N.B. C.A.).
127. R.S.N.B. 1973, c. C-1.

govern the disposition of a deceased's remains and that common law governed. The judge cited the following common law principles:

a) the law does not recognize any property in a dead body;
b) the executors/administrators/next of kin of a deceased person have a right to custody and possession of a body until it has been properly buried or otherwise disposed of, and
c) the right to custody and possession of the body is limited to the carrying out of those actions for which it was granted; namely ensuring the body is properly dispositioned.[128]

The application judge concluded that the husband's remains had been properly interred in a manner and at a location acceptable at the time to both his wife and his family. Further, s. 15 of the *Cemetery Companies Act* provided for disinterment only through a court order or with the consent of the Medical Health Officer (which was not obtained). The application judge found that the reasons provided to disinter the husband's remains did not meet the test of "clear, cogent and compelling reasons" and that "court(s) should be extremely cautious in making these types of orders".[129]

The wife appealed the decision arguing, among other things, that the application judge applied the wrong legal test. She submitted it was a novel case for New Brunswick, acknowledging that there was neither statutory nor binding jurisprudential guidance for a such a situation. She encouraged the court to adopt a test giving priority to survivors along a certain hierarchy in deciding whether to allow disinterment of human remains. She argued that the right of an administrator extends beyond the burial and includes the right to disinter the remains.

The Court of Appeal disagreed. The court concluded that "the common law does not establish a priority or ranking system empowering any particular individual to disinter human remains once the obligation to properly dispose of these has been fulfilled".[130] The court also noted that the common law, like s. 15 of the *Cemetery Companies Act*, recognizes a broad judicial discretion to consider all the circumstances and determine whether there are compelling reasons to allow human remains to be disinterred in accordance with the wishes of a particular person or group of persons. The court dismissed the appeal concluding that:

> The principle derived from *Melville*,[131] *Catto*,[132] and *Mouaga*,[133] is that the decision of an executor, an administrator or a surviving spouse, as the

128. *Mason*, *supra*, footnote 126, at para. 13.
129. *Mason*, at para. 25.
130. *Mason*, at para. 29.

> case may be, properly taken in discharge of the obligation to dispose of human remains, will prevail in the face of an attempt to disinter unless legislation provides otherwise. *In my view, those cases do not stand for the proposition that, once the obligation is discharged, there exists control in perpetuity enabling disinterment of the remains.*[134]

Were this the common law position, it would beg questions such as those posed by the trial judge:

> i. Could an executor/administrator/surviving spouse disinter human remains 5, 10 or 20 years following burial?;
> ii. Is there any limitation period beyond which the family of a deceased person can feel secure the remains of the deceased will not be potentially subject to disinterment?; and,
> iii. Could human remains be subject to multiple re-locations?
>
> These questions do not arise in a regime where, once the obligation to properly dispose of one's remains has been discharged, disinterment of the remains will only be allowed for compelling reasons. In my view, this is the regime recognized at common law.[135]

In this case, the wife discharged her obligation by agreeing with her husband's family about where he should be buried. Once the obligation was discharged, the grave could only be reopened in accordance with the *Cemetery Companies Act* (either through a court order or with consent of the Medical Health Officer). This legislation does not oblige a judge to grant an order because the applicant is the Estate Trustee or administrator of the estate.

The Court of Appeal noted that:

> Section 15 of the *Cemetery Companies Act* obliged the application judge to consider all the circumstances and make the decision he considered appropriate. The judge did so and concluded "David [had] received a proper funeral and interment in June 2016" and he saw "no basis upon which to disrupt the sense of finality inherent in the completion of this funeral process". His decision is not founded on an error of law.[136]

The appeal was dismissed.

131. *Waldman v. Melville (City)* (1990), 65 D.L.R. (4th) 154, 36 E.T.R. 172, [1990] 2 W.W.R. 54 (Sask. Q.B.).
132. *Catto v. Catto*, 2016 ONSC 3025, 20 E.T.R. (4th) 324, 267 A.C.W.S. (3d) 498 (Ont. S.C.J.), additional reasons 2016 ONSC 5047, 20 E.T.R. (4th) 341, 270 A.C.W.S. (3d) 224.
133. *Mouaga v. Mouaga* (2003), 50 E.T.R. (2d) 253, 2003 CarswellOnt 2128, [2003] O.J. No. 2030 (Ont. S.C.J.).
134. *Mason*, *supra*, footnote 126, at para. 39.
135. *Mason*, *supra*, footnote 126, at paras. 39-40.
136. *Mason*, *supra*, footnote 126, at para. 4.

CROSS-JURISDICTIONAL CONSIDERATION OF LEGISLATION

While the common law duties related to the disposal of remains is consistent across the provinces, there are some jurisdictional differences in the legislation regulating burials and cremations and the funeral industry. A brief consideration of provincial legislation follows.

British Columbia

The *Cremation, Interment and Funeral Services Act*,[137] 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 in the following order: spouse, adult child, adult grandchild, legal guardian (if deceased was a minor), parent, adult sibling, adult nephew or niece, and other next of kin.[138]

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 binding and must 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.[139]

137. S.B.C. 2004, c. 35.

138. *Cremation, Interment and Funeral Services Act*, s. 5(1).

139. A 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

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 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.

Québec

Article 42 of the *Civil Code*[140] 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 Québec, a person may direct the disposal of his or her remains, and even a minor can do so if his parents or guardians consent.

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

Further, Bill 66 was passed in Québec in 2016 amending the *Funeral Operations Act*,[141] and codifying the requirement that human remains must be disposed of in a dignified manner. Article 4 of this Act now provides: "In all circumstances, a body or human ashes must be handled and disposed of in a manner that respects the

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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.

140. 1991, c. 64, s. 42.

141. CQLR, c. A-5.02.

dignity of the deceased person." Article 71 was also added, which provides: "no one may scatter human ashes in a place where they may constitute a nuisance or in a manner that fails to respect the dignity of the deceased person." This legislation does not define what constitutes a nuisance, or an affront to the deceased's dignity.

Like British Columbia, both Alberta[142] and Saskatchewan[143] have legislated a hierarchy of authority with respect to who has the right to control the disposal of human remains. The hierarchy in both statutes is similar, starting with the "executor" in Saskatchewan, and "personal representative designated in the Will" in Alberta, followed by spouse, adult child, parent / legal guardian. In Saskatchewan, the decision maker of "last resort" is the Minister of Community Resources and Employment, who may designate an authorized decision-maker with the right to control the disposition of the body. In Alberta, the final decision-make in the hierarchy is the Minister of Human Services.

Other Provinces and Territories

The remaining provinces and territories, New Brunswick,[144] Newfoundland,[145] Nova Scotia,[146] Prince Edward Island,[147] Manitoba,[148] Yukon Territories,[149] Northwest Territories,[150] and Nunavut[151] do not have a legislated hierarchy of authorized decisions makers and have similar legislative schemes that govern the funeral services, burial and cremation industries and practices in those jurisdictions.

142. *Funeral Services Act*, R.S.A. 2000, c. F-29, *General Regulation*, Alta. Reg. 226/1998 at s. 36(2) "Who may control disposition".
143. *The Funeral and Cremation Services Act*, S.S. 1999, c. F-23.3, s. 91; *The Funeral and Cremation Services Regulations*, R.R.S. c. F-23.3, Reg. 1; and *Saunders v. Saskatoon Funeral Home Co.*, 2016 SKQB 217, 268 A.C.W.S. (3d) 681, 2016 CarswellSask 446 (Sask. Q.B.).
144. *Embalmers, Funeral Directors and Funeral Providers Act*, S.N.B. 2004, c. 51.
145. *Embalmers and Funeral Directors Act, 2008*, S.N.L. 2008, c. E-7.1.
146. *Cemetery and Funeral Services Act*, R.S.N.S. 1989, c. 62.
147. *Funeral Services and Professions Act*, R.S.P.E.I. 1988, c. F-17.
148. *The Funeral Directors and Embalmers Act*, C.C.S.M. c. F195.
149. *Funeral Directors Act*, R.S.Y. 2002, c. 98.
150. *Vital Statistics Act*, S.N.W.T. 2011, c. 34.
151. *Vital Statistics Act*, S.N.W.T. (Nu) 1988, c. V-3.

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

The *Criminal Code*[152] 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 years.

> *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 2007 New Brunswick case of *R. v. Murray*,[153] 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 was 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 para. 17:

> While there is little authority on what constitutes offering an indignity to human remains, the thread of the authorities suggests that *an indignity 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*. [emphasis added]

Justice Rideout declined to offer a definition of an "indignity" on bodies, noting that the concept could change with time, but that,

152. R.S.C. 1985, c. C-46.
153. 2007 NBQB 214, 829 A.P.R. 177, 322 N.B.R. (2d) 177 (N.B. Q.B.).

even without a precise definition, an indignity can be intuitively recognized as having taken place. At para. 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.[154] Rideout ruled that the accused's actions, "tarnishe[d] the memory of the dead, leaving the families with negative memories about their loved ones".[155]

In the 1992 Manitoba decision of *R. v. Mills*,[156] a gravedigger was charged under s. 182 of the *Criminal Code* for "offering indignities to human bodies". It was discovered that through his carelessness in using a backhoe in re-filling the dirt over the caskets, the caskets would often crack or splinter or break open. At trial, the gravedigger was convicted and ordered to pay a fine and was placed on probation.

On appeal, the majority of the court overturned the conviction finding that: "The accused admits that when he was backfilling graves, the caskets collapsed with alarming frequency. But that in itself falls far short of establishing that their collapse constitutes an indignity to the bodies which they contained, and that the accused intended to offer those indignities." Justice Huband, on behalf of the majority, went on to observe that "I have difficulty in concluding that what takes place six feet below earth's surface, and completely out of sight, constitutes an indignity to the human remains".[157]

The dissenting opinion, written by Justice Helper, concluded however that:

> The actions of the accused in this case constitute the offering of indignities to human remains. The intentional application of force to the coffins resulting in their being crushed or collapsed necessarily leads to an interference with the contents. I do not accept the submission that the accused's actions merely damaged the coffins and did not interfere with

154. *Murray*, *supra*, at para. 30.
155. *Murray*, *supra*, at para. 31.
156. (1992), 77 C.C.C. (3d) 318, 16 C.R. (4th) 390, 30 W.A.C. 281 (Man. C.A.) (S.C.C.).
157. *R. v. Mills*, *supra*, at 325.

> or affect the bodies therein. The accused's actions did not merely accelerate the inevitable disintegration of the coffin. *The purposeful destruction of the coffins by using the backhoe to crush them necessarily resulted in the disruption of the peaceful laying to rest of human remains. The actions of the accused were disrespectful, dishonourable and callous.* Those actions constitute offering indignities to human remains as prohibited by s. 182 of the *Criminal Code*. [Emphasis added.][158]

The Supreme Court of Canada, in a short one-paragraph decision, concluded that the trial judge did not make any error, overturned the appeal, and restored the conviction.[159]

BEYOND BURIAL AND CREMATION: MODERN MEANS OF DISPOSING OF REMAINS

While the *FBCSA* 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 cost 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.

These modern alternatives to burial and cremation must comply with the *FBCSA* and be consistent with an Estate Trustee's duty to dispose of human remains in a decent, dignified and appropriate manner.

Natural or Green Burial

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.[160] 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 for location purposes.

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

158. *Supra*, at 329.
159. *R. v. Mills*, [1993] 4 S.C.R. 277, 84 C.C.C. (3d) 352, 25 C.R. (4th) 69 (S.C.C.).
160. www.naturalburialassoc.ca.

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 existing cemeteries, they are required to comply with the relevant legislation on interment in accordance with the *FBCSA*.

Alkaline Hydrolysis

Another method, alkaline hydrolysis, is also known as "bio-cremation" and is promoted as a more environmentally friendly option than regular cremation.[161] In this process, the coffin is placed into a high-pressure apparatus, in which the body is exposed to a water and alkali combination to break the body down chemically. 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.

This process was developed in Scotland. Transition Science Inc. holds the distribution rights for "Resomation", a trade name for alkaline hydrolysis in Canada.[162] The process has been accepted in Saskatchewan and Ontario.

The definition found in the *FBCSA* defines a "crematorium" as 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 legislation, or a predecessor of it and includes everything necessarily incidental and ancillary to that purpose".[163] This definition includes an apparatus used in alkaline hydrolysis as it is designed for cremation, or bio-cremation, in this case. It is worth noting that the term "cremation" is not defined in *FBCSA* or its regulations, such that it may include "bio-cremation".

A legal issue that may arise with alkaline hydrolysis 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, it still requires compliance with the applicable municipal legislation. The City of Saskatoon has allowed the addition of the effluent to their water treatment system, while the City of Toronto has not authorized such to date.

On February 14, 2018, the BAO issues a Notice to the Profession advising that the BAO is undertaking a comprehensive study and

161. www.resomation.com.
162. www.transitionscience.com.
163. Section 1, *FBCSA*.

assessment of various factors/issues surrounding alkaline hydrolysis disposition, including: public health issues, the environment, safety, respectful handling of human remains and consumer protection. A further notice was issued on May 2, 2018 advising that the study was ongoing and that licensees were prohibited from selling or offering to sell, in advance need, alkaline hydrolysis services. However this prohibition does not include "at-need sales".[164]

Cryomation

Additionally, Cryomation is the proprietary trade name for a process that 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.[165] 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 comply with the applicable legislation. There may be a challenge, however, since the legislation contemplates cemeteries, crematoria, interment and cremation, and the process of Cryomation does not appear to apply to those methods.

Promession

Another method, Promession, is also a proprietary trade name and is promoted as another environmentally friendly option for disposal and burial.[166] 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 comply with legislation, which at present does not appear to contemplate these alternative means of disposing of human remains.

164. See the website for the Bereavement Authority of Ontario: https://thebao.ca/pre-need-sales-of-alkaline-hydrolysis-prohibited (accessed on 14.02.19).
165. www.cryomation.co.uk.
166. www.promession.org.uk.

CONCLUDING REMARKS

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 continue to affect the development of law. It is interesting to consider the origins of the law are church-based, and yet the law has developed so as to exclude religious values which remain legally 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: 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 growing plethora of case law 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 concerning 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/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*,[167] 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 for failing in the discharge of duties respecting the deceased's remains.

167. *Supra*, footnote 51.

From a practical perspective, it will be interesting to see how the disposal of remains continues to be carried out in the future. Environmental and cost concerns are driving many to contemplate non-traditional means of disposal of remains. 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 requirements for a "decent" and "dignified" disposal.

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

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