

The right to choose



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In his will, Ben appointed his non-Jewish girlfriend to be his executrix and expressed a desire to be cremated. When Ben died, his mother tried to block the cremation because according to Jewish law, it was a desecration of the dead and a denial of the fundamental belief in the afterlife. The lawyers alleged suspicious circumstances and undue influence in the drafting of the will, but the judge dismissed those arguments and focused on who had the right to choose on how to dispose of the remains.

Saleh v. Reichert involved a similar situation. A Muslim woman married outside her faith. The woman was later diagnosed with cancer and stated that she wanted to be cremated. There was no will. Her husband successfully applied to become the administrator and the woman's father challenged the planned cremation in court. The key issue before the court was who had the right to decide.

The courts allowed the cremations. Ontario Law recognizes both burial and cremation as being dignified, acceptable and a valid means of disposing of the dead. While the judges were sympathetic to the angst of the parents, they ruled that religious law had no bearing. The only relevant question was on whom the duty to dispose of the remains falls and the nature of that duty.

What role did the testators' expressed intentions play in the judges' decisions? None. They concluded that a testator's wishes about the disposition of his or her body were unenforceable in law and that the executor/administrator was entitled to possession of the body. For example, in *Williams v. Williams* a Protestant husband converted to Catholicism in order to be buried next to the plot set aside for his wife. Upon his demise, his widow and son fought about the place of burial. The court sided with the deceased's son because he was the executor. They did so despite the fact that the executor's burial plans were clearly contrary to the stated intentions of the deceased.

Who decides about disposal of the remains if there was no executor or administrator? In *Mouaga v. Mouaga*, the spouse wanted to bury the deceased quickly while the parents wanted to embalm the body and delay the burial. The court decided that in the absence of a will, a spouse should decide because he or she would most likely be appointed administrator of the estate.

Having to involve the courts in these circumstances is profoundly sad. These cases are not about money, but disputes on how to best honour the departed. Despite the temptation to jump to conclusions, it would be a mistake to treat these case reviews as substantive legal advice. For those considering this option, there is no substitute for hiring a competent solicitor whose own research, analysis and judgment should be canvassed before going to court.

Charles B. Wagner practices Estate Litigation in Toronto. For further information about the issues raised above, you can access www.cbwagnerlaw.com or contact the lawyer at cwagner@cbwagnerlaw.com or call 416-366-6743.