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DEALING WITH THE BODY, AND OTHER ESTATE ISSUES THAT ARISE IMMEDIATELY UPON DEATH

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**Dealing with the Body,
and other Estate Issues that Arise
Immediately Upon Death**

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As estate solicitors and estate litigators, we deal with many issues arising upon death. Normally, we advise the deceased's survivors and assist in the ordinary administration of the deceased's estate. Sometimes, matters become contentious, and the estate litigator is brought in to address will challenge issues, issues of dependant's support, family law equalization and the determination of estate assets. In some cases as well, interpretation issues arise that require court assistance in order to proceed further.

However, many issues arise immediately upon the death of the deceased: issues that require urgent attention in order to address and, hopefully, resolve. These issues arise at a time when the emotions of the deceased's survivors are most frail. Careful advice and considered, practical solutions delivered with sensitivity to the emotions in play are required.

The First Call

Often, the solicitor is contacted immediately upon the deceased's death. Hopefully, the family knows who the deceased's solicitor is (if he or she had one), and is able to contact that solicitor. That solicitor would usually know whether the deceased left a will, and who the estate trustee is under that will.

If the family does not know who the solicitor is who drafted the will, or whether the deceased in fact left a will, the family should be advised to review the papers of the deceased in order to determine whether those papers reveal whether a solicitor was involved, and if a will was left.

Locating the Will

As stated, the best place to start is by contacting the deceased's solicitor, if he or she is known. Inquiries should be made of family members and close friends as to whether a will was ever mentioned by the deceased.

Alternatively, the deceased's papers should be reviewed. Failing that, the lawyer can contact the deceased's bank in order to determine whether the deceased had a safety deposit box. If one existed, the solicitor should write to the bank and request that they access the safety deposit box to determine whether it contains any testamentary documents. The authorization should be signed by an immediate family member.

It is possible that the will has been deposited with the Ontario Superior Court of Justice, and an appropriate search should be undertaken at the Estates Office.

Finally, advertisements could be placed in the Ontario Reports.

Determining the existence of a will can go a long way towards avoiding early estate administration problems. The will clothes a named individual with authority to make required decisions and the early location of a will can put an end to substantial debate and uncertainty.

Funeral Arrangements

The solicitor's notes, if any, may reveal what the deceased's plans were with respect to the funeral: whether there are any special instructions, and whether the funeral or burial plot was prepaid.

However, it is clear that any instructions left by the deceased, whether in the will or otherwise, are precatory only, and are not binding on the estate trustee.¹

Funeral expenses are paid out of the estate in priority to all other charges. However, the estate trustee must keep in mind the deceased's station in life. An estate trustee may

¹ *Williams v. Williams* (1882), 20 Ch. D. 659

be criticized, and may face liability to creditors and/or beneficiaries, if overly elaborate or expensive funeral arrangements seriously deplete the value of the deceased's estate.

Even before probate is granted, most financial institutions will remit funds out of the deceased's account to pay for funeral expenses upon the presentation of an account from a funeral home.

Plans for the service and burial arrangements are the responsibility of the estate trustee. Family members and others close to the deceased are often involved in the process. However, it is the estate trustee who is ultimately responsible for the arrangements.

Disputes over burial arrangements are rare, but are not unknown. In *Sopinka v. Sopinka* (2001), 42 E.T.R. (2d) 105 (Ont. S.C.), a son died, and his father died three months later. The father was the estate trustee of the son's estate, and the mother was the estate trustee of the father's estate. The mother had the son's cremated remains buried with the father. The son's children were not told of this for approximately one year, and they sought an order that the son's (their father's) remains be exhumed and turned over to them for burial. They also sued for damages for intentional infliction of mental suffering.

In dealing with the issue, the court reviewed the duties of an estate trustee, and the succession of trusteeship.

The court applied s. 3 of the *Trustee Act*, which provides that where a trustee dies, the personal representative of the trustee is capable of exercising the powers or trusts of the deceased trustee. Therefore, in *Sopinka*, the mother stepped into the deceased father's shoes as estate trustee with respect to the estate of the son.

As to the duties of the estate trustee, the court observed that one of the general duties of an estate trustee is to dispose of the body of the deceased. The court went on to make a number of other observations:

- The duty to dispose of the body includes a right of possession of the body for the purposes of disposition²;
- The right of possession exists against even the surviving spouse of the deceased³;
- The rights in respect of burial continue after burial: otherwise those who oppose the executor would disinter the body as soon as it was buried⁴;
- The duty to dispose of the body is circumscribed by the obligation to do so in a dignified fashion⁵;

² *Widdifield on Executors' Accounts*, 5th ed. Vol. 1, p. 230.

³ *Hunter v. Hunter* (1930), 65 O.L.R. 586 (Ont. H.C.)

⁴ *Waldman v. Melville (City)*, [1990] S.J. No. 13 (Sask. Q.B.) at 2.

⁵ *Abeziz v. Harris Estate*, [1992] O.J. No. 1271 (Ont. Gen. Div.) and *Saleh v. Reichert* (1993), 104 D.L.R. (4th) 384 (Ont. Gen. Div.).

- The duty to dispose of the body is circumscribed by the obligation to do so in a manner suitable to the estate of the deceased, or, put another way, in a manner befitting the deceased's station in life⁶; and
- There is a duty on an estate trustee, upon request, to provide particulars of the burial to the next of kin.

The Court concluded that the mother had the authority to dispose of the remains of the son, and further, that there was no evidence that the disposition was undignified, unsuitable or contrary to the son's station in life.

As to the mother's failure to advise the next of kin of the particulars of the burial, the court found that in the particular circumstances of the case, the failure was justified⁷.

Strictly speaking (and subject to my comments below regarding the *Trillium Gift of Life Network Act*) there is no "property" in a dead body. From this, as there is no property in a body, it cannot be disposed of by a will or other instrument. However, as stated above, the estate trustee is entitled to the possession of and custody of the body.⁸

⁶ *Williams v. Williams* (1882), 20 Ch. D. 659 (Eng. Ch. Div.) at 664, and *Schara Tzedek v. Royal Trust Co.*, [1953] 1 S.C.R. 31 (S.C.C.).

⁷ In *Sopinka*, the mother went beyond mere delay in advising of the burial, and she made actual misrepresentations. The court held that while the misrepresentations were a breach of duty, no actual mental suffering resulted. Therefore the action for "mental suffering" was dismissed.

⁸ *Theobald on Wills*, 13th ed. (1971) p. 111, Widdifield on Executors and Trustees, 6th ed., para. 1.1

As can be expected, the duties of the estate trustee and the powers granted can often conflict with the wishes and expectations of family members. This is particularly so where there is religious context present⁹. This is best illustrated in the decision of *Saleh v. Reichert, supra*. There, the deceased was brought up in the Muslim faith. Her husband converted to the Muslim faith for the purposes of marriage. There was evidence that the deceased expressed a wish to be cremated upon her death. Her husband was appointed as estate trustee without a will. He intended to honour the deceased's expressed wishes regarding cremation. The deceased's father objected, asserting that his daughter ought to be buried in accordance with the tenets of the Muslim faith, which did not consider cremation to be an appropriate option for disposing of a body.

The court held that the expressed wish of the deceased was not dispositive of the matter in issue, as an expressed wish regarding the disposition of his or her body cannot be enforced in law, even if stated in a will or other instrument¹⁰.

The court applied the reasoning of Farley J. in *Abeziz, supra* to the effect that the question of burial rights is one of legal obligations only: who has the legal authority to act as estate trustee. Religious law is said to have no bearing on the case. The court concluded that the husband, as estate trustee, had the authority to dispose of the deceased's body. As there was nothing inherently undignified about cremation, his decision was allowed to stand.

⁹ See *Hunter v. Hunter, supra* (Protestant burial vs. Catholic burial); *Abeziz v. Harris Estate*, [1992] O.J. No. 1271 (Ont. Gen. Div.) (Jewish burial vs. cremation)

¹⁰ *Williams v. Williams, supra*.

The case also illustrates certain procedural implications of these types of disputes. The deceased died on May 7, 1993. The father brought an *ex parte* motion on May 11, 1993 to enjoin the husband from cremating the deceased's remains. The injunction was granted, and in order to expedite matters, the court directed that the trial of the issue proceed on May 28, 1993. Judgment was rendered on June 7, 1993. In *Abeziz*, the deceased died on May 18, 1992. The Application appears to have been heard on June 5, 1992 and the parties were advised of the decision on June 6, 1992.

As indicated, the authority to determine the proper disposition of the deceased's body falls upon the estate trustee. Where there is a will, the identity of the estate trustee is clear. However, if the will is challenged, or if there is no will, the identification of an estate trustee will be less clear. The issue becomes who is entitled to act as estate trustee, and thereby entitled to make burial decisions.

In *Abeziz, supra*, the deceased's mother challenged the authority of the deceased's estate trustee to make a decision with respect to cremation vs. burial. The mother questioned the validity of the will left by the deceased. The matter came before the court as an injunction motion. The court considered the challenge to the will, and whether the mother met the injunction test of raising a strong *prima facie* case. The court considered, to the extent that it could on the preliminary evidence before it, the basis for the challenge to the will.

Where there is no will, recourse may be had to the *Estates Act*. The *Estates Act* stipulates to whom administration may be granted in the event that the deceased dies intestate, or in the event that the will is silent with respect to the appointment of an estate trustee¹¹. The administration may be granted to the married spouse of the deceased, or the person whom the deceased was living in a conjugal relationship with immediately before the death. Alternatively, administration can be granted to the next of kin of the deceased, or to both the spouse and next of kin. The *Estates Act* sets up a hierarchy, and if there are issues, or competing entitlements, a contested Application to the court may be required.

The importance of determining who is entitled to act as estate trustee is illustrated in *L.A.W. v. Children's Aid Society of the District of Rainy River*¹². There, the deceased, a minor, was under the care of the Children's Aid Society at the time of his death. He died leaving a will, in which he set out his wishes regarding his burial. However, because he was under 16 at the time he made the will, the will was invalid. The Children's Aid Society wanted to honour his wishes nonetheless, but the deceased's mother, an aboriginal, wanted him to be buried on the reserve. The court considered who had the right to be appointed as estate trustee. While normally the mother would have had the right to be appointed, that right was trumped by the rights of the Children's Aid Society under the *Children and Family Services Act*. The court stated that this was "not a situation of balancing native interests and wishes against non-native wishes". It was a

¹¹ S. 29.

¹² [2005] O.J. No. 1446 (Ont. S.C.J.)

case of determining who would most likely be appointed as Estate Trustee if such an application were made.

Donation of the Body or Body Parts

Ontario's *Trillium Gift of Life Network Act* allows a person to consent to the donation of the person's own body or body parts upon death. A spouse or other family members, in a specific order, are also authorized to consent to such a donation if the deceased has not consented during his or her lifetime. One of the persons authorized to consent to the donation is "the person lawfully in possession of the body". This appears to be a reference to the estate trustee. However, their ability to consent is low on the list, after the spouse, children, parents, siblings and next of kin.

Consent is not to be given if it is believed that the deceased would have objected during his or her lifetime, or if the deceased did not consent, if someone higher on the hierarchical list would object.

A question may arise as to the interplay between the *Trillium Gift of Life Network Act* and the common law right of the estate trustee to determine the proper disposition of the body. For example, can the estate trustee override the consent of the deceased? Can a spouse consent to the donation of the body over the objections of the estate trustee? Under the common law, the wishes of the deceased are only precatory, and the decisions of the estate trustee will override the decisions of the spouse. However, the

legislation clearly provides that the consent of the deceased person is “binding and is full authority for the use of the body...”.¹³ Similarly, the consent of a spouse or other person listed in the legislation is “binding and full authority” for the use of the body. However, a person shall not consent if the person has actual knowledge of the objection of the deceased or of a person of equal or closer relationship to the deceased.¹⁴ The legislation therefore appears to make a limited exception to the common law authority of the estate trustee.

Care of Children

Were a deceased has left minor children, an immediate issue arises as to their care.

If there is a surviving spouse who shares custody, the issue may not arise.

Similarly, were the deceased left a will, the issue may be avoided. Section 61 of the *Children's Law Reform Act* allows a person to appoint another person to have custody of their child upon the grantor's death. The appointment is only valid if there is no other person entitled to custody at the time of death of the grantor. However, the appointment is only valid for 90 days, or if an application for custody is commenced within that 90 day period, until the application is disposed of.

¹³ S. 4(3).

¹⁴ S. 5(4).

If there is no will, or no such clause in the will granting custody, and if an issue arises, an urgent application to the court for custody may be required.

Care of Pets and Perishable Property

Pets, crops, and perishables owned by the deceased form part of the property of his or her estate, and such property must be secured by the estate trustee. Arrangements need to be made immediately for the short-term care of these assets. Again, these decisions would fall on the shoulders of the person or persons who is entitled to act as estate trustee.