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The Disposition of Human Remains and Organ Donation: Increasing Testamentary Freedom while Upholding the No Property Rule

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Abstract
In terms of real and personal property, Canadian law grants individuals substantial testamentary freedom in the disposition of their estate. However, in regards to human remains, Ontario has upheld the common law's longstanding "No Property Rule," which prevents testamentary freedom in regards to one's bodily remains. In light of changing societal notions of property and value with respect to the human body, this article argues in favour of implementing greater testamentary freedom for individuals in regards to the disposition of their body, organs, tissue, and fluids. This article reviews alternative approaches to the testamentary disposition of human remains in Quebec and British Columbia, and highlights Ontario's enhanced testamentary freedom regarding organ donation under the *Trillium Gift of Life Network Act*. As a result, this article recommends increasing and securing testamentary freedom in order to ensure that all reasonable testamentary requests regarding one's body receive the same legal status as directions regarding traditional property objects.

Keywords
Testamentary freedom, Burial, Cremation, Organ Donation, No Property Rule, Organs, Tissue, Bodily Fluid

THE DISPOSITION OF HUMAN REMAINS AND ORGAN DONATION: INCREASING TESTAMENTARY FREEDOM WHILE UPHOLDING THE NO PROPERTY RULE

LOUISE M. MIMNAGH*

INTRODUCTION

In July of 1996, an influential English author passed away after battling lung cancer.[1] The memorial service organized by her family was both extravagant and elegant: a twelve-piece brass marching band performed, over six hundred people attended,and six plumed black horses drew an antique carriage hearse.[2] Ironically, this was the funeral of Jessica Mitford, author of *The American Way of Death*—a gritty exposé on what she regarded as an overly commercialized funeral industry that engaged in the "financial abuse of mourning families."[3]

Mitford was viewed by many as the poster child for disillusionment with the funeral industry, and she requested a simple cremation and service. Her executor's actions have been described as a "successful rebellion by surviving next of kin."[4] Such a successful rebellion is unsettling for those considering their own post-mortem and estate planning.[5]

In terms of real and personal property, Canadian law grants individuals substantial testamentary freedom in the disposition of their estate. However, with respect to the human remains of a deceased, the common law has upheld the longstanding "No Property Rule."[6] This rule states that since the human body is not

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[1] Thomas Mallon, "How Jessica Mitford found her Voice", *The New Yorker* (16 October 2006), online: <http://www.newyorker.com/archive/2006/10/16/061016crbo_books1?currentPage=all>.

[2] Norman L Cantor, *After We Die: The Life and Times of the Human Cadaver* (Washington, DC: Georgetown University Press, 2010) at 44 [*Cantor*]; Leslie Brody, *Irrepressible: The Life and Times of Jessica Mitford* (Berkeley: Counterpoint Press, 2010) at 344.

[3] *Cantor*, *supra* note 2 at 52.

[4] *Ibid.*

[5] Glanville Williams, ed, *Salmond on Jurisprudence*, 12th ed (London, UK: Sweet & Maxwell, 1966) at 301; Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (New York: Cambridge University Press, 2008) at 1 [*Sperling*].

[6] Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Portland: Hart Publishing, 2007) [*Hardcastle*].

property, it has no testamentary disposition, and the manner of its disposal ultimately falls outside the deceased's testamentary freedom.[7]

Individuals tend to place great value and importance upon their real and personal property, as indicated by their care of these assets in life as well as the detailed manner in which they plan for the distribution of these assets upon death. Yet many individuals also give similar significance to their bodies, both while living and upon death.[8] However, due to the No Property Rule, individuals in Ontario generally have more testamentary freedom over the disposition of their cottage or silverware than over their bodily remains. While the No Property Rule may have been a somewhat satisfactory or acceptable legal reality in the past, this paper argues that changing notions of "property" and "value" in regards to the human body requires the adoption of greater testamentary freedom for individuals when making decisions about the disposition of their body as a whole, and for any disposition or donation of their organs, tissue, and fluids.

In order to demonstrate the needs of individuals to have greater testamentary freedom over their bodies, the first part of this paper reviews the common law's historical emphasis on property rights and testamentary freedom, the origins of the No Property Rule, the foundational English decision of *Williams v Williams*,[9] and the historical challenges to this rule prompted by developments in medical research. This part concludes with an assessment of the No Property Rule in Ontario, as well as a review of alternative approaches to testamentary dispositions of human remains in Quebec and British Columbia. The second part of this paper reviews the current organ donation legislation in Ontario, which presents a contradiction to the No Property Rule by allowing individuals to donate their organs, tissues, and fluids upon death. The third and final part of this paper discusses the discrepancy between Ontario's enhanced testamentary freedom regarding organ donation and its limited testamentary freedom for the disposal of human remains. This part concludes with recommendations to alleviate the tension between these two legal regimes and to increase and secure testamentary freedom while retaining the particular strengths of the No Property Rule.

I. THE DISPOSAL OF HUMAN REMAINS

Property Rights and Testamentary Freedom

In Canada, property is divided into two categories: real property, which predominately relates to property rights in land; and personal property, generally

[7] CED 4th (online), Wills (Ont) "Power of Disposition: Public Policy Considerations" (III.2.1) at §74.2.
[8] However, other individuals also express indifference to the disposition of their remains.
[9] *Williams v Williams*, [1882] 20 ChD 659 (UK) [*Williams*].

defined as property rights in objects other than land.[10] Historically, property rights in real and personal property were the main form of holding both wealth and power in England, to the extent that "nothing was afforded greater protection than a person's property."[11] In Canada, this emphasis on property rights continues today, as section 35 of the *Criminal Code of Canada*[12] outlines the permissibility in reasonable circumstances for property owners to prevent individuals from taking, damaging or destroying their property. As a result, Justice Scanlan appropriately noted that "[f]ew things are more precious to people… than having the right to own and enjoy [their] property."[13]

Just as Canadian statutory law grants individuals significant rights in protecting their property, it also bolsters the common law's traditional emphasis on testamentary freedom, or the "venerable tradition [of] enforcing a person's pre-mortem wishes, as expressed in a will, in the post-mortem disposition of that person's property."[14] This liberty to freely dispose of one's property is emphasized in section 2 of the *Succession Law Reform Act* of Ontario, which states that "[a] person may by will devise, bequeath or dispose of all property... to which at the time of his or her death he or she is entitled either at law or in equity."[15] Canadian courts have also upheld diverse expressions of testamentary freedom, from the banal to the outlandish, insofar as the instructions did not upset public policy.[16] In *Re Millar Estate* the Supreme Court of Canada upheld the "Baby Derby Clause" in the will of Charles Millar, which left the residue of his substantial estate in trust for the woman in Toronto who had given birth to "the greatest number of children" under the *Vital Statistics Act*.[17] However, despite the ability to dispose of one's property under our venerable tradition of testamentary freedom, there has been ambiguity and dispute over which objects are protected by property rights and testamentary freedom. This is a matter that both religious and secular courts in England have been forced to address.[18]

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[10] Bruce H Ziff, *Principles of Property Law*, 2d ed (Toronto: Carswell, 1996) at 69-72.
[11] Jane Churchill, "Patenting Humanity: The Development of Property Rights in the Human Body and the Subsequent Evolution of Patentability of Living Things" (1994) 8 Intellectual Property Journal 249 at 281.
[12] *Criminal Code*, RSC 1985, c C-46, s 35 [*Criminal Code*].
[13] *Brown v Bellefontaine* (1999), 549 APR 72 at para 46 (NS SC).
[14] *Cantor*, *supra* note 2 at 29.
[15] *Succession Law Reform Act***,** RSO 1990, c S.26, s 2.
[16] *Re Millar Estate,* [1938] SCR 1 at para 15.
[17] *Ibid*.
[18] *Hardcastle*, *supra* note 6 at 13.

No Property Rule and Exclusion of Human Remains

Since societal conceptions of death are instilled with significant emotional, cultural, and religious implications, the prominence of Christianity in England resulted in the ecclesiastical courts assuming jurisdiction over religious rites, such as burials that occurred on consecrated or sacred ground.[19] Consequently, England's ecclesiastical courts also inherited jurisdiction over the human remains subject to these religious burial rites.[20]

In contrast, other property disputes were within the jurisdiction of the common law court. At this time, the jurisdictional division between the common law and the ecclesiastical courts was strictly upheld. In 1819, the King's Bench refused to hear a dispute regarding the manner of burial in *R v Coleridge*, explicitly noting that this was outside its jurisdiction and "a question for the ecclesiastical courts."[21] As a result of this strict jurisdictional division, Professor Remigius Nwabueze of Southampton University underscores that the common law "did not have the opportunity to develop comprehensive rules on dead bodies" until the ecclesiastical courts' jurisdiction was fully abolished in 1860.[22]

Origins of the No Property Rule: Haynes and Handyside

Despite the ecclesiastical courts' jurisdiction over human remains, various actions regarding cadavers arose in common law courts because of the intertwined property issues cadaver disputes presented. Specifically, in 1614 the question of whether a human cadaver could be a subject that held property was discussed in *Haynes' Case*.[23] In this case, Haynes was charged with petty larceny for exhuming four graves and taking the "winding sheets" used to wrap the bodies.[24] Haynes argued that theft could not be committed against a corpse, since a deceased party could not hold

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[19] Kimberly Whaley, "Disputes over what Remains: Bodies, Burial, Ashes, and New Developments" (Paper delivered at the law Society of Upper Canada, The Six-Minute Estates Lawyer, 24 April 2012), online: <http://whaleyestatelitigation.com/resources/WEL_Disputes_Over_What_Remains_May2012.pdf> at 10-1 [*Whaley*].

[20] Remigius N Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts and Genetic Information* (Hampsire, UK: Ashgate Publishing Limited, 2007) at 45 [*Nwabueze*].

[21] *Hardcastle, supra* note 6 at 27.

[22] *Nwabueze, supra* note 20.

[23] *Haynes's Case* (1614), 12 Co Rep 113, 77 ER 1389 (UK).

[24] Louis J Palmer, *Organ Transplants from Executed Prisoners: An Argument for the Creation of Death Sentence Organ Removal Statute*s (Jefferson, NC: MacFarland & Company, 1999) at 10 [*Palmer*].

property rights in the sheets.[25] The court accepted this portion of Haynes' defense and agreed that "a dead body being but a lump of earth" had no capacity to hold or possess property.[26]

While the decision in *Haynes* focused on the issue of ownership of the sheets, determining whether an individual could hold a form of property in a human corpse was much more problematic. This issue emerged in the 1749 case of *Exelby v Handyside* in which an English physician allegedly disinterred the cadavers of two infants joined by a birth defect.[27] The parents sought to establish that they held a form of property in the remains, but Sir John Willes stated that their action could not proceed, as "no person has any property in corpses."[28] Both *Haynes* and *Handyside*, therefore, pointed to the conclusion that human remains could not be disposed of by will. The issues addressed in these two cases were clarified and expanded over 100 years later, and the No Property Rule emerged as a solidified concept in law.

The No Property Rule: An Established Principle in Williams v Williams

The most frequently cited foundation of the No Property Rule is *Williams v Williams*, which addressed the critical issue of whether or not individuals could dispose of their corpses by will, in the same manner that one could dispose of traditional objects of real or personal property.[29] In this case, the testator completed a codicil containing two directions for his executors: (1) to deliver his body to his friend, Ms. Williams; and (2) for the estate to reimburse Ms. Williams for any expenses regarding the disposal of his body. In a private letter to Ms. Williams, the testator specifically requested that he be cremated. Notwithstanding this codicil, the executors buried the testator in unconsecrated ground. After the funeral, Ms. Williams requested a license to disinter the body to either have it cremated or moved to consecrated ground. The Under-Secretary of State refused to provide permission for cremation because it was forbidden under English law; however, Ms. Williams was granted a license to disinter the body for relocation to consecrated grounds. Once she was granted possession of the testator's body, Ms. Williams sent the body to Italy for cremation and, in accordance with the codicil, sued the executors for her expenses of £321.

The judgment of Justice Kay in *Williams* includes several clear statements of law regarding the alleged right to dispose of one's corpse by will. First, Justice Kay stated "executors have a right to the custody and possession of [a] body (although they

[25] *Hardcastle, supra* note 6 at 26.
[26] *Palmer, supra* note 24 at 10.
[27] *Hardcastle, supra* note 6 at 26.
[28] *Ibid*.
[29] *Williams, supra* note 9.

have no property in it) until it is properly buried."[30] Therefore, Justice Kay found that any property held in human remains was limited to possession, and that this only extended to an executor of the estate until burial.[31] Since Ms. Williams was not an executor, the directions in the codicil to deliver the testator's body to her were void. Second, Justice Kay explicitly refused to define human remains as property. He specified that since testamentary documents may only dispose of property, "[i]f there be no property in a dead body it is impossible that by will […] the body can be disposed of."[32] Ultimately, the No Property Rule and its two principles of law as set out in *Williams* are (1) an executor has the exclusive right and duty to possess the cadaver until a burial occurs in the manner of the executor's discretion, and (2) as there is no property in a cadaver, it cannot be disposed of by will.[33]

Medical Advances Challenging the No Property Rule

Although Justice Kay in *Williams* refused to classify human remains as property, and the description of a human body as nothing "but a lump of earth" in *Haynes* seems overly crude, these statements point to another critical characteristic of property under the common law: property is something that possesses value for its owner. Author Bernard Dickens therefore describes property interests as a value that is based upon the object's utility.[34] Similarly, as illustrated in *Haynes*, seventeenth century human remains did not possess any material or commercial value. Consequentially, failing to grant human remains the coveted status of being "property" was logical within this historical and value-based context. However, as noted by Professor Nwabueze, societal conceptions of property are dynamic, and what is viewed as deserving of property rights may vary between different societies or vary within the same society over time.[35] Therefore, something that was once considered property may be "de-propertized," just as slavery is now overwhelmingly condemned on both moral and legal grounds.[36] Similarly, something that was once overlooked by the property law regime may now be included.[37]

Medical advances in the early nineteenth century aggressively challenged concepts of property, including the No Property Rule and the exclusion of human

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[30] *Ibid*.
[31] *Whaley*, *supra* note 19 at 10-7 (case law also outlines that the executor must bury the deceased in a dignified manner, appropriately considering their "station in life", and must provide the particulars of burial to the deceased's next-of-kin at 10-15).
[32] *Williams, supra* note 9 at 665.
[33] *Ibid* at 659, 665.
[34] *Nwabueze*, *supra* note 20 at vii (Introduction by Bernard Dickens).
[35] *Ibid* at 13.
[36] *Ibid* at 13-14.
[37] *Ibid* at 15-17.

remains from the property law regime. Two medical disciplines in particular, anatomy and surgery, rapidly gained prominence in the nineteenth century and triggered a demand for human remains that could be used for medical research. Cadavers were quickly endowed with a commercial value by medical schools in order to allow students to "practice dissection and perfect the art of surgery."[38] Specifically, the commercial value of one human cadaver was more than the entire weekly wage of a skilled worker at the time.[39] Medical departments seeking human remains often obtained their cadaver supply illegally by using professional "resurrectionists" or "body snatchers," who would covertly remove human remains from graves.[40]

Unsurprisingly, the sudden commercial value ascribed to human remains propelled the practice of body snatching into a serious societal concern for various reasons. First, the commercial allure of body snatching motivated some individuals to "streamline" the process and commit murder.[41] Second, body snatching directly undermined the deeply entrenched adage of "rest in peace."[42] Finally, since human remains are directly associated with the person who once animated them, the practice of illegally unearthing and dissecting these cadavers was considered a matter of great disrespect and brought outrage to the living.[43]

The legal systems of England, Canada, and the United States all struggled to suppress and end the practice of body snatching. Authorities attempted to curb the covert murder and sale of individuals by requiring that a death certificate, as issued by a physician, accompany all sales of human remains.[44] Legislation also sought to ensure that a lawful supply of human remains was channeled to medical schools. For example, the 1752 English *Murder Act* required that convicted murderers' bodies be dissected before burial could occur.[45] However, as demonstrated by the phenomenon of body snatching, "donations" under the *Murder Act* were not sufficient in the face of ever-increasing medical demand.[46] Subsequently, the 1832 English *Anatomy Act* enabled individuals to expressly donate their body for post-mortem examination, either in writing or verbally in the presence of two or more witnesses, in a manner binding upon

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[38] *Ibid* at 17.
[39] *Sperling, supra* note 5 at 89.
[40] *Nwabueze, supra* note 20 at 17.
[41] *Cantor, supra* note 2 at 244 (tragically, being murdered to have one's remains sold for dissection was known as "Burking", after William Burke was arrested for numerous such murders at 244).
[42] *Ibid* at 239.
[43] *Ibid* at 239 (in 1824, medical students of Yale University were barricaded inside their school after a "purloined body" was reported, and mobs rioted outside the building for an entire week at 249).
[44] *Ibid* at 245.
[45] *Sperling, supra* note 5 at 5; *An Act for Better Preventing the Horrid Crime of Murder,* 1751 (UK), 25 Geo 2, c 37, ss II, V.
[46] *An Act for regulating Schools of Anatomy* (1832), 2 & 3 Will IV c75 at XVI, as amended by *Anatomy Act 1984*, c 14 s 13 [*Anatomy Act*]; *Sperling, supra* note 5 at 5-6.

their executor.[47] While seeking to increase the lawful availability of cadavers for dissection, the *Anatomy Act* also incidentally bolstered individuals' testamentary freedom in regard to the treatment of their remains.

Lingering Issues with the No Property Rule: Concepts of Theft

While the legislation discussed above aimed to reduce illegally procured cadavers, significant ambiguity remained regarding what, if any, legal protection actually existed for human remains. Since *Williams* stated that human remains are not property, and as only property can be the object of theft, uncertainty arose about whether any crime or cause of action occurred upon the exhumation of a body. Uncertainty also remained about whether any legal relationships existed once burial was complete. While it seems intuitive that disturbing the remains of the dead is a legally forbidden act, Sir William Blackstone considered this predicament in a statement reminiscent of *Haynes*:

> [S]tealing the corpse itself, which has no owner, though a matter of great indecency, is no felony, unless some of the gravecloths be stolen with it...[48]

> [The] heir has a property interest in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried.[49]

Due to the "great indecency" of such actions, the common law developed several criminal sanctions and made it a misdemeanor to exhume human remains without the appropriate license or permission as early as 1788, in *R v Lynn*.[50] Though the English ecclesiastical courts were fully abolished by 1860, the unified courts grappled with the notion of uniting the long separated domains of the ecclesiastical jurisdiction over human remains and the common law jurisdiction over what was considered property. As a result, while the party who owned the land containing the grave might have a cause of

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[47] *Anatomy Act*, *supra* note 46, s 8.
[48] William Blackstone, *Commentaries on the Laws of England*, vol 2 (Philadelphia: JB Lippencott & Co, 1895) at 235.
[49] William Blackstone, *Commentaries on the Laws of England*, vol 1 (Philadephia: JB Lippencott & Co, 1993) at 429.
[50] *Hardcastle*, *supra* note 6 at 27.

action in trespass, neither the relatives of the deceased nor the estate had a claim for any civil remedies for the undesired removal or desecration of the body.[51]

The No Property Rule in Ontario

Although Canada has never had state-established ecclesiastical courts, Ontario courts have embraced both the criminal law approach and the No Property Rule when considering human remains and their testamentary disposition.[52] Canadian law demonstrates a clear preference for the use of criminal sanctions rather than property rights to address the interference with human remains. This position was expressly noted in an 1899 Ontario Court of Appeal case, *Davidson v Garret*, where criminal charges were sought against two physicians who performed a post-mortem examination of the cadaver of the plaintiff's wife.[53] The plaintiff sought damages for trespass and mutilation of the remains. In dismissing the action, Justice Meredith clearly stated "according to the law of England as introduced into this Province, there is no property in a dead body, and a trespass cannot be committed in respect of it."[54]

As a result, the *Criminal Code of Canada* uses criminal sanctions to address the neglect or disruption of human remains. Section 182(a) highlights the executor's duty to ensure proper burial by making the "[neglect] 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" an indictable offense, which imposes a sentence of imprisonment for a term of up to five years.[55] Similarly, section 182(b) provides the same penalty for anyone who "improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not."[56] Ontario jurisprudence has also followed the two key principles from *Williams*. Even when faced with competing religious convictions between the family of the deceased and the executor, the courts have consistently glossed over the testamentary directions of the deceased and upheld the discretion of the executor.

A 1930 Ontario case that focused on religious convictions and upheld the principles in *Williams* is *Hunter v Hunter*.[57] In this case, the deceased's 1921 will expressed his desire to be buried next to his wife. However, as the testator was Protestant, and his wife was Roman Catholic, religious custom would have dictated that they be buried in separate cemeteries of their respective parishes. Knowing this, the

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[51] *Nwabueze*, *supra* note 20 at 51.
[52] *Ibid* at 50.
[53] 30 OR 653 at paras 1-5, 5 CCC 200 (Ont CA) Meredith CJ.
[54] *Ibid* at para 1.
[55] *Criminal Code*, *supra* note 12 at s 182(a).
[56] *Ibid*, s 182(b).
[57] 65 OLR 586, 4 DLR 255 (Ont SC) McEvoy J [*Hunter*].

testator reportedly converted to Catholicism on his deathbed and, in 1930, reappointed his fourth child as the executor of his estate. Upon his death, a dispute quickly arose regarding his burial place. The executor argued that the testator was "not of sound mind" upon his conversion and remained a Protestant, while the widow and other children sought to uphold the 1930 will.[58]

In accordance with English precedent and the No Property Rule, Justice McEvoy determined that regardless of "painfully contradictory [affidavits] as to [the testator's] mental condition after illness commenced"[59] in 1930, the executor had been validly appointed under the 1921 will and was granted possession of the remains:

> [The court has] repeatedly held that there can be no property in a dead body, but where there has been a duty to bury, it has been held that there is a right of possession of the body for that purpose… [and] the executor has a right to have the body for the purpose of burial.[60]

A similar action regarding competing religious convictions, *Abeziz v Harris Estate*, followed in 1992.[61] In this case, the applicant sought an injunction to prevent the cremation of her son so that he could have a traditional Orthodox Jewish burial.[62] The applicant alleged that her son's May 1992 will, which appointed a secular executor for the estate and expressly outlined his desire to be cremated, was the result of undue influence and suspicious circumstances.[63] These allegations were raised because (1) the executor and the deceased's girlfriend had been present when some of the directions were provided to the solicitor, (2) the deceased's girlfriend was a beneficiary under the will, and (3) the testator was in a weak and deteriorated condition due to terminal cancer.[64] Justice Farley dismissed the allegations of undue influence and suspicious circumstances surrounding the will, upheld the No Property Rule, and confirmed the ultimate discretion of the executor, stating that:

> While it is true that a testator cannot force his executor to comply with his wishes there is nothing to prevent a valid executor from carrying out a testator's lawful wishes concerning the disposal of the testator's body… I appreciate that Orthodox Judaism prohibits

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[58] *Ibid* at para 19.
[59] *Ibid* at para 41.
[60] *Ibid* at paras 46-47.
[61] 34 ACWS (3d) 360, 3 WDCP (2d) 499 (Ont Gen Div) Farley J [*Abeziz*].
[62] *Ibid* at para 12; *Saleh v Reichert* (1993), 41 ACWS (3d) 227 at para 14, 50 ETR 143, 104 DLR (4th) 384 (Ont Gen Div) Bell J [*Saleh*].
[63] *Abeziz*, *supra* note 61 at paras 2, 7.
[64] *Ibid* at paras 6, 19.

> cremation but [as admitted by counsel] religious law had no bearing in this hearing.[65]

Justice Farley also outlined the common law's emphasis on the obligations of the executor with regard to human remains, which are "placed on the executor if there is one" in regard to human remains, namely the "fundamental obligation is that the body be appropriately dealt with—that is, disposed of in a dignified fashion."[66] However, despite this reinforcement of the legal principles outlined in *Williams*, Justice Farley took the unusual step of carefully and openly considering the past comments and conduct of the testator regarding the disposal of his remains, clearly acknowledging the difficult task of applying the No Property Rule in the face of emotionally distraught parties.[67]

As demonstrated by *Hunter v Hunter* and *Abeziz v Harris Estate*, under the No Property Rule, directions regarding the disposition of the deceased's remains were not legally enforceable. Similarly, the *Williams* principles have also been upheld on an intestacy as well as when an individual did not expressly entrust the disposal of their remains to a named executor.[68]

Alternatives to the No Property Rule

Despite the consistency among Ontario courts in applying the No Property Rule and the principles from *Williams*, other jurisdictions in Canada have taken markedly different approaches to the testamentary disposition of human remains. These jurisdictions fall into two categories: (1) those that explicitly recognize that property can be held in human remains, and (2) those that simultaneously uphold reasonable testamentary directions *alongside* the No Property Rule.

Quebec: Property Rights in Human Remains

In direct contrast to the common law, Quebec has a longstanding history of recognizing property held in human remains. In a 1908 case, *Dame Phillips v Montreal General Hospital*, a widow was awarded moral and material damages after a hospital ignored her clear instructions forbidding an autopsy on her late husband. The court found that "in the absence of a testamentary disposition the remains [were], in a limited sense, the property of the deceased's family."[69] The modern version of Quebec's *Civil*

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[65] *Ibid* at paras 23, 28.
[66] *Ibid* at para 28.
[67] *Ibid* at para 21.
[68] See *Saleh*, *supra* note 62 at para 1 for an example involving an intestacy.
[69] "Dame Phillips v The Montreal General Hospital" (1935) 33:3 CMAJ 334 at 334.

Code also reflects the civil law approach to testamentary dispositions of human remains under Article 42:

> A person of full age may determine the nature of his funeral and the disposal of his body… 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.[70]

This provision is clear: if individuals choose to dispose of their remains by will, the executor is bound to uphold these instructions. Unlike Ontario, there is a near absence of litigation in regard to the content of this article.[71] This is perhaps a result of the article's clarity, or may be due to certain cultural or legal norms that make such litigation particularly uncommon in Quebec. However, in 1986, a key limitation of Article 42 was exposed in *Robinette v Cliché*.[72] In this case, the deceased's 1967 will outlined his desire to be buried in Montreal, and his partner Cliché was designated as his executor and sole heir.[73] Despite this written directive, Cliché scattered the ashes near the house that they had purchased together outside of Montreal. The estranged family of the deceased sought to have Cliché's standing as executor and sole heir revoked by arguing that the cremation "constituted a grievous injury to the memory of the testator."[74] In his decision, Justice Brossard found that while Article 42 had technically been breached, this provision imposed no sanction, and Cliché's standing was upheld.[75]

It is clear that Article 42 notably upholds the civil law tradition of allowing (1) property to be held in human remains, and (2) testamentary freedom regarding the disposition of an individual's remains. However, the lack of an established sanction for breaching Article 42 is a critical limitation. Without sanctions, testators cannot be confident that their directions will be followed if their executor disagrees with their wishes.

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[70] *Code civil du Québec*, RSQ 1991, c 64, a 42.
[71] In fact, only three modern cases associated with this provision could be located in addition to *Cliché*, *infra* note 72, although the 1998 decision of *Prévost v Théorêt* was exclusively in regard to the payment of funeral expenses: *Prévost v Théorêt* (1998), 21 ETR (2d) 227 (CQ), 1998 CarswellQue 423; *Dalexis v Kelly*, 2011 QCCS 1583, EYB 2011-188961.
[72] RJQ 751, 22 ETR 232 (Que CS).
[73] *Ibid* at para 6.
[74] *Ibid* at para 9 [translated by author].
[75] *Ibid* at paras 20-22, 25, 31-33.

British Columbia: Upholding Testamentary Freedom alongside the No Property Rule

Unlike Quebec, British Columbia has historically upheld the No Property Rule. Yet in contrast with Ontario, British Columbia has successfully established an increased level of testamentary freedom *alongside* the No Property Rule, as outlined in the *Cremation, Interment and Funeral Services Act*.[76]

This legislation moves beyond the principles in *Williams* and the ultimate discretion of the executor in determining the disposal of the deceased's remains. Specifically, section 5(1) creates a prioritized list of individuals who have the right to control the disposal of a deceased's remains.[77] If priority passes to individuals of equal rank, such as two adult children, section 5(3) seeks an agreement between the parties, or preference will be given to the eldest in the class.[78] Regardless, section 5(4) allows any person "claiming that he or she should be given the sole right to control the disposition" to apply to the Supreme Court of British Columbia for an order granting them priority.[79] In consideration of this order, section 5(5) provides a novel and holistic list of considerations for the court to take into account, including any direction or preferences of the deceased:

> When hearing an application under subsection (4), the Supreme Court must have regard to the rights of all persons having an interest and, without limitation, give consideration to
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> (a) the feelings of those related to, or associated with, the deceased, giving particular regard to the spouse of the deceased,
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> (b) the rules, practice and beliefs respecting disposition of human remains and cremated remains followed or held by people of the religious faith of the deceased,
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> (c) any reasonable directions given by the deceased respecting the disposition of his or her human remains or cremated remains, and

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[76] *Cremation, Interment and Funeral Services Act*, SBC 2004, c 45, s 5(2) [*Funeral Services Act*] ("[i]f the person at the top of the order of priority set out in section 5(1) is unavailable or unwilling to give instructions, the right to give instructions passes to the person who is next in priority").

[77] *Ibid*, s 5(1) (includes: the personal representative named in the will of the deceased; the spouse; an adult child; an adult grandchild; the legal guardian if the deceased was a minor; a parent of the deceased; an adult sibling; and such further devolution through more extended next-of-kin).

[78] *Ibid*, s 5(3).

[79] *Ibid*, ss 5(4), 5(6).

> (d) whether the dispute that is the subject of the application involves family hostility or a capricious change of mind respecting the disposition of the human remains or cremated remains.[80]

These considerations create a dramatically different approach compared to Ontario regarding possession of the deceased's remains. In particular, a consideration of the deceased's religious beliefs and associated burial rites under section 5(5)(b) has been explicitly dismissed by the Ontario courts. This is particularly so in *Hunter*, where the court heard testimony regarding the deceased's conversion to Catholicism and upheld the right to possession of an executor planning to bury the deceased in a Protestant cemetery.[81] In further contrast with section 5(5)(a), the executor's right to possession was also granted preference over the feelings of the spouse.

While section 5 collectively outlines the process for dealing with the first branch of the *Williams* decision (regarding the possession of human remains), section 6 provides an individual with the testamentary freedom to dispose of his or her remains. By declaring that the individuals' written preference respecting the disposition of their remains "is binding on the person who under section 5 has the right to control the disposition of those remains,"[82] section 6 is in direct opposition to the traditional limitations imposed by the No Property Rule. As a result, section 6 of the *Funeral Services Act* is the critical and long-awaited legislation that effectively calibrates the principles from *Williams* in favour of the testator. That is, testators may have testamentary freedom to (1) direct the disposition of their remains and (2) make these directions in a manner that is binding upon the party holding possession of their bodies. Perhaps most impressively, section 6 of the *Funeral Services Act* increases testamentary freedom and accomplishes these ends without having to address the complexities or controversies of abolishing the No Property Rule.

In 2010, the British Columbia Court of Appeal considered sections 5 and 6 of the *Funeral Services Act* in *Kartsonas v Kartsonas Estate*.[83] In this case, the deceased had two wills, the first created in 1978 that named his children as his executors, and the second created in 2007 after his children became estranged, which named his niece as his executrix.[84] Upon the testator's death, his children brought an application under section 5(4) to be granted possession of their father's remains so that he could be buried in Greece after a religious funeral.[85] In contrast, the executrix argued that the testator was an atheist who would not have wanted a religious funeral and sought to have him

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[80] *Ibid*, s 5(5).
[81] *Hunter, supra* note 57.
[82] *Funeral Services Act, supra* note 76 at s 6.
[83] 2010 BCCA 336, 59 ETR (3d) 46 [*Kartsonas*].
[84] *Ibid* at para 3.
[85] *Ibid* at paras 4, 7.

buried in Canada.[86] The testator did not have any written preferences regarding his burial place or type of funeral that would bind the party holding possession under section 6, and the trial judge was forced to weigh the various considerations outlined in section 5(5).[87] In a review of the trial judge's discretion, Justice Tysoe upheld the lower court's decision by finding that Justice Silverman "considered the evidence before him and concluded that the rights of all persons having an interest fell, on balance, in favour of the wishes of the deceased's family members who want a religious funeral."[88] The court strictly interpreted the legislation to find that the wishes of a deceased were only binding if clearly expressed in compliance with the requirements of section 6.[89] Therefore, while the testator's sole written preference, to be cremated quickly, caused this issue to be dropped from litigation, his silence regarding any preference for a non-religious funeral or place of burial allowed these considerations to continue as live issues for dispute.[90]

The *Funeral Services Act* provides numerous benefits. It allows the court to explicitly depart from Ontario's common law approach and the principles outlined in *Williams*. For example, in *Kartsonas*, rather than automatically granting possession to the executor, the Court of Appeal unanimously found that a proper review of the considerations in section 5(5) vested possession of the testator's remains with his children for a religious funeral.[91] Furthermore, the existence of section 6 of the *Funeral Services Act* persuaded the parties to cease litigation on whether cremation or burial should occur, since the 2007 will indicated the testator's clear preference for cremation. All of these developments occurred without having to overrule the No Property Rule or confront its related controversies. Rather, the *Funeral Services Act* simply and effectively puts weight and legally binding force upon what are considered only the mere wishes of the testator in Ontario, thus empowering the deceased's testamentary directions.

While the *Funeral Services Act* grants testators the ability to provide instructions regarding their funeral and the disposition of their remains through a will, it seems the legislation also encourages litigation over any issues on which the testator is silent. Despite appearing to broaden the potential grounds for estate litigation in British Columbia, there is a surprising lack of reported cases: in fact, *Kartsonas* is the *only reported case* associated with this legislation. Unfortunately, this lack of estate litigation also means a lack of insight into the potential penalties that an individual

[86] *Ibid* at para 7.
[87] *Ibid* at para 11.
[88] *Ibid* at para 14.
[89] *Ibid* at para 15.
[90] *Ibid* at paras 5, 15.
[91] *Ibid* at para 15.

could face for disregarding the testamentary directions of the deceased or how issues of standing would be addressed. It is possible that this legislation lacks "teeth" in terms of enforcement, similar to Article 42 of Quebec's *Civil Code*.

II: ORGAN DONATION

An Increase in Testamentary Freedom

Notwithstanding the prevalence of the No Property Rule and the *Williams* decision in Ontario, the *Trillium Gift of Life Network Act* has embraced the notion of greater testamentary freedom over organs, tissues, fluids, and the human body as a whole.[92] Just as nineteenth century anatomical research inspired newfound value in the human cadaver, modern medical technologies have instilled new value into various parts of the body. For example, efforts to complete kidney transplants, which were commonly frustrated by the recipient's immune system attacking the newly introduced organ, were improved in the late 1970s with the introduction of the drug Cyclosporine.[93] New immunosuppressive drugs facilitated the "success and scope of organ harvesting" beyond kidneys and instilled human organs, tissues, and fluids with an incredible and lifesaving value for those in need.[94] As a result, there were 2,169 organ transplants performed in Canada in 2011, with 43 per cent of procedures occurring in Ontario.[95]

Trillium Gift Act Contrasted with Williams

Although living organ donors are an important class, approximately 77 per cent of organ donations in Canada originate from a deceased donor.[96] In recognition of the estimated 47 per cent[97] shortfall between organ donors and individuals on waitlists in Canada, Part II of the *Trillium Gift Act* focuses on facilitating contributions from deceased donors by allowing an individual to proactively consent to organ donation and medical research before death, as noted in section 4(1):

> Any person who has attained the age of sixteen years may consent,

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[92] *Trillium Gift of Life Network Act*, RSO 1990, c H-20 [*Trillium Gift Act*].
[93] "One Life… Many Gifts" *Trillium Gift of Life Network* (2009) online: Trillium Gift of Life Network <http://www.onelifemanygifts.com/docs/curriculum_booklets/1-INTRO.pdf> at 17-18.
[94] *Cantor*, *supra* note 2 at 144.
[95] Canadian Institute for Health Information, "e-Statistics Report on Transplant, Waiting List and Donor Statistics: 2011 Summary Statistics" (2011) online: Canadian Institute for Health Information <http://www.cihi.ca/CIHI-ext-portal/pdf/internet/REPORT_STATS2011_PDF_EN> at Table 1A.
[96] *Ibid.*
[97] *Ibid* at Tables 2A, 2C.

> (a) in a writing signed by the person at any time; or
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> (b) orally in the presence of a least two witnesses during the person's last illness,
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> that the person's body or the part or parts thereof specified in the consent be used after the person's death for therapeutic purposes, medical education or scientific research.[98]

Unlike the result in *Williams* where the testamentary disposition of the individuals' remains are merely regarded as a wish, section 4(3) of this legislation allows these directions to be binding:

> Upon the death of a person who has given a consent under this section, the consent is binding and is full authority for the use of the body or the removal and use of the specified part or parts… except that no person shall act upon a consent given under this section if the person has reason to believe that it was subsequently withdrawn…[99]

In addition, this legislation takes the unusual step of employing a default regime and empowering other parties to provide consent (1) where the deceased has not given consent, and (2) where there is no evidence that the deceased would have objected to the donation.[100] Other parties who may consent are outlined in a prioritized list in section 5(2), with preference beginning with the deceased's spouse and then devolving to the deceased's children, parents, brothers or sisters, and next of kin.[101] In direct contrast with both the common law and principles in *Williams*, the last party to which consent devolves upon under section 5(2) is "the person lawfully in possession of the body" or the executor of the deceased's estate.[102] This prioritized list has therefore expressly and explicitly demoted the once privileged position of executor to ultimately control the cadaver of the deceased. In consideration of *Williams* and the No Property Rule in Ontario, the legislation as a whole is also unusual because any language regarding gifts is "inexorably connected" to the gift being an object of property, since "only property can be donated."[103] Yet under the *Trillium Gift Act* the very items subject

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[98] *Trillium Gift Act*, *supra* note 92 at s 4(1).
[99] *Ibid*, s 4(3).
[100] *Ibid*, ss 5(2), 5(3) (specifically, section 5(3) states that "[n]o person shall give a consent under this section if the person has reason to believe that the person who died or whose death is imminent would have objected").
[101] *Ibid*, s 5(2).
[102] *Ibid*, s 5(2)(f).
[103] *Nwabueze*, *supra* note 20 at 188.

to donation, namely human remains or body parts, have expressly been excluded from consideration as objects of property capable of being gifted.

III: COMPARISON AND CRITIQUE

Ontario's Treatment of Disposition and Donation

It is difficult to discern the reason for the difference in testamentary freedom between these two legal regimes: one regarding the donation of the human cadaver, and the other addressing its final disposition. One possibility is that enhanced testamentary directions under the *Trillium Gift Act* were simply employed to increase access to organ donations and enacted by a legislature influenced by the clear public policy need to address a shortfall in organ donations. Certainly, the public policy argument in favour of an increase in organ donors is self-evident, even to the extent that authors such as John Harris propose doing away with donative consent altogether.[104] However, as consent is still required from either donors or their families, the Ontario legislature was not influenced by demand alone. Another possible explanation for this increase in testamentary freedom may be linked to the influence and treatment of live donors under the same legislation.

For example, Part I of the *Trillium Gift Act* exclusively addresses the doctrine of consent and its application to the human body.[105] As noted in Blackstone's Commentaries, the English common law has a longstanding history of recognizing a non-proprietary and absolute right of "personal security" vested in each person for the "uninterrupted enjoyment of his life, his limbs, his body, [and] his health."[106] As a result, the sudden importation of consent into legislation regarding human remains appears influenced by parallel considerations extended to living donors. This represents a significant departure from prior statements of law, which provided that testators could not consent to have their human remains disposed of by will. Although Ontario seems to be taking steps towards increasing testamentary freedom and empowering individuals wishing to donate organs, tension continues to exist within the law surrounding these issues.

Updating Ontario's Disposition Legislation

An Uneasy Co-Existence: Trillium Gift Act and Williams

From this discussion, it is clear that Ontario's present legislation and jurisprudence pays homage to various conflicting legal rules and principles regarding

[104] *Sperling, supra* note 5 at 8.
[105] *Hardcastle, supra* note 6 at 17; see also *Chester v Afshar,* [2004] UKHL 41, 1 AC 134 (HL).
[106] *Hardcastle, ibid* at 16.

human remains. For example, there is no property held in the body and it cannot be disposed of by will—yet the body as a whole, or its organs, tissue, and fluids, can be the subject of a gift or donation. In addition, the executor of the estate has the ultimate discretion regarding the treatment and disposal of the body, and yet the executor is ranked lowest in priority to consent to organ donation on behalf of the deceased. Similarly, the religious traditions or beliefs of the deceased are meaningless in terms of the body's disposal—yet evidence of such religious traditions or beliefs would conclusively prohibit organ donation from taking place.[107] As a result, there is currently an uneasy co-existence between the principles espoused and steadfastly upheld from *Williams* and the present reading of the *Trillium Gift Act*. However, the fact that the legislation moves beyond a pure public policy framework emphasizing organ donation, and begins to consider the wishes, beliefs and religious sentiments of the deceased, demonstrates that Ontario is willing to consider and enforce testamentary preferences.

Consequentially, the Ontario Legislature should address the above tensions, reassess the No Property Rule in Ontario, and determine whether another approach is preferable. There are strong arguments in favour of adopting a proprietary approach to human remains: positioning the human cadaver under personal property could theoretically simplify its disposal and make these directions enforceable when dictated in one's will.[108] In addition, despite concerns that "propertization" will exacerbate the black market in organ donation, such fears may be unfounded since present medical technology still requires transplantations to occur where both the donor and recipient are in an intensive care setting.[109]

Regardless of the above arguments, referring to human bodies as property simply "produces an uneasy feeling" in individuals and causes bodies to be associated with mere commercial commodities. As a result, there is little political incentive to launch legislative reform to classify cadavers as property.[110] However, continuing the status quo regarding the No Property Rule may not be sufficient to prevent societal unease about property held in cadavers, since attempts by other common law jurisdictions to navigate the No Property Rule have led to unusual and unsettling results. For example, in 1908 the Australian High Court in *Doodeward v Spence* granted limited possessory rights over a stillborn fetus with two heads, after finding that the doctor who preserved the fetus fell under a "work and skill" exception.[111] Similarly, the 2004 Australian decision in *Leeburn v Derndorfer* adopted the work and skill exception

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[107] *Trillium Gift Act, supra* note 92, ss. 4(3), 5(3), 5(4).
[108] *Ibid* at 47.
[109] Nils Hoppe, *Bioequity – Property and the Human Body* (Surrey, UK: Ashgate Publishing Limited, 2009) at 13.
[110] *Ibid* at 5.
[111] *Nwabueze*, *supra* note 20 at 225.

during a dispute between three adult children regarding the disposal of their father's ashes.[112] Justice Bryne cited *Doodeward* and commented that until the ashes were scattered, they "may be owned and possessed… [as] the application of fire to the cremated body is to be seen as the application to it of work or skill which has transformed it."[113] While the Ontario Legislature may find it preferable to maintain the No Property Rule for political and practical reasons, an explicit legislative reference addressing and limiting the work and skill exception could be a proactive measure.

The Ontario Legislature could also uphold the No Property Rule, while expanding testamentary freedom beyond organ donation, by addressing *Williams* through the enactment of new legislative provisions. Specifically, this would involve adopting legislation similar to sections 5 and 6 of British Columbia's *Funeral Services Act*. This would replace the executor's ultimate discretion regarding the disposal of human remains and prioritize the express written wishes of the deceased without having to view human remains within a proprietary framework. Legislative amendments reminiscent of the *Funeral Services Act* would simply extend the duties and obligations that an executor already has to act in good faith while executing the testator's will.

Legislation to Ensure that Donation Occurs

Extending the duties and obligations of the executor to uphold the deceased's reasonable wishes may also resolve an under-reported issue: when surviving family members obstruct organ and medical donations of the cadaver.[114] In fact, there is a general absence of litigation across Canada regarding legislation such as the *Trillium Gift Act*. This is likely due to the fact that there is no one to defend or uphold the testator's wishes in the event that the family and executor of the deceased disagree with the deceased testator regarding donation.

Author Norman Cantor laments that despite legislation encouraging organ donation, hospitals have a "long-standing practice of following an objecting family member's wishes, rather than the deceased's wishes" for the simple reason that unlike the deceased, living family members may pursue litigation or generate negative press.[115] For example, one physician shared that "[y]ou could die with an organ card in every pocket, and another one pasted on your forehead, and still no one would touch you if your family said no."[116]

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[112] *Hardcastle, supra* note 6 at 33.
[113] *Ibid* (however, a strict reading of this decision would actually suggest that the party who cremated the remains obtained a property right in the ashes, rather than the children).
[114] *Cantor, supra* note 2 at 145.
[115] *Ibid* at 146.
[116] *Ibid.*

Similarly, medical schools have also shied away from donations when family members object. For example, American novelist Grace Metalious donated her body to Harvard Medical School, but "in the face of uncomfortable and awkward press" the school declined her donation when the family objected and physically withheld her body.[117] However, under a more enlightened approach of respecting testamentary freedom, Metalious's wishes may have been faithfully executed. This view demands that when executors personally disagree with the proposed donation, they are still bound by their fiduciary duty to uphold the testator's directions. Similarly, in the case of a donation turned away by an uneasy institution, under the *cy-près* doctrine,[118] which attempts to remedy a testator's impossible, illegal, or impractical requests "as near as possible," principles of equity could locate another medical school to receive the donation. Therefore, enacting legislation to modify *Williams* may also protect the practical enforcement of the *Trillium Gift Act*.

CONCLUSION

As demonstrated above, despite the common law's venerable tradition to uphold testators' directions regarding their real and personal property, the influence of the No Property Rule and the principles from *Williams* have limited the testamentary freedom of Ontarians to dispose of their remains by will. In contrast, both Quebec's *Civil Code* and British Columbia's *Funeral Services Act* involve a legislative framework with an increased level of testamentary freedom regarding the disposal of one's cadaver. Similarly, the *Trillium Gift Act* in Ontario has empowered the testamentary wishes of individuals and bolstered consideration of their desires in regard to organ donation.

If Ontario is willing to distance itself from the principles of *Williams* in light of the *Trillium Gift Act* and bodily donations, there is no viable justification for not taking the final step of similarly empowering individuals to dispose of their bodies. While Ontario courts have historically upheld *Williams*, this 1882 decision prevents more empowering legislative reform from developing. This paper argues that Ontario should increase the testamentary freedom of its residents by legally empowering their directions for the disposal of their remains. Specifically, Ontario should look to the *Funeral Services Act* in British Columbia for guidance. All reasonable testamentary requests regarding one's body deserve the same legal status as all reasonable testamentary directions regarding traditional objects of property. To reject such testamentary directions without a sound policy basis undermines and ignores the primary justification for the law of testaments: to respect the wishes of autonomous individuals after their death. Therefore, Ontario ought to grant more testamentary

[117] *Ibid* at 52.
[118] *Buchanan Estate, Re,* 1996 CarswellBC 382, [1996] BCWLD 850, at para 13.

freedom to individuals over the disposition of their remains. This would afford Ontarians greater autonomy with respect to their post-mortem choices and prevent their executors from rebelling against these choices.