SUPREME COURT OF NOVA SCOTIA
Citation: *Curry v. Curry*, 2023 NSSC 402

Date: 20231211
Docket: 521507
Registry: Halifax

Between:

Mary Curry

Applicant

v.

Paula Curry and Patricia (Patti) Curry Bauer

Respondents

Decision

Judge:	The Honourable Justice John A. Keith
Heard:	October 5 2023, in Halifax, Nova Scotia
Final Written Submissions:	October 30 2023
Written Release:	December 11, 2023
Counsel:	Jason Woycheshyn and Sarah Nicholson, for the Applicant Tanya Butler, for the Respondents

By the Court:

Introduction and Summary of Basic Conclusions

[1] Anne Curry died on January 20, 2022, at the age of 90. Her remains were cremated. The disposition of Anne Curry's ashes divided the Curry family and prompted these legal proceedings.

[2] The Applicant, Mary Curry, is one of Anne Curry's three daughters and an executors under the terms of Anne Curry's will, signed March 22, 2001 ("**Anne's Will**").

[3] Mary Curry seeks to divide Anne's ashes. Part would be interred alongside her late husband, Leo Curry, at the Curry family burial plot in Saint Mary's Cemetery, just outside Sydney, Cape Breton, Nova Scotia. Anne's name is already etched onto the large family monument designed by Leo Curry prior to his death. Another part would be buried with Anne Curry's Ukrainian parents (Wasyl ("Bill") Yasinski ("Jasinski") and Pauline Kormylo) at the New Calvary Cemetery in Whitney Pier, Cape Breton, Nova Scotia. Finally, each of Anne's children would be entitled to a portion of Anne's ashes should they so request. Phillip Curry agrees with this proposal. He is one of Anne Curry's four sons.

[4] The Respondents, Paula Curry and Patti Curry Bauer, are Anne Curry's two other daughters and the final two executors under Anne's Will. They seek to inure all of Anne's undivided remains with her parents at New Calvary Cemetery in Whitney Pier. The Respondents say that Anne Curry was an only child and wanted all of her ashes to rest alongside her own parents. In support of this proposal, they also say that:

1. Anne Curry felt unloved and disrespected by her in-laws (Leo Curry's parents) and did not want to be interred near them in in Saint Mary's Cemetery;

2. Anne Curry's marriage to Leo Curry was troubled, with the couple living in separate homes from 2004 forward.

Danny Curry agrees with the Respondents' proposal. He is another of Anne Curry's four sons.

[5] Anne Curry's two remaining children (William and Stephen) take no position on this application.

[6] All parties acknowledge that, as executors appointed under a valid will, Mary Curry, Paula Curry, and Patti Curry Bauer have the legal authority and obligation to properly dispose of Anne Curry's ashes.

[7] All parties also acknowledge that Anne's Will contained a "majority rule" provision which is triggered if "any differences of opinion arise among [the co-Executors] in relation to the execution of [Anne's Will]". However, there is an issue as to the relevance and/or impact of this provision in resolving the dispute over the disposition of Anne's ashes.

[8] The legal questions narrow to:

1. What factors guide and/or constrain the disposition of cremated remains? Just below the surface of this question lies the question of Anne Curry's own wishes. Are those wishes relevant and, if so, what were they?

2. How does the Court resolve disputes among multiple executors in these circumstances? Does the will of the majority necessarily prevail?

[9] Overshadowing the legal questions in this case are the complexities of family dynamics, knotted and gnarled by conflicted feelings of loyalty and love; devotion and distrust; sibling respect and sibling resentment. The resulting dissonance is obviously not unique to the Curry family, but it does scrape through the evidence. Each side claims a deep understanding of their mother's final wishes; but their respective understandings are incompatible. Each side invokes their mother Anne

Curry's life experiences; yet their perspectives are clearly coloured by their own personal (not their mother's) experiences. Each side recalls the deep and loving bond between Anne Curry and all her children; but they have allowed her memory to divide them. Each side is determined to honour and respect their mother; but one is left wondering whether Anne Curry would feel honoured and respected watching her children quarrel in open Court over her remains.

[10] The authorities which consider disputes between multiple executors responsible for the disposition of a deceased person's remains is scarce. In fact, no party provided (and I could not find) a Canadian case on point. However, for the reasons which follow, I conclude that:

1. The decision by a majority of executors as to the disposition of the deceased person is entitled to deference subject to the following basic constraints:

    a. Any decision must result in a dignified and respectful disposition of the deceased remains. This is referred to below as the "**Overriding Obligation**"; and

    b. The minority of executors may reasonably expect that the decision-making process not be rendered entirely pointless because certain basic, minimal standards of fairness were not

met. This includes sharing important information which is clearly relevant to the disposition decision and reasonable, respectful consideration of opposing proposals. For clarity, an executor is not compelled to either accept or undertake an exacting review of an opposing perspective. Rather, an executor is only required to consider it respectfully and reasonably.

2. In this case, respectfully, the minority's reasonable expectations around a fair decision-making process were breached. In the circumstances, the proposal presented by a majority of executors is not entitled to deference. The Court is compelled to intervene.

3. In terms of a remedy, the Court retains the discretion to determine how Anne's ashes shall be laid to rest in a manner which best complies with the applicable law.

4. Half of Anne's ashes will be inured with her husband, Leo, at the Saint Mary's Cemetery in East Bay. Half of Anne's ashes will be inured with her parents at the New Calvary Cemetery in Whitney Pier.

5. The minority's request that to allow some of Anne's ashes be further divided and given to her children, upon request, is denied. The minority's proposal to further subdivide Anne's ashes, with a

> portion going to any of Anne's children who so request, lacks any formality or certainty that Anne's ashes will be afforded the respect and dignity they deserve. The Court will not proactively approve a proposal to divide Anne's ashes among persons who have yet to be definitively identified and leave those unidentified persons to dispose of Anne's ashes in whatever way they may deem fit.

[11] In the circumstances, each side will bear their own costs. The legal issues were novel and, in my view, neither side fully articulated the applicable law. Moreover, neither side succeeded in a way which merits a cost award.

[12] As a final introductory comment, the parties and almost all the witnesses are Anne Curry's children. I have introduced various member of the Curry family by their full names but will refer to each by their first names only. I do so in the interest of brevity and clarity only. No disrespect or misplaced familiarity is intended.

APPLICABLE LEGAL PRINCIPLES

ISSUE 1: FACTORS WHICH GUIDE AND/OR CONSTRAIN THE DISPOSITION OF CREMATED REMAINS

[13] A key source of the modern common law regarding the disposition of a deceased person's remains is Kay, J.'s decision in *Williams* v *Williams*, [1882] 20 ChD 659 at 664-665 ("***Williams***") rendered more than 140 years ago.

[14] I examine the *Williams* decision in some detail not only because of its precedential significance but also because it is necessary to fully appreciate the factual context to understand its meaning and import.

[15] *Williams* related to the disposition of Henry Crookenden's bodily remains. Mr. Crookenden died on December 21, 1875. The fourth codicil to his will included the following instructions to Mr. Crookenden's executor:

1. A specifically identified earthenware vase by Wedgewood was gifted to Mr. Crookenden's friend, Eliza Williams. Notably, Ms. Williams was not an executor under the Will;
2. Mr. Crookenden's directed that his body be dealt with by Ms. Williams in accordance with directions contained in a private letter, a copy of which was not given to the executor. Instead, he sent it to Ms. Williams only, about 9 months prior his death (the "Private Letter"); and
3. The executors of the estate were to pay all costs associated with Ms. Williams carrying out the instructions in the Private Letter.

[16] The Private Letter directed that his body be "burnt" his ashes placed in the Wedgwood vase; and that Ms. Williams be entrusted with the ultimate disposition of the vase containing Mr. Crookenden's ashes.

[17] The executor did not comply with the instructions in the Private Letter. Instead, the executor buried Mr. Williams body an unconsecrated section of a nearby cemetery called Brompton Cemetery.

[18] Ms. Williams was determined to fulfill Mr. Crookenden's wishes. Without notice to either the executor or Mr. Crookenden's widow, Ms. Williams wrote to the Home Secretary seeking a license to disinter Mr. Crookenden's body. Ms. Williams did not mention the possibility of cremation. Yet, the Under-Secretary responded to Ms. Williams' request by pre-emptively refusing a permit to disinter for the purpose of cremation. He then asked Ms. Williams to identify the new burial grounds where the disinterred body would be presumably be moved, if a permit was granted.

[19] One might reasonably ask: why would the Under-Secretary leap to a discussion around cremation when Ms. Williams did not even mention it? And why would the Under-Secretary pre-emptively and categorically reject the idea of cremation? Again, the factual and historical context is relevant.

[20] In late 19th century England, the notion of cremating bodily remains was controversial. Kay, J wrote that having a "body burnt" raised "…a very considerable question whether that is or not a lawful purpose according to the law of this country." (at pages 665 – 666) Kay, J declined to determine the legality of cremation but he

did confirm that Mr. Crookenden was “an advocate for cremation” (at page 660) Thus, it is not surprising that Ms. Williams’ request for a license attracted some suspicion from the Under-Secretary.

[21] Ms. Williams replied that that Mr. Crookenden’s remains would be moved to consecrated grounds in another nearby parish. The Under-Secretary approved the requested disinterment on the strength of Ms. William’s representation.

[22] Ms. Williams’ response was deceptive. She did not intend to bury Mr. Crookenden’s body in another cemetery. She intended to cremate Mr. Crookenden’s body. Several months after receiving this licence, Ms. Williams wrote to the executors to confirm that she would carry out the wishes contained in Mr. Crookenden’s Private Letter if she found it possible to do so.

[23] About a month after that, the managers of Brompton Cemetery (where Mr. Crookenden’s body was originally buried) advised Mr. Crookenden’s widow and sons that Ms. Williams had been granted a licence to disinter the body. They complained to the Secretary of State who revoked the license on March 20, 1878.

[24] It was too late. A week before the license was revoked, Ms.Williams disinterred the body and transported it to Milan, Italy for cremation, where the practise was allowed.

[25] Kay, J. acknowledged that Ms. Williams believed herself to be under "a paramount obligation" to fulfill Mr. Crookenden's wishes "by any means she could" (at page 666). However, he expressed regret that "it led her to deceive the Home Secretary into granting her a license for a purpose which she did not intend to carry out" (668)

[26] In any event, Ms. Williams fulfilled Mr. Crookenden's request for cremation and demanded that the Estate executors pay the related expenses, in accordance with the express terms of the will. When the executors refused payment, Ms. Williams brought an action against them.

[27] From these facts, the following two important legal principles emerged that defined the nature of an executor's authority and responsibility regarding the disposition of a deceased's body:

1. There is no property in a deceased person's remains (*Williams*, at page 665) Thus, Mr. Crookenden's fourth codicil directing the executors to deliver his body to Ms. Williams was void and unenforceable. Kay, J. wrote: "She [Ms. Williams] had no right of property in the body under that direction, nor could she enforce the delivery of the body by the executors. I should have, therefore, no hesitation, if the case stood there, in saying that this direction contained in the codicil was a direction

which could not be enforced at law and was therefore void." (at page 665). This principle has been repeatedly confirmed in subsequent jurisprudence. See for example, *Miner* v *Canadian Pacific Railway*, 1911 CarwswellAlta 23 (Alberta Supreme Court En Banc upholding the trial decision of Beck, J. at paragraph 22; *Waldman* v *Melville (City)*, 1990 CarswellSask 131 (Sask. Q.B.) at paragraphs 13 – 14; *Mason* v *Mason*, 2018 NBCA 20 at paragraph 32 ("***Mason***") at paragraph 30; and *Krauch* v *Degan Estate*, 2021 NSSC 108 ("***Degan***") at paragraph 30; and

2. Executors presumptively retain a right of possession over the deceased person's remains – again, not a right of ownership because there is not property in a body. The right of possession arises solely to ensure that the deceased is "properly buried … in a manner suitable to the estate he leaves behind him" (at page 665). See also *Schara Tzedeck* v *Royal Trust Co.*, [1953] 1 SCR 31 at page 38 ("***Schara Tzedeck***"); *Widdifield on Executors and Trustees*, (2018) 6th ed at §1.1 ("***Widdifield***"); *Sopinka (Litigation Guardian of)* v *Sopinka*, 2001 CanLII 3234 (ONSC) at paragraph 30 ("***Sopinka***"); *Mason* at paragraph 32 ("***Mason***"))

[28] Subsequent to *Williams*, a further obligation arose. Namely, an executor is also required to provide particulars of the disposal of the deceased's remains to the deceased's next of kin. (*Sopinka* at paragraph 35).

[29] For present purposes, the critical questions relate to the executor's obligation to ensure that the deceased is "properly buried", as Kay, J recognized in *Williams*. What does that mean? What factors inform an executor's decision around a "proper burial"?

[30] The jurisprudence which followed *Williams* developed a more modern and robust description of this duty – perhaps reflective of the fact that not all deceased persons are "buried".

[31] In *Degan*, Campbell, J. wrote that an executor is obliged to dispose of human remains in a manner that is "dignified and respectful." (emphasis added, at paragraphs 32 and 34). Pausing here, I note that there is jurisprudence which pre-dates *Degan* and describes the obligation to dispose of the deceased's remains in a "dignified fashion". (*Abeziz* v *Harris Estate*, 1992 CarswellOnt 3803 (Ont. Gen Div) at paragraph 28 (referred to below as "***Abeziz***"); *Saleh* v *Reichert*, 1993 CarswellOnt 567, 104 D.L.R. (4th) 384 (Ont Gen Div) at paragraph 18 (referred to below as "***Saleh***"); *Sopinka*, at paragraph 33; and *Mason* at paragraph 32)

[32] The slightly modified wording in *Degan* (adding the word “respectful”) did not alter the fundamental nature of the obligation. Disposition in a “dignified fashion” is necessarily respectful of the sublimity of life, the gravity of death, and the memory of the dead.

[33] It has also been recognized that, obviously, executors are equally obliged to comply with any applicable statutes.

[34] In sum, executors are impressed with the Overriding Obligation to dispose of a deceased person’s remains in a manner that is respectful, dignified.

[35] As indicated above, a specific issue has arisen in this case regarding the extent to which the deceased person’s own wishes or instructions might be a factor that informs how the executors fulfill their Overriding Obligation.

[36] In Supplementary Written Submissions dated October 30, 2023, counsel for the Respondents wrote: “While executors may look to the testator's will for guidance and, indeed, usually do honour the wishes described therein, they do so out of a moral obligation as opposed to a legal obligation.” (at page 12).

[37] To the extent this might be interpreted to mean that the deceased person’s wishes or instructions are legally irrelevant and may be ignored by the executors, I respectfully disagree.

[38] The actual wishes of the deceased person are relevant. To suggest otherwise would result in the law appearing inexplicably and rigidly detached from what is an obviously meaningful and instinctive issue, worthy of consideration when deciding how to dispose of a deceased person's remains.

[39] The case law bears this out. In *Schara Tzedeck* the Supreme Court of Canada wrote: "In *Williams on Executors*, 12th Ed. p. 610, the learned author says that if the deceased has left directions as to the disposal of his body, though these are not legally binding on the personal representative, effect should be given to his wishes as far as is possible." (at paragraph 12, emphasis added). See also, for example, *Hunter* v *Hunter*, 1930 CarswellOnt 208, [1930] 4 D.L.R. 255, [1930] O.J. No. 147, 65 O.L.R. 586 (Ont SC) ("**Hunter**"); *Abeziz* at paragraphs 10, 11, 17, 21, 23 and 28; *Saleh* at paragraphs 6 – 7; *Sopinka* at paragraph 22; and *Mason* at paragraph 32.

[40] However, importantly and as mentioned in *Schara Tzedec*k, a deceased's wishes are not determinative. The deceased person may not dictate a particular outcome by leaving written instructions or statements confirming their wishes. In *Williams* Kay, J similarly wrote that "a man cannot by will dispose of his dead body. If there be no property in a dead body, it is impossible that by will or any other instrument the body can be disposed of." (at page 665). See also *Abeziz* at paragraph 23; and *Degan* at paragraph 34.

[41] There is a caveat to the significance of a deceased's wishes or instructions. Generally speaking, religious law has no bearing on the issue. The single, overriding obligation is to ensure that the disposition is dignified and respectful. The Court will not be placed in the unseemly position of choosing between competing religious beliefs or deciding that one religious rite is somehow more dignified or respectful than another. (*Abeziz* at paragraph 23, *Saleh* at paragraph 25 and *Lajhner* v *Banoub*, 2009 CarswellOnt 1745, 49 E.T.R. (3d) 87 at paragraph 22).

[42] That said, a deceased person's religious beliefs may provide helpful context to better explain their wishes or instructions. Thus, in *Hunter*, the dispute was whether the deceased would be buried in a Catholic cemetery as proposed by the deceased's widow and three sons, or a Protestant cemetery as proposed by the executor and the deceased's fourth son. McInvoy, J. found in favour of the executor. In doing so, he noted that the deceased person "…had no intention of being buried elsewhere than at 'the place of his fathers,' namely, Sand Hill Cemetery, a Protestant cemetery."

[43] In *Saleh*, the deceased's spouse and executor sought cremation in accordance with his wishes. The deceased's mother objected to cremation on religious grounds. She wished to give her son a traditional Orthodox Jewish burial. Farley, J. found in favour of the executor based on the overriding obligation to simply provide for

disposition in a "dignified fashion" and that "religious law had no bearing in this hearing" (at paragraph 28). However, when framing the factual context including the deceased's wishes regarding cremation, Farley, J equally and properly observed found that the deceased "was not an observing Jew at the time of his death" and that "His behaviour with [his mother's] family and elsewhere when he was with observing Orthodox Jews appears to have been more consistent with respect for others than with any Orthodox belief." (at paragraph 17). He did so to help clarify the factual context surrounding the deceased's wishes.

[44] Beyond a person's wishes and always subject to the Overriding Obligation to ensure a respectful and dignified disposition of human remains, there are other factors which may bear upon the executor's decisions regarding disposition of the deceased's remains. They include:

1. Executors must obviously ensure compliance with any applicable statutes. In Nova Scotia that might include, for example, the *Human Organ and Tissue Donation Act*, SNS 2019, c. 6, as amended, permitting a person to consent in advance to the donation and transplantation (after death) of specified organs or tissues;

2. The deceased's place of residence and connections with the location of any proposed final resting place (*W (LA)* v *Children's Aid Society of*

Rainy River (District), 2005 CarswellOnt 1428 (Ont Gen Div) at paragraphs 7, and 39 -42 referred to below as "**W(LA)**"; see also *Re Taschuk*, 2021 ABQB 414 at paragraphs 51 – 55 referred to below as "***Re Taskchuk***")

3. Specific cultural (including indigenous) customs or traditions; (*W (LA)* at paragraphs 39 -42);

4. Convenience to family members in terms of both visiting and familial (*Re Taskchuk*, at paragraphs 56 – 60)

[45] Other relevant factors may arise. This listing is not intended to be exhaustive or comprehensive.

ISSUE 2: RESOLVING DISPUTES REGARDING THE DISPOSITION OF HUMAN REMAINS

[46] The caselaw involving the disposition of a deceased's persons remains involves non-executors objecting to the executors' decision around disposition. In that particular scenario, the essential principles may be distilled as follows:

1. Non-executors may not insinuate themselves as full participants in this decision-making process when, at law, they play no role; assert no authority; and shoulder no responsibility. Thus, non-executors are not entitled to peel back the layers of the decision-making process and

dissect every factor that influenced (or did not influence) the executor's decision. This does not mean that executors are free to act capriciously, or that non-executors are never entitled to raise an objection regardless of the underlying concern. However, in so far as non-executors are concerned, the analysis is outcome oriented. The executors' decision is measured only against the standard of whether the disposition is dignified and respectful – not a more forensic examination of the executors' decision-making process; and

2. So long as the executors have disposed of the deceased person's remains in a manner which is dignified and respectful, their decisions will be entitled to significant deference. As Richard CJ wrote in *Mason*: "In the case of a dispute over funeral arrangements and the disposal of human remains, a court should defer to the person who is lawfully entitled to make the decision, i.e. the executor, the administrator or the spouse, as the case may be." (at paragraph 32). Indeed, I was neither given nor could find a case in which a Canadian Court rejected an executor's decision regarding the disposition of a deceased person's remains and, instead, imposed the views of a non-executor. The executor's decision has been invariably approved, despite well-

> intentioned and often highly emotional pleas from a non-executor with close connections to the deceased. See, for example, *Williams*, *Degan*, *Abeziz*, *Saleh* or *W(LA)*.

[47] What happens when there are multiple executors and the dispute regarding the disposition of the deceased person's remains is between the executors themselves? What principles apply in these circumstances?

[48] In this case, the Applicant (Mary) is in the minority. She turns to the law regarding executors when fulfilling their responsibilities under the terms of the will (i.e. in their more usual role). She argues that:

> "When more than one executor is appointed, there is a common law presumption that all parties must act unanimously".
>
> (Supplementary Written Submissions dated October 30, 2023 at paragraph 36).

The Applicant's derive this conclusion from the Ontario Court of Appeal decision in *Re Haasz*, 1959 CanLII 386 ("***Re Haasz***") which states: 'It is well settled that in their execution of powers, absolute and discretionary, executors must be unanimous' (at paragraph 19)" The Applicant continues that:

> "…a "majority rule" clause is irrelevant and the Courts will not compel a dissenting co-executor to agree with the majority on a discretionary decision if the executor is acting properly and in good faith. *Widdifield* explained at §8.18, as follows:

> "If trustees must act unanimously, there arises the problem of compromising the differing views of the trustees. If the power is discretionary, the court will not compel a reluctant trustee to concur with the majority if the trustee is acting properly and bona fides: *Tempest* v *Lord Camoys* (1882), 21 Ch. D. 571 (Eng. Ch. Div.), and *Hilton, Re, (sub nom. Gibbes v. Hale-Hinton)* [1909] 2 Ch. 548 (Eng. Ch. Div.). However, where co-trustees are deadlocked, the court will in a proper case compel the trustees to exercise their discretion in a particular manner: see in this regard *Kordyban* v *Kordyban* (2003), 50 E.T.R. (2d) 116 (B.C. C.A.), additional reasons at (2003), 2003 CarswellBC 2019 (B.C. C.A.)."
>
> (Supplementary Written Submissions dated October 30, 2023 at paragraph 39, emphasis in the Applicant's written submissions]

[49] The Applicant then asserts that the decision around the disposition of Anne's ashes is discretionary in nature and, as such, "the Court cannot compel Mary to agree with Paula and Patti" on a discretionary matter. (Supplementary Written Submissions dated October 30, 2023 at paragraph 6. See also paragraph 39 - 40). In other words, so long as the Applicant executor (i.e. the minority) is acting in good faith on a discretionary decision, her co-executors (the majority) are not entitled to simply impose their views. Rather, the executors are effectively deadlocked. And the Court is compelled to exercise its discretion to break the deadlock based on all the evidence. In the process, the Court may (or may not) uphold the minority view.

[50] In support of these conclusions, the Applicant relied generally upon *Widdifield on Executors and Trustees*, (2018) 6th ed., at §8:5 "Fiduciary Duties" and, more specifically, upon the decision of *Re Brodylo Estate*, 2022 ABQB 358 ("***Re Brodylo***") and *Sheldon Butland, as an Executor of the Estate of Hilton S.*

Butland v. *Carol Anne Bezanson & Wendy Louise Turpin*, 2022 NBQB 92 ("***Butland***").

[51] As to *Re Brodylo*, the Applicant says that:

> "The Court agreed with the minority and held that the majority rule clause "cannot be used to override the fiduciary duties of the personal representatives to each other and to the beneficiaries." The Court further held that the majority rule clause did not oust the Court's jurisdiction to scrutinize the evidence submitted in connection with a request for an order."
>
> (Applicant's Supplementary Written Submissions dated October 30, 2023 at paragraph 43)
>
> In *Butland*, the Court was again dealing with concerns being expressed by an executor acting in the minority. The Applicant observes that in this case:
>
> "…the majority rules clause was not determinative of the dispute and it was "not effective or reasonable" in the particular circumstances of that case. The majority rule clause did not prohibit the minority's right to bring a claim (surrounding a debt owed to the late father by one of the co-executors) as executor."
>
> (Applicant's Supplementary Written Submissions dated October 30, 2023 at paragraphs 44)

[52] By contrast, the Respondents (Patti and Paula) represent the majority and they rely upon the "majority rule" provision at paragraph 3 of Anne's Will which states:

> "IN THE EVENT that any difference of opinion arises among my Co-Executors in relation to the execution of my Will, the opinion of the majority of them shall prevail (whether or not an Executor may be personally interested or concerned in the matter in dispute or question)"

[53] The Respondents argue that there is no deadlock because they represent the majority. They say:

> "While appointing multiple executors always carries a risk of deadlock, Anne Curry had the foresight to include a majority rules clause in her will, to prevent Court intervention becoming necessary to break a deadlock. The Applicant has framed this application as necessary to break a deadlock among the executors. The executors are not, in fact, deadlocked if the majority rules clause is accepted. The common law gives the executors the discretion to bury Anne Curry, and two out of three executors agree in the exercise of that discretion. Mary Curry simply cannot accept her co-executors' desire to respect their mother's wishes…"
>
> (Respondents' Supplementary Written Submissions dated October 30, 2023, at page 17)

[54] I acknowledge that these types of disputes are exceedingly rare. I was neither provided with nor could find a Canadian case in which multiple executors could not agree on the disposition of a deceased person's remains. However, respectfully and in my view, neither the Applicant nor the Respondents have fully and accurately captured the legal principles which apply when multiple executors are tasked with the responsibility to dispose of the deceased's remains.

[55] I begin with the Applicant's arguments that executors must act unanimously when making discretionary decisions. In my view, the law relied upon by the Applicant is factually and legally distinguishable for at least four reasons:

1. First, the authorities relied upon by the Applicant all involve estate property. As indicated, the law does not recognize any property rights over a human body. The executors' obligation to dispose of human remains is fundamentally different and involve separate, distinct

considerations more closely related to the unique nature of the underlying obligations when disposing of a deceased person's body;

2. Second, where executors are acting under the terms of the valid will, the testator's intentions are a determinative consideration in the management of estate property. By contrast, as indicated, a deceased person's intentions are not determinative when deciding how to dispose of human remains. They are merely one factor to be considered, among others;

3. Third, the authorities relied upon the Applicant trace the evolution of the law around the executors' discretion to:

    a. Hold estate property; or

    b. Alternatively, convert (or distribute) estate property.[1]

In these types of circumstances, the Court has described its authority as "casting the deciding vote". (*Re Haasz*, *Re Billes*, at paragraph 22;

[1] In *Gibb* v *McMahon*, 1905 CarswellOnt 227 (Ont. CA); aff'd by the Supreme Court of Canada 1906 CarswellOnt 744. In *Re McLaren*, 1922 CarswellOnt 236, 69 D.L.R. 599 ("***Re McLaren***") where the Ontario Court of Appeal again considered whether certain executors were acting in bad faith in preventing the estate from selling (or "converting") certain real estate described as "the Virginia property". , there was a dispute over executors as to whether to sell certain hotel property held by the estate. In *Re Haasz* and again in *Re Billes*, 1983 CarswellOnt 613, 14 E.T.R. 247 (Ont HCJ) ("***Re Billes***), the Ontario Court of Appeal addressed cases regarding the potential sale of shares. were dealing with cases. Subsequently, these cases became the precedents upon which the British Columbia Court of Appeal decided *Kordyban* v. *Kordyban*, 2003 BCCA 216, additional reasons at 2003 BCCA 455 ("***Kordyban***"). This was a dispute between two siblings regarding the distribution of voting shares in a privately held company which shares were held by the father's estate.

Kordyban at paragraph 41; *Re Kaptyn*, 2011 ONSC 2212 ("Re ***Kaptyn***") at paragraph 17) Characterizing the Court's determination as a "deciding vote" was apt in these cases (*Re Haasz*, *Re Billes*, *Kordyban* and *Re Kaptyn*) because:

a. They were all matters that involved true deadlock among multiple executors (i.e. an equal number of executors held opposing views) who, the Court found, were required to make a decision; and

b. They all involved a binary choice between selling/distributing property or continuing to hold the property within the estate.

No similar binary choice surfaces regarding the disposition of bodily remains. Executors cannot choose whether to dispose of bodily remains, or not. Rather, they are obliged to dispose of the deceased person's remains in a dignified and respectful manner.

4. Fourth, this principle around unanimity is built upon the foundational presumption that, absent evidence to the contrary, the executors acting under the terms of a valid will regarding estate property are fiduciaries *per se*. (*Ontario (Attorney General)* v. *Ballard Estate*, 1995

CarswellOnt 181, 6 E.T.R. (2d) 311 (Ont. HCJ) at paragraph 4). As such, they act as joint owners of the estate property for the purpose of fulfilling the testator's intentions in accordance with the terms of the will. As such, they must act unanimously. Obviously where the parties are acting jointly, a majority cannot simply presume the right to simply dominate and run roughshod over the concerns of the minority. In the article "Disputes among multiple trustees: what rights does a minority estate trustee have against an oppressive majority" (2012) 32:1 *Estates Trusts & Pensions Journal* 41, C.D. Freeman explained:

> "Given that multiple trustees own the trust property jointly subject to the beneficial rights of others, it is immediately apparent that the normal rule must be that the trustees act unanimously. This is an old rule and is now trite law. At the same time, we accept that the unanimity rule applies to the powers implicitly or specifically afforded to the estate trustees together whether necessary to administer the trust or otherwise; a separate mere power donated to one trustee alone remains personal and noncompilable."
>
> (at paragraph 51)

Similarly, in Gibb, Maclellan, JA wrote for the entire Ontario Court of Appeal that: "Nothing is better settled that that where there are several trustees all must act" (at paragraph 11) And in *Re McLaren*, Ferguson, JA adopted the following quote from *Williams on Executors*, 11th ed. (1921):

> "…. Where a testator has given a pure discretion to trustees as to the exercise of a power, the Court will not enforce the exercise of the power against the wish of the trustees or one of them, if such one reasonably entertains a different opinion from that of his co-trustees as to the desirability of exercising it in the particular manner proposed, but it will prevent them from exercising it improperly; and even where the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it."

> By contrast, at common law, executors charged with the authority and obligation to dispose of human remains are not acting fiduciaries per se with obligations to the beneficiaries under a valid will. The corresponding presumption of joint decision-making (i.e. unanimity) does not arise.

[56] Pausing here, I note that the common law presumption around unanimity when making discretionary decisions regarding estate property does not mean that executors with intractable views may indefinitely obstruct an estate. For example, "majority rule" provisions were developed to clarify the testator's intentions regarding estate administration; and allow for a more efficient governance model. Moreover, the jurisprudence has evolved such that executors are not, for example, trapped in an unbreakable impasse which could only be resolved if there was evidence of bad faith. In *Re Haasz,* Morden, J.A. explained:

> "The unanimous exercise of one power involved at the same time the exercise of the other. These powers cannot be isolated one from the other and each considered separately. The

> executors here do not agree upon the exercise of either power and so long as this situation continues in the absence of action by the Court, para. 7 of the will remains completely inoperative. The testator intended the powers conferred by the paragraph to be exercised by his executors. In my view, they were and are under an imperative duty to exercise one power or the other. As long as they continue to fail to discharge this duty, the intention of the testator will be frustrated with the result that the beneficiaries may suffer. In these circumstances, where its assistance is invoked, the Court must intervene and assume or compel the due execution of the trust."
>
> (at page 21 and quoted with approval in *Re Billes* at paragraph 21)

[57] There are other circumstances in which a minority of executors dealing with estate property may challenge the will of the majority. As indicated in paragraph 50 above, the Applicant (the minority executor, Mary) cites two cases where the minority successfully challenged a majority's decision: *Re Bodylo* and *Butland*.

[58] In *Butland*, there were three executors. One of the three proposed that the estate take legal action against another to collect upon a debt allegedly owing the estate. The executor who would have been named as the defendant in the proposed action joined with the third executor in voting down the proposal. In other words, an executor used her vote to prevent a legal claim being initiated against herself. Dysert, J. wrote that: "it would be nonsensical if Carol, as the Defendant, were able to defeat this claim on the basis of a lack of majority where she is clearly in a conflict of interest, and where Wendy would affectively be granted a veto to overrule Sheldon." (at paragraph 39).

[59] In *Re Bodylo*, there was a significant dispute over the valuation of the estate's most valuable asset: real estate described in the decision as the "Homestead". The majority of the executors valued the property at $12.95 million based on a self-appraisal. The minority paid for an independent appraisal which valued the Homestead at only $933,000. The minority asked that the majority provide information to support its valuation. No such information was forthcoming. The minority refused to sign the required affidavit for probate on the basis that she did not accept the attached inventory of estate assets, including valuation. The majority sought to impose its own valuation notwithstanding the independent appraisal and/or remove the minority as an executor. C. Dario, J. wrote that a "majority rules" provision:

> "… cannot be used to override the fiduciary duties of the personal representatives to each other and to the beneficiaries (who, in this case, are the same group of people). More specifically, it cannot be used to deny one personal representative the material information used by the other personal representatives to make estate decisions, to permit personal representatives to ignore legitimate requests for such information, or to obligate a personal representative to swear a document that they believe is false, particularly where the supporting information has been withheld or they have an insufficient objective basis upon which to substantiate such decisions."
>
> (at paragraph 30)

[60] It is not necessary to further scrutinize this area of the law. For present purposes, the point is that the cases relied upon by the Applicant emanate from the administration of estate property and, more specifically, the obligations which vest

with executors acting under the terms of a will. The corresponding obligations binding upon a fiduciary *per se*; the common law presumption of joint ownership; and the related requirement that the executors act with unanimity all apply.

[61] For the reasons discussed above, these principles do not (and cannot) apply in the present circumstance.

[62] I am equally compelled to note that the Respondents' reliance on the "majority rules" provision in the will also does not necessarily prevail and, respectfully, the Respondents' arguments seem somewhat contradictory. On the one hand, they argue that: "Anne Curry had the foresight to include a majority rules clause in her will, to prevent Court intervention becoming necessary to break a deadlock….The executors are not, in fact, deadlocked if the majority rules clause is accepted." (Respondents' Supplementary Written Submissions dated October 30, 2023, at page 17). On the other hand, they also argue that "any provisions in a deceased person's will relating to funeral or burial wishes is not binding on their executor" (Respondents' Supplementary Written Submissions dated October 30, 2023, at page 11).

[63] These opposing propositions do not comfortably co-exist. Too many unresolved questions arise. For example, given the clear law that the provisions of a will are not binding on the executor's decision around disposition, on what

principled basis could a "majority rules" provision in a will be considered determinative? Why should a testator be credited for having the "foresight" to include a "majority rules" provision as means of resolving disputes around disposition of human remains when instructions around the disposition of human remains have no place in a will? Moreover, if a testator with "foresight" can claim the benefit of a "majority rules" provision in a will for the purposes of disposition, does that condemn other persons who did not have similar "foresight" to a more complicated process?

[64] In my view, the proper analytical perspective occurs when approaching the issue from the unique common law principles surrounding the disposition of a deceased person's remains. As indicated, these principles grant executors the authority to take possession of a deceased person's remains. They also impress executors with the obligation to dispose of the deceased person's remains in a dignified and respectful manner; and impose certain basic procedural expectations which executors may demand from one another when making decisions regarding the disposition of the deceased person's remains.

[65] First and foremost, as indicated, executors are vested with the authority, and bound by the overriding obligation, to dispose of the deceased's remains in an

efficient manner which is respectful and dignified. The relevant factors which may bear upon the executors' decision are summarized above in paragraphs 38 – 44.

[66] Executors' decisions around disposition can always be measured against this Overriding Obligation. So, non-executors may challenge the executors' decision on the basis that it failed to dispose of a deceased person's remains in a dignified and respectful manner. However, again:

1. Non-executors may <u>not</u> challenge the executors' decision on disposition simply because they prefer (or advocate for) another equally dignified and respectful method of disposition; and

2. As indicated in paragraph 46 above, non-executors are <u>not</u> entitled to forensically dissect the executors' decision-making process. Again, the basis for their challenge is outcome oriented and restricted to the issue of whether the executors' ultimate decision achieves the Overriding Obligations.

[67] In my view, these are the basic principles reflected in cases such as *Degan*, *Mason*, *Saleh* and *Abeziz*.

[68] The perspective broadens where the dispute is between multiple executors (i.e. not external challenges from non-executors). Two scenarios may arise:

1. True deadlock where an equal number of executors take opposing views on how to dispose of the deceased person's remains; and

2. Disagreement between a majority executors and a minority.

I address each scenario below:

(a) True Deadlock

[69] If the executors are evenly split on the decision around disposition of bodily remains, they are under an ongoing duty to bring any such intractable dispute before the Courts as soon as reasonably possible. There is a clear expectation that a deceased person's remains will be disposed of without undue delay.

[70] The Court may cast the "deciding vote" to break the logjam. To be clear, "casting the deciding vote" does not mean that the Court's discretion is limited to choosing one side or the other. The analogy of "casting a deciding vote" is apt where the decision involves a binary choice around estate property to either sell a particular asset or, alternatively, retain ownership. (see the cases cited in paragraph 55(3) above) However, when it comes to a decision around the disposition of human remains, the Court may determine that one of the two opposing sides best reflects the overriding obligation to dispose of human remains in a dignified and respectful manner. But the Court may also decide that neither of the opposing sides fulfills

that goal. The choice is not necessary binary. At that point the "casting vote" analogy begins to break down and the Court ultimately retains the discretion to determine the method of disposition that best reflects the Overriding Obligation.

(b) Disagreements between a majority and minority of executors

[71] Should the minority seek to challenge to the majority's decision, legal proceedings must be commenced as soon as reasonably possible. If the minority fails to do so, it may be precluded from pursuing the challenge. On the one hand, the majority should not be entitled to act precipitously where it has notice of the minority's objections. On the other hand, the minority is not entitled to stall the process indefinitely. Society requires disposal of human remains in a timely manner.

[72] The majority decision around disposition is entitled to deference. This deference exists regardless of whether the will contains a "majority rules" provision. As explained above, the case law related to unanimity around discretionary decisions is based upon other, unrelated legal principles arising out of the presumption of joint ownership of property which applies to executors under the terms of the will. There is no property in human remains and so the legal presumptions incidental to joint ownership of estate property do not apply.

[73] The common law imposes upon executors a right of possession and the related overriding obligation to dispose of the deceased's remains in a respectful and dignified manner. The necessary corollary is that multiple executors must be afforded an efficient and effective decision-making model to properly fulfill this obligation. Deferring to the majority achieves this important objective.

[74] The deference which will be afforded the majority view is not absolute. It is constrained by the following reasonable expectations which constrain executors' decisions:

1. Any proposal on disposition (majority or minority) must obviously comply with the overriding obligations to achieve a dignified and respectful disposition that complies with any applicable statutes; and

2. The minority of executors may reasonably expect that the decision-making process is not rendered entirely pointless because it fails to meet certain very basic, minimal standards of fairness. This includes sharing important which is clearly relevant to the decision around disposition and reasonable, respectful consideration of an opposing proposal. For clarity, an executor is <u>not</u> compelled to either accept or undertake an overly onerous review of an opposing perspective.

Rather, an executor is only required to respectfully and reasonably consider it.

[75] The reasons for carving out these narrow constraints on the deference afforded the majority's decision include:

1. Compliance with the Overriding Obligation predominates and is firmly entrenched in the jurisprudence;

2. Executors fulfilling their duties under the terms of a will are impressed with obligations as fiduciaries *per se*. Those fiduciary duties are owed to the beneficiaries of the estate and are different from the executors' common law duty to dispose of the deceased person's remains. At the same time, the common law imposes upon executors the obligation to dispose of a deceased person's remains in the first instance and in priority to any other person. In my view, the common law identifies executors in priority to anyone else because, in part, they are already impressed with a duty to act in good faith. Limited, minimal obligations in the decision-making process arise in recognition of the executors' unique role and responsibilities;

3. There is a necessary corollary to the common law duty imposed upon executors to dispose of human remains in a respectful and dignified

manner: Participating executors are reasonably entitled to expect certain, basic procedural protections to ensure the decision-making process is not rendered entirely meaningless. Were it otherwise, the majority executors could simply act in a capricious, arbitrary or abusive manner with impunity; secure in the knowledge that they only have to comply with the Overriding Obligation and are otherwise free to act in whatever way they deem fit. In other words, the decision–making process would be driven entirely by outcome – without any meaningful concern for the minority's perspective and despite the fact that the minority executor is equally and legally authorized and obliged to participate. In effect, the minority would be unreasonably and unfairly relegated to the status of a non-executor. See paragraph 46 above explaining the restrictions placed on non-executors who oppose the executors' decision on disposition of a deceased person's remains. That is not the law in terms of how executors must interact in these circumstances.

4. The minority has a reasonable (albeit limited) and enforceable expectation that the decision-making process is not rendered completely meaningless. This means:

a. Sharing important information which is clearly relevant to the decision around disposition. For clarity, executors are not obliged to undertake an in-depth process of discovery to locate and disclose every possible source of information which may be relevant to an opposing proposal. Rather, again, executor cannot deliberately withhold important, relevant information which is actually in their possession and must equally consider the minority's position in good faith; and

b. Respectful consideration of relevant information and/or proposals presented by other executors. For clarity, executors are not compelled to either accept or undertake an overly onerous review of an opposing perspective. Rather, an executor is only required to respectfully consider it.

5. Again, for reasons discussed above and given the unique circumstances surrounding the disposition of a deceased's remains, the executors' duties cannot be defined so broadly as to invite controversy and/or undue delay. In my view, the limited expectation of fairness defined above (i.e. acting so that the decision-making process completely meaningless) ensures the legitimacy of the executors' decision in a way

which neither unnecessarily complicates nor unduly delays the process. By contrast, failing to comply with these basic requirements entirely undermines the process.

APPLICATION OF THE LAW

[76] For the reasons described above, the majority view should prevail unless the minority of executors demonstrates that:

1. The majority's decision fails to comply with their Overriding Obligations; or
2. The majority rendered the decision-making process entirely pointless.

[77] Each aspect is addressed separately below.

Overriding Obligations

[78] The majority executors (the Respondents Paula and Patti) take the position that Anne wanted all of her ashes buried with her Ukrainian parents in New Calvary Cemetery, Whitney Pier, Nova Scotia. Looking at this proposed method of disposition in isolation, inuring all of Anne's ashes with the remains of her Ukrainian parents does not breach, in and of itself, breach an executors' Overriding Obligations.

Decision-Making Process

[79] Based on the written and oral evidence, I find as a fact that the minority's reasonable but limited expectations were breached in such a manner as to render the decision-making process meaningless.

[80] The evidence confirms that:

1. Important information relevant to the decision on disposition of Anne's ashes was deliberately withheld and not shared among all the executors. Indeed, certain information was shared between the majority of executors (Paula and Patti) but not the minority; and

2. The majority failed to reasonably and respectfully consider information presented by the minority. In other words, the majority was rigidly fixed on their own pre-determined conclusion for the disposition of Anne's ashes and rejected outright any reasonable or respectful consideration of information that might suggest an alternate view.

As a result of this dysfunction, the decision-making process was rendered completely pointless.

[81] These findings of fact are further supported by other contextual evidence which helps better explain why the majority adopted such an unyielding and

dogmatic approach. This contextual evidence relates to the executors' various relationships with their father, Leo Curry, who predeceased Anne by a few months. Without exception, the Curry children loved Anne and were devoted to her. By contrast, Leo Curry emerged as a polarizing and divisive figure within the Curry family. In my view, respectfully, the evidence of an historic, personal *animus* against Leo Curry clearly contributed to the majority's inability to maintain an open mind regarding the disposition of Anne's ashes. In particular, the majority were simply not prepared to consider the possibility that some of Anne's ashes might rest with her husband of 68 years.

[82] Each issue is addressed separately below.

Withholding Relevant Information

[83] There are two issues of concern: the evidence surrounding an unsigned document dated March 1, 2005 entitled "My Last Wish"; and the evidence surrounding information passed along to Paula by Joseph MacLean. Each is addressed separately below.

[84] The "My Last Wish" document states:

> "I, Anne Curry, having all my faculties -- have something to say regarding my wishes. It is my wish to be cremated--- no visitation-- only family and friends-- all my ashes be with my Mother and Father----it is only right for this to happen, as I was their only child.

> I'm to be buried in New Calvary Cemetery at Whitney Pier, where I was born. A quiet service at Parkview Chapel-- no big eulogy-- very short right up in paper-- only that I was here and now I'm gone…
>
> My favourite hymn--- Gentle Woman
> "Don't cry for me--- be happy I was here."
> Goodbye my beautiful children, I love all of you so much--- you made me so proud of you-- I loved you Leo—and-- my grandchildren-- who gave me so much love----LOVE to all!!!---(I hope my other grandchildren will be here to say a prayer for me because I love them dearly)
> Your Mom and Bobi.
>
> (I don't want to be in East Bay Cemetery with people who never like me-because I was a Ukrainian girl----I want to be with my parents who love me and they were all I had.)"
>
> Signed ----Anne (Hanusha) Jasinski, Curry

[85] I accept Paula's evidence that she found this document hidden in a strong box with certain other very personal communications with Leo that were all attached as exhibits to Paula's affidavit (Exhibits D, G, E, H, and I). I return to these communications below. For present purposes, I simply note that Paula relies very heavily upon the "My Last Wishes" document in support of their position taken that Anne wanted all of her ashes to be inured with her parents at the New Calvary Cemetery in Whitney Pier and that none rest with her husband or any other member of the Curry family in the "East Bay Cemetery" (i.e. Saint Mary's Cemetery in East Bay).

[86] Unfortunately, Paula did not pass any of the documents found in the strongbox along to her co-executor, Mary. It is unclear whether Paula passed the "My Last

Wishes" document on to her other co-executor, Patti. However, Patti does confirm that Paula gave her certain other personal documents which Paula found in Anne's strongbox: personal letters drafted by Anne for Leo at a time of marital strain (see paragraphs 43 – 45 of Patti's affidavit). Paula did not similarly pass these along to Mary. I accept Mary's evidence and find that she only first obtained a copy of the "My Last Wishes" document and the other personal letters found in the strongbox when reading Paula's affidavit filed in connection with this proceeding. In short, Mary was the only executor being denied access to any of this information in advance of litigation. The impact was prejudicial. Because Mary did not receive this information in a timely manner, she was only able to provide comment in a Rebuttal Affidavit.

[87] These documents were clearly important and relevant to the disposition decision which the executors were required to make. Failing to share this information with all co-executors until after litigation began clearly rendered the initial decision-making process pointless.

[88] As to the evidence of Joseph MacLean, Mr. MacLean was a good friend of Anne Curry. In his affidavit sworn June 29, 2023, Mr. MacLean testified that:

1. During the summer of 2009 or 2010, Anne told Joseph that she wanted to be cremated that half of her ashes should be buried with her parents

Pauline and William Jasinski in Whitney Pier and the other half with her husband Leo in East Bay; and

2. After Anne passed away, he spoke with Paula and confirmed Anne's burial wishes. Mr. MacLean was close to Anne and felt reassured that Paula would fulfill Anne's wishes to have half of her ashes to be buried with her mother, father and the other half with her husband, Leo.

[89] During Mr. MacLean's cross-examination, he spoke of another incident when he sent an email to Paula. In that email, he mentioned that, about 20 years or so in the past, Anne similarly confirmed her wish to have half her ashes buried with her parents and the other half with her husband, Leo. The email was not produced; however, in cross-examination, Paula acknowledged receiving it.

[90] I accept Mr. MacLean's evidence, without reservation. Mr. MacLean was a credible witness. He was a close friend of Anne but a neutral party in this proceeding and, in fact, considers himself a friend of Paula. His evidence was candid, impartial, and unshaken by cross-examination.

[91] Pausing here, I hasten to add that Paula was not obliged to seek out information from Mr. MacLean or any other person. To impose that sort of responsibility on an executor would be unnecessary and overly onerous. However,

in this case, Mr. MacLean voluntarily passed relevant information along to Paula. Once Paula came into possession of this information, she was obliged to share it – not unilaterally dismiss it.

[92] I find as a fact that Paula kept this relevant information to herself and decided not to share it with the other executors. My reasons include:

1. With respect to Mr. MacLean's email, Paula acknowledged receiving the email. There is no evidence that any executor other than Paula had knowledge of this email. I find as a fact that Paula decided not to share either this email or its contents with any other executor because she "did not give it much stock" (her words). Respectfully, Paula's explanation for deciding not to share the information from Mr. MacLean was unreasonable in the circumstances. By way of background, the evidence at the hearing was that Mr. MacLean's email stated that, about 20 years before the email was sent, Anne confided to Mr. MacLean that she wanted her ashes divided. Half would be inured beside her husband, Leo, and half would rest with Anne's parents. Paula dismissed Mr. MacLean's email because, she said, Anne would not have even been thinking about cremation at the time Mr. MacLean recalled the statement was made (i.e. about 20 years before sending the

email). In other words, Paula's concern that Mr. MacLean did not get the timing exactly right caused her to reject the information completely. Paula did not explain how/why a discrepancy over this date could cause her to deny the other, more salient aspects of Mr. MacLean's email regarding Anne's ashes on the disposition other ashes. The uncontroverted fact is that Anne did decide on cremation many years before she died. Whether Anne made this decision 15 or 20 years before Mr. MacLean sent the email is relatively inconsequential when compared against the more significant aspects of Mr. MacLean's email regarding Anne's wishes; and

2. With respect to the relevant information received by Paula during a conversation with Mr. MacLean after Anne's death, Paula's evidence during cross-examination was evasive. She denied Mr. MacLean mentioning Anne's disposition wishes but, tellingly, added the qualification "in so many words". Paula's equivocation on this point is to be compared against Mr. MacLean's evidence which was notable for its straightforward certainty. Again, I accept Mr. MacLean's evidence and find that Paula decided not to pass this relevant information along to the other executors.

[93] It does not matter that the minority was ultimately able to discover Mr. MacLean's information and present it as part of this proceeding. As executors, the minority (i.e. Mary) was entitled to receive this information during the decision - particularly given that it supported their position. Had the majority simply passed this information along and maintained an open mind during the decision-making process, its decision would have been entitled to deference. Unfortunately, that is not what occurred.

[94] The evidence suggests that a degree of tension existed between Mary, on the one hand, and her co-executors (Paula and Patti) on the other. This tension may explain, but does not excuse, the decision not to provide Mary with relevant information. In my view, the conscious decision on the part of the majority to selectively deny Mary important information compromised the executors' decision-making process and rendered it meaningless.

Failure to Reasonably and Respectfully Consider Relevant Information

[95] As indicated, the majority of executors (Paula and Patti, the Respondents in this proceeding) relied heavily upon the unsigned "My Last Wish" found by Paula in Anne's strongbox, the contents of which were reproduced in paragraph 84 above.

[96] I note that this document supports the position taken by the majority that Anne wanted all of her ashes to be inured with her parents at the New Calvary Cemetery in Whitney Pier and that none rest with her husband or any other member of the Curry family in the "East Bay Cemetery" (i.e. Saint Mary's Cemetery in East Bay).

[97] The minority took the position that this unsigned document needed to be put in its proper context. It was written at a moment in time when Anne and Leo were experiencing acute strain in their marriage. Several months before this document was drafted (late summer or early fall 2004), Anne had fallen down the stairs of the family home at 9 Oxford Street in Sydney and became extremely upset the Leo casually disregarded Anne's call for help and apparent disinterest in what could have been a very serious accident. Anne asked Leo to leave the house. He complied and moved into the newly renovated cottage in East Bay. Leo and Anne maintained these separate residences until they died.

[98] The minority states, however, that the "Last Wishes" document was written at a traumatic time and does not define Anne and Leo's relationship. The minority says that Anne and Leo remained loyal to their family; very devoted to one another; and, indeed, loved one another in their own way. There is no evidence that either Anne or Leo moved on to new relationships. They stayed married; celebrated family

events as a married couple; and, despite living in separate homes, continued to speak and see each other on virtually a daily basis.

[99] The minority says an email dated September 5, 2013 (about 9 years after the document entitled "Last Wishes") more accurately reflects the complex evolution of Anne's marriage to Leo and supports their proposed disposition which would see at least some of Anne's ashes inured with the Curry family. This email was sent on Thursday, September 5, 2013; two days prior Anne and Leo's 60th wedding anniversary on Saturday, September 7, 2013. It speaks of her love for Leo and how deeply hurt she was by ongoing divisions in the family. It stated:

> To all my family
> Where to begin I don't know... But I've been thinking about this for a long time now and about the 60 years that Leo and I have been married this coming Saturday. Anyway I am very sad about the way things are in the family right now and I think about it constantly. Like I said if the lymphoma didn't kill me this animosity will. I can no longer stand that my children can't all get along in the way Dad is treated. He asked if anyone asks about him and it made me cry he sounded so sad. I don't want any flowers or gifts, parties or well wishes for my anniversary. I just want to know that my family is a true family. My wish is that you all forgive one another and get along that has always been my wish…I had no family and look at you.
> God spared me but living like this is killing me. You're all so worried about me by the way and yet this continues.
> Your father…my husband yes I love Leo and always have….. He deserves respect. He is generously looked after everyone always. So if you can't find it in your hearts to forgive one another and get along and realize all that you do have. .. I am so ashamed.... So put all this animosity aside or don't bother with me anymore. This took lots of courage for me to write…
> Mom

[100] The majority's response to Anne's email dated September 5, 2013 was reflexively, unreasonably dismissive. Paula and Patti acknowledged receiving it but

immediately rejecting it as written by somebody impersonating Anne - the minority executor (Mary) being identified as the most likely suspect.

[101] With respect to Paula:

1. Paula's affidavit asserts that the email is not written in Anne's "usual style" because Anne "used many dashes ("—") to separate her thoughts". Paula said that Anne "never used ellipses ["…"] … and this email is full of ellipses." (paragraph 82);

2. Paula explained in her affidavit that Anne "traditionally vented her feelings into her journal". It was never Anne's "style to call people out publicly when she was unhappy with them, particularly her children." (paragraph 83);

3. Paula also testified that she asked Anne about the email on the very next day (Friday, September 6, 2013). Anne responded, "What email?". (paragraph 84 of her affidavit). During cross-examination, for the first time, Paula added that when she confronted Anne, she provided Anne with details about the email. Given Anne's confusion, Paula said that she never brought it up again so as to not make Anne uncomfortable; and

4. She suspected Mary wrote the email but she never confronted Mary about it.

[102] With respect to Patti:

1. Patti similarly asserted that the email "does not appear to be written by Mom [Anne]." (paragraph 54 of her affidavit). Her explanations were identical Paula's. Pattie testified that:

    a. Anne used dashes ("---") and not ellipses ("…") to separate her thoughts. Yet, the email "is full of ellipses" (paragraph 55 of her affidavit). During cross-examination, Patti elaborated that all the emails she received from Anne primarily had dashes; and

    b. Anne "traditionally vented her feelings into her journal". It was never Anne's "style to call people out publicly when she was unhappy with them, particularly her children." (Paragraph 56 of her affidavit);

2. After "allegedly" (Patti's word) sending the email, Anne never once mentioned it or any of the concerns brought up in the email" (paragraph 57).

3. During cross-examination, Patti did not accuse Mary of writing this email. During cross-examination, Patti testified that she simply "left it alone."

[103] I make the following findings of fact:

1. Anne did write this email and that it was relevant to the executors' decision regarding the disposition of Anne's ashes;

2. When Patti and Paule received this email, they reflexively and unreasonably concluded that it was fraudulently written by somebody impersonating their mother, Anne;

3. After Anne's death, Patti and Paula in their roles as executors remained steadfast in their original view that the email was not written by Anne. They rigidly refused to reconsider that conclusion and continued to simply reject the email outright.

[104] In my view, there was no reasonable basis to rigidly discredit this email from Anne as a fake. The majority failed to respectfully consider this relevant information. My reasons include:

1. There is nothing at all suspicious about the content of this email. In it, Anne implored her children to set aside their differences, forgive

whatever grievances festered, and get along as a family. The evidence is abundantly clear that there were deep divisions within the family at the time. For example, at the time Patti was estranged from her father, Leo, and would not be attending the wedding anniversary. Patti and Leo would remain estranged until his death. Danny also experienced a similarly difficult relationship with his father. These divisions, and others, continued and remained present at the hearing. I return to these issues below. For present purposes, there is nothing surprising or suspicious about Anne reaching out for peace among her children 2 days before her 60th wedding anniversary. Moreover, the essence of the email was an expression of love for all her children and the abiding hope that, as the email says, her "family is truly a family". All of the witnesses who testified agreed that these were among Anne's core values;

2. Paula initially presumed that it was by the co-executor, Mary, but she didn't confront Mary because there was strife in the family. As such, she was not "overly concerned" that Mary was pretending to be Anne taking into account the "spirit" with which the email was sent. Respectfully, there was no rationale basis for these accusations against

Mary. Mary denies writing the email in her affidavit (paragraph 41) and she repeated her denials during cross-examination. I accept Mary's evidence on this particular point;

3. Neither Paula nor Patti were able to identify anybody else who might have sent the email. Indeed, it is difficult to understand who might interested in fraudulently impersonating Anne for the purposes of articulating Anne's core values;

4. Paula testified that Anne "never used ellipses" but yet the email in question was "full of ellipses", obviously implying that whoever sent the email could not have been Anne. However, Paula was wrong. Anne did use ellipses. The evidence included three typed documents written by Anne: the September 5, 2013 email; the "Last Wishes" document referenced above; and a personal note written to Leo. There were all found by Paula in the strongbox containing the "Last Wishes". Each one of these typed documents contained many dashes but they also contained ellipses;

5. Patti's affidavit similarly stated that Anne used dashes to separate her thoughts but, again, the email in question was "full of ellipses". During cross-examination, Patti softened her position by acknowledging that

Anne "primarily" used ellipses to separate her thoughts. As such, Patti's concern was not so much that the email contained ellipses but, instead, contained too many ellipses and no dashes. Respectfully, these complaints around punctuation are, by themselves, insufficient to sustain allegations of fraud;

6. Paula and Patti both testified that the email was not Anne's "style" (their words) because Anne would not express her disappointment in such a public manner. Instead, they said that Anne vented in her diary. Neither Paula nor Patti elaborated on Anne's alleged style or produced samples from Anne's diary even though, apparently, they were familiar with its contents. I appreciate that a diary is intensely personal. However, Paula and Patti presented other evidence that was intensely personal to Anne and Leo. Given that they are effectively arguing that the email in question was fraudulent, it was incumbent upon them to produce clear evidence in support of the accusation. Moreover, the email was not a public statement. It was a private communication to her family a few days before a public celebration of her 60th wedding anniversary;

7. Paula testified in her affidavit that she asked Anne about the email and that Anne did not know what she was talking about. The affidavit did not explain why Paula would not offer further details when Anne seemed confused by the question. During cross-examination, and for the first time, Paula voluntarily added that she provided Anne with details about the email. However, Paula said, she then dropped the matter because Anne appeared confused, and she didn't want to make her more uncomfortable. Respectfully, even accepting Paula's additional evidence offered during cross-examination, it is unreasonable to conclude that the presumption of fraud was preferable potentially causing Anne discomfort. And it is equally unreasonable to maintain the presumption of fraud when serving as an executor, after Anne's death; and

8. Patti's response was similarly unreasonable. She was in New York City when the email arrived and did not return until after the 60th wedding anniversary. Patti testified that she didn't pursue this serious issue because Anne did not raise it with her. Respectfully, concluding that somebody was sending fake emails under Anne's name without even discussing the matter with Anne was unreasonable. Holding firm to

that original conclusion after being appointed executor is equally unreasonable in the circumstances;

9. Paula's reaction to this email was similar to the manner in which she rejected (and failed to share) important information received from Joseph MacLean, discussed above.

[105] In my view, these findings of fact are fortified by other contextual evidence which explain why the majority stubbornly maintained their position. The relevant context revolves primarily around Leo, whose presence in this proceeding was pervasive and divisive. I turn to that issue now.

Additional Context Relating to Leo Curry

[106] As indicated, Anne was adored and held in great esteem by her children, without exception. The same cannot be said of Leo Curry whose relationships with his children were more complicated and contentious.

[107] Paula, Patti and their brother, Daniel Curry filed affidavits proposing that Anne's ashes be inured with her parents and not her husband, Leo. Patti's husband, Collin Bauer also filed an affidavit in support of this decision.

[108] One common theme which dominates all their evidence is a difficult relationship with their father, Leo. Based on the evidence, it would not be inaccurate to suggest that the Curry children could be almost equally divided between those who got along with Leo; those who didn't; and those who managed not to take sides. Unfortunately, those battle lines endured beyond Leo's demise.

[109] It is not entirely clear how and why Leo became such a polarizing figure among his children. The evidence suggests that Leo was a complicated person who could be remote, opinionated, selfish, and hurtful. But he also could be generous, loyal, industrious, and charismatic. It would be unfair to stand in judgment of Leo who, obviously, is deceased and unable to defend himself.

[110] The relevant fact for the purposes of this decision is that the evidence of Daniel, Patti, Patti's husband Collin, and Paula cast Leo as a decidedly negative figure with very little to say that was positive. A few examples will suffice:

1. Paula, Patti and Collin all refer to Leo and Anne's decision to live in separate residences from 2004 and onward. They generally lay the blame on Leo and his lack of concern and care for Anne;

2. Patti and her husband Collin became estranged from Leo in 2013. Based on the evidence before me, the trigger was Leo's care (or lack of

care) for Anne while Anne who, at the time, was undergoing chemotherapy. The evidence does not confirm what was said but the argument opened wounds that did not heal. Save for a very brief reconciliation, Patti and Collin's relationship with Leo effectively ended at that time. One telling event which revealed the extent of the rift related to a large Curry family monument at the Saint Mary's Cemetery in East Bay which Leo designed. The monument was adorned with individual plaques on which the names of Anne and all his children were engraved – except for Paula. Leo decided to exclude her. On this, Mary recalled Leo suggesting that excluding Paula was somehow due to some genealogical concern related to Paula adopting a hypehenated last name (Curry Bauer). This explanation is inadmissible heresay. Even if I were to accept it, is not credible;

3. Daniel loved his mother and talked to her almost every day, even though he lived in British Columbia for most of his adult life. By contrast, he testified at the hearing that he "tried to keep in touch" with Leo. Some of his visits with Leo were good, but some were not so good. Daniel became upset by his father's decision to exclude Patti's

name from the Curry family monument. He asked that his name also be removed. Leo granted this request and Daniel's name was erased;

4. Paula was Anne's devoted, primary caregiver for the last years of her life. Based on the evidence, her relationship with Leo was not especially close but also not confrontational. Still, her affidavit is replete with criticisms of Leo and, in particular, what Paula perceived as being cold and distant treatment of Anne.

[111] In the interest of balance, I note that the image of Leo presented by the other Curry children who testified (Mary and Phillip) was also not entirely accurate. They glossed over any of Leo's negative characteristics in favour of his perceived strengths.

[112] In event, I find that Paula and Patti, in their role as executors, demonstrated an *animus* towards Leo that provides helpful context to explain their fixed view that none of Anne's ashes be inured with Leo – and all of her ashes be inured with Anne's parents. In my view, this *animus* impaired the ability of the majority of executors (Paula and Patti) to reasonably consider the possibilities that:

1. Despite significant marital strain, Anne loved Leo and had a capacity for forgiveness that transcended the justifiable anger and disappointment she could feel toward Leo;

2. Family was a priority for Anne life; and

3. Ultimately, Anne may have wanted a portion of her ashes to be inured with Leo to recognize their 68-year marriage and, perhaps more importantly, to symbolize her connection with (and love for) the family they raised.

[113] I recognize that Leo Curry was not the only factor driving the majority's (Paula and Patti's) position. They presented evidence around Anne's parents. They also presented evidence that Anne felt unloved and disrespected by Leo's parents, who are buried in the same cemetery as Leo. See, for example, Paula's Affidavit at paragraph 32 and Daniel's affidavit at paragraphs 26 – 28 and 49. However, in my view, Leo clearly emerged as the dominant, divisive factor.

CONCLUSION

[114] The deficiencies breached the minority's reasonable expectations and rendered the decision-making process entirely pointless. In the circumstances, the majority decision is not entitled to deference.

[115] The Court is not bound to send the decision back to the executors. To do so, would only result in further delay and undermine the broader requirement to dispose of a deceased person's remain in a timely manner. Given the evidence and the divisions which separate the parties, I am not satisfied that the executors would be prepared to set aside their rigid, preconceived conclusions and approach the decision-making process. In my view, the Court is compelled to intervene.

[116] The Court is similarly not bound to simply choose between the two proposals presented by the executors. The Court is entitled to exercise its discretion and fashion an appropriate remedy that more fully achieves the executors' overriding obligations to dispose of Anne's ashes in a respectful and dignified manner which complies with any statutory requirements.

[117] I order that:

1. Half of Anne's ashes be inured with Leo at the monument he designed in Saint Mary's Cemetery, East Bay, Cape Breton; and

2. Half of Anne's ashes be inured with her parents at the New Calvary Cemetery in Whitney Pier, Cape Breton, Nova Scotia

[118] My reasons include:

1. Anne's wishes are relevant but not binding. On this issue, I make the following findings of fact:

    a. Anne wanted half of her ashes to be inured with her parents. She was extremely close with her parents and proud of her Ukainian heritage;

    b. Anne wanted half of her ashes to be inured with her husband, Leo. Despite their marital struggles, they remained loyal to one another for 68 years. Pausing here, I acknowledge that the "My Last Wishes" document and communications between Anne and Leo were found in Anne's strong box. Anne clearly wanted to keep (not destroy) these documents which record acutely painful, personal memories from her marriage to Leo. However, Anne decided not to permanently finalize her intentions by simply signing the "My Last Wishes" document. They remained one of several reminders of this difficult moment in time. As importantly, for present purposes, I accept the evidence which post-dated these documents and which confirmed Anne ultimately wanted half of ashes inured with her parents and the other half with Leo. I specifically accept the

evidence of Joseph MacLean and Anne's email dated September 5, 2013. I find that, in the end, Anne loved Leo despite his failings; that Anne has a capacity for forgiveness which she hoped her children would share; and that, above all, Anne very much wanted to unify her family;

c. As indicated, Anne did not want to be inured with Leo's parents, whom she felt were cold, unloving, and treated her with disrespect. Anne will not be inured with Leo's parents. At worse, their remains are in the same cemetery but a different plot;

d. Anne wanted her family to be at peace with one another. Placing half of Anne's ashes with Leo in East Bay and half with her parents in Whitney Pier connects the two parts of her family that meant everything to Anne and symbolizes Anne's abiding hope for unity within her family; and

e. Certain family members spoke of Anne's Catholic faith. Respectfully, religious law does not govern this decision. That said, I was provided with no evidence to suggest that this proposal would be contrary to the basic tenets of Catholicism.

2. Family members who wish to visit Anne's resting place are afforded the convenience of choice. Given the divisions that currently exist in the Curry family, this is a relevant consideration. The Court's determination in this matter accommodates those members of the family who may wish to visit the Curry family memorial designed by Leo and also accommodates those who do not. Hopefully, the issues that divide the Curry children will evaporate with time. That was certainly Anne's wish, but should they continue, this solution better ensures that enduring memories of Anne can be fortified by the ongoing emotional engagement of Anne's children.

[119] The minority (Mary's) proposal that each of Anne's children be entitled to a portion of Anne's ashes should they so request is denied. While I do not say that Anne's children would treat her ashes in a disrespectful or undignified manner, the executors engaged this Court to determine this dispute. In the circumstances, it was incumbent on the minority to provide the certainty necessary to ensure that the disposition of Anne's ashes would be dignified and respectful. This overriding objective is not achieved if some of Anne's ashes are delivered to persons who have not yet been identified and then leaving those unidentified persons to dispose of Anne's ashes in whatever way they may deem fit.

[120] As to costs, the legal issues in this case were novel. And, in my view, neither side fully articulated the applicable law. I am also not satisfied that any party could reasonably claim success. There will be no costs award.

Keith, J.