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Trusts & Estates Forum

**Ted Williams: Is He Headed for the Dugout or the Deep Freeze?
Property Rights in a Dead Body Resurrected**

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[Published in Massachusetts Lawyers Weekly, August 19, 2002]

The uproar and monumental press coverage over the disposition of Ted William’s body have caused the resurrection of some basic legal questions that even estate “experts” have not clearly addressed, the two most significant being: (1) Does a person have the legal right to direct the disposition of his body?, and (2) In the case of a discrepancy between such dispositive provisions in the person’s Last Will and a subsequent change of mind, which will control?

Newspapers across the country from the Boston Globe to the Los Angeles Times (no comment on the New York papers and those damn Yankees) have reported and speculated on whether Ted will remain frozen in Arizona at the Alcor cryonics warehouse or will be returned to Florida to be cremated, and his “cremains” scattered off the Florida Keys. It is now common knowledge that Ted’s Will directed the cremation of his body. It is also common knowledge that John Henry, one of Ted’s children (and thus a “next of kin”), and Ted’s daughter, Claudia, believe that their father wanted his body to be frozen, purportedly so that he might be reunited in the future

with them. At the same time, Bobby Jo (another of Ted's "next of kin" but one left out in the cold) believes the Will clearly reflects Ted's last wishes and should be honored. According to Alcor information, either the whole body could remain frozen, or they have a special, reduced price for just the head (what they euphemistically refer to as "neuro-suspension", something we authors frequently experience). Does this provide a way that both sides could be satisfied? Is this a case for King Solomon to decide?

Under early English common law, a decedent had no "property" rights in his body and could not direct the disposal of his corpse, Williams v. Williams (coincidence?), 20 Ch. D. 659 (1882), and for a while many states in this country followed that rule. This did not last long, however, and many if not most states now recognize the right of an individual to dispose of his body by Will or other document. See e.g., Mass. G. L. c. 113, § 8 et seq. (Uniform Anatomical Gift Act); Ariz. Rev. Stat. Ann. §32-1365.01 ("A legally competent adult may prepare a written statement directing the cremation or other lawful disposition of ...[his] own remains....The written statement may but need not be part of the legally competent adult's Will."); Fla. Stat. 470.002(18) (directing funeral homes to give first priority to a decedent's written statements).

This change of attitude does not mean, however, that actual property rights, as we understand them in a commercial sense, exist in a dead body. For example, a court most likely would not permit a person to direct that his corpse be sold to the highest bidding biomedical research facility. Mass. G. L. ch. 272, §72 sets forth as a "crime against morality and good order" the buying, selling, or possessing of dead bodies. Florida and most states have the same prohibition. Fla. Stat. 872.01 ("Whoever buys, sells, or has in his or her possession for the purpose of buying or selling or trafficking in the dead body of any human being shall be guilty of a misdemeanor of the first degree."). Similarly, the body of a deceased person may not be seized by a sheriff on execution. Mass. G. L. ch. 272, §70. Nor does the decedent's estate have a claim against one that mutilates the corpse; such claims lie with the person who has the right to the possession of the body for burial purposes. Rubianogroot v. Swanson, 2001 Mass. Super. Lexis 244 (2001); Rather, such "rights", to the extent they are recognized and enforced by the courts, are intended to give the decedent, largely out of respect for the dead, the opportunity to state and have carried out his reasonable requests for the disposition of his body. Nevertheless, it is quite possible for

the decedent's purported wishes to be disregarded by the person entitled to the right to possession of the body for the purpose of the burial or other legal disposition of the body.

In any event, whether it is the wish of the deceased or those of the spouse or other relatives regarding the disposition of the body, the law imposes certain limitations. First, there are the limitations imposed by public policy, so that a requested disposition will not be enforced if, in the eyes of a court, it violates basic rules of an orderly society. For example, in Estate of Meksras, Pa. D.&C. 2d 371 (1974), a decedent directed that she be buried wearing her valuable jewelry. The court declared the provision void, stating: "If a practice is developed in our state to foster the burying of valuables with a deceased, our cemeteries, like the tombs of the pharaohs, will be ravaged and violated." Thus, a request which encourages grave robbing would be disregarded. Second, there are limitations imposed by basic rules of human decency and civilization. Mass G. L. c. 114, §43M (...every dead body of a human being dying within the Commonwealth ... shall be *decently buried*, entombed in a mausoleum, vault or tomb, or cremated within a reasonable time after death.)(emphasis supplied). Thus, provisions that subject the body to profanation, ridicule, or disrespect would also be disregarded by the court. In other words, a six foot six inch tall person could direct that he be buried standing up but not in a grave that is only six feet deep.

In Massachusetts, the right to possession of the body and the duty of burial rests first in the surviving spouse, and second in the next-of-kin; not in the executor or administrator. Vaughan v. Vaughan, 294 Mass 164 (1936); Burney v. Children's Hospital, 169 Mass 57 (1897). This is sensible as a practical matter, as the decedent's body is typically long disposed of by the time the executor or administrator is appointed. Thus, the stated directions, if any, by the deceased in his Will would in effect be honored (if they are to be honored) long before the Will is probated, which illustrates another issue. The decedent's wishes as to the disposition of his body do not constitute a disposition of "property" at death as contemplated by the law of Wills, and since, as noted, a direction in a Will is unlikely to be legally approved (probated) in time to humanely carry out the deceased's wishes, why must it be in the Will at all? It would seem that any credible and reliable evidence of the decedent's wishes should be respected by a court, whether or not contained in the Will. In a case in which there was no statement from the decedent, the

Supreme Judicial Court has stated that “In the absence of a direction from the decedent, a surviving spouse, or failing such a spouse (as here) then the decedent’s next-of-kin, have the right to ‘possession ‘ of the body so that they may dispose of it for burial according to their wishes.” Stackhouse v. Todisco, 370 Mass. 860 (1976). The concept that a decedent’s wishes should be upheld when known is part of the “sacred trust” bestowed upon all that “were allied to the deceased.” Larson v. Chase, 50 N.W. 238 (Minn. 1891).

But what happens when the next-of-kin disagree, and there are conflicting documents? In Ted’s case, we have a Will which clearly states his wishes, and supposedly, we have hand-written evidence that may demonstrate a subsequent change of mind by Ted, suggesting that his body be frozen. Assuming both are valid, will the later document control? It appears that it can and probably will, absent public policy and decency issues discussed above. It has been held that where a testator, after having specifically provided in his Will for the disposition of his body, subsequently demonstrated that he had changed his mind about such disposition, courts have been quite willing to disregard the testamentary provisions. See 7 A.L.R. 3d 747 sec. 3(b). This makes sense when we realize that it is not title to property which we are concerned about, but the intent of the decedent.

All of this seems to indicate that the answer to the question of whether a person has the right to direct the disposition of his body, is an unequivocal maybe. One author on the subject stated: “In the absence of specific statutory authority, a person has, at best, a very qualified assurance that the testamentary disposition he makes of his own body will be fulfilled. Jackson, Law of Cadavers at 42 (2d Ed.). We know that public policy and decency concerns can over-ride a decedent’s wishes. But when these over-riding issues are not present, a decedent’s wishes should control. In Florida, the jurisdiction in question, the court in Kasmer v. Guardianship of Limner, 697 So. 2d 220 (Florida District Ct. App. 3d District 1997), ordered a cremation in accordance with the deceased’s wishes, against the objections of the personal representative.

Assume for a moment, however, that the handwritten statement is authentic. We would then be faced with the question of dealing with the “perpetual” maintenance of Ted’s body in a cryonic state. This question, although it appears to be one directly relating to disposition of the body,

may be far more complex, and may in fact be governed in part by public policy issues, and part by estate administration issues. The Arizona facility, Alcor Life Extension Foundation, charges \$120,000 for full body cryonic suspension. See FAQs at www.alcor.org. Unless Ted funded this contract with some huge payment while he was alive (Alcor suggests using an insurance policy, the proceeds of which, by the way, would be includible and therefore fully taxable in Ted's estate, unless Ted had a good estate planner), under what authority could the court allow the estate to expend these funds, and query whether such expense would be deductible on Ted's estate tax return under Internal Revenue Code §2053 (expenses of administration)? Further, Alcor states that its "Irrevocable Patient Care Trust", funded with \$70,000 per whole body "patient", will more than cover the costs projected for the duration of cryonic suspension (even for 406 years or more?). If Alcor's financial optimism is misplaced, would the court order money to be set aside out of the estate to cover the continued costs? If so, we might see things really heating up down there in Florida. And if that wouldn't give the family of a cryonics candidate cold feet, what about this: If, against all expert medical opinion and predictions, Ted was actually revived, could he then recover what was left of his property? Who would go to bat for his great grandchildren and great great grandchildren who inherited the money? When does that statute of limitations run? Well, if Ted did come back, at least he could set the record straight as to his true wishes, and after all those years in cold storage, cremation might be a welcome change of climate.

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