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## Last Wishes and The Authority Of An Estate Trustee

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Imagine that you are an Estate Trustee for a family member or friend's Estate, and that she has asked you to cremate her body and to dispose of the ashes in a public place that is special to her. Would you do it? An opera-lover from Dallas, Texas did exactly this for his friend: he brought his opera-loving departed friend's ashes to a performance of William Tell at the Metropolitan Opera in New York City, and sprinkled the ashes into the orchestra pit during the second intermission. Not surprisingly, the rest of the performance was cancelled and a police investigation ensued. The man, who later apologized for his ill-advised trip to the opera, simply wanted to do what his friend had requested.

In Ontario, an Estate Trustee has control of the deceased's body, and has the ultimate authority on the disposal of the body, as long as it does not contravene any laws. *The Criminal Code*, R.S.C., 1985, c. C-46 (Federal) and the *Funeral, Burial and Cremation Services Act*, 2002, S.O. 2002, c.33 (Provincial) outline what can or cannot be done with human remains. Permission must be sought from the relevant authority before the disposal of human remains, except for the scattering of ashes on unoccupied Crown land (provincial park, conservation areas, Great Lakes etc.) where there are no signs posted prohibiting the act. The services relating to a cemetery in Ontario are regulated by the *Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4. The Ministry of Government and Consumer Services is the provincial authority on cemeteries and funerals. As long as the above laws are followed, an Estate Trustee can decide whether to cremate or bury the deceased's body in a casket, even if it is contrary to the deceased's wishes as outlined in the Will or otherwise, the deceased's religious or cultural beliefs, or the family's wishes.

Apart from an Estate Trustee's ability to stray from a Will with respect to funeral plans, an Estate Trustee takes his or her authority from the Will and does not generally have any other discretion when distributing the Estate. He or she must act in accordance with the terms outlined in the Will as well as in accordance with the laws of the province. Even if the testator

has discussed post-mortem plans with the Estate Trustee, like making a gift to someone not named in the Will, the Estate Trustee cannot deviate from the distribution outlined in the Will. If the Estate Trustee does not follow the Will and the relevant succession laws exactly, and distributes any of the funds of the Estate to a person who is not a beneficiary under the Will, the Estate Trustee may be personally liable to the Estate's beneficiaries for the amounts incorrectly distributed.

The only way to ensure that a testator's Estate plans are followed is to have a valid Will. It is not enough for someone to simply hold a discussion with loved ones as to what they wish to happen after their death. If there is no Will, or if the Will is deficient in some way that it renders one or more of the clauses invalid, there will be an intestacy. When there is an intestacy in Ontario, the *Succession Law Reform Act* dictates who may step forward to be the Estate Trustee and how the Estate will be divided. This means that without a Will, the person appointed to administer the Estate may not be the person the deceased would have chosen, and that person will have the authority to dispose of the deceased's body. In addition, the Estate may be distributed to family members whom the deceased had no intention to benefit. Just as with a Will, when there is an intestacy, the Estate Trustee has no discretion or authority to deviate from what is outlined in the *Succession Law Reform Act*. An Estate Trustee can be held personally liable for acting contrary to Ontario's succession laws.

Even when an Estate seems straightforward, it is important for a testator to seek legal and financial advice to ensure that the Estate plan is feasible and that their plan is properly documented in a Will. It is also important for an Estate Trustee to seek legal and financial advice, when acting for an Estate, to ensure that they are acting in accordance with the Will and the applicable laws.



## About the Author Elikem Deley

Elikem Deley is a member of the estates group and practises in the areas of wills, powers of attorney, estate administration and estate litigation.

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