



ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Estates List)

**ENDORSEMENT**

COURT FILE NO.: CV-24-00727909-00ES HEARD: October 25, 2024

NO. ON LIST: 4

TITLE OF PROCEEDING: **HENRY et al v. CHERYL HENRY**

BEFORE: **JUSTICE B. DIETRICH**

**PARTICIPANT INFORMATION**

**For Plaintiff or Applicant or Moving Party:**

Name of Person Appearing	Name of Party	Contact Info
Cassandra Martino	Lawyers for the Applicants	<a href="mailto:cmartino@felitigation.com">cmartino@felitigation.com</a>

**ENDORSEMENT OF JUSTICE B. DIETRICH**

[1] On October 25, 2024, I granted the moving parties/applicants, Edwin Leonard Henry, and Laurel Dennis Henry (the “Applicants”) an interlocutory injunction preventing the burial, alteration, cremation, transportation or otherwise of the body of the late Edwin George Henry (the “Deceased”), absent the express written consent of the parties and/or absent further court order. I ordered that the body of the Deceased be transferred to a funeral home where it could be frozen pending a final determination of the Applicants’ application. In my endorsement dated and released October 25, 2024, to which my October 25, 2024 Order was attached, I confirmed that my reasons would follow. These are those reasons.

[2] The respondent, Cheryl Henry (the “Respondent”), was properly served with both the application record and the motion record in this matter. She was provided with the details for the hearing, including the videoconference Zoom link. She did not appear at the hearing on October 25, 2024. That said, I am advised by the registrar that the Respondent did appear in the virtual courtroom after the hearing was over and the Order had been granted. The registrar explained to the Respondent that she would be provided with a copy of my October 25, 2024 endorsement and the Order.

## Background Facts

[3] The Deceased died on September 2, 2024. He was survived by eight children and stepchildren. The Respondent is a stepchild of the Deceased. She has held herself out to Turner & Porter Funeral Home (“Turner & Porter”) as the Executor and Trustee of the Deceased’s estate (the “Estate”). The Respondent provided Turner & Porter with a copy of a will (the “Purported Will”), which she claims names her as Executor and Trustee of the Estate. According to the Applicants, who are two of the Deceased’s children, the Respondent is directing that the Deceased’s body be cremated. They oppose cremation on religious grounds.

[4] The Applicants’ evidence is that they have asked the Respondent for information about the Purported Will and for a copy of it, but the Respondent has not responded to their requests.

[5] The Applicants submit that the Deceased was a strong believer in the Christian faith and that he expressed his desire to for a traditional Christian funeral service and burial.

[6] The Applicants also question the validity of the Purported Will. They submit that their father would have told them about the Purported Will. They believe that the Purported Will was made at a time when the Deceased was suffering from brain cancer and an inability to manage his property.

[7] The Applicants submit that the Respondent was acting as an Attorney for Property for the Deceased prior to his death.

[8] The Applicants seek an interlocutory injunction to prevent the cremation of the Deceased’s remains. They wish to provide a Christian burial for the Deceased in accordance with what they believe his wishes were.

## Issue

[9] Should this court grant an interlocutory injunction prohibiting the cremation of the Deceased’s remains?

## Law

[10] Under r. 40.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, a party to a pending or intended proceeding may be granted an interlocutory injunction under section 101 or 102 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”). The CJA permits the Superior Court of Justice to grant an interlocutory injunction where it appears to a judge of the court to be just or convenient to do so.

[11] In *McCorkill v. Streed*, 2013 NBQB 249, at para. 22, Glennie J. stated as follows regarding the granting of an injunction:

The test for granting an injunction as pre-trial relief is well established. A party seeking injunctive relief must satisfy the three-part test set out by the Supreme Court of Canada in the leading decision of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 331 (S.C.C.) (“*RJR-MacDonald*”).

The Applicant must establish that:

- (i) there is a serious issue to be tried;

- (ii) the applicant will suffer irreparable harm which could not be compensated by damages or that damages may be impossible to recover if the injunction is refused; and
- (iii) the balance of convenience favors granting the injunction.

## **Analysis**

### **Is there a serious issue to be tried?**

[12] This part of the test does not require the court to determine whether the Applicants will succeed. There is no requirement for a reasonable prospect of success. The threshold is low. The Applicants need to show that their application is not frivolous or vexatious: *R.J.R. MacDonald*.

[13] The matter of an interim injunction preventing the burial of the remains of a deceased person to allow time to determine who should administer the estate was considered by Myers J. in *Miller v. Miller*, 2018 ONSC 6625 ("*Miller*"). The facts were very similar to the facts in the case at bar. In *Miller*, Myers J., in granting the injunction, confirmed that he was not deciding who would administer the estate or the deceased's alleged wishes regarding her burial. The court was being asked to prevent burial in Toronto, as opposed to Jamaica, to give the parties time to come to court to assert their claims.

[14] As in this case, in *Miller*, one party asserted executorship, but no will had been produced. Myers J. stated, at para. 17: "absent production of a will by the respondent in circumstances that seemed to call out for production of a will if one exists, I am satisfied that there is a serious issue to be tried as to who should be appointed ...".

[15] The Applicants submit that the Respondent has not produced a copy of the Purported Will and is acting unilaterally regarding the Deceased's remains. The Applicants submit that the Respondent is not communicating with the Deceased's family regarding the arrangements. The Respondent has not appeared today to confirm her executorship or to explain her actions. I find that there is a serious issue to be tried.

### **Would the Applicants suffer irreparable harm that could not be compensated by damages?**

[16] The Respondent wishes to cremate the Deceased. The Applicants wish to bury the Deceased in accordance with what they believe to be his wishes and in accordance with Christian tradition.

[17] Again, the *Miller* decision provides helpful authority. In *Miller*, the applicants wished to bury the deceased's body in Jamaica, and not in Toronto. Myers J. found that if the burial took place in Toronto and the administrator, when appointed, wished to bury the body in Jamaica, the applicants would be prevented from having their legal rights determined in time to prevent that very burial. Accordingly, he found that the applicants were at risk of suffering harm for which it would be unjust to hold them to a remedy in damages.

[18] I find that a similar analysis applies here. The harm to the Applicants would be irreparable, and they could not be compensated by damages. The cremation would be irreversible and, if the Applicants were successful, they would not be able to bury the body, which is the very right they are seeking to protect. I find that the Applicants would suffer irreparable harm that could not easily be compensated by damages, and it would be unjust to hold them to this remedy.

## Does the balance of convenience favour the granting of the injunction?

[19] In this case, there is potential harm for both parties. The Respondent claims to have authority to cremate the Deceased. The Applicants question that authority as it has not been supported by any evidence provided to them. They wish to bury the Deceased in accordance with what they believe to be the Deceased's wishes. Both parties will be inconvenienced by the delay in attending to the funeral arrangements. However, the Respondent appears to be proceeding without establishing her right to do so and without communicating with the Applicants or responding to their queries. Had she engaged in a dialogue with them and provided a copy of the Purported Will to them, it is possible that this motion could have been avoided.

[20] As noted in *Miller*, at para. 25, as a general guideline, all other things being equal, when assessing the balance of convenience, "it is a counsel of prudence to ... preserve the status quo." *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396 (H.L.), at p. 408.

[21] Myers J. found the guidance to be apt in *Miller*, and found that, in that case, "it [was] most just to freeze the situation and prevent unilateral actions pending a more informed decision on fuller evidence and argument."

[22] I come to the same conclusion in the case at bar. The Applicants propose that the Deceased's body be removed from Turner & Porter, which does not have facilities for longer-term storage of the Deceased's remains, to DeMarco Funeral Home, where the Deceased's remains will be frozen pending a final determination of the balance of the Applicants' application. The Applicants have agreed to cover the costs of the transfer and storage at first instance pending determination of the balance of the application. While this result is not optimum for either party and is likely to be distressing for both, it preserves the status quo, which I find to be the prudent course of action in this case. The balance of convenience favours a delay in carrying out the funeral arrangements to allow the application to proceed and for both parties to be heard.

### Disposition

[23] The Applicants' motion for an interlocutory injunction was granted. The Order was issued on October 25, 2024.

### Costs

[24] Having succeeded on their motion, the Applicants are entitled to their costs. In accordance with the Order, the Applicants shall serve and file written costs submissions (not exceeding three pages, double spaced) by November 15, 2024. The Respondent may file written costs submissions (not exceeding three pages, double spaced) by November 25, 2024.



---

Justice B. Dietrich

Released: October 28, 2024