

1977

# In The Matter of The Estate of Thomas Milton Moyer, Deceased v. Karla v. Moyer, Mother of The Deceased And Appellant : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Brian M. Barnard; Attorney for Joseph SmartJ. Douglas Kinatader; Attorney for Appellant

---

## Recommended Citation

Brief of Respondent, *In Re Moyer*, No. 15469 (Utah Supreme Court, 1977).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/894](https://digitalcommons.law.byu.edu/uofu_sc2/894)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

IN THE MATTER OF THE ESTATE OF,  
THOMAS MILTON MOYER,  
Deceased.

BRIEF OF RESPONDENT

AN APPEAL FROM THE  
OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY  
THE HONORABLE DAVID M. ...

M. BARNARD, Esq.,  
East Fifth South  
Lake City, Utah,  
Attorney for Respondent.

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

---

IN THE MATTER OF THE ESTATE OF :  
THOMAS MILTON MOYER, : Case No. 15469  
Deceased. :  
:

---

BRIEF OF RESPONDENT

---

AN APPEAL FROM AN ORDER  
OF THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE DAVID B. DEE, JUDGE PRESIDING

---

J. DOUGLAS KINATEDER, Esq.  
Legal Aid Society of Salt Lake  
211 East Third South  
Suite 203  
Salt Lake City, Utah 84111  
Attorney for Appellant

BRIAN M. BARNARD, Esq.  
214 East Fifth South  
Salt Lake City, Utah 84111  
Attorney for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS . . . . .	3
NATURE OF THE CASE. . . . .	9
DISPOSITION IN LOWER COURT. . . . .	9
RELIEF SOUGHT ON APPEAL . . . . .	10
STATEMENT OF FACTS. . . . .	10
ARGUMENT. . . . .	13
Point I	
THERE IS A VALID UNREVOKED AND UNCONTESTED WILL OF THE DECEDENT IN EXISTENCE. . . . .	13
Point II	
THERE HAS BEEN NO UNREASONABLE DELAY BY THE PERSONAL REPRESENTATIVE IN SEEKING THE CREMATION. . . . .	15
Point III	
THE EXPRESSED PREFERENCE OF THE DECEASED IS PARAMOUNT TO THE WISHES OF THE NEXT OF KIN. . . . .	17
Point IV	
THE DECEDENT HAD THE RIGHT AND THE POWER TO MAKE A GIFT OF HIS BODY . . . . .	22

	<u>Page</u>
CONCLUSION. . . . .	23

## AUTHORITIES CITED

### CASES

<u>Barder vs Barder</u> , (1925) 6 Pa. D and C 720 . . . . .	20
<u>Cooney vs English</u> , (1914), 148 N.Y. Supp. 285 . . . . .	20
<u>Enos vs Snyder</u> , (1900), 131 Cal. 68 . . . . .	21
<u>In Re Henderson's Estate</u> , 57 P2d 212. . . . .	21
<u>Meyers vs South Side Cemetary</u> , (1945), 94 Pittsburg Legal J. 323 . . . . .	20
<u>O'Donnell vs Slack</u> , 123 Cal. 285, 55 P. 906 . . . . .	18
<u>Sacred Heart of Jesus Nation Church vs Soklowski</u> , (1924), 159 Minnesota 331 . . . . .	20
<u>Tkaczyk vs Gallagher</u> , 26 Conn. Sup. 290 . . . . .	20

### STATUTES

#### Utah Code Annotated

§26-26-1 . . . . .	19, 22
§26-26-2 . . . . .	22
§26-26-3 . . . . .	22
§26-26-5 . . . . .	19
§26-26-8 . . . . .	22

	<u>Page</u>
§75-2-603. . . . .	18
§75-3-202. . . . .	13
§75-3-408. . . . .	13
§75-3-701. . . . .	15

#### TREATISES

7 ALR 3d 749. . . . .	18
Johnson, <u>The Law of Cadavers</u> , 2d Ed. (1950). . . . .	19

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

---

IN THE MATTER OF THE ESTATE OF :

THOMAS MILTON MOYER, : Case. No. 15469

Deceased. :

:

---

BRIEF OF RESPONDENT

---

## I

NATURE OF THE CASE

This action, initiated by the Respondent in the Court below, was a Petition for the Admission for Probate of a Last Will and Testament and for the Appointment of a Personal Representative, in an Ancillary Probate. The Petition sought the appointment of Joe Smart as the ancillary personal representative and sought the limited relief of a court order to disinterr and cremate the mortal remains of the deceased, pursuant to the terms of the last will and testament of the deceased.

## II

DISPOSITION IN LOWER COURT

The Petition of the Respondent for Appointment and for an Order for Disinterrment came before the Probate Division of the Third Judicial District Court; the Appellant orally objected to the granting of the Petition and Order, and the matter was referred to the trial calendar. The Respondent made a motion for Summary Judgment on the Petition which was granted. The Court entered an Order appointing Joe Smart as the Personal Representative and ordering the disinterrment and cremation of the deceased's mortal remains.



## III

RELIEF SOUGHT ON APPEAL

The Petitioner-Respondent seeks the affirmance of the Order for Summary Judgment appointing the personal representative and ordering the disinterment and cremation of the mortal remains of the deceased.

## IV

STATEMENT OF FACTS

Thomas Milton Moyer died in Salt Lake City, Utah on December 25, 1976 (R. 5). At the time of his death he was a domiciliary of Maricopa County, State of Arizona (R. 5). He left a valid and unrevoked will dated December 11, 1976 (R. 5,8). The will was admitted to probate by the Superior Court of the State of Arizona in and for the County of Maricopa on May 17, 1977 and the personal representative named in the will was appointed (R. 9-11). The filing of the will and the appointment of the personal representative, Raymond Landry, in the Superior Court of Arizona was not contested by any heir or member of the deceased's family.

The probate action in Maricopa County was commenced with the filing of the petition and will on March 4, 1977 by Raymond Landry (R. 8). That action was begun approximately ten weeks after the death of Thomas Milton Moyer by the Maricopa County Legal Aid Society representing Raymond

Landry (R. 9).

The will of the deceased provided in pertinent part:

I request that I be given burial service according to the Old Catholic Rite, of which I am a member, that Mass be offered every day for the first forty (40) days after my passing for the benefit of my immortal soul, and that my name be placed on the roll for the commemoration of the faithful departed in the daily Mass at St. Jude's Priory. My mortal remains are to be cremated at whatever time and place my named executor deems proper. The remaining ashes are to rest in the Chapel of St. Jude's Priory (R. 8).

At the time of death, the deceased was still a member of the Old Catholic Rite (R. 29,30). Raymond Landry was, at the time of the death, the religious superior of Thomas Milton Mover in the Old Catholic Rite, and was named as personal representative in the will of December 11, 1976 (R. 8). The deceased was buried in his religious robes (R. 28,30).

At the time of death, Raymond Landry was with the deceased in Salt Lake City (R. 18,28). After the death Raymond Landry informed the family of the deceased of the will and its contents and specifically of the desire of the deceased to have his mortal remains cremated (R. 18). The family of the deceased, specifically the mother and appellant herein, objected to the cremation and insisted on the burial contrary to the wishes of the deceased (R. 18,28,29, 30,32). Although present for the funeral service and the

burial, Raymond Landry, had not been appointed personal representative and had no legal power to prevent the actions of the appellant in burying the deceased (R. 18).

The will was filed for probate in Arizona on March 4, 1977 (R. 8). Raymond Landry was granted Letters Testamentary on May 17, 1977 (R. 11). On July 6, 1977, the Petitioner herein, Joseph Smart, filed a petition in the Third Judicial District Court in and for Salt Lake County, seeking an ancillary probate, seeking appointment as personal representative in Utah for the sole purpose of the disinterment and cremation of the mortal remains of the deceased (R. 5-7). Attached to that Petition were exemplified copies of the will and pertinent orders from the Superior Court in Arizona (R. 8-12).

All heirs and grantees of the deceased were given notice of the proceeding in Arizona (R. 9-10) and of the proceeding in Salt Lake County (R. 4). None of the heirs or grantees filed any formal objections to either of the proceedings. The appellant and mother of the deceased, Karla Moyer, appeared by her counsel and orally objected to the granting of the Petition when it was initially presented to the Court on July 27, 1977. The matter was then referred to the trial calendar. The Petitioner made a Motion for Summary Judgment which was heard and granted by the Court after hearing on September 23, 1977 (R. 44-45).

That order provided for the appointment of Joseph Smart as personal representative and directed the disinterment and cremation of the mortal remains of Thomas Milton Moyer (R. 44-45).

### ARGUMENT

#### POINT I

#### THERE IS A VALID UNREVOKED AND UNCONTESTED WILL OF THE DECEDENT IN EXISTENCE

After full, complete and proper notice to all heirs, the Third District Court in and for Salt Lake County and the Superior Court in Maricopa County, State of Arizona, found the will of Thomas Milton Moyer, dated December 11, 1976, to be valid and unrevoked (R. 8-12). There was no contest or opposition to that will by anyone either in the Arizona proceeding or the Salt Lake County proceeding. Pursuant to Utah Code Annotated, §75-3-408 (1953) as amended, the appellant in this case is precluded from contesting the testacy of the decedent or the validity or construction of this will. Pursuant to Utah Code Annotated, §75-3-202 (1953) as amended, the appellant in this case is precluded from contesting or challenging the domicile of the deceased. These statutory provisions provide that a final foreign order determining domicile, testacy and the validity or construction of a will made after notice and an opportunity

for contest must be accepted as determinative by the court of Utah.

The appellant in the Court below and in the Brief of the Appellant makes no claim that the will of the deceased is invalid or revoked. Pursuant to that will Raymond Landry was appointed personal representative in Arizona on May 12, 1977. Based upon that will and with the approval of Raymond Landry, an action was commenced on July 6, 1977 in Salt Lake County, Utah seeking the appointment of a personal representative in an ancillary probate and the disinterment and cremation of the remains of Thomas Milton Moyer (R. 16).

The pleadings of the appellant in the Court below, and the Brief of the Appellant on appeal do not state in fact or law sufficient grounds to prevent or prohibit the appointment of Joseph Smart as the personal representative of the estate of Thomas Milton Moyer in this ancillary probate.

The Court below accepted and followed the findings of the Superior Court of Maricopa County, Arizona and gave full faith and credit to their Order and Findings.

The will of Thomas Milton Moyer is valid and unrevoked and nominated Raymond Landry as personal representative of the estate. The will was properly found to be valid by the Third Judicial District Court in and for Salt Lake County. No evidence was presented to the Court to justify, in fact or in law, a refusal to appoint Joseph Smart as personal

representative of the estate in this ancillary matter.

POINT II

THERE HAS BEEN NO UNREASONABLE  
DELAY BY THE PERSONAL REPRESENTATIVES  
IN SEEKING THE CREMATION

The family knew of the will and the request for cremation soon after the death of Thomas Milton Moyer and before funeral arrangements were completed. Raymond Landrv who was present in Salt Lake City and at the hospital at the time of death, informed the family of the will, the request for cremation and of the nomination of himself as personal representative.

At the time of the death and at the time of the funeral, Raymond Landrv was not the personal representative of the estate. At that time he had not been appointed by any Court. Under the Uniform Probate Code (see Utah Code Annotated, §75-3-701 (1953) as amended), the powers of a personal representative commence upon his appointment. The appointment of Raymond Landry did not occur until May 17, 1977. That same section provides: "Prior to appointment, a person named executor in a will may carrv out written instructions of the decedent relating to his body, funeral, and burial arrangements." That provision is permissive rather than mandatory in nature.

After the death, the family took possession of the

body of the deceased. Although Raymond Landry was permitted by law to carry out the written instructions of the decedent, he was prevented by the possession of the body being with the family. Until he was appointed by the court, Raymond Landry had no legal right to force the compliance with the terms of the will of the deceased.

Raymond Landry in his affidavits (R. 15-16, 18-19) and Christopher Smart in his affidavit (R. 27-28) state that Raymond Landry never gave permission for burial in lieu of cremation of the body. The Appellant in her affidavit and in the affidavit of her daughter contends that Raymond Landry gave his permission for the burial in lieu of cremation. This apparent factual dispute has little to do with the case at hand. Raymond Landry was not the personal representative of the estate immediately after the death or prior to the funeral. At the time of the funeral, Raymond Landry was without the right or the power to waive the express desires of the deceased.

Raymond Landry was without any power or right to force the cremation of the body until after his appointment as personal representative. The action for his appointment was commenced approximately ten weeks after the death in Arizona; he was appointed nine and one half weeks later by the Court. The action in Salt Lake County was commenced seven weeks later; the matter was initially heard by the

Court on July 27, 1977, three weeks after the filing in Salt Lake City. The Court below, this Court and the parties to this action are without any knowledge of the delays involved in probate matters in the Courts of Arizona. Based on the information before the Court it cannot be said that Raymond Landry unreasonably delayed in pursuing his obligations under the will and seeking probate of the will in Arizona.

Raymond Landry knew the contents of the will at the time of death but he did not have possession of the body and could not comply with the wishes of the deceased. He was without legal right to force cremation at the time of the funeral. Rather than staging a tug-of-war and disrupting the funeral services of the appellant, Raymond Landry pursued his legal remedies in the Courts of law. Raymond Landry, and Joseph Smart now seek to comply through the Courts with the clearly expressed desires of the deceased.

### POINT III

THE EXPRESSED PREFERENCE OF THE DECEASED IS  
PARAMOUNT TO THE WISHES OF THE NEXT OF KIN

The deceased was a member of a religious order. In his will he not only requested that his remains be cremated but that religious services be held in his memory on a daily basis and that his burial service be according to the Old Catholic Rite of which he was a member. He expressly



stated that his ashes be placed in the Chapel of his religious order.

The intensity and seriousness of the religious commitment of Thomas Milton Moyer is clear from the nature of his requests set out in his will. His preference is clearly expressed and must be followed.

The will gave all of his estate to the Brothers of the Atonement, St. Jude's Priory, Phoenix, Arizona, and asked that his ashes be placed in the Chapel of that Priory.

Decedent expressly provided in his will that his remains be cremated. His intent should be fully effectuated. The Utah Uniform Probate Code, Utah Code Annotated §75-2-603 provides that "The intention of a testator as expressed in his will controls the legal effect of his dispositions." In order to give legal effect to decedent's intentions it is necessary that his remains be exhumed and cremated.

Many courts have announced that a person has property rights in his body and intentions to dispose of the body. His intent, if expressed in a will, will be enforced. 7 ALR 3d 749; O'Donnell vs Slack, 123 Cal. 285, 55 P. 906. Decedent's rights to direct such disposition is paramount to privileges and powers of next of kin.

"There is . . . no doubt about the present right of one to direct . . . that his body be cremated after his death. Nor should there be any denial in the ordinary

case of the paramount and prior right of a decedent to determine the place and manner of disposition of his body after death." Johnson, The Law of Cadavers, 2d Ed. (1950).

Recently the Utah legislature enacted the Anatomical Gift Act, (Utah Code Annotated, Chapter 26) Section 26-26-1 of the Act provides that "Any person . . . may make a gift of any part of his body . . . effective on his death by a written statement . . . " Section 26-26-5 of the Act further provides that "The rights of the donor . . . are superior to those of any person claiming as a spouse, relative, guardian or any other relationship." Although there is no Utah case law on the right of a person to determine the ultimate disposition of his remains, Utah Statutory law recognizes such a proprietary right. If a person has the right to give his remains to science despite the contrary wishes of relatives, certainly he must have the parallel right to have his remains cremated. The Utah legislature has determined that a person has a proprietary interest in his body after death superior to any others.

Courts generally recognize the superior right of decedent's expressed preferences for disposition. Some courts have determined that the weight given to decedent's preferences must be guided by the circumstances of each case.

Several courts have held that where decedent's wishes had been recently expressed, those wishes should

prevail. Sacred Heart of Jesus National Church vs Soklowski (1924) 159 Minnesota 331; Mevers vs South Side Cemetary (1945) 94 Pittsburg Legal J. 323; Barder vs Barder (1925) 6 Pa. D and C 720. The deceased composed his will only two weeks before his death. In that will he specifically requested that his remains be cremated.

The testator's religious conviction is a factor that courts have given significant consideration in determining whether his desired mode of disposition be followed. Tkaczyk vs Gallagher, 26 Conn. Sup. 290. Testator in this case centered his life around his religious beliefs. He lived his life in accordance with his religion and desired that his remains be disposed of in a manner harmonious with those beliefs.

In cases decided against decedent's preference, the wishes of next of kin have been honored. However, when the opposing relatives have been more remote than a spouse, testator's wishes have been honored.

Requests for disinterment are not generally favored. However, disinterment has been permitted when one who had a prior right to determine final disposition had been prevented from exercising it. In Cooney vs English (1914) 148 N.V. Supp. 285 the executor of decedent's will was given the right to disinter the remains of the decedent in order to comply with the directions contained in the will. Executor was

given preference over decedent's son who had buried his father's remains without knowledge of the existence of a will.

This case presents a strong argument for disinterment. Appellant buried her deceased son with full knowledge of his wishes to be cremated which were expressed in a will.

Appellant objects to disinterment and cites Enos vs Snyder (1900) 131 Cal. 68 as authority for the proposition that testator's preference is not controlling. In that case, however, testator had not given a preference as to what should be the disposition of his remains, but rather who should make the decision. In the case at bar the will contains an express direction that decedent's remains be cremated.

The holding of the Court in Enos vs Snyder was significantly altered by the Court in the decision In Re Henderson's Estate, 57 P2d 212. That decision held that each case must be decided on its merits and particular circumstances. The Court below in considering the case of Thomas Milton Moyer saw clearly the religious convictions of the deceased as expressed in his will. These were given great weight by the Court in upholding the right of the personal representative to have the body cremated. Under the circumstances in the case of Thomas Milton Moyer, the cremation and the disinterment are justified and proper

because of the expressed and strong felt desires of the deceased.

Remains of a deceased person should not be removed from the place of sepulchre for light reasons. But compliance with the testator's positive direction is not a light reason, but a controlling one.

#### POINT IV

#### THE DECEDENT HAD THE RIGHT AND THE POWER TO MAKE A GIFT OF HIS BODY

Pursuant to the Utah Anatomical Gift Act, Utah Code Annotated §26-26-1 et seq (1953) the decedent had the right and the power to make a gift of his body to any person or entity. There is no limitation in the Utah statute requiring a donation for medical or scientific purposes. Section 26-26-1 and 26-26-2 are permissive as to whom the gift may be made to; Section 26-26-3 is permissive as to the purpose for which the gift may be made; none of these sections limit the purpose of the donation, or the donee.

Section 26-26-8 of the Anatomical Gift Act provides that the act shall be liberally construed.

The will of Thomas Milton Moyer fully complies with the statutory requirements of the Anatomical Gift Act, §§26-26-1 et seq (1953) as amended, and should be upheld as valid, and enforceable by the Court.

CONCLUSION


Decedent expressed in his will his desire that his remains be cremated. A person has a property right in his remains and may determine their final disposition. A person may choose to donate his remains to science or he may choose to have them cremated. A person's wishes that had been expressed recently and which were guided by religious principles are paramount to the wishes of next of kin. Appellant in this case prevented the executor of decedent's will from carrying out decedent's expressed desire that his remains be cremated. Decedent's remains should be exhumed so that they may be disposed of in accordance with the directions of decedent's will.

Respectfully submitted,

Brian M. Barnard  
Attorney for Respondent  
214 East Fifth South  
Salt Lake City, UT 84111

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Respondent to J. Douglas Kinatader, Attorney for Appellant, Legal Aid Society of Salt Lake, 211 East Third South, Suite 203, Salt Lake City, Utah 84111, postage prepaid in the United States Postal Service this 27~~th~~ day of December, 1977.



BRIAN M. BARNARD  
Attorney for Respondent