Legal Control of Burial Rights

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Abstract
This article argues that the common law rule in Williams v Williams, regarding the non-enforcement of burial wishes, is not only unjustifiable, but is also based on shaky jurisprudence and ignores some fundamental human rights issues. Accordingly, the author suggests that a person’s burial wishes should be recognised and enforced by law. Where the deceased left no burial directions, it is suggested that the law should empower the surviving spouse or civil partner to determine the time, place and manner of burial. Apart from the value (for instance, identity) inherent in the legal recognition and enforcement of a person’s burial wishes, the foregoing suggestions provide a decisive framework for adjudicating intra-familial burial disputes.

Keywords
Funerals, Burial Wishes, Burial Direction, Enforcement of Burial Directions

1 Introduction

Burials and funerals can become the focus of intra-familial, feminist, political, cultural, spiritual or philosophical struggle, a fact obscured by the tendency to

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1 In this article, unless otherwise stated, ‘burial’ is used in a sense that includes cremation and other methods of disposal of human remains.


pass off questions relating to the time, place and manner of burial as the emotive or sentimental preoccupation of the bereaved in the immediate aftermath of death. That response, however, belies the fundamental issues of identity, religion, culture and politics raised by questions relating to burial.  

In the early nineteenth century, the iconoclast Jeremy Bentham chose medical anatomisation over burial as the preferable means of disposing of his remains, and also ordered that his skeleton be used to make an ‘auto-icon’ (or self-statue) of himself. Bentham’s action was a symbolic protest against the hegemonic religion and belief in an afterlife that were prevalent in his era. As Davies and Naffine observe, Bentham had no ‘patience with what he regarded as the prevailing mystical nonsense about the spiritual significance of his physical remains’. By willing his body for anatomical dissection, Bentham not only demonstrated his utilitarian purpose—ensuring that sufficient corpses were available for dissection and medical education—he also wished to ‘challenge the dominant contemporary view that the corpse was essential for resurrection and that what was commonly regarded as mutilation of the corpse by the anatomists would therefore threaten the immortality of the soul’. In the late nineteenth century, a period marked by legal uncertainty surrounding the lawfulness of cremation in England and Wales, Dr Price, an Arch-druid and self-declared infidel, cremated the dead body of his five-month old son as a way of giving

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12 Davies & Naffine, above n 10, 105.
14 Davies & Naffine, above n 10.
15 R (Ghai) v Newcastle City Council [2010] 3 WLR 737, 766 (Cranston J).
acute expression to his paganism. More recently, in 2010 a political protester in Tunisia burned himself alive and, as a result, triggered the wave of political unrest now known as the Arab spring. In the same year, the use of death or funeral rituals to express a person’s fundamental belief or personality was demonstrated in the courts in *R (Ghai) v Newcastle City Council*, in which the claimant, an orthodox Hindu, had to go up to the Court of Appeal to get legal recognition of his wish to be cremated on a traditional open-air funeral pyre, which, according to his beliefs, would be necessary for a good death and flourishing afterlife. These examples suggest that the courts should recognise and enforce a person’s lawful burial wishes whenever possible and that to do so would not merely be pandering to some sentimental or religious posturing. Of course, it might not be possible or practicable for the courts to enforce or accord overriding status to burial instructions in some cases, such as where the instruction is illegal or contrary to public policy, or where the deceased’s executor and relatives are opposed to the deceased’s burial instructions and there is no friend or family member willing to carry out the deceased’s burial wishes. However, where judicial recognition and enforcement of burial wishes is possible, such recognition would help to effectuate the conception of his or her identity that the deceased held in life.

Burial wishes, the fulfilment of which depends upon the exercise of ‘burial rights’, therefore raise significant concerns that involve contestations of power, identity, religion and culture. Where the deceased expressed no burial wishes, it is suggested that the law should empower the surviving spouse or civil partner to determine the time, place and manner of burial.

Some caveats might be useful in order to clarify the analytical context of this article. This article is not directly concerned with such questions as to whether or not property interests exist in a corpse or excised parts of a human body. Nor does it seek to explore the remedial potential of using a non-property

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19 Particularly, ‘burial rights’ is used here to indicate the right to determine the time, place and manner of burial.
20 Civil partners have the same right as spouses under the Civil Partnership Act 2004. In *JM v UK* [2011] 53 EHRR 6, the ECtHR held that a same-sex couple would be regarded as a family.
framework, such as the law of negligence or privacy, to redress interference with a corpse or parts of a human body. Such questions and issues are, of course, interesting and important and have certainly generated a considerable amount of academic literature, but the focus of this article is on the legal recognition and enforcement of burial wishes and, by extension, the control of burial rights, such as the right to determine the time, place and manner of burying a dead person. Furthermore, this article does not address the potential impact of the interposition of coronial jurisdiction on the recognition and enforcement of burial wishes and the exercise of burial rights.

Following this introduction, the second part of this article puts burial wishes in context by examining the value and significance of appropriate funerals and burials and the theoretical underpinnings of burial wishes. The third part examines and critiques the common law rule which prioritises the right of an executor to take custody of the deceased for burial, and the fourth part makes a case for the legal recognition of a person’s burial wishes whenever possible. The fifth part examines the intersections between burial wishes and the Human Rights Act 1998. The sixth part argues that, absent burial directions from the deceased, the law should give primacy to the decision of the surviving spouse or civil partner regarding the time, place and manner of burying their partner; the seventh part examines issues relating to the enforcement of burial wishes; and the eighth part draws together some conclusions.


23 The debate regarding the existence of property rights in the body and body parts has been rekindled by recent cases, such as Yearworth v North Bristol NHS Trust [2010] 1 QB 1; Bazley v Wesley Monash IVF Pty Ltd [2010] QSC 118; and Re the estate of the Late Mark Edwards [2011] NSWSC 478. See also R N Nwabueze, ‘Death of the “No-Property” Rule for Sperm Samples’ (2010) 21 King’s LJ 561; C Hawes, ‘Property Interests in Body Parts: Yearworth v North Bristol NHS Trust’ (2010) 73 MLR 130; and M Brazier, ‘Retained organs: ethics and humanity’ (2002) 22 LS 550.

2 The significance of appropriate funerals and burials and the theoretical basis of burial wishes

The nature and content of funeral rites may be determined by their cultural and social contexts,25 but the decent treatment of the deceased is valued in all cultures.26 As the court observed in Vogelaar v US, ‘few things are more cherished, respected, or sacred than the right to bury our dead. There is a cognizable and compensable interest … in the comfort of knowing that the deceased has been given a comfortable and dignified resting place’.27 Funerals are the means through which survivors experience the sort of comfort described by the Vogelaar court. Ritualised mourning, as Harrison observes, achieves the externalisation and depersonalisation of grief, so that through ‘this work of objectification’ the larger community is able to participate in the mourning in order to contemplate their own mortality; ultimately, ritualised mourning enables the bereaved to ‘distantiate and … master the emotions involved’, thereby avoiding the catalepsy or psychic dissolution that ordinarily results from violent grief.28 As such, funeral contracts are grounded in the emotional health and mental well-being of living relatives. Leavitt observes that ‘funeral serves primarily as a viaduct conducting sympathy, good will, and prestige towards the leading mourners. These emotional outpourings are the real objects of the agreement between the survivors and the funeral director’.29 Similarly, O’Rourke and colleagues opine that funeral services aim to maintain social order, facilitate beliefs in spirit and afterlife, assist the process of grieving, and provide opportunities for the expression of emotional connection, love and respect for the deceased.30 What all this means is that funerary rituals are not only, as Reeves suggests, psychotherapeutic31 but, as St Augustine recognised in the fifth century, funerary

26 In Lamm v Shingleton, 55 SE 2d 810, 813 (1949), the court observed that the ‘tenderest feelings of the human heart center around the remains of the dead’.
30 O’Rourke, above n 25, 729–30.
rituals also provide comfort to the living rather than the dead. Thus, Harrison observes that the ‘primary purpose of ritual lament is not to honor the dead, nor to mechanically discharge emotion, but to master grief by submitting its potentially destructive impulse to objective symbolization.’ Funerals are, however, equally important for the dead. Harrison, for instance, observes that ‘so much of the traditional mourning ceremony works to appease the dead, to secure their goodwill, as it were, so that they might go gently, without rage or reluctance, into that good night’. Similarly, Gittings has shown how funerals respond to the needs of the dead and dying.

Gittings illustrates her arguments with wills from medieval England in which testators painstakingly took time to prepare and make elaborate, and often expensive, arrangements for their funerals and burial. A significant part of those arrangements consisted of charitable bequests for the celebration of requiem masses in honour of, and for the repose of the soul of, the dead. Eschatologically, therefore, testators deployed funerals to ‘mitigate the fear of death’ and, through requiem masses, expressed their hope for a shorter stay in purgatory pending their translation to heaven. Not uncommonly, testators specify funeral grandeur in order to highlight the social status and material wealth that they enjoyed during their lifetime. Funeral grandeur could also be a means of constructing the posthumous identity and memorialisation of the dead as what Schneidman calls a ‘post-self’. Jessica Mitford, however, made a blistering attack on ostentatious funerals, condemning the aggressive commercialism of undertakers and observing that the grandeur of most modern American funeral ceremonies bordered on corpse worship.

While these criticisms might generally be valid, Gittings has observed that they do not accord sufficient weight to the fundamental social and religious issues that underpin most funeral rituals. Thus, contrary to the view expressed by

33 Harrison, above n 28, 65–6.
34 Ibid, 69.
35 Gittings, above n 32, 39–58.
38 Gittings observed that funeral grandeur was both ‘a display of status and also self-perpetuating ceremonies’, above n 32, 159.
41 Gittings, above n 32, 24.
St Augustine, funerals are important both for the dead and for the survivors, which raises interesting problems in cases where the deceased and survivors had different expectations for burial. Whose interests should prevail: the deceased’s interest in their posthumous identity and memorialisation; or the survivors’ interest in obtaining psychological relief through a ritualised mourning of their own choosing? While this sort of situation calls for a balancing of the various interests involved in a particular case, it is suggested that the law might wish to accord priority to the wishes of the deceased, whenever possible, because of the importance of the deceased’s posthumous autonomy in comparison to the interests of survivors.

Theoretically, therefore, a person’s burial instructions could be prioritised, recognised and protected as persisting critical interests ‘that survive their death, and hence there are some senses in which an individual’s interests are still in play post mortem’.42 Interestingly, Harris recognises persisting or critical post-mortem interests, although he generally favours a situation where the dead enjoy no legal rights to their body or parts of it. Of course, what Harris had in mind was a legal approach that would facilitate the supply of transplantable organs; thus, he was not opposed to the conscription of cadaveric organs for the purpose of transplantation.43 A person’s interest in the distribution of their property after their death provides a quintessential example of persisting or critical post-mortem interest, and this type of persisting interest is recognised by law through the statutes on wills. However, a person’s interest in the time, place and manner of their burial is no less important than the testamentary distribution of their property and, thus, qualifies as a persisting or critical interest. Harris identifies reciprocity as the moral criterion of persisting or critical interests; for instance, we enforce the lawful testamentary bequests and devices of the dead in the hope and confidence that, after our death, our own wishes would be respected and enforced by the living.44 Arguably, reciprocity equally underpins the enforcement of a dead person’s lawful burial wishes. If, therefore, we fail to honour the burial wishes of the dead, we take the risk that, after our death, the living would thwart our own solemn burial directions.

Harris, however, argues that persisting or critical interests, while potentially able to survive a person’s death, are much weaker or less important than the interests of the living; in other words, persisting or critical interests must yield

44 Ibid, 535.
to the exigencies and dictates of public interest. As persisting or critical interests, however, burial wishes are not susceptible to the limitation identified by Harris, because they hardly engage important or overriding public interests, except where issues relating to organ donation and procurement might be involved. For instance, Williams-type cases do not raise public interest issues as they involve straightforward problems of choice between the burial wishes of the deceased and the mortuary decision of the executor. Absent public interest, therefore, nothing stands in the way of protecting burial wishes as persisting or critical interests.

Similarly, Sperling identifies four categories of interests—pre-birth interests, life-interests, after-life interests, and far-lifelong interests—and observes that the last two types of interests have the potential to survive a dead person. He opines that the deceased could be harmed posthumously by actions that thwart their after-life interests and far-lifelong interests; thus, he argues that certain posthumous interests should be protected as legal rights, such as interests that 'accord with some significant moral attributes characterizing the dead'. Of course, a significant problem in the analysis of posthumous interests, such as those expressed in burial directions, is the difficulty of locating the subject of such interests since, in the case of burial wishes, the person is already dead by the time the question of enforcement arises. In other words, if the thwarting of burial wishes constitutes a posthumous harm, who is harmed? Is it the deceased, who is no longer a person? Price suggests a proprietary solution to this problem, under which a corpse represents the 'property of the ante-mortem person and thus subject to that individual's power of choice and right of control'. In other words, the thwarting of a burial direction harms the ante-mortem person. Sperling, however, doubts a solution based on the ante-mortem person because of the difficult problems of retroactivity and the determination of the moment of harm. He observes that the debate on the subject of posthumous harm is

45 Williams v Williams [1882] 20 Ch D 659.
46 D Sperling, Posthumous Interests: Legal and Ethical Perspectives (2008) 14.
47 Ibid, 84.
50 Feinberg also suggested that the subject of posthumous harm is the ante-mortem person: above n 48, 89.
51 Sperling, above n 46, 20-5.
exacerbated by the binary construction of existence into persons or things, such that, since a corpse is not a person, it can only be a thing and cannot therefore be the subject of harm. To overcome this problem, Sperling conceptualises an abstract, non-material and persistently existent entity which he identifies as the Human Subject, to serve as a third category beside things and persons for the analysis of existence. Sperling’s Human Subject is coterminous with the person when the latter is alive; however, the Human Subject continues to exist after the person’s death and, more interestingly, continues ‘to hold certain human interests important to that person’. Thus, Sperling’s analysis suggests that where a burial direction is thwarted, the interests of the deceased, now held for them by the Human Subject, would be harmed. Sperling observes that although a person might be dead, they nonetheless continue to exist symbolically in the minds, thoughts and language of other existing creatures; thus, he argues that the law should acknowledge and recognise an interest in ‘one’s symbolic existence’. Sperling’s concept of symbolic existence after death implies that the dead could be harmed posthumously by actions that frustrate their burial directions.

More specifically, Sperling argues that a person’s interest in determining the disposal of their body after death could be justified on the basis of a view of autonomy that ‘emphasizes the integrity of the autonomous person’. An integrity account of autonomy enables a person to express their own character and values and allows them to shape their own lives according to their distinctive personality. Thus, Sperling observes that if the ‘person’s prior wishes accord to and are continuous with the person’s overall character and values, there is no justification in arguing that this person, although dead, does not enjoy autonomy’. He also suggests that burial directions could be justified on the basis of the deceased’s ‘prospective autonomy with regard to the manner in which we wish to die or be considered dead because it is a person’s effort to shape, and interest in shaping, other people’s posthumous recollections of her character and values’.

Thus, while Sperling’s conception of the Human Subject might not be generally accepted, his analysis of posthumous interests provides support for the

52 Ibid, 40.
54 Ibid, 40.
55 Ibid, 41.
56 Ibid, 147.
58 Sperling, above n 46, 148.
existence of posthumous autonomy, and the need for its protection through the enforcement of burial wishes in appropriate circumstances.

In the same vein, Conway has argued that showing respect for the autonomous choice of an individual should provide a firm basis for giving legal effect to burial directions. Anticipating Harris’ argument that the dead have no autonomy and thus no posthumous interests in their remains sufficient to override the public interest in harvesting and using parts of cadavers for medically necessary purposes (such as organ transplantation) and research, Conway argues that posthumous autonomy or rights (enabling individuals to make autonomous decisions that relate to the dead body) do actually exist and have been recognised in areas such as posthumous reproduction, organ donation and advance directives. Thus Conway argues that, just as law gives posthumous effect to an individual’s decisions in the three areas identified above, ‘burial instructions should be upheld as an extension of an individual’s autonomy’. In essence, therefore, it is suggested that the notion of extended autonomy provides a strong basis for protecting and upholding burial directions in appropriate circumstances.

In sum, the analysis above suggests that burial wishes and funerals provide authentic media for expressing the social, personal and religious identities of both the dead and their survivors. Thus, the right to determine the time, place and manner of burial was, and largely remains, an important power of enormous social and legal significance. Against this background, the analysis below examines the control of burial rights by the deceased’s executor.

### 3 Control of burial and cremation by the executor

Under the common law of England and Wales, it is generally accepted that the paramount right to control the funeral and burial of a person who died testate belongs to the executor. Even before the will is admitted to probate, an executor is entitled to take possession of the deceased’s body for burial. Space does not permit a detailed analysis of the legislative, substantive and

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60 Conway, above n 2.
61 Harris, above n 42.
62 Conway, above n 2, 433.
63 Ibid.
64 Grandison v Nembhard [1989] 4 BMLR 140; Williams, above n 45.
65 Buchanan v Milton [1999] 2 FLR 844. The relevant statutory position is covered in full in Jervis on Coroners, above n 24, para 7-01.
procedural frameworks for burial and cremation, which are covered in full in *Jervis on Coroners*, but it should be observed that the major statutes on burial and cremation do not engage directly with issues relating to the legal effects of burial wishes. Regulation 15(1)(a) of the Cremation (England and Wales) Regulations 2008 provides the statutory underpinning of the executor’s authority and power over mortuary decisions. It states that ‘an application for cremation must be made to the cremation authority by (a) an executor of the deceased person.’

Where the deceased died intestate, but owned some property, the person appointed as an administrator of the deceased’s estate is entitled to take possession and custody of the deceased for burial. In a situation of urgency, before the appointment of an administrator, the person ordinarily entitled to a grant of letters of administration is given custody of the deceased for burial; however, this is only a convenient and practical rule. In *Holtham v Arnold*, for instance, Hoffmann J held that the deceased’s estranged wife, rather than the claimant with whom the deceased had cohabited for the last two years of his life, was entitled to control the funeral and burial of the deceased because ‘the person lawfully entitled to administration has the duty to conduct the funeral.’ In other words, in the case of testacy, the executors, rather than the deceased or the deceased’s surviving spouse or civil partner, parents or children, are entitled to determine the time, place and manner of burial. However, in the case of intestacy, the deceased’s surviving spouse or civil partner, children, parents, siblings of the whole blood, siblings of the half blood, grandparents, uncles and aunts of the whole blood, and

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66 See *Jervis on Coroners*, above n 24, paras 7-08–7-31.
67 Births and Deaths Registration Act 1953; Registration of Births and Deaths Regulations 1987; Cremation Act 1902; Cremation (England and Wales) Regulations 2008.
68 Also, Births and Deaths Registration Act 1953 s 16(1)(f) and s 17(1)(d) stipulate that the ‘person causing the disposal of the body’ (presumably the executor) shall be qualified to give information for the registration of a person’s death. Similarly, Registration of Births and Deaths Regulations 1987 s 49(1) provides that the registrar shall issue a ‘certificate for disposal’ for the use of the ‘person effecting the disposal’ (presumably the executor).
70 *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474; *Calma v Sesar* [1992] 2 NTLR 37; *Smith v Tamworth City Council* (1997) 41 NSWLR 680.
71 See Non-Contentious Probate Rules 1987 r 22(1); Administration of Estates Act 1925 (as amended) s 46.
72 *Jones v Dodd* [1999] SASC 125; *Jervis on Coroners*, above n 24, paras 7-01 and 7-05.
73 *Holtham v Arnold* [1986] 2 BMLR 123.
74 *Murdoch v Rhind* [1945] NZLR 425; *Robertson v Pinegrove Memorial Park Ltd & Swann* [1986] ACLD 496. For a contrasting case, see *Lewisham Hospital NHS Trust v Hamuth* [2006] All ER (D) 145 (Jan), discussed by *Jervis on Coroners*, above n 24, para 7-03 (Third Supplement).
uncles and aunts of the half-blood (ranked in that order) are legally designated as
the deceased’s next of kin for the purpose of the law of succession under r 22 of
the Non Contentious Probate Rules 1987.\textsuperscript{75} The next of kin of the highest rank
(for instance, the surviving spouse or civil partner) can be appointed as the admin-
istrator of the estate of the deceased and thus is able to determine the manner and
form of burial. As Cranston J observed generally in \textit{Burrows v HM Coroner for Pre-
ston}, the executors ‘have the right to determine the mode and place of disposal of
the body, even where other members of the family object. The personal representa-
tive’s claims to the body oust other Claimants’.\textsuperscript{76} Cranston J however observed
that it is no longer good law that the views of the deceased could be ignored.\textsuperscript{77}
That general common law rule had been declared in \textit{Williams v Williams}\textsuperscript{78} and
had been accepted in the comparable jurisdictions of Australia\textsuperscript{79} and Canada.\textsuperscript{80}
Although Vinelot J observed in \textit{Grandison v Nembhard} that the rigour of the rule
in \textit{Williams} was such that the ‘court had no power in any circumstances to in-
terfere’,\textsuperscript{81} the courts appear to have power to override the priority of the executor
In \textit{Holtham v Arnold}, Hoffmann J observed that section 116 of the 1981 Act ‘is not
really adapted to dealing with the sort of question [control of burial rights] which
is raised in this case’;\textsuperscript{82} however, the detailed analysis of \textit{Burrows} and \textit{Buchanan}
below suggests otherwise.\textsuperscript{83}

3.1 The litigation in \textit{Williams}

In \textit{Williams}, the testator Mr Henry Crookenden directed in his will that, three
days after his death, his body should be given to Miss Eliza Williams for a pur-
purpose which he had already communicated to her.\textsuperscript{84} In a separate letter to Miss
Williams, Mr Crookenden provided detailed instructions for his cremation. At
the death of Mr Crookenden, and against Miss Williams’ protest, the surviving

\begin{itemize}
\item \textsuperscript{75} Non Contentious Probate Rules 1987 r 22(1).
\item \textsuperscript{76} \textit{Burrows v HM Coroner for Preston} [2008] EWHC 1387, para 13.
\item \textsuperscript{77} Ibid, para 20.
\item \textsuperscript{78} \textit{Williams}, above n 45.
\item \textsuperscript{79} R F Croucher, ‘Disposing of the dead: Objectivity, subjectivity and identity’ in I Freckelton & K Petersen, above n 24, 324–342; Queensland Law Reform Commission, \textit{A Review of the Law in Relation to the Final Disposal of a Dead Body} (2011) QLRC 69.
\item \textsuperscript{80} \textit{Saleh v Reichert} [1993] 104 DLR (4th) 384.
\item \textsuperscript{81} \textit{Grandison v Nembhard} [1989] 4 BMLR 140.
\item \textsuperscript{82} \textit{Holtham v Arnold} [1986] 2 BMLR 123.
\item \textsuperscript{83} \textit{Buchanan}, above n 65.
\item \textsuperscript{84} See White, above n 16.
\end{itemize}
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widow and her children, with the consent of the executor, buried him in the unconsecrated part of Brompton Cemetery. Three years later, Miss Williams deceptively obtained a licence from the Home Secretary authorising the exhumation and re-burial of Mr Crookenden in consecrated ground at Manafan in Montgomeryshire. Miss Williams’ real intention in applying for the licence was to take custody of Mr Crookenden’s body and convey it to Italy for cremation; the ashes were then returned to Wales and buried at Manafan. Miss Williams presented the executors with a bill for the costs of this exercise, which they refused to honour, whereupon Miss Williams commenced judicial proceedings.

Kay J thought that the case raised the question of who, as between Miss Williams and the executors, was entitled to the possession of Mr Crookenden’s body for burial or cremation. He observed that ‘there can be no property in the dead body of a human being’, and that ‘after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried’. Finding no property interests in a dead human body, Kay J concluded that Mr Crookenden lacked the power to make a testamentary bequest of his own body:

[T]he direction in this codicil to the executors to deliver over the body to Miss Williams, who is not one of the executors, is a direction which, in point of law, could not be enforced, and was void. She had no right of property in the body under that direction, nor could she enforce the delivery of the body by the executors.

Kay J’s property analysis, while interesting, hardly captured the crux of the claimant’s argument. Simply put, the claimant’s case was that she desired to enforce (and had enforced) Mr Crookenden’s burial wishes. The claimant accepted this as a moral obligation on her part, the satisfaction of which depended on her ability to obtain lawful possession of Mr Crookenden’s body. Thus, the claimant never asserted that she had a right to custody of Mr Crookenden’s body, but that his burial directions were legally enforceable and binding on the executors, who ought to have complied with the direction or surrendered the remains of the deceased to the claimant who was willing to comply with Mr

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85 Mr Crookenden’s remains were transported to Milan, with the assistance of the then newly formed Cremation Society of England: White, above n 16, 175.
86 Williams, above n 45, 662–3.
87 Ibid, 665.
88 Ibid.
Crookenden’s burial direction. Kay J neither accepted nor fully considered this point about the enforceability of burial directions; he rather assumed that the claimant needed to show a proprietary right in the remains of Mr Crookenden. Conway, after highlighting the tenuous nature of the jurisprudence that undergirds the no-property rule expounded by Kay J in *Williams*, observed that ‘in any event, giving effect to the deceased’s burial wishes would not require any explicit recognition of property rights in a dead body, but would simply create a power to give legally enforceable directions in respect of its fate.’ Thus, Kay J’s property analysis largely misconceived or undermined the case made by the claimant, which was most lucidly outlined in her counsel’s written argument:

The direction in the codicil is not exactly a legacy, but it has always been considered that a man can dispose of his own body. If he directs his executors to bury him in a particular place or way they must do so. *Even if there is no property in a body ... a direction as to disposal may be good.*

Croucher seems to have captured these insights, observing that disputes over burial hardly engage proprietary questions; for instance, she opines that ‘rules for arbitrating claims to the body of the deceased are not about proprietary issues; not about property at all. They are reflective of an entirely different logic.’ In the same vein, the claimant’s counsel’s submission above shows that two non-proprietary issues were involved in the case. Firstly, a direction for burial is not a legacy and does not even need to be contained in a will or formal document. If I give directions regarding the way I should be buried after my death, I should not be taken as having made a gift of my body to the person authorised to carry out my instructions in the same way that I might dispose of my possessions in my will. Secondly, and more importantly, a decedent’s burial direction is binding on the executors, regardless of the executors’ entitlement to custody and possession of the decedent’s body. Thus, it was utterly illogical to hold that Mr Crookenden’s burial direction was not binding on his executors because his executors had the legal custody and possession of Mr Crookenden’s body. Accordingly, the critical

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89 Even under the current system, the executor’s right to possession of a corpse for the purpose of burial is not indefeasible; the court can override the executor’s possession under Senior Courts Act 1981 s 116 if special circumstances are shown.
90 Conway, above n 2, 432.
91 *Williams*, above n 45, 661 (emphasis added).
92 Croucher in Freckelton & Petersen, above n 24, 341.
question raised in Williams’ case, whether or not a burial direction was legally binding and enforceable, was left almost completely unanswered and Williams’ case is therefore not sound authority for the common law rule which accords the executor a paramount right of burial that overrides the burial wishes or direction of the deceased.

3.2 Justifications and rationale of the rule in Williams

It is difficult to ascertain, let alone justify, the rationale of the rule in Williams. If the rule was meant to ensure the decent disposal of a corpse and the protection of public health, then it was unnecessary as those objectives had already been effected by the relevant statutory provisions and by the rule in R v Stewart, which imposes duties of burial on specified persons and, in their absence, imposes (as a default rule) a duty of burial on the occupier of the premises in which the deceased died. Atherton, however, argues that the ‘underlying logic and ethical rationale’ for the priority given to the executor reflects ‘an element of extended, or surrogate, autonomy’; in the sense that, being the deceased’s surrogate and repository for the deceased’s wishes with respect to his or her body, the executor is entitled to control the deceased’s burial. Atherton’s justificatory analysis based on surrogate autonomy sits oddly with the right of the executor to disregard the burial wishes of the deceased, as demonstrated by Williams and the Australian case of Milanka Sullivan v Public Trustee.

Arguably, a better justification for Williams is that it avoids, or furnishes a framework for resolving, intra-familial conflicts that often arise when family members disagree on the time, place and manner of burying a deceased relative. Thus, by selecting the executor (or other specified persons) as the legally designated person to control the disposal of a corpse, the rule in Williams avoids, or fairly easily resolves, intra-familial mortuary conflicts. Conway anticipates

96 For instance, a parent with means has a duty to bury their child: R v Vann (1851) 169 ER 523; Clark v London General Omnibus Co Ltd. [1906] 2 KB 648.
97 R v Stewart [1840] 12 Ad & E 1007.
98 Atherton, above n 24.
the merits of this sort of explanatory framework. Accordingly, under the hierarchical structure of burial rights derived from the common law, the rule in *Williams*, as we have seen, accords priority to the executor in the case of testacy and, in the case of intestacy, the right (or, actually, the duty) of burial belongs to the administrator, or the person lawfully entitled to administration. Also, the burial rights of natural parents are prioritised over those of foster parents, and the burial rights of adoptive parents take precedence over those of natural parents. While potentially helpful in resolving family disputes over the exercise of burial rights, the rule in *Williams* was not enunciated against the backdrop of intra-familial mortuary disputes. Moreover, the rule in *Williams* is not able to resolve family conflicts where the parties are equally ranked in the exercise of burial rights, such as conflicting claims between two executors of the deceased, or between a father and mother over the posthumous fate of their deceased child.

In relation to disputes among equally ranked family members, Freckelton, for instance, observes that ‘vesting the entitlement in an executor, an administrator or a person likely to be entitled to be the administrator has proved of little help’. Although Conway suggests that courts are guided by pragmatism in such cases, Freckelton observes that focusing upon the ‘practicalities’ and giving ‘due regard to the need for expeditious burial with proper respect and decency’ had not ‘advance[d] the decision-making far’.

It might be argued that the common law rule in *Williams* vests paramount possession of a corpse for burial in an executor in order to prevent the sort of situation that arose in *R v Fox* and *R v Scott*, whereby creditors could arrest the body of a deceased debtor for debts owned. However, with the condemnation of cadaveric detention in *Jones v Ashburnham* as a practice ‘contrary to every principle of law and moral feeling’, such a rationale has since become

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100 Conway, above n 2, 427.
101 *Williams*, above n 45; *Burrows v Cramley* [2002] WASC 47.
103 *Smith v Tamworth City Council* [1997] 41 NSWLR 680; *Buchanan*, above n 65.
105 Freckelton, ‘Disputed Family Claims to Bury or Cremate the Dead’ (2009) 17 JLM 178, 182.
106 Conway, above n 2, 428.
107 Freckelton, above n 105, 182.
108 *R v Fox* [1841] 2 QB 246.
110 Thanks to Professor Peter Sparkes for this insight. See also *R v Cheere* [1825] 107 ER 1294.
anachronistic.\textsuperscript{111}

4 Legal recognition and enforcement of burial wishes

The following analysis shows that, even before the more recent and important cases of Burrows and Buchanan (examined below) and contrary to the suggestion in Williams that burial directions were irrelevant, the court had indeed recognised burial wishes in certain circumstances, such as liability for funeral payments. The protection of burial wishes in appropriate circumstances might be analagised to some areas where the law currently protects posthumous interests. For instance, the law recognises and enforces the wishes of a dead person concerning the distribution of their property;\textsuperscript{112} similarly, a person’s decision concerning the post-mortem donation of their body or parts of their body for transplantation or medical education is enforced by law.\textsuperscript{113} Whenever possible, therefore, the law might wish to grant similar protection to a burial direction, which from an individual’s personal point of view might be as important as organ donation and testamentary bequests. Thus, Brazier observes that without such protections for burial directions, a person might be ‘rendered defenceless in death’ and that ‘[l]aws which enable me by Will to determine the fate of my material goods, but not my own remains, need to be revisited’.\textsuperscript{114}

The non-recognition of a decedent’s burial wishes creates a number of temporal and transcendental difficulties. Take, for instance, a religious person who believes in reincarnation and regards the burial of the dead body intact as the prerequisite for a flourishing afterlife; if this person’s executor was to cremate the body instead of burying it, their spiritual expectation would have been defeated.\textsuperscript{115} Similarly, a routine disregard for the burial wishes of the dead

\textsuperscript{111} Jones v Ashburnham [1804] 102 ER 905, 909.
\textsuperscript{112} For instance, the Wills Act 1837 (as amended).
\textsuperscript{113} For instance, the Human Tissue Act 2004. In practice, however, organ procurement authorities would respect the wishes of a living relative who objects to cadaveric donation made by the deceased, and this is recognised by the HTA Code of Practice.
\textsuperscript{114} Brazier, above n 23, 564.
\textsuperscript{115} Under regulations 4 and 12(1) of the Cremation Regulations 1930, it was unlawful to cremate the remains of any person who was known to have left a written direction to the contrary. However, regulations 4 and 12(1) above were revoked by regulation 7 of the Cremation Regulations 1965, so that under the current Cremation Regulations 2008 a cremation can take place contrary to the direction of the deceased. See also D A Smale, Davies’ Law of Burial, Cremation and Exhumation,
is likely to motivate the living to make elaborate and expensive arrangements to ensure compliance (after their death) with their burial directions. For instance, a person might bequeath a legacy to a family member or another person on the condition that the recipient comply with the testator’s burial directions. It is unlikely that the common law intended to engender these awkward situations. McGuinness and Brazier have argued that it is important to respect the wishes of the dead because the living have an interest in what happens to them after their death. Thus, the way the dead are treated affects the way we live our lives.

In the eighteenth-century case of Stag v Punter, the court allowed the executors more money for funeral expenses than was ordinarily the practice in the case of insolvent estates; the reason was that the deceased had given a burial direction that entailed more financial outlay. As the court observed: ‘I am of opinion that sixty pounds (rather than £10) is not too much for the funeral expense, especially as the testator had directed his corps (sic) should be buried at a church thirty miles from the place of his death.’ In the context of liability for funeral payments, therefore, the court held that the executors’ compliance with the deceased’s burial direction was a relevant consideration. Ambrose v Kerrison is another interesting case where compliance with the deceased’s burial direction was an important consideration in determining the defendant’s liability for funeral payments. Ambrose established the anachronistic common law rule that a husband was bound to bury the corpse of his wife and, therefore, was liable for her funeral expenses, even if his wife was separated from him before her death. However, Ambrose is more interesting for the way in which the court treated the effect of burial directions on the then duty of a husband to bury his wife. In Ambrose, the husband and wife had been married in 1820, but had separated soon afterwards. Mrs Kerrison (the wife) had lived alone at Kelvedon, Essex but had then moved to Camberwell where she died in 1850. Gale, Mrs Kerrison’s friend, learned about her death and, on searching Mrs Kerrison’s house, found that she ‘had expressed a desire to be placed in the family-vault at

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118 Stag v Punter [1744] 3 Atk 119.
119 Ibid.
120 Ambrose v Kerrison [1852] 10 CB 776. See also Thomas v Harris [1947] 1 All ER 444.
121 The rule was abrogated (impliedly) by the Married Women’s Property Act of 1882, as confirmed by the Court of Appeal in Rees v Hughes [1946] KB 517.
Kelvedon’.\footnote{Ambrose, above n 120, 777.} Without locating Mr Kerrison, Gale contacted a distant relative of Mrs Kerrison’s who organised and paid for Mrs Kerrison’s burial at Kelvedon. The relative then sought to recover the burial expenses from Mr Kerrison. Mr Kerrison argued that he was only obliged to pay about half of the total sum sought, being what the funeral expenses would have been had the burial taken place in Camberwell—that is, excluding the money spent in the transportation of Mrs Kerrison’s corpse to Kelvedon. Thus, he argued that he was not liable for the additional burial expenses entailed by compliance with Mrs Kerrison’s burial wishes. Parke B observed that ‘her wishes as to the place of interment were reasonable wishes, and might be properly complied with.’\footnote{Ibid, 778.} On appeal, however, Mr Kerrison’s counsel appears to have conceded the reasonableness of Mrs Kerrison’s burial wishes and focused, instead, on a different contention, to the effect that a husband was not liable for the funeral expenses of his separated wife. That argument was equally dismissed by the Court of Appeal, which concluded that there was no need to ‘discuss the propriety of incurring the expense of removing the deceased to Kelvedon for interment’.\footnote{Ibid, 779.} Thus, the court sanctioned the payment of expenses reasonably incurred as a result of following the deceased’s wishes, indicating that burial directions could be relevant in certain circumstances.

Unlike the cases above, \textit{Buchanan v Milton} is one of the few cases where the legal effects of a burial direction were specifically considered.\footnote{Buchanan, above n 65.} In \textit{Buchanan}, the applicant, an Aboriginal Australian, was the deceased’s birth mother and applied to have the mother of the deceased’s daughter displaced as administrator of the estate of the deceased solely in relation to the issue of burial. The application was brought on the basis of section 116 of the (then) Supreme Court Act 1981:

\begin{quote}
(1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
\end{quote}

The deceased had been born in Australia, was put up for adoption when he was four days old and, two years later, was adopted by an English couple who

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\footnote{Ambrose, above n 120, 777.}
\footnote{Ibid, 778.}
\footnote{Ibid, 779.}
\footnote{Buchanan, above n 65.}
were then resident in Australia but subsequently returned with the deceased to live in England. The deceased died in a road accident at the age of twenty-six, being survived by his infant daughter. A dispute arose between the deceased's adoptive mother, who wanted to bury the deceased in England, and his birth mother, who wanted to bury him in Australia. Hale J identified six special circumstances that were relevant: the circumstances of the deceased's adoption; the deceased's Aboriginal heritage; the initial agreement for the disposal of the deceased; the interest of the deceased's daughter; the interests of the deceased's Australian family; and the deceased's wishes. Hale J held that, under the above circumstances, the displacement sought under section 116 of the Supreme Court Act 1981 was not necessary because 'arrangements for the disposal of the remains had already been made before the applicant came on the scene'. Hale J then considered whether it was expedient to grant the application in view of the views of the birth family, the views of the adoptive family, the interests of the deceased's daughter, and the wishes of the deceased. After balancing these factors, Hale J concluded that it was not 'expedient to displace the persons ordinarily entitled to the grant of letters of administration of the estate'. As regards the deceased's wishes in particular, Hale J observed that it was not 'argued on behalf of the applicant that the deceased would have wished his remains to be returned to Australia. There is no evidence to suggest that he would'. Thus, Buchanan begins the articulation of a framework of burial rights that involves a balancing of competing interests, including the burial wishes of a decedent. It highlights the relevance of the deceased's burial direction as a significant factor in the application of section 116 of the Senior Courts Act.

However, the most telling erosion of the authority of Williams is the recent decision of Cranston J in Burrows v HM Coroner for Preston. In Burrows, the deceased's uncle and the deceased's natural mother could not agree on his final resting place. The uncle had lived with the deceased for the last eight years of the deceased's life and wanted his nephew to be cremated according to the wishes he had expressed in life. However, the deceased's mother wished him to be buried. She was entitled to administration under r 22(I)(c) of the Non Contentious Probate Rules 1987 and was therefore entitled to control the funeral arrangements.

126 Ibid, 855.
127 Ibid, 857.
128 Ibid. See also T R Shek, 'Can Dust Remain Dust? English Law and Indigenous Human Remains' (2000) 5 Art Antiquity & Law 265, 283, emphasising the importance attributed to the deceased's wishes, or lack of it, in Buchanan.
and disposal of the deceased. The deceased’s uncle brought an application under section 116 of the Senior Courts Act, seeking to displace the deceased’s mother as an administrator in relation to the disposal of the deceased. Cranston J began his judgment by considering the common law principle stated in Williams in the light of the European Convention on Human Rights (ECHR); he observed that the impact of the ECHR had not been ‘considered by the domestic authorities’ in relation to burial conflicts. Cranston J observed that while Articles 8 and 9 of the ECHR might be relevant to burial conflicts, Article 8 was the more relevant for the decision in Burrows.

After a review of some of the relevant jurisprudence on Article 8, which attached importance to the wishes of the deceased in relation to their disposal, Cranston J observed: ‘[o]ne thing is clear, that in as much as our domestic law says that the views of a deceased person can be ignored it is no longer good law. That rule of common law can be traced back to Williams v Williams, where it was said that directions given by a deceased as to the disposal of his body were not enforceable as a matter of law’. Cranston J observed that this change of legal policy was dictated by the ECHR and the jurisprudence of the European Court of Human Rights, under which the ‘views of a deceased person as to funeral arrangements and the disposal of his or her body must be taken into account’. However, Cranston J observed that the Strasbourg jurisprudence, which demands that the views of the deceased should be taken into account in relation to burial conflicts, is ‘easily accommodated within domestic law: in this type of case a person’s wishes can be regarded as a special circumstance in terms of s 116 of the Act’. The earlier analysis of Buchanan, under which the burial wishes of the deceased were regarded as a relevant consideration for the purpose of section 116 of the (then) Supreme Court Act, justifies Cranston J’s observation that domestic law has incorporated Strasbourg’s jurisprudence according respect to burial directions.

Furthermore, Cranston J observed that apart from the wishes of the deceased, the claims of other family members in relation to the disposal of the deceased might be engaged by Article 8(1) of the Convention: ‘[t]here may be, for example, as there was in this case, the family life that Liam [the deceased] enjoyed with the Burrows family on the one hand and his family life with his mother, Mrs McManus on the other hand’. Thus, he observed that ‘there is no doubt that

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130 Ibid, para 18.
131 Ibid, para 20.
132 Ibid.
133 Ibid, para 21.
those in Mr Burrow’s position can invoke art 8.1.134 Such a conflict of rights under Article 8 would require the court to consider the ‘comparative importance of the different rights being claimed, and to balance those competing rights so as to minimise the interference with each to the least possible extent’.135 Accordingly, Cranston J identified five special circumstances relevant for the claimant’s application under section 116 of the Act:136 the long-time addiction of the deceased’s mother to heroin; the deceased’s clear wishes that he wanted to be cremated; the intention of the deceased’s mother to bury the deceased (contrary to the deceased’s wishes); the deceased’s relationship with his uncle’s family; and the interest in burying or cremating the deceased in the St Helen’s area where he had spent the last eight years of his life. Cranston J concluded that these special circumstances ‘all point in the direction of varying the priority given to the natural mother…and therefore giving the right to the Burrows to take Liam’s body and to arrange the funeral’,137 and that, given the deceased mother’s addiction and inability to assume responsibility for the funeral, ‘it is necessary for the natural mother’s rights to be displaced’.138 Thus, Burrows has made it clear that the law requires the wishes of the deceased to be considered in matters relating to their disposal.

Since burial wishes are just one of the competing factors to be considered in a particular case, whether or not they should prevail must depend on the circumstances of each case and the nature and strength of other competing interests; this calls for a balancing exercise by the judge. Such a conflict might arise where family members are opposed to the deceased’s burial wishes. For example, the deceased might have directed that he wanted to be cremated, but his parents, who qualify as next of kin, are opposed to cremation for religious reasons: whose view should prevail? Of course, this sort of problem arose in Burrows, where the deceased’s wish to be cremated, although supported by his uncle, was contrary to the mother’s wish to bury the deceased. Cranston J observed that the views of the deceased and the uncle (on the one hand) and the deceased’s mother (on the other hand), although in conflict, were all protected under Article 8 of the ECHR. Cranston J observed that such cases require an analysis of the comparative importance of the different rights involved, and the balancing of such competing rights to minimise a conflict. It is suggested that

134 Ibid.
135 Ibid.
137 Ibid, para 27.
138 Ibid.
such comparative assessments and balancing of competing interests should be resolved in favour of the deceased’s burial wishes in three circumstances.

First, consider a case where the deceased died testate and left a burial direction which the executor is willing to enforce but, for religious or cultural reasons, the deceased’s burial direction is not acceptable to the deceased’s family members who plan an alternative burial arrangement for the deceased. ‘Family members’ should be construed in a wide sense to recognise the fragmented nature of modern familial relationships. For instance, the Civil Partnership Act 2004 recognises that a civil partner ranks as one of the closest family members of the deceased. Arguably, the deceased’s family members should also include a cohabiting partner, long-term boyfriend or girlfriend and stepchildren, yet succession law (as noted above) does not recognise this latter category of people as the deceased’s legally designated next of kin. Unfortunately, the deceased’s legally designated next of kin may not ‘truly reflect the relationship which the deceased enjoyed while alive, and may not correspond with the deceased’s subjective understanding of who represents his or her family’. In balancing the competing interests of the deceased and those of the family members as highlighted above, it is suggested that the court should give primacy to the burial wishes of the deceased which the executor is willing to enforce; such an outcome reinforces the (extended) autonomy of the deceased and the deceased’s critical or persisting interests, as well as giving effect to the executor’s paramount right of burial under the common law. Although the interests of the deceased’s family members are also important, they should take a secondary position to the interests of the deceased for the reasons already highlighted.

Second, there might be cases where the deceased died testate and left a burial direction which the executor is unwilling to enforce although the surviving spouse or civil partner and other close family members of the deceased are willing to comply with the deceased’s burial direction. Should the executor’s contrary plan for burial prevail over that of the deceased, which is supported by the deceased’s close family members? Under the rule in Williams, the burial arrangements made by the executor would prevail over the burial direction of the deceased, even if the deceased’s burial direction is supported by the deceased’s close family members; however, such an approach potentially conflicts with the rights of the deceased and the deceased’s family members which, in certain

139 In EM (Lebanon) v Secretary of State for the Home Department [2009] 1 AC 1198, Lord Bingham observed that ‘there is no pre-determined model of family or family life to which article 8 must be applied’.

140 Conway, above n 2, 435.
circumstances, might be protected under Articles 8 and 9 of the ECHR. In balancing the competing interests of the deceased and family members against the right of the executor, it is suggested that a court should give priority to the deceased’s burial wishes (supported by family members) for the reason that burial and funerals vindicate the extended autonomy and posthumous identity of the deceased, as well as providing comfort and psychotherapeutic relief to survivors, rather than the executor (at least, to the extent that the executor is a non-family member). In such cases, there is no logical purpose to be served by giving the executor’s claim an overriding status.

Third, and finally, there might be cases where the deceased died intestate and left a burial direction to which the surviving spouse or civil partner, or other family members, are opposed—in other words, the deceased’s burial wishes, standing alone (without the support of an executor), conflict with those of close family members. How would the court balance such competing interests? Under the common law, the interests of the surviving spouse or civil partner or the highest-ranking next of kin would prevail. However, fidelity to the deceased’s extended autonomy as expressed in their burial wishes means that a court should prioritise the deceased’s burial wishes in such circumstances whenever possible; the interests of the deceased’s family members should rank second to the interests of the deceased in the posthumous fate of their remains. Who then would carry out the deceased’s burial direction? Of course, it is absurd to expect or compel close family members to carry out a burial direction to which they are opposed; in order to deal with a practical problem of this sort, the court should grant standing to any member of the deceased’s family (close or distant) or even a third party who is willing to comply with the deceased’s burial direction. 141 Otherwise, the balance would be resolved in favour of the wishes of the deceased’s family.

5 Burial directions and the Human Rights Act

The framework of the Human Rights Act 1998, which incorporates Articles 8 and 9 of the ECHR, is certainly relevant to the analysis of burial conflicts with a vertical dimension, such as those in Burrows and Ghai (below) because section 6(l) of the Human Rights Act makes the Convention binding against public

141 This, however, raises some issues for future consideration, such as who is to pay for the expenses of carrying out the burial direction, and what if there is insufficient money in the estate to pay for the deceased’s funeral arrangements? In such situations the deceased might wish to make sufficient money available for the execution of their burial direction.
authorities. It is doubtful that the human rights framework is applicable to burial disputes in horizontal cases, such as Buchanan, although it is possible that indirect horizontal effects could be achieved through the duty imposed on the courts as a public authority under sections 3 and 6 of the Human Rights Act. Thus the analysis below, highlighting the potential role of the Human Rights Act in the resolution of burial disputes, assumes a context in which a public authority is involved.

Even within the limited sphere of operation of the Human Rights Act in relation to burial conflicts and burial directions, some complex and difficult issues still arise. For instance, are burial wishes (or directions) entitled to posthumous protection under the Human Rights Act? Davies and Naffine have argued, persuasively, that a person’s legal personality or personhood transcends their biological death, through the instrumentality of a will. Legal orthodoxy, however, stipulates that human rights are personal to living human beings and, therefore, expire upon the bearer’s death. In that sense, a burial direction would not be enforceable as a human right after the person’s death, for the simple reason that the deceased has ceased to be a human being and, as such, is not a subject with rights, much less human rights. In Jones v United Kingdom, for instance, the applicant argued that the refusal of a burial authority to allow him to place a memorial incorporating a photograph on his daughter’s grave violated his right under Article 8 of the ECHR. The European Court of Human Rights observed that ‘the exercise of Article 8 rights of family and private life pertain, predominantly, to relationships between living human beings’, and that while Article 8 might extend to certain situations after death, such as the right to attend a deceased relative’s funeral, ‘there is no right as such to obtain any particular mode of funeral or attendant burial features’. More recently, in Ibuna v Arroyo, the claimant (the deceased’s partner), supported by the deceased’s daughter and executrix, planned to bury the deceased (a Filipino Congressman who had died in London) in accordance with the deceased’s wishes but contrary to the burial

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142 See e.g. H Fenwick, Civil Liberties and Human Rights (4th edn, 2007) 249–256.
143 Davies & Naffine, above n 10, 100–4.
144 Silkwood v Kerr-McGee Corporation, 637 F 2d 743 (10th Cir 1980).
145 See the US case of Na Iwi O Na Kayuna O Mokapu v Dalton, 894 F Supp 1397 (1995), where the court rejected an argument that a dead human body was a person, and could bring a lawsuit in its own name.
146 Jones v UK, App no 42639/04 (ECtHR, 13 September 2005).
147 Ibid, para 2.
148 Ibid, para 2.
arrangements made by the deceased's estranged wife. Peter Smith J accepted that, in determining the person with the right to control the disposal of the deceased, the court should identify and balance the various competing interests of the parties, including the wishes of the deceased Congressman, as stipulated in Buchanan and Burrows. However, unlike Cranston J in Burrows, Peter Smith J held that the deceased's burial wishes were not entitled to the reinforcement of human rights protection because he had 'some difficulty in a post-mortem application of human rights in relation to a body as if it has some independent right to be heard which is in effect what Cranston J is saying'. Thus, Peter Smith J was sympathetic to the traditional principle that human rights expire upon death and that 'there is no room further for any application of any human rights concepts to protect the right of the body to speak from death as it were'.

In two ways, however, a person's burial wishes could be given legal effect in their lifetime under the Human Rights Act. First, it is arguable that burial wishes are protectable privacy interests under Article 8. For instance, in Ghai, Ghai wished that, consistent with his orthodox Hindu belief system, his body should be cremated on an open-air funeral pyre and, for that purpose, he sought a pledge of land from the defendant Council, which would be dedicated to Hindu-type cremations. The Council refused to grant Ghai's request, arguing that open-air funeral pyres were prohibited under the Cremation Act of 1902 and the Cremation (England and Wales) Regulations 2008. Consequently, Ghai brought an application for a judicial review of the Council's decision. Before Cranston J, at first instance, Ghai argued that the prohibition of open-air funeral pyres under the Cremation Act and its regulations violated his rights under Articles 8 and 9 of the ECHR. Cranston J observed that 'in some circumstances the respect accorded to private (and indeed family life) in Article 8 can extend to aspects of funeral arrangements. That is because they are so closely related to a person's physical, psychological or familial identity'. While Cranston J accepted that

149 Ibuna v Arroyo [2012] All ER (D) 36.
150 Ibid, para 50.
151 Ibid.
152 Some cases have held that matters of burial and exhumation engage the protection of right to private and family life: Dödsbo v Sweden (2007) 45 EHRR 581; Ploski v Poland, App no 61654/00 (ECHR, 12 November 2002); Pannulo and Forte v France (2001) 36 EHRR 757.
153 Price observed that the 'Convention is not applicable to deceased persons but rights under article 8 might be invoked prior to death in respect of the subsequent treatment of the cadaver': D Price, 'The Human Tissue Act 2004' (2005) 68 MLR 798, 810.
154 Ghai, above n 15.
155 Ibid, 790.
'Article 8 is capable of being engaged because the claimant is prevented from choosing during his lifetime the manner of his funeral to avoid a bad death,'\textsuperscript{156} he concluded that Article 8 was not engaged in this instance because open-air funeral pyres involved the performance of a public activity outside the realms of privacy protection.\textsuperscript{157} Similarly, although Cranston J held that Ghai’s Article 9 rights were engaged, he concluded that any interference with those rights was justified under Article 9(2).\textsuperscript{158} On appeal, however, Ghai produced further evidence upon which he argued that, instead of open-air funeral pyres, the law permits cremations done within any enclosed structure that qualifies as a ‘building’ under the Cremation Act; he also argued that such cremations could be done with traditional fire, under the glare of sunlight directed to the body during the cremation process. Lord Neuberger accepted Ghai’s revised claims, observing that ‘Mr Ghai’s wishes as to how, after his death, his remains are to be cremated can be accommodated under the Act and the Regulations’.\textsuperscript{159} Thus, the Court of Appeal in Ghai decided the case under the Cremation Act rather than the Human Rights Act. X v Federal Republic of Germany also shows that funeral arrangements might be inextricably intertwined with a living person’s identity and privacy.\textsuperscript{160} In that case, the applicant wished to be cremated after his death and for his ashes to be scattered on his own land. He applied to the German authorities for permission for his ashes to be scattered on his land after his death but the application was rejected. The applicant argued that this rejection amounted to a violation of his right of privacy under Article 8. The European Commission on Human Rights ‘doubted whether or not this right [Article 8] includes the right of a person to choose the place and determine the modalities of his burial’.\textsuperscript{161} However, it held that Article 8 was engaged, reasoning that while funeral ‘arrangements are made for a time after life has come to an end, this does not mean that no issue concerning such arrangements may arise under Article 8 since persons may feel the need to express their personality by the way they arrange how they are buried’.\textsuperscript{162}

Second, a burial wish grounded in a religious faith might be protected as the manifestation of religion or the practice and observance of a religion

\textsuperscript{156} Ibid, 789.
\textsuperscript{158} Ghai, above n 15, 796.
\textsuperscript{159} Ibid, 807.
\textsuperscript{160} X v Federal Republic of Germany (1981) 24 DR 137.
\textsuperscript{161} Ibid, 139.
\textsuperscript{162} Ibid.
under Article 9(1). As we have seen in Ghai, Cranston J accepted that the claimant’s religious belief relating to an open-air funeral pyre cremation was genuine, serious and held in good faith and, thus, qualified as a manifestation of religion under Article 9. Consequently, he observed that the ‘1902 Act and 2008 Regulations stifle the claimant’s desire to have an open air funeral pyre [and therefore] constitute an interference with the manifestation of his religious belief’. Nonetheless, the interference was found to be justifiable under Article 9(2) of the ECHR. Similarly, a person (while alive) might wish that their organs should be harvested after their death, for purposes of transplantation, anatomical dissection or public display; that sort of pre-mortem decision is enforceable post-mortem under section 3 of the Human Tissue Act 2004.

6 The position of a surviving spouse or civil partner

Where the deceased left no burial directions, or where such directions are not legally or practically enforceable, it is suggested that the law should give primacy to the right of the surviving spouse or civil partner to make decisions relating to burial. The law already does this in the case of intestacy, by selecting the surviving spouse or civil partner as the most favoured person to determine the time, place and manner of burial under section 46 of the Administration of Estates Act and rule 22(1) of the Non-Contentious Probate Rules 1987 which designate persons who qualify as the deceased’s next of kin (although for purposes of the law of succession) and rank them in the following order: surviving husband or wife (or civil partner); children; parents; siblings; grandparents; and uncles and aunts. Thus, being entitled to the grant of letters of administration, the surviving spouse or civil partner would be entitled to determine the time, place and manner of burying a deceased partner.

Problems might, however, arise where the deceased died testate but the executor’s arrangements for burial conflict with those of the surviving spouse. Under the rule in Williams, as emphasised in the Commonwealth cases of Hunter

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163 Ghai, above n 15, 777. See also R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246.
164 Ghai, above n 15, 778.
166 In practice, however, organ procurement authorities do respect the contrary wishes of the deceased’s living relatives.
the wishes of the executor as to burial would prevail over those of the surviving spouse or civil partner. However, should such a case of conflict also involve a public authority, the Convention rights of the surviving spouse or civil partner in relation to bereavement under Articles 8 and 9 might be engaged, meaning that priority might be given to the surviving spouse or civil partner instead of to the executor’s paramount right of burial under the common law. For example, Article 9 protection of the burial right of a surviving spouse or civil partner was emphasised in Re Crawley Green Road Cemetery, Luton, where a humanist was mistakenly buried in a consecrated grave after a humanist funeral. The court permitted his exhumation, but only on the ground that the ‘court would…be acting unlawfully if it were to act in a way which is “incompatible” with her [the petitioner-widow’s] rights under Article 9’.

Human rights apart, intuition suggests that, in the absence of burial instructions from the deceased, decisions regarding funeral and burial should be made by the surviving spouse or civil partner, the deceased’s closest kin. Statutorily, this sort of intuition is instantiated by section 27(4)(a) of the Human Tissue Act 2004, which puts the surviving spouse or civil partner at the apex of the hierarchy of persons entitled to give consent for the use of cadaveric tissues. Thus, absent the testator’s burial directions, the court should more readily accord priority to the burial arrangements made by the surviving spouse or civil partner over those made by the executor.

7 Enforcement of burial wishes of the deceased

Should there be a change of legal policy, so that burial wishes become legally recognisable and directly enforceable, a few practical and legal difficulties relating to enforcement would need to be addressed. For instance, there is a potential problem of whether giving full effect to the wishes of a deceased person might give free rein to, for example, the sort of eighteenth-century grandiosity highlighted by Gittings in the case of Henry Trigg who devised his house to a beneficiary on the condition that the beneficiary lay Henry Trigg’s remains on the rafters of the outhouse. In a more recent case in the US, a deceased’s request to be buried wearing valuable jewellery was refused by the court on the
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8 Conclusion

It is important that, whenever possible, the law should recognise and enforce lawful burial wishes because they express a person's identity, personality and fundamental interest in posthumous memorialisation. It is suggested that a person's wishes regarding their funeral and burial might be grounded in certain transcendental expectations, and the execution of such wishes might bring some psychotherapeutic relief to survivors. Thus, social and cultural contexts might affect the recognition and enforcement of a person's burial wishes. The law has made some progress in the protection of a decedent's burial direction by regarding it as one of the special circumstances to be considered under section 116 of the Senior Courts Act and, in cases involving a public authority, such wishes might attract the protection of the Human Rights Act. Therefore, it is suggested that the rule in *Williams* is anachronistic, legally and socially unjustifiable, and has outlived its usefulness. In the case of burial conflicts, therefore, the law should accord priority to the burial wishes of the deceased, provided that such wishes are lawful, reasonable and practicable, and that there is somebody willing to enforce them; it is suggested that such an approach recognises and protects the deceased's

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172 In the Estate of Meksras, Pa D & C 2d 371 (1974).

posthumous autonomy. In the absence of the deceased’s burial wishes, priority should be given to the right of the surviving spouse or civil partner to determine the time, place and manner of burying the deceased.