Only Love Remains: Straddling the Real and the Symbolic in the Disposition of Cremated Remains Between Divorced Couples

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Introduction

A divorced couple, having lost their adult son to an automobile accident, agreed, as bereaved family members now do more and more often, to have his body cremated.1 Once the young man’s body was reduced to what the funeral industry denotes as “cremains,”2 the parents could no longer agree on the disposition of this residuary material.3 Each had a preferred burial location for the ashes. As with other similar cases, one parent asked the court to order the ashes to be divided evenly between them, while the other opposed that request, seeking to have the ashes remain undivided.

Wilson v. Wilson,4 decided in 2014, is the most recent in a small set of cases that consider whether the cremated remains of a divorced couple’s child are property of the marriage and whether they are subject to division. These cases reveal a problem likely to increase over time as the funerary practice of cremating human remains grows in both frequency and acceptance. If King Solomon were faced with the Wilsons’ conflict over a living child, he would no

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3 Wilson, 138 So. 3d at 1177.
4 Id. at 1176.
doubt have awarded the child to the parent who wished to keep the child intact, but the nature of cremated remains, being diffuse and not singular, makes the wisest choice far less obvious.

What this problem and these cases reveal is the fraught position that both cremation and marital property law occupy in American culture. The bereaved’s relationship to cremated remains, like property law, straddles the border between the real and the symbolic. Of course, all burial practices have a symbolic dimension: the term “final resting place” suggests that the lifeless corpse nonetheless will rest as a living person might, while the grave is visited as if it is the residence of a loved one. Cremated remains are similarly both real and symbolic. Consisting primarily of pulverized bone left behind after the rest of the body has been vaporized in the cremation process, they are the actual residue of the living being, and their relationship to that living person can theoretically be verified through the use of DNA technology. However, their meaning to the bereaved, whether kept in a single vessel or divided, is symbolic: It is as if grandma is in the urn on the mantle. Further, the growing popularity of cremation keepsakes, jewelry, and other memorabilia, each holding only a small fraction of a single person’s remains, suggests that cremation, more so than the more traditional funereal practice of burial, provides the bereaved with an increasingly symbolic relationship with the living body of their lost loved one. When multiple loved ones wear a pendant in which a few grams of cremated remains have been fused with glass, it is as if they all carry the whole person of the departed with them.

In a similar manner, property law connects the real with the symbolic. As first year property law students quickly learn, one does not own the dirt of the estate itself; rather, one has a legal relationship with others regarding the physical land. It is merely as if the dirt itself were owned. Yet, this relationship remains related to the physical land or to objects, as in the case of personal property. In marital property, the relationship becomes even more symbolic. While marital property encompasses real and personal property, it also often includes intangibles, like professional degrees, pension rights, and business goodwill, which are sometimes treated as if they are physical objects, and when divided, as if a line were drawn in the dirt.

5 1 Kings 3:24-5 (King James). Presumably there are some number of instances in which the parent seeking to keep the remains intact accedes for that reason to the other parent’s preferred burial location (much like the “true mother” in the King Solomon parable forgoes her custodial rights), but those cases do not end up litigated and reported.
7 See infra notes 33, 34, 37, 39 and accompanying text.
This Article examines what happens when these two symbolic systems collide. Three courts, including *Wilson*, confronted a similar set of facts. In *Wilson*, the Florida District Court of Appeal, responding to the father’s request for a determination that the cremated remains were marital property, found that they were not, reasoning that under Florida law human remains were not property to begin with. Whether an order to divide the remains would be appropriate as a resolution to the dispute, even in the absence of a finding that they were property, was not addressed by the court, presumably because it was not specifically raised by the appeal. Similarly, the court in *Kulp v. Kulp* found that the remains were not property, yet nonetheless continued to consider the propriety in the court’s ordering the remains divided. The court determined under its facts that the lower court had abused its discretion by so ordering. By contrast, an Indiana appellate court recognized an entitlement, but not a property right, in the burial or disposition of cremated remains, and determined that an order to divide the remains was appropriate even if they were not property.

The facts in *Jackson v. Jackson* are somewhat different from *Wilson* and *Kulp*. The cremated remains at the center of the dispute between the divorcing spouses were those of a stillborn child. There, the court determined that the remains were property and would be considered marital property but for the public policy considerations the court recognized. The court held that New York's public policy in favor of a woman’s reproductive rights and her “full control over the progress and outcome of her pregnancy” mandated that the remains of a fetal death were the mother’s separate property, and for that reason she was not required to divide those remains with her husband. The logic of the opinion suggests that the remains of a live-born child who died later would be marital property subject to division.

In Part I of this Article, I discuss the symbolic role of cremation in American culture, noting that as cremation practices have evolved, the cremated remains function as symbolic referents of the deceased rather than as literal remnants, but with the real quality of the remains enhancing the symbolic dimension. In Part II, I apply a similar analysis to marital property law, suggesting that it too functions in the symbolic realm, with the denotation of something as marital property serving to symbolize the couple’s relationship to work, to value, and to one another. Human remains, I argue, and particularly cremated remains, fit awkwardly into this system; whereas intangible assets are often treated as if they

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12 Id. at 1179.
14 Id.
17 Id. at 478.
18 Id. at 479–80.
19 Id. at 481.
20 Id. at 479.
are real, cremated remains, despite their tangibility, are treated as if they are intangible. In Part III, I identify the ways in which the parties and the courts fail to recognize the symbolic dimension of their disputes, through each of these realms. I postulate that the parties to the typical dispute, and the courts that side with one or the other, fail to recognize the separation between the real and the symbolic. Those that would hold that the cremated remains are not marital property and are to be kept intact conflate the symbolic quality of the remains with the real person they represent. At the same time, those who argue the cremated remains should be divided also conflate the symbolic quality of the remains with the real person they represent. Meanwhile, marital property law offers a system for determining property rights that in its own way negotiates the real and the symbolic. However, the mechanisms of its symbolic system are ill-equipped to process the challenges offered by cremated remains. Caught between two symbolic systems that do not fully mesh, courts find it difficult to fashion a remedy that recognizes and honors the different meanings the bereaved parents attach to the remains.

I conclude that the opportunities for symbolic meaning afforded by cremation practices should embolden courts to recognize a marital property interest in cremated remains for purposes of dividing them. Indeed, the impulse that courts share with members of the larger culture to conflate the person with the remains that symbolize that person (an impulse that underlies the hesitation to divide the remains) should instead weigh in favor of a result that distributes the symbolic opportunities more equitably.

I. Cremation in American Culture: Its Symbolic Dimension

The use of cremation as a funerary practice has grown considerably in recent years.21 Based on its current growth, the Cremation Association of North America (CANA) projects that by 2018, cremation will be chosen for the disposition of the body in more than fifty percent of all deaths in the United States.22 Following cremation, the funeral industry and related markets offer a dizzying array of choices for memorializing the deceased. While the options related to burial are limited, cremated remains can be buried, scattered, kept in a decorative urn in the home or elsewhere, released at near-space altitude, worn around the neck in jewelry, or fused into other keepsakes.23 This variety facilitates a concomitant multiplication of the ways in which the living can relate to and maintain a symbolic connection to the deceased.24

24 One commentator, who has analyzed a variety of cremation-related marketing material in the United Kingdom, finds that these advertisements make it clear that, contrary to what might be thought, cremation does not limit choice but, rather, increases
Despite these developments, there has been little written on the social meaning of cremation in contemporary American society. That leaves one to discern much of the meaning surrounding cremation from material available on the internet from the cremation industry and from commercial purveyors of associated products.\textsuperscript{25}

Cremation practices have the capacity both to distance the living from the body of the deceased, and also to bring the living into closer connection with the deceased. From one perspective, cremation can have the effect of reducing the involvement of the living in the memorial traditions, primarily religious, that connect us to the departed.\textsuperscript{26} Similarly, the reduction of the corpse to ash can make the dead seem less human. For these reasons, Sociologist Cecelia Collier opines, “it is apparent that the cremated dead are deader than the buried dead.”\textsuperscript{27} But from a different perspective, the cremation process allows us, far more so than with burial, to invite the corpse and all that it symbolizes into the more intimate aspects of our lives. According to a hospice chaplain, “[t]here’s a bit of a spiritual revolution [among hospice patients she counsels] where there’s less attachment to the physical body . . . . The meaning is in the memories, in the heart, in the places you were together.”\textsuperscript{28} The cremation industry encourages the development of these connections. CANA discourages the use of the portmanteau cremains, commonly used within the industry to refer to cremated remains,\textsuperscript{29} in outward facing communications: “‘Cremains’ has no real connection with the deceased whereas a loved one’s ‘cremated remains’ has a human connection.”\textsuperscript{30}

Professor Pamela Roberts positions the more recent choices by American families with respect to cremation within a larger category of “postmodern, post-death rituals, in which individual choice and personal expression are highly valued elements.”\textsuperscript{31} According to research conducted by her and others, she writes, these rituals “provide opportunities for all to demonstrate continuing bonds with the dead long after the funeral or memorial service.”\textsuperscript{32}
Marketing materials for products and services related to cremation similarly emphasize the symbolic opportunity afforded by cremation. For example, one seller of keepsake jewelry, which contains a small portion of the ashes, writes on its website: “Cremation jewelry . . . helps you keep a part of your loved one with you at all times.” And not only can one person do that, but the experience can be replicated for many members of the family. According to another website: “Gone are the days when families had to decide which loved one would be the keeper of a family member’s remains. Now, with keepsake urns and keepsake pendants for ashes, even the largest, most widely dispersed families can all share equally in the remains.” While the language used can be taken quite literally—it is indeed a part of the departed—it also becomes clear in the language used by these organizations that this token of the real is meant to serve a symbolic function. One online source suggests that families choose the decorative urn “that will provide the best memorial experience.” Another organization for purveyors of keepsake objects states that the artwork of the jewelry can be “a great tool to capture the essence of an individual’s life,” while another celebrates the presence of the ashes as a “small remembrance of a loved one.” Thus, it is the memorial experience, not the body, which is captured in these keepsakes. Similarly, the essence or remembrance that is in the artwork of the jewelry is not “a part of your loved one” in the same sense that the few grams of pulverized bone funneled into the small cavity of the piece are actually a part of the deceased. Yet, the experience as well as the symbolic function of the jewelry is somehow enhanced by the presence of the real.

Ash-scattering practices can also have this effect of enhancing the symbolic meaning of the act by the presence of the real. Ash-scattering devices are advertised for their symbolic qualities. For example:

Our line of scattering tube urns are designed to symbolize the special activities departed ones participated in or enjoyed during their journey of life. These tubes come in a variety of pictorials, including patriotic symbols, golfing greens, ocean sunsets, lush forests, sunflower fields and more. It’s the idyllic way to capture the essence of your loved one and cast ashes to the wind.

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35 Id.
36 What is Cremation Jewelry?, supra note 33.
38 What is Cremation Jewelry?, supra note 33.
The final sentence of this advertising copy demonstrates the slippage between the real and the symbolic with its mixed metaphor that has the user simultaneously capturing and casting off. While the physical ashes are cast, the meaning attached to them is captured.

At the most extreme, the company Mesoloft “makes it possible to honor the dream and memory of your departed loved one by lifting the cremated remains of a beloved family member into the magnificent beauty of near space, almost twenty miles above our planet.”

According to Mesoloft’s website, the remains, once released at that height, slowly return to earth over a wide area on a global scale. The closing sales pitch connects this physical reality to the symbolic level of honor and memory with the following: “You’ll discover the comfort of knowing your loved one is literally everywhere around you.” Cremation art, another service for sale, offers the opportunity to have a small amount of cremated remains incorporated into a reproduction of a family photograph. It is promoted as “[a]n exciting new way to combine the power of personalized art and provide the comfort of keeping a small amount of ashes close.”

The language used in promoting these commercial products suggests that cremation can offer an experience of greater, rather than lesser, ongoing connection to the departed. Many of these products and services are promoted for their symbolic meaning: the ways in which they allow the bereaved to remember the hobbies, qualities, and values of the deceased. However, their symbolic power is enhanced by the availability cremation offers of the real to intertwine with the symbolic. While it is possible for any bereaved to walk through a forest and feel as if the departed loved one is present in the trees and air, a customer of Mesoloft can make some claim, however remote and microscopic, to the possibility of the literal truth of the metaphor.

Professor Pamela Roberts describes a similar phenomenon in the stories her interview subjects shared about experiences with cremation, noting “the ability to incorporate the dead, physically, into everyday life.” She contrasts the ease of linking the real with the symbolic for those who had cremated remains in their possession to those whose departed loved ones received a traditional burial: “With burial, the physical connection to the dead is fleeting; after the funeral, one must travel to the cemetery or interact with linking objects that are not the dead, but representative of them.”

This statement suggests that in her view, or more accurately in the view of her participants, cremated remains are not merely

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41 Id.
42 Id. (emphasis added).
46 Id.
“linking objects”\textsuperscript{47} to the dead, but rather (or also) a real version of the departed themselves.

Several examples of stories in which the cremated remains were personified suggest that they were treated simultaneously as “linking objects” and real versions of the departed. For example, one family brought the container of cremated remains to a restaurant, placed it on a chair, and ordered the deceased’s favorite cocktail.\textsuperscript{48} Others engaged in various dress up rituals with the container, including t-shirts and caps representing the deceased’s favorite teams for televised sporting events.\textsuperscript{49} As Professor Roberts states, “[these] interactions are perceived to be with the dead rather than with symbolic objects.”\textsuperscript{50} Of course, although the cremated remains are perceived as if they are the departed, it is more accurate to say that they create the opportunity for a highly symbolic interaction with the dead. As Professor Prendergast and his colleagues note: “Arguably ashes represent a highly ambiguous form of materiality, being of the person and of the corpse—and yet bearing little resemblance to either.”\textsuperscript{51} Further adding to this ambiguity is the quality they have of being both specific to the individual—their identity can theoretically be verified through DNA analysis\textsuperscript{52}—and quite generic in appearance. It is possible that the ambiguity of this form, the blank slate it offers, facilitates the ability of the bereaved to conflate the real and the symbolic.

Religious views also have a significant impact on the meaning the bereaved ascribe to the cremated remains. While some religions, including Islam and the Orthodox and Conservative movements in Judaism, prohibit cremation, others like Buddhism and Hinduism encourage cremation as an essential part of the rituals surrounding death.\textsuperscript{53} Most Christian faiths lie somewhere in the middle, neither prohibiting nor encouraging cremation.\textsuperscript{54} Those Christian faiths that permit it, however, frown on the division of remains, and instead promote the use of burial customs similar to those used for non-cremated bodies.\textsuperscript{55} The

\textsuperscript{47} Id.
\textsuperscript{48} Id. at 8.
\textsuperscript{49} Id. at 9.
\textsuperscript{50} Id.
\textsuperscript{51} Id. (quoting David Prendergast, Jenny Hockey & Leonie Kellaher, Blowing in the Wind? Identity, Materiality, and the Destinations of Human Ashes, 12 J. Royal Anthropological Inst. 881, 884–85 (2006)).
\textsuperscript{52} Michaela Harbeck et al., Research Potential and Limitations of Trace Analyses of Cremated Remains, 204 Forensic Sci. Int’l 191, 197–98.
\textsuperscript{54} See, e.g., Catholic canonical law: “The Church earnestly recommends that the pious custom of burying the bodies of the deceased be observed; nevertheless, the Church does not prohibit cremation unless it as was chosen for reasons contrary to Christian doctrine.” Code of Canon Law No. 1176 § 3.
reasons expressed by commentators associated with these religious faiths also offer some insight into the symbolic meaning of cremation in the United States. According to Catholic doctrine:

The cremated remains of a body should be treated with the same respect given to the human body from which they come. This includes the use of a worthy vessel to contain the ashes, the manner in which they are carried, and the care and attention to appropriate placement and transport, and the final disposition. The cremated remains should be buried in a grave or entombed in a mausoleum or columbarium. The practice of scattering cremated remains on the sea, from the air, or on the ground, or keeping cremated remains in the home of a relative or friend of the deceased are not the reverent disposition that the Church requires.56

When a rationale is given for this set of limits on cremation practice, it relates to the Christian doctrine of resurrection of the body upon the second coming. By this reasoning, the remains must be available in a holy place in order to ensure resurrection of the righteous at the appropriate time.57 In this case, the religious doctrine quite explicitly conflates the ashes with the person from whom they originated, by the expectation that they will be reunited in the future. While cremation (as opposed to burial) does not enhance this effect for observant members of these faiths, if done according to religious doctrine, it does not interfere with it either. Nevertheless, those analyzing cremation and other funereal practices in the United States have witnessed an increasing secularization in the approach to memorializing the dead. However, rather than causing a retreat in spiritual meaning surrounding death, the secular approaches cataloged by Professor Roberts would seem to substantially enhance the tendency to connect the physical remains with an ongoing relationship with the deceased.58

The meanings found by mourners in cremated remains and encouraged by the funeral and related industries, as well as by organized religion, help render the “ambiguous form of materiality,”59 the undifferentiated ash, something different from clothing, jewelry, collectibles, or other objects associated with the deceased. While these memorabilia may also be imbued with symbolic meaning, the symbolic meaning of the cremated remains is actually enhanced by the intermixture of the real person. This intermixture may explain how hard it is for courts to treat what is otherwise tangible material as property.

57 See id.; see also Guidance Note on the Burial of Ashes, Bishops’ Conf. Eng. & Wales Dep’t. for Christian Life & Worship (Nov. 2008), http://www.liturgyoffice.org.uk/Resources/OCF/Ashes.pdf (providing guidance for the cremation of remains in accordance with the teachings of the Catholic Church).
58 See Roberts, supra note 31.
59 Id. (quoting Prendergast, Hockey & Kellaher, supra note 52, at 884–85).
II. The Symbolic Function of Marital Property Law

Most contemporary theoretical debates regarding marital property law center around intangibles that, while not capable of being physically split, are capable of being economically measured so that their market value can be apportioned.\(^60\) By contrast, cremated remains form a tangible, physical substance that, because of its granular and diffuse form, is capable of easy division in the practical sense. Given that quality, the lack of market value should be beside the point. However, most case law and commentators are in accord that there is no actual property interest in cremated remains.\(^61\) The Latin phrase, *corpus nullius in bonis* (the body belongs to no one), reflects the principle that no one holds a property interest in human remains.\(^62\) The court in *Wilson* cited Blackstone for the proposition that one has no property interest in the “bodies or ashes” of one’s ancestors.\(^63\) Professor Tanya Marsh argues that Blackstone’s statements declaring the absence of a property interest, and those of Lord Coke on whom he relies, can be limited to specific ecclesiastical issues that are not necessarily relevant in modern American law.\(^64\) Despite this narrow reading, she states, “these statements have consistently been read broadly to mean that no property interest may exist in a corpse from the moment of death, regardless of religious affiliation or method of disposition.”\(^65\)

As such, human remains are fairly unique among tangible items in being not-property. Whereas the law has a category of tangible objects that are not-yet-property, such as the notorious wild fox in *Pierson v. Post*,\(^66\) a category for lands that are property that remains outside of private hands,\(^67\) and a category for property previously owned but abandoned,\(^68\) one has to look to Roman law for a category of thing that is nonetheless not the property of anyone (including the


\(^{64}\) Tanya Marsh, *The Law of Human Remains* 13 (2015) (“Read narrowly, Lord Coke and Blackstone simply stated that if a member of the Church of England had been buried in consecrated ground, owned by the Church, his body had been entrusted to the Church until the Resurrection of Jesus Christ and therefore his heirs had no cause of action in secular courts if the remains were disturbed.”).

\(^{65}\) Id. Many commentators have noted that a limited number of cases recognize a “quasi-property” interest in the next of kin for purposes of arranging burial or alternative disposition of the body. See, e.g., David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 556 (2014); Eloisa C. Rodriguez-Dod, *Ashes to Ashes: Comparative Law Regarding Survivors’ Disputes Concerning Cremation and Cremated Remains*, 17 TRANSNAT’L L. & CONTEMP. PROBS. 311, 316 (2008). This property interest appears to expire once the body has been buried or cremated. Keller, *supra* note 60, at 442.

\(^{66}\) Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

\(^{67}\) Id. at 178.

\(^{68}\) Id. at 179.
state). According to Lynda Butler, Roman law acknowledged the following categories of property that were un-owned in some way:

1. Res divine, or things dedicated to and vested in the control of the gods; 2. Res publicae, or things open for public use and subject to state regulation, but incapable of exclusive individual ownership; 3. Res omnium communes, or things legally not property because they were incapable of dominion and control; and 4. Res nullius, or things not possessed by an individual but capable of possession. 69

Res omnium communes cannot apply to the human body, because in addition to being not owned, it means subject to use by all, and was applied most directly to the sea. 70 Similarly, res publicae would not apply to something so private, and res nullius contemplates something capable of being owned in the future (like the wild fox). Thus, the body can only be seen under this schema as res divine, or belonging to the gods. The ecclesiastical origin noted by scholars for the not-property doctrine for human remains in Anglo-American law might create a similar category for the body, as opposed to all other kinds of things.

However, the court in Moore v. Regents of the University of California suggested that dead bodies belong to a particular category of not-property that is instead governed by statute:

[T]he laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. 71

Given the unique way in which human remains are treated by the legal system, it appears to be their tangibility that is beside the point legally. Courts and legislatures seem to regard the designation of human remains as property with the same anti-commercialization squeamishness as they do the more intangible objects of potential division in marital property disputes. 72 In doing so, they overlook the fact that, unlike professional degrees or business goodwill, cremated remains need not be valued in order to be divided, any more than other collections of things that the parties may have taken into possession.

Intangible assets such as business goodwill, professional degrees, and enhanced earning capacity require courts to process them through the central metaphor of property before they can even be considered to be marital property. Although disputes over these attainments arise in contexts in which the parties


70 Id.

71 Moore v. Regents of Univ. of Cal., 793 P.2d 479, 489 (Cal. 1990).

72 See Marsh, supra note 64, at 11 (arguing that despite the ecclesiastical foundations of the doctrine, it is in modern times “rationalized as a reluctance to treat human remains as commercial property.”). For examples of anti-commercialization rhetoric with respect to the proposed intangible objects of marital property, see Keller, supra note 60; Kelly, supra note 10.
seek to distribute or redistribute both present and future wealth, in order for them to play a role in such distributions within a marital property regime, the intangibles must first be viewed as if they are a thing that can be owned. And while the intangibles have no corporeal presence, they must be regarded as if they are a thing in order to be so processed. In responding to the husband’s claim that his medical degree “represents a personal attainment in acquiring knowledge,” the court in *O’Brien v. O’Brien* converted that attainment to a thing in responding:

> [O]ur statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition. Those things acquired during marriage and subject to distribution have been classified as “marital property.”

According to Professor Alicia Brokars Kelly, the most common rationales for excluding these intangible assets or attainments from consideration as property are that courts consider it too difficult to assess the value of these intangibles, and because “requiring the husband to pay over a long period of time would keep the parties financially entangled and prohibit their establishing a new life.” While these rationales would have no application to cremated remains, the reasoning Professor Kelly finds underlying them might apply to cremated remains. She concludes that “language of solitary individualism” in the cases she considers suggests that the real reason for the denial of marital property status for these intangibles occurs because the court privileges the individual effort of the working partner, to which, rather than to the marital unit, it attributes the attainment. To the extent that these cases suggest that individualism and property status are incompatible, or, more accurately, that potentially property-like assets that are tied up with individual meaning are not marital property, they offer a reason for similarly denying cremated remains the status of marital property. Here, the remains reflect the individuality not of one of the parties, but of the departed. Although the cremated remains appear as an undifferentiated material, capable of easy division, courts appear to conflate them with the individuality of the deceased person from which they originate, and for that reason see them as not-property. In this respect, they participate in the cultural perspectives outlined in Part I.

III. Straddling the Real and the Symbolic in Case Law

Three out of the four cases under consideration bow to the hoary precedent that human remains are not property, even though they make different choices

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74 *Id.*
75 Kelly, *supra* note 10, at 84. In reaching her conclusion, Professor Kelly relies in part on my earlier analysis of professional degrees as marital property, and my identification of the “Independent Achiever” theme in cases denying marital property status to professional degrees. See Keller, *supra* note 60, at 421.
76 Kelly, *supra* note 10, at 94.
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about the disposition of those remains. Two of the cases recognize that even if the remains are not property, a court does have the power to treat them as if they were, by ordering their division. The courts’ contemplation of the appropriateness of such an order, however, is heavily influenced by the not-property frameworks, as well as by the cultural attitudes toward cremated remains discussed in Part I.

In re Estate of K.A. (Estate of K.A.) is one of the earlier cases to confront the facts faced by the court in Wilson. As in that later case, previously divorced parents were brought together by the tragic death of their young daughter (aged seventeen) in a car accident. In this case, the decedent, K.A., had, despite her young age, expressed a desire concerning the cremation of her remains. She had told her mother, and the trial court credited this testimony, that she wished “to be cremated and her ashes divided and spread on the coasts of California, North Carolina, and Florida.” Her mother sought to honor this wish with all of the remains, while the father wished to receive half of the remains for burial in his family plot. Thus, it was the father who sought an order urging the remains be divided. The trial court agreed, but without ruling that the remains were property. In upholding the trial court’s decision, the Indiana Court of Appeals referenced modern cremation practices:

Finally, the practice of dividing the remains of a decedent among the survivors is common and acceptable in the funeral service industry. [A funeral home representative] testified that the funeral industry has developed a market around the idea of dividing ashes. Specifically, [she] testified that memento urns or keepsakes have been marketed to preserve divided ashes for surviving family members.

This market, we have seen, is one that encourages the conflation of the dead loved one with the symbolic dimension of the marketed products. The mother’s position at first seems absurd. She is explicitly seeking all of the ashes in order to divide them for scattering in three places, and yet contesting the father’s argument (and appealing the trial court’s decision) that they are divisible. In upholding the trial court’s decision and rejecting the

78 In re Estate of K.A., 807 N.E.2d at 748 (recognizing that the trial court had the power to so rule, but determining that doing so in this case was an abuse of discretion); Kulp v. Kulp, 920 A.2d 867 (Pa. Super. Ct. 2007) (holding that the trial court abused its discretion by ordering equitable division of remains).
79 In re Estate of K.A., 807 N.E.2d at 749.
80 Id. at 750–51.
81 Id. at 749.
82 Id.
83 Id.
84 Id. at 751.
85 See supra notes 33, 34, 37, 39 and accompanying text.
86 In re Estate of K.A., 807 N.E.2d. at 750.
mother’s arguments, the appellate court rejected her logic, stating that “by acceding to [her daughter’s wishes to spread her ashes in three locations], Mother also allows for a division of the remains.” It is possible, as is sometimes the case between divorced parties, that the mother’s seemingly illogical position is motivated by a simple desire to thwart the father’s wishes. However, it is also likely that her position makes sense within a symbolic logic, or, rather, within a logic that conflates the symbolic and the real. This is particularly likely where, as here, she has a fresh memory of her young daughter, very much alive, voicing her interest in the tripartite scattering. Given that image, if the mother is to fully realize her daughter’s expressed wish, it must be all of the daughter who is then divided in three, so that the mother can imagine the daughter fully formed in each of the three places. The wish of the father to dispose of his share differently undercuts this imagery. This logic only works because the cremated remains are simultaneously seen as both symbolizing her and being the daughter in fact.

In Kulp, as in Estate of K.A., the court was also reviewing a trial court decision to authorize the division of cremated remains between the divorced parents of the deceased. As in Estate of K.A., it applied a highly deferential standard to the trial court decision. However, unlike in Estate of K.A., the Kulp court found that the lower court had abused its discretion in authorizing the division. The basis for its decision is a bit confusing. While stating that “the law does not prohibit” the trial court’s decision, the court decided that its discretion was nonetheless abused. While recognizing that the parties “stand on equal footing as Son’s next of kin,” the court nonetheless ruled in favor of the husband, stating: “Given the extremely sensitive nature of this issue, and Husband’s opposition to division of the remains, we conclude that the trial court abused its discretion in using its equitable powers to override the desires of one of the next of kin as to the division of Son’s remains.”

This is peculiar reasoning, of course, because had the trial court decided in favor of the father it would also have been overriding the desires of one of the next of kin (i.e., the mother of the deceased). Given the divorced parents’ disagreement, it was inevitable, absent a settlement, that one parent’s desires would be subordinated to that of the other parent. In order to render the court’s conclusion logically meaningful, it must be that the court saw the father’s interest as the stronger one, the overriding of which is thus more problematic. In disavowing part of the rationale of the non-binding precedent of Estate of K.A. (from a different jurisdiction), the court offered some insight into its view of the strength of the father’s claim: “While the division of cremated remains may be common in the funeral industry and may be acceptable in many instances to the next of kin, in other cases, as in the case of Husband herein, the next of kin may

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87 Id. at 751.
89 Id. at 870.
90 Id. at 873.
91 Id. at 872.
92 Id. at 873.
believe that the division of cremated remains is offensive.”93 Once again, the logic of this statement is not sufficient to justify the outcome in favor of the father, much less under an abuse of discretion standard. It is in the nature of legal disputes that one party will be dissatisfied with the outcome. *Estate of K.A.* also dealt with a party who was upset and possibly offended by the choice to divide the ashes, as well as with another party, as here in *Kulp*, who presumably would be upset and offended by the decision not to divide them. However, the *Kulp* court seemingly privileged the offense taken by the father. By doing so, it suggested that the father’s view is the more appropriate. The *Kulp* court also suggested, by using the word “offensive,” that the practice of dividing remains violates cultural norms shared by the court itself.94

Like the court in *Kulp*, the court in *Wilson* cited the “sensitive nature” of the issue in declining to order a division between divorced parents of their son’s cremated remains.95 That rhetoric again raises the question why sensitivity favors one solution over the other. In *Wilson*, the court was faced with two parents, each of whom wished for their son’s ashes to be buried in a different location.96 While a division of the ashes, the outcome suggested by the father, would have resulted in burial at both locations (and presumably no further litigation), the mother objected to division “for religious reasons.”97 Unlike the father’s solution, the appellate court’s refusal to divide the ashes leaves unresolved the question of their ultimate destination.98

The nature of the mother’s religious beliefs and the faith with which they are linked are not revealed. However, the religious basis for the mother’s objection to division of the remains may suggest why both the *Kulp* court and the *Wilson* court felt that the “sensitive nature of the subject matter” necessitated a resolution that avoided division of the ashes.99 Both courts seem to presume the unwillingness to divide represented the view towards which sensitivity must be exercised, perhaps because of that view’s association, whether asserted (as in the *Wilson* case) or not, with a religious perspective (presumably Christian). It is quite possible that the court in *Estate of K.A.* failed to join in this view only because neither litigant advanced a viewpoint favoring the maintenance of the

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93 Id.
94 Id.
95 Wilson v. Wilson, 138 So. 3d 1176, 1179 (Fla. Dist. Ct. App. 2014). While the lower court in *Wilson* also disallowed the division, the appellate court reviewed the decision on a *de novo* basis. *Id.* at 1177.
96 Id.
97 Id.
98 According to the father’s attorney, Joy Bartmon: “This opinion does not guide the trial court in the determination to be made . . . . Instead, what will occur when the decision as to the ashes goes back to the trial court, is what I wanted to avoid. The final resting place for this young man may be left to the discretion of an administrator who never knew him.” Brett Clarkson, *Son’s Ashes Can’t Be Divided Between Feuding Mom and Dad, Court Rules*, Sun Sentinel (May 21, 2014), http://articles.sun-sentinel.com/2014-05-21/news/fl-scott-wilson-ashes-appeal-court-decision-20140521_1_lili-wilson-scott-wilson-court-rules.
99 *Wilson*, 138 So. 3d at 1179.
remains as a unitary whole. However, it is also possible that what offends the religious perspective similarly offends a perspective steeped in the not-property legal regime that has its origin in Christian ecclesiastical practices.

As discussed above, those religions that permit cremation but frown upon the division of cremated remains do so from a perspective that encourages the strong association of human remains with the person from whom they are derived.100 While in her study of modern American cremation practices, Professor Pamela Roberts does not cite religious beliefs as the basis for the decision by some participants not to divide cremated remains, she writes that “participants who chose intact cemetery placement viewed separating the cremains as dismemberment and voiced their need for a place to visit the dead.”101 This set of rationales is similar to the religious objection to dividing remains because it emphasizes the wholeness and singularity of the deceased despite the disaggregation into ashes. Ironically, both those who divide ashes and those who keep them intact find ways to regard the ashes as a full and ongoing representation of the human being who has died. By validating the religious perspective or the not-property legal perspective with which it aligns, the courts in these opinions also participate in the process by which cremated remains are conflated with the living person.

The holding, as well as the circumstances, of Jackson v. Jackson break the pattern of these other related cases.102 While the Jackson case once again considers the division of cremated remains between divorcing parents, the remains in that case are those of a stillborn fetus of twenty-six weeks gestation.103 And whereas the three other cases, Wilson, Kulp (in which division was not permitted), and even Estate of K.A. (in which an order to divide was upheld), all held that the cremated remains were not property, the Jackson court concluded that they were property.104 The definition of property the Jackson court employed would seem unrelated to the unusual and tragic facts with which it was faced. The court stated: “The ashes are clearly property by any plain meaning of the word. They have a physical aspect separate from any other person or thing and, not being otherwise abandoned, must be ‘owned’ by the petitioner, the respondent or both.”105

The Jackson court’s comments highlight the counterintuitive quality of the not-property designation employed by most courts for cremated remains.106 By emphasizing the thing-ness of cremated remains, the Jackson court may share the point of view of Professor Tanya Marsh that cremated remains are

100 See supra note 56 and accompanying text.
101 Roberts, supra note 31 at 11.
103 Id.
104 Id. at 479.
105 Id. at 479–80.
“deindividualized” as compared to an un-cremated corpse.\footnote{107}{Marsh, supra note 64, at 10.} She suggests that courts have been inclined to treat unprocessed and recently deceased corpses with more respect because they are more highly individualized, and she connects this respect with the unwillingness to designate remains as property.\footnote{108}{She provides no supporting examples, but claims that even though “no court or legislature has articulated this principle so plainly, . . . it is clearly reflected throughout the law of human remains.” Id.} Similarly, the \textit{Jackson} court wrote of the remains in this case being “transmogrified to ashes,”\footnote{109}{“It is also clear that the fetal remains, when transmogrified to ashes, can also become marital property . . . .” Jackson, 979 N.Y.S.2d at 480.} suggesting that transmogrification is a prerequisite for their designation as potential marital property, and that the transformation of their legal status accompanies this physical transformation.

The unusual circumstances of the case become highly relevant for the court’s categorization and disposition of the property. The court concluded that the ashes, though property, are the separate property of the mother because of New York’s public policy in favor of reproductive rights that give the mother “full control over the progress and outcome of her pregnancy without veto power by a husband or putative father.”\footnote{110}{Id. at 481.} The court’s language and its reliance on policy relating to reproductive control evince an intent that the categorization of the remains as separate property (as opposed to marital property subject to division) is limited to remains of a stillborn fetus, as opposed to those of a live-born child who had later died.\footnote{111}{Id. at 479.}

It is quite possible that the origin of the cremated remains and concern about the case’s impact on reproductive freedom also influenced the \textit{Jackson} court’s determination that the remains are property in the first place. The court noted that “a fetus, while still in a woman’s womb would not be considered to be property. But fetal remains, once expelled or extracted from the mother’s body, would be.”\footnote{112}{Id. at 480.} The language choices for the process rendered the remains more thing-like. Not faced with the question, the court did not opine whether the remains of a live born child that later died would similarly be considered property. Given the court’s explicit consideration of public policy in denoting the remains as the woman’s separate property rather than marital property, the initial designation of the remains as property might be similarly influenced by policies relevant to the fetal origin of the remains. Perhaps for the same reasons that Professor Marsh regards cremated remains as de-individualized compared to the intact corpse, fetal remains may similarly be seen as less individualized than those of a live-born child, thus more likely to be seen as property. Or, the choice may be even more related to public policy. An additional reason for the
thingification of the fetal remains may be to parry the efforts by those opposing reproductive rights to overly personify the fetus.\textsuperscript{113}

The unique circumstances, as well as the court’s underlying concern with the issue of reproductive rights (with which the litigating couple is not directly involved), suggest that \textit{Jackson} is \textit{sui generis}, and not relevant to the circumstances of the other cases in which couples battle over the remains of a live-born child and an older child. However, its approach might well serve courts considering more conventional circumstances. By focusing on the thing-like quality of the remains, courts in these other cases might free themselves of the not-property specter haunting cremated remains, and fashion remedies that allow parties on both sides of the dispute to attach their own symbolic meaning to this material object.

IV. Conclusion

Courts are influenced by both the legal framework regarding human remains, and by modern cultural attitudes to view cremated remains as something more personal than an ordinary property interest. At the same time, cultural views are in flux, creating different and sometimes conflicting practices and desires concerning cremated remains, as evident in the disputes that generated the cases under consideration. The litigants themselves, like the courts, operate within a symbolic system that conflates the material substance over which they are arguing with the real person recently departed.

Not unlike the physical process by which the human body is converted to cremated remains, the marital property system also processes assets, attainments, and other would-be property items through a symbolic machinery, converting the intangible to the symbolically tangible—a property interest that can be divided. This process is ill-equipped to handle a would-be property item that is already tangible but imbued with cultural meaning that makes it seem as if it were something else.

If courts could step aside from each of these meaning-generating systems and instead consider the cremated remains as the \textit{Jackson} court does,\textsuperscript{114} as the tangible material that they appear to be, then it would be possible for courts to apply marital property law, dividing cremated remains when appropriate,\textsuperscript{115} just as courts would divide a collection of jewelry or clocks. The source of the reluctance for courts to do so—the impulse to conflate the person with the remains that symbolize that person—is instead the reason that they ought to treat the remains as divisible property. Under such circumstances, couples would be able, indeed would be required, to fashion their own symbolic meaning within the constraints that a simple division offers. The work of Professor

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\textsuperscript{114} \textit{Jackson}, 979 N.Y.S.2d at 479.

\textsuperscript{115} Presuming the absence of policy considerations, as in \textit{Jackson}, that would militate in a different direction.
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Roberts and others who have studied modern cremation practices and rituals suggests that there is no end of opportunity to imbue remains with meaning.\textsuperscript{116} By ordering a division of the remains, courts would distribute these symbolic opportunities more equitably.

\textsuperscript{116} See, e.g., Roberts, \textit{supra} note 31.