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Over My Dead Body: Preventing and Resolving Disputes Regarding the Disposition of the Dead

Shawn Irwin Walker*

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The death of a loved one can be one of the most difficult times of a person's life. This difficulty is multiplied when disputes arise regarding the final disposition of the loved one's bodily remains. There are unique issues that exist in disputes when human remains are involved that do not necessarily exist in other disputes that occur after death. Resolving these disputes involves looking to varying state laws that often use a status-based scheme that prioritizes who controls the remains. When a dispute exists regarding the disposition of remains there are a number of vehicles and avenues parties could take, some better than others for the particular situation. There also exist a number of means an individual could bypass the default status-based scheme in planning the individual's own disposition.

Making disposition directives more accessible and accepted would ensure an individual's wishes concerning disposition and memorial services are fulfilled. Furthermore, when a disposition dispute does arise, parties should seek the most suitable means to resolve the dispute in order to appropriately memorialize the decedent and maintain a healthy grieving process.

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INTRODUCTION

Ronald Booth died on January 7, 1996.¹ At the time, Mr. Booth was living with his girlfriend, Patricia Huff, and was in the process of obtaining a divorce from his wife, Marsha Booth.² Five months prior to his death, Mr. Booth had named Ms. Huff as executor of his estate.³ Despite Ms. Huff's status as executor and live-in girlfriend, she and Booth's ex-wife argued over whether Huff had the right to control Mr. Booth's remains.⁴ Mr. Booth's remains were cremated, a wake was held, and the weeks and months that followed produced a contentious debate regarding the cremated remains.⁵ Both sides produced conflicting stories about the decedent's wishes. Ms. Booth, the decedent's estranged wife, claimed that the decedent requested that family bury his ashes in the family garden or burial plot.⁶ On the other hand, Ms. Huff, the decedent's girlfriend and executor of his estate, claimed that the decedent's wishes were to have loved ones scatter his ashes in his fishing and hunting spots on the Hudson River.⁷ Ten months after the decedent's death,

¹ Booth v. Huff, 708 N.Y.S.2d 757, 758 (N.Y. App. Div. 2000).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 758-59.

⁶ *Id.* at 759.

⁷ *Id.*

unannounced and without consent, Ms. Huff scattered the cremated remains in the Hudson River.⁸

This episode illustrates the delicate, sensitive, and often times complex disputes that can arise upon a person's death. This dispute over the disposition of Mr. Booth's ashes demonstrates the differing opinions the decedent's survivors may have and the need to have available means of resolving these disputes. This is especially the case when a decedent expressed wishes as to the disposition of their remains.

This relatively unknown dispute regarding Mr. Booth's remains is but a sample of the complications that arise as to the right to control remains. Other disputes regarding the disposition of human remains have not been so private. Dramatic disputes have played out through the media regarding the disposition of the remains of prominent figures. Such notable, conspicuous disputes include the fight over socialite Anna Nicole Smith's final resting place;⁹ the dispute that led to baseball legend Ted Williams's head being frozen in Arizona;¹⁰ the squabble over the ashes of another baseball legend, Kirby Puckett;¹¹ and the clash that resulted in the Godfather of Soul, James Brown's remains being moved multiple times before finding a final resting place.¹²

Upon the passing of a loved one, the party or parties charged with the responsibility to arrange for the disposition of the remains are faced with a myriad of decisions. These decisions range from major and significant decisions to minor and less substantial decisions. Examples of major decisions include the means of disposition such as burial, cremation, entombment, or donation to science. Another example of a major decision would be the location of the disposition. For instance, in what cem-

⁸ *Id.*

⁹ Abby Goodnough, *Parties Face Off Over Burial Site for Anna Nicole Smith*, N.Y. TIMES, Feb. 21, 2007, <http://www.nytimes.com/2007/02/21/us/21smith.html> (detailing a dispute regarding burial location between parties including Smith's companion, Smith's mother, Smith's ex-boyfriend, and Smith's infant daughter).

¹⁰ David Hancock, *Ted Williams Frozen in Two Pieces*, CBS NEWS, Dec. 20, 2002, <http://www.cbsnews.com/news/ted-williams-frozen-in-two-pieces/> (detailing a dispute between Williams's children regarding the preservation of Williams's separated head and body in liquid nitrogen. The dispute arose where there was a will asking to be cremated and a subsequent document requesting the biostasis authorization.).

¹¹ *Fiancee says Kirby Puckett Wanted Ashes Spread on Ball Field*, NWI TIMES, May 16, 2006, http://www.nwitimes.com/sports/other/professional/fiancee-says-kirby-puckett-wanted-ashes-spread-on-ball-field/article_c9435dda-36b8-5653-917b-9f4f0b1666f6.html (detailing a dispute between Puckett's children and his fiancée over the possession and disposition of the cremated ashes).

¹² *Agreement Reached Over Burial for James Brown*, REUTERS, Feb. 21, 2007, <http://www.reuters.com/article/us-usa-brown-burial-idUSN2023495420070221> (detailing a dispute between Brown's partner and children regarding the burial place, whether the partner was legally married to Brown, and a pending paternity case in which DNA needed to be extracted from Brown's body).

etary should the decedent be buried; to whom should the cremated remains be given; or whether the process of embalming be performed. Major decisions such as these are significant in nature and tend to be the subject of the majority of the reported cases involving disputes as to the right to control remains.

Although the more major decisions tend to garner more attention and tend to be the subject of more litigation, the subject of most disputes upon the passing of a loved one tend to be more minor in significance. Examples of these less significant disputes are the type of casket; the burial clothes to be worn by the decedent; the selection of the funeral home to provide the services; the selection of the officiator of the funeral or memorial services; the selection of flowers; or even the eulogies, prayers and songs offered. Although these decisions are less significant in nature, they can be very personal to the parties and disagreements can create great contention.

The vast majority of disputes, major or minor, are resolved using self-help by the parties. Many discussions, negotiations, arguments, and concessions regarding the disposition of a loved one are made in funeral homes or living rooms every day. Experienced funeral directors and clergy are familiar with such disputes and can act as informal and compassionate mediators in arriving at a decision.

Part one of this comment will examine the unique issues that exist with disputes involving the disposition of human remains. Part two of this comment will examine the controlling and varying state laws that address the right to control remains. Part two will also address the issues and potential problems that arise with the status-based scheme of determining who has control and what parties have done and can do to overcome or bypass this scheme. Part three of this comment will examine by what means these types of disputes are resolved and the considerations, benefits, and problems that exist in the respective approaches. Finally, part four of this comment will offer suggestions and examine future developments regarding these issues.

I. UNIQUE ISSUES IN DISPUTES INVOLVING HUMAN REMAINS

A number of unique issues distinguish disputes involving human remains from other legal disputes like probate disputes. Unique issues that arise in resolving disputes regarding human remains include, but are not limited to, the unique property status of human remains; the special consideration of timing; and the final and permanent nature of the decisions.



A. The Property Status of Human Remains

The first unique issue that arises in evaluating disputes regarding human remains is the issue of property. Historically, common law has not regarded dead bodies as property.¹³ Disputes involving remains typically arise after a person's death, so these disputes often end up in probate. It is important to note that "[t]he body of one whose estate is in probate unquestionably forms no part of the property of that estate."¹⁴ Courts instead have recognized a quasi-property right to the possession of human remains "for the limited purpose of determining who shall have its custody for burial."¹⁵ Courts have explained that these laws operate to achieve policy goals "rather than abandoning [human remains] to the general law of personal property."¹⁶ This quasi-property right gives the next of kin or person with the right to control the remains the right to possess the remains for burial or other disposition purposes, to oppose disinterment, to refuse autopsy and organ donation, and to seek damages for improper treatment of the body of the deceased.¹⁷

The Texas Supreme Court held, consistent with decisions in other jurisdictions, that a person's property rights of human remains does not include the right to transfer¹⁸ or the right to exclude,¹⁹ but only includes the right of possession for purpose of burial or final disposition.²⁰ In *Evanston Insurance Co. v. Legacy of Life, Inc.*, the plaintiff previously consented to the harvesting of her mother's tissues.²¹ The plaintiff brought suit after she found out the tissues were transferred to other companies and sold for profit.²² The plaintiff asserted claims, including a property claim, arguing that the insurance policy includes coverage for her "loss of use of her deceased mother's tissues, organs, bones and body parts."²³ The court held that the plaintiff had no property rights in

¹³ Ann M. Murphy, *Please Don't Bury Me Down in that Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381, 396 (2007).

¹⁴ O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899).

¹⁵ Sinai Temple v. Kaplan, 127 Cal. Rptr. 80, 86 (Cal. Ct. App. 1976).

¹⁶ Moore v. Regents of Univ. of Cal., 793 P.2d 479, 489 (Cal. 1990).

¹⁷ Jennifer E. Horan, "When Sleep at Last has Come": *Controlling the Disposition of Dead Bodies for Same-Sex Couples*, 2 J. OF GENDER, RACE & JUST. 423, 431-32 (1999).

¹⁸ *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 385 (Tex. 2012) (holding that a right to transfer refers to a property owner's right to transfer property or title to another). See *Transfer*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁹ A property right includes the right to exclude, that is, property owners' ability to exclude others from their claimed property. See Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1095 (2011).

²⁰ *Evanston Ins. Co.*, 370 S.W.3d at 385.

²¹ *Id.* at 379.

²² *Id.*

²³ *Id.*

the tissues other than for burial or final disposition.²⁴ The court reasoned that the plaintiff did not have many of the rights that are associated with the bundle of property rights including the right to transfer and the right to exclude.²⁵ Because of these limited rights, the court held that human remains or tissues are not property of the next of kin.²⁶

A person's property rights in human remains is enormously different from their property rights in personal property. The quasi-property rights an individual has in human remains essentially ends with the right to control remains for the purpose of disposition.

B. Timing

Another unique issue in disputes involving human remains is that of timing. In the case *Sherman v. Sherman*, the plaintiffs, children of the decedent, pursued a temporary restraining order in order to stop the burial of the decedent, directed by the defendant, the decedent's estranged wife.²⁷ The plaintiffs filed the restraining order eight days after the decedent's death.²⁸ The court reasoned that an eight-day delay is typically not abnormal, however in this context, "it strikes the court as an unusually long period of time."²⁹ This case illustrates that there may be more of a sense of urgency when it comes to disputes regarding the disposition of remains.

There are, perhaps, three reasons why there exists a sense of urgency in resolving disputes as to the control and disposition of remains. The first reason involves the fact that shortly after death, the human body begins the decomposition process. Efforts are often taken to slow the decomposition process, such as embalming or refrigeration. However, these procedures merely slow the decomposition process, not stop it. Funeral services and memorials that involve viewing the decedent are of course most time sensitive. Significant disputes can disrupt the timetable for memorial services and viewing the decedent may no longer be an option.

The second reason why there is a sense of urgency in resolving disposition disputes is that death most often is accompanied by intense grief of those left behind. Disputes regarding the disposition of a loved one can cause unnecessary and additional emotional angst. These types of disputes can hinder the grieving process and delay the important clo-

²⁴ *Id.* at 385.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Sherman v. Sherman*, 750 A.2d 229, 231 (N.J. Super. Ct. Ch. Div. 1999).

²⁸ *Id.* at 237.

²⁹ *Id.*



sure that often comes with the memorialization and disposition of a loved one.

The third reason there exists a sense of urgency in disposition disputes is logistics. Generally, funeral homes do not have the capability or space to store human remains for an extended period of time. Most states have statutes in place that dictate what must happen with human remains after death. Many state regulations declare that a body must be interred, cremated, entombed, refrigerated, or embalmed within a certain time period after death, often twenty-four or forty-eight hours after death.³⁰ Therefore, while waiting for a decedent's family to resolve a prolonged dispute regarding the decedent, the funeral home would need to either embalm the body or place it in refrigeration. Not only could this be costly for the funeral home, but funeral homes charge for embalming and most often charge a daily rate for use of refrigeration.³¹ Extended storage of remains in funeral homes can be costly, a hassle, and a source of liability for the funeral home.

C. Finality

The decision regarding the disposition of remains is more often than not final and cannot be undone. Because of this permanency regarding the disposition of remains, decisionmakers have added pressure to reach a just resolution. Generally, an authorized person "may direct any lawful manner of disposition of a decedent's remains by completion of a written instrument."³² This authorization usually gives the funeral home instructions for burial, cremation, entombment, donation, or other means of disposition.

On December 7, 2007, Theodore "Ray" Kennedy, 59, passed away in Las Vegas, Nevada.³³ Mr. Kennedy was survived by a son and sisters who contracted with Palm Mortuary to handle the disposition of his re-

³⁰ See CAL. BUS. & PROF. CODE § 7712.6 (West 2018) (stating that a cremation should not take place more than 24 hours after delivery of the remains, "unless the remains have been preserved in the interim by refrigeration or embalming"); 5 R.I. GEN. LAWS ANN. § 5-33.2-12 (2017) (stating that "[h]uman dead remains shall not be held more than forty-eight (48) hours without embalming or without refrigeration for the purpose of maintaining public health").

³¹ "Some funeral homes have a daily charge for storing the body even if it is embalmed. Some funeral homes price this fee on a per day basis others price it as a lump sum amount for a set number of days. Storage fees are approximately \$35 per day up to \$100 per day." *Funeral Costs*, FUNERALRESOURCES.COM, <https://funeralresources.com/resources/storage-and-refrigeration-fees/> (last visited Mar. 20, 2018).

³² OR. REV. STAT. § 97.130(2) (2017).

³³ Theodore Kennedy Obituary, LAS VEGAS REVIEW-JOURNAL, <http://obits.reviewjournal.com/obituaries/lvrj/obituary.aspx?page=lifestory&pid=142144172> (last visited Mar. 20, 2018).

mains.³⁴ Mr. Kennedy's remains were to be buried following a funeral service.³⁵ During the arrangements, Mr. Kennedy's family expressed their objection to the practice of cremation.³⁶ Before the services, the funeral home informed the family that they had made a grave mistake and had cremated Mr. Kennedy's remains.³⁷ Mr. Kennedy's family brought suit against the funeral home. The suit concluded with a settlement and judgment in the plaintiff's favor.³⁸

This issue of finality is further illustrated with the case discussed in the introduction, *Booth v. Huff*, where the decedent's ashes were scattered in the Hudson River.³⁹ In both of these cases, the permanent and final actions could not be undone and the only remedy left for the injured parties was to sue for damages. Courts and other parties involved in disputes regarding the right to control remains must be mindful of the permanent and final implications to their decisions and actions.

II. THE STATUS-BASED SCHEME USED IN CONTROLLING REMAINS

A. Priority of Decision Laws

Currently, there is no uniformity among the states regarding the disposition of remains. Some states use the common law to settle disputes concerning the disposition and controlling of remains. Meanwhile, other states have adopted laws that designate which of the decedent's relatives, and in what order, determine the disposition of the decedent's remains. These statutes are often referred to as Priority of Decision laws. Both common law and statutes look to an individual's status or relationship to the decedent to determine who controls the disposition of remains. Because of this evaluation as to the status of an individual in relation to the decedent, this structure is often referred to as a status-based scheme.⁴⁰

While approximately twenty-four states have statutes concerning the disposition of human remains, only fifteen states have in place these Priority of Decision laws.⁴¹ These statutes provide a list and priority of

³⁴ *Id.*; *Kennedy v. Carriage Cemetery Servs.*, 727 F. Supp. 2d 925, 928 (D. Nev. 2010).

³⁵ *Kennedy*, 727 F. Supp. 2d at 928.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 927.

³⁹ *Booth v. Huff*, 708 N.Y.S.2d 757, 759 (N.Y. App. Div. 2000).

⁴⁰ See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 230 (2001); Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 254 (2008); Paula A. Monopoli, "Deadbeat Dads": Should Support and Inheritance be Linked?, 49 U. MIAMI L. REV. 257, 291 (1994).

⁴¹ Murphy, *supra* note 13, at 400-01.

persons who have the authority to control the disposition. Generally, these statutes provide that the decedent has the highest priority to determine the disposition of their remains. The weight and procedure of determining the decedent's wishes will be discussed in a subsequent section.

Oregon and New York are two examples of states that have adopted these Priority of Decision laws.⁴² Oregon and New York's statutes are identical in most respects listing in order of priority the decedent's spouse, children, parents, siblings, guardian, and personal representative.⁴³ One major difference between the Oregon and New York statutes is New York's insertion of "the decedent's surviving domestic partner" near the top of the list.⁴⁴ This addition is an example of a statutory evolution and departure of the traditional status-based scheme and will be discussed later in this comment.

Another major difference between Oregon and New York's statutes is that New York's priority list has a "person designated in a written instrument" as the party with the highest priority.⁴⁵ At first glance, this would seem like a major divergence of the two statutes; however, functionally, the statutes operate the same. Oregon, despite the absence from the list above, still gives priority to a party designated by the decedent. The Oregon statute reads, "The decedent . . . may delegate such authority [to direct the manner of disposition of the decedent's remains] to any person 18 years of age or older. Delegation of the authority to direct the manner of disposition of remains must be made by completion of [a] . . . written instrument."⁴⁶

In a statutory jurisdiction, to determine what party has authority to direct disposition of a decedent, a court adheres closely to the statute. Michael A. Trinidad tragically perished in the September 11, 2001 terrorist attacks on the World Trade Center in New York City.⁴⁷ At the time of his death, Mr. Trinidad was divorced, had two infant children, and a number of siblings.⁴⁸ Through efforts at the disaster site and through DNA testing, a portion of Mr. Trinidad's remains were identified and recovered.⁴⁹ Mr. Trinidad's ex-wife and his eldest sibling both desired to receive the remains and control the method of disposition.⁵⁰

⁴² See OR. REV. STAT. § 97.130(2) (2018); N.Y. PUB. HEALTH LAW § 4201(2)(a) (McKinney 2018).

⁴³ See OR. REV. STAT. § 97.130(2); N.Y. PUB. HEALTH LAW § 4201(2)(a).

⁴⁴ N.Y. PUB. HEALTH LAW § 4201(2)(a)(ii-a).

⁴⁵ *Id.* § 4201(2)(a)(i).

⁴⁶ OR. REV. STAT. § 97.130(3).

⁴⁷ *In re Caseres*, 774 N.Y.S.2d 372, 372 (App. Div. 2004).

⁴⁸ *Id.* at 373.

⁴⁹ *Id.*

⁵⁰ *Id.*

The court, looking closely at the statutory language, held that given the decedent passed away without a spouse and because his children were under 18 years of age, the party with priority to control disposition was his eldest sibling.⁵¹

States that do not have Priority of Decision laws or other statutes governing the disposition of remains look to judicially-produced common law to settle disputes and set forth the order of persons entitled to control the disposition of remains. In the highly publicized case of Anna Nicole Smith, the court ultimately relied on common law to determine the proper party with the right to control her remains for the purpose of disposition.⁵² The parties in dispute were Smith's mother and Smith's daughter.⁵³ Smith's daughter was not yet six months old at the time and was appointed a guardian ad litem, who was to act in the best interest of the infant daughter.⁵⁴ Although there existed statutes in the State of Florida regarding disposition disputes, the court of appeals ultimately relied on common law to resolve the dispute because the court found that the statutes were intended to guide funeral home operators or medical examiners in determining liability for a decision regarding the disposition of remains.⁵⁵ The court found that in the absence of desires expressed previously by the decedent, "the spouse of the deceased or the next of kin has the right to the possession of the body for burial or other lawful disposition."⁵⁶ The court, through common law, determined that the daughter was the legal next of kin and permitted the guardian ad litem to decide that Smith's remains were to be buried in the Bahamas next to her son.⁵⁷

B. Overriding the Status-Based Scheme with Decedent's Wishes

Historically, English and American courts held that a decedent could not control the disposition of their remains.⁵⁸ Courts have now recognized a decedent's right to dictate the disposition of their remains.⁵⁹ Enabling individuals the ability to make decisions controlling

⁵¹ *Id.*

⁵² *Arthur v. Milstein*, 949 So. 2d 1163, 1166 (Fla. Dist. Ct. App. 2007).

⁵³ *Id.* at 1164.

⁵⁴ *See id.*

⁵⁵ *Id.* at 1165.

⁵⁶ *Id.* at 1166.

⁵⁷ *Id.*

⁵⁸ *See, e.g., Williams v. Williams*, 20 Ch. Div. 659 (1882) (denying a claim to recover expenses when a body was buried contrary to the decedent's will and holding that a person, by will or other instrument, cannot dispose of their dead body); *see also Enos v. Snyder*, 63 P. 170, 171 (Cal. 1900) (holding that one has no property in his dead body and that disposition cannot be controlled by will).

⁵⁹ *See In re Estate of Moyer*, 577 P.2d 108, 110 (Utah 1978).

their disposition is important; otherwise a party given the right to control remains, under either a common law or statutory scheme, may act contrary to what the decedent wanted. Such was the unfortunate case of Jennifer Gable, a Boise, Idaho native who died suddenly from an aneurysm at the age of 32.⁶⁰ Gable was a transgender individual who changed her name from Geoffrey in 2007 and who was known as a female by friends and acquaintances in recent years.⁶¹ Nevertheless, friends and acquaintances attending Gable's open-casket funeral were shocked to find Gable with a short haircut and wearing a men's suit.⁶² The obituary refers to the decedent as Geoffrey and Geoff and uses the pronouns "he" and "his."⁶³ The obituary makes no mention of Jennifer, her transition, or her female identity.⁶⁴ During the memorial service meant to honor Gable's life, neither Jennifer nor her female identity were mentioned.⁶⁵ The funeral director's hands were essentially tied as he had to follow the directions of the individual who held the legal right to control the disposition of Gable's remains.⁶⁶

Generally speaking, there are perhaps three reasons why an individual would want to direct their own disposition. First, an individual may not have family. Without close, trusted family members to make a decision regarding disposition that authority would default to someone who knows very little about the decedent or even a perfect stranger such as a public health officer.⁶⁷ The second generalized reason why an individual would desire to direct their own disposition is because of dislike or distrust of family members. An individual who has a shaky relationship with family may not be comfortable with the authority defaulting to those they do not trust. The third reason why someone would want to direct their own disposition is because of the individual's beliefs. An individual with strong beliefs, be it religious, non-religious, or otherwise, may want assurance that certain actions or ceremonies do or do not take place.

⁶⁰ Audrey Dutton, *Friends Say Idaho Transgender Woman's Memory Not Honored at Funeral*, IDAHO STATESMAN, Nov. 24, 2014, <http://www.idahostatesman.com/news/local/article40829121.html>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Memorial Networks, *Geoffrey Gable Obituary*, PARKE'S MAGIC VALLEY FUNERAL HOME & CREMATORY, http://www.magicvalleyfuneralhome.com/memsol.cgi?user_id=1435181 (last visited Mar. 20, 2018) (using phrases such as "He was born in . . ." and "Geoff and his brother . . ." and "He is survived by his father . . .").

⁶⁴ *Id.*

⁶⁵ Dutton, *supra* note 60.

⁶⁶ *Id.*

⁶⁷ See OR. REV. STAT. § 97.130 (2018).

This recognition of a decedent's right to dictate the disposition of their remains is often reflected in statutory Priority of Decision laws. Oregon's law, for example, states that an "individual . . . may direct any lawful manner of disposition of [their] remains."⁶⁸ States that have not adopted Priority of Decision statutes also give deference to a decedent's wishes by looking to common law.⁶⁹

An individual may use one of a number of tools to dictate the control and disposition of their remains upon death. The Oregon Priority of Decision law states that a decedent may direct the disposition of their remains by a written, signed instrument or by prearranging with a funeral service practitioner.⁷⁰ Generally, there are four types of instruments an individual may employ to control their own disposition upon death: a will, other written instruments, a proxy or agent, and a preneed funeral plan. Practitioners generally refer to these instruments as "Disposition Directives."

One common instrument for an individual to control their disposition is a will. Generally, the wishes and preferences expressed by a decedent in a will are preferred over the wishes and preferences of any other person.⁷¹ Wills have been used as a means of controlling one's disposition and are relatively inexpensive and efficient. Generally, an individual may direct their disposition using a will by doing one of two things. First, the directions for final arrangements may be a provision within the will. The second option in using a will to express final arrangements is to attach a form as a sort of addenda to the will that expresses the testator's wishes for disposition. Using a will to direct disposition may be a good option to ensure this important information is memorialized alongside other important provisions in the will. The downside to this option, discussed further below, is the fact that a will may not be the most practical location to contain these instructions to which responsible parties would need to refer very soon after death. The inclusion of a disposition provision or directive in a will may be out of place because a will traditionally deals with real and personal property and as discussed previously, there is no property right in human remains.

Another instrument or method for an individual to control their own disposition is a non-will written instrument. These instruments are especially advantageous for those whose loved ones are outside of the traditional or conventional meanings of a family.⁷² These types of instru-

⁶⁸ *Id.* § 97.130(1).

⁶⁹ *Arthur v. Milstein*, 949 So. 2d 1163, 1166 (Fla. Dist. Ct. App. 2007).

⁷⁰ OR. REV. STAT. § 97.130(1).

⁷¹ See Frances H. Foster, *Individualized Justice in Disputes Over Dead Bodies*, 61 VAND. L. REV. 1351, 1376 (2008).

⁷² *Id.* at 1375.

ments are helpful to those most harmed by the family paradigm often found in probate disputes.⁷³ These classes of people include unmarried same-sex or opposite-sex cohabitants, nontraditional elders, and other nonconforming testators.⁷⁴

Non-will written instruments generally have a large spectrum of formality. On the more formal end of the spectrum is something like a revocable trust. However, some jurisdictions do not require a decedent's wishes or preferences to be in a formal instrument such as a will or revocable trust. Utah, for example, requires that a person may direct the preparation, type, and place of disposition through written directions acknowledged before a Notary Public.⁷⁵ The instructions given through this more informal instrument are valid so long as the directions are lawful and there are sufficient resources to carry out the directions.⁷⁶ In Connecticut, an individual can control their disposition simply through a signed and witnessed written document.⁷⁷ The stated goal for this more informal instrument is to ensure that individuals "ha[ve] the ability to make the decisions in advance regarding the disposition of their own remains and their own personal funeral arrangements."⁷⁸

There are a number of other written instruments that would likely fall on the informal end of a spectrum. One private cemetery in Washington State, the White Eagle Memorial Preserve Cemetery, has made available online a simple form which allows an individual to simply state their desire to either be cremated or buried upon their death.⁷⁹ This form, only one page in length, contains a number of check boxes and fill-in-the-blanks that contain all the necessary information for an individual to direct and authorize upon death their remains to be cared for according to their wishes.⁸⁰ User-friendly forms such as this one are increasing in popularity and availability. Although forms downloaded from the internet or pamphlets obtained from funeral homes are widely available and easy to navigate, one may still direct their own disposition via an even more informal means such as scribbling on the back of a napkin. In Washington State, as long as the document expresses "the decedent's wishes regarding the place or method of disposition of their

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ UTAH CODE ANN. § 58-9-601(1) (LexisNexis 2017).

⁷⁶ *Id.* § 58-9-601(2).

⁷⁷ Foster, *supra* note 71, at 1377.

⁷⁸ *Id.*

⁷⁹ *Disposition Authorization*, WHITE EAGLE NATURE PRESERVE CEMETERY, <http://naturalburialground.org/wp-content/uploads/2015/11/Putting-My-House-In-Order.pdf> (last visited Mar. 20, 2018).

⁸⁰ *Id.*

remains, signed by the decedent in the presence of a witness, [it] is sufficient legal authorization for the procedures to be accomplished.”⁸¹

Another strategy for an individual to ensure their wishes concerning disposition are carried out is to use a proxy or agent. In Utah, a person can designate someone to control disposition through a written instrument so long as it is “acknowledged before a Notary Public or executed with the same formalities required of a will.”⁸² In contrast, Oregon’s statute requires less formality. In Oregon, an easy-to-use form is included in the statute.⁸³ Use of this form, or a substantially similar form, would grant authority to an individual to direct the manner of disposition.⁸⁴ Important components in this form include a declaration and signature of two witnesses, details of the authorized person including address and phone number, an alternate authorized person, and signature of the person giving authorization.⁸⁵ A power of attorney is likely not a sufficient instrument to give authority because the power of attorney would likely terminate at death.⁸⁶ LGBTQ groups have advocated for the use of proxies and agents in order to allow individuals to override family default rules and to ensure that “the loved one of their choice will have control of their remains and carry out their wishes after they are deceased.”⁸⁷

Another very common instrument used in controlling one’s own disposition is a preneed funeral plan. Preneed funeral plans are simply referred to as “preneeds” in the funeral industry and constitute a contractual method for controlling one’s disposition. These plans are prepaid and prearranged with a specific funeral home and allow an individual to make specific decisions regarding their disposition. These preneeds usually encompass major decisions, such as the method of disposition, and more detailed decisions such as the specific casket to be used or hymn to be sung. The preneed is typically a contractual agreement between the individual and the funeral home.⁸⁸ The plan is typically funded through a funeral trust, annuity, or insurance policy.⁸⁹ A

⁸¹ WASH. REV. CODE § 68.50.160(1) (2018).

⁸² UTAH CODE ANN. § 58-9-602(1)(a) (LexisNexis 2017).

⁸³ OR. REV. STAT. § 97.130(7) (2018).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See UTAH CODE ANN. § 58-9-602(1)(a).

⁸⁷ Foster, *supra* note 71, at 1377 (quoting Gay Men’s Health Crisis, *The Case for Disposition of Remains Legislation*, GMHC, http://www.gmhc.org/policy/nys/drl_case.pdf (last visited Aug. 26, 2008)).

⁸⁸ Dawn Jimenez, *Funeral Homes/Funeral Services*, SBDCNET, <http://www.sbdnet.org/small-business-research-reports/funeral-homes-funeral-services> (last visited Mar. 20, 2018).

⁸⁹ *Id.*

third party, usually a trustee or insurance company, assumes responsibility for the management of the funds and upon the death of the individual, the funds are released to the funeral home to provide the designated goods and services.⁹⁰

Preneeds began as concepts around the 1930s when burial organizations sold burial certificate plans.⁹¹ By the 1950s, funeral directors were selling prearranged funeral plans.⁹² Today, the preneed business is a billion-dollar industry as the amount of trust funds held pursuant to preneeds exceeds \$25 billion.⁹³ Nearly one quarter of individuals in the United States have engaged in some sort of prepaying for disposition arrangements.⁹⁴

Preneeds are favored by many. Idaho, for instance, gave preneeds the highest priority to control disposition of a decedent's remains.⁹⁵ Beyond the most obvious advantage of allowing an individual to control their own disposition, a preneed has many other benefits. Preneeds are wise financially. Preneeds most often use payment plans and allow an individual to essentially "lock-in" a price to protect from likely price increases in future funeral costs due to inflation or other reasons. Another benefit of preneed funeral plans is taking the decision-making burden off grieving loved ones. Often times, grieving loved ones are left to wonder, "What would mom have wanted?" A preneed can alleviate the amount of decisions and the stress loved ones often face upon the death of an individual. Some jurisdictions have endorsed the preneed funeral plans in the states' Priority of Decision statutes and some states have even given preneeds the highest priority to control disposition of a decedent's remains. Oregon's statute states that an individual may direct the disposition of their remains "by preparing or prearranging with any [licensed] funeral service practitioner."⁹⁶

Whether an individual uses a will, other written instrument, a proxy/agent, or a preneed to direct their own disposition prior to death,

⁹⁰ *Id.*

⁹¹ AARP Public Policy Institute, *The Deathcare Industry*, at 4, http://assets.aarp.org/rgcenter/consume/ib44_deathcare.pdf (last visited Mar. 20, 2018).

⁹² *Id.*

⁹³ *Id.* at 5.

⁹⁴ "A 2007 telephone survey conducted by the Association for the Advancement of Retired Persons (AARP) found that a sizeable portion of the 50+ population (34%) has engaged in some preplanning for a funeral or burial, and just under a quarter of individuals ages 50+ (23%) have prepaid at least a portion of funeral or burial expenses for themselves or someone else. This translates into approximately 29.5 million individuals ages 50+ in the U.S. who have preplanned any part of a funeral or burial for themselves or someone else and 20.0 million individuals ages 50+ in the U.S. who have prepaid for funerals or burials." Jimenez, *supra* note 88.

⁹⁵ 1994 Idaho Sess. Laws 423, §§ 1-4.

⁹⁶ OR. REV. STAT. § 97.130(1) (2018).

physical documentation is likely required. Practically speaking, problems may arise with the use of a physical documentation in controlling one's disposition. These problems may arise with any instrument, but are often related directly to wills. Specifically, out of respect for the decedent or just out of the need to act quickly, a will may not be located or read until several days after death. For instance, there may be a delay in examining the will due to limited access to the safe deposit box where the testator, now decedent, placed the will. This delay in locating or reading a will may lead to decisions inconsistent with the decedent's wishes regarding the decedent's disposition. For that reason, no matter the instrument, it is imperative that an individual who uses one of these means to direct their own disposition inform those closest to him or her this documentation exists and parties should refer to it upon the individual's death. Documentation containing an individual's wishes are of limited use unless someone knows they exist. A disposition directive should likely be kept in the same location as a Power of Attorney and an Advance Health Care Directive as all three of these instruments are often employed near the end of an individual's life.

Courts have placed limits on a decedent's right to dictate disposition of their remains.⁹⁷ The Oregon statute states,

If the decedent directs a disposition . . . and those financially responsible for the disposition are without sufficient funds to pay for such disposition or the estate of the decedent has insufficient funds to pay for the disposition, or if the direction is unlawful, the direction is void and disposition shall be in accordance with the direction provided by the person given priority . . . and who agrees to be financially responsible.⁹⁸

There may be other reasons why less deference is given to a decedent's wishes rather than just legal or financial reasons, such as reverence for the dead. Thomas Moyer, a resident of Phoenix, Arizona, was visiting his mother in Salt Lake City, Utah for Christmas when he unexpectedly passed away.⁹⁹ Moyer's mother had her son buried at the Salt Lake City Cemetery.¹⁰⁰ Moyer's father, the executor of Moyer's will, petitioned the court to permit exhumation of Moyer's remains and so that he could proceed with cremation according to Moyer's wishes expressed in his will.¹⁰¹ The court, despite the properly executed disposition directive in the will, held that Moyer's body was to remain

⁹⁷ *In re Estate of Moyer*, 577 P.2d 108, 110 (Utah 1978).

⁹⁸ OR. REV. STAT. § 97.130(6).

⁹⁹ *In re Moyer*, 577 P.2d at 109.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

buried.¹⁰² The court reasoned that Moyer's father, the executor of the estate, waived the right to cremation when he failed to act and permitted the burial to occur.¹⁰³ The court reasoned that society has a reverent regard for loved ones' remains and "this naturally includes an ardent desire that their remains be treated with respect and allowed to remain in undisturbed peace and rest."¹⁰⁴

C. Non-Recognized Relationships

Professor Susan N. Gary writes that "[i]ntestacy statutes almost uniformly use a formal definition of family: person related by blood, marriage or adoption."¹⁰⁵ The reason these intestacy statutes look to the family is either because it strives to approximate the decedent's wishes or "because society has decided that intestacy statutes should benefit and strengthen families if a decedent does not express a contrary wish in a will."¹⁰⁶ Right to Control Remains laws are not unlike intestacy statutes in that they look to a formal, traditional status-based scheme. As in intestacy, the law on the right to control remains is based on the presumption that persons related by blood, marriage or adoption will know best what the decedent's wishes were as to the disposition of their body.¹⁰⁷ This conventional view can cause dire effects for those in unconventional relationships and can create disputes as to the right to control remains.¹⁰⁸ Notably, the spouse of the decedent is at the top of the list in the status-based scheme. Because of the narrow definition of spouse, unmarried partners can be denied the right to control the disposition of their loved one.¹⁰⁹ Traditionally, the harm this creates has been focused on same-sex partners.¹¹⁰ However, it is applicable as well to unmarried different-sex partners.¹¹¹ Nearly 10% of coupled households consist of unmarried different-sex couples who would stand at risk of

¹⁰² *Id.* at 111.

¹⁰³ *Id.* at 110.

¹⁰⁴ *Id.*

¹⁰⁵ Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQ. 1, 27 (2000).

¹⁰⁶ *Id.*

¹⁰⁷ Horan, *supra* note 17, at 424.

¹⁰⁸ See OR. REV. STAT. § 97.130(2) (2018).

¹⁰⁹ Foster, *supra* note 71, at 1365.

¹¹⁰ "Same-sex-partner households represented 0.6% of all households and 10.9% of unmarried-partner households in 2000. By 2010, same-sex-partner households rose by 51.8% in numbers and to 0.8% of all households and 11.6% of unmarried-partner households." Lawrence W. Waggoner, *Marriage is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L. Q. 215, 222 (2016).

¹¹¹ Foster, *supra* note 71, at 1365.

being harmed by a traditional status-based scheme of determining the authorized party to direct disposition.¹¹²

There have been legal responses to changes in family structure,¹¹³ most notably is the Supreme Court decision holding that the fundamental right to marry is guaranteed to same-sex couples.¹¹⁴ These changes attempt to fit new forms of relationships into the traditional family model.¹¹⁵ However, this status-based model can continue to exclude those who cannot or choose not to enter into such relationships.¹¹⁶ Ever-changing family dynamics coupled with reluctance to modernize the definition of the family increases the likelihood of disputes regarding the disposition of the dead.¹¹⁷

Additionally, changes in the traditional family structure are also reflected in states' Priority of Decision laws. New York's statute discussed above includes an addition of "domestic partner" in the hierarchy of those who have authority to control the decedent's disposition which, as can be imagined, is a more inclusive role than that of a spouse. This detailed definition of domestic partner is likely an attempt by the New York State Legislature to not exclude an individual closest to the decedent in making decisions and arrangements for the disposition of the decedent. This is an example of a statutory means to overcome issues that may arise within the traditional status-based scheme and is a clear departure from the traditional interpretation of a family.

Parties without recognized relationships would have to overcome a significant burden to usurp a party's right to disposition to control a decedent's remains.¹¹⁸ In 1993, Drew Stanton passed away in West Vir-

¹¹² "The amount of cohabitation in the United States has grown at an astonishing rate in the last four decades—from fewer than 500,000 opposite-sex cohabiting couple households in 1960 to 4.9 million (almost ten million individuals) in the most recent census (2000). This is an increase of almost 1000% over forty years, a very rapid social change indeed. Opposite-sex unmarried-partner households now make up at least 9% of all coupled households (coupled households are 57 of all households)." Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J. L. & FAM. STUD. 1, 7 (2007); "Unmarried couple households represented 5.2% of all households in 2000 and increased to 6.6% of all households by 2010. In 2000, opposite-sex-partner households represented 4.6% of all households and 89.1% of unmarried-couple households. By 2010, opposite-sex-partner households rose by 40.2% in numbers and to 5.9% of all households but decreased to 88.4% of unmarried-couple households." Wagoner, *supra* note 110, at 221-22.

¹¹³ Gary, *supra* note 105, at 31.

¹¹⁴ Obergefell v. Hodges, 135 U.S. 2584 (2015).

¹¹⁵ Gary, *supra* note 105, at 60.

¹¹⁶ Foster, *supra* note 71, at 1368.

¹¹⁷ *Id.* at 1367-68.

¹¹⁸ Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel, Inc., 606 N.Y.S.2d 965, 968 (N.Y. App. Div. 1993).

ginia from complications of AIDS.¹¹⁹ Stanton's mother and brother took custody of Stanton's remains and planned an elaborate Jewish Orthodox funeral in New York.¹²⁰ Stanton's partner, Michael Stewart, opposed the proposed actions of the mother and brother and sought to take custody of the body for the purposes of cremation.¹²¹ Although Stewart was the executor of Stanton's estate, the court found that that position failed to give Stewart custody for two reasons.¹²² First, the will did not designate a method of disposition and the will did not vest the right to control disposition to the executor.¹²³ Second, the decedent's body was not subjected to delegation under the will because there is no property right in the decedent's body.¹²⁴ The court in this case ultimately did not render a decision on this case because the parties came to a resolution; the parties agreed to cremate the remains and split the ashes.¹²⁵ Despite the resolution, this case illustrates the complications that arise when a party that seeks to control disposition does not have a recognized relationship with the decedent. Furthermore, this case illustrates the importance and availability of controlling one's disposition. In this case, Stewart, the decedent's partner, may have had the right of disposition had the decedent's wishes for disposition been written in the will or if Stewart was listed as the party to control disposition in the will.

D. Disagreements within the Status-Based Scheme

Professor Ann M. Murphy points out a potential problem with status-based schemes and Priority of Decision laws.¹²⁶ Murphy points out that "there is no provision in the event there is an even number of surviving adult children, siblings or parents of the decedent and they disagree in equal numbers as to the disposition."¹²⁷ Essentially, the question is, what happens when there's a tie? An example of such a dilemma could be when a decedent leaves no instructions as to the disposition of their remains and the decedent's parents have the right to control the disposition of the decedent's remains. A situation could arise where one parent wants the child to be cremated while the other parent prefers a more traditional burial. A more common example could be where an even numbered amount of parties with the right to control remains disagree concerning a more minor decision like the clergy that is to officiate

¹¹⁹ *Id.* at 966.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 967.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 969.

¹²⁶ Murphy, *supra* note 13, at 404.

¹²⁷ *Id.*

at the service or the color of the casket. The Oregon Priority of Decision statute does not set forth procedures if such a tie were to take place.¹²⁸ In such a situation, the parties may have to look to courts or alternative dispute resolution methods to resolve the dispute.

When multiple people have the right to control remains, a single person alone does not have the unilateral right to control disposition of the remains; each party with the right has an equal presumptive say in the disposition.¹²⁹ On October 16, 2009, John M. Gately was killed in a car accident.¹³⁰ According to New Jersey common law, Gately's divorced parents held the right to control remains.¹³¹ The mother of the decedent took the initiative to arrange for the services and the disposition of her son.¹³² The mother elected to have her son cremated and signed a form provided by the funeral home which indicated that she "alone [has] the right [to] give this authorization and direction for said cremation, and that no other person has such right."¹³³ The father alleged that he never authorized the cremation and even voiced his objection to the mother and the funeral home.¹³⁴ This case ultimately came down to a jury deciding that the father did not prove by a preponderance of the evidence that the mother "negligently violated the law regarding the funeral or disposition of [the son]."¹³⁵ On appeal, the Superior Court of New Jersey affirmed the verdict and concluded that in a case such as this, both parents have an equal presumptive say in the disposition of their child and that a funeral director may have a duty to inquire of both parents before assuming that authorization from one parent is valid.¹³⁶

E. The Funeral Home's Duty to Ensure the Proper Party Controls Disposition

Funeral homes often carry the burden to ensure the individual making arrangements and directing the deposition of the decedent is in fact authorized according to the statute, common law, or controlling instrument. That can be a large burden to carry and can create some dire circumstances if done improperly.

¹²⁸ OR. REV. STAT. § 97.130 (2018).

¹²⁹ *Gately v. Hamilton Mem'l Home, Inc.*, 442 N.J. Super. 542, 556-57 (App. Div. 2015).

¹³⁰ *Id.* at 546.

¹³¹ *Id.* at 550.

¹³² *Id.* at 546.

¹³³ *Id.*

¹³⁴ *Id.* at 547.

¹³⁵ *Id.* at 550.

¹³⁶ *Id.* at 558-60, 563.

One state statute that is similar to other states' statutes on the matter reads that a funeral director is permitted to dispose of human remains "on the written authorization of a person who claims to be, and is believed to be, a person who has the right to control the . . . disposition as provided by [statute]." ¹³⁷ This statute, therefore, gives funeral directors a two-prong requirement before they can dispose of remains according to a party's wishes. First, the party must claim to be the party authorized to control disposition. Second, the funeral director must believe that person to indeed be a person that is authorized.

The court in *Gately* held through statutory interpretation that funeral directors do not have an affirmative duty to obtain authorizations from all parties who have a right to control disposition. ¹³⁸ Funeral directors have qualified immunity from civil liability for the disposition of remains. ¹³⁹ This qualified immunity only applies so long as the funeral director did not have reasonable notice that representations made by the supposed authorized party were untrue or that the party lacked the right to control the disposition. ¹⁴⁰ This "reasonable notice" standard that the court articulates is an objective standard founded upon the notion of a reasonable person in the funeral director's position. ¹⁴¹

Another court stopped short of holding that a funeral home must make a good faith effort, similar to that required for constructive service of process, to locate the next authorized individual according to the statute. ¹⁴² In that case, the funeral home was sued for causing severe emotional distress after cremating the decedent. ¹⁴³ The funeral home allowed the decedent's unmarried partner and brother to act as authorized agents in directing the disposition although, according to the statute, an estranged daughter actually held that right. ¹⁴⁴ The partner and the brother had told the funeral home that they did not know where the daughter was or how to contact her. ¹⁴⁵ The court held that there was no evidence suggesting that the funeral home had any reason to doubt that information and that the state's disposition authorization statute does not impose a due diligence requirement on funeral homes. ¹⁴⁶

¹³⁷ N.J. STAT. ANN. § 45:7-95 (West 2018); see *Gately*, 442 N.J. Super. at 556-57.

¹³⁸ *Gately*, 442 N.J. Super. at 558.

¹³⁹ *Id.* at 559-60.

¹⁴⁰ *Id.* at 560.

¹⁴¹ *Id.*

¹⁴² *Matsumoto v. Am. Burial & Cremation Servs., Inc.*, 949 So. 2d 1054, 1057 (Fla. Dist. Ct. App. 2006).

¹⁴³ *Id.* at 1056.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1057.

F. Potential Benefits of Sticking with the Status-Based Scheme

Despite the efforts to overcome the status-based scheme and tools in place to do so, there are benefits to such a scheme that are worth illustrating. One benefit of utilizing a more traditional approach is simply judicial economy. Intestate and priority of decision laws, whether they derive from statutes or common law, can preserve judicial economy by setting forth a predefined hierarchy of persons to whom property is distributed or to whom control of disposition is given.¹⁴⁷ Much can be said regarding the benefits of predictability. Breaking away from the traditional status-based scheme could lead to lengthier proceedings which could burden court systems.¹⁴⁸

III. RESOLVING DISPUTES

There are, as discussed previously, many steps individuals can take to control their own disposition and, as a result, avoid disputes between parties. Generally, it is beneficial to all parties involved for individuals to take such steps. Taking such steps can save parties money, grief, time and would focus attention on memorializing the decedent rather than squabbling over details. However, disputes will continue to arise in context of the disposition of remains.

A. Means to Resolve Disputes

Most disputes regarding the disposition of the dead are likely resolved before a court is asked to intervene or before more formal dispute resolution techniques are utilized. It is not unheard of for families of a decedent to engage in an informal vote or an impromptu round of “rock, paper, scissors” to determine the specific casket in which their loved one is to be buried or the hymn to be sung at the memorial service. Even with detailed preplanning, it is extremely rare to have every detail of a disposition or a memorial service planned and thus, those authorized are undoubtedly left with decisions and choices. These informal decisions and resolutions are most often made surrounding a kitchen table or in the presence of a funeral director acting as an impromptu mediator. Resolutions in this manner are ideal. When parties are able to put differences aside, come to concessions, listen, focus on the desires of the decedent, and be understanding, unpleasant disputes are often avoided and the focus is appropriately on honoring and celebrating the life of the decedent.

¹⁴⁷ Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 1016 (1999).

¹⁴⁸ *Id.*

Nevertheless, when the ideal, informal, self-resolution techniques do not produce a consensus, more formal settings and proceedings are needed to resolve the dispute. In these largely rare occasions there are generally two means of resolving such a dispute: (1) judicial resolution and (2) alternative resolution.

1. *Resolving Disputes Judicially*

A judicial resolution of a dispute regarding the disposition of remains can take many forms. In the case of Anna Nicole Smith, the trial court gave Smith's daughter (through the guardian ad litem) the exclusive right to control disposition by means of granting a motion.¹⁴⁹ In other cases it takes the form of a probate proceeding.¹⁵⁰ Some probate courts have dismissed such cases holding that these types of disputes are not within the jurisdiction of a probate court and are more appropriately handled in civil courts.¹⁵¹ In the case of a woman seeking to disinter and move the body of her deceased unmarried companion to a different cemetery, the matter was presented to the court in the form of an order to show cause.¹⁵² In the case of a husband and wife disputing over the cremated ashes of their deceased minor son, the litigation arose from their divorce proceedings.¹⁵³ In that case, the father filed a Petition for Special and/or Injunctive Relief concerning the disposition of the ashes of the parties' deceased son.¹⁵⁴

In some cases, there is no dispute for a court to resolve, but rather, the court is to determine if a party is liable for actions taken regarding the improper disposition of remains. Such was the case in *Gately v. Hamilton Memorial Home, Inc.* where the father of a decedent brought the tort claims of intentional and negligent infliction of emotional distress and loss of consortium against the funeral home.¹⁵⁵ The father alleged that the funeral home wrongfully released the remains of his son for cremation without his authorization.¹⁵⁶ In that case, the very final act of cremation had already taken place and there was no dispute to be

¹⁴⁹ Arthur v. Milstein, 949 So. 2d 1163, 1166 (Fla. Dist. Ct. App. 2007).

¹⁵⁰ O'Donnell v. Slack, 123 Cal. 285, 288 (Cal. 1899).

¹⁵¹ Estate of Jimenez, 65 Cal. Rptr. 2d 710, 715 (Cal. Ct. App. 1997) (holding that because testator's wishes regarding disposition of her remains were not contained in the will itself, dispute over disposition of remains belonged in civil court, not in probate court).

¹⁵² Felipe v. Vega, 570 A.2d 1028, 1028 (N.J. Super. Ct. Ch. Div. 1989).

¹⁵³ Kulp v. Kulp, 920 A.2d 867, 869 (Pa. Super. Ct. 2007).

¹⁵⁴ *Id.*

¹⁵⁵ Gately v. Hamilton Mem'l Home, Inc., 442 N.J. Super. 542, 556-57 (App. Div. 2015).

¹⁵⁶ *Id.* at 545.

resolved by the court concerning authorization.¹⁵⁷ Instead, the jury was charged with the responsibility of determining the liability of the funeral home.¹⁵⁸

There are perhaps societal benefits to judicial litigation as opposed to other means of resolving disputes such as alternative dispute resolution. One societal benefit to litigation is the development of the law through its judicial interpretation and the setting of precedent.¹⁵⁹ Precedent such as the cases illustrated in this comment are critical to creating a backdrop that allows the law to progress. Another societal benefit to litigation is the reinforcement of social values through their legal application and pronouncement.¹⁶⁰ Litigation creates a window to allow society to view values applied. This perspective may force reflection of whether to continue with the status quo or whether to push for an evolution of societal values.

2. *Alternative Dispute Resolution*

Alternative dispute resolution (ADR), instead of a more formalistic approach based on status-based schemes, addresses concerns of the decedent, non-family survivors, religious organizations, funeral organizations, the state, and even the decedent's pets. The default rules that would have to be followed in a judicial proceeding may not account for all these parties that may be involved in a dispute over disposition of a body. ADR techniques "that combine speed with an ability to entertain viewpoints from many diverse parties"¹⁶¹ would likely be a better approach for all parties involved instead of judicial proceedings.

One court expressed its disdain of having to get involved in a disposition dispute and addressed that such disputes would be better resolved affably between the parties:

Litigation of this character fortunately has seldom arisen in legal history, and we cannot refrain from regretting that these parties should have been unwilling, especially in view of facts and circumstances which hereafter must be noted, to amicably settle their differences. However, since the brothers have, by their attitude and conduct, forced the sister to appeal to us to settle the dispute, we will decide the matter with as little exposure as possible of certain events of a personal nature in this

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99, 111 (1999).

¹⁶⁰ *Id.*

¹⁶¹ Foster, *supra* note 71, at 1384.

dead man's life to which the necessities of a decision compel us regretfully to refer.¹⁶²

Many, if not most, disputes regarding the disposition of the dead are resolved before one or both parties seek other legal assistance or other means to resolve the dispute. However, sometimes parties will leave a dispute unresolved because they believe there is no means through which they could resolve it on their own.¹⁶³ As previously discussed, one option to resolve such disputes is to involve lawyers and courts and to use the tool of litigation. Although litigation may be helpful and even necessary in some situations involving disposition disputes, alternative dispute resolutions can be a better route. Alternative dispute resolution can provide a positive alternative to self-help on one side and litigation on the other side.¹⁶⁴

There are many benefits to using alternative dispute resolution techniques, namely mediation, in resolving disputes. Professor Susan N. Gary identifies five benefits of using ADR in probate disputes that are absolutely applicable in the context of disposition disputes.¹⁶⁵

The first benefit to resolving disposition disputes through ADR is the ability to preserve privacy and confidentiality.¹⁶⁶ The matters at issue in a disposition dispute can be extremely sensitive. It is generally beneficial to avoid public knowledge concerning a loved one's remains. When a litigated case goes to trial, statements made become a matter of public record. Disclosure of these statements regarding these sensitive disputes can be embarrassing for the parties involved. Generally, parties engaging in ADR can stipulate not to disclose. This can allow the parties to feel more able to speak freely, air grievances more openly, and generate solutions without fear of legal consequences.

Second, there are clear emotional benefits to resolving disposition disputes through ADR.¹⁶⁷ Although some argue that litigation is emotionally beneficial because the litigants receive an opportunity to air the grievances in their day in court, often times the venting that occurs in court is irrelevant and rarely provides a sufficient basis to justify the end result of the judicial proceeding. Indeed, animosity in a formal court proceeding can have a long-lasting impact on litigants, and airing dirty laundry in public provides less of an incentive to move forward under a final order.

¹⁶² Boyd v. Gwyn, 6 Pa. D. & C. 275, 276-77 (Pa. Ct. of C. P. 1925).

¹⁶³ Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 423 (1997).

¹⁶⁴ *Id.* at 424.

¹⁶⁵ *Id.* at 423-31.

¹⁶⁶ *Id.* at 424.

¹⁶⁷ *Id.* at 425-26.

Alternatively, ADR can be a more appropriate venue for airing grievances. In this more private setting, there can be more of an opportunity to address emotional issues involved in a dispute. ADR can provide an outlet for emotions and can provide an opportunity to resolve emotional issues as well as the legal issues.¹⁶⁸ ADR generally gives the parties greater control over the dispute resolution process and that control over the process and the outcome can increase psychological well-being.¹⁶⁹

Third, resolving disputes through ADR can repair, maintain, or even improve ongoing relationships.¹⁷⁰ Parties who are disputing regarding the disposition of a loved one likely have unresolved issues that existed before the disposition disputed existed. Parties disputing the disposition of a decedent are most often family members and repairing, maintaining, or improving familial relationships is always a worthy endeavor.

ADR can be beneficial to relationships because it requires parties to work together to reach a solution. Professor Gary identifies two beneficial results of working together.¹⁷¹ First, in the process of understanding the other party's view, communication can increase between the parties.¹⁷² Second, by participating in the problem-solving process, the parties may be better apt to work together to resolve future issues.¹⁷³ As the death of a loved one can be one of the most emotional times for an individual, engaging in a more emotionally beneficial process to resolve disputes is healthy for all parties involved.

Fourth, using ADR as a tool to resolve disposition disputes allows parties to create unique solutions.¹⁷⁴ Litigation often produces a clear winner and a clear loser. ADR on the other hand is more suited to reaching concessions and compromises. Imagine, for example, a difficult dispute where a decedent had not made known any wishes concerning her disposition and one party wants the decedent cremated and another party wants the decedent buried. In a judicial proceeding, a court would likely, based on the laws of that jurisdiction, determine the party with the authorization to control disposition and give that party the control to make the decision. Alternatively, in ADR, a compromise can be reached where both sides concede but also arrive at an amicable solution. Such a compromise using this example may take the form of cre-

¹⁶⁸ *Id.* at 427.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 428.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 429.

mation following a traditional viewing and funeral service of the casketed decedent and then perhaps burial of the cremated ashes in a cemetery.

Fifth, avoiding litigation and using mediation to resolve disposition disputes can have significant financial benefits.¹⁷⁵ It's no secret that funeral and memorial services can be expensive. Including expenses such as professional services, embalming, cemetery property, opening and closing of the grave, headstone, transportation, death certificates, obituaries, and flowers, the total cost of funeral arrangements can exceed \$11,000.¹⁷⁶ The average cost of a casket alone is slightly more than \$2,000, though can be as much as \$10,000 for some mahogany, bronze or copper caskets.¹⁷⁷ During this potentially expensive process, the last thing survivors of a decedent want is added expense in resolving a disposition dispute. Effective use of alternative dispute resolution in general can significantly reduce litigation-related expenses. Through ADR, costs generated from prolonged litigation can greatly be avoided. The use of ADR may lower costs related with investigation, fact-finding, court filings, oral discovery, and trial testimony.

Another possible benefit to resolving disposition disputes through mediation is the speed at which a dispute can be resolved. A formal judicial proceeding and civil litigation can be a slow process. When a time-sensitive dispute regarding the disposition of a decedent arises, the parties may be at the mercy of a court calendar.¹⁷⁸ In ADR proceedings, the parties can stipulate to discovery schedules (or even limit or eliminate discovery altogether) in order to establish an appropriate timeline.¹⁷⁹

IV. SUGGESTIONS AND FUTURE DEVELOPMENTS

Although the law is generally evolving to protect the intent and wishes of the decedent, individuals should not rely on the default scheme of determining the party authorized to direct disposition. Individuals should work proactively to properly express their wishes regarding their disposition. This expression may take the form of a will, other formal or informal written document, an authorization of a proxy/agent,

¹⁷⁵ *Id.* at 431.

¹⁷⁶ Jim T. Miller, *This Is How Much An Average Funeral Costs*, THE HUFFINGTON POST (Oct. 17, 2016, 8:49 AM), http://www.huffingtonpost.com/entry/how-much-does-a-funeral-cost_us_5804c784e4b0f42ad3d264de.

¹⁷⁷ FED. TRADE COMM'N, *Consumer Information: Funeral Costs and Pricing* (July 2012), https://www.consumer.ftc.gov/articles/0301-funeral-costs-and-pricing-checklist#Funeral_Fees.

¹⁷⁸ Kenneth A. Ehrman, *Why Business Lawyers Should Use Mediation*, 75 ABA J. 73, 74 (June 1989).

¹⁷⁹ *Id.*

or a preneed plan. Creating a valid expression not only would go towards ensuring an individual's wishes are fulfilled regarding disposition, but it would also lift a burden from those survivors of the decedent. This expression would likely create a relief for the survivors and allow them to more properly grieve as they would likely be more confident the decedent's wishes are being fulfilled. Individuals who do take that important step of creating a valid expression directing the disposition of their remains should be sure to communicate with others the fact that that expression exists.

With thousands of deaths per day in the United States, thousands of individuals become authorized to direct the disposition of these decedents. These authorized individuals may receive this authorization through their status or relationship to the decedent or they may receive this authorization through other means such as appointment through an instrument. Regardless of the means of receiving authorization, individuals charged with directing the disposition of a decedent should strive to ensure the wishes of the decedent are carried out as much as is feasible. Doing so would ensure a proper decedent-focused funeral service, memorial service, or other disposition event.

Funeral directors often have front-row seats to disputes regarding the disposition of remains. Funeral directors would be well-served to seek education in conflict resolution. State and national funeral director and funeral service associations should seek to create opportunities for those in the industry to obtain continuing education regarding conflict resolution and laws and developments about controlling disposition. Funeral directors should ensure proper procedures are in place to make sure authorization is received from the appropriate party before any action is taken including removal from place of death, embalming, cremation, etc. Funeral directors would also likely be well-served to consult with legal counsel not only when issues arise, but also to work proactively to prevent future issues.

Attorneys should be zealous advocates for decedents who have passed away and no longer have a voice. Attorneys should work to ensure the wishes of decedents are protected. Lawyers should also be sensitive in serving clients who may be involved in a dispute regarding the disposition of remains. The passing of a loved one is likely one of the most difficult experiences for the survivors. Attorneys should strive for a resolution that has the least amount of negative emotional impact while ensuring the most appropriate outcome for the lawyers' clients. In that vein, alternatives to litigation should be seriously considered. There are many benefits to ADR, especially when it comes to disputes involving the death of a loved one.



Attorneys should also work proactively in preventing such disputes. A discussion regarding wishes of disposition of remains in estate planning would help attorneys understand if a disposition directive is appropriate for their client. Estate planning attorneys should be familiar with the Priority of Decision laws in their jurisdiction and responsibly advise clients to complete a disposition directive if there are concerns regarding a default status-based scheme.

Legislatures and courts should continue to strive to make and evolve the law that would create a society that would give individuals more access and opportunity to direct their own disposition. Additionally, legislatures and courts should continue a careful and thoughtful shift away from the status-based scheme of determining the party who controls a decedent's disposition and instead create means that would allow for those closest to the decedent, whatever their status may be, to direct disposition. This continued shift would build towards ensuring the decedent's true wishes regarding disposition are fulfilled.

CONCLUSION

Benjamin Franklin famously wrote, "in this world nothing can be said to be certain, except death and taxes."¹⁸⁰ It is safe to say that we as a society dread both, death and taxes. As for taxes, there are countless tools that make the annual filing more painless. This is evident as we are inundated with advertisements for tax software in the spring. Similarly, there exist helpful tools to make the process of the disposition of the dead easier and more efficient for those involved. Taking advantage of such tools would prevent disputes and help to ensure the decedent's life is appropriately memorialized. When unresolved disputes do arise, parties would benefit from exploring all means of resolution.

¹⁸⁰ LETTER FROM BENJAMIN FRANKLIN TO JEAN-BAPTISTE LEROY (Nov. 13, 1789), in Bartlett's Familiar Quotations 321 (John Bartlett & Justin Kaplan eds., 17th ed. 2002).



