

## UNIFORM ACTS—CAN THE DEAD HAND CONTROL THE DEAD BODY? THE CASE FOR A UNIFORM BODILY REMAINS LAW\*

### INTRODUCTION

Did former Red Sox slugger Ted Williams really want to be decapitated and cryonically frozen so that his bodily remains would spend eternity encapsulated in a building in the Arizona desert, much like items in a warehouse?<sup>1</sup> Although his will stated that he wanted to be cremated, and that his remains should be scattered in the ocean off of Florida,<sup>2</sup> two of the great baseball player's children maintained that he had signed a document agreeing to cryonic freezing of his remains.<sup>3</sup> The document, however, is no more than a small, stained piece of paper, signed by Ted, his son John Henry, and his daughter Claudia, stating that they "agree to be put into bio-stasis" after they die, so that they may "be together in the future, even if it is only a chance."<sup>4</sup> The signatures are not witnessed; however, a "family attorney" claimed it was signed while Ted was in the hospital prior to surgery.<sup>5</sup>

Baseball fans were outraged when they discovered what had happened to the Hall of Famer's bodily remains. A website is devoted to the cause of having Ted's body defrosted and cremated, as directed in his will.<sup>6</sup> The broader problem is how this situation ever

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1. Shortly after Ted Williams's death, the former baseball player's body was flown to the Alcor Life Extension Foundation building in Arizona, where his head was removed and placed in a "steel can filled with liquid nitrogen." *Ted Williams Frozen in Two Pieces*, CBS NEWS, Aug. 12, 2003, available at <http://www.cbsnews.com/stories/2002/12/20/national/main533849.shtml>. His body is stored separately in a similar steel tank. *Id.*

2. *Begging to Differ*, SI.COM, Aug. 13, 2002, [http://sportsillustrated.cnn.com/baseball/news/2002/08/13/williams\\_daughter\\_ap](http://sportsillustrated.cnn.com/baseball/news/2002/08/13/williams_daughter_ap). The will can be viewed online. See *The Smoking Gun*, Archive, <http://www.thesmokinggun.com/archive/tedwill1.html> (last visited Feb. 20, 2007).

3. *What Happened to Ted?*, SI.COM, Aug. 12, 2003, [http://sportsillustrated.cnn.com/baseball/news/2003/08/12/williams\\_si](http://sportsillustrated.cnn.com/baseball/news/2003/08/12/williams_si).

4. *Ted Williams Frozen in Two Pieces*, *supra* note 1. A picture of the document can be viewed online. See *The Smoking Gun*, Archive, <http://www.thesmokinggun.com/archive/twletter1.html> (last visited Feb. 20, 2007).

5. *Ted Williams Frozen in Two Pieces*, *supra* note 1.

6. *Save Ted Williams*, <http://washdc.pages.web.com/saveted> (last visited Feb. 20, 2007).

occurred. That is, many legal practitioners would think that a decedent's cremation directive, when set forth in a will, would be upheld and only revocable by a later document executed with testamentary formalities.<sup>7</sup> As this Note will show, however, a review of actual cases suggests otherwise.

The case involving Ted Williams's bodily remains is one of many situations evidencing the need for more direction from legislatures for both citizens and the courts as to the best way an individual may go about directing the disposition of his body.<sup>8</sup> Many states have been unclear with respect to who has the right to make decisions regarding the disposition of a person's bodily remains. Furthermore, even in those states with statutes that do provide a mechanism allowing individuals to direct what will happen post-mortem, the laws are not always clear or complete and can vary substantially from state to state. Moreover, because the law is not well-settled, many courts allow evidence beyond what would normally be acceptable in an attempt to interpret a deceased's wishes. This sends a message to those who are concerned about their bodily remains that there is almost no way to ensure a disposition according to their wishes.

The first Part of this Note discusses the evolution of the common law in the United States with respect to the disposition of bodily remains, as well as those statutes that have codified the common law. The second Part of this Note outlines problems with the common law and those statutes that codify the common law without any further clarification. This Part also suggests that state legislatures should enact bodily remains statutes that go beyond the common law. The second Part also shows the differences among the various state statutes that have been enacted, and posit that a uniform law is needed to resolve these differences. The final Part of this Note

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7. In Massachusetts in the 1930s, for example, the Boston law firm of Hale and Dorr issued an opinion to the Massachusetts Cremation Society recommending that a person interested in having his body cremated should set forth his instructions "in the will, in order that they may have the benefit of the special sanction and force of that instrument." RICHARD W. HALE & RAYMOND B. ROBERTS, CREMATION OF THE DEAD AND THE RIGHT TO CONTROL THE DISPOSITION OF ONE'S BODY 10 (uncopyrighted, n.d.).

8. The incident involving the remains of Ted Williams merely brought the issue to light. Problems with family members fighting over the remains of the deceased are becoming more and more common for funeral directors, some of whom have stated that they have hired security personnel to guard the doors and prevent altercations or have called police officers to remove "unwanted" people from the funeral services. *Family Battles Over Remains Become Daily Occurrence for Industry*, DEATH CARE BUS. ADVISOR, Aug. 8, 2002, at 3.

discusses the considerations involved in drafting a uniform law and proposes a sample uniform disposition of bodily remains act.

## I. BACKGROUND

For many people, knowing how and where one's final remains will ultimately be disposed is important. People of faith, for example, may be especially concerned with this issue.<sup>9</sup> American courts have often recognized the importance to individuals of having some security about what will happen to their bodies post-mortem. As early as 1872, a Rhode Island court noted that "the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property."<sup>10</sup>

### A. *The Evolution of the Common Law Regarding Disposition of Remains*

The laws of a majority of the states have evolved over the years from borrowing England's ecclesiastical law, which stated that a corpse was not considered property,<sup>11</sup> to adopting the concept of the body as quasi-property.<sup>12</sup> Because people were traditionally

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9. For example, imagine a person who originally came from an Orthodox Jewish family who had converted to Hinduism, or vice-versa. Members of the Jewish faith generally do not believe cremation is proper. In fact, "Jewish law teaches that the whole body should be buried, and that if parts have been removed, for examination or otherwise, they must be returned and buried with the rest of the body." *Kohn v. United States*, 591 F. Supp. 568, 573 (E.D.N.Y. 1984) (quoting I. KLEIN, A GUIDE TO JEWISH RELIGIOUS PRACTICE 270 (1979); 3 ENCYCLOPEDIA JUDAICA 932, 934 (1978); I. KLEIN, RESPONSA AND HALAKHIC STUDIES 38, 39 (1975)). Hindus, on the other hand, believe strongly that cremation is the only way a body should be disposed. See, e.g., *Death: The Last Taboo*, Hindu, <http://www.deathonline.net/disposal/cremation/hindu.cfm> (last visited Feb. 20, 2007). Without the ability to leave instructions that a family member would be bound by, the Hindu may be concerned that his Jewish Orthodox family would direct that his body be buried. On the other hand, the Jewish Orthodox person may worry that her Hindu family would order her body to be cremated.

10. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 237-38 (1872). The court also stated "[m]ost people look forward to the proper disposition of their remains, and it is natural that they should feel an anxiety on the subject." *Id.* at 239. This concept is carried forward in the case of *In re Estate of Moyer*. *In re Estate of Moyer*, 577 P.2d 108, 110 (Utah 1978) ("The matter of the disposition of the dead, and what happens after death, have always been among the serious concerns of mankind. For that and other reasons, which need no elaboration here, the subject is so involved in the public interest, including its health, safety and welfare, that it is not subject entirely to the desires, or the whim or caprice of individuals, but is subject to control by law.").

11. HUGH Y. BERNARD, *THE LAW OF DEATH AND DISPOSAL OF THE DEAD* 16 (2d ed. 1979).

12. See, e.g., *Pierce*, 10 R.I. at 238 ("Although, as we have said, the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform

buried in the church cemetery, the law in England regarding bodily remains was the province of the church rather than the courts.<sup>13</sup> In addition, the English courts struggled with how to describe a corpse, with one case referring to a corpse as being no more than a “lump of earth.”<sup>14</sup> Gradually, the English courts acknowledged that the family of the decedent had a right to possession of the corpse up until the time of burial; however, even then the courts would not allow an individual to direct that his body be cremated after death.<sup>15</sup> Furthermore, although people could petition a court for relief based on various causes of action regarding graves, such as a suit for destruction of a grave marker, the English legal system gave no rights to the next of kin to bring an action for custody of the body.<sup>16</sup> The only right to bring a legal action for disturbance of a corpse rested with the Crown, which could bring criminal charges against the wrongdoer.<sup>17</sup>

America’s legal system has its roots in England’s jurisprudence, and courts originally agreed with the theory that there were no property rights in a corpse.<sup>18</sup> In 1856, however, a New York court strictly rejected the English law with respect to corpses in a case involving the widening of streets in Manhattan, necessitating the disturbance of a cemetery. Attached to the case was a report by a referee<sup>19</sup> named Ruggles, repudiating America’s adoption of laws from an ecclesiastical court system.<sup>20</sup> Although Referee Ruggles did not go so far as to suggest that there were property rights in a

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towards it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it.”).

13. *Id.* at 236.

14. LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 10 (1999) (quoting Haynes’ Case, 77 Eng. Rep. 1389 (K.B. 1614)).

15. *Id.* at 12.

16. *Pierce*, 10 R.I. at 227; *see also* PALMER, *supra* note 14, at 14 (quoting *Rex v. Lynn*, 100 Eng. Rep. 394 (1788) (quoting Lord Coke in the case of *Rex v. Lynn*: “It is to be observed that in every sepulcher, that hath a monument, two things are to be considered . . . the burial of the cadaver . . . belongs to ecclesiastical cognizance; but as to the monument, action is given at the common law for defacing thereof.”)).

17. *Pierce*, 10 R.I. at 236 n.1 (“By the old English law the body was not recognized as property, but the charge of it belonged exclusively to the church and the ecclesiastical courts (as did also administration of estates). The only common law remedy for a wrongful removal was by criminal process.”).

18. PALMER, *supra* note 14, at 20.

19. A referee is “a type of master appointed by a court to assist with certain proceedings. In some jurisdictions, referees take testimony before reporting to the court.” BLACK’S LAW DICTIONARY 1306 (8th ed. 2004).

20. BERNARD, *supra* note 11, at 14.

corpse, he set forth two pertinent conclusions in his report. First, Ruggles stated that “the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect.”<sup>21</sup> Second, “[t]hat such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.”<sup>22</sup>

The courts in a majority of states adopted the Ruggles report, and its rejection of the English ecclesiastical law.<sup>23</sup> While they agreed with Referee Ruggles that the body could not be considered property, it was not until 1872, in the Rhode Island case of *Pierce v. Proprietors of Swan Point Cemetery*, that the term “quasi-property” was adopted to describe the limited rights of custody that were vested in the next of kin.<sup>24</sup> The court in *Pierce* stated that although no one could claim ownership of a dead body, the next of kin should have custody of the body to “hold[ ] it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it.”<sup>25</sup>

In another leading case, *Pettigrew v. Pettigrew*, a Pennsylvania court likened the quasi-property right of possession to being entrusted with the care of the decedent’s corpse.<sup>26</sup> In *Pettigrew*, the court turned for guidance to the system of probating wills, and decided that the quasi-property right in a corpse vested first in the decedent’s administrator or executor.<sup>27</sup> The court stated that because it was incumbent upon the decedent’s estate to pay the funeral bills, the “duty to determine when, where, and in what manner the body shall be buried rest[ed] with the executor or administrator.”<sup>28</sup> Because the state intestacy statute, like many others, conferred the title of administrator of the decedent’s estate upon the surviving spouse, or, if no spouse, then upon the next of kin, the court inferred that the duty to bury the decedent was

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21. *Id.* at 15.

22. *Id.* The Ruggles report has been referred to as “a storehouse to which all subsequent discussions [about custody of remains] have resorted for materials.” *Pettigrew v. Pettigrew*, 56 A. 878, 879 (Pa. 1904).

23. BERNARD, *supra* note 11, at 14-15. *But see In re Johnson’s Estate*, 7 N.Y.S.2d 81 (N.Y. Sur. Ct. 1938) (criticizing Ruggles’s characterization of the English ecclesiastic law and referring to the Roman law in support of the holding that a testatrix did have the right to set forth cremation instructions in her will).

24. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 238 (1872).

25. *Id.* at 243.

26. *Pettigrew*, 56 A. at 879.

27. *Id.*

28. *Id.*

vested first in the surviving spouse and then in the decedent's family.<sup>29</sup>

The quasi-property theory with respect to corpses is still accepted today. The Ninth Circuit has even referred to the next of kin's right to take possession of a corpse as part of "our national common law."<sup>30</sup> However, courts also recognize that individuals have a right, within the bounds of public health standards, to have their bodies disposed of according to their wishes.<sup>31</sup>

### B. *Bodily Remains Statutes*

An example of an attempt at reconciling the tension between the quasi-property theory and a person's right to control the disposition of his body is evidenced by the status of the law in Massachusetts. Since the adoption of the quasi-property theory in 1897,<sup>32</sup> Massachusetts courts have consistently stated that "[i]n the absence of direction from the decedent," the surviving spouse or next of kin has the right to possession of a corpse for the purposes of burial.<sup>33</sup>

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29. *Id.* at 880. It has also been suggested that the idea of granting the spouse or next of kin custody of the body originated from early American times, where many communities did not yet have funeral homes to perform the requisite cleansing and funeral rites; instead, these duties were left up to the family to perform. Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 992-93 (1999).

30. *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002).

31. As far back as the time of the Roman Empire, people had the right to direct the disposition of their remains. For example, one New York court noted the provision "in the Roman law [giving] express recognition of the right of a deceased by testament to direct his burial and to nominate the person to take charge of it." *In re Johnson's Estate*, 7 N.Y.S.2d 81, 89 (N.Y. Sur. Ct. 1938). The court took its proposition from a translation of the Roman Pandects "(Book 11, title 7, section 12, subdivision 4) which appeared at 4 The Civil Law 90," construing the passage as: "He whom the deceased selected must conduct the funeral, but if he should not do so he will be liable to no penalty, unless something of value was left to him for this purpose; for then, if he does not comply with the will of the deceased, he will be excluded from the bequest." *Id.* at 223.

32. *Burney v. Children's Hosp. Boston*, 47 N.E. 401, 402 (Mass. 1897).

33. *Stackhouse v. Todisco*, 346 N.E.2d 920, 922 (Mass. 1976) ("In the absence of direction from the decedent, a surviving spouse, or, failing such a spouse . . . , then the decedent's next of kin, have a 'possession' of the body so that they may dispose of it for burial according to their wishes."); *see also Vaughn v. Vaughn*, 200 N.E. 912, 913 (Mass. 1936) ("[T]he right to possession of the dead body is in the surviving husband or wife, with the duty of burial, and not in the executor or administrator where there is no expressed wish of the testator as to the disposition of the remains."); *Sheehan v. Commercial Travelers Mut. Accident Ass'n*, 186 N.E. 627, 631 (Mass. 1933) ("The right of possession of a dead body for the purpose of burial or other lawful disposition and, consequently, for the purpose of an autopsy, subject to some limitations in the public interest, is vested, at least in the absence of a different provision by the deceased, in the surviving husband, wife or next of kin.").

However, the Massachusetts legislature has not adopted a bodily remains statute setting forth what rights an individual has with respect to disposition of bodily remains (other than organ donation). Instead, the right of an individual to direct the disposition of his or her remains may be found in the section of the Code of Massachusetts Regulations that concerns licensure of embalmers and funeral directors. The section states, in pertinent part, that if an individual does not have a "pre-need funeral services contract,"<sup>34</sup> a funeral home shall

give effect first to any wishes of the deceased person regarding the nature of the funeral goods and services to be provided, the manner in which funeral services are to be conducted, and/or the final disposition of the deceased person's remains, which have been expressed in any written document which was signed by the deceased person in the presence of a witness.<sup>35</sup>

In the case where a decedent has not left instructions, the regulation provides that the next of kin shall make the decision regarding disposition.<sup>36</sup>

Massachusetts is one of many states with some form of legislation or regulations regarding bodily remains. However, as shown below, legislation and regulations vary widely from state to state, from directing that the last will and testament is the proper place for burial instructions to allowing an individual to appoint an agent to make decisions post-mortem.

### 1. Directions in the Last Will and Testament

A number of states have codified the concept that an individual's testamentary instructions as to disposition of bodily remains will be binding. For example, New York law<sup>37</sup> "specifically con-

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34. See *infra* note 82.

35. 239 MASS. CODE REGS. 3.09(2) (2005).

36. 239 MASS. CODE REGS. 3.09(3) ("To the extent that there is no pre-need funeral services contract in effect at the time of death for the benefit of the deceased person, and no other valid written document indicating the wishes of the deceased person with respect to the nature of the funeral goods and services to be provided, the manner in which funeral services are to be conducted, or the final disposition of the deceased person's remains, the funeral establishment and its agents or employees shall follow the directions of the deceased person's surviving kin [in the order specified by the Massachusetts intestacy statute].").

37. This was New York Penal Law § 2210, which was recodified as New York Public Health Law § 4201 when New York restructured its statutes. See N.Y. PUB. HEALTH LAW §§ 4200-4202 (McKinney 2001); see also *Stewart v. Schwartz Brothers-Jeffer Mem'l Chapel, Inc.*, 606 N.Y.S.2d 965, 968 (N.Y. Sup. Ct. 1993) ("Public Health Law former § 4201, the statute upon which many of the aforementioned cases rely,

fer[red] upon a person 'the right to direct the manner in which his body shall be disposed of after his death.'"<sup>38</sup> This statute provided judges with an unambiguous rule. When presented with a case involving a conflict between the directions of the decedent as set forth in his last will and testament and certain members of the decedent's family, the New York Surrogate's Court, with little discussion, turned to the statute and ordered the body disposed according to the decedent's wishes.<sup>39</sup> Oddly enough, when New York enacted its version of the Uniform Anatomical Gift Act,<sup>40</sup> the legislature repealed the prior statute and its surrounding sections in their entirety, thereby leaving New York without a provision for disposition of bodily remains.<sup>41</sup> In 1993, the Queens County Supreme Court noted the discrepancy in a case involving a dispute between a homosexual man's family and his companion as to the custody and disposal of his remains.<sup>42</sup> The court thought the legislature had apparently made a mistake in repealing the prior statute without making any provision for a directive regarding bodily remains, and stated that "the law associated with this right [to direct the manner in which the body shall be disposed of after death] still exists."<sup>43</sup>

The New Jersey legislature has also adopted a law allowing a testator to include language in his will to designate who will direct the disposition of his body after death.<sup>44</sup> Unlike the New York law, however, the New Jersey statute was enacted recently, in 2003.<sup>45</sup>

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provided that, 'A person has the right to direct the manner in which his body shall be disposed of after his death.'").

38. *In re Eichner's Estate*, 18 N.Y.S.2d 573, 573 (N.Y. Sur. Ct. 1940) (quoting N.Y. PENAL LAW § 2210 (repealed 1970)).

39. *Id.*

40. N.Y. PUB. HEALTH LAW §§ 4200-4202. The Uniform Anatomical Gift Act is a uniform law that allows people to donate some or all of their body parts (such as kidneys, corneas, tissues, and bone marrow) for purposes of transplantation or research. *See infra* notes 63-64 and accompanying text.

41. *Stewart*, 606 N.Y.S.2d at 968.

42. *Id.* at 966-67.

43. *Id.* at 968. The court noted that although the parties had settled the matter prior to the court issuing its final judgment (they agreed that the decedent's body would be cremated, with his companion receiving half of his ashes, and his family receiving the other half), this was an important enough matter that guidance for the future was needed, and stated that, in this situation, the decedent should have inserted language in his will that he did not desire a funeral ceremony in the Jewish tradition, and that he elected to have his body cremated instead. *Id.* at 969. However, because this decision was from a Surrogate's court, the question remains whether this statute has in fact been resurrected and whether the higher courts in New York would agree with that decision, or whether the New York legislature will address this matter at some point.

44. N.J. STAT. ANN. § 45:27-22 (West 2003).

45. *Id.*



Therefore, the legal concept of setting forth one's wishes regarding post-mortem disposition in a will is not viewed as obsolete in some states, despite various difficulties associated with that practice.<sup>46</sup>

## 2. Laws Allowing the Appointment of an Agent

As an alternative to directions in the will, a growing number of states have adopted legislation allowing an individual to appoint an agent to direct the disposition of her body. In 2005, Connecticut joined that group.<sup>47</sup> Members of the Connecticut Bar Association's Estates and Probate Section requested that the law be enacted for various reasons, including difficult family situations,<sup>48</sup> multiple marriages, and different religious beliefs.<sup>49</sup> Michael Schenker, a member of the Executive Committee of the Connecticut Bar Association's Estates and Probate Section, spoke in favor of the bill before the Connecticut Judiciary Committee in early 2005.<sup>50</sup> He noted that although attorneys could offer advice to clients about appointing an individual to handle financial and legal affairs in the event they become incapacitated, or appointing someone to make medical decisions in the event they are not capable, lawyers could not with certainty give a client the option of appointing an individual to control the client's bodily remains.<sup>51</sup> Attorney Schenker stated that a "clear set of instructions" would give "some comfort to people" in allowing them to plan for the future and "avoid . . . public family conflicts."<sup>52</sup>

## 3. Laws Addressing Both the Direction of Disposal of Remains and the Appointment of an Agent

Some legislatures allow individuals to have the best of both worlds; that is, they can choose to appoint an agent and they can provide directions as to the method of disposing their bodily re-

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46. See *infra* notes 76 & 78 and accompanying text.

47. See 2005 Conn. Acts 197 (Reg. Sess.). The Act also allows an individual to provide directions as to the disposition of the body post-mortem. *Id.*

48. In addition to difficult family relationships, our increasingly mobile culture has redefined what it means to be "family." However, this is not a new concept. In 1938, the New York Surrogate's Court noted that "loosened family ties" was a factor in deciding who should have custody of a decedent's body. *In re Johnson's Estate*, 7 N.Y.S.2d 81, 85 (N.Y. Sur. Ct. 1938).

49. *Public Hearing of Connecticut Judiciary Committee*, 2005 Leg., Regular Sess. (Conn. Feb. 28, 2005) (testimony of Michael Schenker), available at <http://www.cga.ct.gov/2005/JUDdata/chr/2005JUD00228-R001200-CHR.htm>.

50. *Id.*

51. *Id.*

52. *Id.*

mains. The law enacted by the Connecticut legislature in 2005 allows an individual to sign a document directing the disposition of his or her body and to “designate an individual to have custody and control of such person’s body and to act as an agent to carry out such directions.”<sup>53</sup> Some states allow a person to do one or the other. For example, in Texas, if an individual has left instructions in accordance with the statute, such directions will be followed; in the absence of directions, the person designated as the individual’s agent will have custody and control.<sup>54</sup> If there are no directions, and no agent designated, the next of kin will have the authority to make decisions.<sup>55</sup>

#### 4. Laws Requiring Prepayment of Funeral Expenses

Finally, there is a small minority of states that allows an individual to direct the disposition of his bodily remains only where funeral costs have been prepaid.<sup>56</sup> Idaho allows an individual to provide written instructions as to the disposition of remains as part of a funeral plan that has been “funded in advance of the death of the person leaving instructions.”<sup>57</sup> California takes a similar approach in its statute by allowing a decedent to provide directions as to the disposition of his or her bodily remains, so long as payment arrangements by “any . . . effective and binding means” have been made.<sup>58</sup> The statute goes on to clarify that if funding arrangements are inadequate, the decedent’s wishes shall be complied with, but only to the extent that funds are available, “unless the person or persons that otherwise have the right to control the disposition and arrange for funeral goods and services agree to assume the cost.”<sup>59</sup>

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53. CONN. GEN. STAT. § 45a-318(a)(1) (West Supp. 2006).

54. TEX. HEALTH & SAFETY CODE ANN. § 711.002(a) (Vernon 2003).

55. *Id.*

56. A prepaid funeral contract is not required in Massachusetts. Massachusetts law states that where a prepaid funeral contract is in place, the terms of that contract will be honored; however, if there is no prepaid contract, the funeral home should take the decedent’s wishes into account when those wishes have been expressed in writing and witnessed. 239 MASS. CODE REGS. 3.09 (2005).

57. IDAHO CODE ANN. § 54-1139 (2003).

58. CAL. HEALTH & SAFETY CODE § 7100.1(a)(2) (West Supp. 2005).

59. *Id.* § 7100.1(b); *cf.* ME. REV. STAT. ANN. tit. 22, § 2843-A(5) (West 2004) (“If the [decedent] has left written and signed instructions regarding funeral arrangements and disposal of the subject’s remains, the person having custody and control shall abide by those wishes to the extent that the [decedent] paid for those arrangements in advance or left resources for the purpose of carrying out those wishes.”).

### C. *Uniform Laws*

#### 1. Background

The diversity from state to state in bodily remains laws suggests the need for a uniform bodily remains statute. The concept of uniformity of laws among the states is not a new one. As early as 1889 the American Bar Association identified the need for consistency of laws among the states, and in 1892 the first meeting of what is now known as the National Conference of Commissioners on Uniform State Laws (NCCUSL) was held.<sup>60</sup> The NCCUSL's mission is to examine state law to identify areas where uniformity is needed and promulgate uniform and model laws for use by the states.<sup>61</sup>

One well-known uniform act is the Uniform Anatomical Gift Act (UAGA).<sup>62</sup> The UAGA resembles bodily remains law in that it "represented a departure from centuries of common-law precedent, which held that a body immediately after death became the property of the next-of-kin."<sup>63</sup> Even though the UAGA was enacted to address the vital need of making organs available for transplantation,<sup>64</sup> a bodily remains law would address a matter of importance as well: giving people some security in knowing what will happen to their remains when they are no longer around to defend their wishes.

#### 2. Model Cremation Law

The first model law regarding disposal of bodily remains was developed and distributed by the Cremation Association of North America in 1984.<sup>65</sup> The Model Cremation Law has been updated at

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60. Uniform Law Comm'rs, About NCCUSL, Organization, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited Mar. 24, 2007).

61. *Id.* Of course, the most well-known uniform law is the Uniform Commercial Code. However, other uniform laws which have been widely adopted in some form include the Uniform Electronic Transactions Act, which as of 2004 had been adopted in forty-seven jurisdictions, see NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, ANNUAL REPORT 2003-2004, at 6 (2004), and the Uniform Interstate Family Support Act, which has been adopted in all fifty states, see *id.* at 10.

62. The 1967 version of the UAGA was adopted by all fifty states; however, since the Act's revision in 1987, only twenty-six states have adopted the amended Act. See REVISED UNIF. ANATOMICAL GIFT ACT 1 (Draft 2006), available at <http://www.law.upenn.edu/bll/ulc/uaga/april2006draft.pdf>.

63. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 61, at 13.

64. *Id.*

65. MODEL CREMATION LAW AND EXPLANATION pmb. (Cremation Ass'n of N. Am. 1999), <http://www.cremationassociation.org/docs/model-cremation-law.pdf>.

various times, most recently in 2003.<sup>66</sup> The Association's general counsel developed the law after a review of the laws then in effect in the United States and Canada.<sup>67</sup> However, because its drafting occurred at the behest of individuals and businesses offering cremation services, the law contains language that is directed more to the funeral business than to consumers.<sup>68</sup> Nonetheless, the model law served as a basis for many state legislatures that wanted to enact legislation allowing constituents to designate cremation as the method of disposition.<sup>69</sup>

In addition to providing guidance and protection for crematory operators, the Model Cremation Law also contains provisions to protect consumers from unfair and deceptive practices by the funeral industry. For instance, one section of the law forbids crematories from requiring that human remains be placed in a casket prior to cremation, a policy that was used mostly to line the pockets of the crematory owners.<sup>70</sup>

Now that other forms of disposal of bodily remains exist, such as cryonic preservation,<sup>71</sup> state legislatures have begun adding language to cremation authorization statutes allowing for options other than burial or cremation.<sup>72</sup> Arkansas law, for example, provides that an individual "of sound mind and eighteen (18) or more years of age may execute at any time a declaration governing the final disposition of his or her bodily remains at his or her death,

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66. *Id.*

67. *Id.*

68. For example, the model law uses terms taken from the FTC Funeral Rule such as "alternative container." *Id.* § 1(A). See also § 3A(1) of the form, which states that the first authorizing agent will be "[a]ny person acting on the instructions of a decedent who authorized his or her own cremation through the execution, on a pre-need basis, of a crematory authorization form." *Id.* § 3(A)(1). However, the definitions section of the law does not define "pre-need basis," which seems to be more a term of art used in the funeral industry than something that is readily understood by consumers.

69. In fact, many states whose statutes include the concept of an "authorizing agent" based their statutes on the Model Cremation Law. See, e.g., ALA. CODE ANN. §§ 34-13-11, -121, -122 (LexisNexis 2002); MODEL CREMATION LAW AND EXPLANATION § 1(B) (definition of "Authorizing Agent(s)").

70. MODEL CREMATION LAW AND EXPLANATION § 7.

71. Cryonics is not a twenty-first century phenomenon. The first cryonically preserved human was Dr. Harold Greene, who died on January 12, 1967. GEORGE P. SMITH, II, MEDICAL-LEGAL ASPECTS OF CRYONICS: PROSPECTS FOR IMMORTALITY 9 (1983). The first cryonics society in America was formed two years earlier, in 1965. *Id.* at 16.

72. See, e.g., CONN. GEN. STAT. § 45a-318(a)(1) (West Supp. 2006) ("[D]isposition shall include, but not be limited to, cremation, incineration, disposition of cremains, burial, method of interment and cryonic preservation.").

provided the disposition is in accordance with existing laws, rules, and practices for disposing of human remains.”<sup>73</sup>

The effort of the Cremation Association of North America to promulgate a uniform law with respect to cremation is laudable, especially when viewed as an effort by the industry to police itself. However, with the emergence of new forms of disposition of remains such as cryonics, the Model Cremation Law does not go far enough. Individuals must be assured that whatever their wishes are, such as interment in a certain place or manner, those wishes will be carried out when they are no longer able to speak for themselves.

## II. THE CASE FOR A UNIFORM BODILY REMAINS STATUTE

### A. *Because of Difficulties Associated with the Common Law, States Should Adopt Statutes Addressing the Disposition of Bodily Remains*

Although both the quasi-property theory of giving custody of bodily remains to the next of kin and the provisions giving the decedent the right to direct the disposition of his corpse may seem clear, several questions remain unanswered. First, the common law is not clear as to the mechanism a decedent should use to declare his wishes. This could be something like Ted Williams’s handwritten note,<sup>74</sup> a testamentary statement in the decedent’s will,<sup>75</sup> or a pre-paid funeral contract. Even in states where statutes or the common

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73. ARK. CODE ANN. § 20-17-102(b)(1) (West Supp. 2005); *see also* MD. CODE ANN., HEALTH-GEN. § 5-509(a) (LexisNexis 2005) (“Any individual who is 18 years of age or older may decide the disposition of the individual’s own body after that individual’s death without the predeath or post-death consent of another person by executing a document that expresses the individual’s wishes regarding disposition of the body or by entering into a pre-need contract.”). Most, if not all, of the statutes that follow the Model Cremation Act format, whether they provide for additional methods of disposition or not, state that in the absence of written direction from the decedent, the next of kin, in order of priority, can make the determination. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 5-509(c).

74. *See supra* note 4 and accompanying text.

75. *See supra* note 7. It was common in early America for decedents to include in their will instructions as to the place of their interment. For example, the will of Daniel Webster, who died in 1852, stated that his body was to “be buried in the family vault in Marshfield [Massachusetts],” and that he “be buried without the least show or ostentation.” VIRGIL M. HARRIS, ANCIENT CURIOUS AND FAMOUS WILLS 448-49 (The Lawbook Exchange, Ltd. 1999) (1911). The will of Grover Cleveland, who died in 1908, similarly requested minimal services and directed that his body be buried at the place where he was residing at the time of his death. *Id.* at 349.

law suggest that a last will and testament is the proper method, several problems are associated with this practice.

1. Problems Associated with Directions Included in the Decedent's Last Will and Testament

According to the quasi-property theory, a body is not considered "property," and therefore courts in some jurisdictions have found that a will is not the appropriate place for a decedent to make a disposition of his or her body.<sup>76</sup> Even in those states where the right to dispose of a body by will has been codified,<sup>77</sup> there are problems associated with that practice. In many instances, a will may not be located until after a decedent's body has been interred, at which point it may be too late to follow the decedent's wishes.<sup>78</sup>

There is also a danger that, even if the will is located prior to disposition of the body, the decedent's testamentary wishes will not be carried out. In Florida, for example, the law seemed clear that "[i]n the absence of a testamentary disposition, 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."<sup>79</sup> However, as set forth in the introduction, Ted Williams's handwritten note, executed without any testamentary formalities, was enough for a Florida court to allow his body to be cryonically frozen even though his will directed that his body be cremated.<sup>80</sup>

In some cases, an oral expression of the decedent's wishes is sufficient for a court to disregard provisions in the will for disposition of the decedent's body. In a 2005 case, *Cohen v. Guardianship of Cohen*, the Florida District Court of Appeal held that the dece-

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76. See, e.g., *Enos v. Snyder*, 63 P. 170, 171 (Cal. 1900) ("It is quite well established . . . that, in the absence of statutory provisions, there is no property in a dead body; that it is not part of the estate of the deceased person; and that a man cannot by will dispose of that which after his death will be his corpse.").

77. See *supra* text accompanying notes 38 & 44.

78. See, e.g., *Hernandez*, *supra* note 29, at 1020. If a person had requested cremation in his will but had first been interred, a court may decide not to order exhumation and cremation. See, e.g., *Thompson v. Deeds*, 61 N.W. 842, 842 (Iowa 1895) ("A proper appreciation of the duty we owe to the dead, and a due regard for the feelings of their friends who survive, and the promotion of the public health and welfare, all require that the bodies of the dead should not be exhumed, except under circumstances of extreme exigency."). Clearly, if a person's will requested burial, but the body had already been cremated, there would be no way to correct the mistake.

79. *Cohen v. Guardianship of Cohen*, 896 So. 2d 950, 953 (Fla. Dist. Ct. App. 2005) (citing *Kirksey v. Jernigan*, 45 So. 2d 188, 189 (Fla. 1950)), *rev. denied*, 911 So. 2d 792 (Fla. 2005).

80. See *supra* text accompanying notes 2-5.

dent's wishes set forth in his last will and testament, although quite specific regarding how and where he should be interred, were not conclusive, and instead relied on testimony from the decedent's family as to what he had said about how and where he wanted to be buried.<sup>81</sup>

As the *Cohen* case and the Ted Williams matter demonstrate, courts are willing to ignore provisions for disposition of the body that are contained in an individual's last will and testament. Not only do bodily remains statutes provide a concrete mechanism whereby an individual can direct the disposition of his corpse, but they would also help dissuade people from considering wills as "catch-all" documents where every post-mortem wish must be set forth. Furthermore, because a will may not be located until after a person's funeral services, a statute providing that wishes with respect to disposition of remains should be set forth in a separate document may eliminate the difficulty of locating the will at the time of death.

## 2. Problems Associated with Prepaid Funeral Contracts

An alternative document to the will is the prepaid funeral contract.<sup>82</sup> However, even though they may be helpful in keeping the decedent's family from being overcharged at a time when they are

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81. *Cohen*, 896 So. 2d at 953. The decedent's will indicated that he wanted to "be buried in a 'traditional Jewish burial in [his] family plot in Mount Hebron Cemetery.'" *Id.* at 952. However, according to his widow, Mr. Cohen told her that he wanted to be buried with her in Florida, where they resided at the time. *Id.* at 951. He also discussed his wishes with his adult daughter. *Id.* at 955. The court, perhaps in order to reach what it thought was the "right" result (the judges may have felt that spouses are generally buried with one another, and the Cohens had been married for forty years when Mr. Cohen passed away), stated that because a body is not property, a will does not necessarily control with respect to disposition of mortal remains. *Id.* at 951. Based on that theory, the court "conclude[d] that a testamentary disposition is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that he intended another disposition for his body." *Id.* at 954. The court affirmed the trial court's order of the burial of the decedent in the cemetery in Florida, with a space for his wife next to him. *Id.*

82. This Note uses the phrases "pre-need funeral contract" and "prepaid funeral contract" interchangeably. The term "pre-need funeral contract" is defined as "any written agreement . . . in which . . . the licensed funeral establishment agrees, prior to the death of a named person, to furnish funeral goods and/or services . . . and the buyer, pursuant to that agreement, transfers or tenders funds to the licensed funeral establishment for the purpose of paying all or part of the cost of those funeral goods and/or services." 239 MASS. CODE REGS. 4.01 (2005). The term "pre-need" contract, as opposed to "prepaid" contract, was probably an invention of the funeral industry's marketing division.

particularly vulnerable, prepaid funeral contracts are problematic.<sup>83</sup> For example, Clara Cochran, who died in Tennessee on September 30, 2005, had purchased a prepaid funeral contract so that her children would not have to worry about paying for her funeral when the time came.<sup>84</sup> However, when the time did come, Ms. Cochran's children discovered that the cemetery corporation with which their mother had arranged her funeral had unexpectedly closed its doors without leaving a forwarding address.<sup>85</sup>

In addition to the lack of uniform regulation to protect consumers,<sup>86</sup> difficulties with prepaid funeral contracts include the lack of portability<sup>87</sup> and the fact that younger people who have not been diagnosed with a terminal illness rarely have a prepaid plan in place.<sup>88</sup> Furthermore, although one can use a prepaid funeral contract to lock in a guaranteed price, many people are unaware that they are not obligated to spend thousands of dollars on a funeral. Most states do not require embalming of a corpse, though they do require that any person who embalms corpses be licensed.<sup>89</sup>

Bodily remains statutes can help protect consumers since they would make it clear that an individual does not have to enter into a pre-funded contract with a funeral home in order to make sure his

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83. FED. TRADE COMM'N, *THE PRICE OF DEATH: A SURVEY METHOD AND CONSUMER GUIDE FOR FUNERALS, CEMETERIES AND GRAVE MARKERS* 1-2 (1975).

84. Jamie Satterfield, *Cemetery Closes Abruptly*, *FUNERAL WIRE*, Oct. 12, 2005, <http://www.funeralwire.com/article.php?id=14881>.

85. *Id.*

86. Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 *ELDER L.J.* 1, 1-2 (1996).

87. Several problems arise when a person with a prepaid funeral contract moves from one state to another, such as whether the contract can be transferred, and whether the consumer will incur a penalty for transferring the contract. *See id.* at 34-36.

88. A 1991 survey by the American Association of Retired Persons (AARP) revealed that the "average purchaser" of a pre-need funeral contract was over seventy. *Id.* at 5.

89. *See, e.g.*, MASS. GEN. LAWS ch. 114, § 43M (2004) ("Except as otherwise provided by law . . . every dead body of a human being dying within the commonwealth . . . shall be decently buried, entombed in a mausoleum, vault or tomb or cremated within a reasonable time after death."). People who want the funeral ritual to have more personal meaning may opt to wash and bathe the body of their deceased friend or family member themselves and have a service at home, prior to delivering the body to the crematory or having the body buried. For example, Final Passages, a not-for-profit organization in California, provides educational material about home funeral planning. *See* Final Passages, <http://www.finalpassages.org> (last visited Feb. 20, 2007). Others may choose a simpler interment because they are concerned with the long-term effects that burying embalming fluid, concrete vaults, and steel caskets might have on the environment. There is at least one nature park dedicated to natural burial of human remains. *See* Ramsey Creek Preserve, *Our Mission*, <http://www.ramseycreekpreserve.com/mission.htm> (last visited Feb. 20, 2007).



or her wishes are respected. Because many people move from state to state at different times in their lives, a binding funeral contract in one state that is not easily portable to another state can cause great difficulty. Furthermore, because of inadequate consumer protection in the field of funeral contracts, statutes that do not require the deposit of money with a funeral home that may not be in business the following year would offer consumers a greater level of security.

### 3. The Law is Unclear as to Whether the Right to Possession is Also the Right to Make Decisions

A further difficulty with the common law is that it is not clear whether the “right to possession” includes the right to make decisions as to the disposition of the body, a duty to follow the decedent’s directives, or merely a duty to pay for the proper disposition of the corpse. In the *Pettigrew* case, for example, the court saw the right of possession as more of a duty to perform a service than the privilege of making decisions.<sup>90</sup> The court stated that the right of the family to make decisions was limited by the decedent’s wishes, but refused to adopt a bright line test, instead saying that “[h]ow far the desires of the decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes[,] especially if strongly and recently expressed, should usually prevail.”<sup>91</sup>

The common law rule that the spouse or next of kin shall have custody of the decedent’s remains is partially based upon the rules of intestacy;<sup>92</sup> however, like the laws of intestacy, it does not take into account the real-life relationship between the parties. Instead, the rules are based upon a familial relationship that may be in name only.<sup>93</sup> Furthermore, they treat married and unmarried people differently. For example, if an individual dies while married, it is the spouse who has the right to make the decisions with respect to disposition of the corpse; if an unmarried individual dies, it is his parents or other blood relatives who will make that decision. Unlike the common law rules for disposition of bodily remains, however, the law of wills (with the exception of spousal share provisions) gives people the ability to avoid the intestacy provisions in the

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90. *Pettigrew v. Pettigrew*, 56 A. 878, 879 (Pa. 1904) (“The duty of disposition . . . devolves upon some one and must carry with it the right to perform.”).

91. *Id.* at 880.

92. See *supra* text accompanying note 27.

93. Hernandez, *supra* note 29, at 988.

event they do not want property passing to an undeserving next of kin.<sup>94</sup>

#### 4. Difficulties Associated with the Common Law Lead to Litigation

Disputes among next of kin over the remains of one of their relatives can lead to protracted litigation. The Connecticut case involving the bodily remains of Olga Gallagher symbolizes the problem with laws that give a preference to one family member over another with respect to control of a decedent's body. Mrs. Gallagher died in Connecticut on December 5, 1961, while married to Kenneth Gallagher.<sup>95</sup> Mr. Gallagher intended to cremate his wife's remains; however, before he could do so, Mrs. Gallagher's parents, Mr. and Mrs. Tkaczyk, acting pro se, filed a petition with the North Haven Probate Court to take custody of their daughter's corpse, based upon their claim that cremation was against their religion and allegations that relations between their daughter and her husband had been strained prior to her death.<sup>96</sup> In March of 1965, after the Connecticut Supreme Court of Errors heard and dismissed several of the plaintiffs' motions,<sup>97</sup> the New Haven Superior Court denied the plaintiffs' request for a permanent injunction<sup>98</sup> based upon the statute that was in effect at the time, which provided that the surviving spouse should have custody and control of the remains of the decedent.<sup>99</sup> The case eventually made its way to the U.S. Supreme Court.<sup>100</sup>

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94. See, e.g., Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 1 (2000) ("An intestacy statute can serve as a default rule, but a person whose wishes do not fit the default rule must execute a will.").

95. Tkaczyk v. Gallagher, 222 A.2d 226, 227 (Conn. Super. Ct. 1965).

96. *Id.*

97. See, e.g., Tkaczyk v. Levine *ex rel.* Gallagher, 197 A.2d 943 (Conn. 1963) (dismissing plaintiffs' motions for an injunction and for action under Canon 11 of Judicial Ethics based upon lack of jurisdiction); Tkaczyk v. Levine *ex rel.* Gallagher, 197 A.2d 942 (Conn. 1963) (dismissing plaintiffs' appeal from New Haven Superior Court for failure to prosecute).

98. Tkaczyk, 222 A.2d at 228.

99. *Id.*

100. In 1966, Mr. and Mrs. Tkaczyk, along with the decedent's sister, Julia Cravens, engaged the services of an attorney and turned to the federal court system for help. Not wanting to leave anyone out, the plaintiffs brought suit against twenty-two defendants, including Mr. Gallagher, various Connecticut judges, officials, and attorneys, alleging denial of due process and infringement of their religious freedom by the defendants. Tkaczyk v. Gallagher, 259 F. Supp. 584, 585-86 (D. Conn. 1966). The plaintiffs requested that the court award them in excess of one million dollars in damages. *Id.* at 585. After a four hour hearing, the court dismissed the plaintiffs' complaint

What is most disturbing is not the expenditure of the time and effort of the courts, attorneys, and litigants involved in the *Tkaczyk* matter, but that Olga Gallagher's body remained frozen in storage, without a proper disposition, for at least five years while the various cases worked their way through the courts.<sup>101</sup> It may be that the situation could have been avoided if Mrs. Gallagher had a legal right to appoint her parents as her funeral planning agents, or if she had a right to specify how her remains were to be disposed. Furthermore, even if Mrs. Gallagher did not have a declaration instrument in effect at the time of her death, if the allegations of the *Tkaczyks* were correct and Mr. and Mrs. Gallagher had been legally separated at the time of her death, a carefully drafted bodily remains statute would have precluded Mr. Gallagher from cremating his wife's body.<sup>102</sup>

A similar problem has arisen with respect to the bodies of fallen members of America's armed services. The Department of Defense, rather than requiring that a soldier designate a person to take custody of her remains should she die while in the service, has a blanket policy of giving the soldier's remains to the oldest person in a class, for example, the older parent.<sup>103</sup> As of October 2005, there were at least two sets of parents waging battles over the remains of their children who died while serving in Iraq.<sup>104</sup> This has prompted one United States Representative<sup>105</sup> to suggest to the Department of Defense that they require each member of the armed services to make a designation as to who should receive his or her bodily remains.<sup>106</sup>

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for lack of subject matter jurisdiction, and ordered an inquiry into the actions of the *Tkaczyks*' attorney with a view toward possible discipline. *Id.* at 586. At least twelve attorneys were involved in defending the action. *Id.* at 585. Attached to the federal court's decision were letters from various clerks of Supreme Court Justice Harlan denying the *Tkaczyks*' four requests for stays in the matter. *Id.* at 588-91. Never ones to quit, they filed a petition with the Supreme Court for certiorari, which was denied, *Tkaczyk v. Gallagher*, 386 U.S. 1013 (1967), as was their petition for rehearing, *Tkaczyk v. Gallagher*, 387 U.S. 938 (1967).

101. *Tkaczyk*, 259 F. Supp. at 585.

102. See, e.g., PROPOSED UNIFORM DISPOSITION OF BODILY REMAINS ACT § 5, *infra* Part III.C.

103. Greg Sandoval, *Parents of Soldier Killed in Iraq Meet in Court*, SFGATE.COM, Oct. 3, 2005, <http://sfgate.com/cgi-bin/article.cgi?file=/n/a/2005/10/03/state/n102301D27.DTL>.

104. *Id.*

105. The Representative involved in this issue was Sam Farr, a Democrat from California. *Id.*

106. *Id.*

Bodily remains statutes can help reduce the number of court cases involving corpses. For example, if Mrs. Gallagher had known that her parents and husband did not get along, she may have taken advantage of a law allowing her to execute a document giving one or the other the right to make decisions. On the other hand, bodily remains statutes certainly would not prevent litigation. As with a will, a declaration document would be subject to challenge based upon factors such as duress or undue influence. However, compliance with statutory execution formalities would lend support to the validity of the document, reducing litigation by providing predictable outcomes.

*B. Because the Extreme Difference in States' Approaches Leads to Lack of Portability and Unpredictability, a Uniform Law is Needed*

The promulgation of a uniform law would aid state legislatures in adopting bodily remains statutes. As set forth above, laws in different states provide individuals with different rights with respect to disposition of bodily remains. For example, of those states that have enacted bodily remains laws, some allow an individual to sign a document directing what should be done with his or her remains,<sup>107</sup> but legislators in some states seem uncomfortable with allowing the decedent's wishes to take precedence over the wishes of the surviving spouse, especially when the two conflict.<sup>108</sup> Other states allow for the appointment of an agent who would make decisions after an individual's death.<sup>109</sup> Still other states allow for the

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107. See, e.g., ARK. CODE ANN. § 20-17-102(b)(1) (West Supp. 2005) (A person "of sound mind and eighteen (18) or more years of age may execute at any time a declaration governing the final disposition of his or her bodily remains at his or her death, provided the disposition is in accordance with existing laws, rules, and practices for disposing of human remains.").

108. Until recently, the law in Ohio provided that the wishes of the decedent's spouse took precedence over the decedent's wishes. See OHIO REV. CODE ANN. § 4717.22(A) (West 2004) (establishing a list of agents who could authorize the cremation of a decedent, listing, in order of priority, first the decedent's spouse, and then "[a]ny person acting on the instructions of a decedent who authorized [his] own cremation"). The new law, which went into effect on October 12, 2006, does away with placing the spouse in a position superior to the decedent. See H.R. 426, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (to be codified at OHIO REV. CODE § 4717.22). Note, however, that the bill as originally written *and* as enacted in the Senate included the concept of allowing a decedent's agent or family member to overrule a decedent's cremation directive. See Proposed § 4717.21(C)(2) of 2005 Ohio H.B. No. 426 (text as of Nov. 15, 2005), available at [http://www.legislature.state.oh.us/BillText126/126\\_HB\\_426\\_I\\_Y.pdf](http://www.legislature.state.oh.us/BillText126/126_HB_426_I_Y.pdf).

109. The agent is termed a "funeral planning agent" in Rhode Island. See R.I. GEN. LAWS § 5-33.3-2(a) (2004).

appointment of an agent, but only within an advance directive for health care document (sometimes referred to as a health care power of attorney).<sup>110</sup> There are also states that allow an individual to appoint an agent *and* provide directions as to what should be done with the body.<sup>111</sup>

In some states where the current sepulture statute merely tracks the common law right of the next of kin to dispose of the body, or suggests that an individual can direct the disposition of her remains only by entering into a prepaid funeral contract, legislators are seeking to provide more options. For example, the Ohio legislature recently revamped the Ohio sepulture statute to allow an individual to appoint an agent and provide directions regarding the disposition of remains.<sup>112</sup> It is inefficient for each legislature to research the laws in effect in other states and draft a proposed bill.<sup>113</sup> A uniform act would provide lawmakers with a suggested form. Furthermore, uniform acts encourage efficiency by “facilitat[ing] the development of a repository of judicial decisions that aid interpretation of statutory terms.”<sup>114</sup>

Most important to consumers, the difference in the laws from state to state with respect to bodily remains creates unnecessary confusion. As an example, the note signed by Ted Williams and his two children directing that they be frozen may be acceptable according to the laws of some states, while in others it would be invalid because it had not been executed properly.<sup>115</sup> Moreover, an

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110. See, e.g., VT. STAT. ANN. tit. 18, § 9702(a) (Supp. 2005). An advance directive is a “document that takes effect upon one’s incompetency and designates a surrogate decision-maker for healthcare matters.” BLACK’S LAW DICTIONARY, *supra* note 19, at 57.

111. See, e.g., CONN. GEN. STAT. § 45a-318(a) (Supp. 2006).

112. See *supra* note 108.

113. This is especially difficult for part-time lawmakers. See Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 140 (1996) (“Uniform lawmaking agencies, by concentrating their resources on particular laws, can hire experts in particular fields or in statutory drafting. By contrast, state legislators are often part-time generalists who have little incentive to spend time finely crafting legislation in particular areas and lack the resources to hire advisors.”). On the other hand, it may be that the drafting process produces more innovative legislation. See *id.* at 140-41.

114. *Id.* at 138.

115. Arkansas law requires there be two witnesses to the person’s signature. ARK. CODE ANN. § 20-17-102(b)(2) (West Supp. 2005). California, on the other hand, merely requires the document be in writing. CAL. HEALTH & SAFETY CODE § 7100.1(a) (West Supp. 2005). While the signatures of Ted’s children could be viewed as witnesses to the document, it is not clear from the face of the document whether they signed at the same time or separately. See *supra* note 4.

individual who used a form to validly appoint an agent in one state might find that another state does not recognize the right to appoint an agent for funeral planning. In addition, the differences in the laws from state to state create a hardship for people who frequently move or travel. A person moving from one state to another would have to research the laws of the new state to determine whether his current bodily remains directive would be valid.<sup>116</sup> Furthermore, the person might discover that he no longer had a right to appoint an agent, or that he could not specify where his remains should be interred.

Uniform laws are developed with the goal of consistency among state laws. The NCCUSL criteria for adoption of a uniform law require, among other things, “an obvious reason for an Act on the subject such that its preparation will be a practical step toward uniformity of state law or at least toward minimizing its diversity.”<sup>117</sup> Like the Uniform Anatomical Gift Act, a uniform bodily remains act would provide a means for those individuals who had certain beliefs or desires concerning the disposition of bodily remains to be sure that their wishes would be carried out. Furthermore, a uniform act, even if not adopted by all states, would, at the very least, provide guidelines for interested lawmakers as to what their legislation should include.

The NCCUSL has found that legislatures are more likely to adopt certain types of uniform laws, including those that may not have “substantial interstate implications,” but nonetheless address emerging areas of the law, modernize the law, or “codify the common law.”<sup>118</sup> A uniform bodily remains law would address novel methods of preservation, such as cryonics. Furthermore, such a law may go beyond codifying the common law, which states that an individual has the right to direct the disposition of bodily remains, by allowing the individual to appoint someone to carry out his or her wishes after death.

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116. In today’s increasingly mobile society, it is not hard to imagine a person who was born and raised in one state, but who spent his adult life in other states, desiring to be buried with the rest of his family in his home state. *See, e.g.,* *Cohen v. Guardianship of Cohen*, 896 So. 2d 950 (Fla. Dist. Ct. App. 2005), *rev. denied*, 911 So. 2d 792 (Fla. 2005).

117. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS (2001), *available at* <http://www.nccusl.org/nccusl/DesktopDefault.aspx?tabindex=4&tabid=42>.

118. *Id.*

### C. Summary

The advantages of bodily remains statutes, and a uniform bodily remains law, are many. A uniform law adopted by a majority of states would allow for the acceptance of bodily remains directives executed in different states. As evidenced by the *Cohen* case, it is not unusual for an individual to execute a document in one state and move to another state without updating the document.<sup>119</sup> In addition, a uniform law would reduce the confusion created by the differences among state laws with respect to bodily remains.

Bodily remains legislation is also advantageous in that it helps to reduce litigation or, at the very least, provides a mechanism for individuals who foresee possible litigation to avoid it. In addition, if a uniform bodily remains act was adopted by many legislatures, it might, in turn, encourage the United States to require its soldiers to execute a bodily remains declaration, which would help preclude litigation over the bodies of fallen servicemen and women.

Finally, a uniform act would help in protecting consumers by not requiring them to enter into prepaid funeral contracts in order to ensure that their wishes are carried out. Because many people move from one state to another at different times in their lives, a binding funeral contract in one state that is not easily portable to another state can cause great difficulty. However, any uniform act should address the matter of payment for funeral services so as not to foster litigation over that subject.

### III. CONSIDERATIONS AND COMPONENTS OF A UNIFORM LAW

A uniform bodily remains law should allow for the portability of the document from state to state. In today's mobile society, a person who executes an appointment-of-agent document in Massachusetts should not have to execute a new document when the person moves to Connecticut. A review of statutes of all states allowing for the appointment of an agent or the provision of directions for disposition of the body is beyond the scope of this Note; however, this Part will outline various considerations that any legislature wishing to adopt a uniform act should consider. Finally, this Part will propose a template for use as a uniform act.

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119. *Cohen*, 896 So. 2d 950. In fact, probate or estate uniform laws are among the most widely adopted by the states, perhaps because legislators recognize the costs to individuals of having to update estate planning documents each time they move. Ribstein & Kobayashi, *supra* note 113, at 150.

### A. *Conflict with Constitutional Provisions*

Before adopting new legislation, a state's legislature must examine the new law for compliance with the Constitutions of both the United States and that particular state. A concern in the area of bodily remains legislation is the possibility that the law will run afoul of the Fourteenth Amendment's due process provisions.<sup>120</sup>

#### 1. Fourteenth Amendment Issues

Even though a corpse is not "property" under the law,<sup>121</sup> disposition of a corpse without giving notice to, or obtaining the permission of, the spouse or next of kin may be a deprivation of the family member's due process rights. This denial of due process rights by a person acting in accordance with state laws can give rise to a cause of action under 42 U.S.C. § 1983, which states, in pertinent part, that:

Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>122</sup>

For example, in one Sixth Circuit case, *Brotherton v. Cleveland*, a wife whose husband's corneas had been removed from his corpse without her permission had a legitimate civil rights claim under § 1983 against the coroner who allowed the cornea removal and the eye bank that received the corneas, among others.<sup>123</sup> In order to have a valid § 1983 claim, Mrs. Brotherton needed to show that she had been deprived of a constitutional right (here, a deprivation of property) "under color of state law."<sup>124</sup> In addition, Mrs. Brotherton had to demonstrate that "either (1) the conduct was caused by 'established state procedure rather than random and unauthorized action,' or (2) the means of redress for property depriva-

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120. U.S. CONST. amend. XIV, § 1.

121. See *supra* text accompanying notes 11-25.

122. 42 U.S.C. § 1983 (2000).

123. *Brotherton v. Cleveland*, 923 F.2d 477, 478-79, 482 (6th Cir. 1991), *aff'd in part, rev'd in part*, 173 F.3d 552 (1999), *remanded to* 141 F. Supp. 2d 894 (2001).

124. *Id.* at 479.



tions provided by the state . . . fail[ed] to satisfy the requirements of procedural due process.”<sup>125</sup>

The court dispensed with the “under color of state law” element quickly.<sup>126</sup> The bulk of the court’s opinion was devoted to the issue of whether Mrs. Brotherton had a property interest in her husband’s corpse such that she could be said to have been deprived of that property without due process of law.<sup>127</sup> The court found that in previous cases, Ohio courts had categorized the quasi-property theory as a “legal fiction” when applied to corpses.<sup>128</sup> However, the court also recognized that the common law of Ohio conferred upon a surviving spouse the right to possess a corpse “for the purposes of preparation, mourning and burial.”<sup>129</sup> The court stated that it would make its determination based upon the “substance of that right,” rather than the label given to the right (i.e., “quasi-property”).<sup>130</sup> The court then reviewed the provisions of the Uniform Anatomical Gift Act as adopted in Ohio, and concluded that “the aggregate of rights granted by the state of Ohio to Deborah Brotherton,” including the right to direct the disposition of her husband’s body and the possessory right granted by the Anatomical Gift Act, along with the common law rights of possession, amounted to a “‘legitimate claim of entitlement’” in her husband’s corpse.<sup>131</sup> Based on Mrs. Brotherton’s “legitimate claim of entitlement,” the state of Ohio deprived her of her rights to due process when it authorized the coroner to remove her husband’s corneas without first holding a hearing.<sup>132</sup>

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125. *Id.* (citations omitted) (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 (1984)).

126. *Id.* The Ohio law with respect to cornea removal allowed “coroner[s] to remove . . . corneas [from corpses so long as they had] no knowledge of an objection by the decedent, the decedent’s spouse, or, if there is no spouse, the next of kin, the guardian, or the person authorized to dispose of the body.” *Id.* at 478; *accord* OHIO REV. CODE ANN. § 2108.60(B)(4) (2006). One of the problems in the *Brotherton* case was that the coroner’s office involved in the lawsuit had a policy of not looking at a decedent’s medical record prior to the cornea removal, and so the employees could claim a lack of knowledge regarding a decedent’s or next of kin’s objections to the procedure. *Brotherton*, 923 F.2d at 478. Because these employees were acting in accordance with “the established policy of the coroner’s office,” they were acting “under color of state law.” *Id.* at 479.

127. *Brotherton*, 923 F.2d at 479-82.

128. *Id.* at 480 (quoting *Carney v. Knollwood Cemetery Ass’n*, 514 N.E.2d 430, 434 (Ohio Ct. App. 1986)).

129. *Id.* at 480-81 (quoting *Everman v. Davis*, 561 N.E.2d 547, 550 (Ohio Ct. App. 1989)).

130. *Id.* at 481-82.

131. *Id.* at 482.

132. *Id.*

Five years later, the Sixth Circuit made a similar ruling in a case applying Michigan law rather than Ohio law. In *Whaley v. County of Tuscola*, the court examined the Michigan Anatomical Gift Act and concluded that it was “in substance the same [as Ohio’s] regarding the next of kin’s rights in a deceased relative’s body.”<sup>133</sup>

## 2. The Solution to Fourteenth Amendment Issues

The NCCUSL, in the course of revising the Uniform Anatomical Gift Act, modified the section regarding consent based upon the *Brotherton* decision and other § 1983 actions.<sup>134</sup> The 2006 version of the Act does not allow coroners or medical examiners to authorize organ donation; rather, the decedent or the decedent’s next of kin are the only ones who can make the authorization.<sup>135</sup>

Any drafter of a uniform bodily remains act should review the *Brotherton* decision and its progeny, because a family’s rights to bring suit for unlawful disposition extend beyond cornea removals. In one Florida case, *Crocker v. Pleasant*, a decedent’s parents sued the local police department in the city where their son’s body was found, claiming that their due process rights were violated when the police buried their son’s corpse without first notifying them.<sup>136</sup> The Supreme Court of Florida agreed that the Crockers did have a limited property interest in their son’s body and therefore had “a right to procedural due process under the Fourteenth Amendment of the United States Constitution prior to the deprivation of their property interest.”<sup>137</sup>

Each of these § 1983 decisions was based on the state’s common law, that is, the “quasi-property” right of the next of kin in the

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133. *Whaley v. County of Tuscola*, 58 F.3d 1111, 1114 (6th Cir. 1995). The court also examined Michigan common law, which went further than Ohio’s in giving “the next of kin . . . a right to possess [a] body for burial and [to] prevent its mutilation.” *Id.* at 1115. The Sixth Circuit based its decisions mainly on constitutional law jurisprudence; the majority in *Brotherton* never discussed the public policy behind the cornea removal statute. *See Brotherton*, 923 F.2d 477. However, the dissent noted the importance of cornea transplants in restoring sight to blind people as opposed to the *de minimis* intrusion of removing a corpse’s corneas prior to turning the body over to the family for disposal. *Id.* at 483 (Joiner, J., dissenting). For a more in-depth discussion of the importance of allowing removal of corneal tissue from cadavers, see *State v. Powell*, 497 So. 2d 1188, 1190-91 (Fla. 1986).

134. REVISED UNIF. ANATOMICAL GIFT ACT (2006), at 9, available at <http://www.law.upenn.edu/bll/ulc/uaga/2006final.pdf>.

135. *Id.* at 55.

136. *Crocker v. Pleasant*, 778 So. 2d 978, 980-81 (Fla. 2001).

137. *Id.* at 980, 988, 991.

decedent's body.<sup>138</sup> Therefore, any uniform act should be clear about what rights, if any, the decedent's family has to object to the decedent's directives and, if they do have a right to object, what sort of "procedural safeguards [would be] built into the . . . procedure of effecting the deprivation."<sup>139</sup> This could include an opportunity to request an injunction from a probate court or, at the very least, a time period during which certain persons are given notice of the intended disposition of the body.<sup>140</sup>

*B. Format of the Proposed Act: A Uniform Act Should Allow for Both the Appointment of an Agent and Direction by the Decedent*

Any statute should be clear as to what rights an individual has with respect to his remains. Furthermore, in order to provide maximum flexibility, an individual should be able to do more than direct the manner in which her body should be disposed. Therefore, a uniform act should include a provision allowing an individual to appoint an agent to carry out that individual's wishes and make decisions if necessary.<sup>141</sup>

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138. Whether a property interest is protected under the Due Process Clause is based upon state law. *Sch. Comm. of Hatfield v. Bd. of Educ.*, 363 N.E.2d 237, 238-39 (Mass. 1977).

139. *Crocker*, 778 So. 2d at 990 (quoting *Zinerman v. Burch*, 494 U.S. 113, 125-26 (1990)).

140. In addition to the due process rights accorded by the Fourteenth Amendment to the United States Constitution, state constitutions likewise afford due process protections to their citizens. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977) ("Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions."). However, many states do not provide more stringent protections. New York and California courts have interpreted their state constitutions as providing the same safeguards with respect to due process rights. *See People v. David W.*, 733 N.E.2d 206, 210 (N.Y. 2000); *Gray v. Hall*, 265 P. 246, 252 (Cal. 1928). Therefore, any legislature adopting a uniform act would be advised to review state constitutional jurisprudence to examine what due process rights are afforded. At this time, a uniform act that passed muster under the Fourteenth Amendment may be sufficient, because the constitutions of many states provide the same due process protections. *See, e.g.*, *David W.*, 733 N.E.2d at 210; *Gray*, 265 P. at 252. However, if federal due process protections are minimized, it may be that state courts will increase the level of due process protections afforded under state constitutions. *See, e.g.*, Brennan, *supra*, at 503 ("If the Supreme Court insists on limiting the content of due process to the rights created by state law, state courts can breathe new life into the federal Due Process Clause by interpreting their common law, statutes and constitutions to guarantee a 'property' and 'liberty' that even the federal courts must protect.").

141. The act of appointing someone to serve as funeral planning agent can be compared to the situation of using a living will versus appointing a health care proxy.

One way that some states allow for the appointment of an agent is by the use of health care proxies or durable powers of attorney for health care. Vermont's advance directive statute provides that the health care agent may also "make or refuse to make an anatomical gift, and . . . arrange for the disposition of the principal's remains, including funeral goods and services."<sup>142</sup>

There are advantages and disadvantages to including the appointment of an agent for the disposal of bodily remains in the advance directive. One advantage is having one form that serves a number of different needs, such as appointing a health care agent and a funeral planning agent, and making anatomical gifts (or appointing someone to make anatomical gifts after death). It makes some sense that the decision regarding what should happen to one's body after death includes both funeral planning and organ donation provisions. Furthermore, many people are familiar with advance directives<sup>143</sup> so this would not be an entirely foreign concept. On

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In a living will, a person sets down concrete instructions regarding end of life wishes. Eric C. Miller, *Listening to the Disabled: End-of-Life Medical Decision Making and the Never Competent*, 74 *FORDHAM L. REV.* 2889, 2896 (2006). The living will is usually not able to predict advances in medical technology or the actual situation the patient may be in. *See id.* at 2897 (noting that "living wills cannot usually anticipate the exact circumstances in which future decisions must be made"). However, a health care agent is able to take into account the patient's medical situation at that time and determine what the patient would have wanted. *See, e.g., id.* at 2897 n.71 (outlining a hypothetical of a person suffering from dementia who had previously executed a document stating that he would not want to be kept alive if he was dependent on others; although people with dementia are dependent on others, they may be perfectly happy and there is no reason to refuse medical treatment).

142. VT. STAT. ANN. tit. 18, § 9702(a)(18) (Supp. 2005). The Vermont law, which was enacted in 2005, also calls for the establishment of a central registry or database where Vermont citizens can deposit their advance directive information so that it will be easily accessible to health care providers. *Id.* § 9719(b). Because existing law usually considers any agency created by a health care power of attorney as terminating at the principal's death, some statutes also include a provision that the agency will continue past the principal's death for the purposes of organ donation and funeral arrangements. *See, e.g.,* W. VA. CODE ANN. § 16-30-6(d) (LexisNexis 2006) ("A medical power of attorney representative or surrogate's authority terminates upon the death of the incapacitated person except with respect to decisions regarding autopsy, funeral arrangements or cremation and organ and tissue donation: Provided, That the medical power of attorney representative or surrogate has no authority after the death of the incapacitated person to invalidate or revoke a preneed funeral contract executed by the incapacitated person . . .").

143. If people were not familiar with the concept of advance directives prior to the Terry Schiavo case becoming a national story, they certainly were afterward. As evidence of the volume of calls attorneys started receiving when the case made the headlines, the American Bar Association (ABA) as well as state and local bar associations provided pamphlets and other information to attorneys so that they could advise clients with respect to this area of the law. The ABA also produced a 6-minute feature

the other hand, many people wait until they are being admitted to a hospital for surgery to execute their advance directives. This may not be the best time to make a decision with respect to a funeral.<sup>144</sup> As a matter of fact, it may be that a better time to fill out such a form is during a meeting with a funeral director or when discussing financial and estate planning needs.<sup>145</sup> Furthermore, it may be that the person who is best able to make medical decisions is not the person who is best able to handle the funeral arrangements.

The optimum solution is to provide individuals with a number of choices regarding the disposition of their bodily remains. That is, any uniform act should allow people to appoint an agent, or to provide directions that will be binding when they are gone, or both. In that way, each individual can evaluate his or her own situation and decide which course is the best based on that information. In addition, because the law would allow individuals to make a directive, but would not require them to, people would also have the freedom to be governed by the common law of having the spouse or next of kin make decisions, if that is their choice.

### C. *Suggested Uniform Disposition of Bodily Remains Act*

A uniform act based upon the current Delaware or Connecticut statutes would provide the most flexibility, while at the same time provide the most guidance.<sup>146</sup> For example, the laws of both

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story on advance directives for use by television news shows. ABA, Dying Wishes: Advance Health Care Directives (transcript available at <http://www.abavideo.org/ABA311/script.htm> (last visited Feb. 20, 2007)); ABA Dying Wishes: Advance Health Directives Main Page, <http://www.abavideo.org/ABA311/index.htm> (last visited Feb. 20, 2007) (offering the Video News Release to the media under the hyperlink "VNR Preview").

144. Vermont law recognizes that a person being admitted to a hospital or a nursing home may be in a position to be unduly influenced by those around him, and therefore invalidates an advance directive signed by a person while being admitted to a hospital or nursing home unless an ombudsperson, clergy member, attorney, or person appointed by the hospital to explain advance directives affirms that he or she has explained to the patient the ramifications of the document. VT. STAT. ANN. tit. 18, §§ 9703(d)-(e) (Supp. 2005).

145. For example, a survey conducted by the American Association of Retired Persons (AARP) in 2005 found that 25 percent of Massachusetts elders had spoken to an attorney regarding end of life planning, while only 17 percent had spoken to their physician. ERICA DINGER, AARP MASSACHUSETTS END OF LIFE SURVEY 8 (2005), available at [http://assets.aarp.org/rgcenter/health/ma\\_eol.pdf](http://assets.aarp.org/rgcenter/health/ma_eol.pdf).

146. Note, however, that the Delaware law is very similar to the Colorado Dispositions of Last Remains Act, which was enacted in 2003, one year before the Delaware legislature approved its statute. See H.B. 03-1312, 64 Gen. Assem., Reg. Sess. (Colo. 2003) (codified at COLO. REV. STAT. § 15-19-101 to -108 (2005)). It is only natural for a legislator drafting a bill to look at the laws of other states as a guide, and in fact the

states allow the appointment of an agent as well as the provision of directions regarding disposition of bodily remains.<sup>147</sup> However, because both statutes lack some important sections, any drafter would also have to look beyond those laws and include provisions found in the laws of other states. The suggested Uniform Disposition of Bodily Remains Act that follows is based mainly on the Delaware and Connecticut laws, as well as the Draft Uniform Anatomical Gift Act.<sup>148</sup> The commentary that follows certain sections is not intended as an official comment; rather, it is an explanation of certain elements of the section.

## UNIFORM DISPOSITION OF BODILY REMAINS ACT

### **1. Short Title.**<sup>149</sup>

This [act] may be cited as the Uniform Disposition of Bodily Remains Act.

### **2. Definitions.**<sup>150</sup>

(a) “Adult” means a natural person eighteen years of age or older.

(b) “Bodily Remains” means the deceased’s body or cremains<sup>151</sup> after death.

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Delaware Health and Human Development Committee Report with respect to the Delaware bodily remains statute noted that “[t]here [was] similar legislation in other states,” indicating that the drafters of the bill had reviewed the laws of other states when proposing this legislation. State of Del., Del. Gen. Assembly, Delaware House of Representatives Committee Report on House Bill 416 (2004), *available at* <http://www.legis.state.de.us> (search “Bill Search” for Session “GA 142,” Bill Type “HB,” and number “416,” then select the icon to the right of “House Committee Report”).

147. See DEL. CODE ANN. tit. 12, § 262 (Supp. 2004); CONN. GEN. STAT. ANN. § 45a-318(a) (West Supp. 2006).

148. Because at the time this Note was being written, the Uniform Anatomical Gift Act was in the process of being revised to address legal issues that have arisen recently, see *supra* Part III.A., the Draft Revised Uniform Anatomical Gift Act was used, rather than the final 2006 version.

149. REVISED UNIF. ANATOMICAL GIFT ACT (Draft 2006), *supra* note 62, § 1; see also NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, DRAFTING RULES FOR UNIFORM AND MODEL ACTS R.401 (2006), *available at* [http://www.nccusl.org/Update/Docs/DraftingRules\\_Rev\\_0106.pdf](http://www.nccusl.org/Update/Docs/DraftingRules_Rev_0106.pdf).

150. Unless otherwise noted, adapted from DEL. CODE ANN. tit. 12, § 260 (Supp. 2004).

151. “Cremains” is a term used to refer to a person’s cremated remains. See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 294 (11th ed. 2003) (defining “cremains” as “the ashes of a cremated human body”). The concept of adding “cremains” as distinct from a person’s body was initiated in Colorado by the Judiciary committee, after reviewing that state’s proposed disposition of last remains document.

(c) “Declarant” means a competent adult who signs a declaration pursuant to the provisions of this [act]. A declarant may be a “decedent” as that term is used in this [act].

(d) “Declaration Instrument” means a written instrument, signed by a declarant, governing the disposition of the declarant’s bodily remains and the ceremonies planned after a declarant’s death, including a document governing the disposition of bodily remains under this [act]. Such a declaration may be, but is not required to be, made within a prepaid funeral, burial, or cremation contract with a mortuary or crematorium.

(e) “Reasonable under the Circumstances,” applied to the declarant’s instructions, means appropriate in relation to the declarant’s finances, cultural or family customs, and religious or spiritual beliefs. “Reasonable under the Circumstances” implies consideration of factors that include, but are not limited to, a prepaid funeral, burial, or cremation plan of the decedent; the size of the decedent’s estate; the decedent’s cultural or family customs; the decedent’s religious or spiritual beliefs; and the known or reasonably ascertainable creditors of the decedent.

(f) “Third Party”

(1) “Third Party” means a person:

(A) who is requested by a declaration instrument to act in good faith in reliance upon such instrument;

(B) who is delegated discretion over ceremonial or dispositional arrangements in a declaration instrument; or

(C) who is delegated discretion over ceremonial or dispositional arrangements under Section 5.

(2) “Third Party” includes, but is not limited to, a funeral director, mortician, mortuary, crematorium, or cemetery.

### Commentary on Section 2—Definitions

*Declarant:* This definition is clear in requiring that a declarant be competent.<sup>152</sup> As with a last will and testament or health care proxy, some states require that the decedent have had the requisite capacity to execute the document.<sup>153</sup> Some states, such as Arkan-

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See COLO. COMM. ON JUDICIARY, HOUSE COMMITTEE OF REFERENCE REPORT, H. 64-C001, 1st Sess., at 1 (2003).

152. See also *infra* § 4(a) of the proposed Uniform Disposition of Bodily Remains Act.

153. The Massachusetts organ donor law (based upon the 1968 version of the Uniform Anatomical Gift Act) allows an individual “of sound mind” to make an anatomical gift. MASS. GEN. LAWS ch. 113, § 8(a) (2004). However, the Uniform Anatomic-

sas, set the baseline for capacity at an adult “of sound mind.”<sup>154</sup> Other states have no explicit mental capacity requirements, although some laws specify that the person be over the age of eighteen.<sup>155</sup> The proposed form, in Section 7 of the proposed act, requires the witness to attest to the declarant’s age and state of mind at the time of execution.<sup>156</sup>

*Reasonable under the Circumstances:* When an individual has not left clear directions with respect to how his or her body should be disposed of, or has not appointed a funeral planning agent, and the next of kin cannot agree, the court will have to make the decision. This language, taken from the Delaware statute, provides unambiguous guidance for courts that are faced with this task. The statute is explicit in requiring the court to look at the religious or other sociological beliefs of the decedent as well as the decedent’s financial situation when making its determination.

### 3. Scope, Applicability, Exceptions, and Exclusions.

(a) This [act] applies to a document appointing an agent for purposes of disposing of the declarant’s bodily remains, specifying disposition of the declarant’s remains, or both, executed before, on or after [the effective date of this act].<sup>157</sup> This [act] shall also apply to the disposition of a person’s bodily remains in the event such person dies without having a valid declaration instrument in place.

(b) This [act] shall not be construed to:<sup>158</sup>

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cal Gift Act promulgated by the NCCUSL merely requires that the individual making the gift be over the age of eighteen. *See* REVISED UNIF. ANATOMICAL GIFT ACT (Draft 2006), *supra* note 62, § 4. Because a competency requirement is favored by some states, it is included here to make the statute more acceptable to legislators.

154. ARK. CODE ANN. § 20-17-102(b)(1) (West Supp. 2005); *accord* CONN. GEN. STAT. § 45a-318(a) (2006) (stating that “[a]ny person eighteen years of age or older, and of sound mind” may sign an advance directive with respect to mortal remains).

155. *See, e.g.,* ME. REV. STAT. ANN. tit. 22, § 2843-A (Supp. 2005) (no requirements); MD. CODE ANN., HEALTH-GEN. § 5-509 (LexisNexis 2005) (person must be over the age of eighteen); NEB. REV. STAT. ANN. § 71-1339 (2003) (no requirements); NEV. REV. STAT. ANN. § 451.650 (LexisNexis 2005) (person must be over the age of eighteen); OKLA. STAT. ANN. tit. 21, § 1151(A) (West 2002) (no requirements); S.D. CODIFIED LAWS § 34-26-1 (2004) (no requirements).

156. *See infra* text accompanying note 175. In addition, in the event that a legislature were to adopt the act without including the form, the requirement that the witness attest to the declarant’s capacity is set forth in Section 4(b) of the proposed act. *See infra* text accompanying note 162.

157. Adapted from the REVISED UNIF. ANATOMICAL GIFT ACT (Draft 2006), *supra* note 62, § 3.

158. Taken directly from DEL. CODE ANN. tit. 12, § 261 (Supp. 2004).



- (1) invalidate a declaration instrument or will, codicil, trust, power of appointment, or power of attorney;
- (2) invalidate any act of an agent, guardian, or conservator;
- (3) affect any claim, right, or remedy that accrued prior to the effective date of this [act];
- (4) authorize or encourage acts that violate the constitution, statutes, rules, case law, or public policy of [state] or the United States;
- (5) abridge contracts;
- (6) modify the standards, ethics, or protocols of the practice of medicine;
- (7) compel or authorize a health care provider or health care facility to administer medical treatment that is medically inappropriate or contrary to federal or other [state] law; or
- (8) permit or authorize euthanasia or an affirmative or deliberate act to end a person's life.

Commentary on Section 3—Scope, Applicability, Exceptions,  
and Exclusions

Subsection (a) makes it clear that if an individual has a declaration instrument in place prior to the enactment of the act, it is not necessarily invalidated.<sup>159</sup> The language of subsection (b), taken directly from the Delaware statute, provides some comfort to those who would be concerned that this act would allow or encourage euthanasia or interfere with the practice of medicine. While this language may not be necessary, it is included here as a preemptive measure to address concerns some legislators may have about the act. Finally, this section clarifies that this act is not intended to abrogate any constitutional rights.<sup>160</sup>

#### **4. Declaration of Disposition of Last Remains.**

(a) A competent adult may specify, in a declaration instrument, any one or more of the following:<sup>161</sup>

- (1) the disposition to be made of that person's bodily remains;

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159. In fact, many people may have set forth their burial or cremation instructions in their last will and testament. *See supra* note 75.

160. *See supra* Part III.A.1.

161. Taken from DEL. CODE ANN. tit. 12, § 262 (Supp. 2004).

(2) who may direct the disposition of that person's bodily remains;

(3) the ceremonial arrangements to be performed after that person's death;

(4) who may direct the ceremonial arrangements after that person's death; or

(5) the rights, limitations, immunities, and other terms of third parties dealing with the declaration instrument.

(b) The declaration instrument shall be in writing, contain the date of its execution, be signed by the declarant, and notarized or witnessed in writing by at least one adult who affirms that the notary or witness was present when the declarant signed and dated the declaration instrument and that the declarant appeared to be of sound mind at the time of execution of the declaration instrument.<sup>162</sup>

(c) The agent or successor agent appointed in the declaration instrument may not act as the witness or the notary public under subsection (b) above. In the event an agent or successor agent acts as a witness or notary, and there are no other disinterested witnesses, the declaration instrument is not invalidated by that fact alone; however, the interested witness may not act as the agent or successor agent.

#### Commentary on Section 4—Declaration of Disposition of Last Remains

This portion of the act provides flexibility by allowing an individual to direct what should happen to his bodily remains and at the same time allowing for the appointment of an agent to carry out those wishes.<sup>163</sup> Subsection (a)(5), which is taken directly from the Delaware statute, allows a declarant to negate the terms of this act which limit the liability of third parties relying on a declaration instrument. Although it is doubtful that many people would take advantage of this option, it is included in order to provide options in the event a declarant feels the protections afforded by the statute are unnecessary or should be limited.

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162. Adapted from the Arizona cremation authorization statute. See ARIZ. REV. STAT. ANN. § 32-1365.01(B) (2002). Based on the differing requirements for due execution from state to state, there is a concern that a disposition directive or appointment-of-agent document that was signed in accordance with the laws of one state would not be valid in another state.

163. See *supra* Part III.B.

Subsection (c) clarifies that a person who is appointed as the agent in a declaration instrument should not act as a witness or notary. Although the Uniform Probate Code drafters have eliminated the requirements of disinterested witnesses in the execution of wills,<sup>164</sup> many state laws still include provisions invalidating a testamentary disposition to an interested witness.<sup>165</sup> Therefore, this section is included in order to make the law more appealing to legislatures.

**5. Disposition of Bodily Remains in the Absence of a Declaration Instrument or if Appointed Agent Cannot Act.<sup>166</sup>**

(a) In the absence of a valid declaration instrument, or in the event that an individual and any alternate designated in a declaration instrument decline to act, are unable to act because of death or disability, or cannot be located within forty-eight hours after the time of death or the discovery of the body, the following individuals, in the priority listed, shall have the right to custody and control of the disposition of a person's body upon the death of such person:

(1) The deceased person's spouse, unless such spouse is legally separated from the decedent, has abandoned the deceased person prior to the deceased person's death, or has been adjudged incapable by a court of competent jurisdiction;

[(1-A) The deceased person's domestic partner. For purposes of this section, "domestic partner" means one of two unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare];<sup>167</sup>

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164. See UNIF. PROBATE CODE § 2-505 (2005). The Comment to § 2-505 states that a large gift given to a witness is "a suspicious circumstance" that might give rise to a challenge, but that in cases of undue influence, the wrongdoer usually finds witnesses who are not interested so as not to arouse suspicion. *Id.* § 2-505 cmt.

165. See, e.g., MASS. GEN. LAWS ch. 191, § 2 (2004). Similarly, the Massachusetts health care proxy law does not allow a person named as proxy to act as a witness. MASS. GEN. LAWS ch. 201D, § 2 (2004).

166. Unless otherwise noted, this section is adapted from CONN. GEN. STAT. ANN. § 45a-318(c) (West Supp. 2006). The language "whose whereabouts are generally ascertainable" is taken from DEL. CODE ANN. tit. 12, § 264 (Supp. 2004).

167. ME. REV. STAT. ANN. tit. 22, § 2843-A(1)(D)(1-A) (West Supp. 2005). Missouri law takes a novel approach in addressing the needs of same-sex partners. Under Missouri law, a person has the right to designate who that person's next of kin is, regardless of whether the person is a relative. MO. ANN. STAT. § 194.119(8) (West 2004). This law addresses the needs of same-sex partners in that it allows a person to designate just who is his "family." A Missouri senator, perhaps in reaction to that concept, has

(2) A majority of the deceased person's surviving adult children whose whereabouts are reasonably ascertainable;

(3) The deceased person's surviving parents or legal guardians whose whereabouts are reasonably ascertainable;<sup>168</sup>

(4) A majority of the deceased person's adult surviving siblings whose whereabouts are reasonably ascertainable;

(5) Any adult person in the next degree of kinship in the order named by law to inherit the deceased person's estate, provided such adult person shall be of the third degree of kinship or higher;

(6) Such adult person as the [probate court]<sup>169</sup> shall determine.

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introduced a bill deleting that language from the statute. See S.B. 366, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005), available at <http://www.senate.mo.gov/05info/pdf-bill/intro/SB366.pdf>. As of this writing, the bill has been recommended as "do pass" by the Senate Judiciary and Civil & Criminal Jurisprudence Committee and has gone through two readings. Bill Summary, Missouri S.B. 366, [http://www.senate.mo.gov/05info/BTS\\_Web/Bill.aspx?SessionType=r&BillID=14858](http://www.senate.mo.gov/05info/BTS_Web/Bill.aspx?SessionType=r&BillID=14858) (last visited Feb. 20, 2007). In many states, rights of domestic partners must be added piecemeal to each statute (for example, to the bodily remains legislation, to advance directive legislation, etc.) because voters have adopted constitutional amendments declaring that marriage is only between a man and a woman, and therefore a global grant to domestic partners of spousal rights would be unconstitutional in those states. See, e.g., Neb. Op. Att'y Gen. No. 03004, 2003 WL 21207498 (Mar. 10, 2003) (opining that it would be unconstitutional if the legislature passed a law allowing domestic partners to make decisions with respect to organ donation and disposition of remains). Shortly after the Nebraska Attorney General's Office issued its opinion, the Nebraska statute regarding control of a decedent's remains was amended to provide that a person may designate an agent to dispose of the body. NEB. REV. STAT. ANN. § 71-1339 (LexisNexis 2003). The law had previously allowed the next of kin to make such decisions. 2003 Neb. Laws 95.

168. The District of Columbia, most likely in an attempt to avoid court actions when members of a class could not agree, gave the "oldest adult member" of the class priority over the other class members for the purpose of disposition of remains. D.C. CODE § 2-2813(a) (Supp. 1987), *invalidated by* *Parker v. Horton's Funeral Serv., Inc.*, 200 F.R.D. 1 (2001). However, the statute went on to list the classes as follows: "[s]pouse, adult child, *father*, *mother*, adult brother, adult sister," etc. *Id.* (emphasis added). Because the law clearly preferred a male parent to a female parent, the law was declared unconstitutional. *Parker*, 200 F.R.D. 1. Rather than merely replacing "father, mother" with "parent," and "adult brother, adult sister" with "sibling," however, the legislature rewrote the law, and now requires a majority of the siblings if more than one, and expresses no preference between parents; that is, both parents would have to agree on the disposition. D.C. CODE §§ 3-413(a)(2)-(3) (LexisNexis 2003). In a case where the parents could not agree, the new law places the onus of deciding which parent would have the right to control upon the court.

169. The type of court to be inserted should be the same as that in the "jurisdiction" portion of the suggested uniform act. See *infra* Section 9 and Commentary on Section 9.

(b) Any person acting pursuant to this section shall be subject to the directions for disposition provided by the decedent in accordance with Section 4.

Commentary on Section 5—Disposition of Bodily Remains in the  
Absence of a Declaration Instrument or If Appointed  
Agent Cannot Act

This section tracks the original common law notion that an individual's next of kin shall have custody or control of the body. However, subsection (b) clarifies that the decedent's wishes are controlling and should be accorded the proper respect.

**6. Prohibition Against Certain Persons Acting As Agent.**

The following persons shall not have the ability to direct the disposition of the decedent's remains and shall not be eligible to act as the agent of the decedent pursuant to Section 4 or be allowed custody and control under Section 5:

(a) A person who has been arrested for unlawfully and intentionally committing an act against the decedent that resulted in or contributed to the death of the decedent, unless the charges against said person have been dismissed or the person was found not guilty of said charges by a court of law.<sup>170</sup>

(b) The spouse of the decedent if the spouse and decedent are legally separated or divorced at the time of the death of the decedent, unless the decedent has appointed the spouse to act as the decedent's agent in a valid declaration instrument executed after the date of such separation or divorce, as the case may be.<sup>171</sup>

(c) The decedent's parent if that parent's parental rights have been terminated by court order.<sup>172</sup>

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170. This section is adapted from FLA. STAT. ANN. § 497.005(37) (West 2006).

171. See COLO. STAT. ANN. § 15-19-107(4)(a) (West 2005), which specifically revokes an appointment of the decedent's spouse as agent if the parties were legally separated or divorced after the appointment-of-agent document was signed, unless the instrument specifically states otherwise. However, the remainder of the appointment-of-agent document will stand. *Id.* § 15-19-107(4)(b); *see also* ME. REV. STAT. ANN. tit. 22, § 2843-A(3) (2004) (prohibiting a spouse who was estranged from the decedent from having control of the remains but not explicitly applying this provision to a spouse named as agent in an authority document).

172. Taken from 2005 Tex. H.B. No. 3015.

Commentary on Section 6—Prohibition of Certain Persons  
Acting as Agent

Many states include provisions for when death is caused by the next of kin. Florida's law was recently amended to exclude from the definition of "legally authorized person" a spouse who has been arrested for committing domestic violence upon the decedent which contributed to the death of the decedent.<sup>173</sup> Similarly, California law provides that if an individual who has been designated as an agent or who is the next of kin "has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent's death," that individual shall not have the ability to control the disposition of the decedent's remains, unless the charges are dismissed or the individual is acquitted.<sup>174</sup>

Subsections (b) and (c) clarify what happens in the event spouses are separated or divorced, or a parent's rights have been terminated by judicial action. However, a declarant who wishes to appoint an ex-spouse may do so by executing a declaration instrument appointing that individual after the separation or divorce.

**7. Form.**

(a) The following is a suggested form of declaration instrument:<sup>175</sup>

**DECLARATION OF DISPOSITION OF BODILY REMAINS**

I, \_\_\_\_\_ (Name of Declarant), being of sound mind and lawful age, hereby revoke all directives and instructions regarding the disposition of my bodily remains and revoke all appointments of agents with respect to the disposition of my bodily remains, whether they be set forth in a will, codicil, trust, power of appoint-

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173. See FLA. STAT. ANN. § 497.005(37) (West 2006) (added in 2004 by 2004 Fla. Laws, ch. 2004-301, § 6). Note, however, that the statute is not clear if the provision applies when a spouse has been appointed as agent by the decedent, or only if the spouse is acting as next of kin when the decedent did not leave other instructions. While this is similar to a "slayer statute" prohibiting a decedent's killer from inheriting from the estate of the decedent, the language is slightly different. The Florida slayer statute prohibits a survivor who "unlawfully and intentionally kills or participates in procuring the death of the decedent" from taking under the decedent's will or through the laws of intestacy. FLA. STAT. ANN. § 732.802(1) (West 2006).

174. CAL. HEALTH & SAFETY CODE § 7100(b) (West Supp. 2006). The California code is much clearer in specifying that the prohibition applies to a person acting as agent or next of kin, unlike the Florida law. See *supra* note 173.

175. Except as otherwise noted, this form is adapted from the Delaware disposition of last remains statute. See DEL. CODE ANN. tit. 12, § 265 (Supp. 2004).

ment, or power of attorney. However, this instrument does not revoke my prior instructions regarding organ donation unless section V below is completed.

I hereby declare and direct that after my death the following provisions be taken:

I. If permitted by law, my body shall be (Initial ONE choice):

\_\_\_\_\_ Buried. I direct that my body be buried at \_\_\_\_\_.

\_\_\_\_\_ Cremated. I direct that my cremated remains be disposed of as follows: \_\_\_\_\_.

\_\_\_\_\_ Entombed. I direct that my body be entombed at \_\_\_\_\_.

\_\_\_\_\_ Other. I direct that my body be disposed of as follows: \_\_\_\_\_.

\_\_\_\_\_ Disposed of according to the directions of my agent or successor agent as set forth in section IV below.

II. I hereby request the following funeral or memorial services (initial any which apply):

\_\_\_\_\_ Funeral. I request the following arrangements for my funeral: \_\_\_\_\_.

\_\_\_\_\_ Memorial Service. I request the following arrangements for my memorial service: \_\_\_\_\_.

III. Special Instructions. In addition to the instructions above, I request (on the following lines you may make special requests regarding ceremonies, lack of ceremonies, or disposition of your remains): \_\_\_\_\_.

Note: Those persons or entities asked to carry out a declarant's intent regarding disposition of last remains and ceremonial arrangements need do so only if the declarant's intent is reasonable under the circumstances. "Reasonable under the Circumstances" may

take into consideration factors such as a known prepaid funeral, burial, or cremation plan of the declarant, the size of the declarant's estate, cultural or family customs, the declarant's religious or spiritual beliefs, the known or reasonably ascertainable creditors of the declarant, and the declarant's financial situation prior to death.

IV. I hereby appoint \_\_\_\_\_, having an address and telephone number of \_\_\_\_\_ to have custody and control of my bodily remains to act as my agent to carry out the disposition directions expressed in this document. If \_\_\_\_\_ shall decline to act, be unable to act because of death or disability, or cannot be located within forty-eight (48) hours of my death or the discovery of my body, then \_\_\_\_\_, having an address and telephone number of \_\_\_\_\_, shall act in that person's place or stead.<sup>176</sup>

I may revoke or amend this declaration in writing at any time. I agree that a third party who receives a copy of this declaration may act according to it. Revocation of this declaration is not effective as to a third party until the third party learns of my revocation. My estate shall indemnify any third party for costs incurred as a result of claims that arise against the third party because of a good-faith reliance on this declaration.

I execute this declaration as my free and voluntary act, on \_\_\_\_\_.

(Declarant's signature) \_\_\_\_\_.

I, the undersigned, have witnessed the signing of this document by the Declarant, or at the direction of the Declarant, and state that the Declarant appears to be at least eighteen years of age, of sound mind, and under no constraint or undue influence. I have not been named as agent in this document.

(Witness signature) \_\_\_\_\_.

V. The following section regarding organ and tissue donation is optional. To make a donation, initial the option you select and sign below. *Note: If you have previously made provisions for the donation of one or more of your organs in a separate document, and that document continues to express your current wishes, you should not complete this section in order to avoid revocation of the prior organ donation directive.*

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176. This sentence is adapted from the Connecticut bodily remains statute. See CONN. GEN. STAT. ANN. § 45a-318(d) (West Supp. 2006).



In the hope that I might help others, I hereby make an anatomical gift, to be effective upon my death, of:

A. \_\_\_\_\_ Any needed organs/tissues.

B. \_\_\_\_\_ The following organs/tissues:

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Donor signature: \_\_\_\_\_.

[Notarization Optional]

(b) The form set forth in subsection (a) is optional and nonexclusive, and a person may use another form of declaration instrument if it substantially complies with the statutory requirements of this [act].<sup>177</sup>

(c) A declaration instrument may be acknowledged, but lack of acknowledgment shall not render the declaration ineffective.

#### Commentary on Section 7—Form

The NCCUSL recommends that statutory forms be avoided in uniform acts.<sup>178</sup> Due to the difficulty in reproducing the forms in a statutory text because they contain blank spaces for inserting personal information, different indentation, spacing, etc., the NCCUSL suggests delegating the task of drafting a form to a state agency.<sup>179</sup> However, as of this writing, approximately eleven states include as part of their mortal remains statutes a sample form for appointing an agent or directing the disposition of remains.<sup>180</sup> Furthermore, there are several advantages to including a model form as part of a uniform act. First, it would allow laypersons access to the forms. For example, a funeral director could make a photocopy of the statutory form and provide it to a customer, much like a hospital can provide an advance directive form to an incoming patient. Neither

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177. This subsection is adapted from the North Carolina health care power of attorney statute. *See* N.C. GEN. STAT. § 32A-25 (2005).

178. NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, DRAFTING RULES FOR UNIFORM AND MODEL ACTS 20 (2006), available at [http://www.nccusl.org/Update/Docs/DraftingRules\\_Rev\\_0106.pdf](http://www.nccusl.org/Update/Docs/DraftingRules_Rev_0106.pdf).

179. *Id.*

180. *See* COLO. REV. STAT. ANN. § 15-19-107 (West 2005); CONN. GEN. STAT. ANN. § 45a-318 (West Supp. 2006); DEL. CODE ANN. tit. 12, § 265 (Supp. 2004); GA. CODE ANN. § 31-36-10 (2006); 755 ILL. COMP. STAT. ANN. 65/10 (West Supp. 2006); KAN. STAT. ANN. § 58-632 (2005); MINN. STAT. ANN. § 145C.16 (West 2005); NEV. REV. STAT. ANN. § 451.650 (LexisNexis 2005); N.C. GEN. STAT. § 32A-25; OR. REV. STAT. § 97-130(7) (2005); TEX. HEALTH & SAFETY CODE ANN. § 711.002(b) (Vernon 2003).

the hospital nor the funeral director would be accused of the unlicensed practice of law in those situations.

Second, the entities who ultimately rely on the forms when disposing of remains, such as crematories, will feel more comfortable if the forms they receive, and are expected to act in accordance with, all look essentially the same and have the same information. In that way, a crematory operator would not have to contact an attorney every time he or she received a designation of agent or disposal of remains directive to make sure that it complied with the statute.

Third, if forms are drafted in "plain language," they will be easier for people to understand and the likelihood of ambiguity or mistakes would be lessened. Finally, an individual's appointment of an agent for the disposal of remains or a directive regarding the disposition of remains is not something that would generally require the services of a lawyer. In all likelihood, a funeral director would be knowledgeable about what an individual can legally do with his remains<sup>181</sup> and what type of family member or friend would be the best person to act as agent.<sup>182</sup>

The use of the form is merely recommended and is not mandatory. The act is clear in providing that another document which is executed in accordance with the act will be acceptable.

With respect to the language regarding organ donation, any state adopting this act should determine the requirements of the Uniform Anatomical Gift Act as enacted in that state to determine the witness requirements of that state's donor law.

## **8. Payment for Disposition; Unlawful Disposition.<sup>183</sup>**

(a) If the declarant directs a disposition in a valid declaration instrument and those financially responsible for the disposition are without sufficient funds to pay for such disposition or are unwilling to pay for such disposition, and the estate of the declarant has insufficient funds to pay for the disposition, the wishes of the decedent

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181. For example, if a Massachusetts citizen wanted his remains cryonically frozen, the remains would have to be shipped outside of Massachusetts. See *infra* note 184.

182. Funeral directors are likely to have seen many family arguments over the disposition of remains; and in fact, they are probably more familiar with the spectacle than many attorneys. Furthermore, an AARP study revealed that many more people were comfortable talking with their family or friends about end-of-life issues rather than an attorney or physician. DINGER, *supra* note 145, at 8.

183. This section is adapted from the Oregon and California sepulture statutes. See OR. REV. STAT. § 97.130(6) (2005); CAL. HEALTH & SAFETY CODE § 7100.1(a)(2) (West Supp. 2006).

shall be carried out only to the extent that the decedent has sufficient assets to do so, unless the person or persons who otherwise have the right to control the disposition and arrange for funeral goods and services agree to assume the cost.

(b) If the direction of the declarant is unlawful, the direction shall be void and disposition shall be in accordance with the direction provided by the agent appointed pursuant to Section 4, or if no agent is appointed or able to serve, by those persons given priority in Section 5; provided, however, that the disposition shall be reasonable under the circumstances.

Commentary on Section 8—Payment for Disposition;  
Unlawful Disposition

Each state has its own laws with respect to how a body can be disposed.<sup>184</sup> This portion of the act helps to avoid litigation by providing an alternative scheme when an individual's directions are illegal or unaffordable. However, by including the "reasonable under the circumstances" language, this section also makes clear that the decedent's wishes should be taken into account.

**9. Jurisdiction.**

The [probate court] for the district of the domicile or residence of a deceased person shall have jurisdiction to hear and decide any issue regarding the custody, control, or disposition of the deceased person's body, upon such notice to interested parties as the court shall determine.<sup>185</sup> Any order issued by the court shall be consistent with the decedent's last wishes to the extent they are reasonable under the circumstances.<sup>186</sup>

Commentary on Section 9—Jurisdiction

In order to avoid confusion, the act allows the state legislature to choose a specific court as the proper forum for deciding matters involving the disposition of bodily remains. The proposed act inserts "probate court" because the topic of disposition of bodily re-

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184. See, e.g., MASS. GEN. LAWS ch. 114, § 43M (2004) ("Except as otherwise provided by law . . . every dead body of a human being dying within the commonwealth . . . shall be decently buried, entombed in a mausoleum, vault or tomb or cremated within a reasonable time after death.").

185. This language is adapted from the Connecticut bodily remains statute. See CONN. GEN. STAT. ANN. § 45a-318(e) (West Supp. 2006).

186. This language is adapted from the Delaware disposition of last remains statute. See DEL. CODE ANN. tit. 12, § 264(c) (Supp. 2004).

mains is similar to the disposition of property under a will, and in many states the probate courts are charged with oversight of this matter. The language “upon such notice to interested parties as the court shall determine” is an attempt at addressing possible due process issues<sup>187</sup> while at the same time providing flexibility so that the probate court can address each case as the situation requires. However, each legislature should review the court system of its state and determine which court is best suited to administer these types of cases, based upon such considerations as whether the courts have equitable powers and the types of cases handled by the courts.

#### **10. Nonliability[; Penalties for Non Compliance].<sup>188</sup>**

(a) Subject to subsection (c) below, a third party who acts in accordance with this [act] or with the applicable law with respect to disposition of bodily remains of another state or another country or attempts in good faith to do so is not liable for the act in a civil action or criminal proceeding or subject to discipline for unprofessional conduct.

(b) If a third party makes an anatomical gift in accordance with the declaration instrument, neither the third party making the gift nor the estate of the decedent shall be liable for any injury or damage that may result from the making or the use of an anatomical gift.<sup>189</sup>

(c) Subsection (a) does not apply to an agent who knows that a declaration instrument has been amended or revoked and the agent’s actions are inconsistent with the revocation or amendment.

[(d) Any person who knowingly fails to follow the directions as to the manner in which the body of the declarant shall be disposed of as set forth in a valid declaration instrument, upon conviction]

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187. See *supra* Part III.A.

188. Unless otherwise noted, this section is adapted from the 2006 draft of the Uniform Anatomical Gift Act. See REVISED UNIF. ANATOMICAL GIFT ACT (Draft 2006), *supra* note 62, § 17.

189. In order to track the Uniform Anatomical Gift Act, the drafter should review the current version of that Act to determine whether the drafters have included a provision imposing liability for one who knowingly authorizes the donation of organs from a person who had HIV or hepatitis. See REVISED UNIF. ANATOMICAL GIFT ACT § 18 (Draft 2005) (marginal comment), available at <http://www.law.upenn.edu/bll/ulc/uaga/2005StrikeScore.pdf>. The provision was not included in the final 2006 version of the Act. See REVISED UNIF. ANATOMICAL GIFT ACT (2006), available at <http://www.law.upenn.edu/bll/ulc/uaga/2006final.pdf>.

tion thereof, shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000].<sup>190</sup>

Commentary on Section 10—Nonliability[; Penalties for  
Non Compliance]

Subsection (d) is provided as an optional section because very few states include penalties in their statutes. However, there would seem to be a better chance that a person's directions will be followed if there are penalties for non-compliance.<sup>191</sup> At the same time, in order that funeral directors can do their jobs without the specter of litigation constantly hanging over their heads, this section also provides immunity for good faith actors.

**11. Choice of Law; Validity.**<sup>192</sup>

(a) A declaration instrument is valid if executed in accordance with this [act], the laws of the place where it was executed, or the laws of the place where the person making the declaration instrument was domiciled, has a place of residence, or was a national at the time the declaration instrument was executed.

(b) A person may assume that a declaration instrument is valid unless that person knows that it was not validly executed or was revoked.

(c) The provisions of the most recent declaration instrument shall control over any other document regarding the disposition of

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190. This subsection is taken from the Oklahoma sepulture statute. OKLA. STAT. ANN. tit. 21, § 1151(C) (West 2002). The brackets indicate that the language is optional.

191. Even in the absence of a statutory penalty, there are repercussions for death care industry workers who fail to follow the rules. In Oregon, a crematory worker lost his job after he allowed a woman's body to be cremated without first obtaining permission from the decedent's husband pursuant to Oregon law. *Jones v. Employment Dep't*, 112 P.3d 453, 453-54 (Or. Ct. App. 2005) (citing OR. REV. STAT. § 97.130(2)(a) (2005)). While this sounds like a justified firing, there were extenuating circumstances. The decedent had died as a result of being shot by her husband. *Id.* at 454. The employee obtained authorization to cremate the woman's body from her other family members; however, state law required the husband's authorization before the cremation could be performed, and the husband was in jail. *Id.* The employee contacted the husband's attorney, who promised to obtain the husband's signature. *Id.* Finally, almost a month after the woman's death, although he had not received the husband's written permission, the employee gave in to the demands of the decedent's family and ordered the cremation of the body. *Id.*

192. Unless otherwise noted, this section is adapted from the 2006 draft of the Uniform Anatomical Gift Act. *See* REVISED UNIF. ANATOMICAL GIFT ACT (Draft 2006), *supra* note 62, § 18.

bodily remains.<sup>193</sup> However, an anatomical gift document executed after a declaration instrument shall not invalidate the declaration instrument in its entirety. If the two documents conflict with respect to a certain provision, the more recent document shall control.

### Commentary on Section 11—Choice of Law; Validity

One of the strongest reasons for adopting a uniform act with respect to bodily remains is the desire to make bodily remains declarations portable from state to state.<sup>194</sup> Any uniform act should alleviate most of the problems with portability of documents by promulgating a model form and setting forth the requirements for due execution. However, in the event that a state adopts the act without including the form, and for purposes of clarity, this section makes it clear that a validly executed bodily remains directive executed in another state will be accepted by the state adopting this act. The Colorado and Delaware disposition statutes do not go far enough when they state that the statutes apply to documents executed by a resident of that state within the state as well as to documents signed by a resident of that state when the document is executed.<sup>195</sup> These laws are not clear as to whether they preclude a document executed by a resident of another state who wants to be buried or cremated within Colorado or Delaware from being effective. In contrast, the Vermont advance directive statute is much clearer in stating that “[n]othing in this [law] limits the enforceability of an advance directive or similar instrument executed in another state or jurisdiction in compliance with the law of that state or jurisdiction.”<sup>196</sup>

Subsection (c) states that the most recent document shall control. However, to allow for the possibility that a disposition of remains document and an anatomical gift document might be executed at different times, the law is clear that the recent document shall not revoke the prior document. But where the provisions conflict, the most recent document shall control.

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193. This language was adapted from DEL. CODE ANN. tit. 12, § 266(d) (Supp. 2004).

194. See *supra* Part II.B.

195. See COLO. REV. STAT. ANN. § 15-19-104(4) (West 2005); DEL. CODE ANN. tit. 12, § 266(c).

196. VT. STAT. ANN. tit. 18, § 9716 (Supp. 2005).

**12. Uniformity of Application and Construction.**<sup>197</sup>

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**13. Severability; Conflict with Other Laws.**<sup>198</sup>

(a) If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

(b) In the event this [act] conflicts with any other laws of this state, the provisions of this [act] shall control. [However, in the event any provision of the Uniform Anatomical Gift Act conflicts with this [act], the provisions of the Uniform Anatomical Gift Act shall control.]

Commentary on Section 13—Severability; Conflict with  
Other Laws

The severability clause is new to the UAGA. However, the NCCUSL recommends a provision regarding severability where there is a danger of the law being partially invalidated by an existing law.<sup>199</sup> Here, there is a concern that this act may conflict with the provisions of the anatomical gift law enacted by the state. Subsection (b) is added as a saving clause to avoid minor conflicts with other laws of the state. Certainly, any state adopting a uniform act must carefully review its existing laws to determine whether there are any conflicts. On the other hand, in states that have already enacted bodily remains statutes, the whole statute should be replaced with the uniform act provisions.<sup>200</sup>

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197. This section tracks the language in the 2006 draft of the Uniform Anatomical Gift Act. See REVISED UNIF. ANATOMICAL GIFT ACT (Draft 2006), *supra* note 62, § 23.

198. This section tracks the language in the 2005 draft of the Uniform Anatomical Gift Act. See REVISED UNIF. ANATOMICAL GIFT ACT (Draft 2005), *supra* note 189, § 23.

199. NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, DRAFTING RULES FOR UNIFORM AND MODEL ACTS, *supra* note 178, at 23-24, 26 Rule 604.

200. In Massachusetts, for example, the current regulations are not clear as to the manner in which a person may direct the disposition of his or her remains, but do prescribe who shall have control over a decedent's remains. 239 MASS. CODE REGS. 3.09 (2005); see *supra* text accompanying note 35. In the event the Massachusetts legis-

The second sentence of subsection (b) is optional. It allows a legislature to be clear that organ donation is more important than adhering to a decedent's wishes with respect to burial or cremation, and that therefore the state's organ donation laws should supersede the disposition of bodily remains statutes in the event of a conflict between the two.

**14. Effective Date.**<sup>201</sup>

This [act] takes effect \_\_\_\_\_.

CONCLUSION

Funeral planning is an intensely personal decision-making process. Unfortunately, the laws of some states do not afford citizens the opportunity to provide directions on how their bodily remains are to be disposed of after death. Even in those states that do allow people to pre-plan funerals, there is little statutory assurance that those directions will be followed. Because of the importance to many people of what happens to their bodies post-mortem, state legislatures should provide citizens with clear-cut directions on how an individual may pre-plan a funeral or appoint an agent, and how to ensure that directions are carried out. One way to help the states in enacting this needed legislation is the development of a uniform disposition of bodily remains act allowing for the appointment of an agent and the provision of an advance directive as part of a funeral planning document.

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lature was to adopt a uniform act, the Code section would most likely need to be replaced in its entirety.

201. This section tracks the language in the 2006 draft of the Uniform Anatomical Gift Act. See REVISED UNIF. ANATOMICAL GIFT ACT (Draft 2006), *supra* note 62, § 26.

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