Who Controls the Dead?

The Right to Make Funeral and Disposition Decisions

By Tanya D. Marsh

Death is a transformative event with profound consequences for the individual and her community. Promptly following this emotionally significant moment, decisions regarding the disposition of the corpse must be made. In a basic sense, the process of disposing of human remains is simply the solution to a practical problem. But the manner in which we dispose of remains matters, to many people, quite a bit. A human cadaver is no longer a person, but neither is it an item devoid of meaning. Anthropologists tell us that one of the key differences between humans and other animals is that we do not easily discard the remains of our species. Instead, we attach profound spiritual and emotional significance to their treatment and ultimate disposition.

Americans, pushing back against the commercialized "American way of death," are exploring their options in death care to an unprecedented degree. The most significant evidence of this is the rising popularity of cremation. Before the mid-1980s, the US cremation rate was in single digits. In 2015, for the first time, more Americans were cremated than buried. The growing interest in cremation is driven by concerns about cost, the environmental impact of embalming and ground burial, and a desire for a closer connection between the living and the dead. These same concerns contribute to a growing interest in home funerals, alkaline hydrolysis, and green burial.

Socially conscious entrepreneurs, responding to these concerns, are pushing the accepted boundaries of death care. Katrina Spade and the Urban Death Project are working to create a community compost-based renewal system where human remains are transformed into life-giving soil. Jae Rhim Lee's eco-friendly Infinity burial shroud and suit are infused with fungi that hasten decomposition while neutralizing toxins. Capsula Mundi is developing a biodegradable egg-shaped pod that will encapsulate human remains, serving as a metaphorical "seed" for a memorial tree planted above the pod. Jevon Truesdale and Qico promote an environmentally friendly, sustainable, water-based alternative to fire cremation known as alkaline hydrolysis. Progressive funeral directors like Amy Cunningham and Caitlin Doughty are providing education and services to allow families to take back as much control over remains as they feel comfortable with, subject to legal limitations.

Of course, these new frontiers in death care are controversial. In some American communities, cremation is still controversial. As a result, there may be tension between what disposition methods individuals might choose for themselves, and what choices their families and communities may be willing to support. The law limits choices in various ways and provides the framework to mediate those disputes.

The American Law of Human Remains

The American legal system includes two kinds of law—common law and statutory law. Statutory law is the collection of acts adopted by state legislatures and Congress. The common law is a framework of legal principles derived from custom and judicial precedent. It is sometimes known as "judge-made law." Recognizing that elected legislatures cannot possibly address every kind of legal dispute, the common law fills in the gaps in statutory law. American common law is based upon and incorporates the body of English common law that existed as of the Revolution. The law of human remains was almost exclusively common law until the turn of the 20th century. At that time, state legislatures began to enact laws to regulate funeral directors and embalmers. Those occupational licensing statutes make up the bulk of the statutory law of human remains. Funeral directors are very concerned about clear rules regarding who has the authority to make funeral and disposition decisions. State statutes are therefore primarily concerned with creating that certainty, even at the expense of the interests of decedents and their families. There is very little federal law on these topics other than the Federal Trade Commission's Funeral Rule, which mandates certain disclosures and presentation of pricing information.

The Rights of the Dead

At common law, the dead have rights. Strong and longstanding social and legal norms permit broad freedom to direct the disposition of our property after death and promote respect for dying wishes. With respect to the disposition of human remains, the common law grants two rights to the deceased: (1) the right to a "decent burial," and (2) the right to direct the disposition of their remains.

Although the common law promises decedents that their wishes will be honored, it does not provide a specific mechanism for decedents to leave evidence of their disposition preferences. Many courts have honored the oral expression of dying wishes. The use of a will is more common, although it remains legally controversial. In some states, a decedent may not dispose of his remains in a will because human remains are not property. In other states, courts have held that a decedent may

leave binding disposition instructions in a will.

Given the lack of clarity in the common law, and the need of funeral directors for certainty, it is not surprising that the state legislatures have intervened. Thirty-one states and the District of Columbia have statutes that provide that the decedent has the general right to express a personal preference regarding the disposition of his remains. I call these rules personal preference statutes. There is significant variety among the personal preference statutes. One important difference is the theoretical basis for the statutes. Only three states (Florida, Oklahoma, and South Dakota) expressly grant decedents a statutory right to determine the disposition of their own remains and then provide a mechanism for executing that right. The remaining states do not expressly establish a statutory right, but implicitly assume a common law right by specifying a mechanism for a person to declare how they would like their remains disposed of after death. At first glance, the failure to establish a statutory right seems inconsequential. After all, what is the purpose of the statutory process if not to effectuate an express common law right or an implicit statutory or constitutional right? But the formulation and placement of these statutes in their respective state codes strongly suggests that the point of the process statutes was to make it more difficult for survivors and estates to invalidate contracts for funeral goods and services (i.e., pre-need contracts) entered into by decedents before death. Indeed, in four states (Georgia, Idaho, Mississippi, and Rhode Island), a decedent's wishes will be respected only if he or she purchased a pre-need funeral contract. Three states (Kentucky, New Mexico, and South Carolina) permit individuals to pre-authorize their own cremations, but not to identify any other personal preferences.

A key corollary in state statutory law to the personal preference statutes is the absolution of liability for those who rely upon documents that comply with the statutory process for memorializing preference. Although some states generously forgive all persons from liability for following the written instructions of the decedent, most statutes are clearly intended to relieve only funeral professionals from liability. Other statutes primarily aim to give the funeral director clear legal authority to resolve inconsistencies between a decedent's written instructions and the contrary wishes of survivors. The combination of release of liability for funeral directors for following directives that comply with the statutory requirements, and the emphasis of the statutes on the selection and prepayment of funeral goods and services are clear signals that the personal preference statutes were heavily influenced by the funeral services industry. The result is that in many states, commercial consumer preferences are easier to enforce than non-commercial preferences. If, for example, a person in Wisconsin desired to have his body prepared by his religious congregation and buried in a shroud in a (legally-permissible) backyard cemetery, a choice that would not require the services of a funeral director, crematory authority, or cemetery authority, the law would say that those wishes should be honored, but would not shield those who carried them out from lawsuits brought by surviving next of kin.

The personal preference statutes also vary greatly in terms of the manner in which an individual is required to express his preferences. Some of the states set a very low bar—they simply require that instructions be in writing. Other states require a particular form set forth in the statute. A few states require a notarized declaration. Many states require the written instrument to be witnessed by one or two people. Several provide alternative methods, including setting forth preferences in a will, a health care power of attorney, or pre-need contract.

If a person does not leave instructions regarding the disposition of their remains, or if the relevant state law does not permit them to, the law establishes a framework to determine who may control the remains and make decisions regarding disposition.

The Rights of Next of Kin

Since the early 1850s the general rule in the United States has been that the next of kin have the right to possess and control remains after death, subject only to the wishes of the decedent. In the highly influential 1904 case of Pettigrew v. Pettigrew, the Supreme Court of Pennsylvania attempted to establish a process for sorting out conflicts among surviving kin:

> The result of a full examination of the subject is that there is no universal rule applicable alike to all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association. Subject to this general result, it may be laid down: First, that the paramount right is in the surviving husband or widow, and, if the parties were living in the normal relations of marriage, it will require a very strong case to justify a court in interfering with the wish of the survivor. Secondly, if there is no surviving husband or wife, the right is in the next of kin in the order of their relation to the decedent, as children of proper age, parents, brothers and sisters, or more distant kin, modified, it may be, by circumstances of special intimacy or association with the decedent.

The order of priority set forth in Pettigrew is the most structured that

the common law has accomplished. As the court suggests, this individualized, equitable approach creates uncertainty that, in the event of a dispute among interested parties, can only be resolved by a court. Again, given the understandable interest of funeral directors for certainty in identifying the person or persons with the legal right to make funeral and disposition decisions, it is not surprising that state legislatures have intervened to establish a more orderly process.

Forty-six states and the District of Columbia have statutes that establish a personal obligation or right with respect to the disposition of human remains. These statutes are primarily focused on mediating the competing claims between survivors. Most of the statutes establish a priority list that roughly tracks the hierarchy set forth in Pettigrew and state intestate succession statutes. Not surprisingly, top priority is assigned to the surviving spouse. A few states qualify the spouse's right and obligation based on competency or estrangement at the time of death. A few states put domestic partners or, in the case of Vermont, civil union partners and "reciprocal beneficiaries," on equal standing with spouses.

If a decedent left no surviving spouse or domestic partner who meets the qualifications set forth in the statutes, 39 states identify the children of the decedent as the next in priority. Most states disqualify minor children, while a few do not. Some states permit "any" surviving child to assert the right to control the decedent's remains, while others require a majority of surviving children to agree before they can act. Only two states—Arizona and New Mexico—put the parents of a decedent in a higher priority position than children of the decedent.

If a decedent has no qualifying spouse, parents, or children, 34 states then defer to siblings. As with other classes of kin, most states require the siblings to be adults, but a few do not. Some states allow any sibling to assert the right, while others require a majority to agree.

After siblings, there is significant divergence among the priority lists. A few states include detailed lists of kin. After relatives are exhausted, the lists generally call for an interested friend or stranger. For example, Minnesota seeks "an adult who exhibited special care and concern" for the decedent, while Missouri will take "any person or friend that will assume financial responsibility." Some states end their lists with the public official charged with indigent relief, so that she may organize a pauper's funeral. Only 15 states have statutes that obligate the government to bear the expense of indigent burials. A number of states (including my home states of Indiana and North Carolina) give authority to the funeral director with custody of the body or "any other willing person" to organize the disposition and charge the estate if kin cannot be found within a few days after death.

The Decedent's Right to Designate an Agent

The common law granted decedents the right to dictate the disposition of their remains, but did not expressly give decedents the right to name the person who would control their remains. Many states, however, have statutes that expressly grant decedents the right to designate an agent to control their remains. These agents generally trump all persons in the statutory priority list who would otherwise have the right to control the remains. Presumably, a person would take advantage of a designated agent statute in order to choose a person who will be more likely than his next of kin to effectuate his wishes. Thirty-seven states and the District of Columbia have adopted designated agent statutes. Related statutes allow decedents to grant powers of attorney with respect to health care or similar purposes. Three states only permit the designation of an agent for limited purposes, such as authorizing cremation or making anatomical gifts. The remaining nine states do not allow individuals to designate agents under any circumstances.

Planning

What can, and should, a person do with this information? First, you need to understand your state's laws and how they may allow you to express your personal preferences, choose the disposition method that you prefer, and appoint an agent if you would like one. An estate planning attorney in your state is a good resource. Some estate planning attorneys, however, are not familiar with the intricacies of these laws. Armed with the information in this article, however, you can ask informed questions that should get you the guidance you need. You can also consult resources like Final Rights by Josh Slocum and Lisa Carlson, which provides an overview of the relevant laws in every state. If you spent a significant amount of time in another state, you should also follow this process for that state as well. Remember that the laws that apply are those of state in which a person dies, and unless we never leave home, we cannot ultimately guarantee the location of our death.

Second, if you decide that one of the newly emerging methods of disposition appeals to you, but that the laws of your state will cause problems or prevent you from making that choice, get involved! Write a letter to your local newspaper. Talk to your friends. One of the main reasons that the funeral industry's concerns have trumped consumer concerns in these state laws is because we don't talk about death and they are happy to. If we want better laws and more choices, then we have to begin and sustain a lot of conversations about death. If we are unwilling to engage in those conversations, then we will have to accept that the choices we want and the choices we have may be radically different.

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