

What to Do with the Body?

The Trouble with Postmortem Disposition

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A problem that the families of all clients must face eventually is how to dispose of the client's body. Today the choices are many. Many people do not dig burial. This article will examine many of the problems of postmortem corporeal disposition and how to help a client provide that, when he arrives at the end of his life, his body will be disposed of in the manner he wishes.

The Common Law

Property Rights in Dead Bodies

The English common law did not consider dead bodies property to be owned but rather property to be taken care of. Now the prevailing rule, in England as well as in this country, is that the right to bury the dead and preserve the

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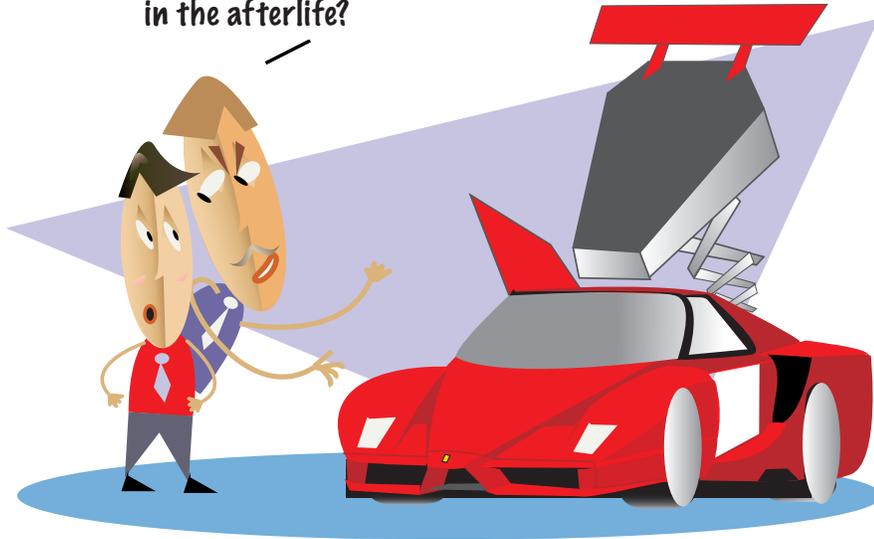
remains is a quasi right in property, the infringement of which may be redressed by an action in damages.

In the United Kingdom, the executor has the right and the duty to deal with the body of the deceased. This is not the law in the United States.

Rights of the Next of Kin

The interests of the next of kin in a dead body are, in some states, entitled to protection under the U.S.

Or, how about 0-60 in 2 seconds in the afterlife?



Constitution. In a Michigan case, *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995), the eyes of a dead body were removed during an autopsy and later sold. The next of kin sued, alleging violation of their rights under section I of the Fourteenth Amendment to the U.S. Constitution, which prohibits states from depriving a person of life, liberty, or property without due process of law. The district court dismissed the plaintiff's claims; the Sixth Circuit reversed. Simply said, the next of kin have the right to dispose of the body, to possess the body for burial, and to prevent it from being mutilated.

The degree to which the federal courts will recognize rights of survivors to be protected in dealings with the dead bodies of those close to them depends on the state. The right to dispose of the body, to possess the body for burial, and to prevent it

from being mutilated is not "property" that would be included in a probate inventory and thus is not within the control of the executor.

In a Missouri case, *Riley v. St. Louis County*, 153 F.3d 627 (8th Cir. 1998), the plaintiff's son committed suicide and a funeral was held. A police officer photographed him in his casket and later displayed the photograph to others as a warning of what might happen to them if they engaged in

right of sepulchre. The court concluded that the actions of the police constituted outrageous and insensitive conduct but were not sufficiently outrageous to shock the conscience of the court. One wonders what it would take to shock the conscience of the Missouri Court of Appeals.

The Development of the Law

In the common law, the decedent has the right to designate his or her desired funeral arrangements and where he or she wishes his or her body to be disposed of. If the wishes of the decedent are not known, and the decedent is survived by a spouse, the spouse may make the funeral and disposition arrangements, unless the decedent and the spouse were estranged at the time of the death.

If the wishes of the decedent are not known, and the decedent is not survived by a spouse living with him or her, then the right to make the funeral and disposition arrangements passes to

1. the children,
2. the parents of the deceased, or
3. the next of kin of the deceased.

gang activity. The plaintiff brought an action alleging violation of her rights under the Fourteenth Amendment, namely her "right of sepulchre," which the court defined as "the right of the next of kin to perform a ceremonious and decent burial of the nearest relative—and an action for the breach of that right." *Riley*, 153 F.3d at 630 (quoting *Galvin v. McGilley Memorial Chapels*, 746 S.W.2d 588, 591 (Mo. Ct. App. 1987)).

The Missouri Court of Appeals found for the defendant, stating that "Missouri courts have abandoned the early fiction that the cause of action for interference with the right of sepulchre rested on the infringement of a quasi property right of the nearest kin to the body." *Riley*, 153 F.3d at 630 (quoting *Lanigan v. Snowden*, 938 S.W.2d 330, 332 (Mo. Ct. App. 1997)). Instead, Missouri courts base the cause of action on the mental anguish of the person claiming the

If the person next in line to handle the final arrangements murdered the decedent, or has been charged with the murder, he or she loses the place in line unless the charges are dropped or the person is found not guilty—by the time that occurs, the matter will be moot. If you want to bury someone, don't kill him or be in a situation where you may be thought to have done so.

State Statutes

Some *state* statutes specify who may arrange funerals and handle the disposition of remains; others provide for appointment of agents to handle arrangements. It is often difficult to find statutes when they exist. There is no uniformity on how they are set forth in the statutory scheme or how they are titled.

Statutes having to do with disposal of dead bodies may be found under "Undertakers," "Funeral

Directors," "Probate," "Health Care Directives," "Disposal of Remains," "Disposition of Remains," "Dead Bodies," or "Health Care Proxies," among others. For instance, in Kansas, direction can be found under Chapter 65, Article 17, "Regulation of Embalmers and Funeral Directors, Funeral Establishments."

Often provisions dealing with the disposition of remains are found under statutory sections governing undertakers and particularly under subsections having to do with cremation. In some cases, provisions for disposition of remains are specified by statute in a section having to do with cremated bodies, but nothing is set forth anywhere in the statutory scheme that deals with bodies that have not been cremated.

Provisions for advance directives or designation of agents may be found under "Durable Powers of Attorney" or "Health Care Powers of Attorney."

In Massachusetts, rules governing custody of dead bodies and the making of funeral arrangements are found, not in the statutes, but in the regulations.

Choices

Help Your Client with Decisions

The lawyer can help his or her client with the decisions to be made.

- Should a funeral director be engaged? (This is not legally required in most cases.)
- Should the decedent be embalmed? (Not legally required in most cases.)
- Is the decedent to be cremated, buried without being cremated, frozen, or freeze-dried? (Believe it or not, the latter two are options.)
- If the decedent is to be cremated, where shall the cremains be disposed?
- What kind of a funeral service is desired?
- Should there be a viewing of the decedent?
- How much should be spent for the casket?
- Where shall the decedent's body or cremains be buried?
- What kind of a grave marker, if required, is to be purchased?

Employment of a Funeral Director

One is not legally required to employ a funeral director in most states. A family member may be able to take custody of the body, obtain a death certificate, and handle other details without hiring someone to assist him.

Embalming

Generally, embalming is not legally required, unless the casket is open at a funeral service.

The Funeral

The decedent can receive a regular funeral, following which he will be buried. The funeral services can be held at the residence of the decedent, at a place of worship, at the gravesite, or at any other place determined by the person in charge. The casket can be open or not. There is no requirement that a funeral be held at all.

Ambrose Bierce, author of *A Devil's Dictionary*, defined "funeral" as "[a] pageant whereby we attest our respect for the dead by enriching the undertaker, and strengthen our grief by an expenditure that deepens our groans and doubles our tears."



I Come to Bury Caesar, Not to Praise Him

According to Shakespeare, Mark Antony said: "I come to bury Caesar, not to praise him." (*Julius Caesar*, act 3, sc. 2.) Then, in a marvelous illustration of paralipsis, Antony goes on to do exactly what he said he was not going to do. (There is some question whether Antony said what Shakespeare said he said, but, you will agree, if he did not say it, he should have said it.)

There is no indication that Caesar left an advance directive, because he did not need to; if you lived in Rome, and you died, and you were a member of the upper class, you were buried with great pomp and ceremony. If you were not a person of note, your body was cremated. As it turned out, because of the frenzy of the mob after Caesar's murder, his body was burned.

Military Funeral Honors

Military funeral honors are provided for an eligible veteran if requested by the family, with an honor guard detail of at least two members of the Armed Forces. The honor guard detail will perform a ceremony that includes folding and presenting the American flag to the next of kin and playing "Taps," which can be played by a bugler, if available, or otherwise by an electronic recording.

Cremation

"Cremation" comes from the Latin "cremo"—to burn. More than one-quarter of dead bodies in the United States are cremated. This proportion increases annually, driven by the cost

savings and the shortage and expense of burial space. In Japan, more than three-quarters of the dead are cremated.

Conventional Burial

A conventional burial is carried out in accordance with the regulations of a particular cemetery. Most require grave liners, at additional expense, and many have limitations on the grave markers that may be used.



Ted Williams

Theodore Samuel Williams, otherwise known as "Ted Williams," "The Splendid Splinter," or "Teddy Ballgame," was the most gifted baseball player of the 20th century. When it came to his burial arrangements, he struck out.

Ted had three children. His son, John-Henry Williams, had his body shipped to Alcor Life Extension Foundation, in Scottsdale, Arizona, to be frozen, with the hope that his father might be returned to life later.

Ted's two daughters, Claudia and Barbara Joyce, did not think that this plan was cool; indeed, they thought it was off-base and sued to prevent it. Supporting the son's position was a memo, which may have been a forgery, written on a restaurant menu. Ted's will directed that he be buried at sea.

The matter was eventually settled, and Ted's body remains in Scottsdale, Arizona. Some time after the settlement, Claudia married John-Henry's lawyer. I am not sure what this proves. ■

A movement has started in Great Britain and in Australia to use "green" cemeteries, in which imperious caskets and grave liners are not used. The Association of Nature Burial Grounds promotes disposal arrangements in which the body is permitted to return to the earth.

In a green cemetery, bodies are buried in a shroud or biodegradable coffin of wicker or cardboard or other simple material. Instead of a headstone, a tree is planted over the grave.

In many states it is possible to be buried in a private cemetery, on one's own property.

Unconventional Burial

The Associated Press, on May 6, 1998, reported that a woman who lived in Tiverton, Rhode Island, was buried in a 1962 Corvair automobile that she owned. Janet Kerlin, *Tiverton Woman Buried in Beloved Car*, Associated Press, May 6, 1998. The engine, steering wheel, and seats were removed to make room for her casket. Such a burial plan would not work with a MiniCooper.

A man was buried in his 1984 Corvette. *Buried in Style: Man Gets Wish . . . Interment in His 'Vette*, Associated Press, May 25, 1994. Other reports of car interments have not been found—perhaps environmentalists concluded that burying bodies in automobiles presented grave problems, or it may be that it was felt that graves should be associated with caskets and not gaskets.

Cryonics—Final Resting Place of Ted Williams

Alcor Life Extension Foundation, in Scottsdale, Arizona, promotes a procedure in which much of the water in cells is replaced with chemicals that do not freeze. Body parts are cooled to a temperature of minus 320°F. The claim is made that body parts in which the water has been replaced with chemicals do not freeze and are not damaged.

Those who pursue cryonics believe that molecular nanotechnology and other scientific practices will

be able to reverse the cryonics process in the future—perhaps a century from now. Decedents who have elected to chill out in cryopreservation must be patient indeed.

The Cryonics Society of Canada has experimented with burying dead bodies in the permafrost. Considering the threat of global warming, this procedure may have to be abandoned.

Burials At Sea

Bodies, whether or not cremated, may be buried at sea from a vessel or from an airplane. If the body has not been cremated, the remains must be buried at least three nautical miles from shore and in water at least 600 feet deep, according to 40 C.F.R. § 229.1.

The U.S. Navy will provide burials at sea for active duty members of the uniformed services, retirees and veterans who were honorably discharged, U.S. civilian marine personnel of the Military Sealift Command, and dependent family members of active duty personnel, retirees, and veterans of the uniformed services.

Freeze-drying

A Swedish company, Promessa Organic AB, is marketing a process by which the decedent's body is flash-frozen to minus 18°C (minus 4°F), then dipped in liquid nitrogen at a temperature of minus 196°C (minus 320.80°F). The body, which is then brittle, is subjected to sound waves that reduce it to powder. The body can then be cremated or buried in a coffin made of cornstarch, which, when placed in the ground, will degrade in about a year.

Disposal of Cremains at Sea

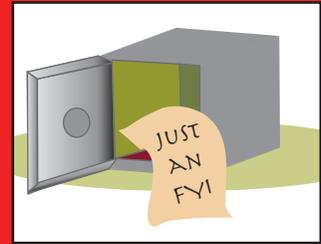
The remains after cremation ("cremains") can be disposed of in a grave, in a structure on land, at sea from a boat or a plane, or retained by the relatives of the deceased or scattered in a garden or other favorite place.

Many companies—particularly in California—conduct disposition of cremains at sea. Some of these companies operate "party boats"—com-

Franklin Delano Roosevelt

Franklin Delano Roosevelt left very detailed instructions, stating that he wished to be buried in a plain pine casket, placed in an unlined grave. He did not want any pomp and circumstance associated with his funeral.

After FDR was buried in an expensive casket in a lined grave, following a state funeral with a great deal of ceremony, his instructions were found in his safe. Had he made his wishes known, a grave error might have been avoided. ■



plete with catering service and champagne. Maybe their motto is: "We'll have a blast to toast your last."

Disposal of the Remains in Reef Balls

Eternal Reefs, Inc., of Decatur, Georgia, makes a "reef ball," a small beehive-shaped structure with holes in it, cast out of concrete into which the ashes of the decedent have been mixed. The structure is placed offshore to create a reef and attract fish. It is claimed that more than 400,000 reef balls have been placed around the world.

Space Shots

Do you have a friend or acquaintance whom you would describe as a "space shot"? Now a burial alternative is available that fits his lifestyle. Space Services, Inc., will place one gram of cremated remains into earth orbit for \$995 and seven grams into earth orbit for \$5,300. For \$12,500, the company will place a one-gram sample of cremated remains in lunar orbit, on the surface of the moon, or into deep space.

Pre-planning Funerals and Disposal of Remains: Pre-need Contract with Funeral Home

A lawyer serves his or her client well by reviewing any contract the client proposes to sign. What if the contract does not provide for later changes by the family, or does not permit the funds to be transferred to another state if the client dies elsewhere?

Advance Directives

It is virtually impossible to ensure that the decedent's wishes for his or her funeral and burial arrangements are carried out. Many statutes state that the desires of the decedent shall be carried out or that various persons shall be protected if they carry out what they understand to be the wishes of the decedent, but there appear to be no sanctions if they are not.

If the decedent's next of kin wish to countermand his instructions, who is to enforce the decedent's wishes? The decedent may make a declaration. The decedent should refer to this in his will—even if the will is not found until after the decedent is laid to rest, it can be of some value.

If the will and declaration are executed, the decedent-to-be will have done about all he can to see that his wishes are carried out. Copies of these documents, when executed, should be distributed to the client's attorney, his family, the agent under his power of attorney, and the agent under his health care proxy.

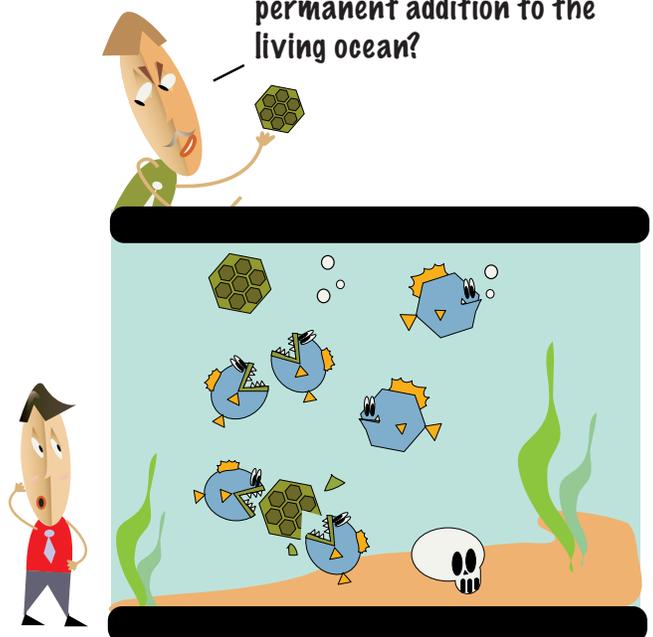
Any declaration should state where the decedent has a burial plot, if such exists. Sometimes that information is discovered only after the decedent has been buried some-

where else. Also the form should disclose the existence of a contract with a funeral home, if there is one. A sample form appears on page 60.

Committee Web Site

A more detailed discussion of this subject can be found on the web site of the Surrogate Decision Making Committee of the Section of Real Property, Probate and Trust Law, at www.abanet.org/dch/committee.cfm=com=RP542000. Also on the web site, the reader will find valuable information about durable powers of attorney. The committee welcomes comments on how it can better serve Section members. ■

Or, would you like to be a permanent addition to the living ocean?



Sample Form

This form is offered as a starting point for the draftsman. It should be tailored to the specific situation, and state law should be reviewed.

DECLARATION OF DISPOSITION OF LAST REMAINS AND APPOINTMENT OF AGENT

I, _____ (*name of declarant*), being of sound mind and lawful age, hereby revoke all prior declarations of my wishes regarding my funeral and the disposition of my last remains, whether set forth in wills, codicils, trusts, powers of appointment, health care documents, powers of attorney, or otherwise, regarding the disposition of my last remains, and I declare and direct that after my death these procedures be followed:

1. I direct that my body shall be:

___ Buried at _____.

___ Cremated and my cremated remains be _____.

___ Other. _____.

1(a). I direct that my body be disposed of as _____ (*name of designee*) shall specify in writing. If _____ is unwilling or unable to act, I nominate _____ as my alternate designee.

2. I request that the following ceremonial arrangements be made:

___ Funeral. I request the following arrangements for my funeral:

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

2(a). I request that _____ (*name of designee*) make all arrangements for any ceremonies, consistent with my directions set forth in this declaration, if any. If _____ is unwilling or unable to act, I nominate _____ as my alternate designee.

3. Special instructions. In addition to the instructions above, I request (here make special requests regarding ceremonies or lack of ceremonies): _____

4. I have entered into a preneed contract with _____ (*name of funeral home*).

I direct that the provisions set forth in that contract with respect to the disposition of my body and ceremonial arrangements (shall be followed) may be followed or not as my family member, designee, executor, or other person taking responsibility for the disposition of my body and ceremonial arrangements shall determine.

5. I own (or have the right to have my remains placed in) a grave, vault, columbarium, or other repository designated as _____ (*designation of gravesite, etc.*) in _____ (*name of cemetery, facility, etc.*), located in _____, _____ (*city, state*). I wish to have my remains deposited there.

I may revoke or amend this declaration in writing at any time. I agree that any 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 or designee for costs incurred as a result of claims that arise against the third party or expenditures made by the designee because of good-faith reliance on this declaration.

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

STATE OF _____ COUNTY OF _____

Then personally appeared the above-named Declarant, whose identity was proven to me by _____ and acknowledged the foregoing to be his free act and deed, before me, on _____.

Notary Public

My Commission Expires

Witnesses:

_____ Residing at _____

_____ Residing at _____