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Victims in Life, Victims in Death—Keeping Burial Rights Out of the Hands of Slayers

INTRODUCTION

It often takes tragedy to bring about change. In 2009, Constance Shepherd was brutally murdered at the hands of her husband, Stephen Shepherd.¹ Her body was found in their New York home—her throat slashed by a medieval-style sword.² While still grieving the loss of their loved one, Constance’s surviving family members were victimized yet again.³ As Constance’s surviving spouse, Stephen Shepherd had the sole right under New York law to control the disposition of her remains,⁴ despite being charged with her murder.⁵ Contrary to her family’s wishes,⁶ Shepherd left Constance’s body in the morgue for more than a month before having his attorney cremate and bury her remains near his favorite fishing spot,⁷ hundreds of miles away from her family and home in New York.

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1. Dean G. Skelos, *Senate Passes Bill to Protect Remains of Crime Victims*, NY STATE SENATE (May 14, 2012), <http://www.nysenate.gov/press-release/senate-passes-bill-protect-remains-crime-victims-0>.

2. Rich Newberg, *Man Pleads Guilty in Death of His Wife*, WIVB.COM (Oct. 13, 2009, 7:17 PM), http://www.wivb.com/dpp/news/crime/Man_pleads_guilty_in_death_of_his_wife_20091013.

3. “Homicide is a crime with more than one victim.” OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, FIRST RESPONSE TO VICTIMS OF CRIME: A GUIDEBOOK FOR LAW ENFORCEMENT OFFICERS 53 (2010), *available at* <http://www.ovc.gov/publications/infores/pdftxt/2010FirstResponseGuidebook.pdf> (referring to survivors of homicide victims).

4. “Disposition” or “final disposition” refers to the lawful disposing of a dead body, which may include burial, interment, cremation, anatomical donation, or other authorized disposition. *See* ARK. CODE ANN. § 20-17-102(a)(2)(C) (Westlaw 2013); FLA. STAT. ANN. § 497.005(32) (Westlaw 2013); N.Y. PUB. HEALTH LAW § 4201 (McKinney 2013).

5. Skelos, *supra* note 1. Shepherd pleaded guilty to manslaughter and agreed to a 21-year sentence. Newberg, *supra* note 2.

6. Constance’s family objected to Shepherd’s burying of her cremated remains on Mount Tremper at a Buddhist temple in the Catskills and believed that his choice was intentionally disrespectful. *See* Tom Precious, *State Bill Would Deny Killer Control of Victim Burial*, THE BUFFALO NEWS, May 15, 2012, *available at* 2012 WLNR 10272924. Conversely, Shepherd indicated to his attorney that it would have been his dead wife’s wish because they were both practicing Buddhists. *Id.*

7. *See* Michael Gormley, *NY Seeks to Deny Murderers Spousal Burial Rights*, ASSOCIATED PRESS (May 14, 2012), *available at* <http://bigstory.ap.org/content/ny-seeks-deny-murderers-spousal-burial-rights>; Michael Regan, *Loophole Closed Allowing Control of Victim’s Body*, TONAWANDA NEWS, Oct. 26, 2012,

The public outcry over Constance Shepherd's story and other similar tragedies prompted the New York State Legislature to amend its disposition of remains law in order to prevent murderers from controlling the disposition of their victims' remains.⁸ The law prohibits any person who, "at the time of the decedent's death, was the subject of an order of protection protecting the decedent; or . . . [who] has been arrested or charged with any crime . . . allegedly causally related to the death of the decedent" from having "the right to control the disposition of the remains of the decedent."⁹ While New York has closed its statutory gap that allowed "slayers"¹⁰ to control the burial of their victims, many states have not yet remedied this alarming oversight in the law.¹¹ Consequently, in some states, murderers like Stephen Shepherd continue to have the ability to control the location, timing, and method of the disposition of their victims' remains.

Nearly all states have "slayer statutes" to ensure that slayers may not inherit property or receive life insurance benefits as a result of their criminal acts,¹² but many states have not extended this prohibition to the power of slayers to legally dispose of their victims' bodies.¹³ Although all states have enacted statutory

<http://tonawanda-news.com/local/x674151912/Loophole-closed-allowing-control-of-victims-body>.

8. See *New York to Deny Burial Right of Convicted Murders*, THE DAILY NEWS, June 12, 2012, available at 2012 WLNR 12776024. Another case prompted action in New York: a murderer who beheaded his wife was able to control the timing and location of her burial. Gormley, *supra* note 7. A week before she was killed, the mother of three had filed for divorce. *Id.*

9. N.Y. PUB. HEALTH LAW § 4201 (amended in 2012 to include a provision calling for forfeiture when a person is arrested or charged with the decedent's death).

10. Throughout this Comment, the term "slayer" is used in a broader sense than the word "murderer." A person who commits murder is one who kills another with malice aforethought. BLACK'S LAW DICTIONARY 1114 (9th ed. 2009). "Slayer" as used in this Comment refers to a person who commits an offense that precludes the person from inheriting from his or her victim under the state's slayer statute. Slayer is generally defined as "a person who kills another, or who participates in killing another, by an act that is felonious, intentional, and without legal excuse or justification." RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 (2011). However, the scope of offenses included in slayer statutes varies by jurisdiction. See 95 C.J.S. *Wills* § 99 (Westlaw 2013). For example, many statutes also encompass voluntary manslaughter, and some even reach negligent homicide. See *id.*; see also *infra* note 180 and accompanying text.

11. See *infra* note 91 and accompanying text.

12. The slayer rule "has been legislated in most U.S. jurisdictions and in the few others it has been applied by common-law doctrines." Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 797 (2012).

13. See *infra* note 91.

guidance concerning the order and priority of persons with the right to control final disposition,¹⁴ nearly half lack forfeiture provisions¹⁵ to account for situations in which one of those individuals is criminally responsible for the decedent's death.¹⁶ Furthermore, even state statutes that do have forfeiture provisions often do not provide adequate coverage. First, some provisions do not encompass all victim-offender relationships; several address only certain categories of familial homicides, like spousal murders, while others do not provide for forfeiture if the deceased specifically designated the slayer to act as his or her agent for disposition.¹⁷ Second, many provisions only contemplate forfeiture once criminal charges have been brought, ignoring the timing considerations involved with making disposition decisions as well as establishing probable cause for an arrest.¹⁸ Third, statutes often do not provide an individual who has forfeited the right of disposition the opportunity to challenge the forfeiture in a timely manner.¹⁹

States must ensure that disposition rights are not granted to slayers by virtue of poorly crafted disposition of remains statutes.²⁰ Instead, these statutes should require forfeiture for any person granted the right to control disposition, whether by designation or by law, who is criminally responsible for the decedent's death. Forfeiture is essential to protect not only a decedent from being victimized a second time by his or her slayer but also the victim's grieving survivors from being rendered powerless and unable to control the final resting place of their loved one. As long as an individual subject to forfeiture is given notice and an opportunity to be heard when forfeiture takes place, the rights of all parties—the accused, the surviving family members, and the victim—will be

14. See *infra* notes 91, 137.

15. A forfeiture provision is a clause in a statute “stating that, under certain circumstances,” a person must lose “a right, privilege, or property.” BLACK’S LAW DICTIONARY, *supra* note 10, at 722 (defining “forfeiture” and “forfeiture clause”).

16. See *infra* note 91.

17. See discussion *infra* Part II.B.2.a.

18. See discussion *infra* Part II.B.2.a.

19. See discussion *infra* Part II.B.2.b.

20. Throughout this Comment, the author refers to statutes governing the disposition of remains as “disposition of remains statutes.” Such statutes have also been referred to as “bodily remains statutes,” “sepulture statutes,” or “priority of decision laws.” See, e.g., Tracie M. Kester, Note, *Uniform Acts—Can the Dead Hand Control the Dead Body? The Case for A Uniform Bodily Remains Law*, 29 W. NEW ENG. L. REV. 571 (2007) (using the phrases “bodily remains statutes” and “sepulture statutes”); Ann M. Murphy, *Please Don't Bury Me Down in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381 (2007) (using the phrase “priority of decision laws”).

taken into account, and the right of disposition will be in the proper hands.

This Comment examines the current state of disposition of remains laws in the United States, identifies the problematic loopholes present in many statutes that permit slayers to control the disposition of their victims' bodies, and recommends the necessary statutory amendments to keep disposition rights out of the hands of slayers. Part I discusses the evolution of the American slayer rule, as well as its inherent limitation—The victim's body is not treated as property forming part of the victim's estate, and thus the slayer rule does not cover the right to control the disposition of a decedent's body. The slayer's ability to control the disposition is therefore treated within state statutory regimes governing the disposition of remains. Part II examines current statutory regimes in states without forfeiture provisions and also highlights the deficiencies present in regimes that do call for forfeiture. Part III provides guidance for state legislatures seeking to revise their disposition of remains laws to prevent slayers from potentially having the legal authority to control their victims' dispositions. In doing so, Part III makes recommendations for determining the proper scope of forfeiture provisions and for safeguarding due process rights. Finally, the Appendix contains a model disposition of remains statute encompassing the statutory provisions necessary to keep disposition rights out of the hands of slayers.

I. FAMILY HOMICIDES AND THE SLAYER RULE

Domestic violence experts have noted that “[w]ith the exception of the police and the military, the family is perhaps the most violent social group, and the home the most violent social setting, in our society.”²¹ In the United States, 22% of homicide victims are killed by a spouse or another family member.²² Between 1980 and 2008, the offender in 10% of homicides was a spouse, and 12% of offenders were other family members of the victim.²³ This latter statistic includes parricide (the murder of a parent by a child),

21. Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 *LAW & INEQ.* 401, 403 (1995) (quoting RICHARD J. GELLES & MURRAY A. STRAUS, *CRIME AND THE FAMILY* 88 (A.J. Lincoln & M.A. Straus eds., 1985)).

22. ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008* 16 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf>. This statistic only includes homicides for which the victim-offender relationship was known. *Id.*

23. *Id.*

filicide (the killing of a child by a parent), and siblicide (the murder of a sibling).²⁴

Although there is now heightened awareness and concern surrounding family violence,²⁵ domestic violence has largely been ignored due to society's traditional belief that it was a "private matter" that was "best resolved behind closed doors."²⁶ While criminal law has evolved to address family violence,²⁷ the legal response to familial homicides has been complicated by this traditional societal view.²⁸ Consequently, there is still much progress to be made.²⁹

A. The Slayer Rule and Slayer Statutes

The problem of familial murders is not new.³⁰ Although the law cannot mend the harm caused by such killings, courts and legislatures have supplemented criminal law punishments with the common law slayer rule, "[t]he doctrine that neither a person who kills another nor the killer's heirs can share in the decedent's

24. Although these categories of family homicide are the most common, this statistic also includes homicides committed by other family members. *Id.* at 21. For a discussion of the different types of family homicides, see Chelsea Diem & Jesenia M. Pizarro, *Social Structure and Family Homicides*, 25 J. FAM. VIOLENCE 521 (2010).

25. See Proclamation No. 887777, 77 Fed. Reg. 60,611 (Oct. 1, 2012).

26. Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 196 (2008). See also Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 992 (1989) ("Courts were initially slow to heed the change in public opinion They emphasized the importance of family autonomy and privacy by displaying a hesitancy to invade the domestic forum.").

27. See Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1263 (2009) (discussing the recent trend towards the criminalization of domestic violence).

28. ADRIA GALLUP-BLACK, RURAL AND URBAN TRENDS IN FAMILY AND INTIMATE PARTNER HOMICIDE: 1980–1999 1 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/208344.pdf>.

29. Although the country has made some progress with respect to changing laws and attitudes toward domestic violence, three women a day in the United States still lose their lives as a result of domestic violence. See Proclamation No. 887777, *supra* note 25.

30. "One of the earliest recorded episodes implicating [this] problem . . . appears to be the Biblical story of Cain and Abel. Spurred by jealousy, 'Cain rose up against Abel his brother, and slew him.'" Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 101 (2007) (quoting *Genesis* 4:8 (King James)).

estate.”³¹ The slayer rule embodies the maxim that one cannot benefit from one’s own crime.³² Nearly all United States jurisdictions have codified the slayer rule into “slayer statutes,” which “prohibit[] a person’s killer from taking any part of the decedent’s estate through will or intestacy.”³³ Grounded in “moral, equitable, and legal principles,”³⁴ a version of the slayer rule appears in nearly every legal system.³⁵

1. *The Evolution of the American Slayer Rule*

At early English common law, the doctrines of attainder, forfeiture of lands and chattels, corruption of blood, and escheat obviated the need for a slayer rule, as neither a slayer nor the slayer’s heirs had the opportunity to benefit from the criminal wrongdoing.³⁶ However, in 1814 Parliament began enacting a series

31. BLACK’S LAW DICTIONARY, *supra* note 10, at 1515.

32. Christopher M. Eisold, *Statute in the Abyss: The Implications of Insanity on Wisconsin’s Slayer Statute*, 91 MARQ. L. REV. 875, 875 (2008).

33. BLACK’S LAW DICTIONARY, *supra* note 10, at 1515. *See supra* note 12 and accompanying text.

34. Sneddon, *supra* note 30, at 102.

35. Cohen, *supra* note 12, at 794. Civil law countries also refuse to permit slayers to inherit property from their victims under the doctrine of unworthy heirs. “Unworthiness is derived from two Roman institutions: (1) *Exhereditatio*, the power of the father to exclude his children from the succession; . . . [and] (2) *Emptorium*, the exclusion of certain heirs for unworthiness, in case of the decedent’s silence.” 3 MARCEL PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 517–18 (La. State Law Inst. trans., 1959) (11th ed. 1938). An unworthy person is deprived of his succession because he has “failed in some duty towards the deceased” and, therefore, does “not deserve to inherit from him.” KATHRYN VENTURATOS LORIO, SUCCESSIONS AND DONATIONS § 5:3, in 10 LOUISIANA CIVIL LAW TREATISE 141 (2d ed. 2009).

36. Julie J. Olenn, *Til Death Do Us Part: New York’s Slayer Rule and In Re Estates of Covert*, 49 BUFF. L. REV. 1341, 1343 (2001). Under the doctrine of attainder, a person’s civil rights were extinguished if the person was convicted of a capital offense. Alison Reppy, *The Slayer’s Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U. L. Q. REV. 229, 232–33 (1942). As incidents of attainder, the land and property of the criminal were then forfeited to the King as punishment, which would have included any property the criminal inherited from the victim. *Id.* The doctrine of corruption of blood barred the murderer’s heirs “unto the remotest generation” from inheriting, as the “blood of the attainted person was said to be corrupt.” *Id.* at 233. Furthermore, under the law of feudal escheat, which “was superadded to the earlier law of forfeiture,” the felon’s land was said to escheat to the lord because he or she left no lawful successor—the felon’s bloodline was corrupted, so its inheritable quality was extinguished and “blotted out forever.” *Id.* at 233–34. Because the crown was very frequently also the superior lord, the two doctrines of forfeiture and escheat have often been confused. 11 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 316 (David S. Garland et al. eds., 2d ed. 1899) [hereinafter ENCYCLOPÆDIA]. However,

of statutes to eliminate these archaic doctrines.³⁷ Fifty-six years later it passed the Forfeiture Act of 1870, which “abolished the entire doctrine of attainder, forfeiture and corruption of blood, or escheat.”³⁸ It was not until after this Act was passed that the courts of England were faced with the situation of slayers potentially taking their victims’ property.³⁹ To address the problem, the courts promulgated the “rule of public policy,” which prohibited slayers from benefiting from their own wrongdoing.⁴⁰

Because Parliament did not pass the Forfeiture Act until after the American Revolution took place, the law in colonial America initially encompassed the early common law doctrines.⁴¹ Their existence, however, was relatively short-lived; constitutional and statutory enactments soon expressly abrogated them.⁴² As a result, slayers attempted to reap benefits from their crimes, claiming that otherwise they were “being denied what was ‘rightfully’ theirs.”⁴³ In response, American courts also relied on the rule of public policy

forfeiture of the offender’s land and possessions to the King as criminal punishment was the doctrine of the old Anglo-Saxon law—it had nothing to do with the feudal system. *Id.* at 316–17. Feudal escheat did not come about in England until the time of the Norman Conquest. *Id.* at 317. Feudal escheat was at first subordinate to the law of forfeiture but later prevalent during the English feudal period. Reppy, *supra*, at 233–34. Under feudal escheat, a tenant’s conviction was considered a breach of the lease of the land, so the feud reverted back to the superior lord. ENCYCLOPÆDIA, *supra*, at 316. If the King acquired an estate as the superior lord, it was not as a sovereign but rather as a proprietor. *Id.* Further, forfeiture applied to both land and possessions, while escheat applied only to land. *Id.*

37. Reppy, *supra* note 36, at 234.

38. *Id.* at 238. However, there was an exception for forfeiture consequent upon outlawry. *Id.*

39. *Id.*

40. *Id.* at 242. *See also infra* Part I.A.2.

41. Reppy, *supra* note 36, at 244.

42. *See id.*

[I]n 1789, the Federal Constitution led the way in providing: “The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.” Similar provision [sic] have been incorporated into some of our state constitutions. Generally, however, in other states the matter has been covered by statutory enactments providing that conviction of a felony shall not work a forfeiture or corruption of blood.

Id. (quoting U.S. CONST. art. III, § 3, cl. 2).

43. Sara M. Gregory, *Paved with Good ‘Intentions’: The Latent Ambiguities in New Jersey’s Slayer Statute*, 62 RUTGERS L. REV. 821, 824 (2010).

and the fundamental maxims of the common law to keep disposition rights out of the hands of slayers.⁴⁴

2. *The Rule of Public Policy*

Unlike the penal nature of criminal law or the compensatory function of tort law, the slayer rule, the name frequently used to refer to the rule of public policy, instead propagates the maxim that no man shall benefit or profit from his wrong.⁴⁵ The underlying moral principle is that human life is sacred.⁴⁶ Additionally, “[t]he law of unjust enrichment forecloses the possibility that a person might benefit from committing a felonious and intentional homicide.”⁴⁷ Further, an individual should not be legally permitted to control the transfer of another’s property by bringing about that person’s death.⁴⁸ These principles also seek to preserve the victim’s intent—presumably that he or she would not want the slayer to benefit by virtue of the killing.⁴⁹

In the early 20th century, states began adopting “slayer statutes” in order to prevent slayers from receiving property as a result of killing their victims.⁵⁰ Now, nearly all states have slayer statutes

44. See, e.g., *Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886) (“It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of the party whose life he had feloniously taken.”); *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) (“To answer these questions in the affirmative it seems to me would be a reproach to the jurisprudence of our state, and an offense against public policy.”); *Weaver v. Hollis*, 22 So. 2d 525, 527 (Ala. 1945) (“A reasonable interpretation of [the statute], in the light of the common-law principle that no person can take advantage of his own wrong; that the law permits no one to profit by his own crime, precludes a felonious killer from taking from his murdered spouse.”).

45. See Bradley Myers, *The New North Dakota Slayer Statute: Does It Cause A Criminal Forfeiture?*, 83 N.D. L. REV. 997, 1002 (2007); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 cmt. a (2003). One court elaborated:

The rule is believed to have its antecedents in ancient maxims of general jurisprudence: No man shall take advantage of his own wrong and its Law-French and Latin counterparts—(1) *Nul prenda advantage de son tort demesne*; (2) *Nullus commodum capere potest de injuria sua propria*; (3) *Jus ex injuria non oritur*; (4) *Nemo allegans suam turpitudinem est audiendus*; and (5) *Nemo ex proprio dolo consequitur actionem*.

State Mut. Life Assur. Co. of Am. v. Hampton, 696 P.2d 1027, 1035 n.6 (Okla. 1985) (Opala, J., concurring) (alteration to original).

46. Sneddon, *supra* note 30, at 102.

47. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. a (2011).

48. Sneddon, *supra* note 30, at 102–03.

49. *Id.* at 103.

50. Myers, *supra* note 45, at 1002.

codifying the principles underlying the rule of public policy.⁵¹ While the statutes differ from state to state, they generally address the same issues: who qualifies as a slayer, what property is forfeited, and who then receives the property.⁵² There is no question as to the recognition and legitimacy of the slayer rule; however, uncertainties remain as to its scope.⁵³

B. The Slayer Rule's Inherent Limitation

Despite judicial recognition 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,”⁵⁴ the slayer rule does not extend to the right to control the disposition of a person's remains. The slayer rule applies to a decedent's estate, which is composed of “[t]he real and personal property that a person possesses at the time of death and that passes to the heirs or testamentary beneficiaries.”⁵⁵ Additionally, most states apply their slayer statutes to life insurance proceeds.⁵⁶ But because there is no property right in a body, it does not form part of the decedent's estate.⁵⁷

51. “The rule is currently found in forty-eight states and also in the Uniform Probate Code § 2-803 (2006).” Cohen, *supra* note 12, at 797 n.32. The remaining two states address the situation through case law. Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 979 n.21 (2007) (“Neither Massachusetts nor New Hampshire has a statute, but each has case law precedent to prevent a killer from inheriting. Maryland takes an interesting bifurcated approach, relying on case law for the slayer, but essentially barring the slayer's issue [every living lineal descendant] from inheriting by statute.” (citations omitted)). Louisiana's slayer statute reflects its civil law tradition, using the doctrine of unworthiness to prevent slayers from inheriting. The Louisiana Civil Code provides: “A successor shall be declared unworthy if he is convicted of a crime involving the intentional killing, or attempted killing, of the decedent or is judicially determined to have participated in the intentional, unjustified killing, or attempted killing, of the decedent.” LA. CIV. CODE art. 941 (2013). As an effect of being declared unworthy, “[t]he successor is deprived of his right to the succession to which he had been called.” LA. CIV. CODE art. 945 (2013).

52. Myers, *supra* note 45, at 1004.

53. Cohen, *supra* note 12, at 794. “The still vivid discussion . . . revolves around several partially overlapping tensions: law and morality; text and context; rules and standards; public and private; civil and criminal liability; courts and legislators.” *Id.*

54. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 237–38 (1872).

55. BLACK'S LAW DICTIONARY, *supra* note 10, at 629.

56. Mary Louise Fellows, *The Slayer Rule: Not Solely A Matter of Equity*, 71 IOWA L. REV. 489, 506 (1986).

57. 22A AM. JUR. 2D *Dead Bodies* § 3 (Westlaw 2013).

Early English common law adopted the position that there was no right of property—and thus no ownership right—in dead bodies.⁵⁸ The English courts developed this rule in response to citizens' attempts to direct the disposition of their remains by testament.⁵⁹ As Sir Edward Coke famously stated, the burial of corpses was “*nullius in bonis*”⁶⁰—belonging to no one;⁶¹ thus, disposition could not be declared by will.⁶² Legal scholars believe that this rule was promulgated as a result of the jurisdictional divide between the secular courts and ecclesiastical courts in England.⁶³ Because people were traditionally buried in church cemeteries,⁶⁴ the ecclesiastical courts had jurisdiction over the dead and the burial process instead of the secular courts.⁶⁵ The dead were considered objects sacred to God rather than objects of property.⁶⁶

American courts initially adopted the English common law rule that there are no property rights in the dead.⁶⁷ Thus, the body is not treated as property that forms part of the estate,⁶⁸ and consequently slayer statutes do not revoke the right to dispose of a decedent's remains. Because there is no true property right in a dead body,⁶⁹ the theory of “quasi-property” emerged as a way for courts to mitigate the harsh consequences of the common law rule.⁷⁰

58. See Shyamkrishna Balganes, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1895 (2012); Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 982 (1999).

59. Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 225 (1986).

60. SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES* 203 (W. Clarke & Sons, 1809). See also Balganes, *supra* note 58, at 1896.

61. BLACK'S LAW DICTIONARY, *supra* note 10, at 1173.

62. Hardiman, *supra* note 59, at 225.

63. *Id.* at 226.

64. Kester, *supra* note 20, at 573–74.

65. Hardiman, *supra* note 59, at 226. In modern English law, legal courts of general jurisdiction govern the burial process. *Id.*

66. Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 228 (1996).

67. *Id.*

68. W. C. Rodgers, *Property Rights in Human Bodies*, 73 CENT. L.J. 39, 39 (1911) (“But the body does not descend by inheritance. The heir inherits the property of his ancestor, dying intestate, yet he will not come into the possession or ownership of his dead body through the law of descent.”).

69. 25A C.J.S. *Dead Bodies* § 2 (Westlaw 2013).

70. Ducor, *supra* note 66, at 228–29. Over time, English courts also began to recognize a quasi-property right of the next of kin in the decedent's body. Kester, *supra* note 20, at 574.

II. AN EXAMINATION OF DISPOSITION OF REMAINS STATUTES

Nearly all states have enacted special legislation to create legal recognition of the quasi-property right of next of kin and other individuals in a decedent's remains for disposition purposes.⁷¹ However, these disposition of remains statutes vary widely, especially with respect to the inclusion and scope of forfeiture provisions.

A. Rights in Remains

The majority of U.S. courts faced with the issue of whether there is a property interest in a decedent's remains agree that some kind of right does exist and often label it as a "quasi-property right."⁷² As quasi-property, no one *owns* the decedent's body, but instead there is a custodial interest over the deceased person's remains for purposes of disposition.⁷³ In England, the right and duty to dispose of remains belongs to the executor.⁷⁴ However, this is not the case in the United States. Because the body is not considered property included as part of the probate estate,⁷⁵ it is not subject to administration by the executor.⁷⁶ Instead, the right vests in the decedent's next of kin—"[t]he person or persons most closely related to a decedent by blood or affinity."⁷⁷

71. See *infra* notes 91, 137.

72. See, e.g., *Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (citing *In re Estate of Moyer*, 577 P.2d 108, 110 n.5 (Utah 1978); *Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989); *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984)). However, some courts have abandoned the quasi-property theory in favor of a mental anguish or infliction of emotional distress tort remedy, suggesting that the quasi-property right in a body is a legal fiction that does not protect a true ownership interest. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 385 (2000).

73. Balganes, *supra* note 58, at 1897.

74. Russell E. Haddleton, *What to Do with the Body? The Trouble with Postmortem Disposition*, 20 PROB. & PROP. 55, 56 (2006).

75. The probate estate is "[a] decedent's property subject to administration by a personal representative. The probate estate comprises property owned by the decedent at the time of death and property acquired by the decedent's estate at or after the time of death." BLACK'S LAW DICTIONARY, *supra* note 10, at 1322.

76. Haddleton, *supra* note 74, at 56.

77. BLACK'S LAW DICTIONARY, *supra* note 10, at 1142. Although the specific rights granted by statute vary by state, "toward the end of the 19th century, . . . courts began to recognize an exclusive right of the next of kin to possess and control the disposition of the bodies of their dead relatives, the violation of which was actionable at law." *Newman v. Sathyavaglswaran*, 287 F.3d 786, 791–92 (9th Cir. 2002).

This right generally includes not only the right to determine the timing, place, and manner of disposition⁷⁸ but also “the right to have [the body] remain in its final resting place, the right to remove the body to a proper place, and the right to maintain an action to recover damages for any outrage, indignity, or injury to the body of the deceased.”⁷⁹ Although some courts differ on the exact classification of the interest,⁸⁰ every state has codified the principle that a decedent’s next of kin have an exclusive right to possess the decedent’s remains for the purpose of disposition.⁸¹ Right of disposition statutes provide a list of persons, generally in order of priority, who have the right to control the disposition of a decedent’s remains.⁸² The traditional rule in most jurisdictions is that the right of disposition vests first in the surviving spouse.⁸³ This order of priority stems from the early belief that “[t]he bond of matrimony is the closest of all human ties.”⁸⁴ Accordingly, courts have held that “[i]n the guardianship of the remains of a deceased person the marital right prevails over that of the next of kin.”⁸⁵ If no surviving spouse exists, generally the right then vests in the adult children of

78. Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT’L & COMP. L. REV. 19, 31 (2002). “The history of how human remains have been treated, mistreated, stolen, sold, and used in underground trade” brought about “statutory approaches to disposing human remains, as well as the law governing coroners, and the constitutional interpretation of property.” Denay L. Wilding Knope, *Over My Dead Body: How the Albrecht Decisions Complicate the Constitutional Dilemma of Due Process & the Dead*, 41 U. TOL. L. REV. 169, 173 (2009) (footnotes omitted).

79. 8 AM. JUR. PL. & PR. FORMS *Dead Bodies* § 1 (Westlaw 2013). *But see infra* note 206 and accompanying text.

80. *See Brotherton v. Cleveland*, 923 F.2d 477, 480–81 (6th Cir. 1991).

81. *See infra* notes 91, 137. However, some states allow decedents to leave disposition instructions or appoint an agent for disposition. *See infra* note 88 and accompanying text.

82. Eloisa C. Rodriguez-Dod, *Ashes to Ashes: Comparative Law Regarding Survivors’ Disputes Concerning Cremation and Cremated Remains*, 17 TRANSNAT’L L. & CONTEMP. PROBS. 311, 316 (2008).

83. Murphy, *supra* note 20, at 401. Virginia, however, has a unique statute in that it places the spouse and next of kin on equal footing. *See* VA. CODE ANN. § 54.1-2807 (Westlaw 2013) (“The authority and directions of *any* next of kin shall govern the disposal of the body, subject to the provisions of § 54.1-2807.01 or 54.1-2825.” (emphasis added)); *see also* discussion *infra* Part II.B.1.e.

84. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 231 (1872). *See also Leschey v. Leschey*, 97 A.2d 784, 787 (Pa. 1953) (“The reason for the preference given to the surviving spouse in the matter of interment or reinterment unquestionably is founded upon the relationship between husband and wife as the closest family tie.”).

85. *Pierce*, 10 R.I. at 231.

the decedent, followed by the surviving parents, adult siblings, and finally, remaining next of kin.⁸⁶

B. The Current State of Disposition of Remains Statutes

Recently, states have begun amending their statutes to depart from the traditional disposition of remains regime. For example, several states now classify the right of domestic partners or civil union partners on the same level as spouses.⁸⁷ Many states also allow a person to leave instructions or designate an agent to control the disposition of his or her remains, whether or not this person is a family member.⁸⁸ Furthermore, several statutes now include forfeiture provisions when there is a pending divorce, legal separation, estrangement, or if a protective order has been issued against the person vested with the right of disposition.⁸⁹ Importantly, some states have amended their disposition of remains statutes to provide for forfeiture if the person vested with the right of disposition is criminally responsible for the decedent's death,⁹⁰ although many still have not.

86. See, e.g., 239 MASS. CODE REGS. 3.09 (Westlaw 2013); OHIO REV. CODE ANN. § 2108.81 (Westlaw 2013); MONT. CODE ANN. § 37-19-904 (Westlaw 2013).

87. See, e.g., MD. CODE ANN., HEALTH-GEN. § 5-509 (Westlaw 2013); R.I. GEN. LAWS ANN. § 5-33.2-24 (Westlaw 2013); VT. STAT. ANN. tit. 18, § 5227 (Westlaw 2013); WASH. REV. CODE ANN. § 68.50.160 (Westlaw 2013). For a detailed discussion of the outdated family paradigm and its application to the disposition of remains, see Frances H. Foster, *Individualized Justice in Disputes Over Dead Bodies*, 61 VAND. L. REV. 1351 (2008).

88. Hernández, *supra* note 58, at 1026–27. See, e.g., IDAHO CODE ANN. § 54-1142 (Westlaw 2013); OKLA. STAT. ANN. tit. 21, § 1158 (Westlaw 2013); TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2010).

89. See, e.g., ALA. CODE § 34-13-11 (Westlaw 2013) (vesting right of disposition in surviving spouse unless petition to dissolve marriage was pending at the time of death or if a judge determines the deceased and the spouse were estranged); IND. CODE ANN. § 25-15-9-18 (Westlaw 2013) (vesting right in surviving spouse except when a petition to dissolve marriage or for legal separation is pending or if the court determines the decedent and spouse were physically and emotionally separated at the time of death); N.J. STAT. ANN. § 45:27-22 (Westlaw 2013) (vesting right in surviving spouse or surviving civil union or domestic partner unless the decedent had a temporary or permanent restraining order issued against him or her); N.Y. PUB. HEALTH LAW § 4201 (McKinney 2013) (vesting right in surviving spouse unless the person was subject to an order of protection at the time of the decedent's death).

90. See *infra* note 137.

1. States Without Forfeiture Provisions

Nearly half of states do not have provisions within their disposition of remains statutes calling for forfeiture when an individual granted the right of disposition is, in fact, the person who killed the victim.⁹¹ Although some may grant a decedent's next of kin standing to bring a dispute in court,⁹² most states without forfeiture provisions do not provide any avenue for the family to

91. The following jurisdictions do not currently have forfeiture provisions: Connecticut, CONN. GEN. STAT. ANN. § 45a-318 (West, Westlaw through 2013 Jan. Reg. Sess.) (proposed amendment in 2013); Delaware, DEL. CODE ANN. tit. 12, §§ 264, 268–269 (West 2006); District of Columbia, D.C. CODE §§ 3-413 to 3-413.01 (Westlaw 2013); Kansas, KAN. STAT. ANN. § 65-1734 (Westlaw 2013); Kentucky, KY. REV. STAT. ANN. §§ 213.420, 367.97501, 367.97527 (Westlaw 2013); Louisiana, LA. REV. STAT. ANN. § 8:655 (2005), *id.* § 37:876 (2007); Maryland, MD. CODE ANN., HEALTH-GEN. §§ 5-509, 5-511 (Westlaw 2013), MD. CODE ANN., HEALTH OCC. § 7-410 (Westlaw 2013); Massachusetts, 239 MASS. CODE REGS. 3.09 (Westlaw 2013), MASS. GEN. LAWS ANN. ch. 38, § 13 (West, Westlaw through ch. 83 of 2013 1st Ann. Sess.) (proposed amendment in 2013); Michigan, MICH. COMP. LAWS ANN. §§ 700.3206, 700.3208 (Westlaw 2013); Minnesota, MINN. STAT. ANN. § 149A.80 (Westlaw 2013); Mississippi, MISS. CODE ANN. § 73-11-58 (West 2010); Missouri, MO. ANN. STAT. § 194.119 (Westlaw 2013); Nebraska, NEB. REV. STAT. § 38-1425 (Westlaw 2013) (proposed amendment in 2013); Nevada, NEV. REV. STAT. ANN. §§ 451.023–451.024 (Westlaw 2013); New Mexico, N.M. STAT. ANN. §§ 24-12A-1 to 24-12A-2, 61-32-19 (Westlaw 2013); North Carolina, N.C. GEN. STAT. ANN. §§ 90-210.124, 130A-420 (Westlaw 2013); North Dakota, N.D. CENT. CODE ANN. §§ 23-06-03, 26-06-31 (Westlaw 2013); Pennsylvania, 20 PA. CONS. STAT. ANN. § 305 (Westlaw 2013); Rhode Island, R.I. GEN. LAWS ANN. §§ 5-33.2-24, 5-33.3-3 (Westlaw 2013); South Carolina, S.C. CODE ANN. §§ 17-5-570, 32-8-315, 32-8-320, 40-19-280 (Westlaw 2013); South Dakota, S.D. CODIFIED LAWS §§ 34-26-1, 34-26-16 to 34-26-17, 34-26A-2 (Westlaw 2013); Virginia, VA. CODE ANN. §§ 54.1-2800, 54.1-2807 to 54.1-2807.01, 54.1-2825, 54.1-2973 (Westlaw 2013); Wyoming, WYO. STAT. ANN. § 2-17-101 (Westlaw 2013).

92. *See, e.g.*, KY. REV. STAT. ANN. § 213.420 (“In the event that a homicide has been committed and the person charged . . . refuses to permit the burial of the . . . victim of his or her alleged homicide, any member of the family of the deceased . . . may apply to [the court] for an order to release the body of the deceased [for disposition].”); MD. CODE ANN., HEALTH-GEN. § 5-511 (“An individual may file a petition with the appropriate court to obtain the authority to be authorizing agent” if he alleges that permitting the person to have authority “may cause substantial injustice” or if the individual “had a closer personal affinity to the decedent and should be allowed to make the arrangements.”); 20 PA. CONS. STAT. ANN. § 305 (allowing the filing of “a petition alleging enduring estrangement, incompetence, contrary intent or waiver and agreement”); VA. CODE ANN. § 54.1-2807.01 (“In the absence of a designation . . . when there is a disagreement among a decedent’s next of kin concerning the arrangements for his funeral or the disposition of his remains, any of the next of kin may petition the circuit court where the decedent resided at the time of his death to determine which of the next of kin shall have the authority to make arrangements for the decedent’s funeral or the disposition of his remains.”).

challenge the slayer's authority and control over the victim's body. An in-depth analysis of the disposition of remains statutes in a few of the states lacking explicit forfeiture provisions reveals how some states leave open the possibility of slayers retaining the right to control the disposition of their victims' remains.⁹³

a. Louisiana

Over the past 15 years, Louisiana has consistently suffered from a high rate of homicides involving one female victim and one male offender.⁹⁴ Despite its high domestic homicide rate,⁹⁵ Louisiana does not have a forfeiture provision within its disposition of remains statute. Unlike Louisiana's slayer statute, which follows the civil law doctrine of "unworthiness,"⁹⁶ Louisiana's disposition of remains statute recognizes the quasi-property right of possession applied by most common law states.⁹⁷ The statute allows for a person to leave specific directions in the form of a written and notarized

93. The five states whose statutory regimes are analyzed in this Comment were ranked by the Violence Policy Center (VPC) in the top ten states for highest female-victim and male-offender homicide rates in 2010. This statistic is often used to analyze domestic homicide rates. VIOLENCE POL'Y CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2010 HOMICIDE DATA 6–7 (2012), available at <http://www.vpc.org/studies/wmmw2012.pdf>. As of the writing of this Comment, no published decisions have addressed the ambiguities present in state laws relating to the disposition of remains and forfeiture. However, this should not be any indication of the relevance or importance of forfeiture provisions and well-written disposition of remains statutes. Court orders determining who has the right of disposition are unlikely to be reported. Further, appeals are impractical in many cases given the timing of disposition decisions.

94. The female-victim and male-offender homicide rate statistic is often used to analyze domestic homicide rates. VIOLENCE POL'Y CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2010 HOMICIDE DATA 6–7 (2012), available at <http://www.vpc.org/studies/wmmw2012.pdf>. Louisiana has ranked in the top five of the VPC's annual report 14 out of the past 15 years. See *When Men Murder Women*, VIOLENCE POL'Y CENTER, <http://www.vpc.org/wmmw.htm> (last visited Jan. 13, 2013).

95. See *supra* notes 93–94 and accompanying text; see also *Nevada Ranks #1 in Rate of Women Murdered by Men for Third Year in a Row According to VPC Study Released Annually for Domestic Violence Awareness Month in October*, VIOLENCE POL'Y CENTER (Sept. 19, 2012), <http://www.vpc.org/press/1209wmmw.htm> (stating that VPC's study is "released each year to coincide with Domestic Violence Awareness Month").

96. See *supra* notes 35, 51 and accompanying text.

97. See *Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989) ("After considering the relevant Louisiana statutory and case law regarding the rights of next of kin in the body of a deceased relative, we conclude that Louisiana has indeed established a 'quasi-property' right of survivors in the remains of their deceased relatives.").

declaration.⁹⁸ Unless this is done, the right to control interment⁹⁹ or cremation¹⁰⁰ vests first in the surviving spouse, so long as no petition for divorce is pending.¹⁰¹ If no surviving spouse exists or a petition for divorce is filed, the right devolves to the surviving adult children and continues down the list of next of kin.¹⁰² As currently written, Louisiana's statute leaves open the possibility that the person granted the right of disposition is the slayer who took the decedent's life.

b. Nevada

Nevada has likewise led the nation in the rate of female-victim and male-offender homicides, ranking first for the past three years.¹⁰³ Despite holding this rank for five of the past six years¹⁰⁴ and having a rate more than twice the national average,¹⁰⁵ Nevada has yet to include a forfeiture provision within its disposition of remains statute. In Nevada, a person may authorize another to make his or her burial arrangements through a legally valid document or in an affidavit.¹⁰⁶ If no such person has been designated, that right then vests in the surviving spouse and continues down the order of next of kin.¹⁰⁷ However, the statute does not take away the right of disposition if the designated agent, surviving spouse, or next of kin is criminally responsible for the person's death.¹⁰⁸

98. LA. REV. STAT. ANN. § 8:655 (2005).

99. "'Interment' means the disposition of human remains by inurnment, scattering, entombment, or burial in a place used or intended to be used, and dedicated, for cemetery purposes." *Id.* § 8:1.

100. Louisiana has a separate statute governing cremation. LA. REV. STAT. ANN. § 37:876 (2007).

101. § 8:655; § 37:876.

102. § 37:876.

103. *Nevada Ranks #1 in Rate of Women Murdered by Men for Third Year in a Row According to VPC Study Released Annually for Domestic Violence Awareness Month in October*, VIOLENCE POL'Y CENTER (Sept. 19, 2012), <http://www.vpc.org/press/1209wmmw.htm>.

104. *Id.*

105. The national rate in 2010 was 1.22 per 100,000. In Nevada, this rate was 2.62 per 100,000. VIOLENCE POL'Y CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2010 HOMICIDE DATA 5–6 (2012), available at <http://www.vpc.org/studies/wmmw2012.pdf>.

106. NEV. REV. STAT. ANN. § 451.024 (Westlaw 2013).

107. *Id.*

108. If the decedent was a member of the armed forces, either active duty or reserve, at the time of death, a person designated on the emergency data form as the person authorized to direct disposition would have priority before the spouse. *Id.*

c. New Mexico

New Mexico's statutes relating to the disposition of remains are located under its Cremation and Thanatopractice¹⁰⁹ regulations. There are two sections under the Cremation regulations, one labeled "No written instructions; priority of others to decide disposition"¹¹⁰ and the other labeled "Right to authorize cremation; definitions."¹¹¹ To make matters more confusing, there is a section in the Thanatopractice regulations entitled "Cremation; requirements; right to authorize cremation; disposition of cremains," which combines the language of both sections.¹¹²

Both sections 24-12A-2 and 61-32-19 describe the priority of persons who can decide disposition if no written instructions are left by the decedent. The first person listed in both statutes is the surviving spouse, followed by the next of kin.¹¹³ While these statutes seemingly relate only to cremation (one located among cremation regulations and the other entitled "Cremation"), the statutory language indicates that the right of disposition is not limited to cremation but extends to other means of disposition as well.¹¹⁴

In addition, sections 24-12A-1 and 61-32-19 contain provisions stating that one "may authorize [one's] own cremation and the lawful disposition of [one's] cremains by: (1) stating [one's] desire to be cremated in a written statement that is signed by the [declarant] and notarized or witnessed by two other persons; or (2) including an express statement in [one's] will."¹¹⁵ But it is unclear from these sections whether this same form requirement would be necessary if the desired means of disposition is not cremation. Furthermore, the second method of authorization, an express statement in a will, may not be effective.¹¹⁶ Often a will is not located until after disposition arrangements have taken place,¹¹⁷ or "survivors [may] not consult the contents of a will until after the decedent has been buried, thereby obviating any formal

109. Thanatopractice relates to the "handling and care of the dead and the sensitivities of those who survive." N.M. STAT. ANN. § 61-32-2 (West 2013).

110. *Id.* § 24-12A-2.

111. *Id.* § 24-12A-1.

112. *Id.* § 61-32-19.

113. § 24-12A-2; § 61-32-19.

114. "[T]he following persons in the order listed shall determine the means of disposition, *not to be limited to cremation*, of the remains of the decedent" § 24-12A-2; § 61-32-19 (emphasis added).

115. § 24-12A-1, § 61-32-19.

116. See Kester, *supra* note 20, at 585; Hernández, *supra* note 58, at 1020.

117. Kester, *supra* note 20, at 585.

consideration of the decedent's . . . wishes stated in the will."¹¹⁸ However, it is clear from the sections that when no instructions are left, the default order of priority will be used, regardless of whether the right holder is responsible for the decedent's death.¹¹⁹

d. South Carolina

Not only do the disposition of remains statutes in South Carolina lack forfeiture provisions, but they are also poorly constructed and unclear. First, laws governing disposition rights in South Carolina are not contained within a single statute. Under the regulations for embalmers and funeral directors, one statute provides that a public officer or "any other person having a professional relationship with the decedent" may not send remains to a funeral establishment "without having first made due inquiry as to the desires of the next of kin If any kin is found, authority and directions of the kin govern except in those instances where the deceased made prior arrangements in writing."¹²⁰ However, there is neither a definition of next of kin nor an order of priority as to who would make such decisions. Under the statutes governing the duties of coroners and medical examiners, one section provides that "[a]fter the post-mortem examination, autopsy, or inquest has been completed, the dead body must be released to the person lawfully entitled to it for burial," indicating that there is one person in control—but the statutes lack a description of who has the ultimate authority.¹²¹

Although South Carolina does not have a statute providing a clear order and priority of persons with the right of disposition, South Carolina courts have followed the common law rule that the right vests first in the surviving spouse, then in the next of kin.¹²² Additionally, South Carolina recently amended its cremation authorization statute to provide that in the absence of a preneed cremation authorization in which a decedent specifies the final disposition of his or her cremated remains, there is an order of priority of persons who may authorize cremation.¹²³ The right first devolves upon a "person designated as agent for this purpose by the

118. Hernández, *supra* note 58, at 1020.

119. § 24-12A-2; § 61-32-19 ("not to be limited to cremation").

120. S.C. CODE ANN. § 40-19-280 (Westlaw 2013).

121. *Id.* § 17-5-570.

122. C. CRAIG YOUNG ET AL., DEAD BODIES § 9, in 6 SOUTH CAROLINA JURISPRUDENCE (Westlaw 2013) (citing *Simpkins v. Lumbermens Mut. Cas. Co.*, 20 S.E.2d 733 (1942) ("determining that a surviving spouse has primary right to possession of a dead body and to control disposition thereof, unless the decedent has by will or other expression made a different disposition")).

123. S.C. CODE ANN. § 32-8-320b (Westlaw 2013).

decedent in a will or other verified and attested document” and if none exists, then upon “the spouse of the decedent.”¹²⁴ The statute continues to list the next of kin in order of priority: adult children, surviving parents, adult siblings, adult grandchildren, grandparents, and so on.¹²⁵ While the South Carolina statutes are far from clear, the same order of priority as listed in the cremation authorization statute would likely also be used to establish the person in charge of determining the general method of disposition, whether or not that person killed the decedent.

e. Virginia

Virginia’s disposition of remains statutes are simultaneously complicated and unique. In the chapter of the Virginia Code entitled “Board of Funeral Directors and Embalmers,” “next of kin” is defined as “any of the following persons, *regardless of the relationship* to the decedent: [any designated agent], the legal spouse, child over 18 years of age, custodial parent, noncustodial parent, siblings . . . or any other relative in the descending order of blood relationship.”¹²⁶ A separate statute then provides that “[t]he authority and directions of *any* next of kin shall govern the disposal of the [decedent’s] body, subject to the provisions of [the section governing disagreements of next of kin] or [the section governing the designation of an individual to make final arrangements].”¹²⁷

It is important to note the statutes’ uses of the word “any”—Virginia is the only state to statutorily define the relatives who qualify as next of kin and grant them authority to control the disposition of remains but not provide any order of priority among the relatives.¹²⁸ Although a designated agent has the ultimate authority over any next of kin, no priority exists among the decedent’s spouse and relatives with respect to the right to control disposition.¹²⁹ The General Assembly of Virginia elected not to use

124. *Id.*

125. *Id.*

126. VA. CODE ANN. § 54.1-2800 (Westlaw 2013) (emphasis added).

127. *Id.* § 54.1-2807 (emphasis added) (referencing *id.* §§ 54.1-2807.01, 54.1-2825).

128. However, there is an order and priority of persons who may authorize postmortem examination of a decedent’s body. *Id.* § 54.1-2973.

129. *Id.* § 54.1-2825 (“Any person may designate in a signed and notarized writing, which has been accepted in writing by the person so designated, an individual who shall make arrangements and be otherwise responsible for his funeral and the disposition of his remains . . . upon his death. *Such designee shall have priority over all persons otherwise entitled to make such arrangements,* provided that a copy of the signed and notarized writing is provided to the funeral

“a sequential hierarchy of relatives” but rather to keep the rights of the next of kin “broad and coequal.”¹³⁰ One purpose of having a broad class of individuals is so that a body can be disposed of in an expeditious manner “without resort to the difficult and often confusing task of sequentially determining who within a blood line is entitled to claim the body that requires immediate attention.”¹³¹

However, Virginia acknowledges that disagreements may arise among the next of kin since the rights of the relatives are coequal; section 54.1-2807.01 states that in the absence of a designation, any relative may petition the court to “determine which of the next of kin shall have the authority to make arrangements for the decedent’s funeral or the disposition of his remains.”¹³² The court must consider a list of factors in determining who should be authorized to make the decisions, including “the expressed wishes, if any, of the decedent, the legal and factual relationship between or among the disputing next of kin and between each of the disputing next of kin and the decedent, and any other factor the court considers relevant.”¹³³

Though the statute does allow the next of kin to petition the court when disposition disputes arise, a slayer would still technically have a coequal right of disposition because forfeiture is not automatic. Furthermore, the language in the statute relating to disputes leaves open the possibility that a designated person could kill the victim and still have ultimate control over his or her disposition, without the family’s ability to challenge.¹³⁴ This is because a designated agent has priority over all next of kin,¹³⁵ and the statute relating to disputes only allows family members to petition the court “[i]n the absence of a designation.”¹³⁶

2. States with Forfeiture Provisions

Although many state statutes currently do not provide for forfeiture, there has been legislative progress toward divesting slayers of disposition rights; presently, 28 states have some version

service establishment and to the cemetery, if any, no later than 48 hours after the funeral service establishment has received the remains.” (emphasis added).

130. *Siver v. Rockingham Mem’l Hosp.*, 48 F. Supp. 2d 608, 611–12 (W.D. Va. 1999).

131. *Id.* at 611.

132. § 54.1-2807.01.

133. *Id.*

134. *Id.*

135. *Id.* § 54.1-2825.

136. § 54.1-2807.01.

of a forfeiture provision within their disposition of remains statutes.¹³⁷ However, even among these statutes, there is wide variation. Some provisions only address situations in which the spouse is the killer, thereby not encompassing cases where another family member may be responsible for the death yet retains the right to control the disposition of the victim's remains.¹³⁸ Other provisions do not account for cases when the slayer may be designated as an agent for disposition.¹³⁹ Additionally, most provisions only contemplate forfeiture when criminal charges have been brought against the slayer, not reaching instances when law enforcement cannot establish probable cause or make an arrest before disposition decisions are made.¹⁴⁰ Lastly, most statutes do not allow a person whose right has been forfeited the ability to challenge the presumption that the forfeiture is just.¹⁴¹

137. The following states have some form of a forfeiture provision: Alabama, ALA. CODE § 34-13-11 (Westlaw 2013); Alaska, ALASKA STAT. ANN. §§ 13.75.020, 13.75.060 (Westlaw 2013); Arizona, ARIZ. REV. STAT. ANN. § 36-831 (Westlaw 2013); Arkansas, ARK. CODE ANN. § 20-17-102 (Westlaw 2013); California, CAL. HEALTH & SAFETY CODE § 7100 (West 2007); Colorado, COLO. REV. STAT. ANN. §§ 15-19-106, 15-19-109 (Westlaw 2013); Florida, FLA. STAT. ANN. § 497.005 (Westlaw 2013); Georgia, GA. CODE ANN. § 31-21-7 (Westlaw 2013); Hawaii, HAW. REV. STAT. §§ -4, -6 (Westlaw 2013) (Laws 2013, Act 17) (official classification pending); Idaho, IDAHO CODE ANN. § 54-1142 (Westlaw 2013); Illinois, 755 ILL. COMP. STAT. ANN. §§ 65/5, 65/20 (West 2007); Indiana, IND. CODE ANN. § 25-15-9-18 (Westlaw 2013); Iowa, IOWA CODE ANN. §§ 144C.5, 144C.8 (Westlaw 2013); Maine, ME. REV. STAT. ANN. tit. 22, § 2843-A (Westlaw 2013); Montana, MONT. CODE ANN. §§ 37-19-904, 37-19-906 (Westlaw 2013); New Hampshire, N.H. REV. STAT. ANN. § 290:16–290:17 (Westlaw 2013); New Jersey, N.J. STAT. ANN. § 45:27-22 (Westlaw 2013); New York, N.Y. PUB. HEALTH LAW § 4201 (McKinney 2013); Ohio, OHIO REV. CODE ANN. §§ 2108.77, 2108.81 (Westlaw 2013); Oklahoma, OKLA. STAT. ANN. tit. 21, §§ 1151a, 1158 (Westlaw 2013); Oregon, OR. REV. STAT. ANN. § 97.130 (Westlaw 2013); Tennessee, TENN. CODE ANN. § 62-5-703 to 62-5-704 (Westlaw 2013); Texas, TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2010), TEX. PROB. CODE ANN. § 115 (West 2003) (repealed and recodified as TEX. EST. CODE ANN. §§ 152.101–152.102 effective Jan. 1, 2014); Utah, UTAH CODE ANN. §§ 58-9-602 to 58-9-603 (Westlaw 2013); Vermont, VT. STAT. ANN. tit. 18, §§ 5227–5228 (Westlaw 2013); Washington, WASH. REV. CODE ANN. § 68.50.160 (Westlaw 2013); West Virginia, W. VA. CODE ANN. § 30-6-22a (Westlaw 2013); Wisconsin, WIS. STAT. ANN. § 154.30 (Westlaw 2013).

138. See discussion *infra* Part II.B.2.a.

139. See discussion *infra* Part II.B.2.a.

140. See discussion *infra* Part II.B.2.a.

141. See discussion *infra* Part II.B.2.b.

a. Limitations in the Reach of Forfeiture Provisions

The forfeiture provisions in some state statutes are drafted so as to only apply to certain categories of persons granted the right of disposition. For example, the disposition of remains statutes in Florida and New Jersey call for forfeiture only in the case of spousal murder. Florida's statute provides:

- (39) "Legally authorized person" means, in the priority listed:
- (a) The decedent, when written inter vivos authorizations and directions are provided by the decedent;
 - (b) [The person designed in a DD Form 93 as agent if the deceased was a member of the Armed Forces, Reserves, or National Guard when he or she died];
 - (c) The surviving spouse, *unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased*.¹⁴²

The rest of the next of kin follow, but there is no provision relating to forfeiture in cases where a family member other than the spouse is responsible for the victim's death.

New Jersey's forfeiture provision is likewise limited to spousal disposition rights as a result of the provision's placement. The statute first provides that a decedent may appoint a person in a will to control the disposition of remains.¹⁴³ However, if no appointment has been made and unless other directions have been given by a court of competent jurisdiction, the right shall go to:

- (1) The surviving spouse of the decedent or the surviving civil union or domestic partner; except that if the decedent had a temporary or permanent restraining order issued . . . against the surviving spouse or civil union or domestic partner, or the surviving spouse or civil union or domestic partner is charged with the intentional killing of the decedent, the right to control the funeral and disposition of the remains shall be granted to the next available priority class as provided in this subsection.¹⁴⁴

142. FLA. STAT. ANN. § 497.005 (emphasis added).

143. N.J. STAT. ANN. § 45:27-22 (Westlaw 2013).

144. *Id.* (emphasis added).

This limitation appears to be the result of oversight on the part of the Legislature, as there is no justifiable reason to call for forfeiture only in the case of spousal killings but not other familial homicides.

Moreover, the ill-considered placement of the forfeiture provision in several statutes creates another limitation: The provision does not take away rights if the victim specifically designated the slayer as an agent to control disposition. For example, New Jersey's statute provides first that if a decedent appoints a person to control disposition, the designee shall have priority over all other persons upon the decedent's death.¹⁴⁵ The default order is applicable only if no designation is made. However, the only provision providing for forfeiture is listed within the default order.¹⁴⁶ Consequently, the forfeiture provision does not apply when a person appointed to control disposition is the person who killed the decedent. This holds true for Florida's forfeiture provision as well.¹⁴⁷ It is unlikely that the state legislatures intended to create this loophole that allows a slayer to retain the right to dispose of his or her victim's remains if the victim previously designated the slayer to act as his or her agent for disposition.

Iowa's forfeiture provision, in contrast, only calls for forfeiture of a designee's authority and does not extend to rights granted to a person when no designation is made.¹⁴⁸ It provides: "A *designee* shall forfeit all rights and authority *under a declaration* . . . [if] [t]he designee is charged with murder in the first or second degree or voluntary manslaughter in connection with the declarant's death and those charges are known to a third party."¹⁴⁹ Thus, family members granted the power of disposition by law rather than by specific designation are not subject to forfeiture of their rights.¹⁵⁰ While Iowa's provision remedies the defect present in Florida and New Jersey's statutes, it has the effect, again likely unintentional, of not reaching slayers granted the right of disposition by statute rather than by designation.

Another drafting choice that limits the impact of current forfeiture provisions is that most state statutes require a person to be charged with an offense relating to the death before forfeiture takes place,¹⁵¹ though some states extend the application of forfeiture

145. *Id.*

146. *Id.*

147. FLA. STAT. ANN. § 497.005.

148. IOWA CODE ANN. § 144C.8 (Westlaw 2013).

149. *Id.* (emphasis added).

150. *Id.* § 144C.5.

151. *See, e.g.*, UTAH CODE ANN. § 58-9-603 (Westlaw 2013); W. VA. CODE ANN. § 30-6-22a (Westlaw 2013); WIS. STAT. ANN. § 154.30 (Westlaw 2013). Tennessee's forfeiture provision even requires a person be convicted before

provisions to persons arrested in connection with the death.¹⁵² However, these statutes do not address situations in which a suspect is on the run and not yet arrested or charged, or when there is good cause to believe a person was involved in the killing but not yet enough evidence to establish probable cause for an arrest. While an arrest or charge provides additional assurance that the forfeiture is justified, the forfeiture provisions of most states do not reach individuals believed to be involved or responsible for the death who have not yet been arrested or charged, which is problematic because disposition decisions must be made shortly after the death.¹⁵³

To address this situation one state, Vermont, goes so far as to require forfeiture if the right holder is a person of interest and likely to be prosecuted in connection with the decedent's death.¹⁵⁴ For example, in the case of Stephen Shepherd, he was labeled a person of interest and likely to be prosecuted during the time he was in hiding before his arrest.¹⁵⁵ In such situations, most forfeiture provisions would still permit suspected slayers to retain the right to dispose of their victims until the slayer has been formally charged. While Vermont expanded the coverage of its forfeiture provision by including "person of interest and likely to be prosecuted," this language could become problematic because the phrase "person of

forfeiture takes place. TENN. CODE ANN. § 62-5-704 (Westlaw 2013). *See also infra* note 183 and accompanying text.

152. *See, e.g.*, N.H. REV. STAT. ANN. § 290:17 (Westlaw 2013); OR. REV. STAT. ANN. § 97.130 (Westlaw 2013); WASH. REV. CODE ANN. § 68.50.160 (Westlaw 2013).

153. If not quickly buried or cremated, bodies will begin to decompose. If there is a dispute, many state statutes authorize the funeral director to embalm or refrigerate the body during the proceedings. *See, e.g.*, ARK. CODE ANN. § 20-17-102 (Westlaw 2013); UTAH CODE ANN. § 58-9-602 (Westlaw 2013). Such delay is not only costly, with storage fees ranging from \$35–\$100 per day, *Funeral Costs – a detailed price breakdown*, THE FUNERAL SITE, http://www.thefuneralsite.com/ResourceCenters/Costs/How_much.html (last visited Oct. 7, 2012), but it also prolongs the emotional distress of the kin during such litigation and ultimately keeps the victim from his or her final resting place. *See Kester, supra* note 20, at 588–89 (describing a case in which a body remained in storage for over five years while next of kin disputed in court); *see also infra* notes 205–06 and accompanying text.

154. VT. STAT. ANN. tit. 18, § 5228 (Westlaw 2013).

155. *See* T.J. Pignataro & Jay Rey, *Husband Sought in Tonawanda Death: Town Police Suspect Homicide After Wife's Body is Found in House*, THE BUFFALO NEWS, May 21, 2009, available at 2009 WLNR 9723003; Gene Warner & T.J. Pignataro, *Husband Arrested in Tonawanda Slaying: Found in Catskills After a Nationwide Alert, Will be Charged with Murder, Town Police Say*, THE BUFFALO NEWS, May 22, 2009, available at 2009 WLNR 9795915.

interest” is not a formally defined term.¹⁵⁶ However, if forfeiture provisions only affect persons charged or arrested, suspected slayers may still be granted the right to control the disposition of their victims’ remains, with their families having no recourse to challenge the authority.

b. Lack of Due Process Considerations

Although many states have automatic forfeiture provisions within their disposition of remains statutes, few grant notice of the forfeiture and an opportunity to challenge the presumption in a meaningful and timely manner to an individual who has forfeited the right of disposition. The absence of procedure to challenge the forfeiture may constitute a due process violation, as disposition of remains statutes grant a bundle of rights to the next of kin of decedents.¹⁵⁷ Though the right to dispose of remains is not a traditional property right, this statutory entitlement may rise to the level of a constitutionally protected interest.¹⁵⁸

The New York State Legislature considered the possibility that an alleged slayer may be wrongfully accused when it amended New York’s disposition of remains law in 2012.¹⁵⁹ As a result, the Legislature included a provision allowing courts to waive the application of forfeiture in certain instances.¹⁶⁰ The statute provides that the application of the forfeiture provision “may be waived . . . in the interest of justice by order of . . . the court . . . in which the criminal action . . . is pending . . . [or] if proceeding in that court would cause inappropriate delay, a court in a special proceeding.”¹⁶¹ However, the statute provides little guidance as to when waiver may be appropriate or if a person must receive notice of the forfeiture and the ability to challenge the deprivation. New York has at least considered the procedural concerns when depriving a person of a statutorily granted right; in contrast, most state statutes do not contemplate this matter.

156. Dan Fletcher, *What’s a ‘Person of Interest’?*, TIME (Sept. 17, 2009), <http://www.time.com/time/nation/article/0,8599,1924318,00.html>. See also BLACK’S LAW DICTIONARY, *supra* note 10, at 1257 (A person of interest is “[a] person who is the subject of a police investigation but who has not been identified by investigators as being suspected of committing the crime itself.”).

157. See discussion *infra* Part III.B.

158. See discussion *infra* Part III.B.

159. See Video: Press Conference on Legislation to Protect Remains of Crime Victims (NY SENATE 2012), available at <http://www.nysenate.gov/video/2012/may/15/video-press-conference-legislation-protect-remains-crime-victims>.

160. N.Y. PUB. HEALTH LAW § 4201 (McKinney 2013).

161. *Id.* The statute also gives the ability to challenge the forfeiture to a person who has forfeited the right due to an outstanding order of protection. *Id.*

III. GUIDANCE FOR LEGISLATIVE REFORM

The majority of state statutory regimes relating to the disposition of remains currently fail both victims and surviving family members, as they either do not call for forfeiture in the case of murder or do not have comprehensive forfeiture provisions. The maxim underlying the slayer rule that no man shall take advantage of his own wrong should prevent slayers from having the right to dispose of their victims' remains, just as it does in the case of prohibiting the inheritance of property or life insurance benefits. The principles underlying the slayer rule also call for forfeiture of disposition rights. Morally, there is sanctity in life. Equitably, the slayer should not be granted a right by virtue of committing a crime. Legally, a slayer should not be permitted to control the disposition of a decedent's remains by bringing about the death. Presumably a victim would not want the person who took his or her life to make important decisions regarding the victim's final resting place. For these reasons, a slayer should and can be prevented from having the right to dispose of his or her victim's remains.¹⁶²

Every state must ensure not only that slayers are divested of the right to control their victims' final dispositions but also that families of victims are not deprived of this right. Making disposition arrangements is an integral part of the grieving process.¹⁶³ Homicide already victimizes survivors; their "trust in the world, spirituality, and beliefs about social order and justice can be devastated."¹⁶⁴ Furthermore, this process of making disposition and funeral arrangements often "assists survivors in coming to terms with the loss and their grief, particularly where the death was unexpected."¹⁶⁵ When the victim's family is deprived of this right and instead the slayer is granted control of the disposition, both the survivors and the decedent are victimized a second time.

162. A slayer may choose to vindictively inflict more pain on the survivors by refusing to relinquish the body to the family and making decisions contrary to the victim's wishes. *See, e.g.*, Video: Press Conference on Legislation to Protect Remains of Crime Victims (NY SENATE 2012), *available at* <http://www.nysenate.gov/video/2012/may/15/video-press-conference-legislation-protect-remains-crime-victims>.

163. Hernández, *supra* note 58, at 991–92.

164. OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, FIRST RESPONSE TO VICTIMS OF CRIME: A GUIDEBOOK FOR LAW ENFORCEMENT OFFICERS 53 (2010), *available at* <http://www.ovc.gov/publications/infores/pdf/txt/2010FirstResponseGuidebook.pdf>.

165. Hernández, *supra* note 58, at 991.

A. Determining the Proper Scope of Forfeiture Provisions

To protect victims' families and to keep such personal matters out of the hands of slayers, every state should extend the reasoning behind the slayer rule to provide for forfeiture of slayers' rights to dispose of their victims' remains.¹⁶⁶ But it is not enough that a disposition of remains statute contain a forfeiture provision. While the language and coverage of statutes may vary by state, the following fundamental requirements should be considered: (1) a clear order and priority of all persons who may be vested with the right to control disposition, whether by designation or by law; (2) an effective forfeiture provision that is triggered when any person granted the right is a suspect likely to be prosecuted, arrested, or charged with murder or voluntary manslaughter; and (3) a requirement that a person deprived of the right be afforded notice and a meaningful opportunity to challenge the forfeiture.

1. Ensuring All Potential Right Holders Are Subject to Forfeiture

When discussing familial homicides, spousal homicides are often the first category that comes to mind. The disposition of remains statutes in Florida and New Jersey are evidence of this, as their forfeiture clauses apply only to spouses, not other family members.¹⁶⁷ However, 12% of homicide victims are killed by other family members.¹⁶⁸ Thus, a family member may be criminally responsible for a decedent's death and yet still be vested with the right to control the disposition of the decedent's remains, for example, if the victim is unmarried or divorced. Consequently, forfeiture provisions must be positioned within disposition of remains statutes so as to affect all persons with the authority to control disposition, whether a spouse or any other person granted the right of disposition. States can easily ensure forfeiture provisions are applicable to all categories of potential right holders by first listing a clear order and priority of persons entitled to the right of

166. This Comment focuses on the need for forfeiture in instances when the person granted the right of disposition is criminally responsible for the decedent's death. However, many states choose to require forfeiture in other instances as well, for example, if there is an outstanding order of protection against an individual at the time of the decedent's death or if an individual vested with the right declines to act, is unable to act, does not act within a certain time period, or cannot be found. See, e.g., N.Y. PUB. HEALTH LAW § 4201 (McKinney 2013); OHIO REV. CODE ANN. § 2108.75 (Westlaw 2013).

167. See discussion *supra* Part II.B.2.a.

168. Cooper, *supra* note 22, at 16.

disposition, then calling for forfeiture in the case of *anyone* vested with the right by virtue of the statute.¹⁶⁹

For example, Indiana's disposition of remains statute states: "Except as provided in subsection (b), the following persons, in the order of priority indicated, have the authority to designate the manner, type, and selection of the final disposition of human remains."¹⁷⁰ After listing designated agents and all next of kin, subsection (b) then contains the statute's forfeiture provision.¹⁷¹ By drafting the statute in this manner, Indiana avoided the flaw present in Florida's and New Jersey's statutes: The forfeiture provision is applicable to any person who is granted the right of disposition, not just a spouse.

In addition to affecting all persons granted the right of disposition through the default order of priority, forfeiture provisions must also apply to right holders designated as agents for disposition. Presumably a victim would not want a person who brought about his or her death to control the disposition of the victim's remains, even if that person was previously designated as an agent to determine disposition, a power of attorney, or a designee to carry out the decedent's wishes. For this reason, forfeiture provisions should be crafted and positioned so that they divest slayers of the right to control disposition, no matter how or when such right is vested. By comprehensively covering all ways by which disposition rights can be vested, a forfeiture provision will effectively prevent slayers from controlling the disposition of their victims' remains.¹⁷²

The forfeiture provision in the Arkansas Final Disposition Rights Act of 2009 successfully applies to anyone granted the right of disposition, including designated agents. Under section (d)(1), the Act covers the order and priority of all persons who could potentially be vested with the right to control disposition, whether appointed by the decedent or granted the right by the default statutory order.¹⁷³ Then, section (e)(1) contains the forfeiture provision, which provides: "A person entitled under this section to the right of disposition shall forfeit that right" in certain instances, including murder.¹⁷⁴ Because the Act addresses all ways by which disposition rights can be bestowed and applies to all manners of disposition, the forfeiture provision within the Arkansas Final

169. See, e.g., Appendix subsections (B)–(C).

170. IND. CODE ANN. § 25-15-9-18 (Westlaw 2013) (emphasis added).

171. *Id.*

172. See, e.g., Appendix subsections (B)–(C).

173. ARK. CODE ANN. § 20-17-102 (Westlaw 2013).

174. *Id.*

Disposition Rights Act of 2009 effectively divests slayers of disposition rights in any potential scenario.¹⁷⁵

In reforming their laws, state legislatures should take care to make sure forfeiture provisions affect all relevant statutes. Often, statutes concerning the designation of an agent are distinct from general disposition of remains statutes.¹⁷⁶ Accordingly, every applicable statute relating to disposition should reflect a forfeiture provision in order to ensure that the law is consistent and slayers are not granted disposition rights as a result of drafting oversight and conflicting statutes.¹⁷⁷

2. Establishing When Forfeiture Should Take Place

Of the state statutes containing forfeiture provisions, most provide for forfeiture in the case of murder and voluntary manslaughter.¹⁷⁸ When drafting the forfeiture provision, states may look to their respective slayer statutes for guidance as to which grounds should necessitate forfeiture. The nomenclature of specific crimes varies by state¹⁷⁹ as does the list of offenses encompassed within slayer statutes;¹⁸⁰ thus, a state's forfeiture provision language should mirror that of its slayer statute.

But unlike the application of slayer statutes and the resulting deprivation of property that can take place after a trial or a civil determination,¹⁸¹ disposition decisions must be made soon after the

175. *Id.*

176. This also holds true for statutes relating to anatomical gifts, preneed funeral or cremation contracts, duties of burial, authorization for cremation, declaration of instructions in a will or otherwise, and also designation of an agent for disposition of remains. *See, e.g.*, Jonathan Spralding Revised Uniform Anatomical Gift Act, N.M. STAT. ANN. § 24-6B (Westlaw 2013); *Id.* § 24-12A-1 (“Right to authorize cremation; definition”); *Id.* § 24-12A-2 (“No written instructions; priority of others to decide disposition”); *Id.* § 45-3-701 (“Time of accrual of duties and powers”); *Id.* § 61-32-19 (“Cremation; requirements; right to authorize cremation; disposition of cremains”).

177. For example, a state's statute relating to burial rights may provide for forfeiture while the statute relating to cremation authorization does not.

178. *See, e.g.*, IOWA CODE ANN. § 144C.8 (Westlaw 2013); UTAH CODE ANN. § 58-9-603 (Westlaw 2013).

179. *See, e.g.*, UTAH CODE ANN. § 58-9-603 (“voluntary manslaughter”); MONT. CODE ANN. § 37-19-906 (Westlaw 2013) (“deliberate or negligent homicide”); WASH. REV. CODE ANN. § 68.50.160 (Westlaw 2013) (“first degree manslaughter”).

180. For example, some states extend forfeiture to include non-felonious homicides. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 (2011).

181. *Id.*

commission of the crime.¹⁸² Thus, the forfeiture provision must specify when the forfeiture is triggered, as final arrangements ordinarily take place prior to the determination of criminal guilt.¹⁸³ Most of the currently enacted forfeiture provisions require a person to either be arrested or charged before forfeiture takes place.¹⁸⁴ However, states should expand their forfeiture provisions to include a suspect likely to be prosecuted in connection with the death.¹⁸⁵ Both the timing of disposition decisions and the potential delays involved in building a case to file charges justify such an extension. As opposed to the term “person of interest,” “suspect” is formally defined, so there would be less ambiguity surrounding when forfeiture would apply.¹⁸⁶ By crafting forfeiture provisions to reach suspects likely to be prosecuted as well as those arrested or charged with murder or voluntary manslaughter, disposition rights will be kept out of the hands of those believed to be involved or responsible for the death, even if not yet arrested¹⁸⁷ or under prosecution.¹⁸⁸

182. See *supra* note 153 and accompanying text.

183. Tennessee’s forfeiture provision currently requires a person be *convicted* of an offense in connection with the decedent’s death before forfeiture takes place. TENN. CODE ANN. § 62-5-704 (Westlaw 2013). However, disposition decisions are generally made soon after death. Accordingly, such a provision may result in either extensive delays in the disposition due to prolonged criminal proceedings or in alleged slayers controlling the disposition of their victims’ remains before being convicted.

184. See discussion *supra* Part II.B.2.a.

185. A suspect is “[a] person believed to have committed a crime or offense.” BLACK’S LAW DICTIONARY, *supra* note 10, at 1584. The statute must also require that a suspect who has forfeited the right of disposition receive notice of the forfeiture and have a meaningful opportunity to challenge the forfeiture. See discussion *infra* Part III.B.

186. Fletcher, *supra* note 156.

187. For example, in Texas the right of disposition is automatically forfeited if “an indictment has been filed charging the person with a crime . . . that involves family violence against the decedent.” TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2010). However, Texas has another statute that provides that “[t]he executor of a decedent’s will or the decedent’s next of kin may file an application for an order limiting the right of the decedent’s surviving spouse to control the decedent’s burial or cremation.” TEX. EST. CODE ANN. § 152.101 (Westlaw 2013) (effective Jan. 1, 2014).

If the court finds that there is good cause to believe that the decedent’s surviving spouse is the principal or an accomplice in a willful act that resulted in the decedent’s death, the court may, after notice and a hearing, limit the surviving spouse’s right to control the decedent’s burial or cremation.

Id. § 152.102 (effective Jan. 1, 2014). The currently enacted law is substantively identical. TEX. PROB. CODE ANN. § 115 (West 2003) (repealed effective Jan. 1, 2014).

188. Most forfeiture provisions also require that the status of the investigation, arrest, or prosecution be known to the funeral service or crematory practitioner in

B. Safeguarding Due Process Rights

Just as the rights of victims and families are of high importance, so too are the rights of the accused. An alleged slayer should have the ability to challenge the forfeiture of the right of disposition, not only for policy reasons because a conviction has not yet taken place but also to satisfy procedural due process concerns that are likely implicated when depriving a person of the right of disposition.¹⁸⁹ The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹⁹⁰ While bodies are not

order to protect practitioners from liability. In practice, after the medical examiner determines the cause and manner of death, the victim’s family is contacted to determine what arrangements should be made. Telephone Interview with Bobby Ducote, Funeral Home Manager, Schoen Funeral Home (Oct. 29, 2012) [hereinafter Decote Interview]. See N.H. REV. STAT. § 5-C:66 (Westlaw 2013) (“When a funeral director, next of kin, or designated agent is requested to take custody of a body, he or she shall first ascertain whether a pronouncing physician, pronouncing registered nurse, APRN, or a medical examiner has established the cause of death and released the body for final disposition.”). The body is then transferred from the morgue to the funeral establishment or crematory. During this process, communication takes place between the medical examiner, the family member who releases the body, and the practitioner; the cause and manner of death is communicated to the practitioner, as it must be listed on the death certificate. Decote Interview, *supra*. See OHIO REV. CODE ANN. § 3705.16 (Westlaw 2013) (“Each death . . . shall be registered . . . by the funeral director or other person in charge of the final disposition of the remains. The funeral director . . . shall present the . . . death certificate to the attending physician of the decedent, the coroner, or the medical examiner, as appropriate for certification of the cause of death.”).

189. There are two general categories of due process: substantive due process and procedural due process. 16C C.J.S. *Constitutional Law* § 1505 (Westlaw 2013). Whereas substantive due process prohibits governmental interference with rights rooted in the concept of liberty, procedural due process “requires government action resulting in the deprivation of a liberty or property interest to be implemented in a fair manner.” *Id.* The central issue that arises with forfeiture provisions is whether there are constitutionally adequate procedures surrounding the deprivation, not whether the state has the power to deprive someone of the right of disposition. See *id.* §§ 1443–1444. Accordingly, this Comment addresses procedural due process instead of substantive due process.

190. U.S. CONST. amend. XIV. Forfeiture provisions in disposition of remains laws clearly constitute a deprivation under the color of state law since the deprivation is provided for by state statute. Thus, the remaining questions are whether forfeiture of the right of disposition qualifies as a deprivation of a protectable interest within the meaning of the Fourteenth Amendment and, if so, “whether the state afforded constitutionally adequate process for the deprivation.” *Newman v. Sathyavaglswaran*, 287 F.3d 786, 789 (9th Cir. 2002) (citing *Parratt v. Taylor*, 451 U.S. 527, 536–37 (1981), *overruled on other grounds*, *Daniels v.*

treated as property in the traditional sense, the next of kin are entitled to certain statutory rights in remains.¹⁹¹ Consequently, the issue at hand is whether the deprivation of a statutorily granted right of disposition in remains is an interest entitled to procedural due process protection.¹⁹²

Because property interests are created by state law and not by the Constitution, courts look to applicable state law to determine whether a property interest exists.¹⁹³ However, “federal constitutional law determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.”¹⁹⁴ Thus, the determination of whether the right of disposition is protected by the Due Process Clause does not depend on whether the state classifies the interest in remains as property, quasi-property, or not property,¹⁹⁵ but “whether [the substance of] that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the [D]ue [P]rocess [C]lause.”¹⁹⁶ All states have disposition of remains statutes granting a bundle of rights in a decedent’s remains to the next of kin,¹⁹⁷ therefore, states have created a statutory entitlement and legal interest that is likely protectable under the Constitution. Indeed, numerous courts have come to this same conclusion and

Williams, 474 U.S. 327 (1986)). States must also ensure that any laws enacted are in compliance with state constitutions.

191. See discussion *supra* Part II.A.

192. “‘Liberty’ and ‘property’ are broad and majestic terms. They are among the [g]reat [constitutional] concepts . . . purposely left to gather meaning from experience” Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 (1972) (alterations in original) (quoting Nat’l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)). Although it is conceivable that the right of disposition could constitute a liberty interest, this seeming difficulty of categorizing the right as a liberty or property interest can be avoided for the purposes of this Comment, as both are entitled to procedural due process protections. 16C C.J.S. *Constitutional Law* § 1444 (Westlaw 2013) (“When a state action threatens to deprive a person of a protected liberty or property interest, a person is entitled to procedural due process.”).

193. Roth, 408 U.S. at 571 (“Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law”).

194. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (citing Roth, 408 U.S. at 577; Perry v. Sindermann, 408 U.S. 593, 602 (1972)).

195. Brotherton v. Cleveland, 923 F.2d 477, 482 (6th Cir. 1991) (stating that the identification of property interests for due process purposes turns on the substance of the interest recognized, not the name given to that interest by the state).

196. *Id.* at 481–82 (quoting Memphis Light, 436 U.S. at 9).

197. See *supra* notes 91, 137.

have found that the right of disposition is a constitutionally protected interest.¹⁹⁸

In order to avoid potential due process violations, states should provide an avenue to ensure that the deprivation is executed in a fair manner.¹⁹⁹ Due process is a flexible concept that differs depending on a particular situation,²⁰⁰ but “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”²⁰¹ The Supreme Court has consistently “held that some form of hearing is required before an individual is finally deprived of a property interest.”²⁰² Yet, most states with forfeiture provisions currently do not provide any procedure allowing an alleged slayer to challenge the deprivation, which would likely constitute an unconstitutional deprivation of a protectable interest since no determination of guilt has yet been made.²⁰³ Accordingly, states should amend their disposition of remains statutes to require a person statutorily deprived of the right of disposition to be given notice of the deprivation as well as the opportunity to be heard at a meaningful time and in a meaningful manner.

To adequately protect due process rights, forfeiture hearings should take place quickly before any action is taken with respect to

198. See *Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989) (holding that Louisiana has established a quasi-property right in remains and also finding that there were adequate state post-deprivation procedures); *Whaley v. County of Tuscola*, 58 F.3d 1111, 1116 (6th Cir. 1995) (finding that the next of kin have a constitutionally protected property interest in a decedent’s remains); *Brotherton*, 923 F.2d at 482 (holding that the aggregate of rights granted to the next of kin rose to the level of a legitimate claim of entitlement); *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796–97 (9th Cir. 2002) (holding that the exclusive right of the next of kin to dispose of remains created a property interest entitled to due process protection); *Crocker v. Pleasant*, 778 So. 2d 978, 988 (Fla. 2001) (holding “that in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition”).

199. 16C C.J.S. *Constitutional Law* § 1505 (Westlaw 2013).

200. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

201. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

202. *Id.* To determine whether an administrative procedure comports with the Due Process Clause, a court must weigh the three factors identified by the Supreme Court in *Mathews v. Eldridge*:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

203. See discussion *supra* Part II.B.2.b.

the disposition of remains.²⁰⁴ This is because disposition decisions must be made shortly after death,²⁰⁵ and such decisions are often irreversible.²⁰⁶ State legislatures may choose which court they wish to be the proper forum for deciding such matters based upon which court in their jurisdiction is best suited to handle disposition disputes.²⁰⁷ Reasonable alternatives include the probate court, circuit court, or district court.²⁰⁸ Currently, some states do allow family members to petition the court to divest an alleged slayer of the right of disposition.²⁰⁹ However, instead of requiring a victim's grieving family to use time, resources, and effort to revoke such rights from a slayer, automatic forfeiture provisions laying out an avenue to challenge the forfeiture in a hearing would be far more effectual.²¹⁰ Allowing a person deprived of the right of disposition the ability to contest the forfeiture adequately protects the due process rights of alleged slayers while also preventing any unnecessary burdens on victims' families and the court system.

204. "[N]o fixed format, process, or procedure is demanded for a due process hearing" 16B AM. JUR. 2D *Constitutional Law* § 1001 (Westlaw 2013). The exact nature of the due process hearing for cases involving the forfeiture of the right of disposition is beyond the scope of this Comment.

205. "The law in most states requires that all bodies be buried shortly after death." Brian L. Josias, *Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies*, 79 NOTRE DAME L. REV. 1141, 1145 (2004) (footnote omitted). Accordingly, disposition disputes "demand quick action" because "[b]odies must be buried, organs must be harvested, and healing for the next of kin must begin." *Id.* at 1166.

206. Cremation is an irreversible method of disposition, and "[b]urial choices, once made, are often difficult if not impossible to reverse. If interment is the preferred method, laws in many states have stringent prohibitions on the exhumation of bodies. These laws make interment almost as irreversible as cremation in terms of long-term ramifications." *Id.* at 1146 (footnote omitted).

207. Kester, *supra* note 20, at 613–14.

208. *See, e.g.*, ALA. CODE § 34-13-11 (Westlaw 2013) (probate court); MICH. COMP. LAWS ANN. § 700.3208 (Westlaw 2013) (circuit court); MONT. CODE ANN. § 37-19-906 (Westlaw 2013) (district court).

209. *See, e.g.*, TEX. PROB. CODE ANN. § 115 (West 2003) (repealed and recodified as TEX. EST. CODE ANN. §§ 152.101–152.102 effective Jan. 1, 2014); KY. REV. STAT. ANN. § 213.420 (Westlaw 2013).

210. The bringing of a dispute creates unnecessary burdens on the family. Right of disposition disputes "can make the loss of a loved one more difficult and can carry on for years after the death." Theresa E. Ellis, *Loved and Lost: Breathing Life into the Rights of Noncustodial Parents*, 40 VAL. U. L. REV. 267, 293 (2005). Furthermore, "[e]nsuring fulfillment of the burial wishes of a deceased loved one should not require . . . surviving kin to enter into time-consuming and costly litigation." Josias, *supra* note 205, at 1181. The survivors have already been victimized by losing their loved one—they should not be further required to challenge the right to make arrangements and to control his or her disposition.

CONCLUSION

Legislatures have the power to prevent murder victims from being victimized after death and their survivors from being wronged a second time by ensuring that final disposition rights do not fall into the hands of slayers. The solution is a simple one—a disposition of remains statute containing a provision that calls for forfeiture if the person with the right to control disposition is a suspect likely to be prosecuted, arrested, or charged in connection with the decedent's death. So long as there is a means for the accused to challenge the forfeiture in a timely manner, the statute will adequately protect due process rights as well as victims' families who may otherwise have to watch their loved ones be disposed of by their slayers. Slayers should not be permitted to take advantage of their wrongdoing, and state statutes should not be the source granting slayers the right to do so. State legislatures must fight against domestic violence and amend their disposition of remains statutes to adequately protect victims and their families from the tragic consequence of flawed statutes—slayers determining the final resting place of their victims.

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APPENDIX: MODEL DISPOSITION OF REMAINS STATUTE

Below is a comprehensive model statute regarding the right to control the disposition of a decedent's remains. Subsections (B) and (C) address the problems presented in this Comment. Subsection (B) contains a clear order and priority of persons granted the right of disposition—including both disposition by declaration²¹¹ and disposition by law.²¹² Thus, all potential avenues for an individual to be granted the right of disposition are provided for in one location, and the order and priority of persons entitled to make disposition decisions is clearly delineated.²¹³ Subsection (C) then contains the forfeiture provision, which unambiguously applies to any and all persons possessing the right of disposition as granted by Subsection (B).²¹⁴ It also requires that the person subject to forfeiture be afforded notice and an opportunity to challenge the forfeiture in a timely manner.²¹⁵

The model statute also covers additional issues concerning the disposition of remains, including relevant definitions,²¹⁶ other instances when forfeiture of the right of disposition may be appropriate,²¹⁷ guidance for court determinations of disposition disputes,²¹⁸ and provisions limiting practitioner liability.²¹⁹

Right to Control the Disposition of a Decedent's Remains

- (A) Definitions. As used in this section, unless the context otherwise clearly indicates, the following words and phrases shall have the meaning hereinafter ascribed to each:
- (1) "Declarant" means a competent adult who signs a declaration pursuant to the provisions of this article.
 - (2) "Declaration instrument" means a written legal document executed by a competent adult to provide instructions as to final disposition and/or to appoint a designated agent(s) to

211. Disposition by declaration refers to the decedent providing instructions through a declaration instrument as to his or her disposition, as well as the decedent designating an agent to control his or her disposition through a declaration instrument. *See* Appendix subsection (B)(1)–(2).

212. Disposition by law occurs in the absence of a declaration or designation. *See* Appendix subsection (B). The question of the exact priority and order of persons delegated authority is beyond the scope of this Comment.

213. *See* Appendix subsection (B).

214. *See* Appendix subsection (C).

215. *See* Appendix subsection (C).

216. *See* Appendix subsection (A).

217. *See* Appendix subsection (C).

218. *See* Appendix subsection (D).

219. *See* Appendix subsection (E).

control the decedent's disposition. A 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, other than the designated agent, who affirms that he or she was present when the legally competent adult signed and dated the document and that the legally competent adult appeared to be of sound mind and free from duress at the time of execution of the document. United States Department of Defense Record of Emergency Data Forms (DD Form 93) as well as prepaid funeral, burial, or cremation contracts also qualify as declaration instruments. The provisions of the most recent declaration instrument shall control over any other document regarding the disposition of remains. However, neither an anatomical gift document nor a declaration instrument shall invalidate the other in its entirety. If the two documents conflict, the more recent document shall control as to the conflicting provisions.

- (3) "Final disposition" means the final disposal of a decedent's remains, which may include burial, aboveground interment, cremation, burial at sea, delivery to a medical institution for lawful dissection if the medical institution assumes responsibility for disposal, or other lawful disposition.
 - (4) "Practitioner" refers to funeral directors, funeral service providers, cemetery authorities, and crematory authorities.
 - (5) "Reasonably ascertainable" means the individual is able to be contacted without undue effort and willing and able to act in a timely manner.
 - (6) "Right of disposition" means the right to make all decisions, consistent with applicable laws, regarding the handling of a decedent's remains.
- (B) Right of disposition. The right to control the disposition of a decedent's remains vests in and devolves upon the following persons, at the time of the decedent's death, in the following order, except as provided in subsection (C):
- (1) the decedent, if providing disposition instructions through a valid declaration instrument;
 - (2) the decedent's designated agent(s) to control final disposition, if designated in a valid declaration instrument. If the designated agent is a spouse, a subsequent divorce, annulment, or legal separation automatically revokes the delegation, unless otherwise provided in the declaration

instrument or if the decedent appointed the spouse after the date of such divorce, annulment, or separation,²²⁰

- (3) the surviving spouse, domestic partner, or civil union partner, unless legally separated or a divorce or legal separation is pending;
- (4) the majority of the surviving adult children of the decedent whose whereabouts are reasonably ascertainable;
- (5) the surviving parents or legal guardians of the decedent whose whereabouts are reasonably ascertainable, unless parental rights have been terminated by court order;
- (6) a majority of the surviving adult siblings of the decedent whose whereabouts are reasonably ascertainable;
- (7) any adult person in the next degree of kinship in the order named by the law to inherit the decedent's estate;
- (8) any other person willing to assume the responsibilities to act and arrange the final disposition of the decedent's remains, including the personal representative of the decedent's estate or the funeral practitioner with the custody of the remains, after attesting in writing that a good faith effort has been made to no avail to contact the individuals listed above.

A person under this section shall act pursuant to any disposition wishes of the decedent, to the extent that they are known.

- (C) Forfeiture of the right of disposition.²²¹ Any individual granted the right to control the disposition of a decedent's remains under subsection (B) forfeits this right and the right is passed on to the next qualifying person or persons under subsection (B) in the following circumstances:
- (1) the individual vested with the right declines to act, is unable to act because of death or disability, cannot be located after a good faith effort to do so within forty-eight hours after the time of death or the discovery of the body, or the individual does not exercise the right within three days of notification of the decedent's death or within five days of the decedent's death, whichever is earlier;
 - (2) the individual was the subject of an order of protection at the time of the decedent's death, or is identified by a law enforcement agency as a suspect likely to be prosecuted or is arrested or charged with first or second degree murder or

220. This provision is derived from Delaware's statute. DEL. CODE ANN. tit. 12, § 268 (West 2006).

221. Much of this subsection is derived from Vermont's statute relating to forfeiture of the right to determine the disposition of a decedent's remains. VT. STAT. ANN. tit. 18, § 5228 (Westlaw 2013).

voluntary manslaughter in connection with the decedent's death, if the status of the investigation, arrest, or charge is known to the practitioner, except the right shall be returned to the individual in the following circumstances:

- (a) if the prosecution is not pursued or the individual is acquitted of the alleged crime before the remains are disposed of; or
 - (b) if, after the individual is afforded notice and an opportunity to appear in person or by counsel, or both, at a timely hearing on the matter, the court of competent jurisdiction determines that the forfeiture is not in the interest of justice;
- (3) if the court of competent jurisdiction determines that, pursuant to subsection (D), another person is most fit and appropriate to carry out the right of disposition; or
- (4) as otherwise ordered by the court of competent jurisdiction.
- (D) Court determination.²²² Notwithstanding other provisions of this section, the court of competent jurisdiction in the state of the decedent's domicile may determine the individual(s) most fit and appropriate to control the disposition of the decedent's remains or resolve a dispute regarding the disposition of the decedent's remains. It may also choose to set aside forfeiture of the right of disposition in the interest of justice.
- (1) The following persons may file a petition in the court of competent jurisdiction:
 - (a) before a decedent's death, the decedent or the decedent's legal representative;
 - (b) a relative of the decedent;
 - (c) a person who claims and establishes through evidence that the person had a closer personal relationship to the decedent than the next of kin;
 - (d) the person subject to forfeiture of the right of disposition pursuant to subsection (C); or
 - (e) the funeral service or crematory practitioner with custody of the remains.
 - (2) In making its decision as to the individual most fit and appropriate to control disposition or to resolve a dispute regarding disposition, the court shall consider the following factors:
 - (a) the decedent's expressed or known directions or wishes;
 - (b) the decedent's religious affiliation or beliefs;

222. This subsection contains statutory provisions from Maine and Vermont. ME. REV. STAT. ANN. tit. 22, § 2843-A (Westlaw 2013); VT. STAT. ANN. tit. 18, § 5231 (Westlaw 2013).

- (c) the cost and practicality of the proposed arrangements and disposition and the ability of the responsible party or parties to pay for the proposed arrangements and disposition;
 - (d) the relationship between the decedent and any individual claiming the right of disposition, including whether the individual and the decedent were estranged or had a relationship characterized by hostility or violence;
 - (e) whether the proposed arrangements are inclusive of the desires of the family;
 - (f) the degree to which the arrangements will allow maximum participation by all wishing to pay respect; and
 - (g) any other information the court, in its discretion, deems relevant.
- (E) Practitioner liability.²²³ The following provisions apply to the actions and liability of funeral directors, funeral service practitioners, cemetery authorities, or crematory authorities and their employees.
- (1) If there is a dispute regarding the right of disposition, the practitioner may refuse to accept, inter, or otherwise dispose of the remains until the practitioner is provided with a court order or the parties to the action submit a final stipulation approved by the court regarding the disposition of remains.
 - (2) If there is a dispute regarding the right of disposition, the practitioner who has physical possession of the remains may embalm or refrigerate and shelter the remains while the action is pending. The costs shall be the responsibility of the party or parties who contracted with the practitioner, the person or entity who is otherwise liable for the costs of final disposition, or the estate as ordered by the court, or any combination of these, and the court may include in the order a decision concerning which of these shall be responsible for paying these costs.
 - (3) If a practitioner commences an action under this section, the practitioner may ask the court to include an order against the estate or the parties for reasonable legal fees and costs.
 - (4) A practitioner is not required to independently investigate to determine who has the right of disposition or who is next of kin.

223. This subsection contains statutory provisions from Maine and Vermont. ME. REV. STAT. ANN. tit. 22, § 2843-A; VT. STAT. ANN. tit. 18, § 5231.

- (5) A practitioner who, in good faith, acts upon the instructions of the party it reasonably believes holds the right of disposition shall not be held civilly or criminally liable, or be subject to disciplinary action, for acting in accordance with those instructions.