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Letting the Dead Bury the Dead: Missouri's Right of Sepulcher Addresses the Modern Decedent's Wishes

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Missouri Revised Statute § 194.119[1]

I. INTRODUCTION

September 22, 2005: seventeen-year-old Caitlyn from St. Charles, Illinois, dies.[2] Caitlin's mother wants to scatter some of her ashes and have the rest made into necklaces for relatives, but her father wants to give her a "proper burial."[3] The two reach a settlement in court nearly a year later, with the father getting a portion of the remains.[4]

February 26, 2008: a man's body has been in a funeral home cooler in Springfield, Illinois, for nearly fourteen months while his two daughters fight in court over his estate and the means of disposing his body.[5] The funeral home asks the court for permission to dispose of the body when the women refuse.[6]

November 13, 2008: a widow wins a court battle against her parents-in-law to have her husband's body moved from its current resting place near the residence of her parents-in-law to a national cemetery for the Royal Canadian Mounted Police.[7]

These disputes among a decedent's survivors are, unfortunately, far from uncommon. Spouses, parents, siblings, and other relatives feud over multiple aspects of funeral arrangements – everything from the type of casket to the division of cremated remains. With today's increasing movement away from the "'traditional' family" paradigm, battles may involve ex-spouses, same-sex partners, and children from multiple marriages.[8] The evolving con-

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1. MO. REV. STAT. § 194.119 (Supp. 2008).

2. Tona Kunz & Adam Kovac, *Burial Argument Settled: The Parents of a Girl Who Committed Suicide Have Settled a Legal Fight Over Her Ashes*, CHI. DAILY HERALD, Aug. 21, 2006, at 1.

3. *Id.*

4. *Id.*

5. *Funeral Home Fed up with Fight over Body*, SPRINGFIELD ST. J.-REG., Feb. 29, 2008, at 9.

6. *Id.*

7. Kirk Makin & Dawn Walton, *Widow's Right to Move Body Upheld: Refusal to Hear Appeal Means Mountie's Remains Can Be Transferred to RCMP Cemetery*, TORONTO GLOBE & MAIL, Nov. 14, 2008, at A13.

8. Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351, 1354-55 (2008); *see also* Eloisa C. Rodriguez-Dod, *Ashes to*

cept of who belongs in a person's "family" is one factor that may result in increased "family feuds" at the funeral home.[9]

The right of sepulcher refers to "the right to choose and control the burial, cremation, or other final disposition of a dead human body."[10] Until recently, the law for sepulcher in Missouri was based on the traditional family, giving a decedent's spouse, children, parents, and siblings highest priority[11] – often even over the wishes of the decedent herself.[12] A recent amendment to Missouri Revised Statute Section 194.119 now gives top priority for the right of sepulcher to "[a]n attorney in fact designated in a durable power of attorney wherein the deceased specifically granted the right of sepulcher over her body to such attorney in fact."[13] Missouri's new approach gives a person more control over determining who can take charge of her burial and funeral arrangements. Yet a comparison to similar state statutes and relevant case law demonstrates that the Missouri legislature can and should do more to ensure that a decedent's wishes are met. The legislature should amend the law to (1) broaden the kinds of legal documents that are valid to dictate the means and agent for a decedent's final disposition and (2) instruct state courts to consider the decedent's actual personal relationships when determining in whom the right of sepulcher vests, if the decedent had not made burial arrangements ahead of time.

II. LEGAL BACKGROUND

A. The Historical Right of Sepulcher

To understand the right of sepulcher in Missouri, it is important to know the historical basis of that right. The justifications for giving someone a right to control the disposition of her own remains stem from common law. Historically, under English and American common law, a person could not determine how her body would be disposed because no one had property rights

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Ashes: Comparative Law Regarding Survivors' Disputes Concerning Cremation and Cremated Remains, 17 TRANSNAT'L L. & CONTEMP. PROBS. 311, 312-13 (2008).

9. Rodriguez-Dod, *supra* note 8, at 313 (quoting Stephanie Garry, *Senator Wants Pet in His Casket*, MIAMI HERALD, Apr. 10, 2007, at B1).

10. MO. REV. STAT. § 194.119.1 (Supp. 2008).

11. MO. REV. STAT. § 194.119.2 (Supp. 2004) (amended 2008).

12. Missouri allows for one to state her desired place of burial in a will, but "[h]ow far the desires of decedent should prevail against those of a surviv[or] depends upon the particular circumstances of each case." Rosenblum v. New Mt. Sinai Cemetery Ass'n, 481 S.W.2d 593, 595 (Mo. App. 1972) ("Missouri courts have not had before them the question now presented us as to whether a deceased person, other than by will, has the right to determine in his own lifetime his place of burial . . . ."). Also, it is unclear whether one can designate a funeral planning agent or means of burial in a will.

13. MO. REV. STAT. § 194.119.2(1) (Supp. 2008).

in a dead body.[14] Eventually, the law created a "quasi-property right in a dead body," which gave the decedent's next of kin the right to receive the decedent's body intact and to choose "the time, place, and manner of burial."[15] This right developed through state statutes requiring relatives to dispose of a body and through courts enforcing damages against anyone who harmed a dead body.[16]

The right to receive a body and arrange for its burial is still enforced today. This right is so important to American jurisprudence that the United States Court of Appeals for the Ninth Circuit deemed it part of "our national common law."[17] The basis for that right, however, is split into two camps: some states follow the quasi-property theory, while others treat the human body not as property but "'as the subject of privacy rights.'"[18] American jurisdictions that follow the quasi-property theory note that a decedent's next of kin do not actually own the body under "a traditional property right . . . but merely hold the right [of sepulcher] as a sacred trust for the benefit of all family and friends who have an interest."[19] Missouri follows the quasi-property rule.[20] Yet Missouri, as well as other quasi-property jurisdictions, has recognized that a decedent's oral or written wishes as to the disposition of her body "are entitled to consideration and substantial weight, in the light of all facts attending their utterance or publication."[21] Whether Missouri courts will

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

15. *Id.* at 397-98 (quoting 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)).

16. *Id.* at 398.

17. Newman v. Sathyavaglswaran, 287 F.3d 786, 788 (9th Cir. 2002).

18. Elizabeth E. Appel Blue, *Redefining Stewardship over Body Parts*, 21 J.L. & HEALTH 75, 106 (2008) (quoting Radhika Rao, *Property, Privacy and the Human Body*, 80 B.U. L. REV. 359, 365-66 (2000)).

19. *Id.* at 106-07.

20. *See, e.g.*, Caen v. Feld, 371 S.W.2d 209, 212-13 (Mo. 1963) (per curiam); Rosenblum v. New Mt. Sinai Cemetery Ass'n, 481 S.W.2d 593, 594 (Mo. App. 1972) ("[O]ne whose duty it becomes to bury a deceased person has no right of ownership over the corpse; but, in the broader meaning of the term, he has what has been called a 'quasi property right' which entitles him to the possession and control of the body for the single purpose of decent burial."); Wall v. St. Louis & S.F.R. Co., 168 S.W. 257, 259 (Mo. App. 1914); Litteral v. Litteral, 111 S.W. 872, 873-74 (Mo. App. 1908) (living next of kin has a duty "to provide for the preparation of the body, the funeral, and burial"). *See also* Ryan DeBoef, Note, *Another One Bites the Dust: Missouri Puts to Rest Uncertainty About Anatomical Gift Immunity*, 70 MO. L. REV. 837, 842-46 (2005) (describing the history of the right of sepulcher in Missouri).

21. *Rosenblum*, 481 S.W.2d at 595; *see also* Tracie M. Kester, *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, 576 (2007).

actually give effect to any kind of written or oral statement, however, has yet to be addressed.

B. Factors Leading to Different Legislative Approaches to the Right of Sepulcher

While the right of sepulcher remains rooted in the common law, changes in the demographics of the U.S. population have forced states to develop laws that emphasize a person's ability to dictate who will arrange her funeral and burial. Perhaps most influential is the steady increase of unmarried couples cohabitating, whether same or opposite sex. According to the 2009 Current Population Survey from the U.S. Census Bureau, out of 67.5 million households containing opposite sex couples, 6.7 million unmarried couples reported living together.[22] In 2008, the American Community Survey project from the U.S. Census Bureau estimated that out of 61.9 million couple households, approximately 564,000 were same-sex partner homes.[23] Additionally, a high divorce rate, coupled with longer lifespans due to improved health care, have resulted in more people getting remarried after a divorce or spouse's death.[24]

As for same-sex couples, ten states and the District of Columbia currently recognize their relationships and have granted them some of the same rights and privileges that married couples possess.[25] In other states, particularly those that have banned gay marriage,[26] cohabitating couples and their attorneys have resorted to legal documents to create legally binding appointments of their partners that are enforceable against disputing survivors. The possibility of clashes among same-sex partners, parents, spouses, ex-spouses,

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22. ROBERT BERNSTEIN, U.S. CENSUS BUREAU, CENSUS BUREAU REPORTS FAMILIES WITH CHILDREN INCREASINGLY FACE UNEMPLOYMENT (2010), *available at* http://www.census.gov/Press-Release/www/releases/archives/families_households/014540.html.

23. Am. Community Survey, *Household Characteristics of Opposite-Sex and Same-Sex Couple Households: ACS 2008*, http://www.census.gov/population/www/socdemo/files/ssex-tables-2008.xls.

24. Jeffry L. Weiler, *Right of Disposition of Remains: Funeral, Burial or Cremation Arrangements*, 16 OHIO PROB. L.J. 166 (2006).

25. These jurisdictions are California, Connecticut, Hawaii, Maine, Maryland, New Hampshire, New Jersey, Oregon, Vermont, Washington, and Washington, D.C. Marc L. Stolarsky, *Advanced Directives in Same-Sex Relationships*, 19 OHIO PROB. L.J. 132, 132 (2009). Most recently, the Iowa Supreme Court recognized gay marriage in its state. *See* Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009).

26. *See id.* (noting that, in 2004, eleven states' voters approved constitutional amendments to outlaw gay marriage).

or children from current and former marriages "'suggest[s] there is every likelihood that the number of burial conflicts will increase.'"[27]

C. State Legislation

In the same way that states have taken diverse approaches to the rights of same-sex couples, states have reacted differently to the problem of conflicting interests in the right of sepulcher. Some states, such as Alabama, Florida, and North Dakota, still rely on the common law approach: unless the decedent provides a testamentary disposition, the right of sepulcher belongs to the spouse and then next of kin.[28] Others have expanded the definition of one's "next of kin" specifically to include same-sex partners.[29] Yet perhaps the most common approach state legislatures have used – and the one that most resembles Missouri's recently amended law – is to enact statutes that allow for someone to appoint an agent for burial or provide directions in a written document. This Section emphasizes comparable state statutes within the United States Court of Appeals for the Eighth Circuit and the Midwest but examines legislation from other states as well.

Several states that allow a person to appoint an agent for final disposition of her remains explicitly give priority to those agents. In Illinois, first priority is given to someone designated in a written instrument that complies with the Disposition of Remains Act, followed by the executor or personal representative of a decedent's estate acting pursuant to directions in the will.[30] Iowa and Minnesota similarly give preference to those named in a declaration

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27. Foster, *supra* note 8, at 1368-69 (quoting Heather Conway, *Dead but Not Buried: Bodies, Burial and Family Conflicts*, 23 LEGAL STUD. 423, 452 (2003)).

28. Arthur v. Milstein, 949 So.2d 1163, 1165-66 (Fla. Dist. Ct. App. 2007) (finding that statutes determining priority of those authorized to dispose of decedent's remains applied to the liability of funeral homes or medical examiners, not "private parties engaged in a pre-burial dispute as to the decedent's remains," thus making "common law . . . dispositive"). *See also* Cottingham v. McKee, 821 So. 2d 169, 171 (Ala. 2001) ("Unlike other states, Alabama does not have a statute addressing the custody of remains of deceased persons."); N.D. CENT. CODE § 23-06-03.1 (LEXIS through 2009 legislation) ("The duty of burying the body of a deceased person devolves upon the surviving husband or wife if the deceased was married or, if the deceased was not married but left kindred, upon the person or persons in the same degree, of adult age, nearest of kin to the deceased . . . .").

29. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. §§ 6-101, 5-509(c)(1) (West, Westlaw through 2009 Reg. Sess.); N.J. STAT. ANN. § 45:27-22.a(1) (West, Westlaw through L.2009, c. 166 and J.R. No. 11.).

30. 755 ILL. COMP. STAT. ANN. 65/5(1)-(2) (West, Westlaw through P.A. 96-853, with the exception of 96-838, 96-839, 96-843, 96-845 to 96-848, 96-850, and 96-852, of the 2009 Reg. Sess.). Illinois statutes provide a specific form for appointment of an agent to control disposition of bodily remains and require that form to be signed by the principal and appointed agent and notarized. *Id.* at 65/10 and 65/15.

from the decedent.[31] Under the Nebraska Funeral Directing and Embalming Practice Act, the right to control the disposition of a deceased person's body is given primarily to those the decedent indicated in her will (regardless of the will's validity) or a pre-need funeral contract.[32] Otherwise, the decedent can give someone the right of sepulcher in a signed and sworn affidavit, though that person will not be deemed an attorney-in-fact.[33] Using approaches most similar to Missouri's, California and Kansas first look to a power of attorney for health care to determine the right and duty of disposition.[34]

Some states, however, place limitations on who can be made an agent. In Iowa, for instance, unless the agent is related to the decedent within the third degree of consanguinity,[35] she cannot be a funeral director, attorney, or an employee, agent, or owner of a funeral business, cremation business, cemetery, nursing home, assisted living program facility, adult day services program, or licensed hospice program.[36] This is presumably to prevent the risk of undue influence or fraud against the elderly and sick. Also, in Iowa, a legal separation, divorce, or annulment will automatically revoke designation of a spouse as an agent, unless the decedent expressly stated otherwise.[37] A designated person will forfeit her right to control a decedent's final disposition if she fails to exercise her right within twenty-four hours after learning of the decedent's death or forty hours after the death, whichever occurs first.[38] In contrast, Minnesota explicitly excludes instructions in a durable or nondurable power of attorney that terminates upon the principal's death.[39] Additionally, Minnesota lets a district court remove the right to control and the duty of

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31. In Iowa, a decedent's declaration must be a written instrument included with the durable power of attorney for health care that is signed and dated by the decedent, signed by two disinterested witnesses, and notarized. IOWA CODE ANN. §§ 144C.2.8, 144C.5.1.a, 144C.6 (West, Westlaw through 2009 Reg. Sess.). Minnesota requires a written, signed, and dated instrument from the decedent. MINN. STAT. ANN. § 149A.80.1 (West, Westlaw through 2009 Reg. Sess.).

32. NEB. REV. STAT. ANN. §§ 38-1425(1)(a), 38-1426(1) (LEXIS through 2009 101st 1st Sess.). Nebraska disregards the validity of a will so that the decedent's directions can be carried out "immediately." *Id.* at § 38-1426(2).

33. NEB. REV. STAT. ANN. § 38-1425(1)(a).

34. CAL. HEALTH & SAFETY CODE § 7100(a)(1) (West, Westlaw through c. 652 of the 2009 portion of the 2009-2010 Reg. Sess.); KAN. STAT. ANN. § 65-1734(a)(1) (West, Westlaw through 2009 Reg. Sess.).

35. Family members within the third degree of consanguinity are (1) the spouse, children, and parents (first degree); (2) siblings, grandchildren, and grandparents (second degree); and (3) uncles, aunts, nephews, nieces, great-grandparents, and great-grandchildren (third degree).

36. IOWA CODE ANN. § 144C.3.4 (West, Westlaw through 2009 Reg. Sess.).

37. § 144C.7.2.a.

38. § 144C.8.2. The law also requires forfeiture if the designated person is charged with murder or voluntary manslaughter in connection with the decedent's death and a third party knows of the charges. § 144C.8.1.

39. MINN. STAT. ANN. § 149A.80.2(1) (West, Westlaw through 2009 Reg. Sess.).

disposition from any "estranged" relatives, defined as those "having a relationship [with the decedent] characterized by mutual enmity, hostility, or indifference."[40]

Besides dictating who can be named an agent, states vary widely on the types of valid documents and statements that will enforce a decedent's directions. Of all the state statutes on the subject, the Disposition of Remains Act of Illinois probably has one of the most comprehensive schemes. Illinois allows a decedent to provide instructions through written directions, an agent designated to carry out her wishes in a will, a prepaid funeral or burial contract, a valid power of attorney that expressly grants the right of sepulcher to that agent, a valid cremation authorization form, or a written, signed, and notarized instrument that meets the Act's requirements.[41]

To ensure validity, some statutes emphasize proper execution of the instrument. One such statute is the Arkansas Final Disposition Rights Act, which requires a declaration to be signed by the declarant or someone on behalf of the declarant at her direction and witnessed by two people.[42] Others dictate what the instrument must say to be effective. For example, California Health and Safety Code Section 7100.1(a) requires a person's "directions [to] set forth clearly and completely the final wishes of the decedent in sufficient detail so as to preclude any material ambiguity."[43] Minnesota's provisions are unusual in allowing someone to dictate the means and place of burial by any written instruction.[44] States also provide mechanisms for revocation or modification of an instrument.[45]

These statutes describing who possesses the right of sepulcher and what instruments are valid to enforce a decedent's wishes address situations in-

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40. § 149A.80.3.

41. 755 ILL. COMP. STAT. ANN. 65/40(a) (West, Westlaw through P.A. 96-853, with the exception of 96-838, 96-839, 96-843, 96-845 to 96-848, 96-850, and 96-852, of the 2009 Reg. Sess.).

42. ARK. CODE ANN. § 20-17-102(b)(2) (LEXIS though 2009 Reg. Sess.). *See also* IOWA CODE §§ 144C.2.8, 144C.6.1-.2 (West, Westlaw through 2009 Reg. Sess.) (requiring a written instrument included with a durable power of attorney for health care that complies with Iowa law, names a designee, and is executed properly as required by the Act).

43. CAL. HEALTH & SAFETY CODE § 7100.1(a) (West, Westlaw through c. 652 of the 2009 portion of the 2009-2010 Reg.Sess.).

44. MINN. STAT. § 149A.80.1 (2006).

45. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7100.1(a) (directions in California cannot be "altered, changed, or otherwise amended in any material way, except as may be required by law," unless the decedent has made a contrary signed and dated statement); 755 ILL. COMP. STAT. ANN. 65/15 (West, Westlaw through P.A. 96-853, with the exception of 96-838, 96-839, 96-843, 96-845 to 96-848, 96-850, and 96-852, of the 2009 Reg. Sess.) (revocation or modification of a document only with a later written instrument that also meets the Disposition of Remains Act's requirements); IOWA CODE ANN. §144C.7 (West, Westlaw through 2009 Reg. Sess.) (revocation of an entire document or designation through a later signed and dated writing).

volving people who planned their post-death arrangements. Yet in anticipation that many people die without having done so, most states provide a default priority order for those in whom the right of sepulcher can vest.[46] As indicated previously, those named in a proper instrument often are given top priority. Statutes then usually fall back on the common law approach, with the right going to the surviving spouse, adult children, parents, adult siblings, surviving adults in the next degrees of kinship, or a person legally authorized to take custody of the body, such as a county coroner or medical examiner.[47]

States vary slightly in their exact priority orders. Arkansas, for instance, gives first priority to the decedent's surviving parents while also allowing priority for "a friend" if no one else is available.[48] Iowa separately acknowledges one's surviving grandchildren and grandparents from other next of kin.[49] In Nebraska, the last persons recognized are the decedent's guardian, personal representative, or representative of an entity to which the decedent decided to donate her body (e.g., teaching institution, university, hospital, or blood bank).[50] Thus, a person looking to exercise the right of sepulcher, in absence of any written instructions, should check her state's law carefully before asserting that right. Otherwise, she may risk a drawn-out court battle with others claiming priority, such as those in the cases cited at the outset of this article.

Perhaps because of an increased number of conflicts among a decedent's survivors and sometimes between the survivors and the funeral home, a few states specifically address how courts should handle disagreements on final disposition between private parties with equal priority. In California, if the conflict cannot be resolved within a week, those who possess the remains or have an equal right to direct disposition can petition the appropriate superior

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46. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7100(a); DEL. CODE ANN. tit. 12, § 264(a) (LEXIS through 77 Del. Laws, ch. 214); 755 ILL. COMP. STAT. ANN. 65/5 (West, Westlaw through P.A. 96-853, with the exception of 96-838, 96-839, 96-843, 96-845 to 96-848, 96-850, and 96-852, of the 2009 Reg. Sess.); KAN. STAT. ANN. § 65-1734(a) (West, Westlaw through 2009 Reg. Sess.); MINN. STAT. ANN. § 149A.80.2 (West, Westlaw through 2009 Reg. Sess.); N.C. GEN. STAT. § 90-210.124(2) (LEXIS through 2009 Reg. Sess.); OR. REV. STAT. ANN. § 97.130(2) (West, Westlaw through 2009 Reg. Sess.); R.I. GEN. LAWS § 5-33.2-24(2) (LEXIS through Jan. 2009 Sess.); WASH. REV. CODE ANN. § 68.50.160.3 (West, Westlaw through 2009 legislation).

47. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7100(a)(2); MINN. STAT. ANN. § 149A.80.2(2)-(11); MO. REV. STAT. § 194.119.2 (Supp. 2008).

48. ARK. CODE ANN. §§ 20-17-302(a), 20-17-303 (West, Westlaw through 2009 Reg. Sess.). Arkansas's statutes do not define who constitutes a "friend," but they imply that it is someone who is not a relative or legal guardian. *Id.*

49. IOWA CODE ANN. § 144C.5.1.c-.h (West, Westlaw through 2009 Reg. Sess.). This Act applies only to deaths occurring on or after July 1, 2008. *See* 2008 Iowa Legis. Serv. 1051 (West).

50. NEB. REV. STAT. ANN. §§ 38-1425(f)-(i), 38-1426(1) (LEXIS through 2009 101st 1st Sess.).

county court[51] for a court order to determine which party has control of disposition.[52] As for Minnesota, its dispute resolution provisions come into play if those with the same degree of relationship cannot agree by majority vote.[53] If there is no agreement, a party, mortician, or funeral director can then file a petition to settle the dispute in the district court where the decedent resided.[54] The district court is then required to consider the following factors in making its decision:

> (1) the reasonableness, practicality, and resources available for payment of the proposed arrangements and final disposition;
>
> (2) the degree of the personal relationship between the decedent and each of the persons in the same degree of relationship to the decedent;
>
> (3) the expressed wishes and directions of the decedent and the extent to which the decedent has provided resources for the purpose of carrying out the wishes or directions; and
>
> (4) the degree to which the arrangements and final disposition will allow for participation by all who wish to pay respect to the decedent.[55]

Minnesota's provisions that require a court to consider the actual "personal relationship" the decedent held with certain survivors suggest that Minnesota aims to place primary importance on whomever the decedent considers to be her "family," regardless of blood or marital relationship.[56] Since most states with default priority orders do not have instructions for resolving deadlocks, other state courts may find Minnesota's law useful when addressing a conflict among private parties.

The unifying theme of state statutes that allow a decedent to appoint an agent or create a written document is to give a decedent as much control as possible over her funeral arrangements. Not only do these laws emphasize the importance of the decedent's intent and wishes regarding her final disposition, but they also implicitly recognize that those to whom the decedent was most closely connected in life are often the best to honor and celebrate that person in death. At the same time, the widely varying approaches from state

51. The proper forum is where the decedent's remains are located or where she lived at the time of death. CAL. HEALTH & SAFETY CODE § 7105(c).

52. *Id.* The court must also designate the descending priority order in case the person vested with the right to control disposition does not act within seven days. *Id.*

53. MINN. STAT. ANN. § 149A.80.5 (West, Westlaw through 2009 Reg. Sess.).

54. *Id.*

55. *Id.*

56. *Id.*

to state make clear just how important it is for someone to ensure that her agent designation or written document complies with the laws in any state where she may be laid to rest.

D. State Case Law

Despite statutory guidance, recent case law shows that courts still struggle with determining disposition of a decedent's body. These cases show how courts differ in their approaches in balancing the decedent's wishes, the rights of third parties to dictate someone's burial or funeral, and public policy.

In *Bruning v. Eckman Funeral Home*, a New Jersey court determined that a decedent's intentions could be subordinated to the wishes of others.[57] The decedent, Mr. Bruning, was married and had never legally divorced his wife, despite the fact that they had stopped living together long before his death.[58] In fact, Mr. Bruning lived with Denise Helstowski "[f]or at least six years before his death."[59] In 1972, Mr. Bruning bought four burial plots for his family.[60] In 1993, he bought a mausoleum, stated that he wanted to be buried there, signed a directive that gave his burial plots to his granddaughter, and said, "[M]y final burial will be with my beloved Denise Helstowski."[61] After Mr. Bruning's death in 1996, Mrs. Bruning filed a complaint seeking to enjoin Helstowski and the funeral home from making the funeral arrangements.[62]

At that time, New Jersey's statute gave the right of sepulchur of a decedent's body to the surviving spouse, "unless other directions ha[d] been given by the decedent or by a court."[63] The court, examining the statute's legislative history, determined that the phrase "other directions" was not limited to wills or properly executed writings but could include oral and written testamentary or nontestamentary statements.[64] Yet even if a person made such a statement, "the directions [were] not necessarily controlling. . . . When a decedent's expressed intentions [were] challenged, 'consideration must be given to the rights and feelings of those . . . [in] relationship to, or association with, the decedent, such as his surviving spouse, relatives, and friends.'"[65] Thus,

57. 693 A.2d 164, 168 (N.J. Super. Ct. App. Div. 1997).

58. *Id.* at 165.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 166.

63. *Id.* (emphasis omitted) (quoting N.J. STAT. ANN. § 8A:5-18 (1996) (repealed 2003)).

64. *Id.*

65. *Id.* at 168 (quoting Frank D. Wagner, Annotation, *Enforcement of Preference Expressed by Decedent as to Disposition of His Body After Death*, 54 A.L.R.3d 1037, 1044 (1974)).

despite a clear written statement from Mr. Bruning regarding his desire to be buried with Helstowski, the court remanded for trial on the issue of Mr. Bruning's intentions in order to give due consideration to Mrs. Bruning's position.[66]

The issue of survivors' interests also arises when legally separated or divorced parents disagree on division of the cremated remains of their child. In *In re Estate of K.A.*, the child, K.A., was killed in an automobile accident.[67] K.A.'s mother informed the father and the funeral home that before her death K.A. stated that she wanted to be cremated with her ashes spread on the coasts of California, North Carolina, and Florida.[68] Though both parents authorized cremation, the father challenged dividing up the ashes.[69] The Court of Appeals of Indiana examined two statutes, one listing the priority order to determine a decedent's final disposition and the other indicating the order of authorizing agents for cremation.[70] Both gave a decedent's surviving parents priority in the absence of a surviving spouse or adult children;[71] for cremation, either parent could serve as an authorizing agent unless one parent made a written objection to the crematory authority.[72] In this case, the appellate court upheld the trial court's equal division of K.A.'s remains, noting "the sensitive nature and the specific facts of this case."[73] The court noted that K.A.'s wishes and her mother's plan to carry them out allowed for dividing up the ashes, that neither parent had a stronger claim to the ashes under the statutes, and that division of remains was common and acceptable for cremation.[74] The court also noted that the trial court had properly considered K.A.'s and her parents' wishes.[75]

A case with similar facts but the opposite result is a Pennsylvania case, *Kulp v. Kulp*.[76] During a divorce action, the trial court ordered division of the cremated remains of Mr. and Mrs. Kulp's only child.[77] Mr. Kulp appealed, seeking to keep all the remains together and place them at a burial site.[78] Pennsylvania's statutory law gave the next of kin the right of sepulcher if no

66. *Id.*

67. 807 N.E.2d 748, 749 (Ind. Ct. App. 2004).

68. *Id.*

69. *Id.*

70. *Id.* at 750-51 (citing IND. CODE ANN. §§ 25-15-9-18, 23-14-31-26(a)(3) (West, Westlaw through 2004 Reg. & Spec. Sess.)).

71. *Id.* (citing §§ 25-15-9-18, 23-14-31-26(a)(3)). The cremation provision actually gave top priority to someone with the decedent's health care power of attorney. § 23-14-31-26.

72. *In re Estate of K.A.*, 807 N.E.2d at 751 (citing § 23-14-31-26(a)(3)).

73. *Id.*

74. *Id.*

75. *Id.*

76. 920 A.2d 867, 873 (Pa. Super. Ct. 2007).

77. *Id.* at 868-70.

78. *Id.* at 868-69.

surviving spouse and no evidence of "enduring estrangement, incompetence, contrary intent or waiver and agreement" existed.[79] The court noted that the priority order for "next of kin" followed intestacy law – in effect, if no surviving spouse, then to the decedent's issue; if no issue, then to his parents.[80] The court acknowledged that the "rights and feelings of the next of kin are paramount" and noted that both Mr. and Mrs. Kulp had equally important rights as such.[81] Yet unlike the Indiana court in *In re Estate of K.A.*,[82] Mr. Kulp's opposition and the "extremely sensitive nature of this issue" led the Superior Court of Pennsylvania to conclude that the trial court had abused its discretion in ordering division of the remains.[83] In doing so, the trial court had improperly sought to "override the desires" of Mr. Kulp.[84]

In comparing *In re Estate of K.A.* to *Kulp*, the similarities are striking. In both cases, the courts faced similar factual situations and applied statutes that gave surviving parents equal rights in their child's remains.[85] Both courts referred to the "sensitive nature" of the dispute as one reason supporting their decisions.[86] The most plausible reason as to why the *In re Estate of K.A.* court found division proper yet the *Kulp* court deemed it an abuse of discretion is that in *In re Estate of K.A.*, just a few months before her own death, the decedent had told her mother, mother's fiancé, and sibling after attending a funeral that she wished to have her ashes scattered in three different locations.[87] Since courts favor giving effect to a decedent's plans when possible, evidence of K.A.'s intent and the mother's willingness to comply with her wishes, as opposed to the lack of any such evidence in *Kulp*, seems to have tipped the scale in favor of division. Had K.A. not made such a statement, the court may have given more weight to the father's arguments against division, just as the court did in *Kulp*. The fact that the court of appeals in *Kulp* overturned the trial court's decision to divide up the ashes (because the father disputed division) suggests that it is possible that a parent may be excluded entirely when there is no statement from the decedent to trump the parents' claims.

Yet another case in which the court had to break a tie between a decedent's next of kin with equal standing is the Alabama case of *McRae v.*

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79. *Id.* at 871 (quoting 20 PA. CONS. STAT. ANN. § 305(c) (Purdon, Westlaw through Reg. Sess. Act 2006-189 & 2005-2006 1st Spec. Sess. Act 1)).

80. *Id.* at 871 n.2 (citing 20 PA. CONS. STAT. ANN. §§ 305(e), 2103 (Purdon, Westlaw through Reg. Sess. Act 2006-189 & 2005-2006 1st Spec. Sess. Act 1)).

81. *Id.* at 873.

82. 807 N.E.2d 748 (Ind. App. 2004). *See supra* notes 67-75 and accompanying text.

83. *Kulp*, 920 A.2d at 873.

84. *Id.*

85. *See supra* notes 68-74, 76-83 and accompanying text.

86. *See supra* notes 73, 83 and accompanying text.

87. *In re* Estate of K.A., 807 N.E.2d 748, 749 (Ind. App. 2004).

Booth.[88] In this case, the decedent's son and daughter disagreed on disposition – the son wanted immediate burial and interment, but the daughter wanted to keep the body in cold storage until an autopsy was done to establish cause of death.[89] After the Alabama Court of Civil Appeals discussed the common law principle that the right of sepulcher passed to a decedent's surviving spouse, then to next of kin, it noted that the parties in this case were of "equal kinship to the decedent."[90] Additionally, the court explained that a statute describing the priority order of those authorized to exercise the right of sepulcher was not dispositive in resolving a conflict among persons of the same degree of kinship or level of priority.[91] The court of appeals upheld immediate interment of the body, citing the fact that the daughter had not established that an autopsy was required by statute and the "public policy favoring prompt and decent burial of the dead."[92] The court further noted that, as a practical matter, quick interment outweighed the burden of continuing to store the decedent's remains for ninety-five dollars a day until the son agreed to an autopsy.[93] Interestingly, even though the law did not support the daughter's argument for an autopsy, the Alabama court emphasized the public policy of immediate burial as the deciding factor in a dispute between two parties of equal degrees of kinship.[94]

Public policy also arguably stood as the basis for the New York Superior Court's decision in *Maurer v. Thibeault*, in which the court found that a decedent's husband did not meet the definition of "surviving spouse" under New York law because he and the decedent were estranged at the time of her death.[95] The decedent, Wendy, was found dead in her home on May 26, 2008.[96] Wendy's mother wanted to have her buried in her Pennsylvania hometown, but Wendy's husband claimed that she wanted her cremated ashes scattered at the home where he, Wendy, and their son lived.[97] Wendy's mother argued that, at the time of her death, Wendy was sufficiently estranged from her husband because she had obtained an order of protection against him in April 2008 and had filed for divorce.[98]

Under New York Public Health Law Section 4201, the right to control disposition went, in order, to someone designated in a written instrument,

88. 938 So.2d 432, 434 (Ala. Civ. App. 2006).
89. *Id.* at 433.
90. *Id.* at 433-34.
91. *Id.*
92. *Id.* at 435.
93. *Id.*
94. *Id.*
95. 860 N.Y.S.2d 895, 898-99 (N.Y. Sup. Ct. 2008).
96. *Id.* at 895.
97. *Id.*
98. *Id.* at 896.

surviving spouse, domestic partner, adult children, and parents.[99] The court construed the statute's phrase "surviving spouse" in light of prior case law, which indicated that the term did not include those "separated or estranged from their partners at the time of death."[100] The court determined that, based on Wendy's protection order, divorce action, and repeated statements that her husband would try to harm or kill her, "[t]here c[ould] be little doubt that Wendy and [her husband] were both 'separated' and 'estranged,' in every practical sense of those words."[101] As such, Wendy's husband was not a "surviving spouse" and lacked priority to dispose of her remains.[102] The court then granted right of burial to Wendy's mother.[103]

One case that supports a public policy of considering a decedent's close, personal relationships outside her immediate family is *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc.*[104] Michael Stewart and Drew Stanton had lived together as partners for five years in New York.[105] In fact, Stanton previously had executed a will giving everything to Stewart and appointing him executor of his estate.[106] After Stanton's death in July 1993, his mother and brother took possession of his body, intending to conduct an Orthodox Jewish funeral.[107] Stewart sought an emergency order to stop them and get possession of Stanton's remains.[108] Stewart argued "that Stanton was alienated from his mother and brother[,] . . . shunn[ed] his Jewish heritage," had repeatedly stated that he wanted cremation, and did not want a religious funeral.[109] Though the parties settled the matter by agreeing to cremate Stanton's body and divide the ashes,[110] the court noted that "the possibility of further litigation, the lack of current judicial gloss on the subject, and the timeliness of the issues involved here" made it appropriate to write an opinion as a guide to other courts and same-sex couples facing the same "tragic situation."[111]

The court stated that a family's right of disposition was not absolute, especially in light of a decedent's right to dictate his own final disposition and strained family relationships.[112] Furthermore, it noted that courts typically

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99. *Id.* at 895-96 (citing N.Y. PUB. HEALTH LAW § 4201 (McKinney, Westlaw through L. 2008, chs. 1-6, 9-17)).

100. *Id.* at 897.

101. *Id.* at 898-99.

102. *Id.* at 899.

103. *Id.*

104. 606 N.Y.S.2d 965, 966 (N.Y. Sup. Ct. 1993).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 966.

109. *Id.* at 966-67.

110. *Id.* at 969.

111. *Id.* at 966.

112. *Id.* at 967-68.

emphasize the importance of following a decedent's wishes as well as "the lack of formality required" to communicate his intentions.[113] The court held that Stewart had standing to challenge Stanton's relatives' right to control disposition because "not allowing [Stewart] standing to represent Stanton's final wishes would not only ignore the principles enunciated to protect those wishes, but would also illustrate a callous disregard of Stanton and Stewart's relationship."[114] The court asserted that "the close, spousal-like relationship that existed between the Plaintiff and his 'significant other'" supported its decision.[115]

The above survey of cases shows that courts with statutes on the right of sepulcher first rely on statutory law to determine the default priority order for those authorized to exercise the right. Courts then consider other factors when deciding who has the correct, or stronger, claim for right of sepulcher: actual ties outside the family,[116] the interests of survivors balanced with a decedent's wishes,[117] and public policies like immediate interment.[118] Not unlike statutory approaches to the problem of the right of sepulcher, the case law can be varied and inconsistent. The cases discussed above do acknowledge, to some extent, the importance of giving effect to a decedent's wishes regarding who has the right of sepulcher and how she may exercise it. Whether a court will ultimately enforce those wishes over the protests of survivors, however, is a little more uncertain.

III. RECENT DEVELOPMENTS IN MISSOURI

Missouri initially enacted its statutory right of sepulcher in 2003, with the right vesting first in the surviving spouse, followed by surviving adult children, parents, adult siblings, those in the next degree of kinship, a person willing to assume the financial burden, and the county coroner or medical examiner.[119] Although a person could designate someone as her closest next of kin by a signed, dated, verified, and witnessed written document, her designation was subject to rejection by any surviving spouse, parents, children, or siblings.[120] A legislative summary indicates that this law was enacted because funeral homes needed guidelines establishing whose instructions took

113. *Id.*

114. *Id.* at 968.

115. *Id.* The court went on to state that the lack of any written evidence of Stanton's wishes would have made Stewart's case very difficult. *Id.* At the same time, statements about wanting a non-religious cremation showed that "Stanton was at least uncertain about what he desired." *Id.* at 968-69.

116. *See, e.g.*, *supra* notes 104-15 and accompanying text.

117. *See, e.g.*, *supra* notes 57-75 and accompanying text.

118. *See, e.g.*, *supra* notes 88-94 and accompanying text.

119. H.B. 394, 92d Gen. Assem., 1st Reg. Sess. (Mo. 2003) (codified at MO. REV. STAT. § 194.119.2 (Supp. 2004) (amended 2008)).

120. §§ 194.119.2(5), 194.119.6, 194.119.8 (Supp. 2004) (amended 2008).

precedence when multiple parties claimed the right to determine a decedent's disposition.[121]

The Missouri legislature approved an amendment to Missouri Revised Statute Section 194.119 in 2008.[122] Governor Matt Blunt signed Senate Bill 1139 on July 10, 2008, and the new version became effective on August 28, 2008.[123] Missouri Revised Statute Section 194.119 now states,

> [T]he term "next-of-kin" means the following persons in the priority listed if such person is eighteen years of age or older, is mentally competent, and is willing to assume responsibility for the costs of disposition: (1) An attorney in fact designated in a durable power of attorney wherein the deceased specifically granted the right of sepulcher over his or her body to such attorney in fact . . . .[124]

State Senator Jolie Justus, who proposed the amendment, noted that giving top priority to someone named under a durable power of attorney benefitted not only gay and lesbian couples but also unmarried elderly couples and those who did not want family interference with their funeral arrangements.[125] She stated, "I'm interested in all of the populations that are affected, and so are other senators. . . . No one saw it as [a lesbian, gay, bisexual, and transgender[126]] issue. They saw it as an end-of-life issue."[127]

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121. *Summary of the Committee Version of the Bill: H.B. 394 – Designation of Next-of-Kin*, 92d Gen Assem. (Mo. 2003) (House Comm. on the Judiciary). *See also* Kelly Wiese, *New Missouri Law a Victory for Gay Rights*, KAN. CITY DAILY REC., Aug. 6, 2008, *available at* 2008 WLNR 25680625 (reporting comments made by Missouri Senator Jolie Justus).

122. S.B. 1139, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008) (codified at MO. REV. STAT. § 194.119 (Supp. 2008)).

123. *Id. See also* Adriane Crouse, Missouri State Senate, Current Bill Summary: SB 1139 – Revises the Uniform Anatomical Gift Act, http://www.senate.mo.gov /08info/BTS_Web/Bill.aspx?SessionType=R&BillID=110568 (last visited Mar. 12, 2009).

124. § 194.119(2) (Supp. 2008). To establish a durable power of attorney under Missouri law, the instrument must be labeled "Durable Power of Attorney" and have language of durability to ensure that the Power of Attorney remains effective upon the principal's incapacitation. *Id.* § 404.705.1(1)-(2) (2000). The principal then must sign, date, and acknowledge the instrument, as well as get the document notarized. *Id.* § 404.705.1(3) (2000).

125. *See* Wiese, *supra* note 121.

126. Merriam Webster's Online Dictionary, http://www.merriam-webster.com /dictionary/LGBT (last visited Mar. 12, 2009).

127. Wiese, *supra* note 121.

IV. DISCUSSION

A. Advantages and Unresolved Issues of the Amended Statute

The 2008 amendment to Missouri Revised Statute Section 194.119 is definitely an improvement over previous law because it gives a decedent a means to dictate who will be in charge of her funeral arrangements.[128] A decedent can thus designate someone she trusts or treats as family regardless of any familial and marital ties. Another advantage includes the convenience of having one instrument that lets a principal appoint a health care agent, funeral planning agent, and someone to make anatomical gifts, which all deal with control over the principal's body.[129] Also, most people are familiar with the concept of a durable power of attorney, so such instruments are likely easier to follow upon the principal's death.[130]

For the uninformed Missouri resident, however, this law still presents several limitations and pitfalls. For instance, a decedent may fail to create a durable power of attorney, fail to execute the power of attorney properly, fail to grant expressly the right of sepulcher to the agent, or neglect to name a substitute agent. The decedent's designated agent may even later refuse to exercise that right. If one of these situations occurs, her survivors will have to follow the Section 194.119 "family paradigm" default rules for the right of sepulcher.[131] These default rules, often modeled after intestacy law, have not adapted to address a modern decedent's needs or a society with an expanding definition of who constitutes "family" and "spouse." Default rules such as Missouri's are particularly burdensome if the decedent was estranged from her relatives or engaged in relationships such as a same-sex civil union or unmarried cohabitation but failed to act to avoid these rules.

Case law from other states shows that surviving friends and family may have some remedy in the courts. *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc.*,[132] *Maurer v. Thibeault*,[133] and *Bruning v. Eckman Funeral Home*[134] indicate that, while some courts give weight to a person's actual relationships, familial ties often prevail.[135] For instance, the New Jersey Court of Appeals in *Bruning* required the lower court to consider the interests of the decedent's wife, despite a clear written statement that the decedent

128. *Compare* § 194.119 (Supp. 2004) *with* § 194.119 (Supp. 2008). *See supra* notes 122-23 and accompanying text.

129. *See* Kester, *supra* note 21, at 598.

130. *See id.*

131. Foster, *supra* note 8, at 1379.

132. 606 N.Y.S.2d 965 (N.Y. Sup. Ct. 1993).

133. 860 N.Y.S.2d 895 (N.Y. Sup. Ct. 2008).

134. 693 A.2d 164 (N.J. Super. Ct. App. Div. 1997).

135. *See supra* notes 65-66, 101-103, 112-115 and accompanying text.

wished to be buried with his longtime live-in girlfriend.[136] Likewise, the New Jersey Court of Appeals in *Stewart* noted that lack of written evidence of the decedent's wishes made the claim of his partner weaker than his mother and brother's, despite evidence of strained familial relations.[137] These cases demonstrate that, under the amended Missouri law, an attorney-in-fact may still face opposition from the decedent's surviving family, who can contest the instrument on such grounds as lack of capacity or undue influence or challenge the agent for failing in her fiduciary duties of loyalty and due care.

Besides not giving effect to a decedent's actual intentions and relationships, the default rules in Missouri Revised Statute Section 194.119 are problematic because they provide no guidance when people in the same priority tier disagree over the means of disposition.[138] The parental dispute in *Kulp v. Kulp*,[139] as well as the Illinois cases cited at the beginning of this Article,[140] show just how increasingly common it is for these fights to reach the courts – and how difficult they can be to resolve. Lacking any statutory guidance, a court in Missouri likely would have no choice but to resort to an approach similar to that used in *Kulp* and weigh the parties' interests just to break a tie. These cases, however, illustrate that such an analysis takes far too long and may not give due consideration to the decedent's own wishes.[141]

Furthermore, giving effect only to a power of attorney to avoid the default priority order of Missouri Revised Statute Section 194.119 fails to contemplate problems that may arise in trying to enforce a decedent's directions or appointment of agent in a different state than Missouri. As not all states have the same requirements for executing a durable power of attorney, an out-of-state funeral home or medical examiner may mistakenly treat a valid power of attorney in Missouri as an invalid designation of the person with authority to dispose of the decedent's remains. Iowa, for example, has strict

136. 693 A.2d at 168.

137. 606 N.Y.S.2d at 968-69.

138. *See* Murphy, *supra* note 14, at 404 (describing Washington Revised Code § 68.50.160, which, like Missouri's statute, lists a priority order but no standards for addressing tiebreakers).

139. 920 A.2d 867, 873 (Pa. Super. Ct. 2007).

140. *See* Kunz & Kovac, *supra* note 2; *Funeral Home Fed up with Fight over Body*, *supra* note 5.

141. Missouri, of course, is not alone in having a statute that is silent on this issue. Kansas's provision, which mirrors Missouri's in giving priority to a designation in a durable power of attorney, does not address this, and neither does Illinois's or Iowa's, among others. *See* KAN. STAT. ANN. § 65-1734 (West, Westlaw through 2009 Reg. Sess.); 755 ILL. COMP. STAT. ANN. 65/5 (West, Westlaw through P.A. 96-853, with the exception of 96-838, 96-839, 96-843, 96-845 to 96-848, 96-850, and 96-852, of the 2009 Reg. Sess.); IOWA CODE ANN. § 144C.5 (West, Westlaw through 2009 Reg. Sess.). Currently, the only three jurisdictions with statutes listing factors a court should consider for a dispute among people in the same priority level are the District of Columbia, Minnesota, and Pennsylvania. *See* Rodriguez-Dod, *supra* note 8, at 318.

limitations on who can be named designee and requires the document to have two people not named in the instrument witness the principal's signature and sign in the presence of each other.[142] Arkansas also requires two witnesses.[143] Missouri, however, does not.[144] Kansas will uphold a durable power of attorney if it is either witnessed by two people (with several exclusions) or notarized.[145]

Besides different state approaches to executing a power of attorney, the variety of ways a person may document her instructions in states other than Missouri could prove problematic if that person then moves to Missouri and her survivors try to enforce her out-of-state directions. California, for example, will generally accept any declaration that "set[s] forth clearly and completely the final wishes of the decedent in sufficient detail so as to preclude any material ambiguity."[146] Illinois accepts several instruments besides a power of attorney that expressly grant the right of sepulcher to the agent, including a will, prepaid funeral or burial contract, and valid cremation authorization form.[147] Some states, such as Indiana, even permit oral instructions.[148] It is not altogether clear to what extent these kinds of instructions would be accepted by courts and relevant businesses (e.g., hospitals, funeral homes, crematories, cemeteries, morgues) in Missouri. While the Missouri Court of Appeals has stated that it will consider a decedent's oral and written wishes in light of all circumstances,[149] clarifying the statute could help prevent litigation in the first place or at least give Missouri courts better guidance. When considering the effectiveness of a Missouri declaration in other states, or vice versa, the widely varying requirements in each state mean that a decedent is not guaranteed to get what she wants if she happens to move to another state prior to her death.

B. Ways to Improve Missouri's Right of Sepulcher

The simplest solution to provide people with more flexibility in dictating their post-death arrangements is for the Missouri legislature to broaden the ways that residents can dictate their final disposition by statutorily legiti-

142. IOWA CODE ANN. § 144C.6 (West, Westlaw through 2009 Reg. Sess.).

143. ARK. CODE ANN. § 20-17-102(a)(2) (West, Westlaw through 2009 Reg. Sess.).

144. MO. REV. STAT. § 404.705.1 (2000).

145. KAN. STAT. ANN. § 58-632 (West, Westlaw through 2009 Reg. Sess.).

146. CAL. HEALTH & SAFETY CODE § 7100.1(a) (West, Westlaw through c. 652 of the 2009 portion of the 2009-2010 Reg. Sess.).

147. 755 ILL. COMP. STAT. ANN. 65/40(a) (West, Westlaw through P.A. 96-662 of 2009 Sess.).

148. *See In re* Estate of K.A., 807 N.E.2d 748, 749, 571 (Ind. Ct. App. 2004) (court gave effect to the decedent's oral wishes to be cremated and divided).

149. Rosenblum v. New Mt. Sinai Cemetery Ass'n, 481 S.W.2d 593, 595 (Mo. App. 1972).

mizing instructions left in wills, other written or notarized documents, preneed funeral contracts, and possibly even oral statements. Allowing different kinds of documents that other states also recognize aids a decedent in enforcing her wishes both in and out of Missouri. This can prove crucial because, as Kester observes, many people wait until hospitalization to execute a durable power of attorney, which is not always the best time to decide funeral arrangements.[150] Yet if a designation for the right of sepulcher is not addressed before execution of the instrument, the principal could very well forget to include the statutorily required express designation. Allowing other written instructions will give Missourians more flexibility as to what documents are enforceable when planning their own funerary arrangements. Moreover, legitimizing other forms of instructions should help survivors, funeral homes, and others avoid turning to the courts to determine or dispute what the decedent wanted.

Legitimizing more testamentary and nontestamentary instructions, while easiest, may not be sufficient to guide courts. This seems especially likely if the decedent made invalid or no statements, had multiple marriages and children from former marriages, or had survivors within the same degree of relationship under the default rule. In the absence of such evidence, Missouri courts should give more weight to a decedent's established ties and not just use them as a last resort or tiebreaker. Missouri may want to adopt as a default rule Minnesota's list of factors that courts must consider when resolving conflicts, which includes "the degree of the personal relationship between the decedent and each of the persons in the same degree of relationship to the decedent" and "the degree to which the arrangements and final disposition will allow for participation by all who wish to pay respect to the decedent."[151] An approach that emphasizes those with whom the decedent was closest should, more often than not, comply with a decedent's desires, avoid rewarding estranged family members, and hopefully enforce the public policy of immediate interment.[152]

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150. Kester, *supra* note 21, at 598-99.

151. MINN. STAT. ANN. § 149A.80.5(2), (4) (West, Westlaw through 2009 Reg. Sess.).

152. Small and simple changes may not be sufficient. Some commentators argue for a larger scheme – namely, a uniform bodily remains act – because it will provide all states with a model to follow and ensure consistency in enforcing instruments across state lines. *See, e.g.*, Kester, *supra* note 21, at 597-99; Murphy, *supra* note 14, at 383 ("[S]tates vary in their laws on the disposition of remains, provided they even have such laws. A uniform law patterned after the Uniform Anatomical Gift Act or existing state law would provide much-needed certainty in this area."). The National Conference of Commissioners on Uniform State Laws has yet to create and approve a uniform bodily remains act, and, even if drafted, the National Conference's promulgation of a uniform act would be no guarantee that Missouri or other state legislatures would adopt it. While this is arguably the most comprehensive approach, it is not the most practical. As people continue to live longer and experience ever-expanding

V. CONCLUSION

While the 2008 amendment to Missouri Revised Statute Section 194.119 acknowledges that a decedent's wishes for her final disposition deserve enforcement over the objections of survivors, the statute does too little in light of its failure to allow for other testamentary and nontestamentary instructions (whether created in Missouri or not), address disputes among people with the same level of priority, and give preference to a decedent's actual relationships. To fix this, the Missouri legislature should consider amending the statute to validate other types of instructions and guide courts to place more importance on those whom the decedent treated as family, regardless of blood or marital ties. Not only will such provisions give people more confidence that their intentions will be carried out after their death, but they also should help to eliminate the kinds of protracted disputes among survivors that all too often fill the newspapers. Certainty in the law is vital to ensuring that, when a decedent is finally laid to rest, she truly is able to rest in peace.

KIMBERLY E. NAGUIT

familial relationships, surviving friends and family, funeral homes, and courts in Missouri need current guidance on how best to balance the wishes of the decedent against those of her survivors.