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## Last Rights Denied: Right of Sepulcher in Springing Power of Attorney for Health Care Invalidated

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## NOTE

# Last Rights Denied: Right of Sepulcher in Springing Power of Attorney for Health Care Invalidated

*In re Estate of Collins*, 405 S.W.3d 602 (Mo. App. W.D. 2013)

ALICE HASELTINE\*

### I. INTRODUCTION

A cancer patient with deteriorating health prepares for her physical and mental decline by executing a durable power of attorney for health care. The form grants the patient's agent both the right to make health care decisions during the patient's lifetime and the "right of sepulcher" – the authority to control the final disposition of the patient's body.<sup>1</sup> The powers in the form are "springing," meaning the authority of the agent is ineffective until the patient is certified as having lost her mental capacity.<sup>2</sup> The patient dies shortly thereafter in an accidental and instantaneous death. Because the patient was not incapacitated prior to her death, the durable power remains ineffective, and the agent is refused the right to dispose of the patient's body. While this result is unexpected, it reflects the current state of the law in Missouri.<sup>3</sup>

A recent decision from the Missouri Court of Appeals, *In re Estate of Collins*, holds that when a competent principal under a durable power dies suddenly without the required doctor's certification of incapacity, the agent's right of sepulcher does not vest, and therefore, the agent is never granted authority to dispose of the principal's remains.<sup>4</sup> The practical effect of this decision is to invalidate the rights of sepulcher in prevalent springing durable powers of attorney for health care. In light of this decision, all existing springing durable powers of attorney for health care in Missouri should be revisited to ensure that the instruments give effect to the principals' intentions regarding the disposition of their remains. Additionally, the Missouri legislature should enact legislation that will remedy durable powers of attorney for health care that were drafted prior to *Collins*.

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1. MO. REV. STAT. § 194.119.1 (2000).

2. MO. REV. STAT. § 404.825 (2000).

3. See *In re Estate of Collins*, 405 S.W.3d 602, 607 (Mo. App. W.D. 2013).

4. *Id.*

## II. FACTS AND HOLDING

On June 12, 2012, Betty Jean Collins executed a Durable Power of Attorney for Health Care Choices and Health Care Directive.<sup>5</sup> Four short days later, Collins was involved in an automobile collision.<sup>6</sup> She died instantaneously, and a legal battle over the disposition of Collins' body ensued between her daughters, Robyne Ridley-McKinney and Charlotte Ridley, and her grandniece, Tina Shoemaker.<sup>7</sup>

Collins' durable power of attorney was stock – provided free by a local health clinic – and appointed Collins' grandniece, Tina Shoemaker, “as [her] agent for health care choices when [she is] unable to make decisions or communicate her wishes.”<sup>8</sup> The document provided, “This durable power of attorney becomes effective when two physicians certify that I am incapacitated and unable to make and communicate health care choices.”<sup>9</sup> The document additionally explained, “You may choose to have one physician, instead of two, determine whether you are incapacitated. If you wish to exercise this option . . . initial here.”<sup>10</sup> Collins initialed the provision, indicating that a single physician's certification would be sufficient to give effect to the document's provisions.<sup>11</sup> When effective, this instrument afforded Collins' agent certain powers to:

- Consent, refuse or withdraw consent to artificially supplied nutrition and hydration.
- Make all necessary arrangements for health care on [Collins'] behalf. This includes admitting [Collins] to any hospital, psychiatric treatment facility, hospice, nursing home or other health care facility.
- Hire or fire health care personnel on [Collins'] behalf.
- Request, receive and review [Collins'] medical and hospital records. Take legal action if necessary to do what [Collins] directed.
- Carry out [Collins'] wishes regarding autopsy and organ donation, *and decide what should be done with [her] body.*<sup>12</sup>

Upon Collins' death, Shoemaker exercised the power of sepulcher that she believed was granted to her by Collins' durable power of attorney and

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5. *Id.* at 603.

6. *Id.*

7. *Id.*

8. *Id.* at 603 nn.1-2.

9. *Id.* at 603.

10. *Id.*

11. *Id.*

12. *Id.* at 604 (emphasis added).

made arrangements to have Collins' body cremated.<sup>13</sup> The Ridleys, who desired to have their mother buried in a family burial plot, contested the action, filing a Motion for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction to restrain Shoemaker from proceeding with cremation.<sup>14</sup> The Circuit Court of Benton County issued the temporary restraining order and heard arguments for preliminary and permanent injunctions.<sup>15</sup>

The Ridleys argued that an injunction was proper because Shoemaker never had authority to act as Collins' attorney in fact under the durable power of attorney.<sup>16</sup> The Ridleys asserted that, because a physician did not certify Collins' incapacity, the agent's authority failed to take effect.<sup>17</sup> In the absence of an attorney in fact, the Ridleys contended that they – as Collins' daughters and closest kin – had the authority to determine the disposition of their mother's body.<sup>18</sup>

Shoemaker argued that she had the authority to decide the disposition of Collins' body because a physician's certification of incapacity was not required to give effect to the provision that allowed Collins' agent to "decide what should be done with [her] body."<sup>19</sup> Shoemaker contended that an alternative interpretation of this provision would be contrary to statutory language that gives an attorney in fact under a durable power of attorney a priority to exercise the right of sepulcher on behalf of the principle.<sup>20</sup> Further, Shoemaker presented testimony indicating that Collins desired to be cremated and that Collins executed the durable power of attorney to ensure that her burial preferences would be observed.<sup>21</sup> Shoemaker argued that the court's interpretation of the document should effectuate these apparent intentions.<sup>22</sup>

The trial court found the durable power of attorney effective and granted Shoemaker the right to Collins' remains.<sup>23</sup> The court did not elaborate on its reasoning; however, the court did observe from the bench, "[I]t does say the power of attorney becomes effective when two physicians certify . . . [that an

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 605.

19. *Id.* at 604.

20. *Id.* The "statutory language" that Shoemaker uses as the basis of her argument is unspecified in the opinion. Shoemaker is presumably referring to a Missouri Revised Statute that sets forth a hierarchal list of individuals entitled to exercise the right of sepulcher. MO REV. STAT. § 194.119 (Supp. 2011). At the top of the list is "[a]n 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 an attorney in fact." *Id.*

21. *Collins*, 405 S.W.3d 602 at 606-07.

22. *Id.* at 607.

23. *Id.* at 603.

individual is] unable to communicate health care choices. I'm kind of thinking the coroner saying 'this person's dead' probably takes the place of that."<sup>24</sup>

The Ridleys filed an appeal in the Missouri Court of Appeals Western District.<sup>25</sup> Upon review, the instant court held that if a durable power of attorney explicitly provides that the agent's authority does not take effect until a physician conclusively determines incapacitation, and if the individual dies in a manner that is not preceded by a documented period of incapacity, the requisite condition precedent remains unsatisfied, and the agent's authority under the durable power of attorney does not go into effect.<sup>26</sup>

### III. LEGAL BACKGROUND

#### A. *A Property Right in the Human Body – The Historical Right of Sepulcher*

The right of sepulcher is “the right to choose and control the burial, cremation, or other final disposition of a human body.”<sup>27</sup> While the modern right of sepulcher is narrowly defined and widely acknowledged, the history of this right reveals courts' disagreement regarding the existence and scope of property rights in human remains.<sup>28</sup>

As early as 1690, John Locke proposed that an individual holds a property right in his body.<sup>29</sup> Yet, English common law declined to extend this concept to the recognition of property rights in human remains.<sup>30</sup> The idea that there could be a property right in human remains presented a procedural obstacle for the English court system: common law courts exercised jurisdiction over property, while the ecclesiastical courts had jurisdic-

24. *Id.* at 604 n.4 (quotation marks added).

25. *Id.* at 603.

26. *Id.* at 606.

27. MO. REV. STAT. § 194.119.1 (Supp. 2011).

28. 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, 395 (2007).

29. JOHN LOCKE, TWO TREATIES OF GOVERNMENT 287 (Peter Laslett ed., Cambridge University Press (1960)). John Locke writes, “Though the Earth and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. Thus no Body has any Right to but himself.” Locke suggested that the body was property of a “special sort, held in trust rather than as an individual owner.” Radhika Roa, *Property, Privacy, and the Human Body*, 80 B.U.L. REV. 359, 367 (2000).

30. Roa, *supra* note 29 at 396; *see, e.g.*, SIR WILLIAM BLACKSTONE, KNIGHT, THE LAW OF ENGLAND: IN FOUR BOOKS 537 (Banks & Co., Albany, N.Y. 1899) (“[T]hough the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains when dead and buried.”).

tion over matters pertaining to the human body.<sup>31</sup> The proposition that property rights exist in human remains blurred the lines between two distinct procedural realms.<sup>32</sup>

Reluctantly, American courts followed English precedent and declined to recognize a property right in human remains.<sup>33</sup> A 1912 decision from West Virginia is representative of the early American aversion to the British no-property rule.<sup>34</sup>

The real question is not the disposable, marketable value of a corpse or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order to decently bury it and secure its undisturbed repose. The dogma of the English ecclesiastical law, that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper moral sense, that its adoption would be an eternal disgrace to American jurisprudence.<sup>35</sup>

American courts' desire to abandon the British no-property rule<sup>36</sup> was magnified by the abandonment of the ecclesiastical courts in England<sup>37</sup> and the need for statutes regulating the disposal of bodies and recognizing damages for the disfigurement of human remains.<sup>38</sup> Despite disfavor for the British rule, American courts struggled to find a legal basis for the recognition of a property right in human remains.<sup>39</sup> A uniform theory was not adopted.<sup>40</sup> Some jurisdictions allowed recovery for injuries arising from the mistreatment of human remains through tort theory,<sup>41</sup> and a second group of jurisdictions redressed injuries through recognition of a quasi-property right in human remains.<sup>42</sup>

Jurisdictions that permitted recovery in tort for the mistreatment of human remains recognized some combination of the following causes of action:

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31. See Murphy, *supra* note 28.

32. See *id.* at 397-98.

33. *Id.* at 396; see, e.g., Snyder v. Snyder, 60 How. Pr. 368, 371 (N.Y. 1880) (“While there is property in the burial lot, in the monuments, in the ornaments and decorations of the deceased or his grave, there is none in the remains themselves.”).

34. 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).

35. Ritter v. Couch, 76 S.E. 428, 430 (W. Va. 1912); Murphy, *supra* note 28, at 398.

36. Murphy, *supra* note 28, at 398.

37. *Id.* at 397-98.

38. *Id.* at 398.

39. See Nwabueze, *supra* note 34, at 28.

40. *Id.* at 30-31.

41. Rao, *supra* note 29, at 386.

42. *Id.* at 385-86.

intentional mishandling of a human corpse, abuse of a dead body, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent or wrongful interference with a dead body.<sup>43</sup> While a plaintiff's options for bringing an action against a corpse were seemingly numerous, so too were the courts' restrictions on recovery.<sup>44</sup> Some courts required that plaintiffs prove awareness of the defendant's willful, wanton, and outrageous conduct.<sup>45</sup> Other courts refused to allow plaintiffs to recover when the defendant's behavior was merely negligent.<sup>46</sup> Recovery for mistreatment of human remains under tort liability was difficult and inconsistent.<sup>47</sup>

Not every jurisdiction recognized the desecration of human remains as a cognizable injury within tort law, and strict application of the British no-property rule left the spouse and next of kin of a desecrated corpse without a remedy.<sup>48</sup> Courts needed a theory – or fiction – for granting a remedy to “injured” relatives.<sup>49</sup> The quasi-property theory resulted.<sup>50</sup>

The concept of a quasi-property right is said to be “an invention by U.S. courts to help a deserving plaintiff.”<sup>51</sup> A quasi-property right is – as its name suggests – a limited right with little relation to property in its traditional sense.<sup>52</sup> A quasi-right in human remains affords the decedent's spouse or next-of-kin the right to recover damages resulting from misconduct toward the decedent's corpse but places two significant restrictions on the right of possession.<sup>53</sup> First, the decedent's spouse or next-of-kin is permitted to possess the body only for the purpose of proper burial.<sup>54</sup> Second, designated survivors are required to possess the corpse in accordance with the decedent's “manifest inter vivos intent.”<sup>55</sup>

Missouri courts are of the group that recognized a quasi-property right in human remains.<sup>56</sup> Early Missouri common law recognized a quasi-right in human remains; the “quasi” nature of this right is visible in Missouri courts'

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43. Nwabueze, *supra* note 34, at 29.

44. *Id.* at 30.

45. *Id.* at 31.

46. *Id.* at 29.

47. *Id.* at 29-30.

48. *Id.* at 30.

49. *Id.* at 30-31.

50. *Id.* at 31.

51. *Id.*

52. *Id.*

53. Ryan DeBoef, *Another One Bites the Dust: Missouri Puts to Rest Uncertainty About Anatomical Gift Immunity*, 70 MO. L. REV. 837, 842-43 (2005).

54. *Id.* at 843.

55. *Id.* at 843-44.

56. Kimberly E. Naguit, *Letting the Dead Bury the Dead: Missouri's Right of Sepulcher Addresses the Modern Decedent's Wishes*, 75 MO. L. REV. 249, 251 (2010).

treatment of recovery for damages to a corpse.<sup>57</sup> The damages recoverable were not for injury to the dead body.<sup>58</sup> Instead, because the next of kin held a mere quasi-property right in the decedent's corpse, the next of kin could merely recover for emotional injuries – not for physical damage to the corpse.<sup>59</sup> This restricted property right in human remains is referred to as the “right of sepulcher” and generally affords the decedent's spouse or next-of-kin the authority to dictate “the time, place, and manner of burial.”<sup>60</sup> Today, all jurisdictions recognize this right to receive a body and make arrangements for its burial.<sup>61</sup>

### B. Developments in Missouri Law

In 2003, Missouri enacted its first right of sepulcher statute.<sup>62</sup> This statute set forth a hierarchy under which individuals' right of sepulcher vested: the surviving spouse was at the top of the list, followed by surviving adult children, parents, adult siblings, individuals in the next degree of kinship, a person willing to assume the financial obligation, and, finally, the county coroner or medical examiner.<sup>63</sup> The statute provided that a person could designate someone as “next-of-kin” by executing a signed, dated, verified, and witnessed document.<sup>64</sup> The designated next-of-kin's right would vest only in the absence of spouse, parents, children, or siblings.<sup>65</sup>

Proponents of the 2003 law argued that the statute was necessary to clarify an existing “gray area in Missouri law and provide . . . certainty for both

57. *Patrick v. Emp'rs Mut. Liab. Ins. Co.*, 118 S.W.2d 116, 122 (Mo. Ct. App. 1938).

58. *Id.* (quoting *Hill v. Travelers Ins. Co.* 294 S.W. 1097, 1099 (Tenn. 1927)).

59. *Id.* (quoting *Hill*, 294 S.W. at 1099) (“The damages recoverable . . . are . . . measured by the . . . suffering of the plaintiff . . .”).

60. *Murphy*, *supra* note 28, at 396 (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)).

61. While the right of sepulcher is universally recognized, the extent of the right varies by state. *See, e.g.*, ARK. CODE ANN. § 20-17-102 (West 2012); CAL. HEALTH & SAFETY CODE § 7100.1 (West 2012); COLO. REV. STAT. § 15-19-104 (West 2012); 755 ILL. COMP. STAT. ANN. § 65/50 (West 2012); IND. CODE ANN. § 29-2-19-9 (West 2012); IOWA CODE ANN. § 144C.5 (West 2012); KAN. STAT. ANN. § 65-1734 (West 2012); KY. REV. STAT. ANN. § 367.97501 (West 2012); MINN. STAT. ANN. § 149A.80 (West 2012); MO. ANN. STAT. § 194.119 (West 2012); NEB. REV. STAT. ANN. § 38-1425 (West 2012); N.J. STAT. ANN. § 45:27-22 (West 2012); N.Y. PUB. HEALTH LAW § 4201 (McKinney 2012); OHIO REV. CODE ANN. § 2108.70 (West 2012); OKLA. STAT. ANN. § 1151 (2012); TENN. CODE ANN. § 34-6-204 (West 2012); TEX. HEALTH & SAFETY CODE ANN. § 711.02 (2012); VA. CODE ANN. § 54.1-2825 (West 2012).

62. MO. REV. STAT. § 194.119 (Supp. 2011).

63. *Id.* § 194.119.2.

64. *Id.* § 194.118.8

65. *Id.*



families and funeral homes,<sup>66</sup> and supporters specifically voiced their concern that funeral homes needed guidelines for giving deference to burial instructions when multiple parties claimed the right of sepulcher over a single body.<sup>67</sup> While many viewed the hierarchal scheme set forth in the 2003 law as an improvement, the law failed to accommodate individuals whose desires were inconsistent with the statutory scheme. This law proved particularly inadequate for lesbian and gay couples who preferred to afford their partners the right of sepulcher – rather than those related to them by consanguinity.<sup>68</sup>

In 2008, the Missouri legislature amended Missouri Revised Statute section 194.119.<sup>69</sup> The revision reallocated power and placed “[a]n attorney in fact designated in a durable power of attorney wherein the deceased specifically granted the right of sepulcher over his or her body or to such an attorney in fact . . .” at the top of the hierarchy.<sup>70</sup> For the first time, a person unrelated by affinity or consanguinity could be granted the right of sepulcher despite the existence of the decedent’s spouse, parent’s children, or siblings.<sup>71</sup> The implications of the change were felt beyond the gay community: the new law was beneficial to any individual whose sepulcher wishes conflicted with those of his family.<sup>72</sup>

### III. THE INSTANT DECISION

The threshold issue in *Collins* was whether a durable power of attorney that requires a physician’s certification of incapacity as a condition precedent to the effectiveness of the attorney in fact’s authority can spring into effect upon a corner’s certification of the individual’s death.<sup>73</sup> The court held that it cannot and explained that when the explicit condition precedent is not satis-

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66. 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), *available at* <http://www.house.mo.gov/billtracking/bills03/sumpdf/HB0394c.pdf>.

67. Naguit, *supra* note 56, at 263-64.

68. See Kelly Wiese, *New Missouri Law a Victory for Gay Rights*, KAN. CITY DAILY REC. (Aug. 6, 2008), <http://deathcarelaw.wp.lexblogs.com/wp-content/uploads/sites/274/2014/02/Daily-Record-KC-aug-082.pdf>.

69. S.B. 1139, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008) (codified at MO. REV. STAT. 194.119 (Supp. 2008)). Governor Matt Blunt signed the bill on July 10. Naguit, *supra* note 56, at 264. The new law became effective on August 28, 2008. MO. REV. STAT. §194.119.2 (Supp. 2008).

70. *Id.* at § 194.119.2.

71. *Id.*

72. See Wiese, *supra* note 68. Senator Justus, a Democrat from the tenth district, proposed the legislation. *Id.* Commenting on the new law, Justus stated, “[n]o one saw [this] as [a lesbian, gay, bisexual, and transgender] issue. They saw it as an end-of-life issue.” *Id.*; see also Naguit, *supra* note 56, at 264.

73. In re Estate of Collins, 405 S.W.3d 602, 603 (Mo. App. W.D. 2013).

fied, the instrument fails to take effect.<sup>74</sup> Collins died without her attorney in fact having the authority to act on her behalf.<sup>75</sup>

The court's analysis began with a fundamental explanation of the right of sepulcher. Missouri Revised Statute section 194.119 defines the "right of sepulcher" as "the right to choose and control the burial, cremation, or other final disposition of a dead human body."<sup>76</sup> The provision further provides that "[t]he next-of-kin of the deceased shall be entitled to control the final disposition of the remains of any dead human being."<sup>77</sup> The court explained that the statute sets forth a hierarchical scheme for determining a decedent's next-of-kin: at the top of the list is "[a]n 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."<sup>78</sup> Surviving children are lower in the hierarchy.<sup>79</sup> The court explained that, based on the text of section 194.119, Shoemaker – if indeed an authorized attorney in fact under Collins' durable power of attorney – was in the position of highest priority to determine the ultimate disposition of Collins' body.<sup>80</sup> Accordingly, the effectiveness of the attorney in fact's authority under Collins' durable power of attorney was paramount to the court's adjudication of each party's rights.<sup>81</sup>

In its analysis of Collins' durable power of attorney, the court offered some explanatory groundwork: "A durable power of attorney is essentially one that does not terminate in the event the principal becomes disabled or incapacitated."<sup>82</sup> The court further explained that durable powers of attorney are authorized by the Durable Power of Attorney Law of Missouri (DPALM) and must comply with the provisions provided therein.<sup>83</sup> Additionally, the court noted that Missouri has enacted the Durable Power of Attorney for Health Care Act (DPAHCA), which provides for the creation of durable powers of attorney that permit attorneys in fact to make general health care decisions on behalf of the principal.<sup>84</sup> The court noted that there is significant overlap between the DPALM and the DPHCA, as section 404.810 of the DPHCA incorporates several DPALM provisions by reference.<sup>85</sup> Most notably, the DPHCA incorporates section 404.710.6(8), which provides

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74. *Id.* at 607.

75. *Id.*

76. MO REV. STAT. § 194.119.1 (Supp. 2012).

77. *Id.* § 194.119.3.

78. *Collins*, 405 S.W.3d at 605; *see also* MO. REV. STAT. § 194.119.2.

79. MO. REV. STAT. § 194.119.2(4).

80. *Collins*, 405 S.W.3d at 605.

81. *Id.*

82. *Id.* at 605 (citing MO REV. STAT. § 404.703(4) (2000)).

83. *Id.*

84. *Id.*

85. "Section 404.710, section 404.714, section 404.705, subsections 1 and 2 of section 404.707, section 404.717, subsection 1 and 2 of section 404.723, section 404.727, and section 404.731 shall apply to powers granted under sections 404.800 to 404.865." MO REV. STAT. § 404.810 (Supp. 2011).

that “[a]ny power of attorney may grant power of authority to an attorney in fact to . . . exercise the right of sepulcher over the principal’s body under section 194.119.”<sup>86</sup>

The court established that the Durable Power of Attorney for Health Care Choices and Health Care Directive executed by Collins on June 12, 2012 was drafted in accordance with the requirements set forth in the DPHCA.<sup>87</sup> However, the court noted that a statutorily compliant, duly executed durable power of attorney did not conclusively establish Shoemaker’s status as attorney in fact.<sup>88</sup> The court explained, “[Section 404.714.8]<sup>89</sup> provides . . . that “[a]n attorney in fact may be instructed in a power of attorney that the authority granted shall not be exercised until, or shall terminate on, the happening of a future event, condition or contingency, as determined in a manner prescribed in the instrument.”<sup>90</sup> Collins’ durable power of attorney explicitly provided that it would only become effective when a physician certified Collins’ incapacity.<sup>91</sup>

The court reasoned that Collins could have chosen to execute a power of attorney that granted the right of sepulcher to Shoemaker without a condition precedent.<sup>92</sup> Relying on the durable power of attorney’s “clear, unambiguous language,” the court concluded that none of the provisions in Collins’ durable power of attorney came into effect because the condition precedent for the document was never satisfied.<sup>93</sup> The court further explained that Shoemaker’s contention that the durable power of attorney should be interpreted in light of Collins’ intent and her desire to be cremated fails because such an interpretation would run afoul of the parol evidence rule.<sup>94</sup>

In conclusion, the court reasoned, “A death certificate from a non-physician coroner is simply not the same thing as a physician’s certification of incapacity.”<sup>95</sup> Collins could have provided for a different condition precedent – or omitted one entirely.<sup>96</sup> Instead, she chose to execute a durable power of attorney that would only spring into effect under certain circumstances.<sup>97</sup> Because the circumstances never materialized, Shoemaker never be-

86. MO REV. STAT. § 404.710 (Supp. 2011).

87. *Collins*, 405 S.W.3d at 603.

88. *Id.* at 606.

89. This statute is found in the DPALM and is incorporated in the DPAHCA by reference. *See supra* text accompanying note 85.

90. *Collins*, 405 S.W.3d at 606.

91. *Id.* at 603.

92. *Id.* at 606.

93. *Id.*

94. *Id.* at 606-07 (citing *Blue Ridge Bank & Trust Co. v. American Ass’n of Orthodontics Foundation*, 106 S.W.3d 543, 549 (Mo. App. W.D. 2003)) (“Absent ambiguity the intent of the maker of a legal instrument is to be ascertained from the four corners of the instrument without resort to extrinsic evidence.”).

95. *Id.* at 607.

96. *Id.* at 606.

97. *Id.*

came Collins' attorney in fact.<sup>98</sup> Thus, the court held that the trial court erred as a matter of law when it concluded that Shoemaker was granted the right of sepulcher pursuant Collins' durable power of attorney.<sup>99</sup>

#### IV. COMMENT

The *Collins* decision creates a trap for the unwary. The practical effect of *Collins* is to invalidate the rights of sepulcher in springing durable powers of attorney for health care prepared not only by attorneys but also those provided by organizations as a service to people across the state of Missouri. In practice, *Collins* creates an unexpected result: when a competent principal under a durable power of attorney dies suddenly without the required doctor's certification, his or her agent's right of sepulcher does not vest, and the agent is, thus, never granted authority to dispose of the principal's remains. *Collins*' unanticipated result does not, however, stem from an unprecedented application of Missouri law. Instead, the result is surprising because the drafters of the instrument executed in *Collins* did not consider the effect of a sudden death on the principal's conveyance of the right of sepulcher. In light of *Collins*, legal practitioners and organizations that provide these forms and services should revisit all existing springing durable powers of attorney for health care to ensure that the instruments give effect to the principals' intentions regarding the final disposition of their remains. Further still, the Missouri legislature should consider enacting legislation that will remedy durable powers of attorney that are drafted in disregard – or without knowledge – of *Collins*.

##### A. *The Form at Issue*

The true significance of *Collins* is rooted in the universality of the language the court declared ineffective. The form executed by Collins explained, "This durable power of attorney becomes effective when two physicians certify that I am incapacitated and unable to make and communicate health care choices."<sup>100</sup> This formulaic language is virtually indistinguishable from that found in the Missouri Bar's Durable Power of Attorney For Health Care Choices & Health Care Directive, which provides, "This Durable Power of Attorney is effective when I am incapacitated and unable to make and communicate a health-care decision as certified by [a physician]."<sup>101</sup> While exact statistics regarding the distribution of the Missouri Bar form are un-

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98. *Id.* at 607.

99. *Id.*

100. *Id.* at 603-04.

101. Durable Power of Attorney for Health Care & Health Care Directive, MO. BAR, [http://www.mobar.org/uploadedFiles/Home/Publications/Legal\\_Resources/Durable\\_Power\\_of\\_Atorney/final-dpa-forms-fillable.pdf](http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Durable_Power_of_Atorney/final-dpa-forms-fillable.pdf) at 1 (last visited Mar. 2, 2014).

known, it is an undeniably prevalent form in Missouri.<sup>102</sup> The Missouri Bar form's popularity is likely attributable to its accessibility: a hyperlink on the Missouri Bar's homepage connects patrons to a fillable form in which they are provided instructions for execution.<sup>103</sup> The form's instructions provide that formal legal counseling is not a requisite for execution.<sup>104</sup> Because the condition precedent on the Missouri Bar form and the form provided to Collins at the Warsaw Health Clinic<sup>105</sup> are virtually indistinguishable, the court's determination that a death certificate is not sufficient to conclusively establish incapacity<sup>106</sup> does far more than invalidate Shoemaker's authority to dispose of Collins' body – it invalidates the prospective right of sepulcher granted to untold numbers of agents under the Missouri Bar's Durable Power of Attorney for Health Care and Health Care Directive.<sup>107</sup>

The appellate court's reasoning was based on Collins' unrestricted ability to grant Shoemaker an immediate right of sepulcher and Collins' decision to execute a form lacking this immediate authority.<sup>108</sup> Technically, the court's analysis does not deviate from the long established rule that durable powers of attorney be construed with "legal strictness" and that "[the] act [performed under the instrument] be legally *identical* [to the act] authorized to be done."<sup>109</sup> The court's strict application of the rule to the facts of this case was painfully unyielding for those voicing Collins' apparent intent to be cremated. But it was, perhaps, most surprising to drafters and practitioners:

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102. It is impossible to know how many Missouri Bar DPAHC forms have been executed. Missouri Bar Media Relations Director, Farrah Fite, reported that the Missouri Bar has distributed more than 25,000 hard copies of the DPAHC since March 2012.

103. See <http://www.mobar.org/> (click 'Durable Power of Attorney') (click 'The Missouri Bar Durable Power of Attorney for Health Care and Health Care Directive').

104. DPOAHC FAQ Sheet 1, *available at* [http://www.mobar.org/uploadedFiles/Home/Publications/Legal\\_Resources/Durable\\_Power\\_of\\_Attorney/final-dpa-forms-fillable.pdf](http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Durable_Power_of_Attorney/final-dpa-forms-fillable.pdf). While the aid of a legal professional is not required, a document containing frequently asked questions can be downloaded with the fillable form that provides: "Please understand that the instructions and frequently asked questions contained in the booklet, as well as the forms that you can consider completing, do not take the place of meeting with and receiving advice and counsel from an attorney-at-law experienced in assisting clients with completing these forms. Often lawyers who do estate planning, elder law, and general practice emphasizing those areas can assist you with your health care advance planning. Please contact any of them if you have any questions."

105. *Collins*, 405 S.W.3d 602, 607 n.1.

106. *Id.* at 606.

107. See *supra* note 101.

108. *Collins*, 405 S.W.3d at 606. The court explained that "Collins *could have* . . . executed a power of attorney granting the right of sepulcher to Shoemaker without the inclusion [of any] condition precedent . . . [yet] [t]he clear, unambiguous language of the durable power of attorney . . . expressly provides that none of its provisions become effective until . . . physician certification." *Id.* (emphasis added).

109. *Prior v. Hager*, 440 S.W.2d 167, 174 (Mo. App. 1969).

the court's disregard of the maxim *ut res magis valeat quam* – that the thing may rather have effect than be destroyed<sup>110</sup> – was unforeseeable. The court construed the durable power of attorney in a manner that gave no effect to the sepulcher provision.<sup>111</sup>

The court's wooden construction of Collins' durable power of attorney was unexpected and raises unforeseen problems for practitioners and laypersons alike. However, as this durable power of attorney – and those similarly constructed – returns to the drawing board, the rigidity of this decision provides certainty that precise revisions will be given effect. The drafting goal of a stock durable power of attorney is not to “meet every person's needs or contain every person's choices,” and the Missouri Bar form is no exception.<sup>112</sup> Instead, drafters strive to generate a form that is malleable enough to be workable for a variety of people.<sup>113</sup> A durable power of attorney that is liberally interpreted is workable for no one because precise language is drafted and executed in vain when there is no certainty that a court will give effect to the precision.

### B. Implications Beyond the Right of Sepulcher

While the most obvious effect of *Collins* is to invalidate an agent's authority to determine the disposition of a principal's body unless a physician certifies that the principal is incapacitated, the effect of *Collins* potentially extends beyond sepulcher. Provisions relating to postmortem examination, autopsy, and authorization of anatomical gift giving<sup>114</sup> are also at risk of invalidation under the existing form. Like sepulcher, the relevance of powers relating to postmortem examination, autopsy, and anatomical gift giving do not hinge on the principal's capacity or lack thereof. While these particular issues were not contested in *Collins*, the court's decision to draw a hard line between death and incapacity demonstrates the need for drafters to do the same.

### C. Document and Statutory Amendments

The necessary revision to the Missouri Bar form – and forms drafted in its likeness – is a simple one; there are two potential revisions that would better effectuate principals' intent. Drafters should consider modifying the existing form by distinguishing between powers that are exercised during the

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110. *Anglade v. St. Avit*, 67 Mo. 434, 436 (1878).

111. *Collins*, 405 S.W.3d at 606.

112. DPOAHC FAQ Sheet, *supra* note 104, at 1.

113. *Id.*

114. *See, e.g.*, Durable Power of Attorney for Healthcare and Healthcare Directive, Section F, MO. BAR, [http://www.mobar.org/uploadedFiles/Home/Publications/Legal\\_Resources/Durable\\_Power\\_of\\_Attorney/final-dpa-forms-fillable.pdf](http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Durable_Power_of_Attorney/final-dpa-forms-fillable.pdf) (last visited Mar. 2, 2014).

life of the principal after he is declared incapacitated and those powers that are exercised after death regardless of the principal's capacity.<sup>115</sup> It is difficult to imagine any circumstance under which a principal would desire for the right of sepulcher to vest only upon a certification of incapacity – rather than upon execution of the instrument.<sup>116</sup> After all, the very nature of the right of sepulcher requires that the death of the principal precede the agent's exercise of the right. This revision better effectuates a principal's intent because it affords principals the opportunity to grant their agent the right to make posthumous decisions in the event of sudden, unexpected death.

An alternative revision would alter the structure of the form and spatially separate powers exercised during the lifetime of the principal and those exercised after death. Under a structure change, the rights of sepulcher, postmortem examination, autopsy, and authorization of anatomical gift giving would be addressed under a separate section on the form providing that “the provisions concerning the right of sepulcher, postmortem examination, autopsy, and authorization of anatomical gifts are effective immediately upon the execution of this instrument.”<sup>117</sup> The effect of this structural change would be effectively identical to that of the language revision.<sup>118</sup> The desired benefit of a structure change would be heightened clarity; ideally, spatially separating the right of sepulcher, postmortem examination, autopsy, and authorization of anatomical gifts from rights relating to ante mortem capacity would make this distinction – and the rights' immediate effectiveness – evident to the principal.<sup>119</sup>

While a revision to the Missouri Bar form would likely minimize the occurrence of future situations where a principal wrongly believes that his durable power of attorney provides for the absolute disposition of his remains, the court's decision in *Collins* calls for further action. The nature of the stock durable power of attorney – its modest execution requirements, current accessibility, and the fact that it is often provided by public service organizations potentially unapprised of changes in Missouri case law – has generated concern about whether a drafting revision is a sufficient remedy.<sup>120</sup>

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115. The following is proposed language: “This durable power of attorney becomes effective when two physicians certify that I am incapacitated, except for the provisions concerning the right of sepulcher, postmortem examination, autopsy, and authorization of anatomical gifts, which are effective immediately upon the execution of this instrument.”

116. Of course, a principal who does not wish to grant his or her agent the right of sepulcher could indicate so on the form by declining to check the box granting the right of sepulcher under the instrument.

117. Language proposed by author.

118. See *supra* notes 112-113 and accompanying text.

119. See *supra* notes 112-113 and accompanying text.

120. Reg Turnbell, *Recent Western District Case Calls for Action*, MO. BAR ELDER LAW COMMITTEE NEWSLETTER, (Sept. 2013) <http://www.mobar.org/committees/elderlaw/newsletter/sept13/wd.htm>. The need for legislative action does not

Members of the Missouri Bar Elder Law Committee have suggested that, in light of *Collins*, the Missouri legislature should consider enacting legislation that will “insulate against drafting errors.”<sup>121</sup>

One legislative solution would be to amend Missouri’s Right of Sepulcher Statute found in Missouri Revised Statute section 194.119, which provides a hierarchy for determining where the right of sepulcher vests.<sup>122</sup> The statute currently provides that at the top of the hierarchy is “[a]n 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.”<sup>123</sup> Additional language would be added to this portion of the statute to explain that such a designation in a durable power of attorney is immediately effective upon the execution of the power of attorney.<sup>124</sup>

Whether the proposed legislation should apply retroactively is an additional consideration. While there is a fundamental principle of law holding that a retroactive law is generally unfair,<sup>125</sup> there are several arguments favoring a law with retroactive application, including the belief that the simultaneous operation of the new and old rules muddies – rather than clarifies – the state of the law.<sup>126</sup> While the benefits of a retroactive revision to Missouri Revised Statute section 194.119 are apparent, retroactive legislation invokes constitutional considerations.<sup>127</sup>

The Missouri Constitution places restrictions on the enactment of retroactive legislation in article 3, section 13 which provides that “no . . . law retrospective in its operation . . . can be enacted.”<sup>128</sup> Legislation is retroactive

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express the majority opinion of the Missouri Bar Elder Law Committee. *Id.* Some members have articulated that drafting revisions are sufficient. *Id.*

121. *Id.*

122. MO. REV. STAT § 194.119 (2) (Supp. 2011).

123. *Id.*

124. Proposed revision to MO. REV. STAT § 194.119.2.1:

For purposes of this chapter and chapters 193, 333, and 436, and in all cases relating to the custody, control, and disposition of deceased human remains, including the common law right of sepulcher, where not otherwise defined, the 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. Such designation (in a durable power of attorney) is immediately effective upon the execution of said power of attorney;

125. Elmer Smead, *Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 777 (1936) (“Coke usually is cited as the authority for this principle as represented by this maxim of the common law”). However, this rule can be traced from Greek and Roman law. *Id.* at 775.

126. MCGOVERN, KURTZ, & ENGLISH, *PRINCIPLES OF WILLS, ESTATES, & TRUSTS* 42 (2d ed. 2011).

127. See *supra* notes 123-126 and accompanying text.

128. MO. CONST. art. 1, § 13.



“when it looks or acts backward from its effective date, and is retrospective if it has the same effect as to past transactions or considerations as to future ones . . . .”<sup>129</sup> However, article 3, section 13 has not been interpreted as a strict prohibition on *any* law that relates to previous transactions; rather, this provision prohibits laws that affect previous transactions “to the substantial prejudice of the parties interested.”<sup>130</sup> Rather than substantially prejudice the interested parties, this legislative action would put the law in conformity with what the law was thought to be.<sup>131</sup>

## V. CONCLUSION

The *Collins* decision establishes that a dead person is not “incapacitated” for purposes of meeting a condition precedent on a durable power of attorney for health care. The practical effect of this determination is to invalidate the rights of sepulcher – and potentially rights relating to postmortem examination, autopsy, and authorization of anatomical gift giving – in springing durable powers of attorney for health care prepared by attorneys and organizations across the state of Missouri. Drafters, practitioners, and those who have executed durable powers of attorney should revisit the documents to ensure that the instrument gives effect to the principals’ intentions regarding the final disposition of their remains. Further still, the Missouri legislature should consider enacting legislation to remedy durable powers of attorney that were drafted without anticipating the problem caused by *Collins*.

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129. Missouri Real Estate Com’n v. Rayford, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010) (quoting State ex rel. Meyer v. Cobb, 467 S.W.2d 854, 856 (Mo. 1971)). The determination as to whether retroactive legislation violates the Missouri Constitution hinges on “whether [the statute] . . . impairs a vested or substantial right or imposes a new obligation, duty, or disability with respect to a past transaction.” *Id.*

130. *Id.*; see also American Eagle Waste Industries, LLC v. St. Louis County, 379 S.W.3d 813, 827 (Mo. 2012).

131. A retroactive amendment would not be unprecedented in Missouri. See, e.g., S.B. 892, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006) (Uniform Trust Code section 813 enacted in 2004 and made effective retroactively in 2006).