

ONE LAST REQUEST:

UNDERSTANDING MICHIGAN'S FUNERAL REPRESENTATIVE LAW

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I. INTRODUCTION

Most people give some thought to what they want to happen to their remains when they die.¹ The discourse around death indicates that most

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1. See *King v. Frame*, 216 N.W. 630, 632 (Iowa 1927) (noting that “the public sentiment and secular jurisprudence of civilized nations hold the grave and the dead body in higher and better regard.”). Moreover, the default rule, in this case, should favor the deceased as he or she is unable to later bargain for a different allocation of rights. See Herbert Hovenkamp, *Fractured Markets and Legal Institutions*, 100 IOWA L. REV. 617, 648–51 (2015) (“A well-designed default rule assigns the right so that it creates the greater value in most situations . . . making bargaining unnecessary.”). See generally

people assume that everyone has at least a *right* to direct the disposition of their body.²

Michigan Public Act 57 of 2016³ enables a person declarant to designate a funeral representative designee who is then entrusted with the authority to make decisions about funeral arrangements and the handling, disposition, or disinterment of the declarant's body after death.⁴ "This would include, but is not limited to, decisions about cremation, and the right to possess cremated remains of the decedent."⁵

This Note contains a survey of ancient rituals concerning bodily disposition⁶ and religious practices.⁷ These historical trends developed a foundation for present practices and attitudes towards death, bioethics, and anatomical gifts.⁸ Michigan's funeral representative law offers greater autonomous freedom of disposition than the previously controlling Michigan law by providing individuals with peace of mind that a person they choose will take care of their final wishes.⁹ While the new law is a step in the right direction, this Note identifies points of the law which remain imprecise, offers solutions, and calls for reform. For example, it is unclear what fiduciary obligations a funeral agent owes and to whom those rights are entrusted.¹⁰ This Note also suggests the Michigan Legislature adopt certain provisions from other states' disposition laws.¹¹ Other states address practical questions, such as: whether written instructions from decedent need to be followed; whether

Timothy J. Farmer, *Don't Die in Iowa: Restoring Iowans' Right to Direct Final Disposition of Their Bodily Remains*, 100 IOWA L. REV. 1813 (2015).

2. See, e.g., *Do you care where you are buried?*, BBC RELIGION & ETHICS (Sept. 27, 2013, 9:16 AM), <http://www.bbc.co.uk/religion/0/24209072> (presenting viewpoints of religious and other community leaders as to their preferences regarding the disposition of their remains); Lucy Townsend, *Where could I be buried if graveyards run out of space?*, BBC NEWS MAG. (Aug. 25, 2011, 10:23 AM), <http://www.bbc.co.uk/news/magazine-14647010> (speaking of various options for the disposition of the author's remains if space in the United Kingdom is taken up by the remains of others). See generally Farmer, *supra* note 1.

3. 2016 MICH. LEGIS. SERV. P.A. 57 (S.B. 551) (West).

4. H. FISCAL AGENCY, LEGISLATIVE ANALYSIS, FUNERAL REPRESENTATIVE: SENATE BILL 551 (SUBSTITUTE H-1 WITH FLOOR AMENDMENT) (Mich. 2016).

5. *Id.*

6. See *infra* Part II (A)(1).

7. See *infra* Part II (A)(2).

8. See *infra* Part II (B)(1).

9. Adam Zuwerink, *New Michigan Law Allows for Funeral Representative Designation in Estate Planning*, WEST MICH. L., P.C. (April 25, 2016), <http://westmichiganlaw.com/estate-planning/new-michigan-law-allows-funeral-representative-designation-estate-planning>.

10. James P. Spica, *Rights and Rites: Understanding the Fiduciary Obligations of Designated Funeral Representatives*, 62 WAYNE L. REV. 185, 197 (2017).

11. See *infra* Part III (B)(1) and (2).

the decedent's wishes are financially reasonable; and whether decedent should only be allowed to leave instructions if decedent pre-paid for the requested funeral arrangements.¹²

II. BACKGROUND

Giving close relatives authority to make decisions about the disposition of the remains of the recently deceased appears to be a culturally universal practice.¹³

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must also touch this thing of death.¹⁴

Funerals are often referred to as the celebration of a person's life.¹⁵ Others consider a funeral to be one of the few socially acceptable outlets left where surviving family and friends can outpour grief and pain.¹⁶ Fortunately, Michigan's Funeral Representative Act¹⁷ addresses the needs of both camps, the decedent and surviving family, or at least it is fully capable of doing so.¹⁸ While the decedent can leave instructions for her agent, the agent is *not* legally bound to follow those instructions.¹⁹

12. See *infra* Part III (B)(1).

13. PHILLIP L. WALKER, *Bioarchaeological Ethics: A Historical Perspective on the Value of Human Remains*, in BIOLOGICAL ANTHROPOLOGY OF THE HUMAN SKELETON 21 (M. Anne Katzenberg & Shelley R. Saunders eds., 1st ed. 1998).

14. Louisville & N. R. Co. v. Wilson, 51 S.E. 24, 25 (Ga. 1905).

15. See discussion *infra* Part II (A)(1); see also Kathleen M. Boozang, *An Intimate Passing: Restoring the Role of the Family and Religion in Dying*, 58 U. PITT. L. REV. 549, 564–65 (1997).

16. See PAUL E. IRION, THE FUNERAL AND THE MOURNERS: PASTORAL CARE OF THE BEREAVED 62(1954) (“the funeral has a psychological function to establish a climate for therapeutic mourning”); Paul E. Irion, *Changing Patterns of Ritual Response to Death*, 22 OMEGA J. DEATH & DYING 159, 161–62 (1990–91); August G. Lageman, *The Emotional Dynamics of Funeral Services*, 35 PASTORAL PSYCH. 16, 20 (1986).

17. MICH. COMP. LAWS ANN. § 700.3206 (West Supp. 2018).

18. Douglas G. Chalgian, *Long Sought Fix Awaits Signing*, PLAN TO BE 100 (Mar. 18, 2016), <http://plantobe100.com/tag/funeral-representative/>.

19. *Id.*

The law leaves the decision-making power up to the agent.²⁰ This control likely provides peace of mind to the decedent²¹ before death because the decedent can pick the individual she would like to make her funeral decisions.²² Before, the decedent's next of kin made this decision.²³ In a situation where an individual has no spouse, children, or immediate family, the table of consanguinity controls who is the legal next of kin.²⁴ Prior law addressing the disposition of one's body was at odds with the modernized decedent's estates rules, which allow one to decide the distribution of their real and personal property in the event of their death.²⁵ It is probable that most funeral representatives will act in accordance with the decedent's wishes. However, in the event the decedent's instructions call for a costly funeral, exceeding the assets of the decedent's estate, the law leaves the door open for the surviving family to adjust accordingly.²⁶ The law also allows those still living to implement funeral and memorial rituals which appropriately and meaningfully address their grief and mark the beginning of their healing process.²⁷

A. Rituals and Beliefs

1. Ancient Death Rituals and Beliefs

Initially, the need to remove a dead relative's decaying body from the homestead to prevent "scavengers from consuming the body" made the practice of disposing remains necessary.²⁸ But the disposition of the body is more than just that—it consists of both technical and ritual acts.²⁹ In the technical sense, burial is a physical act, involving disposal of the odorous, deceased body.³⁰ Ritually, a person's burial reflected their social status; he or she was celebrated and, in some cases, prepared for

20. MICH. COMP. LAWS ANN. § 700.3206 (West Supp. 2018).

21. Zuwerink, *supra* note 9.

22. H. FISCAL AGENCY, LEGISLATIVE ANALYSIS, FUNERAL REPRESENTATIVE: SENATE BILL 551 (SUBSTITUTE H-1 WITH FLOOR AMENDMENT) (Mich. 2016).

23. Zuwerink, *supra* note 9.

24. *See generally* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES (9th ed. 2013).

25. *Id.*

26. MICH. COMP. LAWS ANN. § 700.3206(13) (West 2016).

27. *See* Zuwerink, *supra* note 9.

28. WALKER, *supra* note 13, at 4.

29. *See* A.R. RADCLIFFE-BROWN, STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY 143 (1952).

30. *See id.*

afterlife.³¹ In the area of funerals, changing normative attitudes toward death and dying have paved the way for scientific advances related to the treatment of the human body immediately following death.³²

The reasons for certain modes of preparation, treatment, and disposition of a deceased body are deeply rooted in ancient beliefs of an afterlife.³³ Cremation began in the early Stone Age.³⁴ Burning the body stemmed from the idea of an afterworld in the sky.³⁵ The ascending smoke from the fire was believed to have released and transported the soul to the celestial afterworld.³⁶ The Egyptians mummified the body to preserve it from decay³⁷ because Egyptians believed the decedents' spirit would eventually return to the corpse.³⁸ For this reason, ancient Egyptians were commonly buried with tools, food, jewelry, animals, and other items.³⁹ Egyptians often buried the dead near, or even underneath,

31. Lewis R. Binford, *Mortuary Practices: Their Study and Their Potential*, 25 MEMOIRS OF THE SOC'Y FOR AM. ARCHAEOLOGY, 6, 17 (1971), <http://www.jstor.org/stable/25146709>; see also, A.R. RADCLIFFE-BROWN, THE ANDAMAN ISLANDERS 148 (1922).

32. Binford, *supra* note 31, at 12. See, e.g., Philippe Aries, *The Reversal of Death: Changes in Attitudes Toward Death in Western Societies*, DEATH IN AMERICA 26 AM. Q. 536, 537 (SPECIAL ISSUE) (1974) (discussing how human sciences have remained largely silent about death such that "ordinary men . . . behave as though death no longer exist[s]"); Tanya D. Marsh, *Rethinking the Law of the Dead*, 48 WAKE FOREST L. REV. 1327, 1342–43 (2013); NIGEL BARLEY, GRAVE MATTERS: A LIVELY HISTORY OF DEATH AROUND THE WORLD 14 (1997) ("In the archaeological record, ritual concern with mortal remains is amongst the first signposts that Man has evolved from mere hominoid and emerged as a higher being."); Herman Feifel, *Psychology and Death: Meaningful Rediscovery*, 45 AM. PSYCHOLOGIST 537, 537 (1990) ("From the beginnings of recorded history, realization of finitude has been a powerful concern and shaping force. Indeed, many feel that one of humanity's most distinguishing characteristics, in contrast to other species, is its capacity to grasp the concept of a future—and inevitable—death.").

33. DUKEMINIER & SITKOFF, *supra* note 24.

34. *History of Cremation*, CREMATION ASS'N OF N. AM. (Nov. 3, 2016), <http://www.cremationassociation.org/>.

35. *Id.*

36. Edwin O. James, *Cremation and the Preservation of the Dead in North America*, 30 AM. ANTHROPOLOGIST 214, 232–33 (1928), <http://users.clas.ufl.edu/davidson/arch%20of%20death/Week%2004/Binford%201971.pdf>.

37. Binford, *supra* note 31, at 12.

38. JESSICA MITFORD, THE AMERICAN WAY OF DEATH REVISITED 143 (Robert Gottlieb ed., 1998) (1963). See generally JAMES J. FARRELL, INVENTING THE AMERICAN WAY OF DEATH, 1830–1920 (Alan F. Davis ed., 1980).

39. Abigail J. Sykas, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?*, 25 VT. L. REV. 911, 917 (2001).

their former homes.⁴⁰ The thought was that the dead would come back to the family in the form of babies.⁴¹

The orientation of the body in the grave was also symbolic to ancient peoples.⁴² Burying a body facedown was a sign of disrespect in some cultures; archaeologists are uncovering these bodies all across the world.⁴³ Burying people in certain cardinal directions represented death at sunset . . . new life at sunrise.⁴⁴ The belief that life would continue for the deceased meant that the deceased person needed to travel to the land of the dead.⁴⁵ Therefore, those living wanted to make it as easy as possible for the decedent to “find their way.”⁴⁶ In addition to cardinal reference points, terrestrial reference points were important to those individuals who believed in reincarnation; the body needed to be aligned toward the location where the soul must reside before being reborn.⁴⁷

Other cultures historically *disallowed* close relatives the authority to make decisions about the disposition of the remains in special circumstances.⁴⁸ Egyptians required special treatment of bodies which were consumed by the Nile—by drowning or crocodiles.⁴⁹ Egyptians believed that Osiris specifically chose people for special roles in the afterlife.⁵⁰ Remarkable deaths, like falling into the Nile River or getting pulled in by a crocodile, signaled Osiris’s choice.⁵¹ That person’s body was “treated as a most holy and sacred relic.”⁵²

40. H.J. Rose, *Celestial and Terrestrial Orientation of the Dead*, 52 ROYAL ANTHROPOLOGICAL INST. OF GR. BRIT. AND IR. 127, 129–30 (1922).

41. *Id.*

42. Binford, *supra* note 31, at 12.

43. James Owen, *Facedown Burials Widely Used to Humiliate the Dead*, NAT’L GEOGRAPHIC NEWS (June 23, 2009), <http://news.nationalgeographic.com/news/2009/06/090623-facedown-burials.html>.

44. EDWARD B. TYLOR, PRIMITIVE CULTURE 375 (John Murray ed., 1913).

45. Rose, *supra* note 40, at 13233.

46. *Id.* at 129.

47. *Id.* at 130–32.

48. *Id.*

49. HERODOTUS, THE HISTORY OF HERODOTUS 156 (George Rawlinson trans., 1910).

50. Jeremy Myers, *Drown in the Nile and Become God*, REDEEMING GOD, <https://redeeminggod.com/egyptian-baptism/> (“No one may touch the corpse, not even any of the friends or relatives, but only the priests of the Nile, who prepare it for burial with their own hands—regarding it as something more than the mere body of a man—and themselves lay it in the tomb.”).

51. *Id.*

52. *Id.*

2. Religious Customs

For early Christians, “anatomical studies of the dead were especially troublesome.”⁵³ Many feared dissection and believed it made resurrection after death impossible.⁵⁴ Realizing their fear but also appreciating the need for cadavers for anatomical study, King Ptolemy I of Egypt became the first leader to approve of dissection.⁵⁵ He issued a royal decree meant to encourage physicians to dissect executed criminals.⁵⁶ During the Renaissance, the dread associated with dissection began to wane.⁵⁷ During the sixteenth century, Protestant surgeons in England were granted official authority to retrieve the bodies of hanged criminals from the gallows for anatomical study.⁵⁸ This decree served a dual purpose—“furthering the healing arts” and deterring criminals “who feared the desecration of their bodies.”⁵⁹

Many of the rituals and customs Muslims follow are derived from specific actions of Muhammad.⁶⁰ Muslims consider burial preparation a “Fard Kifayah,” a communal duty.⁶¹ Muslims bathe the body, wrap it with a shroud, pray over the body, pray for the dead generally, and then bury the body.⁶² Unique to the Islamic religion is a type of washing of the body that is acceptable when water is not available called “dry washing.”⁶³

Unlike Muslims, Buddhists do not share a common ritual or funeral service.⁶⁴ However, Buddhists share common principles regarding death: that it should occur in “an atmosphere of peace, calm, and sensitivity.”⁶⁵ Immediately after death, the body should remain undisturbed for at least four hours before being moved.⁶⁶ Following the example of the Buddha,

53. WALKER, *supra* note 13, at 5.

54. *Id.*

55. MARY ROACH, STIFF: THE CURIOUS LIVES OF HUMAN CADAVERS 39–40 (2003).

56. *Id.*

57. WALKER, *supra* note 13, at 6.

58. *Id.*

59. *Id.*

60. Mohamed Baianonie, *The Basic Rules of Islamic Funerals*, IMAM OF THE ISLAMIC CENTER OF RALEIGH, N.C. U.S.A. 1, http://islam1.org/iar/imam/archives/images/Islamic_Funerals.pdf.

60. *Id.* at 4.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Buddhist Funerals*, THE BUDDHIST SOCIETY (Nov. 3, 2016), <http://www.thebuddhistsociety.org/page/buddhist-funerals>.

65. *Id.*

66. *Id.*

cremation is the most common form of disposition.⁶⁷ Embalming is frowned upon; Buddhists believe it is wrong to disturb the body any more than necessary between the time of death and the time of disposition.⁶⁸

Like other religions, the Jewish faith recognizes the difference between the body and soul at death.⁶⁹ In Jewish theologies the soul “lingers” in the room immediately after death occurs.⁷⁰ For that reason, it is customary for at least one Jewish person to remain in the room with the corpse.⁷¹ The reason for this practice, referred to as “shemirah,” is to “ensure that the deceased’s soul does not feel abandoned before it is able to separate from the body completely.”⁷² One of the many ways Jewish people demonstrate respect toward the deceased is by burying the body as soon as possible.⁷³ Like many customs, this practice originated out of practicality. Burying the body quickly reduced the chances of thievery and limited unpleasant smells of decomposition.⁷⁴ Jewish people in Israel wrap their deceased in a shroud and bury them directly in the ground without a casket.⁷⁵ It is important for the body to decompose and “return to dust.”⁷⁶ Most cemeteries require bodies to be buried in a casket, and some even require the casket be placed in a grave liner or vault.⁷⁷ Among other things, the flat surface makes it easier to mow the grass.⁷⁸ To comply with their faith, Jewish people drill holes in the bottom of a completely biodegradable casket so the body has direct contact with the earth.⁷⁹

67. *Id.*

68. *Id.*

69. Mark A. Popovsky, *Jewish Ritual, Reality and Response at the End of Life: A Guide to Caring for Jewish Patients and Their Families*, DUKE INST. HOSPICE FUND. 27 (May 2007), <https://divinity.duke.edu/sites/divinity.duke.edu/files/documents/tmc/Jewish-Ritual.pdf>,

70. *Id.* at 29.

71. *Id.*

72. *Id.*

73. *Id.* at 30.

74. *Id.*

75. *Id.* at 32.

76. *Id.*

77. RONDA SMITH, *THE AMERICAN DEATH SYSTEM* 25–26 (1997).

78. *Id.*

79. Popovsky, *supra* note 69, at 32.

B. The Advent of Anatomical Gifts

1. Practical Need

As the study of medicine increasingly became valued and appreciated, so too did the need for cadavers.⁸⁰ The demand for bodies quickly outnumbered the “supply” of executed criminals.⁸¹ The shortage led physicians, or “resurrectionists,”⁸² as they were called, to resort to unorthodox modes of obtaining bodies.⁸³ To reduce their chances of getting caught, the resurrectionists would hire professional body snatchers to rob the cemeteries of the “poor and powerless.”⁸⁴

Beginning in the last half of the 18th Century, people realized how important it was for surgeons to have proper, reliable access to cadavers.⁸⁵ Communities recognized the worth of having an operation performed by a surgeon who had experience working with the human body.⁸⁶ To meet the need for more bodies, “anatomical acts” were passed which allowed physicians access to victims of duels, suicides, and, most importantly, unclaimed bodies.⁸⁷

Unfortunately, American physicians gained another supply of cadavers: Civil War soldiers.⁸⁸ The logistical nightmare of mass

80. D.C. Humphrey, *Dissection and Discrimination: The Social Origins of Cadavers in America*, 49 BULL. N.Y. ACAD. MED. 819 (1973).

81. *Id.*

82. M.E. Hutchens, *Grave Robbing and Ethics in the 19th Century*, 278 J. AM. MED. ASSOC. 1115 (1997); SUZANNE M. SHULTZ, BODY SNATCHING: THE ROBBING OF GRAVES FOR THE EDUCATION OF PHYSICIANS 59 (1992).

83. Hutchens, *supra* note 82, at 1115.

84. WALKER, *supra* note 13, at 6. Body snatching allowed doctors to improve surgical techniques and learn more about diseases; see also Anna Hodgekiss, *Body Snatching was Gruesome, but it Revolutionized how we Understand Anatomy and Medicine, say Cambridge Dons*, DAILY MAIL UK (Oct. 30, 2012), <http://www.dailymail.co.uk/health/article-2225141/Body-snatching--common-practice-200-years-ago--revolutionised-understanding-anatomy-medicine-say-Cambridge-scientists.html>; BURKE AND HARE (Ealing Studios TV 2010); ANATOMICAL DISSECTION IN ENLIGHTENMENT ENGLAND AND BEYOND: AUTOPSY, PATHOLOGY, AND DISPLAY (Piers Mitchell ed., 2012); ROACH, *supra* note 55.

85. WALKER, *supra* note 13, at 10.

86. *Id.*

87. *Id.*

88. Tanya D. Marsh, *Rethinking the Law of the Dead*, 48 WAKE FOREST L. REV. 1327, 1329–30 (2013) (citing DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR 86–101 (2008)); JACK McLAUGHLIN, GETTYSBURG: THE LONG ENCAMPMENT 183 (1963)

A whole slew of [embalmers] had descended on Gettysburg in the high spirit of profit. Setting up their places of business within a macabre distance of the field hospitals, they did not wait long for a flourishing trade [T]he embalmers

casualties desensitized many Americans when dealing with dead bodies.⁸⁹ The military was responsible for preserving the bodies of thousands of dead soldiers for transportation back to their families.⁹⁰ In 1862, the Army Medical Museum established a repository of body parts, medical records, and photographs obtained during autopsies and medical treatment of military casualties.⁹¹

"Although the prevalence of conviction in an afterlife seems to have changed relatively little during the twentieth century, the cultural context in which it occurs has been dramatically transformed."⁹² Now, with the emergence of the funeral industry,⁹³ familiarity with the dead and the technical components of disposition are distant memories of the past.⁹⁴ This shift toward "lack of contact with the dead has greatly increased the cultural gulf between a public that has little familiarity with death and skeletal researchers, such as bioarchaeologists, who confront the dead on a daily basis."⁹⁵

2. *The Human Body as Property*

From a scientific standpoint, the concept of the human body as a type of property which can be owned is biologically inaccurate.⁹⁶ The human body is destined to decay, or burn, "to come up again as wheat or roses, which in turn may form the bodies of future generations of people."⁹⁷ Some scientists even venture to say that our bodies are on "extended loan" to us from the "biomass."⁹⁸ It is culturally accepted that the living body is "animated by the soul, [and] the person resulting from this union has a right to the preserved integrity of the body which is a necessary part of his or her total being."⁹⁹ Examples of preserved integrity are the

pumped the bereaved for all the cash they could get and then pumped in their preservative.

SMITH, *supra* note 77, at 27 ("Because of [their] offensive behaviors the U.S. Army established the first licensing rules for embalmers and undertakers during the Civil War.").

89. WALKER, *supra* note 13, at 11.

90. *Id.*

91. *Id.*

92. *Id.* at 5.

93. GARY LADERMAN, *REST IN PEACE: A CULTURAL HISTORY OF DEATH AND THE FUNERAL HOME IN TWENTIETH-CENTURY AMERICA* 25 (2003).

94. *Id.*

95. WALKER, *supra* note 13, at 5.

96. H.E. Emson, *It is Immoral to Require Consent for Cadaver Organ Donation*, 29 J. OF MED. ETHICS 125-27 (Jun., 2003).

97. *Id.* at 125.

98. *Id.* at 125-26.

99. *Id.* at 126

laws prohibiting crimes against the body, like murder, assault, and battery.¹⁰⁰ When the body is dead, what sort of integrity is appropriate?

The law currently charges someone, either a designated funeral agent or next of kin, with the authority to dispose of the corpse in accordance with shared cultural beliefs and the requirements of public health—but the corpse is not his or her property.¹⁰¹ In this instance, some states treat the human body as “quasi-property”—not property per se but “as the *subject* of privacy rights.”¹⁰²

3. *Respecting Autonomy*

The advent of modern medicine marked the first significant use of a human body for dissection.¹⁰³ “[T]he invention of immunosuppressive drugs, which block the bodily rejection of transplanted organs and tissues,” make today’s organ transplantations highly effective.¹⁰⁴ As a result, what was once disposed is now a vital resource.¹⁰⁵ This breakthrough in modern medicine brought with it new ethical problems.¹⁰⁶ To be effective, doctors must remove an organ as soon after death as possible.¹⁰⁷ Unfortunately, if the decision to donate is not made in advance by the decedent, it may be difficult for close relatives to make the decision.¹⁰⁸ Too often, the close relatives’ decision to say “no” is a result of shock compounded by grief and sadness.¹⁰⁹ But this decision “requires re-examination of basic beliefs: to whom does the cadaver ‘belong’ and who should morally have rights to determine its disposal?”¹¹⁰ To the deceased, the body was a vital component of their person which has ceased to function.¹¹¹ To the bereaved family, it is the last tangible part of their loved one.¹¹² For the potential recipient of its

100. *Id.*

101. Emson, *supra* note 96, at 126.

102. 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)) (emphasis added).

103. ROACH, *supra* note 55, at 39–40.

104. Emson, *supra* note 96, at 126.

105. *Id.* (“From the strictly practical viewpoint, from being an object without intrinsic value destined only for disposal, the cadaver became at one leap a vital resource.”).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 125–27.

110. *Id.*

111. *Id.*

112. *Id.*

donated organs, the body is the hope of restored life.¹¹³ Medical doctors argue that the right of a person to determine how their body should be disposed of made sense when there was no continuing use for their body.¹¹⁴ However, today, the dead body is an incredibly practical and vital life source for people waiting for organ transplants.¹¹⁵

In many instances a person's decision *not* to be an organ donor is not fully intentional.¹¹⁶ One is required to sign up to be an organ donor on his or her own accord, and statistics show that many people simply fail to sign up.¹¹⁷ There is a great gap between the proportion of people in a society who favor organ donation and the much smaller proportion that do anything about it.¹¹⁸ People might not discuss their wishes regarding organ donation with each other so family members might be unaware of their relatives' "general views about donation or whether they have differing opinions about corneas and kidneys."¹¹⁹ "Relatives frequently opt for the default position, which is not to donate."¹²⁰ Perhaps the most disappointing finding is that many people whose relatives halt the donation process "would probably have either agreed to donation or at least not held an objection."¹²¹

4. *The Emotional Response of Families*

The shock of losing a loved one can leave families in an ill-equipped, emotional state to discuss donation.¹²² Some families feel unable to

113. *Id.*

114. *See id.* at 125–27.

115. *Id.*

Another way of looking at the cadaver, is to liken it to a dress or a suit of clothes hanging in a closet, worn by the person during life, evocative of pleasant experiences and happy times, but now no longer needed by the one who has died and useful only as a memorial by the bereaved. If it can help to keep the living warm, should not this be done? Is this not both practically and morally, its right utilization?

Id.; *see also*, Charles A. Erin & John Harris, *Presumed Consent or Contracting Out*, 25 J. MED. ETHICS, 365–66 (1999).

116. V. English & A. Sommerville, *Presumed Consent for Transplantation: A Dead Issue After Alder Hey?*, 29 J. MED. ETHICS 147 (2003).

117. *Id.* at 148.

118. *Id.*

119. *Id.* at 149.

120. *Id.*

121. *Id.* at 150.

122. Yvette Brazier, *Organ Donation: Most are Willing to Give, so Why is There a Donor Shortage?*, MEDICAL NEWS TODAY (Mar. 10, 2016), <http://www.medicalnewstoday.com/articles/307514.php?trendmd-shared=1>.

agree, even if it was the deceased's wish.¹²³ "They may be unaware or surprised that the person registered [to be an organ donor], especially if their religious or cultural background [does] not normally condone donation."¹²⁴ Some families are distressed to learn that they might not have known their loved one as well as they thought.¹²⁵

"Every day, 79 people receive a transplant, but at least 20 people die waiting, because of the shortage of donated organs."¹²⁶ Certain misconceptions exist relating to the process of organ donation.¹²⁷ Many people erroneously believe their organs are too old or would be of no use.¹²⁸ Others think emergency room doctors will prematurely stop working on them because they think doctors would rather have their organs than fight to save them.¹²⁹ Some think racial minorities do not receive their share of the donated kidneys and do not want to contribute toward inequality in death.¹³⁰ Vanity is often a very big contributor to the desire not to donate one's organs; some individuals incorrectly believe they cannot have an open casket or will not look as 'natural' if their organs have been extracted.¹³¹ Lastly, a small group of people think this final donation might somehow cost them money.¹³² Each of the reasons above is charged with personal emotion. The Michigan Funeral Representative Law allows the person's funeral agent to make decisions about organ donations which are difficult for some individuals to grapple with as they ruminate on the nature of their mortality.¹³³

123. *Id.*

Organ donation enjoys strong support in the United States. In 1984, Congress passed the National Organ Transplant Act to meet growing needs. The United States Department of Health and Human Services (DHHS) described organ and tissue donation and transplantation as "one of the most regulated areas of health care today." The Organ Procurement and Transplantation Network (OPTN) maintain a national registry for organ matching. Legislation to encourage donors is regularly updated, creating not just policies but also incentives, such as the Stephanie Tubbs Jones Gift of Life National Medal, established in 2008 to honor donors and their families.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Michigan Act Permits Nomination of Funeral Representatives to Make Post-Death Decisions*, DYKEMA GOSSETT PLLC (Apr. 19, 2016), http://www.dykema.com/resources-alerts-michigan-act-permits-nomination-of-funeral-representatives-to-make-post-death-decisions_04-19-2016.html.

III. ANALYSIS

A. *The Michigan Funeral Representative Law*1. *How the Law Operates*

On June 27, 2016, Michigan Public Act 57 of 2016 (the Act) became effective.¹³⁴ The Act allows a person to designate an agent to make post-death decisions related to the disposition of their body and funeral arrangements.¹³⁵ Prior to the Act, Michigan's Estates and Protected Individuals Code (EPIC) assigned authority to make these types of decisions to certain persons in the decedent's life.¹³⁶ Because the decedent's wishes were not given any weight in the decision, the statute prevented individuals from having a say in what happened to their body once they died.¹³⁷ Consequentially, the decedent could not mitigate potential disagreements among family members by leaving directives for post-death decisions to specified individuals.¹³⁸ Under the new Act, though, this has changed.

According to earlier jurisprudence, a decedent's surviving spouse had the right to make these decisions, followed by the decedent's next of kin, as defined by Michigan statute.¹³⁹ While this statutorily-assigned presumption *could* be challenged in court, judges were given deference to consider the "reasonableness and practicality" of post-death decisions and other relevant factors when making decisions.¹⁴⁰

Like other states, Michigan's new provision requires the court to consider the actual "personal relationship" the decedent held with certain survivors, suggesting that Michigan aims to place primary importance on whomever the decedent considers to be her "family," regardless of blood or marital relationship.¹⁴¹ Michigan's law may be useful to other states

134. 2016 MICH. LEGIS. SERV. P.A. 57 (S.B. 551) (West) (codified at MICH. COMP. LAWS ANN. § 700.3206).

135. *Id.*

136. *Id.*

137. H. FISCAL AGENCY, LEGISLATIVE ANALYSIS, FUNERAL REPRESENTATIVE: SENATE BILL 551 (SUBSTITUTE H-1 WITH FLOOR AMENDMENT) (Mich. 2016).

138. *Id.*

139. *Id.*

140. DYKEMA GOSSETT PLLC, *supra* note 133.

141. 2016 MICH. LEGIS. SERV. P.A. 57 (S.B. 551) (West) (codified at MICH. COMP. LAWS ANN. § 700.3206) (West Supp. 2018)). *See, e.g.*, MINN. STAT. ANN. § 149A.80.5 (West 2016); 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, 257 (2010).

because “most states with default priority orders do not provide instruction for resolving deadlocks.”¹⁴²

Just like funeral rituals, the traditional ways families live and love have changed.¹⁴³ These changes have compelled states to develop laws that allow for individuals to assign who will make their post-death decisions.¹⁴⁴ An influential and steadily increasing group of individuals are those who are unmarried and living together.¹⁴⁵ “Additionally, a high divorce rate coupled with longer lifespans due to improved health care has resulted in more people getting remarried after a divorce or spouse’s death.”¹⁴⁶ More and more, couples which exist outside of the traditional, normative family are obtaining the counsel of attorneys and creating legal appointments of their partners, which are enforceable against disputing survivors.¹⁴⁷ The reasons couples are taking measures to prevent family clashes “suggest there is every likelihood that the number of burial conflicts will increase.”¹⁴⁸

The Act eases *some* disadvantages of the old law. The Act allows an individual, who is of sound mind and at least eighteen years old, to appoint an agent to make post-death decisions related to disposition of bodily remains and funeral arrangements.¹⁴⁹ But it cannot be just any person. The designee must also be of sound mind and at least eighteen years old.¹⁵⁰ The designee must not have been accused of killing (abusing, neglecting, or exploiting) the declarant.¹⁵¹ For additional assurance, the Act permits an individual to nominate a successor agent in

142. Naguit, *supra* note 141, at 257.

143. See discussion *supra* Part II (A)(1) and (2).

144. In addition to difficult family relationships, our increasingly mobile culture has redefined what it means to be “family.” However, this is not a new concept. In 1938, the New York Surrogate’s Court noted that “loosened family ties” was a factor in deciding who should have custody of a decedent’s body. In *re Johnson’s Estate*, 7 N.Y.S.2d 81, 85 (N.Y. Sur. Ct. 1938); 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 (2007).

145. Naguit, *supra* note 141, at 252.

146. *Id.*

147. *Id.*

148. Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351, 1368–69 (2008) (quoting Heather Conway, *Dead but Not Buried: Bodies, Burial and Family Conflicts*, 23 LEGAL STUD. 423, 452 (2003)); see also Eloisa C. Rodriguez-Dod, *Ashes to Ashes: Comparative Law Regarding Survivors’ Disputes Concerning Cremation and Cremated Remains*, 17 TRANSNAT’L L. & CONTEMP. PROBS. 311, 312–13 (2008).

149. H. FISCAL AGENCY, LEGISLATIVE ANALYSIS, FUNERAL REPRESENTATIVE: SENATE BILL 551 (SUBSTITUTE H-1 WITH FLOOR AMENDMENT) (Mich. 2016).

150. MICH. COMP. LAWS ANN. § 700.3206(2) (West Supp. 2018).

151. MICH. COMP. LAWS ANN. § 700.3206(12) (West Supp. 2018).

the event that the initial agent, or “funeral representative,” is unwilling or unable to serve.¹⁵² These designations must be in a writing signed and dated in the presence of two witnesses or before a notary public.¹⁵³ Inclusion of the designation in an individual’s will or a medical power of attorney is acceptable.¹⁵⁴

If an individual fails to nominate a funeral representative, the statute falls back on the common law approach, with the right going to the surviving spouse, adult children, grandchildren, and so forth.¹⁵⁵ As with prior law, this presumption may be challenged in court by initiating a proceeding under EPIC section 3207.¹⁵⁶ An EPIC section 3207 proceeding may be initiated by an individual claiming decision-making power or by an interested party, such as a funeral home that has custody over the deceased.¹⁵⁷ “A section 3207 proceeding thus provides the court an opportunity to alter, at the instance of an interested person, the priority otherwise determined by the Act.”¹⁵⁸ If an individual with priority to act cannot be located after a good-faith effort, affirmatively declines to act, or fails to act within forty-eight hours after receiving notification of the decedent’s death, the next person with priority to act may do so.¹⁵⁹ The House Fiscal Agency reported that some members of the Michigan House expressed concern about the forty-eight hour notification window, saying it is too short of a time period and should be increased to seventy-two or ninety-six hours, “as there could be multiple reasons why the designated person could not act” in time.¹⁶⁰ At the same time, delaying the response time puts hospitals and funeral homes at a disadvantage and reduces their efficiency.¹⁶¹ Hospitals have to keep the body refrigerated or, if the body is already in the custody of the funeral home, the funeral establishment may desire to embalm the body to preserve it and halt deterioration.¹⁶² An agent may accept the designation by either signing an acceptance or affirmatively acting as funeral representative.¹⁶³

152. MICH. COMP. LAWS ANN. § 700.3206a (West Supp. 2018).

153. MICH. COMP. LAWS ANN. § 700.3206(2)(b) (West Supp. 2018).

154. MICH. COMP. LAWS ANN. § 700.3206(2)(b) (West Supp. 2018).

155. MICH. COMP. LAWS ANN. § 700.3206(3) (West Supp. 2018).

156. MICH. COMP. LAWS ANN. § 700.3207(1) (West Supp. 2018).

157. MICH. COMP. LAWS ANN. § 700.3207(1) (West Supp. 2018).

158. Spica, *supra* note 10, at 209.

159. MICH. COMP. LAWS ANN. § 700.3206(4) (West 2016).

160. H. FISCAL AGENCY, LEGISLATIVE ANALYSIS, FUNERAL REPRESENTATIVE: SENATE BILL 551 (SUBSTITUTE H-1 WITH FLOOR AMENDMENT) (Mich. 2016).

161. S. FISCAL AGENCY, S.B. 551: ANALYSIS AS ENROLLED, 98, at 7 (Mich. 2016).

162. *Id.*

163. MICH. COMP. LAWS ANN. § 700.3706a(2) (West Supp. 2018).

2. Funeral Representative's Obligations

"Interestingly, neither the new amendment, nor any other provision in [EPIC], show that a funeral representative has a fiduciary duty to the decedent."¹⁶⁴ Although Michigan law does not specifically instruct a funeral representative as to *how* she must carry out her duties, "[b]y including a funeral representative in the definition of 'fiduciary' contained in the law, the Michigan legislature states that the funeral representative would have to act in the person's best interest."¹⁶⁵ In their legislative analysis report, the Michigan legislature goes further to say that a funeral representative has a duty to the declarant after death.¹⁶⁶ However, EPIC makes following the written instructions of the decedent merely *permissive*, not required. "Subject to sections 3206 to 3207, before or after appointment, a person named as personal representative in a will *may* carry out the decedent's written instructions relating to the decedent's body, funeral and burial arrangements."¹⁶⁷ A personal representative and funeral representative can be the same person, but that is not always the case. This portion of the law is in serious need of clearer language on this point. Nonetheless, an instruction list from the decedent is helpful in carrying out disposition request. The funeral representative can budget and clarify, from perhaps the personal representative, what funds are available for the funeral and burial.

The new law effectively makes the funeral representative financially responsible for the funeral and burial expenses if the agent chooses to accept the designation.¹⁶⁸ I would suggest drafting a provision in funeral representative designation forms indemnifying the funeral representative from paying costs out-of-pocket, declaring that funds for payment shall be satisfied by the decedent's estate or trust. Another effective and simple option is to leave life insurance to the funeral representative to pay for disposition fees. In either of these situations, the designated representative would be allowed to make "reasonable" funeral and burial arrangements with the available funds.¹⁶⁹ Jennifer Harvey gives an example of how "reasonableness" is measured: "Michael Jackson's

164. Jennifer M. Harvey, *New Funeral Representative Legislation effective June 27, 2016*, THE INSTITUTE OF CONTINUING LEGAL EDUCATION, ICLE COMMUNITY (Jun. 24, 2016), <http://community.icle.org/blogs/jennifer-m-harvey/2016/06/24/new-funeral-representative-legislation-effective-june-27-2016>.

165. H. FISCAL AGENCY, LEGISLATIVE ANALYSIS, FUNERAL REPRESENTATIVE: SENATE BILL 551 (SUBSTITUTE H-1 WITH FLOOR AMENDMENT) (Mich. 2016).

166. *Id.*

167. 2016 MICH. LEGIS. SERV. P.A. 57 (S.B. 551) (WEST).

168. 2016 MICH. LEGIS. SERV. P.A. 57 (S.B. 551) (WEST).

169. Harvey, *supra* note 164.

golden coffin may be approved by Michigan law as ‘reasonable’ for the size of his estate, but this would not be ‘reasonable’ for most other estates.”¹⁷⁰

B. How Other States’ Funeral Representative Laws Compare

1. Examining Statutes from Other States to Improve Michigan’s New Statute

Some states “allow individuals to have the best of both worlds—that is, they can choose to appoint an agent and they can provide directions as to the method of disposing their bodily remains.”¹⁷¹ In 2005, Connecticut’s legislature enacted a law which allows an individual to appoint an agent to have “custody and control” of their body and to carry out the individual’s written directions.¹⁷² Colorado’s outlook is that if funeral instructions are left, they must be followed, only if they are practical, legal, and adequately funded.¹⁷³ Other states, like Texas, allow an individual to “do one or the other.”¹⁷⁴ If an individual left instructions, they will be followed.¹⁷⁵ If the individual did not leave instructions, the agent will have custody and control.¹⁷⁶ If the individual did not leave instructions nor designated an agent, the next of kin will have the authority to make decisions.¹⁷⁷ Several more states “sanction the decision-making priority of a designated funeral representative and leave the weight to be accorded to the declarant’s instruction to the funeral

170. *Id.*

171. Kester, *supra* note 144, at 579, 582.

172. CONN. GEN. STAT. ANN. §45a-318(a)(1) (West 2016).

173. Spica, *supra* note 10, at 209; COLO. REV. STAT. ANN. § 15-19-102(1)(a) (West 2016) (“A competent adult individual has the right and power to direct the disposition of . . . her remains after death and should be protected from interested persons who may try to impose their wishes regarding such disposition contrary to the deceased’s desires.”); *see also, e.g.*, CAL. HEALTH & SAFETY CODE § 7100 (West 2016) (stating that funerary instructions of decedent to be faithfully carried out); DEL. CODE ANN. tit. 12, § 264 (West 2016) (stating that decedent may control disposition of last remains through declaration); MINN. STAT. ANN. § 149A.80 (West. 2010) (“Persons . . . entitled to control the final disposition . . . shall faithfully carry out the reasonable and otherwise lawful directions of the decedents”); UTAH CODE ANN. §§ 58-9-601, 58-9-602 (West 2016) (stating that the person designated to control disposition of remains shall carry out decedent’s “advance directions”).

174. Kester, *supra* note 144, at 58 (citing TEX. HEALTH & SAFETY CODE ANN. §711.002(a) (Vernon 2003)).

175. *Id.*

176. *Id.*

177. *Id.*

representative's discretion."¹⁷⁸ In Ohio, "[a]n adult who is of sound mind may execute . . . a written declaration assigning to a representative . . . [t]he right to direct the disposition, after death, of the declarant's body" and make other funeral arrangements.¹⁷⁹ The declaration must include "[a] statement that all decisions made by the declarant's representative are binding," and "[a] space where the declarant may indicate the declarant's preferences regarding how the right of disposition should be exercised, including any religious observances the declarant wishes the person with the right of disposition to consider."¹⁸⁰

A small minority of states, including Massachusetts and Idaho, allow individuals to leave instructions or designate an agent only if the individual prepaid their funeral costs.¹⁸¹ Idaho allows the individual's instructions to be part of a funeral plan that has been "funded in advance of the death of the person leaving instructions."¹⁸² California employs a similar statute so long as payment arrangements by "any . . . effective and binding means" have been made.¹⁸³ California's statute goes a bit further and clarifies that if funding arrangements are inadequate, the decedent's wishes shall be complied with, but only to the extent that funds are available, "unless the person or persons that otherwise have the right to control the disposition and arrange for funeral goods and services agree to assume the cost."¹⁸⁴

178. Spica, *supra* note 10, at 210.

179. OHIO REV. CODE ANN. § 2108.70(B)(1) (West 2016).

180. OHIO REV. CODE ANN. § 2108.72(3), (8) (West 2017).

181. Kester, *supra* note 144, at 580 n. 6 (citing IDAHO CODE ANN. § 54-1139 (West 2003); 239 MASS. CODE REGS. 3.09 (2005))

A prepaid funeral contract is not required in Massachusetts. Massachusetts law states that where a prepaid funeral contract is in place, the terms of that contract will be honored; however, if there is no prepaid contract, the funeral home should take the decedent's wishes into account when those wishes have been expressed in writing and witnessed.

182. IDAHO CODE ANN. § 54-1139(b) (West 2016).

183. CAL. HEALTH & SAFETY CODE § 7100.1(a)(2) (West 2016).

184. Kester, *supra* note 144, at 580 n. 59 (citing CAL. HEALTH & SAFETY CODE § 7100.1(b) (West Supp. 2005); cf. ME. REV. STAT. ANN. tit. 22, § 2843-A(5) (West 2004))

If the [decedent] has left written and signed instructions regarding funeral arrangements and disposal of the subject's remains, the person having custody and control shall abide by those wishes to the extent that the [decedent] paid for those arrangements in advance or left resources for the purpose of carrying out those wishes.

In Michigan, there are few limitations regarding who can be named as a funeral representative.¹⁸⁵ However, one limitation is that the agent cannot be an employee of the health facility that provided care to the decedent, unless they are a relative of the decedent.¹⁸⁶ These specific limitations seem well-intended, but they are over inclusive. States like New York do not prevent employees of health care facilities from being listed as funeral representatives.¹⁸⁷ Individuals with illnesses often rely heavily on those who take care of them toward the end of their lives.¹⁸⁸ Those with terminal illnesses may determine their post-death wishes while receiving care and might feel comfortable describing those wishes to their caregiver.¹⁸⁹ Perhaps these caregivers are in a great position to carry out the decedent's wishes, or they do not have emotional ties to the individual like a family member does. Often, family members confuse what the decedent wanted with what the family member is comfortable with.¹⁹⁰ Allowing a healthcare employee to carry out the decedent's wishes could prevent family clashes. An even better idea going forward is to enlist neutral parties to specialize and volunteer in serving as funeral representatives.

As one practitioner evaluates,

the Michigan legislature made a choice and though it chose not expressly to support an expectation that funerary instructions left by a declarant will ordinarily be followed, it could have done that without the jurisprudential nonsense of imagining that a funeral representative acting after the declarant's death could somehow owe a legal duty, at that time, to the declarant.¹⁹¹

185. See MICH. COMP. LAWS ANN. § 700.3206 (West Supp. 2018). The person must be at least eighteen years old and of sound mind. The person also may not be an owner, agent, or employee of a funeral home or an employee of a health facility that provided care to the decedent, unless that person is a relative of the decedent.

186. See MICH. COMP. LAWS ANN. § 700.3206 (West 2016).

187. N.Y. PUB. HEALTH LAW § 4201 (West 2012).; see also *Appointment of Agent to Control Disposition*, CITY FUNERAL SERVICE (Jan. 19, 2016), http://www.nycremation.com/ny_disposition_laws.html.

188. *End of Life Issues and Care*, AM. PSYCHOL. ASS'N, <http://www.apa.org/topics/death/end-of-life.aspx>.

189. *Id.*

190. See discussion *supra* Part II (B)(4).

191. Spica, *supra* note 10, at 10 (emphasis added).

2. *Examining Case Law from Other States to Predict Outcomes in Michigan*

Michigan courts have not yet interpreted and applied the Act, but case law from other states with similar funeral representative laws show how courts differ in their approaches toward “balancing the decedent’s wishes, the rights of third parties to dictate someone’s burial or funeral, and public policy.”¹⁹² *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc.*,¹⁹³ *Maurer v. Thibeault*,¹⁹⁴ and *Bruning v. Eckman Funeral Home*¹⁹⁵ indicate that, while some courts consider all relevant, meaningful relationships in the decedent’s life, biases favoring blood relationships often prevail.¹⁹⁶ 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 wished to be buried with his longtime live-in girlfriend.¹⁹⁷ 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.¹⁹⁸ These cases demonstrate that an agent 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.

Other states recognize a decedent’s oral or written wishes as to the disposition of her body.¹⁹⁹ The right to arrange for the disposition of a

192. Naguit, *supra* note 141, at 210 (emphasis omitted).

193. *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc.*, 606 N.Y.S.2d 965 (N.Y. Sup. Ct. 1993).

194. *Maurer v. Thibeault*, 860 N.Y.S.2d 895 (N.Y. Sup. Ct. 2008).

195. *Bruning v. Eckman Funeral Home*, 693 A.2d 164 (N.J. Super. Ct. App. Div. 1997).

196. *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)).

197. *Id.*

198. *Stewart*, 606 N.Y.S.2d at 968–69.

199. Missouri allows for one to state her desired place of burial in a will, but “how far the desires of decedent should prevail against those of a survivor 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. See Naguit, *supra* note 141.

body is considered part of "our national common law."²⁰⁰ States have different theories about the body as property.²⁰¹ Some consider the human body as a type of quasi-property while others consider it not as property but "as the subject of privacy rights."²⁰² The human body as quasi-property does not give the person in charge of disposition ownership of the body but allows that person to "merely hold the right [of sepulcher] as a sacred trust for the benefit of all family and friends who have an interest."²⁰³

IV. CONCLUSION

Michigan's new law is informed largely by the cultural shift away from steadfast consanguineous rules toward freedom of bodily disposition. Michigan's new law does not enable the dead hand complete dexterity to control bodily disposition. When an individual is estranged from next of kin, that individual can appoint a funeral representative to be the sole decision maker on his or her behalf. The new law has commonly been misinterpreted; many people believe they are legally binding an agent to follow their instructions. Instead, the law allows a person to decide *who* makes the decisions, not *what* those decisions will be. The law should be amended to include clearer instructions related to fiduciary obligations. The law should make the list of those who are eligible to serve as agents more inclusive, particularly to include health facility employees. Finally, the law should clearly inform designees that if the decedents' estate is insufficient to cover the cost of the plans, the designee is required to pay the costs.

During our last days on Earth, it is impossible for any of us to know if we will have family members nearby, if those family members will currently be hostile toward one another, or if those individuals will be so emotionally overwhelmed that they cannot function in a normal way. Surviving friends and family seek the comfort that celebrations, rituals, and religious customs commemorating a cherished life can bring. Designating a friend or neighbor to make decisions on our behalf and providing funds for him or her to make arrangements might be the last helpful and thoughtful gesture we make in our lives. In an area of the law colored with tradition, this new law can offer us all one last reassuring choice.

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

201. Naguit, *supra* note 141.

202: Rao, *supra* note 102.

203. Naguit, *supra* note 141.