

Burial or cremation – who decides?

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OPSOMMING

Begrawe of veras - wie besluit?

Elke mens gaan eendag te sterwe kom. Met dood verval alle regte wat die lewende mens gehad het. Die besluit om die oorledene te begrawe of te veras word aan die agtergeblewenis oorgelaat. Begrafnisondernemers het egter geen leiding oor wie van die agtergeblewenes se wil moet geld nie. Dit lyk voor die handliggend dat dit die naaste familie moet wees, maar in veranderde omstandighede is die familie nie meer soos van ouds nie. Die hele kosep van 'n familie het verander weens saamvlyverhoudings of dieselfde geslag-huwelike. Wat doen 'n begrafnisondernemer indien die naasbestaandes nie kan ooreenkomm wat met die lyk moet gebeur nie. Die Wet (National Health Act 61 van 2003) en die Regulasies in terme van die Wet bied geen leiding nie. 'n Voorstel is om as lewende persoon 'n dokument op te stel waarin aangedui word wie verantwoordelik vir die liggaa na dood moet wees.

1 Introduction

The physicality of a human corpse is undeniable. It is a carcass, with a predisposition to decay, to become noisome, obnoxious to the senses, and harrowing to the emotions. Disposal of such perishable remains is imperative.¹

Every human being will eventually die. With death all rights to autonomy and self-determination ends. Not even the wish a living person expressed in a will concerning the disposal of his body has any legal effect. The decision whether a burial or a cremation should take place after death is left to those who stay behind.² Family members might feel a moral obligation to fulfil the deceased's wishes as pronounced in a will, but this can only happen if the contents of a will are known to the family members as a will is usually only read after the burial or cremation takes place. A difficulty for funeral undertakers is that as they have no legal guidance of whose wishes should be honoured or who should give permission for a cremation to take place.

1 Richardson 'Death, Dissection and the Destitute' in Cantor *After We Die: The life and times of the human cadaver* (2010) 91.

2 Whether a person died from natural causes or otherwise is not the focus of this article, the emphasis is rather on who should give permission for the cremation or burial to take place after a death certificate has been obtained as well as who has the right to the ashes after a cremation.

Cremation is the process of burning a dead body at very high temperatures until there are only brittle, calcified bones left, which are then pulverized into ‘ashes’.³ These cremains can then be kept in an urn, buried, scattered or even incorporated into objects as part of the last wishes of the deceased.⁴ In modern crematories, the body is stored in a temperature-controlled room until approval is given for cremation. Apart from someone giving consent for a body to be cremated, a death certificate is essential to make sure no medical investigation is needed because unlike after a burial, the body cannot be exhumed once it is cremated. It might seem obvious that it should be the nearest family consenting to a cremation but in a changing society the word ‘family’ is beginning to get a new meaning as it is no longer based on blood relation alone.

If there is a dispute amongst the family members whether a cremation or a burial should take place, the funeral director has no legal guidelines as to who has the final say. There could be people who are not family members with whom the deceased, long before his death, had discussed issues relating to his final disposition. An example might serve to explain the dilemma in real terms. Person X, the divorced father of a minor child, dies. Before his, death he was living with a woman from a different religion for the past three years. His mother and father are still alive. He left a will in which he expressed his wish to be cremated. Both his partner and his father are against a cremation, but his mother insists that his wish to be cremated be honoured. The executor of the deceased’s will, who is not a family member but a long-time friend, also wants a cremation in order to honour his friend’s wish. Whose view should the funeral home follow? Should a dispute like this be legally directed?

Although this article is applicable to both burials and cremations, the emphasis, to a certain extent, is more on cremation as the cremation of human corpses might become legally prescribed within the foreseeable future because land is a diminishing resource. Cemeteries are nearing saturated and land for new ones is unlikely to be provided.⁵ The issues surrounding the cremation of a corpse are also more intricate since once a body has been burnt, there is no turning back – unlike a burial where

3 ‘Cremo’ is Latin for burn. Cremains is another word for human ashes as it refers to the human remains after a cremation has taken place.

4 For the history of cremation see Goetting & DelGuerra ‘Cremation: History, Process and Regulations’ 2003 *The Forum for Family and Consumer Issues* available from: <http://ncsu.edu/ffci/publications/2003/v8-n1-2003-january/fa-1-cremation.php> (accessed 2014-10-28); Murphy ‘Please do not bury me down in that cold ground: The need for uniform laws on the disposition of human remains’ 2007 *The Elder Law Journal* 384-389.

5 Mhlanga ‘Land shortage will see cremations soar’ 22 Aug 2011 available from: <http://www.property24.com/articles/land-shortage-will-see-cremations-soar/13962> (accessed 2014-10-28); Health Systems Trust ‘South Africa: cremation the only option as cemeteries fill’ (accessed 2014-10-28); Dambudzo ‘The state of cemeteries in South African cities’ 2012 *South African Local Government Association (SALGA)*; Masango ‘Cremation a problem to African people’ 2005 *HTS Theological Studies* 1286-1287.

the body can be exhumed. With this in mind, the question of who should dispose of human cremains is also analysed.⁶

The article starts by discussing a testamentary wish concerning what should happen with one's body after death but as will be indicated, a dead body is no one's property; it is thus not possible to legally determine what should happen with your body after death. By concluding that a wish in a will is only a directive to the next of kin, the next part of the article discusses the changing definition of a family and the effect it might have on giving consent for a cremation and the disposing of the cremains afterwards. The legal uncertainty in South Africa regarding authorised cremations will then be highlighted after which some recommendations are made to assist local funeral homes in cases where they are faced with differing family views.

2 The Dead's Wishes in a Will

The common law writers were unanimous in stating that any person has the freedom of testation.⁷ South Africa acknowledges the right to freedom of testation as long as the will of the testator is not *contra bonos mores*. This requirement – of not being against societal values – could be interpreted as meaning that the law of succession is interested in issues of morality and should therefore be in favour of 'the moral thing to do' after a person has passed away.

English common law does not recognise property rights in a dead body and a deceased cannot dispose of his body by will. In the United States of America, the courts in most states recognise that there is no property in a dead body in a commercial sense but the courts do respect a deceased's wishes of burial preferences as part of freedom of testation.⁸ In other words, according to common law dead bodies are not property to be owned but rather property to be taken care of.⁹ The right to bury or cremate human remains is a 'quasi' right in the property of the

6 Richardson 'Death, Dissection and the Destitute' in Cantor (*supra* n 1) 112-118.

7 De Groot 2 18 4; Van Leeuwen RHR 3 4 2; Voet (Gane-translation) 28 1 2; Van der Keessel Praelectiones ad Gr 2 16 2; Van der Linde Koopmans Handboek 1 9 4; Van der Westhuizen & Slabbert 'Wysigings van die bepalings van 'n liefdadigheidstrust' 2007 TSAR 211-212.

8 Hernandez 'The property of Death' 1999 *University of Pittsburgh Law Review* 982; Young 'The right of posthumous bodily integrity and implications of whose right it is' 2013 *Marquette Elder's Advisor Law Review* 247-248 where it is stated that at 'common law, individuals cannot make legally binding decisions about the means of disposal of their bodies. This is because the law of succession is said only to contemplate transfers of property and one's body is not property at common law'. Arizona has overridden this as Arizona law provides that a 'legally competent adult may prepare a written statement directing the cremation or other lawful disposition of the legally competent adult's remains'.

9 Slabbert 'This is my kidney, I can do what I want with it – Property rights and ownership of human organs' 2009 *Obiter* 501-504.

dead body.¹⁰ In his *Institutes of the Laws of England*, Sir Edward Coke wrote that the ‘burial of the Cadaver is nullius in bonis (in the goods of no one) and belongs to Ecclesiastical cognisance’.¹¹ In his *Commentaries on the Laws of England*, published in 1765, Sir William Blackstone wrote that:

though 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 the dead are buried. [But] if anyone in taking up a dead body steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral.¹²

There are at least three reasons for the rule that a corpse (or cremains) is incapable of being owned. First, there is no ownership of a human body when alive, why should death then trigger ownership of it?¹³ Second, as implied by Coke and Blackstone above, the body was the temple of the Holy Ghost and it would be sacrilegious to do anything other than to bury it.¹⁴ Third, it is in the interest of the public health not to allow persons to make cross-claims to the ownership of a corpse.¹⁵ An example of a case in this regard is the United Kingdom case of *Williams v Williams*.¹⁶ In a codicil to his will, the deceased directed that his executor should give his body to Miss Williams; he requested her to cremate his body under a pile of wood (cremation was not lawful in Britain until 1902) and to place his ashes into a Wedgwood vase. She could claim her expenses from the executor. Despite his wish, the body had been buried by the executor. Miss Williams instructed that the body be dug up and it was cremated in Milan. She claimed the expenses from the executor but her claim was dismissed as the judge held there was no property in the corpse and therefore a person could not dispose of his body by will.¹⁷

In accordance with the views above, it seems clear that no one can own a corpse or human cremains. The practice in common law countries

10 Haddleton ‘What to do with the body: The trouble with postmortem disposition’ 2002 *Probate & Property Magazine* (November/December) 56; Murphy 2007 *The Elder Law Journal* 398.

11 3 Co. Institutes 203 (1644).

12 15th ed, 1809, Book II, 428-429.

13 Slabbert 2009 *Obiter* 499-517.

14 *In Re Estate of Johnson* 7 NYS 2d 81 (Sur. Ct. 1938); the United States (US) case of *Spiegel v Evergreen Cemetery Co.*, 186 A. 585, 586 (N.J. 1936) where it was stated that ‘[t]he ecclesiastical court had jurisdiction of the dead; and, in consonance with the doctrines of that jurisdiction, the common law early rejected the concept of property in the corpse and the ashes, and treated them as subjects largely of church superintendency’.

15 *Doodeward v Spence* in the High Court of Australia (1908) 6 CLR 406.

16 [1882] 20 Ch D 659.

17 See the US case of *Enos v Snyder* 63 P. 170,171 (Cal. 1900) where the court stated in the absence of statutory provisions, there is no property in a dead body, that it is not part of the estate of the deceased person, and that a man cannot by will dispose of that which after his death will be his corpse.

is usually that if the wishes of the deceased are known, and he is survived by a spouse, the spouse may make funeral and disposition arrangements according to the deceased's wishes. If the deceased and his spouse were estranged at the time of the death or if the wishes of the deceased are not known, then the funeral and disposition arrangements pass to the major children, the parents of the deceased, or a close relative.¹⁸ The problem here is that if the father and mother are both still alive and do not agree as per the example earlier, who has the final say? The same can be asked when the major children disagree on cremation or burial.

The same problem is highlighted by Rodriguez-Dod in her discussion of statutory laws regulating funerary and crematory services.¹⁹ She states that the general purpose of these laws is to guide the funeral home operators by clearly delineating the priority of those persons who are legally authorised to make funeral arrangements for a deceased person. But, the statutes fail to address what happens if two people in the same category, such as siblings, disagree over the manner of disposition of the body or the distribution of the ashes. Section 497.383(2) of the Florida Statute provides only that it should be resolved in court. The same is required by the states of Minnesota and Pennsylvania.²⁰ Courts are instructed to make a decision based on the following factors:

The reasonableness, practicality and resources available for payment for the proposed arrangements and final disposition; the degree of the personal relationship between the deceased and each of the persons in the same degree of relationship to the deceased; the expressed wishes and directions of the deceased and the extent to which the deceased has provided resources for the purpose of carrying out those wishes or directions; and the degree to which the arrangements and final disposition will allow for participation by all who wish to pay respect to the deceased.²¹

It is virtually impossible to ensure that the deceased's wishes for his funeral and burial arrangements are carried out as there appears to be no sanction if they are not. If the deceased's family wish to countermand his instructions, who is to enforce his wishes? If a will or declaration is executed, the deceased-to-be will have done about all he can to see that his wishes are carried out. Sometimes that information is discovered only after the deceased has been buried somewhere else or a cremation has already taken place.²² An example from the United States of America can once again illustrate this dilemma. In *Betty Brannam v Edward Robeson Funeral Home No 43141/96* (N.Y. Sup. Ct. Nov 14, 1996) (unpublished order),²³ the deceased requested – in an executed will – that his remains

18 Haddleton *supra* n 10 at 56.

19 Rodriguez-Dod 'Ashes to ashes: Comparative law regarding survivors' disputes concerning cremation and cremated remains' 2008 *Transnational Law & Contemporary Problems* 316.

20 *Idem* 318.

21 D.C. Code 3-413.01; Minn. Stat. 149A.80; Rodriguez-Dod 2008 *Transnational Law & Contemporary Problems* 318-319.

22 Haddleton *supra* n 10 at 59.

23 Hernandez 1999 *University of Pittsburgh Law Review* 972.

be cremated and that his ashes be in the sole control of his executor who was his long-term female companion and the mother of three of his children. The executor contacted his estranged wife to advise her of the deceased's wishes and invited her to participate in the funeral arrangements. The estranged wife had the body removed from the mortuary to a funeral home for burial rather than cremation. Even though the executor provided the funeral home with a copy of the deceased's will, the funeral home refused to abide by it. Ms Brannam had to get a court order compelling the funeral home to abide by the deceased's wishes. The disregard for the doctrine of testamentary freedom is specifically heightened when a testator favours persons other than the biological family members.²⁴ This leads to conflict because of a lack of legislation guiding a funeral home as to who has the right to make funeral arrangements.

3 Mortal Remains Legislation

The question could be asked who has the ultimate authority over funeral arrangements to fulfil certain wishes expressed while living or even whether cremains should not get legal status 'because ashes of the deceased are now often treated as souvenirs, ending up sometimes in bitter disputes between family members and sometimes in the garbage'.²⁵ Rodriguez-Dod refers to the American case of *Kulp v Kulp*²⁶ in which a child's ashes had to be divided between the deceased child's parents to be disposed of as each saw proper. The dispute over the couple's son arose in the process of their divorce. Unfortunately, disputes such as these are not uncommon and funeral homes are increasingly finding themselves in the middle of family feuds.²⁷

Traditionally the care of the body of a deceased was the primary responsibility of the family, the justice system sees it as the family

24 In this regard see the US case of *Rosenblum v New Mt. Sinai Cemetery Assoc.* 481 S.W.2d 593, 595 (Mo. Ct. App. 1972) in which it was stated that how far the desires of the deceased should prevail against those of a surviving spouse, depends upon the particular circumstances of each case; *McEntee v Bonacum* 92 N.W. 633,634 (Neb. 1902) in which the court doubted whether a dying request by a deceased as to the disposition of his remains is obligatory upon his next of kin; *Burnett v Surratt* 67 S.W.2d 1041,1042 (Tex. Civ. App. 1934) where the court said that a surviving spouse's preferences are paramount to those of a deceased except where the spouse has forfeited the right of control of the burial due to estrangement, divorce, or separation at which point the deceased's wishes are entitled to a respectful consideration by the court.

25 As quoted in Rodriguez-Dod 2008 *Transnational Law & Contemporary Problems* 311.

26 *Kulp v Kulp* 920 A2d 867, 873 (Pa. Super. Ct 2007).

27 Rodriguez Dod 2008 *Transnational Law & Contemporary Problems* 312 where it is stated that on 'March 12, 2007, the Superior Court of Pennsylvania decided that a trial judge had abused his discretion in deciding that a child's ashes should be divided between the deceased child's parents to be disposed of as each saw proper'.

members having a quasi-property right in the body to take care thereof until burial or cremation.²⁸ When funeral homes developed, they, over time, followed this trend. Yet, today only one in four families conforms to the idea of the traditional nuclear family of mother, father, and children.²⁹ The rising incidence of divorce, the decreasing stigma of sexual relationships out of marriage and alternative lifestyles with same sex partners have challenged the traditional concept of a family. Even the advancements in reproductive sciences have removed the determinacy of equating family with genetic connections.³⁰

[T]he concept of the family is culturally determined and subject to ethic and cultural variations.... Legally, a family group may be based on consanguinity or affinity by marriage alone; but there may be *de facto* relationships also, without blood relationship or marriage, and these may or may not be legally recognized... [S]mall group classifications, regardless of whether they originate in psychology, sociology, or anthropology, do not necessarily coincide with legal classifications...[L]egal classifications [of family] tend to be more narrow and rigid than group classifications.... [They are] cerebral... abstract and relatively removed from specific factual situations.³¹

In *Stewart v Schwartz Brother-Jeffe Memorial Chapel*,³² the deceased's mother and brother took possession of his remains for an elaborate Orthodox Jewish funeral and burial. This was opposed by the deceased's life-partner of five years who stated it was the wish of the deceased to be cremated although he failed to record it in his will. The court considered the close, spousal-like relationship that existed between the two and accepted the life-partner's standing as a representative of the deceased's wishes. Even though the court accepted the life-partner's position as representative, they did not consider him 'family'. Should a corpse get legal status by way of mortal remains legislation, it could be a mechanism to acknowledge the expanding definition of 'family' and thus diminish familial conflict or the disregard for life-long partnerships. Such a legally recognised directive would allow the deceased, while still living, to define whom he sees as 'family' and whom he wants to take decisions concerning his remains. Such legislation does not have to determine who owns the remains as property, but it should rather appreciate the complexity of death in a society where autonomy is valued and few people live their lives alone. The legislation could create a construct that respects individual rights while acknowledging the importance of the

28 Hernandez 1999 *University of Pittsburgh Law Review* 993.

29 Foster 'Individualized justice in disputes over dead bodies' 2008 *Vanderbilt Law Review* 1357-1361 where it is stated that 'legal ties do not necessarily create familial ties'.

30 Hernandez 1999 *University of Pittsburgh Law Review* 1004-1005; Smolensky 'Rights of the dead' 2006 *Ariz. Legal Studies Discussion Paper* 06-27 784, where the case of *Hecht v Super Ct (Kane)* 20 Cal Rptr. 2d 275, 282-283 (Cal. Ct. App. 1993) is discussed. The deceased's intent to reproduce posthumously was respected.

31 As quoted in Hernandez 1999 *University of Pittsburgh Law Review* 1007.

32 606 N.Y.S.2d 965,966 (Sup. Ct. 1993) issuing a judicial opinion to serve as a guidepost for other courts even though the litigants settled the case.

individual's social network as death is a context in which autonomy is enforced by one's relation to others. In the end, death implicates the needs of not only the deceased, but also of those who loved him as well.³³ Currently, it seems that there is bias in favouring the preferences of biological family members concerning the mortal remains of members of their family.³⁴ The tension between individualism and family status is one which mortal remains legislation could begin to alleviate.³⁵

Mortal remains legislation could also permit a deceased to delegate the control over his mortal remains to a proxy, as the law of wills – as pointed out above – is insufficient to ensure that the wishes of a deceased will be carried out. Even if the family was prepared to comply with a deceased's wish, the content of a will is usually only validated after the body has been buried or cremated. Funeral homes are often unsure as to whether they should respect the burial instructions in a will if such a will has not yet been accepted by the Master of the High Court as being valid. Although South Africa has legislation concerning cremation facilities, there are no guidelines on who may request cremation or a burial when the deceased's wishes are unknown or who may ultimately control the deceased's cremains.³⁶

4 Cremains in South Africa

There is no specific legislation controlling the disposal of human cremains nor are there guidelines on who should consent to a cremation in South Africa. As indicated above, due to the lack of specific legislation, funeral homes follow the practice as per the common law on who may consent. It is based on biological linkages and will usually be the spouse, a major child, the parents or a major sibling. In the absence of specific legislation, it could be of value to consider the National Health Act³⁷ concerning permission for an organ donation. Section 62(2) determines that 'in the absence of a donation under sub-section (1)(a) [where the donor him or herself have indicated they are organ donors]... the spouse, partner, major child, parent, guardian, major brother or major sister of that person, *in the specific order mentioned*, may, after that person's death, donate the body...'.³⁸ The significance of this section is that it allows for a partner to consent before the biological order of children and brothers or sisters are followed. The same order in which consent must be given is followed in section 66(1)(b) concerning the granting of

³³ Hernandez 1999 *University of Pittsburgh Law Review* 1026. For a list of US state laws concerning the disposition of a body, see Murphy 2007 *The Elder Law Journal* Appendix A 416-465.

³⁴ Hernandez 1999 *University of Pittsburgh Law Review* 975.

³⁵ *Ibid.*

³⁶ The Regulations Relating to the Management of Human Remains, GN R363 in GG 36473 2013-05-22; Regulations to the National Health Act 61 of 2003.

³⁷ 61 of 2003.

³⁸ Own emphasis.

permission for a post-mortem. No mention is specifically made in section 68 that the Minister can make regulations concerning the burial or cremation of the remains of a person except section 68(1)(b) which determines regulations can be made concerning ‘the preservation, use and disposal of bodies, including unclaimed bodies’, but this should be read with section 90(4)(c).

The regulations in terms of the National Health Act regarding the general control of human bodies, tissue, blood, blood products and gametes³⁹ determines in section 26 that ‘[a]ny person who acquired the body of a deceased person... by virtue of any provision of the Act and these regulations, shall... on receipt of that body... acquire exclusive rights in respect thereof’. An interpretation of this provision could mean that the funeral undertaker has exclusive rights in the dead body but cannot decide how to dispose thereof.

Other regulations in terms of the Act relating to the management of human remains⁴⁰ provides, in section 2(1), that these regulations shall apply to ‘[f]uneral undertakers’ premises and crematoriums’ but it discusses only finer detail concerning funeral undertaker’s premises, the transportation, importation and exportation of human remains, the burial in excavated land, and the requirements to be an authorised crematorium. Crematoriums must keep a register of all cremations as section 19(1)(g) determines that there should be a record of ‘the manner in which the ashes of the person were disposed of’. This requirement seems strange as the funeral undertaker can only record to whom the cremains were given as he or she has no control over what happens with the cremains once handed over. What is more disturbing, is that no mention is made as to who should consent to a cremation nor to whom the cremains of a person should be given to for disposal. Because of this lack of clarity or direction given to funeral undertakers, they fall back on the biological family and the order traditionally followed according to common law. In the recent case of *AB and the Surrogacy Advisory Group v Minister of Social Development*⁴¹ concerning the genetic link requirement for surrogacy according to the Children’s Act,⁴² Basson J discussed the constitutional concept of ‘family’ by stating that:

The question that pertinently arises is whether genetic lineage (which constitutes a critical component currently in terms of the Act should be relevant in defining the concept of a family).⁴³

The Constitutional Court has on occasion been willing to question the traditional view of what constitutes a family in the context of two lesbian parents. In *J v DG, Department of Home Affairs* 2003 (5) SA 621 (CC) ...

39 No. R.180 in GG 35099 2012-03-02.

40 GN R363 *supra* n 36.

41 *AB and Another v Minister of Social Development as Amicus Curiae: Center for Child Law* (40658/13) [2015] ZAGPPHC.

42 38 of 2005.

43 *AB and Another v Minister of Social Development* *supra* n 41 par 43.

the court held that ...plainly the Legislature sought thereby to deal with advances in fertility and reproductive technology but it seems to have confined itself to the traditional view of the family⁴⁴.

In *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at [11] the CC questioned the traditional view of a family and held as follows: 'Family means different things to different people, and the failure to adopt the traditional form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them equally worthy of concern, respect, consideration and protection under law'.⁴⁵

I am in agreement with the sentiments expressed by the Constitutional Court: A family cannot be defined with reference to the question whether a genetic link between the parent and the child exists. More importantly, our society does not regard a family consisting of an adopted child or adopted children as less valuable or less equal than a family where children are the natural or genetically linked children of the parents. A family can therefore, in my view, take due cognisance of the advances made in fertility and reproductive technology and with that comes the obligation to redefine the traditional view of the family.⁴⁶

Taking cognisance of the above, it seems clear that the Constitutional Court recognises that a family – as it is traditionally known – should no longer be the determining factor when decisions must be taken. In the context of this article, it should thus be self-explanatory that a funeral undertaker should not solely follow the common law lineage when asking permission for a cremation to take place. In this regard, it is recommended that the funeral home should recognise the wishes of surviving unmarried (opposite or same sex) partners, blended family members, extended family members and nonrelatives of the deceased. Even more favourable would be if the deceased-to-be, whilst still alive, could execute a signed, maybe a notarial executed document, naming an agent to take care of his remains in order to avoid that the body is given to the family. Haddleton gives such an example:

⁴⁴ *Idem* par 44.

⁴⁵ *Idem* par 45.

⁴⁶ *Idem* par 46.

Example:⁴⁷

Declaration of disposition of last remains and appointment of agent

I,..... (name of declarant), being of sound mind and lawful age, hereby revoke all prior declarations of my wishes regarding the disposition of my last remains. I declare and direct that after my death these procedures should be followed:

I nominate as my agent to oversee that my will is done. I nominate as my alternate designee.

I direct that my body shall be cremated.

My cremated remains must be.....

I request the following ceremonial arrangements to be made.....

I have entered into a preneed contract with (funeral home)

Etc.

I may revoke or amend this declaration in writing at any time. I agree that any third party who receives a copy of this declaration may act according to it. Revocation of this declaration is not effective as to a third party until the third party learns of my revocation. My estate shall indemnify any third party or the agent appointed for costs incurred as a result of claims that arise against the third party or expenditures made by the agent because of good-faith reliance on this declaration.

I execute this declaration as my free and voluntary will on this day of 2015.

Address:

Signature:

The declarant personally appeared before me and proved his/her identity as:.....

He/she acknowledge the foregoing to be his/her free will.

.....(notary public)

Witness 1.....

Witness 2.....

47 Haddleton *supra* n 10 at 60.

Such a declaration should be legally binding and thus different from a living will which has no legally binding effect. It should not be part of the will of the deceased and should therefore not be regulated by the law of succession concerning property rights. It should rather be seen as a separate legally valid document or direction about what should happen with a body or cremains after death – it should be able to stand on its own in a court of law. An example of such a declaration could be inserted into the regulations of the National Health Act and could be used by funeral homes or people selling funeral cover.

5 Conclusion

Society's moral standing could be uplifted if promises made to the dead are kept because keeping such promises will indicate respect for the dignity of the dead. If it is seen by the living that promises to the dead are fulfilled, the living will be comforted that their wishes will also be respected after death.⁴⁸ By changing legislation to allow for an advance directive to people who care about what happens to their bodies after death, is to give them confidence that their wishes will be respected and will ultimately be fulfilled.⁴⁹ Thus, the claim that living individuals have an interest in what happens to their corpses rests not on interests that survive death, but rather on the benefit to them knowing, while they are alive, that their wishes will be respected.⁵⁰ If it becomes common practice to follow and respect the directives given by a living person about what should happen with him after death, a lot of family conflicts will be resolved and posthumous bodily integrity will be respected.⁵¹

The dead should be treated with dignity because they were alive once and while alive they possessed autonomy to make decisions concerning their bodily integrity after death. Granting the dead posthumous 'rights' will aid in controlling the behaviour of living persons and harmonising society.⁵² Funeral homes should not be left in the middle of family conflicts. Death is an emotional matter but with a few additions to the regulations of the National Health Act, a huge difference could be made to both the living and the dead.

⁴⁸ Young 2013 *Marquette Elder's Advisor Law Review* 201.

⁴⁹ *Idem* 200.

⁵⁰ *Idem* 214.

⁵¹ *Idem* 267.

⁵² Smolensky *supra* n 30 at 769.