

GRANDMA IS AN HEIRLOOM: NEW OPTIONS FOR SELF-IMMORTALIZATION

Comment

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I. INTRODUCTION

“Only in death will we have our own names since only in death are we no longer part of the effort. In death we become heroes.”¹

The need for self-immortalization has been a constant theme throughout history, dating back prior to the Egyptians.² Preserving one’s self for future generations has led to interesting and creative burial methods. Burial methods have varied throughout history, but the desirability of immortality has remained the same. Cremation jewelry gives the decedent an opportunity to become an heirloom and for generations to pass down that heirloom. This new technique not only allows for self-preservation, but also provides a means of keeping a loved one close. You cannot get closer to your deceased relative than to wear them around your neck.

Part II of this comment will address the history of disposition of remains, as well as the process and options for cremation jewelry.³ Part III

1. www.searchquotes.com, http://www.searchquotes.com/Chuck_Palahniuk/Death/quotes/2/ (last visited Oct. 10, 2011).

2. See discussion *infra* Part II A.

3. See *infra* Part II.

of this comment will address the decedent's rights versus the rights of the survivors. It is easy to see how the wants of family members may come into conflict, especially when dealing with new memorial techniques.⁴ Part III will also address how the survivors will be able to handle the remains.⁵ The concept of human bodies as property has long been a subject of debate; however, the courts have managed a system for the purposes of burials.⁶ Part IV of this comment will address the causes of actions associated with cremation jewelry, such as the mishandling of the remains or action for improper care.⁷ Part IV will also address potential future problems associated with cremation jewelry.⁸

II. BACKGROUND

A. *History of Burial Methods*

Originally, the practice of removing a dead body from the home was put into place because of a need to “prevent scavengers from consuming the body.”⁹ The rituals and customs associated with the burial developed much later.¹⁰ According to ancient Egyptian Custom, the people entombed Egypt, the body with its worldly possessions, including animals, tools, food, and jewelry.¹¹ The Greeks believed by burning the deceased, they would set the soul free.¹² There have been many ideas about burial techniques throughout history; however, cremation has remained prevalent since its creation.¹³

The practice of cremation began in the early Stone Age, around 3000 B.C., in Europe and the Near East.¹⁴ During the end of the Stone Age, cremation began to cross into Northern Europe, evident by urns in western Russia.¹⁵ During Between 2500 to 1000 B.C., cremation began to sweep Northern Europe and Hungary, and Northern Italy began to create cemeteries

4. *See infra* Part III.

5. *See infra* Part III.

6. *See infra* Part III.

7. *See infra* Part IV.

8. *See infra* Part IV.

9. Ann M. Murphy, *Please Don't Bury Me Down in That Cold Ground*, 15 ELDER L.J. 381, 385 (2007) (citing Phillip L. Walker, *Bioarchaeological Ethics: A Historical Perspective on the Value of Human Remains*, in *Biological Anthropology of the Human Skeleton* (M. Anne Katzenberg and Shelley R. Saunders eds., 2000)).

10. *Id.*

11. *See* Murphy, *supra* note 9, at 385 (citing Abigail J. Sykas, *Waste Not, Want Not: Can Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?* 25 VT. L.REV. 911, 917 (2001)).

12. *Id.*

13. *See id.*; *History of Cremation*, CREMATION ASSOCIATION OF NORTH AMERICA, <http://www.cremationassociation.org/?page=historyofcremation> (last visited Oct. 12, 2010).

14. *History of Cremation*, CREMATION ASSOCIATION OF NORTH AMERICA, <http://www.cremationassociation.org/?page=historyofcremation> (last visited October 12, 2010).

15. *Id.*

for cremation.¹⁶ Even in the Mycenaean Age, approximately “1000 B.C., cremation became an integral part of the” ancient Greek burial custom.¹⁷ In accordance with the Grecian trend, the Romans began to practice cremation, and the “the cremated remains were generally stored in elaborate urns.”¹⁸ However, by 400 A.D., due to Constantine’s decision to convert Constantinople into a Christian society, earthen burials replaced cremation.¹⁹ The Christians believed cremation was a pagan ritual and cremation was not preferred unless in times of war.²⁰

Modern cremation practices only “began a little over a century ago, after years of” experience with a chamber.²¹ In North America, the real start of cremation began with Dr. Julius LeMoyne in 1876 when he “built the first crematory in Washington, Pennsylvania.”²² A second crematory opened almost ten years later and, as was standard for the time, the cremation society owned and operated it.²³ Some of the early advocates for cremation were Protestant clergy who wanted to reform burial practices and medical personnel who were concerned with the health conditions of the cemeteries.²⁴ In 1999, there were approximately 1,500 crematories and almost 600,000 cremations.²⁵ The number of crematories rose by almost 600 in 2009 and the act cremation rose to over 900,000 in 2009.²⁶ The practice of cremation is becoming steadily more accepted and more practiced in America today,²⁷ which has led to the creation and the rising industry of cremation jewelry.

B. Cremation Jewelry: The Process and Options

“Cremation Jewelry is, simply put, jewelry that contains some of the cremated ashes of a deceased family member or loved one.”²⁸ Cremation jewelry follows in the footsteps of its predecessors as a way to memorialize loved ones for eternity.²⁹ With the rise and the acceptance of cremation in society, cremation jewelry has become an important contribution to the

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *History of Cremation*, CREMATION ASSOCIATION OF NORTH AMERICA, <http://www.cremationassociation.org/?page=historyofcremation> (last visited October 12, 2010).

21. *Id.* A cremation chamber is a special kind of furnace, in which the body is exposed to extreme heat and reduced to its basic elements. CREMATION INFO., www.cremationinfo.com/cremationinfo/questions.htm (last visited Oct. 12, 2011).

22. *History of Cremation*, CREMATION ASSOCIATION OF NORTH AMERICA, <http://www.cremationassociation.org/?page=historyofcremation> (last visited October 12, 2010).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. CREMATION JEWELRY, <http://www.cremationjewelry.net> (last visited Oct.12, 2010).

29. *See id.*

memorial industry.³⁰ Families can use cremation jewelry in concert with the more accepted traditionally memorials, such as urns.³¹ Some “families will often store most of a loved one’s ashes in a more traditional memorial and use a small portion of the cremated remains to share with a long-distance relative.³² In essence, families can use cremation jewelry to bring together those who cannot attend the funeral, but who are still an essential part of the family unit.

There are many options for cremation jewelry.³³ One of the most popular options is the cremation memorial pendant.³⁴ “[C]remation pendants house the remains of a loved one” and come in different styles and designs.³⁵ “Styles range from simple and unadorned to elegantly engraved pendants.”³⁶ Some of the pendants are capable of holding a photo, and families can choose to have some of the pendants engraved.³⁷ Pendants consist of glass, crystal, sterling silver, or 14kt gold.³⁸ Although the creators of cremation jewelry craft the actual pendant, the person who requested the jewelry is responsible for the filling of the cremation jewelry with the cremated remains of the loved one.³⁹ The cremation jewelry ships with a funnel to ease the process.⁴⁰

One of the unique options for cremation jewelry is turn the cremated remains into a diamond.⁴¹ The Everlasting Memories website details the diamond-creation process:

In the laboratory, the analysis of the chemical structure of the cremated remains takes place The several different potassic and calcium compounds (around 85% of the total ash volume) are chemically and physically extracted from the carbon. The carbon recovered in this procedure creates the basis and beginning of the subsequent synthesis in our facility . . . for the initial growth a diamond crystal is added . . . [allowing] more crystals [to form]. The rough diamond is grown [through high

30. *Id.*

31. *Id.*

32. *Id.*

33. CREMATION JEWELRY, <http://www.cremationjewelry.net/cremation-pendants-information.pho> (last visited Oct. 10, 2011).

34. *Id.*

35. *Id.*

36. *Cremation Pendants*, EVERLASTING MEMORIES, <http://www.evrmemories.com/heart-keepsakes-cremation-jewelry-s/26.htm> (last visited October 12, 2010).

37. *Id.*

38. *Id.*

39. *See id.*

40. *Cremation Jewelry FAQs*, EVERLASTING MEMORIES, <http://evrmemories.com/cremation-jewelry-FAQs-s/134.htm> (last visited Oct. 12, 2011).

41. *Making a Cremation Diamond*, EVERLASTING MEMORIES, <http://evrmemories.com/making-cremation-diamond-s/82.htm> (last visited Oct. 14, 2010).

temperature and high pressure] and the start crystal will be cut off. The diamond is then cut and polished⁴²

The process for cremation diamonds last up to three months or more depending on the size of the desired diamond.⁴³ Additionally, companies are able to create a diamond from a loved one's lock of hair.⁴⁴ Family members can also add color to their diamonds; they can choose between blue, red, green, yellow, as well as the traditional colorless.⁴⁵ The only downside to cremation diamonds is the price tag. The smallest size available, .10-.19 carats, costs \$2,490.⁴⁶ For a one carat diamond from the remains of a loved one, the price will be between approximately \$14,999 and \$ 19,999.⁴⁷ The "diamonds will have flaws similar to a natural diamond" and the creators rate them based on the same clarity ratings as natural diamonds.⁴⁸ After the family member received diamond, the family member can choose to place the diamond in any setting, such as a pendant or a ring.⁴⁹

In addition to cremation jewelry, family members can choose to turn the cremated remains of a loved one turned into cremation art.⁵⁰ "These cremation *keepsake prints* incorporate a small amount of your loved ones ashes into the actual painting and an earth-friendly compound is added to the paint and cremated ashes."⁵¹ There is a wide range of colors your painting can incorporate.⁵² After a family member placed an order for a cremation painting, the company sends a small collection kit to gather the ashes.⁵³ Once the painting is finished, it is sealed, framed, and comes ready to hang in the home.⁵⁴ The artist even sends a Certificate of Authenticity with the order.⁵⁵

Individuals especially attached to their pets, can use cremation jewelry to commemorate the life of a loved animal.⁵⁶ A pet owner can choose to cherish its beloved pet in a pendant, which range in all different shapes and

42. *Id.*

43. *Cremation Diamond Information: Education Center*, EVERLASTING MEMORIES, <http://evrmemories.com/ashes-into-diamonds-information-s/176.htm> (last visited Oct. 8, 2011).

44. LIFE GEM MEMORIAL DIAMONDS, <http://www.lifegem.com/> (last visited Oct. 14, 2010).

45. *Life Gem Prices*, LIFE GEM MEMORIAL DIAMONDS, <http://www.lifegem.com/secondary/LGPrices2006.aspx> (last visited Oct. 8, 2011).

46. *Id.*

47. *Id.*

48. LIFE GEM MEMORIAL DIAMONDS, *Carats, Cuts, Clarity, and Color*, http://www.lifegem.com/secondary/LGPrices2006.aspLG_CCC2006.aspx (last visited Oct. 8, 2011).

49. CREMATION JEWELRY, <http://www.cremationjewelry.net> (last visited Oct.12, 2010).

50. *Cremation Art*, EVERLASTING MEMORIES, <http://www.evrmemories.com/Cremation-Art-Painting-s/241.htm> (last visited Nov. 11, 2010).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Pet Cremation Jewelry*, EVERLASTING MEMORIES, <http://www.evrmemories.com> (follow Pet Cremation Jewelry hyperlink) (last visited Oct.14, 2010).

sizes including shapes of the animal itself.⁵⁷ Other options range from urns to even a gold-plated food dish.⁵⁸ Cremation pet jewelry ships with a funnel, so you can fill the bracelet, ring, or pendant of your choice.⁵⁹ There are many ways to remember a loved one or a special pet through cremation jewelry or art.⁶⁰

III. PART II: DECEDENT’S RIGHTS VERSUS SURVIVOR’S RIGHTS

A. Order of Rights

“The obsession with burial and what to do with bodies when life has fled is a defining human trait.”⁶¹

When decided to order cremation jewelry it is important to discuss who has the rights to the decedent’s remains. Family members may have differing positions over how to dispose of a loved one and state statutes can help to determine who has the first right to decide, especially in cases that the decedent died without a will.⁶² Fifteen states have statutes that designate a list of those persons who have control of the remains in order of their rights.⁶³

57. *Id.*

58. *Id.*

59. *Id.*

60. Another interesting burial is to have some of your loved one’s ashes flown into space. *Weirdest Wills*, TRUTV, 2009, <http://www.trutv.com/library/crime/photogallery/weirdest-wills.html?curPhoto=14> (last visited Oct. 10, 2011). “The creator of *Star Trek*, Eugene Wesley Roddenberry was one of the first people to have a space burial.” *Id.* “After his 1991 death from heart failure and cremation, some of his remains were brought on a mission aboard the Space Shuttle Columbia.” *Id.* “In 1997, more of Roddenberry’s ashes . . . were launched into orbit via a Pegasus XL rocket.” *Id.* “In 2012, another portion of Roddenberry’s ashes is planned to depart into deep space, along with the ashes of his late wife.” *Id.*

61. Murphy, *supra* note 9, at 400 (citing Adam Gopnik, *Remains of Days*, NEW YORKER, Mar. 12, 2007, at 25).

62. Murphy, *supra* note 9, at 400.

63. Murphy, *supra* note 9, at 400. Those states are as follows: “Alabama, Arizona, California, Colorado, Connecticut, Delaware, The District of Columbia, Illinois, Kansas, Minnesota, North Carolina, New York, Oregon, Rhode Island, and Texas.” *Id.* at n.203. For example, the California Health and Safety Code section 7100 provides for right to control disposition of remains. *Id.* at 418; CAL. HEALTH & SAFETY CODE § 7100 (West 2007). Section 7100 provides the order of the control is the following: “(1) an agent under a power of attorney for health care; (2) the competent surviving spouse;” (3) “the sole surviving competent adult child of the decedent. . . ;” (4) “the surviving competent parent or parents of the decedent;” (5) “the sole surviving competent adult sibling of the decedent . . . ;” CAL. HEALTH & SAFETY CODE § 7100 (West 2007). The Texas Health and Safety Code section 711.002 provides for the disposition of remains for decedent’s who have not left specific instructions in writing. Murphy, *supra* note 9 at 456; TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2010). Section 711.002 provides the following priority for disposition, including cremation:

“(1) the person designated in a written instrument signed by the decedent; (2) the decedent’s surviving spouse; (3) any one of the decedent’s surviving adult children; (4) either one of the decedent’s surviving parents; (5) any one of the decedent’s surviving adult siblings; or (6) any adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent.” TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2010).

The Arizona Revised Statute Section 36-831 provides for the burial duties. Murphy, *supra* note 9, at 417;

In *Arthur v. Milstein*, plaintiffs brought an action “to determine entitlement to dispose of decedent’s body.”⁶⁴ Virgie Arthur, mother of Anna Nicole Smith, asked the court to quash the trial court’s “order that granted Dannielynn Hope Marshall Stern’s [daughter of Anna Nicole Smith] motion to recognize her sole right to determine the disposition of Smith’s remains.”⁶⁵ The court cited to the Florida Probate Code § 732.103, which provides:

The part of the intestate estate not passing to surviving spouse under section 732.102, or the entire intestate estate if there is no surviving spouse, descends first to the lineal descendants of the decedent, and if there is no lineal descendant, to the decedent’s father and mother equally, or to the survivor of them.⁶⁶

The court also noted the common law with regard to disposition. “Generally, in the absence of a testamentary disposition, the spouse of the deceased or the next of kin has the right to the possession of the body for burial or other lawful disposition.”⁶⁷ The court reasoned, “that the remaining list of legally authorized persons are those who are most likely to know and to follow . . . [the] wishes” of the decedent.⁶⁸ The state statute incorporated the common law rules and the court ruled in favor of Dannielynn, who followed the last ascertainable wish of her mother.⁶⁹

ARIZ. REV. STAT. ANN. § 36-831 (2009). The duty of burying the decedent or providing other funeral or disposition devolves in the following order: (1) surviving spouse unless legally separated or a petition for divorce was filed; (2) the person designated as having power of attorney; (3) “if the dead person was a minor, on the parents;” (4) “on the adult children;” (5) “on the parents;” (6) “on the dead person’s adult sibling;” ARIZ. REV. STAT. ANN. § 36-831 (2009). An example from the east coast is the Delaware Code for right to dispose of remains. Murphy, *supra* note 9, at 420; *see* DEL. CODE ANN. tit. 12, § 264 (West 2007). The right to control disposition of the last remains vests in the following order:

- (1) the decedent if acting through a declaration instrument;
- (2) the surviving spouse of the decedent, if not legally separated;
- (3) either the appointed personal representative or administrator of the decedent’s estate if such person has been appointed;
- (4) a majority of the surviving adult children of the decedent whose whereabouts are reasonably ascertainable;
- (5) the surviving parents or legal guardians of the decedent whose whereabouts are reasonable ascertainable;
- (6) a majority of the surviving adult siblings of the decedent whose whereabouts are reasonably ascertainable; etc. DEL. CODE ANN. tit. 12, § 264 (West 2007).

These statutes are just a sampling of the statutes across the United States; however, minus slight wording, they are remarkably similar. The surviving spouse is typically the first person to be charged with the disposition of the remains. Murphy, *supra* note 9, at 401.

64. Murphy, *supra* note 9, at 401-03; *Arthur v. Milstein*, 949 So.2d 1163, 1163 (Fla. Dist. Ct. App. 2007).

65. *Id.* at 1164.

66. Murphy, *supra* note 9, at 402 (citing FLA. STAT. § 732.103 (2005)).

67. *Arthur*, 949 So.2d 1163 (citing *Kirksey v. Jernigan*, 45 S.O.2d 188, 189 (Fla. 1950)).

68. *Id.* at 1166.

69. *Id.* It is important for those who would like to be a part of cremation jewelry to tell their family members, especially if they are not going to have a will, because then the decision will go to the descendant listed in the intestate statutes.

In *Kulp v. Kulp*, a divorced couple argued over the disposition of their child's remains.⁷⁰ The court relied on the Pennsylvania Probate, Estates, and Fiduciaries Code section 305 to determine the right to dispose of a decedent's remains.⁷¹ Section 305 states that "the next of kin shall have sole authority in all matters pertaining to the disposition of the remains of the decedent."⁷² Thus, "the next of kin have sole authority" when there is no surviving spouse.⁷³ The court held the parents of the child had equal rights to the child's remains.⁷⁴

In *Booth v. Huff*, an action was resolved concerning "a dispute over the disposition of the cremated remains of Ronald Booth."⁷⁵ "At the time of his death, decedent was in the process of obtaining a divorce from his wife and . . . was residing with defendant, his girlfriend."⁷⁶ The Defendant took possession of the remains and ten months after decedent's death "scattered the ashes in the Hudson River."⁷⁷ The defendant did not inform the decedent's family of this plan and the decedent's daughters sued.⁷⁸ The court stated, "generally, the surviving next of kin have a right to the immediate possession of the decedent's body for preservation and burial."⁷⁹ However, the court stated "a decedent's wishes will be taken into account when a dispute erupts over the disposition of the ultimate remains."⁸⁰ In this case, the court said that there were "triable issues of fact regarding the decedent's intentions" and that summary judgment was not appropriate.⁸¹

On the other hand, when the deceased unambiguously expressed his wishes about the disposition of their remains, the court will consider those wishes very seriously.⁸² For example, the Revised Code of Washington section 68.50.160 states, "a person has the right to control the disposition of his or her own remains without the predeath or prodeath consent of another

70. *Kulp v. Kulp*, 920 A.2d 867, 868 (Pa. Super. Ct. 2007). "'Next of Kin' are defined as the spouse and relatives by blood of the deceased in order that they be authorized to succeed to the deceased's estate under Chapter 21 as long as the person is an adult or an emancipated minor." *Id.* at 871 n. 2.

71. *Id.* at 871.

72. *Id.* at 871; 20 PA. CONS. STAT. ANN. § 305(c) (West 2010).

73. *Kulp*, 920 A.2d at 871.

74. *See id.*

75. Murphy, *supra* note 9, at 399–400 (referencing *Booth v. Huff*, 708 N.Y.S.2d 757, 758 (N.Y. App. Div. 2000)).

76. *Id.*

77. Murphy, *supra* note 9, at 399–400 (citing *Booth v. Huff*, 708 N.Y.S.2d 757, 758–59 (N.Y. App. Div. 2000)).

78. *See id.*

79. Murphy, *supra* note 9, at 399–400 (citing *Booth v. Huff*, 708 N.Y.S.2d 757, 759 (N.Y. App. Div. 2000)).

80. *See* Murphy, *supra* note 9, at 399–400 (citing *Booth v. Huff*, 708 N.Y.S.2d 757, 759 (N.Y. App. Div. 2000)).

81. *See* Murphy, *supra* note 9, at 399–400 (citing *Booth v. Huff*, 708 N.Y.S.2d 757, 759 (N.Y. App. Div. 2000)). Again, to determine who has the right to order cremation jewelry, it is important to consider who has the rights to the remains.

82. *See* Murphy, *supra* note 9, at 399–400.

person.”⁸³ If the decedent has written their wishes in the presence of a witness and has had that document signed, then the court will deem that document as sufficient legal authorization for the disposition of their remains.⁸⁴ In addition, if the decedent has already made prearrangements for the disposition of their remains or “filed with a licensed funeral establishment or cemetery authority,” then their surviving kin may not cancel those arrangements or make “substantial revisions.”⁸⁵

In conclusion, cremation jewelry may be a controversial topic for the family members. If there is a dispute between the descendants about what to do with the body, then it will become important to know who has the right to decide according to the statute. These statutes are particularly significant when the decedent dies intestate, i.e. without a will. If a person would like to make any changes to the line of succession, other than those provided in the statute, then it would be appropriate to create a will denoting that fact. In addition, cultural feelings dictate that we should follow the desires of the decedent; therefore, if a person would expressly like to become a part of cremation jewelry, then that person should carve out a section in the will dedicated to this point to avoid any future disputes.

B. Conflict of Interests

Unfortunately, family disputes over the disposition of a loved one’s remains are fairly common.⁸⁶ When emotions are running high, conflicts are bound to arise. “Some of the disputes are even highly publicized given the deceased’s identity”—Anna Nicole Smith, Michael Jackson, Gary Coleman, etc.⁸⁷ Courts handle these disputes differently depending on the state and the jurisdiction.⁸⁸ Family members may debate over the decision to receive cremation jewelry; therefore, it is important to inquire into who has the decision to order the jewelry.

In *Brannam v. Edward Robeson Funeral Home*, a particularly miserable dispute arose.⁸⁹ The decedent left instructions in his will that he was to be cremated and his ashes should be under the control of the executor of his estate—the mother of his children.⁹⁰ His estranged wife contacted the funeral home and she said would not release the remains to the executor of decedent’s estate.⁹¹ The estranged wife also refused to allow the decedent’s children and

83. Murphy, *supra* note 9, at 404 (referencing WASH. REV. CODE § 68.50.160 (2007)).

84. Murphy, *supra* note 9, at 404 (referencing WASH. REV. CODE. § 68.50.160(1)).

85. Murphy, *supra* note 9, at 404 (referencing WASH. REV. CODE § 68.50.160(2)).

86. See Murphy, *supra* note 9, at 408.

87. *Id.*

88. *Id.* at 409.

89. Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 972–73 (1999) (citing *Brannam v. Edward Robeson Funeral Home*, No. 43141/96 (N.Y. Sup. Ct. Nov. 14, 1996)).

90. *Id.*

91. *Id.*

the executor to attend the wake ceremony.⁹² The executor ultimately resorted to suing the funeral home to recover the remains of the decedent's body.⁹³ The court granted the executor the remains after a hard fought battle between the survivors of the decedent.⁹⁴

In *Leno v. St. Joseph Hospital*, plaintiffs filed an action "alleging that defendant, without proper authorization, had performed an autopsy on" their brother.⁹⁵ The court restated the common principle that "a right of possession of a decedent's remains devolves upon the next of kin in order to make appropriate disposition thereof."⁹⁶ However, the court decided what to do when there are those of equal status competing for the disposition of the remains.⁹⁷ The court stated the following: "The common-law 'right' is the right to bury decently, and there was no requirement of unanimity on the part of those who were of equal status concerning the place or mode of burial."⁹⁸ The court ultimately ruled in favor of the hospital because the "exact whereabouts of . . . all of the next of kin" could not be readily known.⁹⁹ The authorization of one person is enough for the hospital to take action, and there is "no requirement that notice be given to parties in rank of preference."¹⁰⁰

One of the more public disputes involved Ted Williams, a famous Boston Red Sox baseball player, who died in 2002.¹⁰¹ Williams's son, John Henry, and his daughter, Claudia, pushed for their father's body to be cryogenically preserved.¹⁰² Surgeons severed Williams's head from his body, storing his body and head separately in liquid nitrogen.¹⁰³ "Williams' eldest daughter, Bobby-Jo Williams Ferrell had fought against the entire process."¹⁰⁴ She claimed "that her [father] had asked and requested in his will to be cremated and his ashes scattered off the Florida coast."¹⁰⁵ However, a handwritten note signed by John Henry, Claudia, and Ted Williams stated they all agreed to be put in biostasis after their death.¹⁰⁶ Bobby-Jo Williams Ferrell brought suit to have her father's wishes recorded

92. *Id.*

93. *Id.*

94. *Id.*

95. *Leno v. St. Joseph Hospital*, 302 N.E.2d 58, 59 (Ill. 1973).

96. *Id.* at 59.

97. *See id.*

98. *Id.* at 61.

99. *Id.*

100. *Id.* According to this case, if there are those of equal status in the intestacy statutes, such as children, then the authorization to make cremation jewelry will only need to come from one of the children, instead of requiring all of them to agree. *See id.*

101. *Ted Williams Frozen in Two Pieces*, CBS NEWS, Aug. 12, 2003, <http://www.cbsnews.com/stories/2002/12/20/national/main533849.shtml> (last visited Oct. 15, 2010).

102. *See id.*

103. *See id.*

104. *Id.*

105. *Id.*

106. *See id.*

in the will recognized.¹⁰⁷ The court will usually defer to the decedent's wishes with regard to the disposition of his remains.¹⁰⁸

Another example of a public debate came with the discovery of Gary Coleman's secret will, which his *Different Strokes* co-star Todd Bridges revealed.¹⁰⁹ Coleman passed away in 2010 after suffering a brain hemorrhage.¹¹⁰ He "ha[d] been estranged from his mother and father. . . since a 1989 battle over his finances."¹¹¹ "Uncertainty regarding Gary Coleman's estate arose when Entertainment Tonight revealed that Shannon Price lied about being married to Coleman. . . The will purportedly excludes Coleman's parents who would prefer that no will be produced."¹¹² Without a will, his parents would likely receive a portion of Coleman's estate.¹¹³ Utah District Judge James Taylor appointed Robert Jeffs, a Provo lawyer, as the administrator of Coleman's estate and announced "Coleman's remains be securely stored until he makes a final decision regarding the estate executor."¹¹⁴ The battle between the executors is now between Anna Gray, who the 2005 will named as executor, and Price.¹¹⁵ The court will consider the decedent's wishes when trying to decide what to do with the remains, as well as the circumstances surrounding his life and death.

Another way courts handle disputes between family members is to split the cremated remains among the survivors.¹¹⁶ In *Kulp v. Kulp*, as previously mentioned, a divorced couple fought over the remains of their child's ashes.¹¹⁷ The trial court ordered the deceased remains "be divided into two separate urns, and [the court] allowed each party to their urn at a site of his/her choice."¹¹⁸ The court held the "law does not prohibit the trial court from ordering a division between the remains"; however, the husband in this case appealed the decision.¹¹⁹ "[This] issue is an extremely sensitive one," and when one of the survivors believes splitting the remains is offensive, the

107. Carrie Johnson, *Williams' Shift from Will Must be Proven*, ST. PETERSBURG TIMES ONLINE, (July 20, 2002), http://www.sptimes.com/2002/07/20/news_pf/Citrus/Williams__shift_from_.shtml (last visited October 15, 2010).

108. *See id.* If one has a particular desire to be made into cremation jewelry, then that wish should be made known.

109. Wenn.com, *Bridges: Coleman Had a Secret Will*, TORONTO SUN, June 3, 2010., <http://torontosun.com/entertainment/tv/2010/06/03/14241856-wenn-story.html>.

110. *See id.*

111. *Id.*

112. Gerry W. Beyer, *Gary Coleman May Have a Will*, WILLS, TRUSTS, & ESTATES PROF. BLOG (June 4, 2010), http://lawprofessors.typepad.com/trusts_estates_prof/2010/week_22/index.html.

113. *See id.*

114. *See* Gerry W. Berry, *Update on Gary Coleman's Estate*, WILLS, TRUSTS, & ESTATE PROF. BLOG, (June 20, 2010), http://lawprofessors.typepad.com/trusts_estates_prof/2010/06/update-on-gary-colemans-estate.html.

115. *Id.*

116. *See, e.g.*, *Kulp v. Kulp*, 920 A.2d 867, 872 (Pa. Super. Ct. 2007).

117. *Kulp v. Kulp*, 920 A.2d 867, 868 (Pa. Super. Ct. 2007).

118. *Id.*

119. *Id.* at 872.

court should consider those feelings.¹²⁰ Therefore, the trial court abused its discretion in this case.¹²¹

In *Estate of K.A.*, the appellate court “held that [the] trial court did not abuse its discretion in ordering” the division of the deceased minor’s ashes equally between the divorced parents, even though the mother had sole custody of the minor.¹²² The daughter, age seventeen, died in a car accident and “both mother and father executed the ‘Cremation Authorization.’”¹²³ A dispute arose over the disposition of the body after the cremation was completed.¹²⁴ K.A.’s wishes allowed for the division of her ashes and the mother allowed for a division of the remains.¹²⁵ The court held that the division of the remains among the survivors is a “common and acceptable in the funeral service industry;” therefore, the appellate court affirmed the decision of the trial court.¹²⁶

In *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel Inc.*, the court approved of the parties’ agreement to cremate the decedent’s body and split the cremated remains.¹²⁷ The deceased appointed Stewart, his lover and companion of five years, as the executor of his estate.¹²⁸ Stewart stated the deceased desired to be cremated and did not want a religious ceremony.¹²⁹ The deceased’s mother and brother took possession of his remains and planned to hold an Orthodox Jewish funeral, despite Stewart’s declaration that the deceased opposed a funeral.¹³⁰ Before the court rendered an official decision on the case, the parties reached a decision, which included a division of the remains.¹³¹

In order to plan for the disposition of a loved one, it is crucial to determine who has proper decision-making authority. Disputes among family members over the disposition of the remains are unfortunately very common. Courts have handled these disputes in a number of ways, including considering the feelings of both the deceased and his survivors, even if those wishes are unorthodox (cryogenics or cremation jewelry).¹³² If the parties are amenable to the decision, some courts will also allow the remains to be split among the survivors of equal authority.¹³³

120. *Id.* at 872–73.

121. *Id.* at 873.

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

123. *Id.* at 749.

124. *Id.*

125. *Id.* at 751.

126. *Id.*

127. *Stewart v. Schwartz Brothers-Jeffer Mem’l Chapel, Inc.*, 606 N.Y.S.2d 965, 969 (N.Y. Sup. Ct. 1993).

128. *Id.* at 966.

129. *Id.* at 966–67.

130. *Id.* at 966.

131. *Id.* at 969.

132. *See* Murphy, *supra* note 9, at 384–415.

133. *See supra* note 122.

Cremation jewelry, although a rising trend, may be offensive to some of the family members. Therefore, different family members may have a conflict of interest with regard to cremation jewelry. It is important to figure out who has the right to determine what to do with the remains of the body in order to establish the right to select cremation jewelry as the final disposition. In addition, a family member could choose to send cremation jewelry to those who are not a part of the funeral as a way to soothe the tension between the family members with regard to disposition rights. If the court allows for the split of the remains, then multiple family members could decide to have their loved one turned into jewelry.

C. Ownership of the Deceased

“Whether the human body may be classified as property” has been the subject of debate throughout history, especially because of its moral implications.¹³⁴ “English common law . . . held that no property rights attached to a dead body,” which may have developed because property matters were handled in the common law courts and “the ecclesiastical courts had jurisdiction over the human body.”¹³⁵ “Initially, the American courts followed suit.”¹³⁶ In *Enos v. Snyder*, 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.”¹³⁷ However, the courts needed a way to recognize the survivor’s rights to dispose of the deceased, which lead to a recognition of “quasi-property” rights.¹³⁸

The courts established this concept of “quasi-property” rights from their understanding of what exercisable property rights may be held by the survivor of the deceased.¹³⁹ “The right to possession of the body corresponds with a duty to dispose of the body.”¹⁴⁰ “Courts have reasoned that, out of the right to burial, there arises the duty to bury and, out of the duty to bury, there arises the ‘quasi-property’ right.”¹⁴¹ In *Pettigrew v. Pettigrew*, the court stated the following:

134. Murphy, *supra* note 9, at 396 (citing Michael H. Scarmon, *Brotherton v. Cleveland: Property Rights in the Human Body—Are the Goods Oft Interred with Their Bones*, 37 S.D. L. REV. 429, 436 (1991/1992)).

135. *Id.*

136. *Id.*

137. Murphy, *supra* note 9, at 396 (citing *Enos v. Snyder*, 63 P. 170 (1900)).

138. See Jennifer E. Horan, *When Sleep at Last Has Come: Controlling the Disposition of Dead Bodies for Same-Sex Couples*, 2 J. GENDER RACE & JUST. 423, 429–30 (1999).

139. *Id.* at 430–31 (citing *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 441 (W. Va. 1985)).

140. Horan, *supra* note 138, at 431.

141. *Id.* (citing *McKibben v. McKibben*, 119 N.Y.S.2d 685, 687 (N.Y.C. Mun. Ct. 1952)).

When a man dies, public policy and regard for the public health, as well as the universal sense of propriety, require that his body should be decently cared for and disposed of. The duty of disposition therefore devolves upon someone, and must carry with it the right to perform. . . [T]here is a legally recognized right of custody, control, and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust.¹⁴²

“These rights, whether classified ‘quasi-property’ or a duty to dispose of the body in ‘trust,’ exist in the surviving spouse or next of kin, not in the decedent.”¹⁴³

In *Leno v. St. Joseph Hospital*, as previously mentioned, the plaintiffs alleged the defendant performed an autopsy on the body of their brother without their consent.¹⁴⁴ The court stated, “[t]he principle is firmly established that while in the ordinary sense, there is no property right in a dead body, a right of possession of a decedent’s remains devolves upon the next of kin in order to make appropriate disposition thereof, whether by burial or otherwise.”¹⁴⁵ The court held that the next of kin had a right to request an autopsy because they had a “quasi-property” right.¹⁴⁶

In *Arthur v. Milstein*, as mentioned above, the plaintiffs sued to determine entitlement to dispose of the decedent’s body.¹⁴⁷ The court reaffirmed the principle that the next of kin has “the right to possession of the body for burial or other lawful disposition.”¹⁴⁸ In addition, the court stated that “many courts have announced the rule that a person has the right to dispose of his own body by will.”¹⁴⁹ The court defaulted to the decedent’s last ascertainable wish as to the proper disposition of the deceased and her survivors had the right to determine the lawful disposition of her remains.¹⁵⁰

In *City of Key West v. Knowles*, “Lorraine Knowles sued the City and its former Cemetery Sexton” because “she was deprived of a property interest in her husband’s buried remains.”¹⁵¹ “[A]n urn containing the cremated remains of Knowles’ late husband . . . was interred in an above-ground burial vault at the Key West City Cemetery.”¹⁵² Six months later, without the knowledge or consent of Knowles, a cemetery worker placed the casket of

142. Horan *supra* note 138, at 431 (citing *Pettigrew v. Pettigrew*, 56 A. 878, 878 (Pa. 1904)).

143. Horan, *supra* note 138, at 432.

144. See *Leno v. St. Joseph Hospital*, 302 N.E.2d 58 (Ill. 1973).

145. *Id.* at 59–60.

146. See *id.*

147. Murphy, *supra* note 9, at 401–03; *Arthur v. Milstein*, 949 So.2d 1163, 1163 (Fla. Dist. Ct. App. 2007).

148. *Arthur*, 949 So.2d at 1166.

149. *Id.*

150. Murphy, *supra* note 9, at 401–03; see *Arthur*, 949 So.2d at 1166.

151. *City of Key West v. Knowles*, 948 So.2d 58, 59 (Fla. Dist. Ct. App. 2007).

152. *Id.*

the deceased's "cousin in the same vault as the urn."¹⁵³ The court stated, "[i]n Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition."¹⁵⁴ However, these rights to disposition "exist only for the purposes of burial, or for other statutory purposes, and nothing further"¹⁵⁵ Therefore, the court held that a "constitutionally protected property interest to remains ends at the point of burial or other lawful disposition."¹⁵⁶

In *Arkansas Board of Embalmers and Funeral Directors v. Reddick*, "a funeral director sought judicial review of a decision by the Board of Embalmers and Funeral Directors suspending his funeral director's license for two years."¹⁵⁷ Reddick personally knew the deceased and became close while he served as her pastor.¹⁵⁸ Reddick had the deceased execute a power-of-attorney.¹⁵⁹ The Board ruled that Reddick violated the rules by (1) removing the body of the deceased to the "funeral home without first obtaining authorization from the family," (2) going "to the home of the deceased and removing papers, jewelry, and clothing" without permission, (3) "[a]t the time of the death . . . [he] removed the deceased's purse, containing credit cards and safety deposit keys, without authorization of family members, (4) failing to explain the insurance policy to the family members of the deceased, (5) . . . Reddick acted as the arranger and did not provide family members with Statement of Goods and Service Selected prior to funeral," and finally (6) "Reddick violated Board Rule XIV . . . by failing to make every reasonable attempt to fulfill the needs and desires of the arrangers."¹⁶⁰ The court held that upon the death of the deceased, "it fell to her closest blood relative to decide what was to be done with her remains."¹⁶¹

Additionally, the court recognized in *Reddick* that "[a] quasi-property right in dead bodies vests in the nearest relatives of the deceased, arising out of their duty to bury their dead."¹⁶² This right extends to the 'custody of the body for burial, to prevent the corpse from disturbances after burial, or to remove it to a proper place."¹⁶³ If the spouse fails to timely act with regards to "asserting a right to care for the body, then the care of the body goes to the

153. *Id.*

154. *Id.* at 60.

155. *Id.*

156. *Id.*

157. Ark. Bd. of Embalmers and Funeral Dirs. v. Reddick, 233 S.W.3d 639, 641 (Ark. 2006).

158. *Id.*

159. *Id.*

160. *Id.* at 643.

161. *Id.*

162. *Id.* at 643-44.

163. *Id.* at 644.

next of kin.”¹⁶⁴ Therefore, the right to the deceased in this case vested in the cousins, and Reddick stepped in prematurely.¹⁶⁵

In *Rekosh v. Parks*, “[d]ecedent’s adult sons brought [an] action against decedent’s former wife, funeral home, and cemetery, after decedent was cremated.”¹⁶⁶ Plaintiffs claim the cremation of their father interfered with their next of kin’s right to possess and preserve decedent’s body.¹⁶⁷ The plaintiffs also claimed neither the funeral home nor the cemetery properly secured a cremation authorization form.¹⁶⁸ The court held “while there is no property right, in the ordinary sense, in a dead body, the next of kin have a right to the possession of the decedent’s remains to make appropriate disposition thereof.”¹⁶⁹ “In Illinois, this right has been construed to give the next of kin the right to determine the time, manner, and place of burial.”¹⁷⁰ Plaintiffs allege that because the decedent’s former wife “was divorced from the decedent at the time of his death, and that therefore she had no right to possess. . . the body.”¹⁷¹ The court held that the plaintiff’s complaint stated sufficient facts to show “interference with the next of kin’s right to the possession” of the decedent’s remains.¹⁷²

This “quasi-property” right is for the purposes of burial or other lawful disposition.¹⁷³ Most courts have held that the right to the remains ends after the lawful disposition has taken place.¹⁷⁴ After the cremation has taken place, one could argue that lawful disposition of the remains has taken place and the rights to the remains have ended, except for placing the remains in their final resting spot.¹⁷⁵ Cremation jewelry uses a small portion of the ashes and places them into the jewelry requested.¹⁷⁶ By placing the ashes in the jewelry, does that constitute a final resting spot? If the placing of the ashes into the cremation jewelry ends the ownership right to the ashes, how does one claim ownership of the jewelry?

One argument is that the ownership of cremation jewelry continues after the ashes have been placed in the jewelry.¹⁷⁷ This position becomes especially important when referencing cremation diamonds and cremation jewelry. The ashes of a loved one are actually transformed into a diamond

164. *Id.*

165. *Id.*

166. *Rekosh v. Parks*, 735 N.E.2d 765, 765 (Ill. App. Ct. 2000).

167. *Id.*

168. *Id.* at 770.

169. *Id.* at 767.

170. *Id.* at 774

171. *Id.* at 775

172. *Id.*

173. *See generally supra* Part IV.A.

174. *See Horan, supra* note 138.

175. *Id.*

176. *See Cremation Jewelry, supra* note 28.

177. *Id.*

or placed into a valuable item of jewelry.¹⁷⁸ The ashes could arguably be considered as part of the person's remains, but one could also claim the remains have met their legal disposition because the remains have been placed in a final resting spot.¹⁷⁹ The argument being that the ownership rights of the diamond or jewelry should continue for the owner despite the fact that they have reached their final resting spot.¹⁸⁰ The family member requesting the diamond or jewelry should have a priority in comparison to anyone else.¹⁸¹ In addition, the courts can apply this position to decide who has ownership of the jewelry, even if the jewelry is ever lost or stolen.¹⁸² However, this position could become particularly tricky if the family member would like to bequeath or sell his jewelry/diamond to another, as evidenced in Part IV B.¹⁸³

IV. THE RIGHT TO SUE

A. Tort Analysis

Unfortunately, in dealing with the fragile remains of a loved one, occasional accidents or wrongdoings can occur. These potential causes of action also occur when there is a mistreatment of the remains or the remains are not properly disposed.¹⁸⁴ When causes of action arise and a family member decides to sue, courts have to decide how to treat these causes of action. "Some courts analyze the right in survivors not as a 'quasi-property' right, but instead through the tort of emotional distress."¹⁸⁵ "The tort is caused when there is an interference or disturbance of the body and damages are rewarded due to the resulting mental anguish."¹⁸⁶

Courts typically limit standing for this cause of action to those who had right to control the disposition of the remains.¹⁸⁷ Some courts have moved away from this limitation, however, recognizing that family members could also feel the mental anguish caused by the interference or the disturbance of their loved one.¹⁸⁸ "Yet, none of these cases has extended liability to a non-

178. EVERLASTING MEMORIES, *supra* note 50.

179. City of Key West, 948 So.2d 58.

180. See Murphy, *supra* note 9, at 400.

181. *Id.* at 400-01.

182. See *id.*

183. See *infra* Part IV.B.

184. See Horan, *supra* note 138, at 435 (citing Carney v. Knollwood Cemetery Ass'n, 514 N.E.2d 430, 434 (Ohio Ct. App. 1986)).

185. *Id.* "In order to facilitate recovery for the mishandling of a dead body without conceding the existence of a cause of action for emotional distress, the courts have in the past resorted to the fiction of a 'quasi property' interest in the dead body." *Id.*

186. See *id.*

187. See *id.* (referencing Walser v. Resthaven Mem'l Gardens, 633 A.2d 466, 473 (Md. Ct. Spec. App. 1993)). For the list of those who have a right to control the disposition of the remains, see Part III and footnote 63.

188. *Id.* (citing Christensen v. Superior Court, 820 P.2d 181, 191 (Cal. 1992)).

family member.”¹⁸⁹ Instead, courts redefined the meaning of a family member to encompass non-family members who could suffer the same mental anguish.¹⁹⁰

This transition from property rights to tort liability enabled the courts to avoid labeling the remains as property or even “quasi-property” while still allowing family members to recover if justice requires it.¹⁹¹ The courts that follow this idea believe the ability to label a body as a kind of property right is worthless because bodies cannot be bought, sold, transferred, or assigned.¹⁹² Therefore, tort theory could encompass the survivors’ rights without creating an artificial reliance on a “quasi-property” theory.¹⁹³ Although similar to the “quasi-property” theory, tort liability will not give the decedent the legal right to dictate his disposition before his death.¹⁹⁴ If survivors have the right to tort claims, then the right of the decedent might be further limited because funeral homes would be unwilling to contract with the decedent alone without of consent from the survivors.¹⁹⁵

If a family member were to order a cremation diamond or even cremation art, then the family member must ship a small portion of the decedent’s ashes to the company in charge.¹⁹⁶ If the company loses the ashes, or the shipping company has some sort of problem in transit, then can a family member sue for emotional distress? According to some courts, the answer is probably.¹⁹⁷ These courts would prefer the family members sue for emotional distress, rather than claim they owned to the remains and that they were deprived of those ownership interests.¹⁹⁸ In this regard, the courts can escape the moral dilemma of classifying remains as property.¹⁹⁹ The courts would have to struggle with the issue of mental anguish, should a wrongdoer steal the jewelry.²⁰⁰

B. Potential Causes of Action

The court systems have handled the ways to sue in a variety of manners. Some courts stick to the “quasi-property” theory and allow for a legitimate claim of entitlement, which gives the survivors the rights to sue.²⁰¹ Other

189. Horan, *supra* note 138, at 435 (referencing *Christensen v. Superior Court*, 820 P.2d 181, 191 (Cal. 1992)).

190. *Id.*

191. Horan, *supra* note 138, at 436.

192. *See id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *See supra* Part IV.A.

197. *See supra* Part IV.A.

198. *See supra* Part IV.A.

199. *See supra* Part IV.A.

200. *See supra* Part IV.A.

201. *See supra* notes 199–201.

courts, as seen above, tend to avoid the question of property, and prefer a mental anguish cause of action.²⁰² There have also been those that use a combination of both in order to give justice to survivors who have dealt with the mental anguish caused with the interference or disturbance with the remains of a loved one.²⁰³

In *Crocker v. Pleasant*, the “decedent’s parents brought . . . action against the city and county for interference with their . . . interest in their son’s dead body.”²⁰⁴ The court acknowledged that “in addition to the statutory provisions, Florida case law has long recognized the right to possess a loved one’s remains for the purposes of burial or other appropriate disposition”²⁰⁵:

It is well settled that, in the absence of testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition which they may see fit. *And the invasion of such right by unlawfully withholding the body from the relative entitled thereto is an actionable wrong, for which substantial damages may be recovered.*²⁰⁶

The court also stated that the right to recover is especially appropriate with regard to tortious interference with the rights involving dead bodies.²⁰⁷ The mental anguish caused to the surviving relative is a natural and probable consequence of the type of wrong committed and is “frequently the only injurious consequence to follow from it.”²⁰⁸ Therefore, the “Florida courts have recognized causes of action based upon interference with a dead relative’s body in a variety of circumstances”, including when the underlying conduct involves intentional misconduct or malice.²⁰⁹ The court in this case concluded that Florida has a “legitimate claim of entitlement by the next of kin to possession of the remains” and that there was a wrongful interference with those rights.²¹⁰

In *Kirksey v. Jernigan*, Lillie Kirksey brought an action against a funeral home to recover for damages for mental anguish, “because the defendant allegedly took the dead body of plaintiff’s child without being authorized” and then refused to return the body.²¹¹ The child died accidentally, while the plaintiff was absent, and the undertaker took the body of the child to his

202. See *supra* Part IV.A.

203. See *supra* Part IV.A.

204. *Crocker v. Pleasant*, 778 So.2d 978, 978 (Fla. 2001).

205. *Id.* at 987.

206. *Id.* (citing *Kirksey v. Jernigan*, 45 So.2d 188, 189 (Fla. 1950)).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 988.

211. *Kirksey v. Jernigan*, 45 So. 2d 188, 188 (Fla. 1950).

establishment “without the authority of the plaintiff or anyone authorized to act in her behalf.”²¹² The court stated the following:

But we do not feel constrained to extend this rule to cases founded purely in tort, where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or great indifference to the persons, property, or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages.²¹³

When there is tortious interference with the rights involving dead bodies, the right to recover is especially appropriate.²¹⁴ The court also stated that when the next of kin have a cause of action when the remains are unlawfully interfered with, or wrongfully withheld.²¹⁵ Because mental anguish is the natural and probable consequence of a wrongful interference of a dead body, it would be the proper cause of action to bring.²¹⁶

In *Scheuer v. Willie*, the decedent’s children brought an action against a funeral home for intentional infliction of emotional distress after the funeral home decided to embalm the body of the decedent, which was in violation of the children’s religious beliefs.²¹⁷ The funeral home did not “[attempt] to ascertain or contact the decedent’s next of kin”, but immediately embalmed the body.²¹⁸ The court held: “[t]o state a cause of action for the intentional infliction of emotional distress a complaint must allege facts which, if proven, would also support an award of punitive damages.”²¹⁹ Additionally, the court reiterated the stance “the right to recover . . . is especially appropriate the tortious interference with rights involving dead human bodies.”²²⁰ The court also held “there was an issue of fact as to the funeral home’s knowledge of the adverse consequences of its decision to immediately embalm the body;” therefore, summary judgment was not appropriate.²²¹

There are a couple of important issues that arise when transporting remains to a facility that makes either cremation art or jewelry. For example, what happens if the cremated remains are lost or if the order is wrongfully put in and you get a blue diamond, when you wanted a yellow one?²²² The

212. *Id.* at 189.

213. *Id.*

214. *Id.*

215. *Id.* at 190.

216. *Id.* at 189.

217. *Scheuer v. Willie*, 385 So.2d 1076, 1076 (Fla. Dist. Ct. App. 1980).

218. *Id.* at 1077.

219. *Id.* at 1078.

220. *Id.* (citing *Kirksey*, 45 So. 2d at 190).

221. *Scheuer*, 385 So.2d at 1078.

222. *Cf. TSA Requirements for Cremation Urns, EVERLASTING MEMORIES*, <http://www.evrmemories.com/cremation-urn-tsa-transporting-s/188.htm>; *accord Cremation Diamonds; The Creation Process*,

answer seems to be to sue for mental anguish for the wrongful interference with a dead body.²²³ The next of kin, with a legitimate claim of entitlement, could probably consider suing the transportation company or the facility that provides these options.²²⁴ Dealing with the remains of a loved one is a highly emotionally charged area; therefore, mental anguish for any wrongdoing is a probable consequence of any mistreatment that might occur.

C. Potential Future Problems

This comment has addressed several problems related to cremation jewelry and art.²²⁵ One additional problem that may arise in the future of cremation jewelry is incorporating cremation jewelry into a will, especially for the purposes of taxation.²²⁶ When evaluating an estate, there is a tax placed on the estate based on the value of the estate.²²⁷ Appropriately, jewelry adds value to an estate.²²⁸ However, would it be appropriate to tax jewelry that had the remains of a loved one? It seems like society would suggest a resounding no; however, that may not be the result when facing an evaluation of the property. There may not be a way to separate the cremation jewelry from the other jewelry one owns. Unless there was a specific way to separate these jewels during the settlement of the estate, or if someone makes special note of it in a will, the jewelry may just find its way into the pile that is taxable.

Additionally, when one requests a cremation diamond, the creators rate the diamonds on the clarity scale that is used for a normal diamond.²²⁹ It may not be one hundred percent perfect, but it is virtually the same as a stone diamond.²³⁰ These diamonds are also very costly to create, and the diamond itself could be worth monetary value, besides the sentimental value, because there is not a significant difference between a natural occurring diamond and a diamond created from cremated remains.²³¹

Another potential future problem could be the loss or theft of the jewelry. Could the “owner” of the jewelry sue the thief? How would the thief even know that this particular piece of jewelry was made of cremated remains? Most of the time, thieves cannot be found, so would the loss count

EVERLIFE MEMORIALS, <http://www.everlifememorials.com/v/keepsake-cremation-jewelry/cremation-diamond-creation-process.htm>.

223. *Cf. Mortuary Malpractice and Funeral Abuses*, BRYANTON PORCELL LLP, <http://www.braytonlaw.com/practiceareas/morturay.htm>.

224. *Cf. id.*

225. *See supra* Parts II.B, III.A–C.

226. *Cf. Estate Tax*, IRS, <http://www.irs.gov/business/small/article/o,,id=164871,00.htm>.

227. *Id.*

228. *See id.*

229. Making a Cremation Diamond, *supra* note 41.

230. *See* Part I.B.

231. *Id.*

as mistreatment of a dead body? Could the “owner” of the cremation jewelry put insurance on it in order to safeguard it? With cremation jewelry being a new concept and method for burial, it seems that there may be problems in the future. The courts have yet to decide these issues, because those who have requested the jewelry have not yet considered placing these items in a will.

V. CONCLUSION

Cremation has been prevalent in our history dating back to the early Stone Age.²³² In addition, there has been a strong cultural sentiment to honor and respect the dead through various burial methods, including mummification and burning.²³³ In the last few decades, the popularity of cremation has steadily increased, especially due to the high cost for burial plots.²³⁴ With the rise of cremation, there has been interesting choices with regard to handling the remains, including cremation jewelry.²³⁵ Cremation jewelry is jewelry that contains a small portion of the ashes of a loved one.²³⁶ Family members can order these pieces of jewelry in all shapes and sizes, ranging from pendants and diamonds to rings and bracelet.²³⁷ One could even order cremation jewelry for their pets!²³⁸

In order to determine who has the right to order the cremation jewelry, it is important to consider who has the rights to the remains.²³⁹ State statutes dictate who has an interest in the remains descending order.²⁴⁰ If someone wants to deviate from that standard approach, then they should create a will dictating the order they would prefer.²⁴¹ Most of the time spouses and children have the first say on what to do with the remains.²⁴²

The problem arises when there is a conflict between those of equal status, or those who think they should have a higher status, about what to do with the remains.²⁴³ Courts resolve these conflicts in a variety of ways.²⁴⁴ Some courts refer to the last wishes of the decedent, regardless of what the will stated, and some courts split the remains among the survivors so they may all have an equal share.²⁴⁵ Additionally, to have a right to the remains,

232. *See supra* Part I.A.

233. *See supra* Part II.A.

234. *See supra* Part III.B.

235. *See supra* Part III.A.

236. *See supra* Part II.B.

237. *See supra* Part II.B.

238. *See supra* Part II.B.

239. *See supra* Part IV.A.

240. *See* Part III.A.

241. *See supra* Part III.A.

242. *See supra* Part III.A.

243. *See supra* Part II.B.

244. *See supra* Part II.B.

245. *See supra* Part II.B.

there must be some sort of “ownership” interest for the sake of burial and the decisions involved in those rights.²⁴⁶ These ownership called “quasi-property” rights, last until a person places the remains in their final resting place.²⁴⁷ This concept becomes especially important when dealing with cremation jewelry. One argument suggests that once the ashes become a part of cremation jewelry they made it to their final resting spot; however, one possesses a continual ownership interest in the jewelry itself, especially compared to the rights of others.²⁴⁸

If the ashes are lost in transit or if there is a misappropriation of the body, such as wrongfully cremation, then the courts determined there should be a cognizable remedy for such a wrongdoing.²⁴⁹ Some courts have chosen to avoid the concept of “quasi-property” altogether, instead referring to a tort analysis, which includes the suffering caused by this type of loss or interference.²⁵⁰ Therefore, the cause of action that one could sue for when dealing with the tortious interference with a dead body is mental anguish or mental suffering, especially since there is really no other way to recover.²⁵¹

Cremation jewelry is an interesting way to commemorate the life of a loved one.²⁵² One could literally create a family tree to wear around his or her neck with a diamond or pendant for every person. A family could pass this piece of jewelry down for generations. Grandma would be a literal heirloom. However, there could be several future problems, especially when it comes to taxation.²⁵³ Prior to distribution, an estate includes any item of value for purposes of taxation.²⁵⁴ How does one calculate the worth of cremation jewelry? A family member added value to something that had previously only had sentimental weight (such as urns), which means it is technically valuable (especially when referring to the cremation diamonds).²⁵⁵ Also, the cremation jewelry is virtually indistinguishable from the other jewelry the decedent possessed; therefore, it would be almost impossible to just exclude the cremation jewelry, even if only for morality sake.²⁵⁶ Lawyers should advise their clients about the options for cremation jewelry and the potential problems that may arise in the future with regard to this new burial method.

246. See Part II.C.

247. See Part II.C.

248. See Part II.C.

249. See *supra* Part III.

250. See *supra* Part III.A.

251. See *supra* Part III.A.

252. See generally, *Cremation Pendants*, EVERLASTING MEMORIES, <http://www.evrmemories.com> (last visited Oct. 12, 2010) (discussing reasons why people choose to create jewelry out of ashes.)

253. See *supra* Part III.C.

254. See *supra* Part III.C.

255. See *supra* Part II.B (discussing the cost of creating a cremation diamond).

256. See *supra* Part III.C.