

A WOMAN IN LIFE, BUT A MAN AFTER DEATH: PROTECTING THE POSTMORTEM IDENTITIES OF TRANSGENDER INDIVIDUALS

Comment

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I. INTRODUCTION

Contemplating death is not a pleasant experience for most people. However, for the transgender community, it is becoming increasingly more important to consider from an estate planning perspective.¹ Throughout their lives, transgender people face numerous challenges regarding their identities.² These challenges can continue after a transgender individual's

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1. See generally Patti Spencer, *First Steps in Estate Planning for Transgender Client*, THE BALANCE (Nov. 11, 2016), <https://www.thebalance.com/first-steps-in-estate-planning-for-transgender-client-3860822> (discussing the distinct estate planning needs of transgender individuals).

2. See Simon Davis, *Transgender People Are Misgendered, Even in Death*, VICE (Jan. 21, 2015), <http://www.vice.com/read/transgender-people-are-misgendered-even-in-death-120>.

death if he or she is not buried according to their gender identity.³ Transgender individuals run the risk of having their surviving family members bury them in an undignified manner if the transgender individual passes away without specifically documenting instructions for their burial.⁴

For instance, in 2014, a transgender woman named Jennifer Gable passed away suddenly from an aneurysm.⁵ She was thirty-two years old, otherwise in good health, and had not executed a formal document stating her wishes for her funeral arrangements.⁶ Consequently, under Idaho intestacy law, control of the disposition of Jennifer's body went to her father, who decided to bury her as a man.⁷

Funeral guests were horrified when they looked into the open casket and saw that the funeral home had cut Jennifer's hair short, dressed her in a suit, and referred to her by male birth name, which Jennifer had legally changed well before her death.⁸ The funeral home stated that because Jennifer's death certificate registered her as "male," it followed standard procedure of dressing the deceased in a suit.⁹ One of Jennifer's friends described the ordeal as an "erosion of her identity."¹⁰

While this tragedy could have possibly been avoided if Jennifer had a last will and testament, 55% of Americans die intestate each year.¹¹ Whether it be due to cost, age, or pure laziness, people often pass away without creating any sort of estate plan.¹² Dying intestate is particularly troubling for the transgender community, whom face the risk of having their family members not burying them according to gender identity.¹³ Nevertheless, there are two legal solutions that can simplify the task of planning for death and help ensure gender identity is respected after death: disposition of remains statutes and the Respect After Death Act (RADA).¹⁴

3. *Id.*

4. *See generally id.* (discussing how complications with identification can result in a transgender person being misgendered at the time of his or her death).

5. *See* Mitch Kellaway, *Outrage After Idaho Trans Woman Buried 'As a Man,'* ADVOCATE (Nov. 24, 2014, 2:19 PM), <http://www.advocate.com/politics/transgender/2014/11/24/outrage-after-idaho-trans-woman-buried-man>.

6. *Id.*

7. *See* IDAHO CODE § 54-1142 (West 2015); *see* Kellaway, *supra* note 5.

8. *See* Kellaway, *supra* note 5.

9. *Id.*

10. *Id.*

11. *See Estate Planning FAQs*, AMERICAN BAR ASSOCIATION (last visited Sept. 14, 2016), https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning.html.

12. *See* Richard Eisenberg, *Americans' Ostrich Approach to Estate Planning*, FORBES (Apr. 9, 2014, 11:04 AM), <http://www.forbes.com/sites/nextavenue/2014/04/09/americans-ostrich-approach-to-estate-planning/#2c1e548af07b>.

13. *See* Kellaway, *supra* note 5.

14. *Compare* TEX. HEALTH & SAFETY CODE ANN. § 711.002 (g) (West 2015) (permitting decedent's remains to be disposed of according to written instructions signed by the decedent), *with* CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B) (West 2015) (allowing a death certificate to recognize decedent's sex according to gender identity).

This comment will discuss the distinct needs of a transgender client in planning for death. First, this comment will present a background and explanation of important transgender-related terms to promote a comprehensive understanding of the transgender experience.¹⁵ Second, this comment will provide a brief synopsis of the relevant estate planning laws as they currently stand.¹⁶ Third, an in-depth discussion of disposition statutes and the RADA will follow.¹⁷ Finally, this comment will address the need for uniform laws regarding disposition and identity recognition by proposing legislation to resolve the issue of transgender individuals being misgendered upon death.¹⁸

II. EXPLANATION OF IMPORTANT TERMS

Various terms relating to transgender individuals deserve clarification and explanation before discussing the impact of the transgender community on estate planning law.¹⁹ The terminology has changed over recent decades and differs within different transgender communities; therefore, transgender people sometimes vary in the way they describe themselves.²⁰ Despite the variations from person to person, the following definitions provide a fundamental overview of vocabulary commonly used when discussing transgender individuals.²¹

A. Definitions

Primarily, transgender is a word that describes a person whose behavior or expression of gender differs from standard behavior or expression of the person's assigned biological sex at birth.²² Under this definition, a transgender man is a transgender individual who identifies as a man and a transgender woman is a transgender individual who identifies as a woman.²³

Sex refers to the assignment of gender at birth based on biological factors, which include external genitalia, internal reproductive organs, chromosomes, and hormones.²⁴ A person's sex is typically characterized as

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Parts IV & V.

18. See *infra* Parts VI & VII.

19. See *generally Transgender Terminology*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (Jan. 2014), https://web.archive.org/web/20161027090054/http://www.transequality.org/sites/default/files/docs/resources/TransTerminology_2014.pdf (defining commonly used transgender vocabulary).

20. See *id.*; see *Tips for Allies of Transgender People*, GLAAD (last visited Nov. 8, 2016), <http://www.glaad.org/transgender/allies>.

21. See NATIONAL CENTER FOR TRANSGENDER EQUALITY, *supra* note 19.

22. See NATIONAL CENTER FOR TRANSGENDER EQUALITY, *supra* note 19.

23. *Id.*

24. See *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*,

male, female, or intersex.²⁵ A cisgender (person who is not transgender) individual's assigned sex corresponds with his or her gender identity; however, a transgender individual's assigned sex varies from his or her gender identity.²⁶

Gender is defined as the behaviors, feelings, and attitudes society relates to each category of sex.²⁷ For example, to interpret gender, society often associates the color pink with girls and the color blue with boys.²⁸ Behaviors that align with societal expectations are known as gender-normative, while those that stray from general expectations are referred to as gender non-conformity.²⁹

Gender identity is a person's internal feeling of whether they perceive themselves as male, female, or something different.³⁰ Because gender identity is an inherent sense, it is not something that can be visibly conveyed or seen by others.³¹ Generally, a transgender individual's gender identity does not match his or her assigned sex at birth.³² After a person identifies as transgender or undergoes a medical transition, his or her gender identity is then referred to as an affirmed gender identity.³³

Gender expression refers to the way people express or represent their gender identity to society.³⁴ Gender is often expressed through means such as voice, clothing, makeup, jewelry, hairstyles, behavior, or body characteristics.³⁵ Gender expression may, but does not always, correspond with a person's gender identity.³⁶

Transition is the time when an individual starts to live according to his or her gender identity instead of the gender of his or her assigned sex at birth.³⁷ The transition process usually includes steps such as dressing differently or choosing a new name.³⁸ However, the transition process can also include more permanent measures like medical surgery or legally altering identity documents.³⁹

AMERICAN PSYCHOLOGICAL ASSOCIATION (2015), <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf>.

25. *Id.*

26. *Id.*

27. *Id.*

28. See *Understanding Gender*, GENDER SPECTRUM <https://www.genderspectrum.org/quick-links/understanding-gender/> (last visited Nov. 8, 2016).

29. See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 24.

30. See NATIONAL CENTER FOR TRANSGENDER EQUALITY, *supra* note 19.

31. *Id.*

32. See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 24.

33. *Id.*

34. See NATIONAL CENTER FOR TRANSGENDER EQUALITY, *supra* note 19.

35. *Id.*

36. See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 24.

37. See NATIONAL CENTER FOR TRANSGENDER EQUALITY, *supra* note 19.

38. *Id.*

39. *Id.*

Finally, sexual orientation describes a person's emotional and sexual attraction to other people.⁴⁰ Sexual orientation can refer to members of the same sex, another sex, or no sex.⁴¹ Sexual orientation tends to be categorized as gay, lesbian, bisexual, heterosexual, or asexual.⁴² Being transgender does not denote any certain sexual orientation.⁴³

B. Sex v. Gender

Traditionally, society believed the words sex and gender to be synonymous.⁴⁴ However, in modern times, their meanings are increasingly becoming distinct from one another.⁴⁵ In a footnote to one of his dissenting opinions, Justice Scalia clarifies the difference between the two terms by writing: "[t]he word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male."⁴⁶

The distinction between sex and gender is of particular importance to transgender individuals.⁴⁷ Sex and gender are not only personal identities, they are also social identities.⁴⁸ Consequently, gender can impact one's identity as well as social practices.⁴⁹ Gender influences a person's self-understanding in relation to others they interact with or observe.⁵⁰ From a legal standpoint, the American legal system's fixed outlook on sex and gender extremely disadvantages the transgender community.⁵¹ The law typically operates under a binary model that assumes only two biological sexes exist: male and female.⁵² The American legal system poses problems for individuals who do not perfectly fit into any one category.⁵³ Further, the American legal system's treatment of transgender individuals denies them

40. See AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 24.

41. See NATIONAL CENTER FOR TRANSGENDER EQUALITY, *supra* note 19.

42. *Id.*

43. See GENDER SPECTRUM, *supra* note 28.

44. See Tim Newman, *Sex and Gender: What Is the Difference?*, MEDICAL NEWS TODAY (Mar. 24, 2016), <http://www.medicalnewstoday.com/articles/232363.php>.

45. *Id.*

46. J. E. B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 (1994) (Scalia, J., dissenting).

47. See generally Peter K. Hatemi & Rose McDermott, *Distinguishing Sex and Gender*, 44 PS: POLITICAL SCIENCE & POLITICS, 1,89-92 (2011), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/S1049096510001939> (arguing for the importance of distinguishing between sex and gender to help reduce discrimination).

48. See Zuleyka Zevallos, *Sociology of Gender*, THE OTHER SOCIOLOGIST, <https://othersociologist.com/sociology-of-gender/> (last visited Nov. 10, 2016).

49. *Id.*

50. *Id.*

51. See Eric Boos, *The Unscientific Science of Gender Jurisprudence: Evaluating the Negative Impact of Normative Legal Language on Issues of Sex and Gender*, 27 WIS. J.L. GENDER & SOC'Y 229, 229-30 (2012).

52. *Id.* at 230.

53. *Id.*

their constitutional right to equal and fair treatment under the law, while also harming their dignity and identity.⁵⁴

The binary model of the law repeatedly causes problems after the death of a transgender person.⁵⁵ When a person's assigned sex at birth does not align with the gender he or she chose to live as, the official assigned to fill out the person's death certificate is faced with a complicated and confusing task.⁵⁶ While listing a transgender individual's sex according to anatomy or assigned sex at birth may seem easier, such an act may go against the wishes of the person who decisively lived their life as a different gender.⁵⁷ Further, as in the Jennifer Gable story, the wrong sex listed on a death certificate can lead to a surviving family member burying the deceased in an undignified manner.⁵⁸ The transgender population is more prevalent now than ever, and the law needs to recognize the transgender community's needs and adjust accordingly.⁵⁹

C. Gender Identity v. Gender Expression

The distinction between gender identity and gender expression is very important to the transgender community.⁶⁰ As stated earlier, gender identity is the internal sense of gender a person perceives themselves to be, while gender expression is the manifestation of gender to society through observable traits.⁶¹ There is a misconception that the two terms have the same meaning, which can impact legal protections to the transgender community.⁶²

When legislative bodies enact laws that are written with an indifference to the distinction between gender identity and gender expression, certain people can lose the protections those laws are meant to provide.⁶³ Because

54. *Id.*

55. See generally Jan Omega, *Transgender Death Certificates: Deceased Will Have Their Gender Identity Recognized*, INQUISITR (Aug. 28, 2014), <http://www.inquisitr.com/1437895/transgender-death-certificate-deceased-will-have-their-gender-identity-recognized/> (discussing the problem of gender identity being recognized at death).

56. See April Dembosky, *Making the Law Respect Gender Identity After Death*, NPR (June 30, 2015, 4:50 AM), <http://www.npr.org/sections/codeswitch/2015/06/30/418770266/making-the-law-respect-gender-identity-after-death>.

57. See generally *id.* (discussing the dilemma coroners face when the deceased is a transgender individual).

58. See Kellaway, *supra* note 5.

59. See generally Liz Halloran, *Survey Shows Striking Increase in Americans Who Know and Support Transgender People* (Apr. 24, 2015), <http://www.hrc.org/blog/survey-shows-striking-increase-in-americans-who-know-and-support-transgender> (noting the growing presence of transgender people in America).

60. See Autumn Sandeen, *Gender Expression and Gender Identity Are Two Different Concepts*, SHADOW PROOF (May 7, 2011), <https://shadowproof.com/2011/05/07/gender-expression-and-gender-identity-are-two-separate-concepts/>.

61. See NATIONAL CENTER FOR TRANSGENDER EQUALITY, *supra* note 19.

62. See Sandeen, *supra* note 60.

63. See generally *FAQ: The Gender Nondiscrimination Act*, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/resources/know-your-rights/faq-the-gender-nondiscrimination-act> (last

gender expression is a spectrum with unlimited options for certain amounts of masculine, feminine, or other types of expression, people express themselves differently and in varying amounts.⁶⁴ A law providing for protection based solely on gender expression could discriminate against people that choose to express their inherent gender identity subtly or not at all.⁶⁵

California passed the Gender Nondiscrimination Act to address the possibility of unequal treatment under the state's laws.⁶⁶ The act was created to clarify the state's existing legal protections in order to be more inclusive of the variety of people seeking protection.⁶⁷ California accomplished this goal by making gender expression and gender identity separate protected categories under the law.⁶⁸ The Act's clarifying language helps ensure transgender individuals are fully afforded their rights; the Gender Nondiscrimination Act sets the standard that other states should adopt.⁶⁹

III. WHERE IS AMERICA CURRENTLY?

Before discussing the laws affecting a transgender person's identity upon death in detail, a brief explanation of where states' laws currently stand is useful.⁷⁰ Presently, there are existing laws that benefit the transgender community's need for gender identity recognition upon death, but these laws are not consistent throughout the United States.⁷¹ Certain disposition of remains statutes and legislation regarding death certificates provide a solution to prevent transgender people from being buried without regard to their gender identities.⁷²

visited Nov. 10, 2016) [hereinafter *The Gender Nondiscrimination Act*] (discussing California's clarification of law in order to ensure legal protection).

64. See *Gender Identity and Gender Expression*, IOWA STATE UNIVERSITY LESBIAN GAY BISEXUAL TRANSGENDER STUDENT SERVICES, <http://www.lgbtss.dso.iastate.edu/library/education/gi-ge> (last visited Nov. 10, 2016).

65. See generally *The Gender Nondiscrimination Act*, *supra* note 63 (discussing how unclear language in the law made the law inaccessible to those in need of its protection).

66. See *id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Compare TEX. HEALTH & SAFETY CODE ANN. § 711.002 (g) (West 2015) (permitting decedent's remains to be disposed of according to written instructions signed by the decedent), with CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B) (West 2015) (allowing a death certificate to recognize decedent's sex according to gender identity).

71. Compare TEX. HEALTH & SAFETY CODE ANN. § 711.002 (g) (West 2015) (permitting decedent's remains to be disposed of according to written instructions signed by the decedent), with CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B) (West 2015) (allowing a death certificate to recognize decedent's sex according to gender identity).

72. Compare TEX. HEALTH & SAFETY CODE ANN. § 711.002 (g) (permitting decedent's remains to be disposed of according to written instructions signed by the decedent), with CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B) (allowing a death certificate to recognize decedent's sex according to gender identity).

A. Disposition Statutes

Disposition of remains refers to “[t]he placement of cremated or whole remains in their final resting place.”⁷³ Disposition statutes determine who gets control of a decedent’s remains to make decisions about the way such remains are handled.⁷⁴ Presently, disposition laws across the United States are inconsistent.⁷⁵ Specifically, laws addressing the disposition of a decedent’s remains differ from state to state, and conflict often arises due to a lack of uniformity in the law.⁷⁶ Forty-nine states have passed some form of a law regarding the disposition of remains in general, but the laws vary tremendously.⁷⁷ Typically, states’ disposition statutes fall into one of three types of categories: Priority of Decision, Designated Agent, or Personal Preference.⁷⁸

B. Death Certificate Reflection of Gender Identity

The process of changing one’s gender on identification documents varies from state to state.⁷⁹ While some states have liberal rules, other states make people take significant steps to alter gender on an identification document.⁸⁰ Additionally, the rules tend to differ depending on the type of document that needs to be changed.⁸¹ For example, modifying gender on a driver’s license is more widely allowed than changing gender on a death certificate.⁸²

In passing the RADA, California became the nation’s leader in death certificate alteration.⁸³ The RADA requires a death certificate to reflect a decedent’s sex based on gender identity.⁸⁴ An informant “who is in the best position to know” the decedent’s chosen gender gives input to determine the

73. See *Terms & Definitions*, FUNERAL CONSUMERS ALLIANCE OF MINNESOTA, <https://fcaofmn.org/terms--definitions.html> (last visited Jan. 27, 2017).

74. See generally TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2015) (regulating disposition of remains in Texas).

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

76. *Id.*

77. See Tanya D. Marsh & Daniel Gibson, *Summary of State Laws Regarding the Authority to Dispose of Human Remains*, FORGOTTEN ASHES (Aug. 2013), <http://www.forgottenashes.com/state-laws>. See generally S.B. 341, 27th Leg., Reg. Sess. I (Haw.2013) (stating when Hawaii’s legislation was passed, forty-eight states had enacted right of disposition laws);

78. See *infra* Section IV.A–C.

79. See *Know Your Rights: Transgender People and the Law*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/know-your-rights/transgender-people-and-law> (last visited Oct. 13, 2016).

80. *Id.*

81. *Id.*

82. *Id.*

83. See CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B) (West 2015); see *CA Governor Signs Respect After Death Act*, TRANSGENDER LAW CENTER (Sept. 26, 2014), <http://transgenderlawcenter.org/archives/11140> [hereinafter *CA Governor Signs Respect After Death Act*].

84. See CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B) (West 2015).

gender that is placed on the death certificate.⁸⁵ If there is a disagreement and a dispute arises, the decedent's most recent gender identifying documentation determines gender.⁸⁶ The progressive act helps ensure the respectful burial of people according to their gender identity.⁸⁷ Additionally, Washington D.C. followed California's lead by proposing the Death Certificate Gender Identity Recognition Amendment Act of 2015; the 2015 Amendment furthers the goal of respecting decedents' gender identity upon death by amending their laws to contain similar provisions to those of California.⁸⁸

IV. DISPOSITION STATUTES

Currently, except for Alaska, every state has a statute or regulation that addresses the disposition of remains in one way or another:

- Alabama – Title 34, chapter 13, section 11 of the Code of Alabama.⁸⁹
- Arizona – Title 36, section 831.01 of the Arizona Revised Statutes.⁹⁰
- Arkansas – Arkansas Final Disposition Rights Act of 2009.⁹¹
- California – Section 7100.1 of the California Health and Safety Code.⁹²
- Colorado – Title 15, article 19, section 104 of the Colorado Revised Statutes.⁹³
- Connecticut – Title 45a, section 318 of the Connecticut General Statutes.⁹⁴
- Delaware – Title 12, section 262 of the Delaware Code.⁹⁵
- Florida – Section 497.005(43) of the Florida Statutes.⁹⁶
- Georgia – Title 31, chapter 32, section 7(e)(5) of the Code of Georgia.⁹⁷
- Hawaii – Senate Bill 341, 2013.⁹⁸

85. See Associated Press, *Calif. Governor Signs Bill Allowing Transgender Status on Death Certificates*, LGBTQ NATION (Sept. 26, 2014), <http://www.lgbtqnation.com/2014/09/calif-governor-signs-bill-allowing-transgender-status-on-death-certificates/>.

86. *Id.*

87. See *CA Governor Signs Respect After Death Act*, *supra* note 83.

88. See Council of the D.C., 2015 D.C Legis. B. 444, Period 21 (D.C. 2017).

89. ALA. CODE § 34-13-11 (1975).

90. ARIZ. REV. STAT. ANN. § 36-831.01 (1991).

91. ARK. CODE ANN. § 20-17-102 (West 2013).

92. CAL. HEALTH & SAFETY CODE § 7100.1 (West 1998).

93. COLO. REV. STAT. ANN. § 15-19-104 (West 2010).

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

95. DEL. CODE ANN. tit. 12, § 262 (West 2004).

96. FLA. STAT. ANN. § 497.005(43) (West 2016).

97. GA. CODE ANN. § 31-32-7(e)(5) (West 2008).

98. S.B. 341, 27th Leg., Reg. Sess. I (Haw. 2013).

- Idaho – Title 54, section 1139 of the Idaho Code.⁹⁹
- Illinois – Chapter 755, act 65, section 40 of the Illinois Compiled Statutes.¹⁰⁰
- Indiana – Title 29, article 2, chapter 19, section 8 of the Indiana Code.¹⁰¹
- Iowa – Chapter 144C, section 5 of the Iowa Code.¹⁰²
- Kansas – Chapter 65, section 1734 of the Kansas Statutes.¹⁰³
- Kentucky – Chapter 367, section 93105 of the Kentucky Revised Statutes.¹⁰⁴
- Louisiana – Title 8, section 655 of the Louisiana Revised Statutes.¹⁰⁵
- Maine – Title 22, section 2843-A of the Maine Revised Statutes.¹⁰⁶
- Maryland – Title 5, section 509 of the Maryland Health–General Code.¹⁰⁷
- Massachusetts – Title 239, section 3.09 of the Code of Massachusetts Regulations.¹⁰⁸
- Michigan – Chapter 700, section 3206 of the Michigan Compiled Laws.¹⁰⁹
- Minnesota – Chapter 149A, section 80 of the Minnesota Statutes.¹¹⁰
- Mississippi – Title 75, chapter 63, section 25 of the Mississippi Code.¹¹¹
- Missouri – Chapter 194, section 119 of the Missouri Statutes.¹¹²
- Montana – Title 37, chapter 19, section 903 of the Montana Code.¹¹³
- Nebraska – Chapter 38, section 1426 of the Revised Statutes of Nebraska.¹¹⁴

99. IDAHO CODE ANN. § 54-1139 (West 2009).

100. 755 ILL. COMP. STAT. ANN. 65/40 (West 2016).

101. IND. CODE ANN. § 29-2-19-8 (West 2009).

102. IOWA CODE ANN. § 144C.5 (West 2008).

103. KAN. STAT. ANN. § 65-1734 (West 2011).

104. KY. REV. STAT. ANN. § 367.93105 (West 2016).

105. LA. STAT. ANN. § 8:655 (2016).

106. ME. REV. STAT. ANN. tit. 22 § 2843-A (2015).

107. MD. CODE ANN., HEALTH–GEN. § 5-509 (West 2010).

108. 239 MASS. CODE REGS. 3.09 (2016).

109. MICH. COMP. LAWS ANN. § 700.3206 (West 2016).

110. MINN. STAT. ANN. § 149A.80 (West 2010).

111. MISS. CODE ANN. § 75-63-25 (West 2004).

112. MO. ANN. STAT. § 194.119 (West 2015).

113. MONT. CODE ANN. § 37-19-903 (West 2009).

114. NEB. REV. STAT. ANN. § 38-1426 (West 2014).

- Nevada – Chapter 451, section 024 of the Nevada Revised Statutes.¹¹⁵
- New Hampshire – Chapter 290, section 17 of the New Hampshire Revised Statutes.¹¹⁶
- New Jersey – Title 45, chapter 27, section 22 of the New Jersey Statutes.¹¹⁷
- New Mexico – Chapter 45, article 3, section 701(B) of the New Mexico Statutes.¹¹⁸
- New York – Section 4201 of the New York Public Health Law.¹¹⁹
- North Carolina – Chapter 130A, section 420 of the North Carolina General Statutes.¹²⁰
- North Dakota – Chapter 23-06, section 03(4) of the North Dakota Century Code.¹²¹
- Ohio – Chapter 2108, section 70 of the Ohio Revised Code.¹²²
- Oklahoma – Title 21, section 1151 of the Oklahoma Statutes.¹²³
- Oregon – Chapter 97, section 130 of the Oregon Revised Statutes.¹²⁴
- Pennsylvania – Title 20, section 305 of the Pennsylvania Statutes and Consolidated Statutes.¹²⁵
- Rhode Island – Title 5, chapter 33.3, section 3 of the General Laws of Rhode Island.¹²⁶
- South Carolina – Title 32, chapter 8, section 320 of the Code of Laws of South Carolina.¹²⁷
- South Dakota – Chapter 34-26, section 1 of the South Dakota Codified Laws.¹²⁸
- Tennessee – Title 34, chapter 6, section 204(b)(3) of the Tennessee Code.¹²⁹
- Texas – Section 711.002 of the Texas Health and Safety

115. NEV. REV. STAT. ANN. § 451.024 (West 2016), *amended by* 2017 Nev. Legis. Serv. 45 (West).

116. N.H. REV. STAT. ANN. § 290:17 (2012).

117. N.J. STAT. ANN. § 45:27-22 (West 2014).

118. N.M. STAT. ANN. § 45-3-701(B) (West 1978).

119. N.Y. PUB. HEALTH LAW § 4201 (McKinney 2012).

120. N.C. GEN. STAT. ANN. § 130A-420 (West 2010).

121. N.D. CENT. CODE ANN. § 23-06-03(4) (West 2015).

122. OHIO REV. CODE ANN. § 2108.70 (West 2006).

123. OKLA. STAT. ANN. tit. 21 § 1151 (West 2011).

124. OR. REV. STAT. ANN. § 97.130 (West 2012).

125. 20 PA. STAT. AND CONS. STAT. ANN. § 305 (West 2013).

126. 5 R.I. GEN. LAWS ANN. § 5-33.3-3 (West 1999).

127. S.C. CODE ANN. § 32-8-320 (2012).

128. S.D. CODIFIED LAWS § 34-26-1 (2017).

129. TENN. CODE ANN. § 34-6-204 (West 2015).

Code.¹³⁰

- Utah – Title 58, chapter 9, section 602 of the Utah Code.¹³¹
- Vermont – Title 18, section 9712 of the Vermont Statutes.¹³²
- Virginia – Title 54.1, section 2825 of the Code of Virginia.¹³³
- Washington – Chapter 68.50, section 160 of the Revised Code of Washington.¹³⁴
- West Virginia – Chapter 30, article 6, section 22 of the Code of West Virginia.¹³⁵
- Wisconsin – Chapter 154, section 30 of the Wisconsin Statutes.¹³⁶
- Wyoming – Title 2, chapter 17, section 101 of the Wyoming Statutes.¹³⁷

Each law varies depending on the state.¹³⁸ For instance, Texas' law allows a person to leave written directions regarding disposition in a writing that is signed and acknowledged by the decedent.¹³⁹ Contrastingly, New Mexico's

130. TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2015).

131. UTAH CODE ANN. § 58-9-602 (West 2016).

132. VT. STAT. ANN. tit. 18 § 9712 (West 2005).

133. VA. CODE ANN. § 54.1-2825 (West 2010).

134. WASH. REV. CODE ANN. § 68.50.160 (West 2012).

135. W. VA. CODE ANN. § 30-6-22 (West 2012).

136. WIS. STAT. ANN. § 154.30 (West 2010).

137. WYO. STAT. ANN. § 2-17-101 (West 2010).

138. Compare ALA. CODE § 34-13-11 (1975) (authorizing an agent to direct disposition of remains), with ARIZ. REV. STAT. ANN. § 36-831.01 (1991), and ARK. CODE ANN. § 20-17-102 (West 2013), and CAL. HEALTH & SAFETY CODE § 7100.1 (West 1998), and COLO. REV. STAT. ANN. § 15-19-104 (West 2010), and CONN. GEN. STAT. ANN. § 45a-318 (West 2016), and DEL. CODE ANN. tit. 12, § 262 (West 2004), and FLA. STAT. ANN. § 497.005(43) (West 2016), and GA. CODE ANN. § 31-32-7(e)(5) (West 2008), and IDAHO CODE ANN. § 54-1139 (West 2009), and 755 ILL. COMP. STAT. ANN. 65/40 (West 2016), and IND. CODE ANN. § 29-2-19-8 (West 2009), and IOWA CODE ANN. § 144C.5 (West 2008), and KAN. STAT. ANN. § 65-1734 (West 2011), and KY. REV. STAT. ANN. § 367.93105 (West 2016), and LA. STAT. ANN. § 8:655 (2016), and ME. REV. STAT. ANN. tit. 22 § 2843-A (2015), and MD. CODE ANN., HEALTH-GEN. § 5-509 (West 2010), and 239 MASS. CODE REGS. 3.09 (2016), and MICH. COMP. LAWS ANN. § 700.3206 (West 2016), and MINN. STAT. ANN. § 149A.80 (West 2010), and MISS. CODE ANN. § 75-63-25 (West 2004), and MO. ANN. STAT. § 194.119 (West 2015), and MONT. CODE ANN. § 37-19-903 (West 2009), and NEB. REV. STAT. ANN. § 38-1426 (West 2014), and NEV. REV. STAT. ANN. § 451.024 (West 2016), and N.H. REV. STAT. ANN. § 290:17 (2012), and N.J. STAT. ANN. § 45:27-22 (West 2014), and N.M. STAT. ANN. § 45-3-701(B) (West 1978), and N.Y. PUB. HEALTH LAW § 4201 (McKinney 2012), and N.C. GEN. STAT. ANN. § 130A-420 (West 2010), and N.D. CENT. CODE ANN. § 23-06-03(4) (West 2015), and OHIO REV. CODE ANN. § 2108.70 (West 2006), and OKLA. STAT. ANN. tit. 21 § 1151 (West 2011), and OR. REV. STAT. ANN. § 97.130 (West 2012), and 20 PA. STAT. AND CONS. STAT. ANN. § 305 (West 2013), and 5 R.I. GEN. LAWS ANN. § 5-33.3-3 (West 1999), and S.C. CODE ANN. § 32-8-320 (2012), and S.D. CODIFIED LAWS § 34-26-1 (2017), and TENN. CODE ANN. § 34-6-204 (West 2015), and TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2015), and UTAH CODE ANN. § 58-9-602 (West 2016), and VT. STAT. ANN. tit. 18 § 9712 (West 2005), and VA. CODE ANN. § 54.1-2825 (West 2010), and WASH. REV. CODE ANN. § 68.50.160 (West 2012), and W. VA. CODE ANN. § 30-6-22 (West 2012), and WIS. STAT. ANN. § 154.30 (West 2010), and WYO. STAT. ANN. § 2-17-101 (West 2010), and S.B. 341, 27th Leg., Reg. Sess. I (Haw. 2013) (showing the variation of disposition laws throughout the United States).

139. See TEX. HEALTH & SAFETY CODE ANN. § 711.002(g) (West 2015).

law requires that such instructions only be left in a formal last will and testament.¹⁴⁰ The various laws across the country can be categorized into three different classifications: Priority of Decision, Designated Agent, or Personal Preference.¹⁴¹

A. Priority of Decision Laws

Some states have enacted laws that determine which family members can control the disposition of a decedent's remains.¹⁴² These laws generally list the family members in order of priority.¹⁴³ Typically, a statute begins by declaring that the decedent has the first right of determining disposition, but if there is no declaration by the decedent, then the ordered list of family members governs disposition.¹⁴⁴

Iowa's statute provides a standard example.¹⁴⁵ Iowa law asserts that the right to have control over the remains of a decedent or to make funeral arrangements for a decedent vests in the following people in the following order:

- a. A designee pursuant to decedent's declaration
- b. Spouse
- c. Child
- d. Parents
- e. Grandchild
- f. Sibling
- g. Grandparent
- h. The next of kin under intestate succession
- i. A person who warrants the identity of the decedent
- j. The county medical examiner.¹⁴⁶

Kansas, Louisiana, and New Jersey have enacted similar provisions.¹⁴⁷

The order of decision-making under priority of decision laws resembles the scheme for intestacy.¹⁴⁸ However, intestacy statutes typically do not mention an agent of the decedent, which is a distinguishing factor of priority of decision laws.¹⁴⁹ While these laws provide the benefit of a decedent's

140. See N.M. STAT. ANN. § 45-3-701(B) (West 1978).

141. See Murphy, *supra* note 75, at 403–06; Tracie M. Kester, *Uniform Acts—Can the Dead Hand Control the Dead Body? The Case for a Uniform Bodily Remains Law*, 29 W. NEW ENG. L. REV. 571, 579 (2007); Tanya D. Marsh & Daniel Gibson, *Summary of State Laws Regarding the Authority to Dispose of Human Remains*, FORGOTTEN ASHES (Aug. 2013), <http://www.forgottenashes.com/state-laws>.

142. See Murphy, *supra* note 75, at 400.

143. *Id.*

144. *Id.*

145. See IOWA CODE ANN. § 144C.5 (West 2008).

146. See IOWA CODE ANN. § 144C.5(1)(a–j) (West 2008).

147. See KAN. STAT. ANN. § 65-1734 (West 2011); LA. STAT. ANN. § 8:655 (2016); N.J. STAT. ANN. § 45:27-22 (West 2014).

148. See Murphy, *supra* note 75, at 405.

149. *Id.*

declaration taking priority over the wishes of surviving family members, each law has drawbacks that impact the transgender community.¹⁵⁰

Historically, the rigid definition of “spouse” caused obstacles for couples in a same-sex relationship.¹⁵¹ Although *Obergefell v. Hodges* eliminated this issue, unmarried partners still face a problem.¹⁵² As in the story of Jennifer’s shocking burial, the narrow interpretation of family allowed Jennifer’s father to determine the disposition of her remains and bury her as a man.¹⁵³ Although Jennifer did not have a partner at the time, this troubling outcome occurs for unmarried partners living in states with this statutory scheme.¹⁵⁴ Because unmarried partners remain unrecognized as family members and do not appear listed in the order of priority, unmarried partners are frequently sidelined while family members, who may disapprove of the decedent’s lifestyle, make all of the decisions about the funeral arrangements.¹⁵⁵ Maine, New Jersey, and Washington, among others, have sought to combat this problem by amending their respective laws to include a “domestic partner” in the line of priority.¹⁵⁶ Further, Washington recognizes a domestic partner to be the equivalent of a spouse.¹⁵⁷

Priority of decision laws usually give first priority of disposition to a person designated by the decedent; however, the technical requirements for that designation tend to demand formal processes like notarization or including the designation in a will or power of attorney.¹⁵⁸ On the other hand, while several states have revised their statutes to the benefit of the transgender community, many states still retain the rigid historical definition of family within their statutory scheme.¹⁵⁹ The technicalities of designation, coupled with the states’ varying characterizations of priority, make priority of decision laws less than desirable for a transgender individual.¹⁶⁰

150. See generally Frances H. Foster, *Individualized Justice in Disputes Over Dead Bodies*, 61 VAND. L. REV. 1351, 1365–66 (2008) (discussing the narrow definition of family under the priority of decision-making scheme).

151. See *id.* at 1365.

152. See Foster, *supra* note 150, at 1365–66. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (guaranteeing the fundamental right of marriage to same-sex couples).

153. See Kellaway, *supra* note 5.

154. See Foster, *supra* note 150, at 1365.

155. *Id.* at 1365–66.

156. *Id.* at 1366–67.

157. *Id.*

158. See KAN. STAT. ANN. § 65-1734(a)(1) (West 2011); see also LA. STAT. ANN. § 8:655(A)(1) (2016); N.J. STAT. ANN. § 45:27-22(a) (West 2014).

159. See generally KAN. STAT. ANN. § 65-1734(a) (West 2011) (recognizing a decedent’s spouse and does not include any provision for a domestic partner).

160. See Foster, *supra* note 150, at 1364.

B. Designated Agent Laws

Designated agent laws allow a decedent, prior to death, to appoint a person to manage the disposition of his or her remains.¹⁶¹ The appointed individual receives first priority over all others to make decisions about the decedent's burial arrangements.¹⁶² Designated agent laws permit a decedent to choose a person, possibly other than a legal spouse or relative, that he or she believes will best follow his or her wishes after death.¹⁶³

Connecticut provides a standard example of designated agent law.¹⁶⁴ The statute begins by stating that any sound person eighteen years of age or older may execute a written document, signed by themselves and two witnesses, designating an agent to have control of the person's body and carry out the disposition of the person's remains upon death.¹⁶⁵ Further, the statute states that the designated agent cannot dispose of the remains in a manner that is inconsistent with the person's wishes, unless such disposition is approved by the probate court.¹⁶⁶ Moreover, the statute declares that a funeral director's decision to carry out the decedent's wishes cannot be challenged as long as the funeral director's decision was reasonable.¹⁶⁷ Finally, if there is no written designation or the agent cannot be found, the statute provides a list of individuals who have priority to control disposition.¹⁶⁸ This list resembles a typical intestacy scheme—next of kin listed in descending order of priority beginning with decedent's closest relative, usually a spouse or children.¹⁶⁹ The statutes of Alabama, Rhode Island, and Wyoming contain similar language.¹⁷⁰

Designated agent laws tend to be more useful to a decedent than priority of decision laws.¹⁷¹ For example, if the decedent was estranged from the person entitled to control disposition under a priority of decision system, that person may not dispose of the decedent's remains in a way consistent with the decedent's wishes.¹⁷² However, designated agent laws protect a

161. See Daryl J. Finizio, Esq., *Funeral Planning Agent Designation: An Unused, but Useful, Tool for Same-Sex Couples*, 55-APR R.I. B.J. 31, 31 (2007).

162. *Id.*

163. See *Who has the legal right to make decisions about your funeral?*, FUNERAL CONSUMERS ALLIANCE, <https://www.funerals.org/?consumers=legal-right-make-decisions-funeral> (last visited Jan. 7, 2017).

164. See CONN. GEN. STAT. ANN. § 45a-318 (West 2016).

165. See *id.* § 45a-318(a).

166. See *id.* § 45a-318(b).

167. See *id.* § 45a-318(c).

168. See *id.* § 45a-318(d).

169. *Id.*; see *Intestate Succession Rules*, NATIONAL PARALEGAL COLLEGE, http://nationalparalegal.edu/willsTrustsEstates_Public/IntroEstatePlanning/IntestateSuccessionRules.asp (last visited Feb. 4, 2017).

170. See ALA. CODE § 34-13-11 (1975); 5 R.I. GEN. LAWS ANN. § 5-33.3-3 (West 1999); WYO. STAT. ANN. § 2-17-101 (West 2010).

171. See FUNERAL CONSUMERS ALLIANCE, *supra* note 163.

172. *Id.*

decedent's wishes by allowing the decedent to preselect a person that he or she feels confident will dispose of his or her body in a suitable manner.¹⁷³

Ensuring compliance with a decedent's wishes is an aspect of designated agent laws that greatly benefits the transgender community.¹⁷⁴ Designated agent laws help safeguard the likelihood that a transgender decedent will be buried in a manner consistent with his or her gender identity by allowing the decedent to designate the power of control to a trusted person.¹⁷⁵ By permitting the decedent to choose a designated agent, designated agent laws prevent estranged or disapproving relatives from overriding a decedent's last wishes for his or her funeral arrangements.¹⁷⁶

C. Personal Preference Laws

The implementation of personal preference laws is the most recent development of disposition of remains law.¹⁷⁷ Personal preference laws are ideal for a decedent because not only do they allow the designation of an agent, but also provide an opportunity for the decedent to include specific instructions for the disposition of his or her remains.¹⁷⁸ Because this statutory scheme permits individuals to list their specific wishes, relatives and agents are given more certainty.¹⁷⁹ Therefore, relatives and agents can make funeral arrangements on a decedent's behalf with confidence that such arrangements align with the decedent's requests.¹⁸⁰

The laws of Texas and Illinois are two model examples of personal preference statutes.¹⁸¹ The Texas statute states that written directions for disposition can be provided in a "written instrument" that is signed by the decedent.¹⁸² The statute's general language benefits a decedent because it does not require the instructions to be placed in a formal will or prepaid funeral contract, making the decedent's objectives easier to accomplish.¹⁸³ The statute further provides that the instructions may only be revoked or modified through a subsequent document signed by the decedent.¹⁸⁴

173. *Id.*

174. *See generally* Justin Nobel, *The Transgender Funeral Struggle – A Report From the Frontier of Sexual Identity and Death*, DIGITAL DYING (Dec. 19, 2015), <https://www.funeralwise.com/digital-dying/10048/> (discussing struggles between a transgender decedent's wishes and current U.S. laws).

175. *Id.*

176. *Id.*

177. *See* Murphy, *supra* note 75, at 406.

178. *See* Kester, *supra* note 141.

179. *See* Murphy, *supra* note 75, at 407.

180. *See generally id.* (stating that personal preference laws give family members and agents certainty).

181. *See* TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2015); 755 ILL. COMP. STAT. ANN. 65/40 (West 2016).

182. *See* TEX. HEALTH & SAFETY CODE ANN. § 711.002 (g).

183. *See generally id.* (stating instructions can be placed in any kind of written instrument signed by the decedent).

184. *See id.*

Otherwise, the person authorized to control the disposition of remains should adhere to the decedent's directions.¹⁸⁵ The statute provides a list of people who have priority to control the disposition if no directions were provided or the person with the right to control is unwilling or unable to do so.¹⁸⁶

Illinois's statute includes progressive language that specifically addresses transgender individuals.¹⁸⁷ The statute provides:

[W]ritten directions for the disposition . . . may include instructions regarding gender identity, including, but not limited to, instructions with respect to appearance, chosen name, and gender pronouns, regardless of whether the person has obtained a court-ordered name change, changed the gender marker on any identification document, or undergone any transition-related medical treatment.¹⁸⁸

The clarifying language helps to prevent a surviving family member from burying a transgender person as a different gender than he or she desired—instructions left by the decedent take precedence over all other factors.¹⁸⁹ Illinois's statute ensures the unfortunate situation that occurred after Jennifer Gable's death does not reoccur so long as the deceased individual left written directions.¹⁹⁰

Because a person can appoint an agent and document specific instructions for a funeral arrangement under the statute, utilizing personal preference laws are of the upmost benefit.¹⁹¹ Personal preference laws provide certainty that a person's wishes are properly carried out after his or her death.¹⁹² These laws also provide the greatest protection to a transgender individual who is concerned about how his or her body will be treated and presented after death.¹⁹³

V. DEATH CERTIFICATE REFLECTION OF GENDER IDENTITY

Changing gender on an identity document is a step that many transgender individuals often take when transitioning.¹⁹⁴ While altering

185. *Id.*

186. *See id.* § 711.002 (a).

187. *See* 755 ILL. COMP. STAT. ANN. 65/40 (a) (West 2016).

188. *Id.*

189. *See generally id.* (stating specifications for instructions left by transgender individuals).

190. *See id.*

191. *See* Kester, *supra* note 178.

192. *See* Murphy, *supra* note 75, at 407.

193. *See generally* Meggan Sommerville, *Illinois takes steps with new laws to protect transgender community*, CHICAGONOW (Dec. 30, 2015, 6:31 AM), <http://www.chicagonow.com/trans-girl-cross/2015/12/illinois-transgender-new-laws-2016/> (discussing the impact of Illinois' disposition of remains statute upon the transgender community).

194. *See Frequently Asked Questions about Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (July 9, 2016), <http://www.transequality.org/issues/resources/frequently->

gender on an identity document is becoming a more common practice today, the law is still sparse in regard to gender identity being reflected on a death certificate.¹⁹⁵ Although individuals can request a gender change on a driver's license, birth certificate, or passport, a death certificate tends to present greater complications.¹⁹⁶ Fortunately, the RADA and the Death Certificate Gender Identity Recognition Amendment Act of 2015 combat the issue of gender identity reflection on death certificates.¹⁹⁷

A. Current Identity Document Alteration

Without proper identification, various laws and regulations prohibit an individual from partaking in important tasks such as traveling, finding employment, or opening a bank account.¹⁹⁸ A transgender individual faces these challenges when the gender marked on his or her identity document does not match his or her gender after transition.¹⁹⁹ The person's state of residence can further complicate the situation.²⁰⁰ The National Center for Transgender Equality studied each state's laws governing changing gender on a driver's license and assigned a grade to every state based on how complicated it is to make such a change in that state.²⁰¹ Seventeen states received an "A+" for having forms that are easy to understand and can be certified by a range of licensed professionals.²⁰² In these states, changing one's gender on a driver's license is mostly a matter of paperwork.²⁰³ However, twelve states received a grade of "F" for requiring proof of surgery, an amended birth certificate, or a court order to change gender on a driver's license.²⁰⁴ These twelve states force a transgender individual to overcome major obstacles to receive a driver's license with a gender that corresponds with his or her identity.²⁰⁵

asked-questions-about-transgender-people [hereinafter *Frequently Asked Questions About Transgender People*].

195. See generally *id.* (list of identification documents allowed to be changed does not include death certificate).

196. See *id.*

197. See CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B) (West 2015); Council of the D.C., 2015 D.C. Legis. B. 444, Period 21 (D.C. 2017).

198. See *Frequently Asked Questions about Transgender People*, *supra* note 194.

199. *Id.*

200. See *id.*; Arli Christian, *How Trans-Friendly Is the Driver's License Policy in Your State?* NATIONAL CENTER FOR TRANSGENDER EQUALITY, (July 2017) <https://view.officeapps.live.com/op/view.aspx?src=http://www.transequality.org/sites/default/files/docs/DL-July-2017.docx>.

201. See Arli Christian, *How Trans-Friendly Is the Driver's License Policy in Your State?* NATIONAL CENTER FOR TRANSGENDER EQUALITY, (July 2017) <https://view.officeapps.live.com/op/view.aspx?src=http://www.transequality.org/sites/default/files/docs/DL-July-2017.docx>.

202. *Id.*

203. See *id.*

204. *Id.*

205. See *id.*

With states ranging in grades from A+ to F, a transgender person can be severely prejudiced based on where he or she lives.²⁰⁶ Transgender individuals living in a state with a grade of F must spend significantly more time and money to achieve the same results as a transgender individual living in an A+ state.²⁰⁷ The absence of uniformity in U.S. laws regarding identity documentation alteration negatively impacts the transgender community by denying it of what many believe is a fundamental right.²⁰⁸

Varying policies amongst states is not the only area involving identity documents lacking standardization.²⁰⁹ Most states' regulations largely overlook altering sex on a death certificate to match a person's gender identity.²¹⁰ For instance, the National Center for Transgender Equality's website provides a list of identity documents typically sought to be altered by a transgender individual.²¹¹ While this list includes documents such as social security cards, medical records, and birth certificates, there is no mention of death certificates.²¹²

Due to the inconsistent laws in each state regulating burials and death certificates, the Centers for Disease Control and Prevention's *Funeral Directors' Handbook on Death Registration and Fetal Death Reporting*, which was last revised in 2003, is the nearest thing to a national standard.²¹³ The language in the handbook directs for a death certificate to be filled out according to observation of the physical bodily characteristics of the decedent if sex cannot be verified through medical records.²¹⁴ This practice often leads to incorrect assumptions about the decedent's gender, which can cause those tasked with observing the body to bury the decedent in an undignified manner.²¹⁵

B. Respect After Death Act

To combat the issues surrounding changing sex on a transgender person's death certificate, the California legislature passed the Respect After Death Act.²¹⁶ RADA was inspired by the misgendering of a San Francisco

206. See generally *id.* (illustrating the various policy differences in states throughout the U.S.).

207. *Id.*

208. See Andrew Cray & Jack Harrison, *ID Accurately Reflecting One's Gender Identity Is a Human Right*, CENTER FOR AMERICAN PROGRESS (Dec. 18, 2012, 4:01 AM), <https://www.americanprogress.org/issues/lgbt/reports/2012/12/18/48367/id-accurately-reflecting-ones-gender-identity-is-a-human-right/>.

209. See generally Davis, *supra* note 2 (discussing the challenging implications of the death of a transgender individual due to states' laws).

210. *Id.*

211. See *Frequently Asked Questions about Transgender People*, *supra* note 194.

212. *Id.*

213. See Davis, *supra* note 2.

214. *Id.*

215. *Id.*

216. See *CA Governor Signs Respect After Death Act*, *supra* note 83.

transgender citizen upon his death.²¹⁷ His story brought awareness to the fact that the transgender community needed assurance that gender identity would be reflected on death certificates—RADA was created to achieve this goal.²¹⁸

The Act became effective in July 2015, and California's Health and Safety Code now demands that a decedent's sex on a death certificate reflect the person's gender identity.²¹⁹ An informant, someone who is likely in a position to know the decedent's choices and preferences, determines gender identity.²²⁰ If a dispute arises, gender identity will be determined according to decedent's most recent gender identifying documentation.²²¹

California's groundbreaking legislation brings attention to the dilemma the transgender community faces when gender identity does not align with the sex on a death certificate.²²² RADA ensures that a transgender California resident will be buried with dignity as the gender they identified as.²²³ Additionally, following California's lead, Washington D.C. proposed the Death Certificate Gender Identity Recognition Amendment Act of 2015.²²⁴ The Act contains similar provisions and goals as RADA in hopes that citizens of Washington D.C. can freely express their gender with assurance that it will be recognized without discrimination.²²⁵ Monica Hopkins-Maxwell, the Executive Director of the American Civil Liberties Union of the Nation's Capital, stated "[t]he bill provides clarity to persons filling out a death certificate and outlines guidelines to be followed in the event of a conflict. In essence, it is a straightforward piece of legislation that will enable us to respect the decedent's identity and wishes."²²⁶

VI. WHAT SHOULD WE DO?

America's transgender population doubled in size from 700,000 to 1.4 million in the past five years, and state and federal lawmakers need to reevaluate the current law to accommodate this rapidly growing demographic.²²⁷ Specifically, legislative bodies across the United States need to standardize by upholding gender identity recognition upon the death

217. *Id.*

218. *Id.*

219. See CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B) (West 2015).

220. *Id.*

221. *Id.*

222. See generally *CA Governor Signs Respect After Death Act*, *supra* note 83 (discussing RADA and its benefits for the transgender community).

223. *Id.*

224. See Council of the D.C., 2015 D.C. Legis. B. 444, Period 21 (D.C. 2017).

225. See Monica Hopkins-Maxwell, *Bill 21-0444, "Death Certificate Gender Identity Recognition Amendment Act of 2015,"* ACLU (Dec. 10, 2015), <http://aclu-nca.org/news/aclu-dc-testimony-on-bill-21-0444-death-certificate-gender-identity-recognition-amendment-act->.

226. *Id.*

227. See Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/health/transgender-population.html>.

of a transgender individual.²²⁸ Uniformity in states' disposition of remains statutes, as well as uniformity in states' regulation of identity document alteration, would greatly protect the rights of a transgender person after death.²²⁹

A. Uniformity of Disposition Statutes

A uniform law would clearly establish parameters for bodily disposition and decrease disputes between interested parties over the remains of the deceased.²³⁰ A uniform piece of legislation can prevent injustice to decedents by eliminating the wide variability in disposition statutes across the nation.²³¹

Texas's disposition of remains statute is a suitable model for a uniform law.²³² Texas's statute is appealing because the statute permits a decedent to appoint an agent and to provide particular burial instructions in a writing signed by the decedent.²³³ The flexible language of the statute allows the decedent's instructions to be included in any signed written instrument, rather than a formal document; therefore, creating such an instrument becomes an easier process that more individuals are likely to partake in.²³⁴ Additionally, Texas's statute includes a sample form that a person's appointment document can be modeled after.²³⁵

Preferably, the uniform law would also include language specifically directed at transgender individuals, like that of Illinois's statute.²³⁶ The provision would explain that burial instructions could include matters related to gender identity, such as personal appearance, name to be used, or proper gender pronouns.²³⁷ Unambiguous language discussing the particular needs of the transgender community will help to ensure a transgender person includes proper instructions in his or her appointment document.²³⁸

Combining select language from the Texas and Illinois disposition statutes results in a statute that benefits the transgender community and would provide uniformity in disposition law across the United States:

228. See generally Davis, *supra* note 2 (stating that while California's RADA is a step in the right direction, it only affects one state and more needs to be done across the country).

229. *Id.*

230. See Murphy, *supra* note 75, at 410–11.

231. *Id.* at 415.

232. See TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2015).

233. See *id.* § 711.002 (g).

234. See generally *id.* (allowing a disposition appointment to take the form of a written instrument signed by the decedent).

235. See *id.* § 711.002(b).

236. See 755 ILL. COMP. STAT. ANN. 65/40 (West 2016).

237. See 755 ILL. COMP. STAT. ANN. 65/40 (a).

238. See generally *id.* (discussing directions regarding gender identity that one may include when appointing an agent for disposition of remains).

(a) Unless a decedent has left directions in writing for the disposition of the decedent's remains as provided in Subsection (e), the following persons, in the priority listed, have the right to control the disposition, including cremation, of the decedent's remains, shall inter the remains, and in accordance with Subsection (a-1) are liable for the reasonable cost of interment:

- (1) the person designated in a written instrument signed by the decedent;
- (2) the decedent's surviving spouse or domestic partner;
- (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;
- (6) any one or more of the duly qualified executors or administrators of the decedent's estate; or
- (7) any adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent.²³⁹

(a-1) If the person with the right to control the disposition of the decedent's remains fails to make final arrangements or appoint another person to make final arrangements for the disposition before the earlier of the 6th day after the date the person received notice of the decedent's death or the 10th day after the date the decedent died, the person is presumed to be unable or unwilling to control the disposition, and:

- (1) the person's right to control the disposition is terminated; and
- (2) the right to control the disposition is passed to the following persons in the following priority:
 - (A) any other person in the same priority class under Subsection (a) as the person whose right was terminated; or
 - (B) a person in a different priority class, in the priority listed in Subsection (a).²⁴⁰

(a-2) A person exercising the right to control the disposition of remains under Subsection (a), other than a duly qualified executor or administrator of the decedent's estate, is liable for the reasonable cost of interment and may seek reimbursement for that cost from the decedent's estate.²⁴¹ When an executor or administrator exercises the right to control the disposition of remains under Subsection (a)(6), the decedent's estate is liable for the reasonable cost of interment, and the executor or administrator is not individually liable for that cost.²⁴²

(b) A written instrument is legally sufficient under Subsection (a)(1) if the instrument designates a person to control the disposition of the decedent's remains, the instrument is signed by the decedent, the signature of the decedent is acknowledged, and the agent or successor agent signs the instrument before acting as the decedent's agent.²⁴³ Unless the instrument

239. See TEX. HEALTH & SAFETY CODE ANN. § 711.002(a).

240. *Id.* § 711.002(a-1).

241. *Id.* § 711.002(a-3).

242. *Id.*

243. *Id.* § 711.002(c).

provides otherwise, the designation of the decedent's spouse as an agent or successor agent in the instrument is revoked on the divorce of the decedent and the spouse appointed as an agent or successor agent.²⁴⁴ Such written instrument may be modified or revoked only by a subsequent written instrument that complies with this subsection.²⁴⁵

(c) A person listed in Subsection (a) has the right, duty, and liability provided by that subsection only if there is no person in a priority listed before the person.²⁴⁶

(d) A person who represents that the person knows the identity of a decedent and, in order to procure the disposition, including cremation, of the decedent's remains, signs an order or statement, other than a death certificate, warrants the identity of the decedent and is liable for all damages that result, directly or indirectly, from that warrant.²⁴⁷

(e) A person may provide written directions for the disposition, including cremation, of the person's remains in a will, a prepaid funeral contract, or a written instrument signed and acknowledged by such person.²⁴⁸ A party to the prepaid funeral contract or a written contract providing for all or some of a decedent's funeral arrangements who fails to honor the contract is liable for the additional expenses incurred in the disposition of the decedent's remains as a result of the breach of contract.²⁴⁹ The directions may govern the inscription to be placed on a grave marker attached to any plot in which the decedent had the right of sepulture at the time of death and in which plot the decedent is subsequently interred.²⁵⁰ The directions may include instructions regarding gender identity, including, but not limited to, instructions with respect to appearance, chosen name, and gender pronouns, regardless of whether the person has obtained a court-ordered name change, changed the gender marker on any identification document, or undergone any transition-related medical treatment.²⁵¹ The directions may be modified or revoked only by a subsequent writing signed and acknowledged by such person.²⁵² The person otherwise entitled to control the disposition of a decedent's remains under this section shall faithfully carry out the directions of the decedent to the extent that the decedent's estate or the person controlling the disposition are financially able to do so.²⁵³

(f) If the directions are in a will, they shall be carried out immediately without the necessity of probate.²⁵⁴ If the will is not probated or is declared

244. *Id.*

245. *Id.*

246. *Id.* § 711.002(d).

247. *Id.* § 711.002(f).

248. *Id.* § 711.002(g).

249. *Id.*

250. *Id.*

251. 755 ILL. COMP. STAT. ANN. 65/40(a) (West 2016).

252. TEX. HEALTH & SAFETY CODE ANN. § 711.002(g).

253. *Id.*

254. *Id.* § 711.002(h).

invalid for testamentary purposes, the directions are valid to the extent to which they have been acted on in good faith.²⁵⁵

(g) A cemetery organization, a business operating a crematory or columbarium or both, a funeral director or an embalmer, or a funeral establishment shall not be liable for carrying out the written directions of a decedent or the directions of any person who represents that the person is entitled to control the disposition of the decedent's remains.²⁵⁶

B. Uniformity of Identity Document Alteration

Uniformity of identity document alteration regulations, specifically in regard to death certificates, would increase the protection of gender identity after the death of a transgender individual.²⁵⁷ A uniform law regulating gender identity reflection on death certificates will safeguard against undignified burials of transgender people.²⁵⁸ By legally requiring sex on a death certificate to correspond with gender identity, unfortunate situations like that of Jennifer Gable will be less likely to occur.²⁵⁹ The funeral home that assisted with Jennifer's burial defended their actions by saying that Jennifer's death certificate had listed her as a male.²⁶⁰ A law requiring a death certificate to correspond with gender identity would prevent funeral directors from making similar mistakes in the future.²⁶¹

A uniform law of this nature benefits transgender individuals by serving as a fallback for those whom did not leave burial instructions in accordance with the applicable disposition statute.²⁶² Although there would be no specific directions or an appointed agent, the decedent could be certain that his or her body would be buried respectfully due to the assurance of the law.²⁶³ If a transgender person does not make his or her burial preferences

255. *Id.*

256. *Id.* § 711.002(i).

257. See *Bill Introduced in CA Ensuring Accurate Gender Reflected on Transgender People's Death Certificates*, TRANSGENDER LAW CENTER (Jan. 30, 2014), <https://transgenderlawcenter.org/archives/9792>.

258. See generally *id.* (discussing how California's RADA ensures a transgender individual's gender is correctly identified and he or she is treated with dignity after death).

259. See generally Christine Colby, *Dying Trans: Preserving Identity in Death*, THE ORDER OF THE GOOD DEATH (Jan. 10, 2017), <http://www.orderofthegooddeath.com/dying-trans-preserving-identity-death> (using the Jennifer Gable story as an example of what RADA and The Death Certificate Gender Identity Recognition Amendment Act of 2015 were created to prevent).

260. See Steve Rothaus, *Transgender woman dies suddenly, presented at funeral in open casket as a man*, MIAMI HERALD (Nov. 21, 2014), <http://www.miamiherald.com/news/local/community/gay-south-florida/article4055600.html>.

261. See Colby, *supra* note 259.

262. See generally CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B) (West 2015) (stating that even if no instructions are left by a decedent, evidence of his or her gender identity, like an updated birth certificate, driver's license, or medical treatment, is used to prove the appropriate gender for a death certificate).

263. See generally *CA Governor Signs Respect After Death Act*, *supra* note 83 (stating that RADA will protect transgender decedent's dignity after death).

known before death, a uniform law demanding gender identity reflection on a death certificate will ensure that the person will not be buried as a gender he or she did not identify as in life.²⁶⁴

California's RADA is an excellent basis for a uniform law; thus, the language from RADA should be taken directly and adopted by every state.²⁶⁵ A uniform law requiring gender identity to be reflected on a death certificate would read:

[A] person completing the certificate shall record the decedent's sex to reflect the decedent's gender identity. The decedent's gender identity shall be reported by the informant, unless the person completing the certificate is presented with a birth certificate, a driver's license, a social security record, a court order approving a name or gender change, a passport, an advanced health care directive, or proof of clinical treatment for gender transition, in which case the person completing the certificate shall record the decedent's sex as that which corresponds to the decedent's gender identity as indicated in that document.²⁶⁶

VII. CONCLUSION

To ensure a respectful burial, it is vital for transgender individuals to make clear and specific arrangements before death.²⁶⁷ Personal preference disposition statutes allow a transgender person to leave detailed funeral instructions as well as appoint an agent to faithfully carry out such instructions.²⁶⁸ Personal preference laws are beneficial to transgender individuals who want to guarantee respectful treatment of their remains because the laws allow them to unambiguously state their wishes and select a person they trust to be in control.²⁶⁹ A uniform law of this type adopted in every state would safeguard against burials like Jennifer Gable's because estranged family members could not override the decedent's clear directions and choice of agent.²⁷⁰

Further, if a uniform disposition law is not feasible, a uniform law regulating gender identity on a death certificate is another solution to the misgendering of transgender individuals after death.²⁷¹ By implementing the language of RADA nationwide, the transgender community would gain the protection of gender identity recognition upon death.²⁷² Sex on a death certificate would no longer be determined solely by observation of physical

264. *Id.*

265. *See* CAL. HEALTH & SAFETY CODE ANN. § 102875(a)(1)(B).

266. *Id.*

267. *See* Davis, *supra* note 2.

268. *See supra* Section IV.C.

269. *See supra* Section IV.C.

270. *See supra* Section VI.A.

271. *See supra* Section VI.B.

272. *See supra* Section VI.B.

bodily characteristics.²⁷³ Rather, sex would reflect gender identity, which would be decided through an informant close to the decedent or by the gender listed on the decedent's most recent identity document.²⁷⁴

Although transgender rights are improving across the United States, the transgender community still lacks protection of identity after death.²⁷⁵ The story of Jennifer Gable's tragic burial serves as a wakeup call for the need of reformation in the law to ensure the rights of transgender individuals.²⁷⁶ Respect after death is a basic right that should be afforded to all people—uniform laws regarding disposition and death certificate reflection of gender identity can help ensure transgender individuals are treated with dignity upon death.²⁷⁷

273. See *supra* Section V.B.

274. See *supra* Section V.B.

275. See Andrew McGill, *Americans Are Embracing Transgender Rights*, THE ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/08/americans-are-embracing-transgender-rights/497444/>; see Davis, *supra* note 2.

276. See *supra* Part I.

277. See *supra* Part VI.