

# THERE ARE FIFTY WAYS TO LEAVE YOUR LOVER BUT ONLY TWO LEGAL WAYS IN TEXAS: UPDATING TEXAS HEALTH AND SAFETY CODE SECTION 711.002 TO PROTECT DISPOSITION OF FAMILY MEMBERS

## Comment

*by Elizabeth Nañez\**

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## I. DISPOSITION OF DECEDENT’S REMAINS

### *A. Introductory Hypothetical*

Edward is Edmund’s only son. Edward was born during Edmund’s first marriage to Jackie, which ended fifteen years ago when Jackie died. Edmund

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\* J.D. Candidate, Texas Tech University School of Law, May 2016.

then remarried Michelle ten years ago. Unfortunately, Edmund and Michelle did not have a happy marriage and they fought a lot. About eight years ago, Edmund and Michelle thought it would be best if they both lived in separate houses. Although they never divorced, believing it to be a daunting process and being against Michelle's religion, both lived separate lives. Edmund lived in El Paso, Texas, and Michelle moved back to San Antonio, Texas, because her whole family lives there. Neither would visit the other and they kept contact to a minimum. Although some communication went on at first, over the years, Edmund and Michelle's estrangement intensified. Finally, Edmund decided to file for divorce.

A few months ago, Edmund passed away intestate. Because Edmund did not leave instructions on how to distribute his estate or who he wanted to dispose of his remains, the right to disposition of Edmund's estate and remains will follow Texas law.<sup>1</sup> Under the Texas statute for disposition of remains, Health and Safety Code § 711.002, if the decedent did not leave directions in writing for disposition, the first person that has priority is the person designated by the decedent.<sup>2</sup> Because Edmund did not designate a person, the second person that has priority is the surviving spouse of the decedent, in this example, Michelle.<sup>3</sup> Both Michelle and Edward agreed that Edmund wanted cremation, which is what Michelle did with Edmund's remains; however, Michelle and Edward do not agree on the final resting place of the cremated remains. Because Michelle is a practicing Catholic, she wants to place Edmund's remains in a mausoleum in San Antonio, Texas.<sup>4</sup>

Edmund had occasionally talked with his son about what to do with his remains once he died. Although Edmund had not specified an exact preference, he had stated that he did not want his remains left in a room full of strangers for eternity. Edmund told Edward he wanted something unique done with his remains. Some of the suggestions Edmund made included using the ashes as the ammo in fireworks, sending part of the ashes into outer space, and using the ashes to blow glass into a paperweight.<sup>5</sup> Edward had also heard of unique things to do with ashes, such as, storing the ashes in an

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1. See TEX. HEALTH & SAFETY CODE ANN. § 711.002(a) (West 2013).

2. See *id.* "Unless a decedent has left directions in writing for the disposition of the decedent's remains . . . the following persons, in the priority listed, have the right to control the disposition . . . the person designated in a written instrument signed by the decedent . . ." *Id.*

3. See *id.* The order of priority is followed as long as the person listed is not "connect[ed] with the decedent's death, [and] an indictment has [not] been filed charging the person with a crime . . . that involves family violence against the decedent." *Id.*

4. *Catholic Cremation*, THE CATHOLIC CEMETERIES, <http://www.catholic-cemeteries.org/cremation.aspx> [<http://perma.cc/287E-7TRW>] (last visited Oct. 15, 2014).

5. See Rebecca Zamon, *Ash Scattering: Non-Traditional Ways To Be Memorialized*, HUFFINGTON POST (May 25, 2012, 2:47 PM), [http://www.huffingtonpost.ca/2012/05/25/ash-scattering\\_n\\_1545627.html](http://www.huffingtonpost.ca/2012/05/25/ash-scattering_n_1545627.html) [<http://perma.cc/ETG7-SQDR>].

hourglass, pressing the ashes into a vinyl record, using the ashes to create a diamond, or turning the ashes into pencils.<sup>6</sup>

Despite knowing that Edward planned to do something unique with his father's ashes to follow his wishes, Michelle decided to place the urn in a mausoleum in San Antonio. Even though Michelle had not spoken to Edmund in eight years, the court gave her priority of the disposition of remains based on the language of the statute that lists the surviving spouse as the first in priority when a person is not specified.<sup>7</sup> The court also stated that, because the court had never finalized the divorce decree that Edmund had filed prior to death, Michelle remained Edmund's spouse and she has the right to decide what to do with Edmund's remains.<sup>8</sup> Consequently, Michelle ignored Edmund's wishes, and Edward is now 553 miles away from his father's remains.<sup>9</sup> Although it was important to Edward to follow his father's preference, the court prevented Edward from carrying out his father's wish.<sup>10</sup> Even though this situation does not seem fair to Edward, nothing in the current wording of the statute provides him any protection.<sup>11</sup>

This comment will discuss why Health and Safety Code § 711.002 Disposition of Remains; Duty to Inter is relevant to modern family dynamics based on changes in the United States over the past decades, and why the state should amend the statute to better reflect today's society.<sup>12</sup> This comment will first discuss why § 711.002 is relevant among families who have experienced divorce and remarriage.<sup>13</sup> Next, this comment will analyze how courts acknowledged quasi-property interests in a deceased's remains and the equitable view behind the decision.<sup>14</sup> This comment will then consider how Texas has previously handled disposition of remains, and how disposition is currently handled.<sup>15</sup> This comment will also compare other states' disposition statutes to the Texas statute, specifically focusing on states that acknowledge separation and pending divorce when deciding priority order for the disposition of remains.<sup>16</sup> Further, this comment will use state statutes that acknowledge separation and pending divorce to suggest wording for Texas's disposition of remains statute, and the author will also analyze the implications of changing the statute.<sup>17</sup> Finally, this comment will discuss

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6. *See id.*

7. *See* TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2013).

8. *See In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet. h.).

9. *See* Driving Distance from San Antonio, TX to El Paso, TX, TRAVELMATH, <http://www.travelmath.com/drive-distance/from/San+Antonio,+TX/to/El+Paso,+TX> [ <http://perma.cc/7cB5-VEZB>] (last visited Jan. 23, 2015).

10. *See* Estate of Woods, 402 S.W.3d at 849.

11. *See* HEALTH & SAFETY § 711.002.

12. *See infra* Parts I.B.1–2, III.A.

13. *See infra* Parts I.B.1–2.

14. *See infra* Part I.C.1.

15. *See infra* Parts I.C.2, II.A.

16. *See infra* Part II.B.1–2.

17. *See infra* Parts II.B.2, III.A.

what estate planners should do in the meantime to help ensure that their clients' wishes are carried out.<sup>18</sup>

## B. Why This Statute is Relevant

### 1. Divorce Statistics

Currently, about half of all marriages in the United States end in divorce.<sup>19</sup> Over the past several decades, divorce rates have fluctuated; the highest rates of divorce occurred in the 1980s.<sup>20</sup> Additionally, divorce rates among people over sixty years old have increased over the past few decades.<sup>21</sup> Statistics show that divorce among baby boomers remains high.<sup>22</sup> These divorce rates can factor into the disposition of remains in two significant ways.<sup>23</sup>

First, if a divorced couple had children, the children may need to compete against a second spouse for disposition of the remains, especially if the second spouse and the children's parent became estranged over the years.<sup>24</sup> For example, in 1981, 18.7 in 1,000 children experienced their parents divorcing.<sup>25</sup> If the child's parent remarried and then became estranged from the second spouse or filed for divorce, but the divorce was not granted before the parent passed, then the estranged spouse would get

18. See *infra* Part III.B.

19. See Casey E. Copen, et. al., *First Marriages in the United States: Data From the 2006–2010 National Survey of Family Growth*, NAT'L HEALTH STATISTICS REPORT (Mar. 22, 2012), <http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf> [<http://perma.cc/S33P-GEJP>].

20. See Philip N. Cohen, *Family, Meet the New Recession (Same As the Old Recession?)*, HUFFINGTON POST (Jan. 10, 2009, 5:12 AM), [http://www.huffingtonpost.com/philip-n-cohen/family-meet-the-new-reces\\_b\\_149768.html](http://www.huffingtonpost.com/philip-n-cohen/family-meet-the-new-reces_b_149768.html) [<http://perma.cc/YLA8-AA5Z>]; Robert Hughes, Jr., *Is the US Divorce Rate Going Up Rather Than Going Down?*, HUFFINGTON POST (Mar. 6, 2014, 12:27 PM), [http://www.huffingtonpost.com/robert-hughes/is-the-us-divorce-rate-go\\_b\\_4908201.html](http://www.huffingtonpost.com/robert-hughes/is-the-us-divorce-rate-go_b_4908201.html) [<http://perma.cc/D8GG-Z8F2>] (stating that the statistics for the past thirty years may be off because of the quality of the research; divorce rates for those decades might actually be higher than previously recorded).

21. See Hughes, Jr., *supra* note 20.

22. See Christopher Ingraham, *Divorce Is Actually On the Rise, And It's the Baby Boomers' Fault*, WASH. POST (Mar. 27, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/03/27/divorce-is-actually-on-the-rise-and-its-the-baby-boomers-fault/> [<http://perma.cc/GY8Z-8RZ3>].

23. See generally Nat'l Center for Health Statistics, *Advance Report of Final Divorce Statistics, 1988*, MONTHLY VITAL STATISTICS REPORTS 2 (May 21, 1991), available at [http://www.cdc.gov/nchs/data/mvstr/supp/mv39\\_12s2.pdf](http://www.cdc.gov/nchs/data/mvstr/supp/mv39_12s2.pdf) (stating the percentage of children affected by parent's divorce) [<http://perma.cc/78MS-WWAR>]. See Hughes, Jr., *supra* note 20 (reporting an increase among older individuals filing for divorce).

24. See Nat'l Center for Health Statistics, *supra* note 23 (stating the statistics for children affected by divorce in 1981).

25. See *id.* Additionally, forty percent of children are born out of wedlock which means that these children would be put in the same position as children from a divorce if their parents eventually marry someone. See Joyce A. Martin, et. al, *Births: Final Data for 2012*, NATIONAL VITAL STATISTICS REPORTS (Dec. 30, 2013), [http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62\\_09.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf) [<http://perma.cc/YG48-CJ3Z>].

priority.<sup>26</sup> In this scenario, the estranged spouse would have priority even though the child had reached the age of majority and was capable of making decisions for his or her parent.<sup>27</sup>

Secondly, due to the increase of divorce rates among older people, an older individual has a greater risk of passing away before a court could finalize the petition for divorce.<sup>28</sup> If the divorce was not completed, then the surviving spouse retains priority in disposing of the decedent's remains.<sup>29</sup> Some have made the argument that spouses might change their minds and reconcile before the court grants the divorce; therefore, the surviving spouse should retain the right of disposition.<sup>30</sup> However, the likelihood of reconciliation is not high.<sup>31</sup> Often, spouses who marry but live separate lives stay together for the convenience and benefits that married couples enjoy, such as taxes, insurance, pensions, and health care, and not because of an actual relationship between the spouses: "the primary consideration is practical and financial, not familial."<sup>32</sup>

## 2. Divorce in Texas

The divorce rates in Texas are slightly higher when compared to the divorce rates throughout the United States.<sup>33</sup> Over the decades, divorce rates have fluctuated. In 2010, the crude divorce rate was 3.3% for 1,000 residents.<sup>34</sup> In Texas, it takes a minimum of sixty days after filing a suit before a court may grant a divorce.<sup>35</sup> However, if a couple disagrees over the terms of the divorce, the process could take longer.<sup>36</sup>

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26. See *In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet. h.).

27. See *id.* Second marriages have a higher chance of ending in divorce than first marriages because more problems seem to present themselves, such as, trying to blend two families together, taking on responsibilities, and dealing with different cultures blending together. *Id.* See also Maggie Scarf, *Why Second Marriages Are More Perilous*, TIME (Oct. 4, 2013), <http://ideas.time.com/2013/10/04/why-second-marriages-are-more-perilous/> [<http://perma.cc/3NZX-TEB5>].

28. See generally Hughes, Jr., *supra* note 20. Also, divorce rates alone are not an indication of stability in the marriage. *Id.*

29. See *Estate of Woods*, 402 S.W.3d at 849.

30. See Sharon Jayson, *Splitting? 79% of Marital Separations End in Divorce*, USA TODAY (May 6, 2012), <http://usatoday30.usatoday.com/news/health/wellness/story/2012-05-06/Splitting-79-of-marital-separations-end-in-divorce/54790574/1> [<http://perma.cc/DK3U-A8W4>].

31. See *id.* "About 79% of married couples who separate end up getting divorced." *Id.* Furthermore, once couples have been separated for three years, the chance of them getting back together is slight. *Id.*

32. Pamela Paul, *The Un-Divorced*, N.Y. TIMES (July 30, 2010), [http://www.nytimes.com/2010/08/01/fashion/01Undivorced.html?pagewanted=all&\\_r0](http://www.nytimes.com/2010/08/01/fashion/01Undivorced.html?pagewanted=all&_r0) [<http://perma.cc/GJ82-JQTD>].

33. See *Divorce Rates Highest in the South, Lowest in the Northeast*, CENSUS BUREAU REPORTS, U. S. CENSUS BUREAU, [https://www.census.gov/newsroom/releases/archives/marital\\_status\\_living\\_arrangements/cb11-144.html](https://www.census.gov/newsroom/releases/archives/marital_status_living_arrangements/cb11-144.html) (last visited Oct. 17, 2014) [<http://perma.cc/3FK4-MP8U>].

34. See Texas Dep't of State Health Servs., *2010 Marriage and Divorce*, MARRIAGE AND DIVORCE (July 1, 2014), <http://www.dshs.state.tx.us/chs/vstat/vs10/nnuptil.shtm> [<http://perma.cc/HPW2-ENSD>].

35. See TEX. FAM. CODE ANN. § 6.702(a) (West 2009).

36. See *id.*

Generally, divorces that involve families with children usually take six to nine months.<sup>37</sup> Divorces that involve more assets usually take six months to a year, with some divorces continuing for several years when spouses cannot reach an agreement.<sup>38</sup> If the divorce involves both children and property, the average time for a divorce to become final ranges from nine to eighteen months.<sup>39</sup> Even when spouses divorce amicably, uncontested divorces still take about three to six months.<sup>40</sup>

If the divorce process is ongoing when one spouse dies, the court will not grant the divorce and the surviving spouse retains the right of disposing of the remains.<sup>41</sup> Similarly, the surviving spouse is still entitled to the rights given by the marriage even if the spouses separate before one spouse's death.<sup>42</sup> Only death or a court decree can terminate a marriage in Texas.<sup>43</sup> The court will not grant a decree for a legal separation because Texas does not recognize legal separation.<sup>44</sup> Thus, in order to terminate a spouse's privileges, including the right to disposition of remains, the court has to render a final divorce decree before the death of the spouse.<sup>45</sup>

### C. Background

#### 1. Throughout the Country

The United States did not establish property rights in a decedent's body until the late 1800s.<sup>46</sup> At first, the United States followed England's legal system, which did not recognize legal rights to a deceased's remains because the rights belonged to the church, who buried the body in the church's cemetery.<sup>47</sup> Despite England's structure, the idea that a property interest existed in a dead body has been around for a long time.<sup>48</sup> Romans

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37. See Natalie Gregg, *How Long Does It Take to Get Divorced in Texas?*, THE L. OFF. NATALIE GREGG FAMILY L. (Feb. 12, 2012), <http://nataliegregg.com/2012/how-long-does-it-take-to-get-divorced/> [<http://perma.cc/ND7F-U8LC>].

38. See *id.*; *Facts About Divorce in Texas (How Long Will It Take to Get Divorced?)*, THE NACOL L. FIRM PC (Feb. 16, 2011), <http://www.nacollawfirmblog.com/family-law/facts-about-divorce-in-texas-how-long-will-it-take-to-get-divorced> (listing other factors that can have an impact on how long a divorce takes such as crowding of court dockets, drafting of legal documents, having temporary orders, and trying alternative dispute resolution) [<http://perma.cc/E4VD-FVJB>].

39. See Gregg, *supra* note 37.

40. See *id.*

41. See *In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet. h.).

42. See *Corgey v. McConnell*, 260 S.W.2d 99, 102 (Tex. Civ. App.—El Paso 1953, no writ).

43. See *In re Marriage of Wilburn*, 18 S.W.3d 837, 840 (Tex. App.—Tyler 2000, no pet.).

44. See Kelly McClure & Chris Meuse, *Family Law for the Non-Family Specialist: How to Master Conversations on Family Law*, 58 THE ADVOC. (TEXAS) 8 (2012).

45. See *Corgey*, 260 S.W.2d at 102.

46. See *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 238 (1872).

47. See 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, 573–76 (2007).

48. See Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 981–82 (1999).

acknowledged the right of remains and allowed the deceased to state how they wanted their remains disposed.<sup>49</sup>

*Pierce v. Proprietors of Swan Point Cemetery* established this idea in the United States; although no rights to a dead body exist, it is wrong not to acknowledge some kind of right because of the emotion connected with the deceased.<sup>50</sup> Fairness plays a role to determine the surviving family members' rights.<sup>51</sup> The court in *Pierce* decided to create a "quasi property" interest in a dead body, which gave the deceased's loved ones a chance to provide the deceased with a proper funeral.<sup>52</sup> Additionally, Hon. Samuel B. Ruggles investigated and reported on the rights of the deceased's family in 1801, and he stated that the "real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order decently to bury it, and secure its undisturbed repose."<sup>53</sup> The main idea behind treating a dead body as quasi-property is to allow equity.<sup>54</sup>

The courts' acknowledgement of quasi-property rights to a decedent's body established the order of priority for disposition.<sup>55</sup> The priority order for disposition comes from a combination of different ideas, such as, the order for intestacy, lack of funeral homes, and the surviving spouse's responsibility to the deceased spouse.<sup>56</sup> The first idea of disposition follows the order of priority of intestacy.<sup>57</sup> If the deceased dies intestate, then the surviving spouse has priority to receive property, with the assumption that the surviving spouse will take care of the children.<sup>58</sup> For this reason, the order of intestacy does not list children first.<sup>59</sup> Additionally, the courts viewed adult children as capable of taking care of themselves, and thus listed after the surviving spouse.<sup>60</sup> Since the surviving spouse will receive the estate, he or she should have the responsibility of handling the remains of the deceased.<sup>61</sup>

The second idea for the order of disposition comes from a lack of funeral homes in the United States.<sup>62</sup> This meant the family of the deceased had the

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49. See *Pierce*, 10 R.I. at 235. Roman civil law followed a certain order for disposition of remains: the person the deceased appointed to be in charge was the first in priority, followed by the person who received property, then the next of kin. *Id.*

50. See *id.* at 237–38.

51. See *id.*

52. See *id.*

53. *Renihan v. Wright*, 25 N.E. 822, 824 (Ind. 1890).

54. See *id.*; see *Pierce*, 10 R.I. at 238.

55. See *Pierce*, 10 R.I. at 238.

56. See *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904); Kester, *supra* note 47, at 575–76; Hernandez, *supra* note 48, at 992–93.

57. See Kester, *supra* note 47, at 575–76.

58. See Hernandez, *supra* note 48, at 988.

59. See *id.*

60. See *id.*

61. See *Pettigrew*, 56 A. at 880 (stating that because the right of administration goes to the spouse, the right to control the body goes to the spouse).

62. See Hernandez, *supra* note 48, at 992–93.

duty of taking care of the body; therefore, close family members received priority for disposition of remains.<sup>63</sup> The third idea of disposition maintains that disposing of remains falls within the duties of a spouse and that “marital right[s] prevails over . . . the next of kin.”<sup>64</sup>

The entire basis for these concepts evolves from the idea that spouses should come first in the order of priority.<sup>65</sup> The United States, as well as other countries, seem to generally accept this idea.<sup>66</sup> However, when courts establish the order for priority, judges seem to decide the order based on the presumption that spouses lived together and had an emotional connection at the time of the deceased’s death.<sup>67</sup>

## 2. In Texas

Texas also followed the idea that a spouse should have priority of disposition.<sup>68</sup> An early case, *Wright v. Harned*, held that even though the deceased and his spouse had an estranged relationship, and the wife attempted filing for divorce several times, “[s]he was his wife not withstanding the estrangement and her attempt to be freed from the matrimonial relation, and, as such, had the rights of a widow or next of kin in the disposition . . . of the remains.”<sup>69</sup> However, in *Burnett v. Surratt*, the court acknowledged that although the general rule provides that a wife gets priority in the right to possession, this may not hold true when couples “were [not] living in the normal relations of marriage.”<sup>70</sup> The court also stated that “[t]he right to bury a corpse and preserve its remains is a legal right recognized,

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63. See *id.* (“the cleansing of a cadaver, its dressing and care until the time of the funeral service, the arrangements for the construction of a coffin and the like were all tasks that often fell to a decedent’s family in the absence of an organized mortuary industry.”).

64. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 238 (1872).

65. See *Kester*, *supra* note 47, at 575–76. Even in civil law countries, like Spain and France, when the decedent does not leave instructions about what to do with his remains, the spouse is the one who can decide how to deal with them. *Id.*

66. See *id.*

67. See *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904).

68. See *In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet. h.); *Terrill v. Harbin*, 376 S.W.2d 945, 947 (Tex. Civ. App.—Eastland 1964, writ dismissed); *Wright v. Harned*, 163 S.W. 685, 688 (Tex. Civ. App.—Galveston 1914, no writ). The deceased wanted a funeral that would fit his lifestyle; however, his estranged wife, who was in another town when funeral arrangements were being made, did not want to pay for the lavish funeral that the funeral director had organized. Everyone in this case acknowledged that the law states the next of kin has the right to determine disposition of remains; however, the court did not cite to how it reached this conclusion. *Wright*, 163 S.W. at 688.

69. *Wright*, 163 S.W. at 688.

70. *Burnett v. Surratt*, 67 S.W.2d 1041, 1042 (Tex. Civ. App.—Dallas, 1934, writ refused). The court found that it would not be equitable for the estranged wife to be able to decide what should happen to the deceased’s remains and that equity should be taken into consideration; therefore, if someone had a stronger connection with the deceased, that person should prevail over the estranged spouse. *Id.*



controlled, and directed only by courts of equity.”<sup>71</sup> Despite the courts’ different conclusions, none cited authority for their reasoning.<sup>72</sup>

During the time the court decided the *Burnett* case, the forty-third legislature was in session, and the House of Representatives passed Article 928 which established an order for disposition.

[T]he duty of interment and the liability for the reasonable cost of the interment of such deceased person shall devolve upon, his or her surviving wife or husband, or if there be no surviving wife or husband they shall vest in and devolve upon the surviving child or children of deceased, or if there be no surviving husband or wife or child of deceased, they shall vest in and devolve upon the surviving parent or parents of such deceased[.]<sup>73</sup>

The forty-ninth legislature recodified the statute, keeping the same order of priority, and the seventy-first legislature “recodified this law under Section 711.002 of the Health and Safety Code.”<sup>74</sup> Although the seventy-third Legislature heard testimony about a funeral home not working with the deceased’s children because the estranged wife refused to make arrangements, the legislature kept the same wording.<sup>75</sup> Over the years the legislature has made changes to the Health and Safety Code, but the order of disposition, when the deceased does not leave instructions, has remained the same.<sup>76</sup>

## II. DISPOSITION OF REMAINS TODAY

### *A. Texas’s Current Disposition Statute*

Texas’s current disposition statute remains similar to the first version introduced.

(a) Except as provided by Subsection (l), unless a decedent has left directions in writing for the disposition of the decedent’s remains as provided in Subsection (g), 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 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;
- (3) any one of the decedent’s surviving adult children;

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71. *Id.*

72. *See id.*; *Wright*, 163 S.W. at 688; GERRY W. BEYER, § 68.13 *Disposition of Body-Texas Case Law*, 10 TEX. PRAC. TEXAS LAW OF WILLS § 68.13 (3d ed. 2014).

73. *See Estate of Woods*, 402 S.W.3d at 848.

74. *Id.* at 848–49.

75. *See id.* at 848.

76. *See id.* at 849.

- (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.<sup>77</sup>

*In re Estate of Woods* is the main case that interprets how the court believes the statute should be applied.<sup>78</sup> In this case, the court stated that the legislature's intent controls the interpretation of the statute, especially when the text is clear.<sup>79</sup> The court held that because the statute lists the surviving spouse before the surviving adult children, the spouse has a superior right of priority, even with estranged spouses.<sup>80</sup> The court also stated that courts do not have the authority to resolve disputes among the parties listed in favor of certain parties simply based on the parties' relationship to the deceased.<sup>81</sup>

## *B. Current Standing for Disposition Throughout the Country*

### *1. Main Views for Disposition of Remains*

Currently, states have different views regarding who should have priority for the disposition of the deceased's remains when the spouses were estranged and the deceased did not designate who he or she wanted in charge of the disposition of his or her remains.<sup>82</sup> Three main views exist: (1) that a surviving estranged spouse has some rights, but a court may factor estrangement when deciding a surviving spouse's right; (2) estrangement does not matter when deciding a surviving spouse's rights; and (3) if estrangement, separation, or petition for divorce exists prior to the deceased's death, the next of kin gets priority over the surviving spouse.<sup>83</sup>

In regards to the first view, although surviving spouses retain some rights, estrangement is a factor courts consider when deciding spouses' rights.<sup>84</sup> Courts consider other factors along with estrangement and separation when determining disposition, such as, the length of separation,

77. TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2013).

78. See *Estate of Woods*, 402 S.W.3d at 849.

79. See *id.*

80. See *id.*; *Samsel v. Diaz*, 659 S.W.2d 143, 144 (Tex. App.—Corpus Christi 1983, no writ.) (“Case law has emphasized that the widow has the primary and paramount right to designate the place and manner of burial.”); *Flores v. De Galvan*, 127 S.W.2d 305, 307 (Tex. Civ. App.—San Antonio 1939, writ dismissed cor.) (“[G]enerally conceded that on the death of the husband, the paramount right to control the burial or other legal disposition of the body is in the surviving wife.”).

81. See *Estate of Woods*, 402 S.W.3d at 849.

82. See *Rosenblum v. New Mt. Sinai Cemetery Ass’n*, 481 S.W.2d 593, 595 (Mo. Ct. App. 1972); *In re Barner’s Estate*, 270 N.Y.S.2d 678, 684 (Sup. Ct. 1966). But see *Estate of Woods*, 402 S.W.3d at 849; *Andrews v. McGowan*, 739 So. 2d 132, 136 (Fla. Dist. Ct. App. 1999).

83. See ALA. CODE § 34-13-11(b)(3) (1975); ARIZ. REV. STAT. ANN. § 36-831(A)(1) (2014); IND. CODE ANN. § 25-15-9-18(3)(A)–(B) (West 2012); *Estate of Woods*, 402 S.W.3d at 849; *Andrews*, 739 So. 2d at 136; *Rosenblum*, 481 S.W.2d at 595; *Barner’s Estate*, 270 N.Y.S.2d at 684.

84. See *Rosenblum*, 481 S.W.2d at 595; *Barner’s Estate*, 270 N.Y.S.2d at 684.

the interaction with each other, and the support the spouses provided to one another.<sup>85</sup>

The second view is that estrangement or separation does not affect the disposition of remains.<sup>86</sup> The estranged or separated surviving spouse retains the right of disposition of remains despite the lack of emotional or physical connection to the deceased's life.<sup>87</sup> This comment will focus on the third view; if estrangement, separation, or a petition for divorce prior to an individual's death allows next of kin to have priority.<sup>88</sup>

## *2. States That Acknowledge Estrangement, Separation, or Petition for Divorce When Deciding Priority*

Although disposition of remains statutes use different names in different states, the idea behind the statutes are similar; all of the statutes deal with who has priority disposing of a decedent's remains.<sup>89</sup> The following state statutes provide protection to families when estrangement exists between a surviving spouse and the decedent.<sup>90</sup>

### *a. Alabama*

Alabama's current wording in the Right of Disposition Statute acknowledges a change in a spouse's relationship.

[t]he right to control the disposition of the remains of a deceased person as an authorizing agent, including the location, manner, and conditions of disposition and arrangements for funeral goods and services to be provided, shall vest in the following persons in the priority listed and the order named, provided the person is at least 18 years of age and of sound mind: . . .

(3) The surviving spouse.

(4) The sole surviving child of the decedent or, if there is more than one surviving child, a majority of the surviving children. Less than a majority of the surviving children may be vested with the rights of this section if reasonable efforts have been made to notify all surviving children of the

85. See *Rosenblum*, 481 S.W.2d at 595; *Barner's Estate*, 270 N.Y.S.2d at 684 (stating that the surviving spouse retained rights because the spouses "had been apart for only three years, had continued to live in the same community[,] and the wife had received support payments from her husband. . .").

86. See *Andrews*, 739 So. 2d at 136; *Estate of Woods*, 402 S.W.3d at 849.

87. See *Andrews*, 739 So. 2d at 136. The court stated that Florida's statute "was designed to establish a priority of rights," and even if it was better not to give estranged spouses priority, this was a public policy issue which should be dealt with by the legislature instead of decided by the court. *Id.*

88. See *infra* Parts II.B.2.a–d.

89. See ALA. CODE § 34-13-11(a) (explaining who the authorizing agent is and who has the right of disposition); ARIZ. REV. STAT. ANN. § 36-831 (explaining who has burial duties); IND. CODE ANN. § 25-15-9-18(a) (Explaining priority of persons in determining final disposition and interment of human remains).

90. See ALA. CODE § 34-13-11(b)(3); ARIZ. REV. STAT. ANN. § 36-831(A)(1); IND. CODE ANN. § 25-15-9-18(3)(A)–(B).

instructions and a majority of the surviving children are not aware of any opposition to the instructions. . . .

(b) The right of disposition shall be forfeited and passed to the next qualifying person listed in subsection (a), in any of the following circumstances: . . .

(3) If the person is the spouse of the decedent and a petition to dissolve the marriage was pending at the time of death of the decedent.<sup>91</sup>

Edmund from the opening hypothetical demonstrates the Alabama statute: since Edmund filed for divorce before passing away, a petition to dissolve the marriage was pending when Edmund died.<sup>92</sup> Therefore, Michelle's right is forfeited and transferred to the next qualifying kin, Edward.<sup>93</sup> Edward can now carry out his father's wishes to have his remains dealt with uniquely.<sup>94</sup>

The court decided *Southern Life & Health Ins. Co. v. Morgan*, one of Alabama's earliest cases, before the creation of the current statute or its predecessor.<sup>95</sup> The court stated that one of the main reasons for acknowledging rights of disposition was to allow the right to pay their proper respects to those with an affection for the deceased and an interest in seeing him or her laid to rest.<sup>96</sup> Although a surviving spouse normally received first priority, if the spouses did not live together at the time of deceased's death, the next of kin had more interest in the "sacred trust" right to the body or remains than an estranged spouse.<sup>97</sup> This ruling followed the idea of equity, which is the reason courts allowed rights to a dead body in the first place.<sup>98</sup>

In 2011, Alabama changed the right of disposition statute from "the decedent's spouse at the time of decedent's death" to the current statute, which provides protection to other family members.<sup>99</sup> According to the Senate bill, the legislature set a goal to revise the law for directing and arranging the disposition of remains.<sup>100</sup> Although the legislature drafted four different versions of the bill before accepting the final version, the section stating that spouses forfeit their rights if a petition for divorce was pending remained unchanged throughout the entire process.<sup>101</sup>

91. ALA. CODE § 34-13-11a(3)–(4), (b)(3) (1975).

92. *See supra* Part I.A.

93. *See* ALA. CODE § 34-13-11(b)(3); *see supra* Part I.A.

94. *See* ALA. CODE § 34-13-11(b)(3); *see supra* Part I.A.

95. *See* *Southern Life & Health Ins. Co. v. Morgan*, 105 So. 161, 167–68 (Ala. Ct. App. 1925). Decedent's father was unable to get the required death certificate to bury his son. *Id.* The court found that because the decedent had been living with his parents, and his wife had not communicated with him prior to his death, it was appropriate for the disposition of remains to go to the decedent's father. *Id.*

96. *See id.*

97. *See id.*

98. *See id.*; *Renihan v. Wright*, 25 N.E. 822, 824 (Ind. 1890); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 238 (1872).

99. *See* Ala. S.B. 94, 2011 Leg., R. S. (Ala. 2011).

100. *See id.*

101. *See id.* (amended Mar. 24, Apr. 28, June 2, and June 9).

One issue the Alabama interpretation presents is that if priority shifts from a surviving spouse to the deceased's adult children, the children might disagree on what should be done with their parent's remains.<sup>102</sup> Alabama courts addressed this issue even before the statute's wording changed.<sup>103</sup> Alabama courts believe that this issue also raises a question of equity, and decisions should consider all facts and circumstances.<sup>104</sup> Deciding cases by considering all the circumstances, courts ensure that the disposition goes to the person who is closest to and wants the best for the deceased.<sup>105</sup>

Currently, the Texas statute states, "any one of the decedent's surviving adult children" receive the right of disposition after a spouse.<sup>106</sup> If the legislature amended the statute to acknowledge when a "petition to dissolve the marriage was pending at the time of death of the decedent" and leave the wording "any one of the decedent's surviving adult children," Texas could avoid the issue that arose in Alabama when a decedent's adult children disagree over the disposition of the deceased's remains.<sup>107</sup> Alternatively, Texas could follow Alabama's choice to give the courts discretion to determine what happens when adult children do not agree on how to dispose of a deceased's remains.<sup>108</sup> This would involve making a decision on all facts and circumstances to determine the most equitable outcome.<sup>109</sup>

Amending the Texas statute to include wording similar to Alabama's statute would result in a spouse forfeiting his or her rights if a petition for divorce was pending.<sup>110</sup> Even though reconciliation rates are not high, the wording of this statute alone may not be enough if the legislature wants to offer protection to reconciled spouses.<sup>111</sup>

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102. *See* *McRae v. Booth*, 938 So. 2d 432, 433 (Ala. Civ. App. 2006) (deciding what should be done with the decedent's remains when the son wants to inter the body immediately and daughter wants an autopsy of the body before interment).

103. *See id.*

104. *See id.* at 433–35.

105. *See id.*

106. TEX. HEALTH & SAFETY CODE ANN. § 711.002(a)(3) (West 2013).

107. *Id.*; ALA. CODE § 34-13-11(b)(3) (1975). Currently in Texas, when adult children disagree about what should be done with decedent's remains, a funeral home "shall not be liable for refusing to accept . . . or to inter or otherwise dispose of decedent's remains, until it receives a court order . . . [confirming] that the dispute has been resolved . . . ." TEX. HEALTH & SAFETY CODE ANN. § 711.002(k).

108. *See McRae*, 938 So. 2d at 433–35.

109. *See id.* When people who have equal rights to disposition, like adult children, cannot agree on how to dispose of decedent's remains, a judge can decide based on "reasonableness and practicality of the proposed funeral and disposition arrangements[,] . . . degree of the personal relationship [with] the decedent[,] . . . financial ability and willingness[,] . . . convenience and needs of other family members and friends who wish to pay their respects [and,] . . . desires of decedent." ALA. CODE § 34-13-11(c).

110. *See* ALA. CODE § 34-13-11(b)(3).

111. *See* Jayson, *supra* note 30.

*b. Indiana*

Indiana's statute also acknowledges the relationship between spouses at the time of the deceased's death and provides protection to the next of kin in situations where the surviving spouses had separated or became estranged:

(a) Except as provided in subsection (b), the following persons, in the order of priority indicated, have the authority to designate the manner, type, and selection of the final disposition of human remains, to make arrangements for funeral services, and to make other ceremonial arrangements after an individual's death: . . .

(3) The individual who was the spouse of the decedent at the time of the decedent's death, except when:

(A) a petition to dissolve the marriage or for legal separation of the decedent and spouse is pending with a court at the time of the decedent's death, unless a court finds that the decedent and spouse were reconciled before the decedent's death; or

(B) a court determines the decedent and spouse were physically and emotionally separated at the time of death and the separation was for an extended time that clearly demonstrates an absence of due affection, trust, and regard for the decedent.

(4) The decedent's surviving adult child or, if more than one (1) adult child is surviving, the majority of the adult children. However, less than half of the surviving adult children have the rights under this subdivision if the adult children have used reasonable efforts to notify the other surviving adult children of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving adult children.<sup>112</sup>

If Indiana's disposition of remains statute applied to the opening hypothetical, the court could allow Edward to decide how to dispose of Edmund's remains, because Edmund filed for divorce prior to dying, the petition to dissolve the marriage would have remained pending when Edmund died.<sup>113</sup> Additionally, under Indiana's statute, even if Edmund had not filed for divorce, he and Michelle were estranged for eight years, stopped talking to each other, and lived in cities separated by 553 miles; the court could determine that Edmund and Michelle were physically and emotionally separated.<sup>114</sup> This would also give Edward the right to decide how to dispose of Edmund's remains.<sup>115</sup> If after Edmund had filed for divorce, he and Michelle resumed talking again, moved back in with each other, and overall seemed to reconcile their relationship, but when Edmund died the petition for

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112. IND. CODE ANN. § 25-15-9-18(a)(3)(A)–(B), (4) (West 2012).

113. *See id.* § 25-15-9-18(a)(3)(A); *supra* Part I.A.

114. *See* IND. CODE ANN. § 25-15-9-18(a)(3)(A); TRAVELMATH, *supra* note 9; *supra* Part I.A.

115. *See supra* Part I.A.

divorce still remained on file, Michelle could ask the court to allow her to keep her priority.<sup>116</sup>

Indiana has always seemed to follow the idea of equity when determining who should be in charge of the deceased's remains.<sup>117</sup> Prior to changing the wording of the statute, the court in *Inlow v. Wilkerson* implied that a spouse might not have any right to the deceased's remains if the spouses were estranged prior to decedent's death.<sup>118</sup> In 2011, Indiana's legislature changed the wording to reflect this idea by adding the new section to the original wording, "[t]he individual who was the spouse of the decedent at the time of the decedent's death."<sup>119</sup> When the legislature amended the statute, it found it important to include wording that allowed a surviving spouse to show reconciliation with the decedent prior to the deceased's death.<sup>120</sup>

One of the issues that might arise with the wording of the statute is that, similar to Alabama's statute, Indiana's statute states that the designation of decedent's remains goes to the majority of the decedent's adult children, if the spouses became separated or estranged.<sup>121</sup> As mentioned above, Texas can avoid issues between the deceased's adult children since the Texas statute allows any one of the deceased's adult children to make decisions.<sup>122</sup> Another potential issue of the wording of the Indiana statute is that a court would need to determine if spouses were emotionally or physically separated; the court would base its decision on whether the spouses separated for an extended time and "demonstrate[d] an absence of due affection, trust, and regard."<sup>123</sup> The legislature could solve this issue the same way the courts

116. See IND. CODE ANN. § 25-15-9-18 (a)(3)(A)–(B); *supra* Part I.A.

117. See *Renihan v. Wright*, 25 N.E. 822, 824 (1890) "[T]hat a child has no such claim . . . in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper, moral sense, that its adoption would be an eternal disgrace to American jurisprudence." (court citing Hon. Samuel B. Ruggles's investigation of the rights courts should give to deceased's family members); see *Bogert v. City of Indianapolis*, 13 Ind. 134, 138 (1859) ("[P]roposition, that the bodies of the dead belong to the surviving relations, in order of inheritance . . . and that they have the right to dispose of them as such . . .").

118. See *Inlow v. Wilkerson*, 774 N.E.2d 51, 55 (Ind. Ct. App. 2002). Decedent's husband sought an award for emotional distress because decedent's sister-in-law took over the handling of the decedent's remains. *Id.* at 53. The court stated that the decedent's husband might not have rights because the decedent and husband were not living in the same house and the husband did not visit her while she was sick, nor did he attend her funeral. *Id.* at 55.

119. Compare IND. CODE ANN. § 25-15-9-18 (a)(3) (West 2012)(wording after amendment permits a forfeiture of the surviving spouse's rights), with IND. CODE ANN. § 25-15-9-18 (a)(3) (West 2011) (wording prior to amendment did not state surviving spouse forfeits rights).

120. See Ind. S.B. 146, 117th Leg., R.S. (2011). The legislature focused on getting reconciliation in the language of the statute by including the wording: "unless a court has determined that the decedent and spouse were reconciled before the decedent's death." *Id.* The bill received a unanimous vote. Ind. H.R. Roll Call, Reg. Sess. S.B. 146 (2011).

121. See IND. CODE ANN. § 25-15-9-18(a)(3)(A)–(B), (4); ALA. CODE § 34-13-11(a)(4) (1975).

122. See *supra* Part II.B.2.a.

123. IND. CODE ANN. § 25-15-9-18(a)(3)(B).

have solved other issues: take all facts and circumstances into consideration to allow for an equitable result.<sup>124</sup>

Finally, another issue that may arise from the wording of the statute is that a court must determine whether or not spouses reconciled after they filed the petition for divorce but prior to the deceased's death.<sup>125</sup> Indiana's statute provides guidance on the procedure to determine whether reconciliation occurred:

A spouse seeking a judicial determination under subsection (a)(3)(A) that the decedent and spouse were reconciled before the decedent's death may petition the court having jurisdiction over the dissolution or separation proceeding to make this determination by filing the petition under the same cause number as the dissolution or separation proceeding. A spouse who files a petition under this subsection is not required to pay a filing fee.<sup>126</sup>

Although the wording seems like it could create issues for courts, it might actually preserve spouses' rights and ensure that spouses retain their rights, if they can show that they deserve them.<sup>127</sup>

### *c. Arizona*

In Arizona, the legislature amended the wording of the Burial Responsibility Statute in 2007.<sup>128</sup> Previously, the Arizona statute had similar wording to Texas's statute, stating the surviving spouse had the right of priority.<sup>129</sup> After the legislature amended the statute, the current wording acknowledges divorce and separation:

Except as provided pursuant to subsection H of this section, the duty of burying the body of or providing other funeral and disposition arrangements for a dead person devolves in the following order:

1. If the dead person was married, on the surviving spouse unless:
  - (a) The dead person was legally separated from the person's spouse.
  - (b) A petition for divorce or for legal separation from the dead person's spouse was filed before the person's death and remains pending at the time of death.

[then to a power of attorney if given the right to disposition of remains] . . .

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124. See *Inlow v. Wilkerson*, 774 N.E.2d 51, 55 (Ind. Ct. App. 2002); *Renihan v. Wright*, 25 N.E. 822, 824 (1890); *Bogert v. City of Indianapolis*, 13 Ind. 134, 138 (1859).

125. IND. CODE ANN. § 25-15-9-18(a)(3)(A).

126. *Id.* § 25-15-9-18(j).

127. See generally *In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet. h.) (suggesting the idea that spouse's rights should be superior to anyone else's rights unless decedent had designated an individual to be in charge of disposition).

128. See Ariz. S.B. 1023, 48th Leg., R.S. (2007).

129. *Id.*



4. On the adult children of the dead person.<sup>130</sup>

The Arizona Legislature intended to change the person responsible for the deceased's burial or disposition.<sup>131</sup> The legislature wanted to make sure that in situations when a spouse filed for divorce, or legally separated, other individuals would have priority over the surviving spouse.<sup>132</sup> Arizona's statute lists the decedent's designated power of attorney as the second in priority.<sup>133</sup> The statute also includes how to dispose of the deceased's remains if members of the authorizing party disagree.<sup>134</sup>

Going back to the hypothetical, if Edmund lived in Arizona, a petition for divorce would have been on file when he died; therefore, Michelle would not have priority of Edmund's remains because a divorce remained pending at the time of Edmund's death.<sup>135</sup> The right of disposition of remains would then go to Edmund's designated power of attorney.<sup>136</sup> Since Edmund had not designated a power of attorney, as the adult child, Edward would have priority, and the right of disposition would go to Edward.<sup>137</sup>

An issue with Arizona's statute is that it places a power of attorney between the decedent's surviving spouse and the adult child.<sup>138</sup> If the right of disposition does not go to the surviving spouse, because of a pending divorce, a power of attorney has priority before the adult child.<sup>139</sup> This issue would not arise in Texas if the legislature only amended the statute to acknowledge the spouses' relationship at the time of deceased's death; but did not amend the order of priority.<sup>140</sup>

130. ARIZ. REV. STAT. ANN. § 36-831 (West 2014).

131. *See* Ariz. S.B. 1023, 48th Leg., R.S. (2007).

132. *See id.* Arizona has amended its burial statute over the years to provide more detail about the order of priority. Ariz. S.B. 1023, 48th Leg., R.S. (2007). In 1984, the statute did not specify who followed in priority after a spouse stating, "If the dead person was not married but left kindred, upon the persons in the same degree, nearest of kin to the dead person, of adult age and within the state and of sufficient means to defray the necessary expenses of burial." *Morton v. Maricopa Cnty.*, 865 P.2d 808, 812 (Ariz. App. 1993).

133. *See* ARIZ. REV. STAT. ANN. § 36-831.

134. *See id.* "[F]inal arrangements shall be made by a majority of the members of the category who are reasonably available." *Id.*

135. *See id.*; *supra* Part I.A.

136. *See* ARIZ. REV. STAT. ANN. § 36-831; *supra* Part I.A.

137. *See* ARIZ. REV. STAT. ANN. § 36-831; *supra* Part I.A.

138. *See* ARIZ. REV. STAT. ANN. § 36-831.

139. *See id.*

140. *Compare id.* (stating that a power of attorney has priority before the adult child when the right of disposition does not go to the surviving spouse), *with* TEX. HEALTH & SAFETY CODE ANN. § 711.002 (discussing that Texas's disposition of remains statute gives first priority to the deceased's expressed directions and then gives priority to whoever the deceased appoints as a special agent). If none of the above exists, then priority goes to the deceased's spouse, directly followed by the adult children. HEALTH & SAFETY § 711.002

*d. Louisiana*

Louisiana's current disposition of remains statute takes into consideration whether either spouse filed for divorce prior to the deceased's death.

A. The right to control interment, as defined in R.S. 8:1(26), of the remains of a deceased person, unless other specific directions have been given [or the designation of a specific person to control disposition has been made] by the decedent in the form of a written and notarized declaration, vests in and devolves upon the following in the order named:

(1) The surviving spouse, if no petition for divorce has been filed by either spouse prior to the death of the decedent spouse.

(2) A majority of the surviving adult children of the decedent, not including grandchildren or other more remote descendants.<sup>141</sup>

If Edmund lived in Louisiana, Edward would make the decision as to the disposition of Edmund's remains since Edmund filed for divorce prior to his death.<sup>142</sup> Louisiana's statute is similar to Alabama and Arizona's statutes, which also acknowledge that a spouse loses priority when a petition for divorce is on file, thus allowing Edward to take charge of Edmund's remains.<sup>143</sup>

Louisiana seems to favor the right of a spouse as the first in priority when deciding how to dispose of a decedent's remains.<sup>144</sup> The court in *Bunol v. Bunol*, a 1930 case, stated that: "It is conceded that, upon the death of a husband or wife, the surviving spouse has a right superior to any next of kin to select the burial place."<sup>145</sup> Similarly, in *In re Succession of Begnaud*, a more recent case, the court stated that "a spousal preference exists in other areas involving the right to control interment."<sup>146</sup> Despite favoring a spouse's right to the disposition of remains, the legislature acknowledged that some situations, such as divorce, might change who should be first in priority.<sup>147</sup>

In 2001, the legislature amended the statute to the current wording: "if no petition for divorce has been filed."<sup>148</sup> The legislature intended to protect surviving spouses who would receive preference as long as neither spouse

141. See LA. REV. STAT. ANN. § 8:655 (2014).

142. See *id.*; *supra* Part I.A. Louisiana, like Texas, does not acknowledge legal separation. See Benjamin J. Brouillette, *Separation in Louisiana*, BROUILLETTE L. FIRM (Nov. 8, 2012), <http://batonrouge.legalhelp.com/2012/11/08/separation-louisiana/#.VMGvSUfF-Qw> [<http://perma.cc/7AVK-9MXZ>].

143. See ALA. CODE § 34-13-11a(3)-(4), (b)(3) (1975); ARIZ. REV. STAT. ANN. § 36-831 (West 2014); *supra* Part I.A.

144. See *Kok v. Harris*, 563 So. 2d 374, 378 (La. Ct. App. 1990) (stating that since the surviving spouse and decedent were still together "the sole and exclusive right of disposing of the remains of the deceased belonged to the surviving spouse."); *Bunol v. Bunol*, 127 So. 70, 71-72 (La. App. 1930).

145. *Bunol*, 127 So. at 71.

146. *In re Begnaud*, 123 So.3d 1252, 1255 (La. App. 2013).

147. See LA. REV. STAT. ANN. § 8:655; H. Journal, 27th Sess., 1st Sess. 27-98 (2001).

148. La. H.B. 98, 27 Leg., R.S. (2001).

filed for a petition for divorce prior to the deceased's death.<sup>149</sup> Louisiana's statute also states that a majority of the children receive the right of disposition after the spouse.<sup>150</sup> As discussed above, families can avoid this issue in Texas.<sup>151</sup>

Louisiana, like Texas, stresses the importance of having the surviving spouse receive first priority in the disposition of remains.<sup>152</sup> Wording similar to Louisiana's statute would allow Texas to retain its stance of giving first priority to the surviving spouse, but would also allow acknowledgement that under some circumstances priority should go to someone else.<sup>153</sup>

### III. WHAT SHOULD BE DONE

#### *A. How the Texas Statute Should be Worded*

The legislature should amend the current disposition of remains statute, Health and Safety Code § 711.002, in order to acknowledge the spousal relationship at the time of a spouse's death.<sup>154</sup> Texas can use other states' statutes that have acknowledged a change in a spousal relationship, such as Alabama, Indiana, Arizona, and Louisiana, to determine the wording for its statute.<sup>155</sup> The following is the proposed wording for amending Texas's Disposition of Remains Statute:

- (a) Except as provided by Subsection (l), unless a decedent has left directions in writing for the disposition of the decedent's remains provided in Subsection (g), 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 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, [unless:]
    - (A) a petition for divorce . . . [by either the surviving spouse or the decedent] was filed before the person's death and remains pending at the time of death, unless a court

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149. *See id.* The purpose of the statute was "to provide for preference of a surviving spouse subject to certain conditions; and to provide for related matters." H. Journal, 27th Sess., 1st Sess. 27–98 (2001).

150. *See* LA. REV. STAT. ANN. § 8:655 (2014).

151. *See supra* Parts I.B.2.A–C.

152. *See Begnaud*, 123 So.3d at 1255; *Kok v. Harris*, 563 So. 2d. 374, 378 (La. App. 1990); *Bunol v. Bunol*, 127 So. 70, 71–72 (La. App. 1930); *In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet. h.).

153. *See* LA. REV. STAT. ANN. § 8:655.

154. *See* TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2013).

155. *See* ALA. CODE § 34-13-11(b)(3) (1975); ARIZ. REV. STAT. ANN. § 36-831 (2014); IND. CODE ANN. § 25-15-9-18(3)(A)–(B) (West 2012); LA. REV. STAT. ANN. § 8:655(A)(1)–(5).

[determines] the decedent and spouse were reconciled before the decedent's death; or

(B) a court determined the decedent and spouse were physically and emotionally separated [or estranged] at the time of death and the separation [or estrangement] was for an extended time that clearly demonstrates an absence of due affection, trust, and regard for the decedent

[(C)] A spouse seeking a judicial determination under subsection [(2)(A)] that the decedent and spouse were reconciled before the decedent's death may petition the court having jurisdiction over the dissolution . . . proceeding to make this determination by filing the petition under the same cause number as the dissolution proceeding. A spouse who files a petition under this subsection is not required to pay a filing fee.

(3) any one of the decedent's surviving adult children.<sup>156</sup>

With the proposed wording, Edward would receive the right to dispose of Edmund's remains.<sup>157</sup> Edward can establish priority in one of two ways.<sup>158</sup> Under § 2(A), since Edmund filed for divorce from Michelle prior to his death, the petition for divorce remained pending at Edmund's death.<sup>159</sup> For Michelle to keep her priority, she would need to show the court that she reconciled with Edmund prior to Edmund's death.<sup>160</sup> Michelle could prove this by seeking a judicial determination by filing a petition under the same cause number as the dissolution proceeding.<sup>161</sup>

Under § 2(B), Edward could attempt to get priority even if Edmund had not filed for divorce prior to his death.<sup>162</sup> This would be done by having the court determine that Edmund and Michelle were physically and emotionally separated or estranged when Edmund died.<sup>163</sup> In order to show physical or emotional separation or estrangement, the court would consider all of the facts and circumstances involved: Edmund and Michelle had lived apart for eight years in different cities separated by 553 miles and had limited communication.<sup>164</sup> By adding these two sections to the statute, Edward

156. See HEALTH & SAFETY § 711.002; ARIZ. REV. STAT. ANN. § 36-831(A)(1)(b); IND. CODE ANN. § 25-15-9-18(3)(A)-(B).

157. See ALA. CODE § 34-13-11(a)(3)-(4), (b)(3); ARIZ. REV. STAT. ANN. § 36-831(A)(1); IND. CODE ANN. § 25-15-9-18(a)(3)(A)-(B), (4); LA. REV. STAT. ANN. § 8:655(A)(1); *supra* Part I.A.

158. See ALA. CODE § 34-13-11(a)(3)-(4), (b)(3); ARIZ. REV. STAT. ANN. § 36-831(A)(1); IND. CODE ANN. § 25-15-9-18(a)(3)(A)-(B), (4); LA. REV. STAT. ANN. § 8:655(A)(1); *supra* Part I.A.

159. See ALA. CODE § 34-13-11(a)(3)-(4), (b)(3); ARIZ. REV. STAT. ANN. § 36-831(A)(1)(b); IND. CODE ANN. § 25-15-9-18(a)(3)(A)-(B), (4); LA. REV. STAT. ANN. § 8:655(A)(1); *supra* Part I.A.

160. See IND. CODE ANN. § 25-15-9-18(j); *supra* Part I.A.

161. See IND. CODE ANN. § 25-15-9-18(j); *supra* Part I.A. In Texas, the cause of action for a no fault divorce is insupportability. TEX. FAM. CODE ANN. § 6.001 (West 1997).

162. See IND. CODE ANN. § 25-15-9-18(a)(3)(B); *supra* Part I.A.

163. See IND. CODE ANN. § 25-15-9-18(a)(3)(B); *supra* Part I.A.

164. See IND. CODE ANN. § 25-15-9-18(a)(3)(B) (West 2012); *supra* Part I.A.

receives greater protection in the order of priority, allowing for a more equitable outcome.<sup>165</sup>

The proposed statute takes wording from Alabama, Indiana, Arizona, and Louisiana statutes.<sup>166</sup> Indiana has the most expansive statute because it provides priority to the adult children when a spouse files a petition for divorce prior to the deceased's death, or when the spouses were emotionally or physically estranged.<sup>167</sup> Indiana also gives the surviving spouse the opportunity to show the court that the couple had reconciled prior to the deceased's death.<sup>168</sup> Ideally, Texas's disposition statute, like Indiana's statute, should allow for the forfeiture of priority in both situations, which would create the most equitable outcome.<sup>169</sup> However, even if Texas follows Alabama, Arizona, or Louisiana's statutes, the wording of those statutes would still protect other family members because the spouse would forfeit the right once either spouse had filed for divorce.<sup>170</sup>

The wording of the proposed statute would also protect spousal priority, which is important to the Texas Legislature, because the legislature provides the opportunity for a judicial determination that the spouses reconciled, which retains the surviving spouse's priority.<sup>171</sup>

### *B. What Estate Planners Should Do in the Meantime*

Texas courts have made it clear that they will follow the wording in the statute without considering individual facts and circumstances until the legislature changes the wording.<sup>172</sup> As a result, estate planners need to provide information regarding disposition of remains to clients to allow the clients the ability to designate individuals to be left in charge of their remains.<sup>173</sup>

An individual, in express written directions, can choose who he or she wants to execute the disposition of his or her remains; thus, ensuring

165. See ALA. CODE § 34-13-11(b)(3)(1975); ARIZ. REV. STAT. ANN. § 36-831(A)(1) (2014); IND. CODE ANN. § 25-15-9-18(a)(3)(A)–(B); LA. REV. STAT. ANN. § 8:655(A)(2) (2014) (stating that if a spouse filed a petition for divorce prior to the decedent's death, the spouse forfeits priority); *supra* Part I.A.

166. See ALA. CODE § 34-13-11(b)(3); ARIZ. REV. STAT. ANN. § 36-831; IND. CODE ANN. § 25-15-9-18(a)(3)(A)–(B); LA. REV. STAT. ANN. § 8:655.

167. See IND. CODE ANN. § 25-15-9-18(3)(A)–(B).

168. See IND. CODE ANN. § 25-15-9-18(j).

169. See IND. CODE ANN. § 25-15-9-18(3)(A)–(B), (j) (West 2012).

170. See ALA. CODE § 34-13-11(b)(3); ARIZ. REV. STAT. ANN. § 36-831; LA. REV. STAT. ANN. § 8:655.

171. See IND. CODE ANN. § 25-15-9-18(j); *In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet. h.); *Terrill v. Harbin*, 376 S.W.2d 945, 947 (Tex. Civ. App.—Eastland 1964, writ dismissed); *Wright v. Hamed*, 163 S.W. 685, 688 (Tex. Civ. App.—Galveston 1914, no writ).

172. See *Estate of Woods*, 402 S.W.3d at 849.

173. See *id.*

disposition according to the decedent's wishes.<sup>174</sup> Acceptable forms of writing include "a will; . . . a prepaid funeral contract; or . . . a signed and acknowledged written instrument."<sup>175</sup> Estate planners can also advise clients to select a special agent "appointed for the purpose of controlling the disposition of the decedent's remains."<sup>176</sup> If a special agent is selected, the estate planner needs to make sure that all requirements are met in order for the writing to be enforceable: "(1) substantially comply with the statutory form; (2) . . . properly completed; (3) . . . signed by the decedent; (4) . . . signed by the agent and each successor agent; and (5) contain an acknowledgement of the decedent's signature."<sup>177</sup>

It is also important for estate planners to explain to clients that they have the option of choosing who will dispose of their remains, and how it will be done, because not all clients are aware of this capability:

For many clients disposition of remains is something they haven't thought about. Generally, in my first meeting with a client they receive a long-form questionnaire which asks for a lot of information from them. I use it as a tool to get them to start thinking and talking about all of the topics and things that go into a detailed estate plan. There are questions about disposition of remains within the questionnaire. Most of the time the client does not know they have the ability to make those decisions prior to their death but I get them talking. I use a separate disposition of remains form in my estate plans rather than putting it as a clause in the will. This allows them to be more detailed if they want to be. I rarely, if ever, create an estate plan without the document. Even if they only designate someone to make the decisions — they still get the form. (unless of course they are just adamantly against it). I have had some clients who have prepaid for their funeral expenses and picked out what they want through a contract with a funeral home. We refer clients to funeral homes if they wish to do this but I don't usually push this, but it is one option. If a prepaid funeral contract is included I will sometimes include that within the will rather than a separate form because it's usually one sentence. Some clients come in with very specific directions of what they want, the type of funeral, the number of songs, the casket, etc. Those clients find the process extremely important. Many however, because it is something they have never thought about before, do not always feel it is necessary. In those situations, I explain to them that one part of the estate planning process is planning for after you die so that your loved ones are not left with that burden.<sup>178</sup>

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174. See TEX. HEALTH & SAFETY CODE ANN. § 711.002 (West 2013); GERRY W. BEYER, § 68.12 *Disposition of Body - Statutory Law*, 10 TEX. PRAC., TEXAS LAW OF WILLS § 68.12 (3d ed. 2014).

175. Beyer, *supra* note 174. See HEALTH & SAFETY § 711.002.

176. Beyer, *supra* note 174. See HEALTH & SAFETY § 711.002.

177. Beyer, *supra* note 174. See HEALTH & SAFETY § 711.002.

178. E-mail from Kayla R. Wimberley Attorney, Matthew Harris Law, PLLC, to author (Jan. 21, 2015, 8:48AM CST) (on file with author).

When I talk to the clients I request that they place a lot of thought into it because it is a big decision. Whether they always do or not, I don't know. For the most part I think they do because everyone has family that they have a better relationship with than others and I find it rare that they put someone in that role that they do not have a significant relationship with.<sup>179</sup>

Even when clients realize that they should have an estate plan, it does not always mean that they realize they can designate who should be in charge of the disposition of remains.<sup>180</sup> Until the legislature offers greater protection to other family members, clients should be specific about who they would like to have in charge.<sup>181</sup>

#### IV. CONCLUSION

As Texas's Disposition of Remains Statute stands now, Edward does not have any recourse available to him to obtain his father's remains.<sup>182</sup> Edmund's wish of having his remains disposed of in a unique way will not be carried out, and Edward will be 553 miles from his father's remains.<sup>183</sup> This type of situation is present in today's society because of changes in the United States over the past several decades—divorce now occurs in fifty percent of marriages, with an increase occurring among baby boomers.<sup>184</sup> Many of today's families are blended because of divorce and remarriage; therefore, the disposition of remains statute should acknowledge the changes in society and provide protection to the family members of these blended families.<sup>185</sup>

Courts have acknowledged a quasi-property right in a deceased's body because of the emotional connection with the deceased, and have allowed loved ones the chance to provide the deceased with a proper funeral.<sup>186</sup> The main idea behind a quasi-property right is to allow equity; however, Texas does not take equity into consideration.<sup>187</sup> Texas courts enforce a strict interpretation of the disposition of remains statute, which is why the legislature should amend the statute to better protect disposition of family members' remains.<sup>188</sup> By following other states' wording, Texas can take

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179. E-mail from Kayla R. Wimberley, Attorney, Matthew Harris Law, PLLC, to author (Jan. 22, 2015, 8:47AM CST) (on file with author).

180. See Wimberley, *supra* note 178.

181. See *id.*

182. See HEALTH & SAFETY § 711.002 (West 2013); *In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet. h.); *supra* Part I.A.

183. See TRAVELMATH, *supra* note 9; *supra* Part I.A.

184. See Copen et. al., *supra* note 19; Ingraham, *supra* note 22.

185. See generally Nat'l Center for Health Statistics, *supra* note 23 (stating the percentage of children affected by parent's divorce). See Scarf, *supra* note 27.

186. See *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 235 (1872).

187. See *id.*; *supra* Parts I.C.1, II.A.

188. See *In re Estate of Woods*, 402 S.W.3d 845, 849 (Tex. App.—Tyler 2013, no pet.).

into account situations where spouses live separate lives, file a petition for divorce, or reconcile, all of which allow the right of disposition of remains to go to the most suitable person.<sup>189</sup> Disposing of a loved one's remains is a very personal experience, and Texas courts should be more considerate of who gets this right.<sup>190</sup> Until the legislature amends the statute, estate planners can help provide clients with information about selecting someone to dispose of their remains, but this help can only go so far.<sup>191</sup>

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189. *See supra* Parts II.B.2, III.A.

190. *See supra* Part III.A.

191. Gerry W. Beyer, *The Basics of Texas Intestate Succession Law*, PROFESSORBAYER.COM (Jan. 8, 2008), [http://www.professorbeyer.com/Archive/new\\_site/Articles/Intestate\\_Succession\\_Texas\\_Basics.pdf](http://www.professorbeyer.com/Archive/new_site/Articles/Intestate_Succession_Texas_Basics.pdf) [<http://perma.cc/ZWG3-M34G>]. Sixty to seventy-five percent of Americans die intestate, which means that estate planners cannot provide information if clients do not seek help with their estates. *Id.*