

DEAD BODIES EVERYWHERE (DUN DUN DUN): FUNERAL TRENDS IN THIS RECESSION AND THE LAWS REGULATING THESE CHANGES

by Megan C. Wells

I.	INTRODUCTION.....	485
II.	THE FUNERAL AND DEATH-CARE INDUSTRY	488
	A. <i>The Funeral Rule</i>	488
	B. <i>State Regulation</i>	489
	C. <i>Typical Funeral Expenses</i>	491
III.	OPTIONS FOR FUNERAL PLANNING.....	491
	A. <i>Personal Preference Laws</i>	492
	B. <i>A Funeral Trust</i>	494
	C. <i>Life Insurance Policies</i>	495
	D. <i>Joint Accounts</i>	496
IV.	OPTIONS AVAILABLE TO DECEDENT’S RELATIVES AND FRIENDS	496
	A. <i>Casket Options</i>	497
	B. <i>Selling the Family Burial Plot</i>	498
	C. <i>Whole-Body Donation</i>	499
V.	UNCLAIMED BODIES AND THE SUBSEQUENT FINANCIAL REPERCUSSIONS	500
	A. <i>Abandoned Loved Ones</i>	500
	B. <i>Government Funded Burials</i>	502
VI.	THE HOME BURIAL AND DEATH MIDWIFE TREND, AND GOVERNMENT REGULATION.....	503
	A. <i>Home Funerals</i>	503
	B. <i>Death Midwives and Other Home Funeral Assistants</i>	504
	C. <i>State Regulation</i>	505
VII.	FUTURE STRAINS ON ESTATE AND FUNERAL PLANNING CAUSED BY BABY BOOMERS	506
VIII.	CONCLUSION	508

I. INTRODUCTION

The American people are feeling the financial strain of unstable economic times, and all classes of people are altering their lifestyles accordingly.¹ Higher-income households feel pressured to conserve, while

1. Peter S. Goodman, *Reluctance to Spend May Be Legacy of Recession*, N.Y. TIMES, Aug. 29, 2009, at A1.

middle- and lower-class citizens are relying on careful budgeting just to make ends meet.² While car, rent, and food payments are anticipated expenses, the death of a loved one is not always foreseeable. Sudden funeral and burial expenses can seem onerous in the face of other priorities like putting food on the table, paying medical expenses, and other expenditures.³

Consider the case of two friends faced with the sudden death of their close friend. After Donny passes away unexpectedly, Jeffery ("The Dude") and Walter take it upon themselves to see that their friend is properly laid to rest.⁴ Planning on scattering Donny's ashes off of a California cliff and into the Pacific Ocean, they have his body cremated.⁵ However, upon visiting with the funeral director about the bill, they are confronted with an outrageous charge for an urn.⁶ After an aggravated conversation with the funeral director, who insists that the urn is "modestly priced" and absolutely necessary, The Dude and Walter find an alternative vessel in which to transport the ashes to the scattering site: a Folgers coffee can.⁷ Although

2. *See id.*

3. *See* Alison Stateman, *Death in the Recession: More Bodies Left Unburied*, TIME, Aug. 7, 2009, available at <http://www.time.com/time/nation/article/0,8599,1914780-1,00.html>; *see also* National Funeral Directors Association Statistics, <http://www.nfda.org/index.php/media-center/statisticsreports> (last visited Oct. 16, 2009). The average cost of a regular adult funeral includes the following general items:

Non-declinable basic services fee	\$1,595
Removal/transfer of remains to funeral home	\$233
Embalming	\$550
Other preparation of the body	\$203
Use of facilities/staff for viewing	\$406
Use of facilities/staff for funeral ceremony	\$463
Use of a hearse	\$251
Use of a service car/van	\$120
Basic memorial printed package	\$119
<i>Subtotal without Casket</i>	\$3,940
Metal Casket	\$2,255
<i>Subtotal with Casket</i>	\$6,195
<u>Vault</u>	\$1,128
Total Cost	\$7,323

Id.

4. *See* THE BIG LEBOWSKI (Polygram Filmed Entertainment 1998). Starring Jeff Bridges as The Dude, John Goodman as Walter, and Steve Buscemi as Donny. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* As Walter looks over the funeral bill, he questions one of the charges.

Walter: What's this?

Funeral Home Director: That's for the urn.

Walter: Don't need it. We're scattering the ashes.

Director: Yes, so we were informed. However, we must of course transmit the remains to you in a receptacle.

Walter: This is a hundred and eighty dollars.

Director: It is our most modestly priced receptacle.

Walter: A hundred and eighty dollars?!

Director: They range up to three thousand.

inexpensive and uniquely unconventional, the spur-of-the-moment method lacked the grandeur of a traditional casket or urn.⁸ However, with Walter's touching last words about his friend, it is evident that what matters most is not the means of disposition of a decedent's remains, but a last showing of love and respect to the deceased.⁹

Tightened purse strings have led to changing ideas about traditional funeral and burial practices.¹⁰ This comment discusses the effects these changes have on the funeral industry, the legislation regulating this industry, and emerging trends attempting to lessen the tension post-death costs can have on an estate.

Funeral laws and trends can be characterized by two realms: the current law and its anomalies. The first half of this comment reflects funeral laws and practices that are relatively well-known, while the second half addresses emerging trends and the issues arising because of them. Part II of this comment describes the funeral industry and the recent rising costs of funeral expenses.¹¹ Part III describes various methods of funeral planning, including the options of pre-planning provisions and the use of annuities and funeral trusts.¹² Part IV addresses the options available to family members and the decision-making requirements of decedents.¹³

Once current funeral law and practices are examined in detail, this comment explores the fascinating trends emerging due to the economic recession and changes in individual spending.¹⁴ Part V discusses the current surge in unclaimed dead bodies and the strain this places on county morgues, especially considering recent local governmental budget cutbacks.¹⁵ Part V further discusses state laws pertaining to indigent burials, including laws on abandoned bodies and government funded burial stipends.¹⁶ Part VI will address the increasingly popular phenomenon of home burials, death midwives, and recent state legislation attempting to regulate these practices.¹⁷ This part will also discuss the fact that some state laws discourage such practices, which reflects support of the funeral

The Dude: Can't we just rent it from you? Yeah?

Director: Sir, this is a mortuary, not a rental house.

Walter: Just because we're bereaved doesn't make us saps!

Id.

8. *Id.*

9. *Id.* In typical movie fashion, the tender moment is disrupted when Walter thoughtlessly scatters the ashes into the wind, and subsequently into The Dude's face. *Id.*

10. See Stateman, *supra* note 3.

11. See *infra* Part II. A-C.

12. See *infra* Part III. A-D.

13. See *infra* Part IV. A-C.

14. See *infra* Parts V-VII.

15. See *infra* Part V.A.

16. See *infra* Part V.B.

17. See *infra* Part VI.A-C.

industry.¹⁸ Part VII of the comment will explain why the impending decline in health of the baby boomers will place even more strain on estate and funeral planning.¹⁹ Indeed, this section will include a recommendation of where the law should move regarding the options available to families of decedents and governmental involvement in burial assistance.²⁰ Ultimately, this comment demonstrates that current laws leave heirs and morgues with few concise options regarding the burial of decedents and urges states to enact laws which better regulate funeral and burial practices.²¹

II. THE FUNERAL AND DEATH-CARE INDUSTRY

The funeral industry is a billion-dollar, “economically sophisticated, politically adept, and consumer-oriented institutional powerhouse.”²² Revenue in the United States funeral industry is projected to grow 1.2% and reach \$20.7 billion this year, which is significant because most other industries are reporting losses.²³ Regardless of the state of the national economy, funeral homes will always have business.²⁴ As one funeral home manager pointed out, “The angel of death doesn’t consider economic times.”²⁵

A. *The Funeral Rule*

Although funerals still rank among the most expensive purchases for consumers, federal regulations have reined in the monopolizing power held by members of the funeral industry.²⁶ In 1972, the Federal Trade Commission (FTC) began to investigate funeral practices across the nation.²⁷ The FTC concluded that industry interests dominated both state regulation and consumer interests, leaving “the consumer vulnerable to unfair and deceptive practices.”²⁸

18. See *infra* Part VI.C.

19. See *infra* Part VII.

20. See *infra* Part VII.

21. See *infra* Part VIII.

22. Gary M. Laderman, *Funeral Industry*, <http://www.deathreference.com/En-Gh/Funeral-Industry.html> (last visited Jan. 22, 2010); see also *Funerals: A Consumer Guide*, <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro19.shtm> (last visited Oct. 15, 2009) (explaining that Americans spend billions of dollars every year arranging more than two million funerals for family and friends).

23. See Gabrielle Glaser, *The Funeral: Your Last Chance to Be a Big Spender*, N.Y. TIMES, Apr. 18, 2009, at BU 1.

24. Dan McDonald, *Funeral Business Is Not Immune to Recession*, METROWEST DAILY NEWS, Mar. 12, 2009, available at <http://www.metrowestdailynews.com/business/x599192699/Funeral-business-is-not-immune-to-recession>.

25. *Id.*

26. See *Funerals: A Consumer Guide*, *supra* note 22.

27. *Harry & Bryant Co. v. F.T.C.*, 726 F.2d 993, 996 (4th Cir. 1984).

28. *Id.*

Consumers are susceptible to abuse by members of the funeral industry because funeral arrangements are generally made in haste and under great emotional stress.²⁹ In an effort to combat this trend, the FTC developed regulations that made it possible for family members and friends to choose between several options and not be limited to what funeral directors proposed was best.³⁰ The Rule on Funeral Industry Practices (“the Funeral Rule”) identified several unfair practices in the sale of funeral goods and prescribing requirements to prevent funeral directors from using deceptive or unfair practices against family members of decedents.³¹ The Funeral Rule gives consumers several rights, including: the right to buy the funeral arrangements they want and not a predetermined package; the right to receive price information on the phone; the right to receive a written, itemized price list when visiting a funeral home; the right to use an “alternative container” instead of a casket for cremation; and the right to make funeral arrangements without embalming.³²

B. State Regulation

The Funeral Rule is not applicable where the FTC has determined that a state’s regulations in this area of practice are more rigorous than the federal regulations.³³ The state can regulate and control businesses engaged in operating a mortuary, a funeral home, or an undertaking or embalming establishment as these are public or “quasi public business[es].”³⁴

[I]n the exercise of its police power, a state may adopt reasonable regulations as to the location of cemeteries within the state. In addition, regulations may also be promulgated as to burials or other means of disposing of dead bodies, contracts for the disposal or burial of bodies, coroners, undertakers, and autopsies.³⁵

29. See *Paying Final Respects: Your Rights When Buying Funeral Goods & Services*, <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro26.shtm> (last visited Feb. 25, 2010).

30. *Id.*

31. *Id.*; see also FTC Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 16 CFR § 453 (2008) (setting forth preventive requirements in the form of price and information disclosures). “Funeral directing” is the “profession of directing and supervising funerals for profit, or the profession of preparing dead bodies for burial or cremation by means other than embalming, or the disposition or shipping of dead human bodies, or the provision or maintenance of a place for the preparation of dead human bodies.” *Telophase Soc. of Fl., Inc. v. State Bd. of Funeral Dir. and Embalmers*, 334 So. 2d 563, 565 (Fla. 1976).

32. See *Paying Final Respects: Your Rights When Buying Funeral Goods and Services*, *supra* note 29.

33. 16 C.F.R. § 453.9 (1994).

34. *McKinley v. Reilly*, 393 P.2d 268, 269-70 (Ariz. 1964).

35. 22A Am. Jur. 2d *Dead Bodies* §1 (2009).

Some states empower boards of embalming and funeral directing to license embalmers, funeral directors, and funeral directing establishments.³⁶ These state laws require that an undertaker be licensed as an embalmer prior to engaging in the business of undertaking. The Court of Appeals of New York justified this requirement in *People v. Ringe*.³⁷ Although this is an early case, the reasoning behind such certification is still just:

The care of dead human bodies and the disposition of them by burial or otherwise is so closely related to the health and general welfare of a community that the business of caring for and disposing of such bodies may be regulated by license and special regulations under the general police power of the state. The danger that may arise from the body of a person who has died from some infectious, contagious, and communicable disease or otherwise is to some extent obviated by the sanitary regulations of local boards of health; but regulations relating to the transportation of dead bodies, permits for burials in the locality where the person has died and in the compilation of vital statistics are quite inadequate to protect the health and general welfare of a community, unless the person who comes into immediate contact with the dead body and upon whose care and skill the public are principally dependent in preventing the spread of infection or contagion and protecting the health, good order, and general welfare of a community, is selected with special reference to his skill, knowledge and experience.³⁸

State regulation surrounding funeral and burial practices would fail to benefit the community unless the care of the dead body prior to the ceremony is done efficiently and embodies sanitary rules and regulations.³⁹

However, state regulation of funeral and burial practices are limited.⁴⁰ A police regulation is valid only if it is a reasonable one, “appropriate for the accomplishment of a legitimate object falling within the scope of the police power.”⁴¹ Any regulation must justify its validity upon the “public need for safety, health, security, and protection of the general welfare of the community.”⁴²

36. See *Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming and Funeral Directing*, 398 N.E.2d 471, 474 n.4 (Mass.1979).

37. See *People v. Ringe*, 197 N.Y. 143, 143 (N.Y. 1910).

38. *Id.* at 147.

39. *Id.* at 147-48.

40. 38 Am. Jur. 2d *Funeral Directors and Embalmers* § 4 (2009).

41. *Id.*

42. *City of Coleman v. Rhone*, 222 S.W.2d 646, 648 (Tex. Civ. App.—Eastland 1949, writ ref’d); see also *Odd Fellows’ Cemetery Ass’n v. City & County of San Francisco*, 73 P. 987, 988 (Cal. 1903).

C. Typical Funeral Expenses

A traditional adult funeral and burial costs between \$7,000-\$10,000.⁴³ A full-service funeral, generally, includes a viewing or visitation and a formal funeral service, use of a hearse to transport the body, and burial or cremation of the remains.⁴⁴ Added costs of embalming and dressing the body, a casket, cemetery plot, and other funeral goods and services must also be factored in.⁴⁵ In order to cut costs amid the economic downturn, more people are “spending less on their dead” by opting to have their loved ones cremated instead of paying for a traditional burial.⁴⁶ Cremation services run between \$800-\$1,000, including the cremation fee, transporting the body, an urn, and a death certificate.⁴⁷

III. OPTIONS FOR FUNERAL PLANNING

There are several options for a person contemplating pre-need planning for their own funeral. One can merely make specific arrangements for their funeral, or they can actually pre-pay for the decided-upon arrangements. According to some, the pre-need funeral industry remains “shaky at best” because a number of abuses of the system have been reported.⁴⁸ However, states do regulate the industry, and some state lawmakers are passing pre-need funeral service bills that better protect consumers.⁴⁹ Preplanning a funeral is an important option because it “‘frees us up’ to live the rest of our lives with less worry about death.”⁵⁰ There are several ways for such planning to occur, including through a funeral

43. See Stateman, *supra* note 3; see also Donna Leinwand, *Demand Rises for Publicly Funded Burials*, USA TODAY, Aug. 20, 2009, available at http://www.usatoday.com/news/nation/2009-08-19-funerals_N.htm.

44. See *Funerals: A Consumer Guide*, *supra* note 29.

45. See *id.* While a funeral director directs and supervises the actual funeral, an “undertaker” is one who engages in the care of the dead bodies, and the burial or other disposition of them. See *supra* note 31. See also *People v. Ringe*, 197 N.Y. 143, 144 (N.Y. 1910). One of an undertaker’s jobs is to embalm the body if the family so wishes; to embalm is to treat a dead body with chemicals, drugs, or balsams so as to preserve it. See *Ansell v. Dept. of Commerce, Bd. of Examiners of Mortuary Sci.*, 564 N.W.2d 519, 524 (Mich. Ct. App. 1997).

46. Ellis E. Conklin, *Business is Cooking at Local Crematories. Thank the Recession*, ST. LOUIS NEWS, Mar. 3, 2009, available at http://blogs.riverfronttimes.com/dailyrft/2009/03/business_is_cooking_at_local_crematories.php.

47. See *id.*; see also P.J. Huffstutter, *The Unclaimed Ashes of Hard Times*, LA TIMES, Feb. 22, 2009, available at <http://www.latimes.com/news/nationworld/nation/la-na-on-the-edge-funeral22-2009feb22,0,7641253,full.story>.

48. *PrePayment – Is it the Right Choice?*, May 26, 2009, <http://www.deathcare.com/2009/prepayment-is-it-the-right-choice.html>.

49. *Id.*

50. Robert Mullins, *Baby Boomers Lag in Preparing Funerals, Estates, et al.*, Dec. 18, 1998, available at <http://milwaukee.bizjournals.com/milwaukee/stories/1998/12/21/focus3.html>.

director, a will, or even an online website designed to help plan and personalize a funeral.⁵¹

A. Personal Preference Laws

“Personal Preference” laws are a relatively new development in the area of testamentary instructions for funeral arrangements.⁵² Professor Ann M. Murphy cites an Illinois Personal Preference law as being “particularly workable.”⁵³ The Illinois Disposition of Remains Act mandates that a decedent may provide written directions for the disposition of his remains by any of the following:

[A] will, a prepaid funeral or burial contract, a power of attorney that satisfies the provisions of Article IV—Powers of Attorney for Health Care of the Illinois Power of Attorney Act and contains a power to direct the disposition of remains, a cremation authorization form that complies with the Crematory Regulation Act, or in a written instrument that satisfies the provisions of Sections 10 and 15 and that is signed by the person and notarized. In the event the decedent left no instructions, the Act provides the order of decision priority as:

1. The designated agent “To Control Disposition of Remains” under § 10 of the Act;
2. The executor or representative, acting according to instructions as to disposition in the decedent’s will;
3. The surviving spouse;
4. The adult children of the decedent;
5. The surviving parents of the decedent;
6. The surviving adults in the next degree of kinship to the decedent;
7. In the case of an indigent, the public official charged with arranging the disposition of the decedent;
8. In the case of an individual who has donated his or her body to science, or who has died in a nursing home or other private institution and who has executed a cremation authorization form, a representative of the institution; and

51. See *My Funeral, A Funeral Planning Tool*, <http://www.thefuneralsite.com/> (last visited Jan. 15, 2010). This website includes “every known option for modern funeral planning . . . [w]hether you want a completely customized event, or a traditional funeral.” *Id.* It allows you to record many of the decisions loved ones will face someday, including disposition of the body, location of the services, and various particulars of the funeral service such as music, readings, speakers, and ceremony official. *Id.*

52. Ann M. Murphy, *Please Don’t Bury Me In That Cold, Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381, 406 (2007).

53. *Id.*

9. Any other person willing to assume legal and financial responsibility.⁵⁴

Texas, Oregon, and Rhode Island also have similar declarations of disposition.⁵⁵

Most states enforce that “a decedent’s wishes expressed in a will should be followed ‘so far as possible,’ ‘if considerations of propriety and decency do not intervene,’ even against the wishes of the surviving kin otherwise entitled to dispose of the remains.”⁵⁶ An executor of a will “has a right and duty to carry out any reasonable and proper directions made in the will” regarding disposition of the deceased’s body.⁵⁷ Courts determine the intent of a testator or testatrix by looking to the four corners of the will: if the language is unambiguous and clearly expresses the decedent’s intent “then that language must govern.”⁵⁸

Courts have held that the weight accorded to the decedent’s preference is determined on a case-by-case basis, in light of all relevant circumstances, and after an evaluation of all competing interests.⁵⁹ After a case-by-case analysis,

if the decedent’s expressed intentions as to the disposition of his or her remains are challenged, consideration must be given to the rights and feelings of those entitled to be heard because of their relationship to, or association with, the decedent, such as his or her surviving spouse, relatives, and friends.⁶⁰

When lawyers neglect to inquire about a client’s post-death preferences, they are “failing their clients” by not ensuring that a decedent’s wishes are followed.⁶¹ Attorneys should assist clients with preplanning their funeral and disposition of their remains by designating the wishes in the person’s will or in their Health Care Directive.⁶² A client’s “clear

54. See Illinois Disposition of Remains Act, 755 Ill. Comp. Stat. 65/1 (Supp. 2007). In the absence of a testamentary provision or statute, funeral expenses charged against an estate must be a reasonable sum. See 31 Am. Jur. 2d *Executors and Administrators* § 561. In determining a reasonable amount, courts consider the decedent’s position in life and the value of his or her estate. *Id.*

55. Murphy, *supra* note 52.

56. Estate of Jimenez, 65 Cal. Rptr. 2d 710, 713 (Cal. App. 2d Dist., 1997) (quoting Estate of Henderson, 57 P.2d 212, 215 (1936)).

57. 22A Am. Jur. 2d *Testamentary Directions* § 27 (2009); see also Cottingham v. McKee, 821 So.2d 169, 172 (Ala. 2001).

58. See Cottingham, 821 So.2d at 172 (quoting Born v. Clark, 662 So.2d 669, 671 (Ala. 1995)).

59. See Rosenblum v. New Mt. Sinai Cemetery Ass’n, 481 S.W.2d 593, 595 (Mo. App. 1972).

60. 22A Am. Jur. 2d *Dead Bodies* § 25 (2009); see also Bruning v. Eckman Funeral Home, 693 A.2d 164, 167 (App. Div. 1997); *infra* Part IV.

61. Murphy, *supra* note 52, at 415.

62. *Id.*

wishes are always preferable to a court or family member's attempts to determine a loved one's wishes."⁶³

B. A Funeral Trust

There are three methods of paying for a funeral ahead of time: (1) by setting up a funeral trust with a bank or funeral home, (2) through a life insurance policy, or (3) by setting aside money that a loved one can have access to for the funeral.⁶⁴ As to the first option, someone can set up an inter vivos trust and designate a portion of the trust property for funeral expenses.⁶⁵ The trustee of a "living trust" must "exercise a high standard of care in managing and investing the trust property."⁶⁶ When creating such a trust account, one can appoint a professional asset manager, such as a bank or trust company, as trustee.⁶⁷ Such professionals "may have more expertise and experience with various types of investments than most individuals," as well as greater investment opportunities.⁶⁸ The language of a funeral trust account should explain how and where the funeral services will be received and should list each funeral service desired.⁶⁹ After the client chooses the desired services and the agent calculates the cost, the prices of the chosen arrangements are locked in; as long as the funeral plans are followed accordingly, the funeral provider cannot approach the family and demand more money.⁷⁰

A purchaser can choose between an irrevocable and a revocable funeral trust.⁷¹ Both types of funeral trust plans cover most expenses of a funeral and burial service: basic services of a funeral director and staff, embalming, care of the deceased; funeral home facilities; merchandise used in the services; casket; transportation equipment and driver; cemetery charges; and burial plot.⁷²

63. *Id.*

64. See OREGON INSURANCE DIVISION 7 OREGON DIVISION OF FINANCE AND CORPORATE SECURITIES, PRENEED FUNERAL PLANS AND SO-CALLED "FUNERAL INSURANCE" (2006), available at <http://www.insurance.oregon.gov/publications/consumer/3932.pdf>

65. GERRY W. BEYER, TEXAS WILLS AND ESTATES 340 (6th ed. 2008).

66. *Id.*

67. *Id.* at 342.

68. *Id.*

69. *Id.*; see also Mullins, *supra* note 50.

70. See FuneralPlan.com, *Paying for a Funeral With Preneed Insurance*, <http://www.funeralplan.com/funeralplan/financing/insurance.html> (last visited Oct. 16, 2009) [hereinafter *Paying for a Funeral With Preneed Insurance*].

71. See FuneralTrusts.com, *Frequently Asked Questions*, <http://www.funeraltrusts.com/questions.cfm> (last visited Jan. 15, 2010).

72. *Id.*

A revocable trust can be dissolved by the person who originally created it.⁷³ Upon dissolution, the assets revert back to the ownership status they held before they were assigned to the trust.⁷⁴

An irrevocable trust cannot be dissolved until the creator of the trust passes away, at which time the assets of the trust are put into motion.⁷⁵ No one, not even the creator of the trust, can gain access to the assets placed in an irrevocable trust once it is created.⁷⁶ Despite the finality of an irrevocable trust, it does have several advantages. First, irrevocable trusts receive special tax treatment.⁷⁷ A trust cannot be confiscated by any nursing home or government sponsored care, such as Medicaid, and is insulated against inflation.⁷⁸ In addition, a funeral trust is exempt from Medicaid and Supplemental Security Income “spend down” requirements and estate taxes.⁷⁹ And finally, a funeral trust can be used to pay for additional expenses outside of specific funeral and burial expenses.⁸⁰ This includes a permanent monument in the cemetery, travel expenses for family members to attend the funeral, outstanding debts or obligations, hospital and doctor fees, legal fees, and a repast once the services are concluded.⁸¹

C. Life Insurance Policies

Life insurance policies are the most affordable plan for those with limited means. Some funeral service providers encourage people to buy life insurance policies and list the funeral service provider as the named beneficiary.⁸² A life insurance policy is bought in the amount needed to cover funeral expenses, and the funeral home guarantees this policy. The client pays a monthly premium based on age, and the money grows interest to provide for inflation.⁸³ When death occurs, the expenses are paid automatically.⁸⁴ Consumers should be cautious of such a request by a

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* A “spend down” applies to seniors and people with disabilities, who still qualify for Medicaid even though their incomes exceed the income limit. See CT Elderlaw.org Medicaid Spend Down, <http://www.ctelderlaw.org/HealthCare/medicaid.spenddown.htm#What%20is%20a%20Medicaid%20spend-down?> (last visited Jan. 29, 2010). If their medical bills are equal to or greater than their excess income, then the process of subtracting those medical bills from the individual’s income over a six month period constitutes a Medicaid spend down. *Id.*

79. See FuneralTrusts.com, Frequently Asked Questions, <http://www.funeraltrusts.com/questions.cfm> (last visited Jan. 15, 2010).

80. *Id.*

81. *Id.*

82. OREGON INSURANCE DIVISION 7 OREGON DIVISION OF FINANCE AND CORPORATE SECURITIES, *supra* note 64.

83. See *Paying for a Funeral With Preneed Insurance*, *supra* note 70.

84. *Id.*

funeral provider and should ask the provider several specific questions before changing their plan from a funeral trust plan to a life insurance plan.⁸⁵ Such a plan must be renewed before lapse or the investment disappears.⁸⁶

D. Joint Accounts

Finally, the third option involves setting up a joint account with someone else's name on it. If the account is designated as a funeral trust account, then the money will go toward the funeral and may not be used for something else.⁸⁷

People can also purchase annuities to be put toward funeral expenses upon death.⁸⁸ An annuity is a contract with an insurance company that makes payments to the annuitant at regular intervals for a set period of time.⁸⁹ Purchasers can structure an annuity in several different ways, but all are purchased for a specified amount of time and finance funeral expenses at death.⁹⁰

IV. OPTIONS AVAILABLE TO DECEDENT'S RELATIVES AND FRIENDS

In the absence of a different testamentary provision by the deceased, the spouse of the deceased, or the next of kin, in that order, has the right to the possession of the body for burial.⁹¹ Generally, the "wishes of a decedent will be carried out so far as possible," but will still be "governed 'by rules of propriety and reasonableness determined by a court of equity.'"⁹² Disputes among family members over bodily remains are common, and there is also a "historic tension between the requests of

85. See OREGON INSURANCE DIVISION 7 OREGON DIVISION OF FINANCE AND CORPORATE SECURITIES, *supra* note 64. Consumers should ask if they will be able to change the policy beneficiary in the event of a move or a change in funeral providers; if they will get the full value of their investment back if they cancel the policy pre-death; how much the funeral provider will receive for this transfer of plans; how much commission the insurance agent will receive; and the tax implications. See *id.*

86. See *Paying for a Funeral With Preneed Insurance*, *supra* note 70.

87. See *id.*

88. See FuneralPlan.com, *Paying for a Funeral with an Annuity*, <http://www.funeralplan.com/funeralplan/financing/annuities.html> (last visited Oct. 16, 2009) [hereinafter *Paying for a Funeral with an Annuity*].

89. See Paul Sullivan, *Annuities: What You Need to Know*, N.Y. TIMES, Jan. 27, 2009, <http://www.nytimes.com/2009/01/28/your-money/annuities/primerannuities.html>.

90. See *Paying for a Funeral with an Annuity*, *supra* note 88.

91. 22A Am. Jur. 2d *Dead Bodies* § 17 (2009) (noting that right to possessions not an absolute right and is subject to judicial control); see also *Arthur v. Milstein*, 949 So. 2d 1163, 1165 (Fla. Dist. Ct. App. 4th Dist. 2007).

92. *Holland v. Metalious*, 198 A.2d 654, 655 (N.H. 1964); see also *Sullivan v. Catholic Cemeteries, Inc.*, 317 A.2d 430, 432 (R.I. 1974).

decedents and the wishes of their family.”⁹³ Such disputes could be avoided “if the decedent . . . [names] an agent for the purpose of the disposition of his or her remains, or [executes] a personal preference request.”⁹⁴

A “recessionary drag on family wallets” is causing family and friends of the recently deceased to seek out less expensive, heavily discounted, or even free funeral or burial options.⁹⁵ As accurately reflected in *The Big Lebowski*, loved ones with tightened purse strings look for sensible and thrifty, yet still respectable, alternatives to the sometimes extravagant options presented by funeral planners.⁹⁶

A. Casket Options

Most recently, decedent’s loved ones have new and reasonable options for caskets. Large retailers like Wal-Mart and Costco sell caskets and urns online and in stores, which undercuts most funeral homes’ prices.⁹⁷ Wal-Mart caskets begin at \$999 for lower-end models, and all but one sell for less than \$2,000.⁹⁸ In addition to offering funeral goods at a lower price than most other commercial funeral homes and retailers, Wal-Mart allows people to pay for the caskets over a period of twelve months with no interest.⁹⁹ According to one funeral director, the funeral industry does not feel threatened by Wal-Mart’s recent decision to enter into the death industry.¹⁰⁰ The president-elect of the National Funeral Home Directors Association claims that consumers have had the ability to buy caskets online for years with “minimal effect” on the funeral business, and “Wal-Mart can’t offer one thing funeral directors do have: the ability to comfort someone during a trying time [T]he most critical element is the human contact,” which large retail stores are unable to offer via online websites.¹⁰¹

Additionally, some funeral homes allow families to rent a casket for the service and then have their loved one cremated, rather than to buy a

93. Murphy, *supra* note 52, at 410; see also Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 972-73 (1999).

94. Murphy, *supra* note 52, at 411; see also *supra* Part III.A.

95. See Margaret Haberman, *Grim Economic Indicator for Oregon: More Unclaimed Bodies*, THE OREGONIAN, Aug. 26, 2009, http://www.oregonlive.com/portland/index.ssf/2009/08/economy_likely_spurring_record.html.

96. *Id.*; see also *THE BIG LEBOWSKI*, *supra* note 4.

97. See Clemente Lisi, *Retailer Selling Caskets, Urns Online*, NEW YORK POST, Oct. 28, 2009, http://www.nypost.com/p/news/national/retailer_selling_caskets_urns_online_Tvg2hoIDHwxpcUmk7EZsN.

98. *Walmart Caskets for Sale Online, Starting at \$999*, THE HUFFINGTON POST, Oct. 28, 2009, http://www.huffingtonpost.com/2009/10/28/walmart-caskets-for-sale_n_337894.html (the “Sienna Bronze Casket” sells for \$3,199). Wal-Mart also has a large selection of various types of urns available for sale online. See Walmart, www.walmart.com (last visited Nov. 12, 2009).

99. *Wal-Mart Now Selling Caskets, Urns Online*, MSNBC Oct. 28, 2009, <http://www.msnbc.msn.com/id/33519190/ns/business-retail/>

100. *Id.*

101. *Id.*

casket and bury the decedent.¹⁰² The choice of renting can easily save a few thousand dollars on funeral costs while still affording the family the opportunity to view the body and spend last moments with the deceased.¹⁰³ During an individual service, cardboard inserts are placed inside the casket, and once the service is over, the inserts are removed and cremated along with the body.¹⁰⁴

B. Selling the Family Burial Plot

Sometimes family members and friends have no place to bury a casketed body. As unemployment and heavy debt continues to increase, people are beginning to “scour their homes for assets to sell in hopes of paying the bills of the here-and-now.”¹⁰⁵ Gravesites are not an untouchable investment.¹⁰⁶ Fifty years ago, cemetery plot investments involved a door-to-door salesman pitch.¹⁰⁷ More recently, this business has turned into a pre-need, financial planning undertaking.¹⁰⁸ However, pre-need burial plot sales have decreased during the recession, and instead, there is a “quickly mounting number of ads” offering burial plots for sale.¹⁰⁹ Cemeteries typically do not buy back plots, but people can post listings on Internet grave-resale sites.¹¹⁰ Despite the apparent readiness for some to sell off plots for quick cash, some families are very reluctant to “[give] up their plans of being buried near their loved ones” and do so only to make ends meet.¹¹¹ Sellers typically sell plots for about half of what a comparable one would retail for at the cemetery, so this is a prime time for consumers to

102. See Jacqueline Ingles, *South Georgians Renting Caskets to Curb Funeral Costs*, Sept. 10, 2009, <http://www.wctv.tv/news/headlines/58705732.htm>.

103. *Id.* (rental caskets range in price from \$400 to \$2,000).

104. *Id.* (reporting that funeral directors only reuse the outer shell of the casket).

105. Brigid Schulte, *Out of Cash and Forced to Dig Deep*, WASH. POST, Aug. 18, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/08/17/AR2009081703041.html?sid=ST2009081703105>.

106. See Anne Marie Chaker, *Where Real Estate Is Still Hot*, WALL ST. J., Sept. 24, 2009, <http://online.wsj.com/article/SB10001424052970203278404574420942782020938.html> (“As if the recession hasn’t ruined enough people’s plans in this life, it now seems to be disrupting the hereafter as well.”). The recession is not the only reason for the apparent increase in sellers of previously purchased in-ground plots: increased mobility means individuals may no longer live near a family plot, and there is a growing acceptance of cremation as an alternative to burial. *Id.*

107. *Id.*

108. Schulte, *supra* note 105, at 2.

109. *Id.* at 1-2. Mike Doherty, vice president of a memorial cemetery, warns that this is a poor strategy because “death is not optional” and planning ahead is “a great service to the family.” *Id.*

110. *Id.* at 1. Websites such as plotbrokers.com, plotexchange.com, gravesolutions.com, and thecemeteryregistry.com are seeing a large increase in listings. Many of the listings carry a tone of financial desperation. Others employ terms like “Best Offer!” and “Bargain!” to entice buyers interested in grave sites. *Id.* Most cemeteries do not buy back plots because they usually aren’t lacking for spaces to sell. See Chaker, *supra* note 106.

111. Chaker, *supra* note 106.

purchase plots and other funeral inventory while sellers are willing to negotiate.¹¹²

C. Whole-Body Donation

In situations where relatives and friends simply cannot afford a traditional or home funeral, there is another option—a full body donation for medical research and educational purposes.¹¹³ Every state, including the District of Columbia, has enacted the provisions of the Uniform Anatomical Gift Act in some form.¹¹⁴ An anatomical gift by will takes effect upon the death of the testator, even if the will is not probated or is declared invalid.¹¹⁵ Pursuant to Section 3 of the Uniform Anatomical Gift Act, specified family members “may make an anatomical gift of all or a part of the decedent’s body for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift”¹¹⁶

In the past three to five years, the business of whole-body donation “has come out of the shadows to advertise itself as an opportunity to contribute to medical research.”¹¹⁷ An anatomical gift becomes effective at the death of the donor, and the time of death must be determined by a physician who tends to the donor at his or her death or by the physician who certifies the death.¹¹⁸ Although the Uniform Anatomical Gift Act does not define the point in time when life ends, the Uniform Determination of Death Act provides that “[a]n individual who has sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted

112. *Id.* Other inventory includes caskets, memorials, headstones, and services that are sometimes included in the purchase of a cemetery plot as a package deal. *Id.*

113. See Biogift, http://www.biogift.org/03_faq.html (last visited Nov. 12, 2009). Organizations like Biogift “recover, process, store and distribute organs, tissue, and specimens to well-known and respected companies and institutions across the country.” *Id.*

114. 22A Am. Jur. *Dead Bodies* § 86 (2009); see also UNIF. ANATOMICAL GIFT ACT *Definitions* § 1 (1987).

115. See UNIF. ANATOMICAL GIFT ACT *MAKING, Amending, Revoking, and Refusing to Make Anatomical Gifts by Individual* § 2 (1987).

116. See UNIF. ANATOMICAL GIFT ACT *Making, Revoking, and Objecting to Anatomical Gifts, by Others* § 3 (1987). “Any member of the following classes of persons, in the order of priority listed, may make an anatomical gift . . . of the decedent’s body. . . .” unless otherwise refused by the decedent prior to death:

- (1) the spouse of the decedent;
- (2) an adult son or daughter of the decedent;
- (3) either parent of the decedent;
- (4) an adult brother or sister of the decedent;
- (5) a grandparent of the decedent; and
- (6) a guardian of the person of the decedent at the time of death. *Id.*

117. See Haberman, *supra* note 95.

118. See UNIF. ANATOMICAL GIFT ACT *Rights and Duties at Death* § 8 (1987).

medical standards.”¹¹⁹ In full body donation, a body is “cut into pieces depending on what organs or limbs are needed at training facilities or schools.”¹²⁰ Almost everyone is a candidate regardless of age or current state of health.¹²¹ Typically, after all studies are completed, the entire body is medically cremated and a partial amount of the cremated remains are returned at no cost to the deceased’s family within four weeks of the donation.¹²² However, if a donee is able to harvest the donated portions of the body without excessive mutilation, he or she may authorize embalming and the use of the body in funeral services.¹²³

V. UNCLAIMED BODIES AND THE SUBSEQUENT FINANCIAL REPERCUSSIONS

A. *Abandoned Loved Ones*

In cities across the nation, morgues are overflowing with abandoned dead bodies.¹²⁴ These unclaimed corpses are not just those of the indigent, estranged, or unidentifiable, but a growing number are also the deceased whose “loved ones simply cannot afford to bury or cremate them.”¹²⁵ In Los Angeles County, the numbers of unclaimed dead have risen 36% in the past year, while Clark County (Las Vegas) reports an increase of 22% in the same area.¹²⁶ Detroit, Michigan and Chapel Hill, North Carolina also report similar numbers.¹²⁷ The number of unclaimed bodies in Wayne County (Detroit) is at a record high, and local authorities cite two causes for the situation: (1) unemployment in the area is around 28%, and (2) the county’s \$21,000 annual budget to bury unclaimed dead bodies ran out in June.¹²⁸

119. UNIF. ANATOMICAL GIFT ACT *Definitions* § 1 Comment (1987).

120. *Id.*

121. *Id.* “Age, disease, or state of health does not eliminate an individual from being a donor, but donors with active communicable diseases may not donate.” *Id.* Additionally, factors such as severe obesity, decomposition of the body, trauma, or embalming may prohibit its donation. *Id.*

122. *Id.* (the cremated remains returned consist of the parts of the body not used for medical research); see also UNIF. ANATOMICAL GIFT ACT *Rights and Duties at Death* § 8 (1987) (stating that after removal of the necessary parts, custody of the remainder of the body vests in the person obliged to then further dispose of the body).

123. See UNIF. ANATOMICAL GIFT ACT *Delivery of Document of Gift* § 7 (1987); see also 22A Am. Jur. *Dead Bodies* § 101 (2009) (stating that in a partial donation, “the donee must cause the part to be removed without unnecessary mutilation.”).

124. See Stateman, *supra* note 3 (surpluses of the unclaimed deceased are especially prevalent in large cities, such as Los Angeles, Las Vegas, and Detroit).

125. See *id.*

126. See Haberman, *supra* note 95; see also Stateman, *supra* note 3 (stating that economic times may have gotten so bad some dead are going unburied).

127. See Stateman, *supra* note 3.

128. See Poppy Harlow, *Detroit: Too Broke to Bury Their Dead*, Oct. 1, 2009, available at http://money.cnn.com/2009/10/01/news/economy/_morgue/index.htm (last visited Oct. 16, 2009).

Although nationwide unemployment rates are not as high, these two reasons resonate throughout the country.¹²⁹

In the past, state death investigators, hospital social workers, chaplains, and funeral providers have managed to identify most bodies and eventually find loved ones willing to accept responsibility for the body.¹³⁰ However, many more bodies are going unclaimed every year, and state governments have to pay for their disposal (usually by cremation).¹³¹

Ordinarily, the expense of providing a funeral for a decedent is chargeable to his or her estate, and the personal representative of the deceased (surviving spouse, next of kin, or other representative) maintains the right to dispose of the body by proper burial or cremation.¹³² If the representative fails to act, a proper third person is permitted to make the necessary arrangements, and “the law implies a promise on the part of the representative to pay the reasonable expenses of the interment to the extent of the assets of decedent’s estate.”¹³³

In Oakland County, one funeral director, Stephen Kemp, is now surrounded by plastic baggies of unclaimed ashes.¹³⁴ The bodies were originally sent from the Oakland County medical examiner’s office to the funeral home after they had accumulated too many bodies in their storage coolers, and Kemp was left with the decision of what to do with them.¹³⁵ Choosing to cremate them, he paid \$895 for each cremation and tucked the remains away around the office.¹³⁶ Some remains were claimed by family members, but many other families were unsure what to do with the ashes, so they left them unclaimed.¹³⁷ Although Kemp has been around funeral homes for years, he still ponders “how hard it must be for relatives to leave their kin with a stranger, and why some people were seemingly mourned by no one.”¹³⁸ These chilling words reflect the truth that people really are “heartbroken about the fact that they can’t [bury their loved ones]” because they can’t afford burial and funeral expenses.¹³⁹ As the Clark County

129. *Id.* Unemployment tops 10% in many cities across America. *Id.*

130. *See* Stateman, *supra* note 3.

131. *See id.* Oregon is the only state pays to cremate the unclaimed dead through a special fund, which is collected from fees paid by funeral providers when they register a death with the state. The other 49 states pay for disposition of unclaimed bodies with state, or more often, county tax dollars. *See* Haberman, *supra* note 95.

132. 22A Am. Jur. 2d *Dead Bodies* § 17 (2009).

133. 38 Am. Jur. 2d *Executors* § 559 (2010).

134. *See* Huffstutter, *supra* note 47.

135. *See id.*

136. *See id.*

137. *See id.* According to state law, if the family of a decedent cannot afford a burial, the next of kin can apply for \$427 in state cremation assistance, and then pay the remaining \$468 to the funeral home for a cremation. Only two families took advantage of this option and paid Kemp. *See id.*

138. Huffstutter, *supra* note 47.

139. Stateman, *supra* note 3.

coroner and president of the International Association of Coroners and Medical Examiners stated:

Let's not forget that this is not just a financial issue The sense that I get from our investigators is that when people are emotionally strapped already [because of their finances], this is almost like the icing on the cake. It sort of breaks their back. It's hard enough when you're dealing with the death of a loved one. Then add in all the additional social pressures that go along with it, and it can make things seem insurmountable.¹⁴⁰

Morgues have always been burdened by indigent decedents and indigent burials, but the recent increase in the number of indigent burials is reflective of the financial hardship facing many Americans today.¹⁴¹ Historically, indigents either had no family or were homeless, but now they are "folks . . . recently unemployed or their house is in foreclosure."¹⁴²

B. Government Funded Burials

According to coroners and funeral directors in major U.S. cities, the "number of people seeking government-paid funerals, cremations and burials is spiking."¹⁴³ Because some people are unable to pay the high cost of a private service, they are forced to request county burials for their loved ones.¹⁴⁴ A county burial requires the use of public money to cremate or bury those unable to afford private services.¹⁴⁵ When families either fail to claim their deceased loved ones or choose to sign a release stating they cannot afford to bury them, it "taxes the county resources because then the county is responsible for burying these people."¹⁴⁶ Some cities and counties cannot afford to offer such burial assistance.¹⁴⁷ Medical examiners' and coroners' offices, like many county agencies, are experiencing severe budget cuts that are impacting their services.¹⁴⁸ In Milwaukee County, the burial assistance program currently offers up to \$1,500.¹⁴⁹ However, the County's Department of Health and Human Services has proposed cutting \$300,000 from the yearly budget; if that budget cut occurs, it is estimated that the number of unclaimed bodies will at least triple.¹⁵⁰ When small

140. Stateman, *supra* note 3.

141. *See id.*

142. *See id.*

143. Leinwand, *supra* note 43.

144. *See id.*

145. *See id.*

146. Stateman, *supra* note 3. Some budget cuts are as much as 20-25%. *Id.*

147. *See Harlow, supra* note 128.

148. Stateman, *supra* note 3.

149. *Id.*

150. *Id.*

government money runs out, locals must look to state government for help.¹⁵¹ For example, for fiscal year 2009, Michigan allocated \$4.9 million for burial assistance; less than \$135,500 of that remains for the rest of the year.¹⁵² When the 2009 budget ran out, the dead bodies that remained in local morgues could not be disposed of until the county burial fund is “replenished” the following year.¹⁵³

VI. THE HOME BURIAL AND DEATH MIDWIFE TREND, AND GOVERNMENT REGULATION

A. Home Funerals

Max Alexander’s terminally ill father-in-law, Bob, requested that his family spend very little money on his funeral and burial, so a few weeks before he passed away, Max and his family began preparing for home after-death care.¹⁵⁴ This decision to hold a home funeral instead of “outsourcing the dying process to professionals” is a trend that has dramatically increased over the last five years.¹⁵⁵ Max’s wife met with a local home burial support group, and Max and his son built a homemade coffin out of plywood and deck screws purchased at The Home Depot.¹⁵⁶ When Bob finally died, the family “worked quietly and deliberately . . . out of a deep sense of purpose” to prepare the body for viewing and burial by washing his body with warm water and lavender oil, trimming his fingernails, positioning his body comfortably before rigor mortis set in, and laying him in a coffin lined with freezer packs.¹⁵⁷ Like many others who have conducted home after-death care, the Alexander family found that the experience provided them with a sense of closure and gave them “a new respect for life, and possibly a larger view of the world.”¹⁵⁸

151. See Harlow, *supra* note 128.

152. Stateman, *supra* note 3.

153. See Harlow, *supra* note 128.

154. See *id.*

155. Max Alexander, *The Surprising Satisfaction of a Home Funeral*, SMITHSONIAN, Mar. 2009, at 1, available at <http://www.smithsonianmag.com/arts-culture/Presence-of-Mind-Which-Way-Out.html>.

156. Katie Zezima, *Home Burials Offer an Intimate Alternative*, N.Y. TIMES, July 20, 2009, at A1, available at <http://www.nytimes.com/2009/07/21/us/21funeral.html>

157. Alexander, *supra* note 154. They were careful to build a sturdy coffin and spent time applying veneer, linseed oil, and a cherry wood cross to the outside of it. *Id.* The entire coffin project cost the family \$90.98. *Id.* at 2. Some woodworkers make coffins specifically for home funerals. *Id.* They range in price from \$480 to \$1,200 and can double as bookcases, entertainment centers, coffee tables, and other furniture until they need to be used. Zezima, *supra* note 155.

158. Alexander, *supra* note 154.

159. *Id.*, at 4; see also Zezima, *supra* note 155 (the granddaughter of the deceased found that a home burial was “the natural, loving way to do things”). Home funeral rituals can be “emotionally meaningful” and can help with the grieving process. *Id.*

Soon after his father-in-law passed away, Max's own father died.¹⁵⁹ In contrast to Bob, Max's father had "planned his funeral down to the clothes he would wear in his coffin and the music to be played at the service."¹⁶⁰ The total cost of his funeral services and burial was \$11,287.83.¹⁶¹

Max describes his experiences with the dead bodies distinctively: his father-in-law's body "looked unquestionably dead, but . . . beautiful" after the home after-death care, while his father "looked more like a wax museum figure" after being "embalmed and made up" by the funeral director.¹⁶² After reading accounts of home burials as compared to the commercial funeral process, it seems that the former can be a very meaningful experience for grieving family members and friends, while the latter sometimes creates a "disconnect" between the living and the newly dead.¹⁶³

B. Death Midwives and Other Home Funeral Assistants

Although only a "tiny portion of the nation's dead are cared for at home," more and more people are inquiring about the lower-cost options of home funerals.¹⁶⁴ Nationwide, there are at least forty-five organizations or individuals who specialize in helping families with the home death-care process.¹⁶⁵ Some such individuals, who call themselves "death midwives" or "death doolahs," are employed by the bereaved "to assist with paperwork, facilitate the transport and the care of the body for a home ritual or wake"¹⁶⁶ Eleven years ago, Jerrigrace Lyons was inspired to "found death midwifery and reinvent the long lost concept of the American funeral home" when her close friend died leaving explicit instructions for her loved ones to take care of her body after her death, asking that they bathe and dress her, conduct an intimate home memorial, and scatter her ashes around

159. Alexander, *supra* note 154.

160. *Id.* at 3.

161. *Id.* In addition to paying for services worth \$4,295 (as pre-selected by his father before his death), the family picked out a \$2,595 powder-coated metal coffin (a lower priced choice) and paid cemetery charges and church fees. *Id.*

162. *Id.* at 2-4; *see also* The Golden Girls: Like the Beep Beep of the Tom-Tom (NBC television broadcast Feb. 10, 1990). The character Blanche is quoted as saying; "I've been to enough funerals to see how they make up dead people. They look like clowns. You expect to see ten of them coming out of one coffin." *Id.*

163. Zezima, *supra* note 155; *see also* Bill Strubbe, *Death Midwifery and the Home Funeral Revolution*, Apr. 2007, available at http://www.lime.com/magazines?uri=commongroundmag.com/lime/2007/04/home_funeral0704.html stating that a home funeral is a "powerful opportunity for healing and growth").

164. Zezima, *supra* note 155.

165. *Id.* (compare with only two such businesses existing in 2002).

166. Strubbe, *supra* note 163; *see also* Zezima, *supra* note 155 (explaining that a home funeral supervised by a death midwife costs significantly less than a traditional funeral; it can vary from about \$200 for an initial consultation to \$3,000 if the midwife needs to travel).

the world during their travels.¹⁶⁷ Although she was apprehensive at first, Lyons found that the ritual created a “sacred and intimate atmosphere in which to express all the emotions . . . helping [to] cope with and accept the death . . . of her friend.”¹⁶⁸ Lyons later founded Final Passages, a home funeral service, and has helped to midwife nearly 300 home funerals since the death of her friend.¹⁶⁹ In addition to assisting with home funerals, Lyons conducts midwife workshops that cover the practical matters of cleaning the body, anointing with scented waters or oils, the particulars of rigor mortis, proper positioning of dry ice under the organs, and the necessities of a death midwife’s travel kit.¹⁷⁰

C. State Regulation

Courts in the United States “have been . . . hesitant to intrude into private affairs concerning the disposition of a decedent’s remains . . . absent a compelling showing of necessity.”¹⁷¹ Although a home funeral is a very personal and private matter for the family and friends of the deceased, the process is still regulated by state governments and is becoming more so as the popularity of home burials continues to grow:

The right to possession of a dead human body for the purpose of burial is, under ordinary circumstances, in the spouse or other relatives of the deceased. However, the matter of the disposition of the dead is so involved in the public interest, including the public’s health, safety, and welfare, that it is subject to control by law instead of being subject entirely to the desires, whim, or caprice of individuals.¹⁷²

State regulation varies at the different stages of the home funeral process.¹⁷³ Some state laws require that a funeral director handle human remains at some point during the process.¹⁷⁴ However, most states allow loved ones to be responsible for the body themselves.¹⁷⁵ It is usually required by all states that families first obtain a death certificate and burial-

167. *Id.*

168. *Id.*

169. Strubbe, *supra* note 163; see also <http://www.finalpassages.org/>.

170. Strubbe, *supra* note 163. Such a travel kit includes medical gloves, adult diapers, nail clippers, alcohol, dry shampoo, make-up, music CDs, and essential oils. *Id.* It also includes a few “disconcerting items” such as an X-Acto knife, suturing kit, and Krazy Glue because a death midwife must sometimes close up open wounds. *Id.*

171. *Sherman v. Sherman*, 750 A.2d 229, 233 (Ch. Div. 1999); see also 22A AM. JUR. 2d *Dead Bodies* § 2 (2009).

172. 22A AM. JUR. 2d *Dead Bodies* § 1 (2009).

173. Zezima, *supra* note 155.

174. *Id.* (includes Connecticut, Indiana, Louisiana, Michigan, Nebraska, and New York). The services of a funeral director are still significantly less than a traditional funeral, costing around \$1,300. *Id.*

175. *Id.*

transit permit before conducting a home funeral.¹⁷⁶ Depending on the applicable state statute, a person may violate criminal law by transporting a dead body without a burial-transit permit.¹⁷⁷ Rules surrounding the burial itself are usually left to local governmental control, but burials are generally permitted on private, rural, or semirural land with a town permit.¹⁷⁸

Some state lawmakers are calling for stricter regulation of home funerals and burials.¹⁷⁹ Senator Vicki Walker of Eugene, Oregon, is sponsoring a bill that would “require home burials be on private property and would also require [the bereaved] to notify the state” and potential homebuyers that someone is buried on the property.¹⁸⁰ The proposed bill would also require that all death care consultants (including death midwives) pass an exam and obtain a license to operate.¹⁸¹ The goal of this proposed home death-care exam is to provide the same level of consumer protection as is afforded to consumers by the Funeral Rule.¹⁸²

VII. FUTURE STRAINS ON ESTATE AND FUNERAL PLANNING CAUSED BY BABY BOOMERS

Although death is never a joyful occurrence, the impending deaths of baby boomers are a “windfall worth lusting over,” to the funeral industry.¹⁸³ Baby boomers represent a strong generation of seventy-six million people born in the two decades following World War II.¹⁸⁴ Because advances in medical science and technology caused a decline in death, the nation’s death rate is expected to be “stagnant” for several more years before baby boomers eventually begin to succumb to the inevitable.¹⁸⁵ However, the U.S. Census Bureau estimates that the annual number of deaths will rise from 2.6 million in 2010 to three million in 2024 and four million in 2043.¹⁸⁶ Although boomers “have been a powerful spending force for the past three decades, driving demand for homes and cars and lifting sales at

176. *Id.* A burial transit permit allows the body to be moved from a hospital to a cemetery or crematory. *Id.*; see also Alexander, *supra* note 143, at 2 (Maine “frowns on citizens driving dead bodies around willy-nilly, so a Permit for Disposition of Human Remains is required”).

177. See *State v. Chambers*, 477 A.2d 110, 113 (Vt. 1984).

178. Zezima, *supra* note 155; see also Alexander, *supra* note 154, at 2 (Maine allows backyard burials subject to local zoning).

179. See Anna Song, *Lawmaker Wants Rules for Home Funerals*, May 27, 2009, <http://www.katu.com/news/local/46303787.html>

180. *Id.*

181. *Id.* Traditional funeral practitioners and embalmers are already required to be licensed. *Id.*

182. *Id.*

183. Dianne Hardisty, *Boomers Doing Death a Little Differently*, Sept. 5, 2009, <http://www.bakersfield.com/news/local/x616725012/Boomers-doing-death-a-little-differently>.

184. See Emily Kaiser, *Economy Faces Bigger Bust Without Boomers*, Jan. 31, 2008, <http://www.reuters.com/article/idUSN3131412220080131>. Baby boomers were born between 1946 and 1964. See Hardisty, *supra* note 183.

185. See Hardisty, *supra* note 183.

186. *Id.*

restaurants and retail stores,” their wealth is waning as a result.¹⁸⁷ Despite earning about \$3 trillion in annual income, baby boomers have also “been a big reason for the paltry U.S. saving rate of close to zero.”¹⁸⁸ A survey conducted by KeyBank and Zogby International revealed that 67% of boomers think they may run out of money in their lifetime; this concern about financial security arises in the face of rising health-care costs and longer life expectancy.¹⁸⁹

The death industry can anticipate a surplus in funeral needs, but experts suggest that baby boomers will be “quick to question” the costs of traditional services and will inquire into less expensive options available.¹⁹⁰ At the forefront, “American cultural attitudes keep customers ignorant about how to access” death care services.¹⁹¹ As a result, many baby boomers, “clinging to their youthful self-concepts, still avoid talking about death.”¹⁹² However, awareness of death plan services is growing: hospice care operators have voiced that hospice care is underutilized, estate planners encourage the need for proper planning to ensure that heirs get more of the estate and third parties get less, and funeral directors tout the need for people to preplan or prefund funerals.¹⁹³

Of course traditional burials are still available, but other options for the disposition of remains are increasing, becoming more varied, and targeting a specific market.¹⁹⁴ A “host of nontraditional dispositions currently available to consumers” include “green burials, cryonic preservation, do-it-yourself burials, burials at sea, freeze-drying, reef balls, space shots, and life gem created diamonds.”¹⁹⁵ As previously stated, cremation is a significantly cheaper alternative to a traditional ground burial, and the rate of cremations is “skyrocketing.”¹⁹⁶ The emergence of baby boomer funeral planning can be characterized in the following way:

[B]aby boomers [want] the deaths of their loved ones commemorated by a certain aesthetic that somehow defines their lives.

Boomers are used to getting consumer goods when, where, how and at the price they want . . . and their attitude about purchasing death-related goods and services is no different “A cultural idea in America,

187. See Kaiser, *supra* note 184. Baby boomers “reportedly have been lousy savers for retirement,” so have probably “set aside even less money for their final hurrah.” See Hardisty, *supra* note 183.

188. See Kaiser, *supra* note 184.

189. *Id.*

190. See Hardisty, *supra* note 183; see also Mullins, *supra* note 50 (death industry includes hospices, funeral homes, cemeteries, and estate planning).

191. Mullins, *supra* note 50.

192. *Id.*

193. *Id.*

194. See Murphy, *supra* note 52, at 412.

195. *Id.*

196. See Hardisty, *supra* note 183.

fomented by the funeral industry, is that the only right or proper way to show how much we love our dead is through the amount of conspicuous consumption we engage in.

In other words, “even death won’t stop baby boomers from being smart consumers.”¹⁹⁷

VIII. CONCLUSION

Although there is significant regulation of traditional funeral and burial practices, federal and state governments have been slow to react to changing ideas about death care.¹⁹⁸ It is now evident that funeral trends are evolving amid an economic recession and the aging of the baby boomer generation.¹⁹⁹ There are both negative and positive changes in the death care industry. Many Americans are finding themselves faced with the decision of whether to leave deceased loved ones unclaimed.²⁰⁰ What seems like a purely financial decision can churn into a question of moral obligation in the minds of these financially strapped families. On the other end of the spectrum, more and more families are finding peace and saving money by holding home funerals and caring for their deceased loved ones on their own.²⁰¹ As the growing problem of inability to pay for funeral services arises across the country, we could see a sudden surge in home funerals and burials. And if the alternative is abandonment in the local morgue, isn’t this a viable option?

Government regulation of emerging funeral and burial trends is inconsistent but there are several options. First, the federal government could create uniform laws that encourage states to better regulate emerging trends so that family members and friends are aware of their options and can plan accordingly. Relevant probate laws could reflect the organization of several existing sets of law, including the FTC’s Funeral Rule and the Uniform Anatomical Gift Act. The Funeral Rule clearly and effectively sets forth regulations concerning disclosures and pricing practices affecting the funeral industry.²⁰² The Uniform Anatomical Gift Act enforces regulations surrounding whole- and partial-body donations and post-donation funeral and burial services.²⁰³ A model code that combines aspects of both could effectively regulate the emerging trends and create an informative set of laws for both consumers and their attorneys.

197. Hardisty, *supra* note 183 at 1.

198. *See supra* Parts II, VI.C.

199. *See supra* Parts VI, VII.

200. *See supra* Part V.

201. *See supra* Part VI.

202. Murphy, *supra* note 52, at 389; *see also supra* Part II.A.

203. *See supra* Part IV.C.

Second, instead of implementing uniform death care laws, state governments could simply step back and allow people to lay their loved ones to rest how they best see fit, while monitoring the emerging trends to ensure that they do not harm the general well-being of the community.²⁰⁴ The funeral and death care industry is a very sensitive one, and thus far, people have come up with creative, harmless, and gratifying solutions to the industry's taxing financial issues in the form of home funerals and burials, whole-body donation, and funeral goods rental options.²⁰⁵

The anticipated increase in deaths as the baby boomers succumb to the inevitable will provide a unique time in which this area of the law could be put to the test. Legislatures could create a concise set of laws before the death industry reaches its most crucial peak or could give families discretion to solve individual funeral and burial issues. There is no overarching, correct solution and time will certainly tell what the future holds for regulation of the emerging trends. Along the way, attorneys should remain fully aware of all death care options, including preplanning options and options for family and friends, and pay attention to future emerging trends and any laws that regulate them.

204. See *supra* Part II.B.

205. See *supra* Parts VI, IV.A-C.