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Ashes to Ashes: Comparative Law Regarding Survivors' Disputes Concerning Cremation and Cremated Remains

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Ashes to Ashes: Comparative Law Regarding Survivors' Disputes Concerning Cremation and Cremated Remains

Eloisa C. Rodriguez-Dod*

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*France wants to give cremated remains a legal status because ashes of the deceased are now often treated like souvenirs, ending up sometimes in bitter disputes between family members and sometimes in the garbage.*¹

I. INTRODUCTION

Several years ago, Professor of Law Michael A. Olivas underwent some inner emotional and religious turmoil concerning his father's death. Professor Olivas wrote:

Before my father, Sabino Olivas, a great *chilero*, died, he left clear oral instructions to me that his ashes were to be spread on his chile plants. He died following a car accident in 1998. I was the executor of his will, and I was required to make a solomonic choice—he was also a lifelong Catholic, and Catholics may be cremated but their ashes are to be interred in consecrated ground. What is *el hijomayor* to do? Do first

* Professor of Law, Nova Southeastern University Shepard Broad Law Center, Fort Lauderdale, Florida. I would like to thank my colleague, Professor Elena Marty-Nelson, for her encouragement and advice. My gratitude is also extended to my research assistants, Marta Colomar García, David Arola Kaminski, and David Klein, for their assistance with this article.

¹ *France Seeks More Respect for Ashes of the Dead*, REUTERS, Dec. 15, 2005, <http://news.ninemsn.com.au/article.aspx?id=7703> [hereinafter *Respect for Ashes*].

son obligations trump fiduciary obligations? Is a Chile plant “consecrated” ground, under [New Mexico] law? Is this a case of *habeas corpus*?

So I took a pinch of ash and sprinkled it on the plants in the backyard, and I buried the rest in his grave in the Santa Fe Military Cemetery.²

His decision allowed him to honor peacefully his father’s last wishes.

Decisions regarding cremation of decedents and disposition of ashes, however, are often accompanied by feuding rather than harmony. On March 12, 2007, the Superior Court of Pennsylvania decided that a trial judge had abused his discretion in deciding that a child’s ashes should be divided between the deceased child’s parents to be disposed of as each saw proper.³ The dispute over the couple’s son arose in the process of their divorce.⁴ Disputes such as these are not uncommon.⁵

Although the death of a loved one often brings survivors closer through the inevitable grieving,⁶ the emotions associated with death can also tear survivors apart. Disputes regarding rights to the decedent’s remains, such as that which occurred with the divorcing couple mentioned above, may arise among family members and those with a close relationship to the decedent. A parent may fight with the other parent, a sibling may fight with parents or other siblings, and a decedent’s partner may fight with the decedent’s family members over who may control both the process of disposition of the body and possession of the decedent’s ashes. The expansion and changes in who may

² Posting of Michael A. Olivas, MOlivas@uh.edu, to owner-latino-law-profs@ucdavis.edu (May 5, 2007) (on file with author).

³ *Kulp v. Kulp*, 920 A.2d 867, 873 (Pa. Super. Ct. 2007).

⁴ *Id.* at 868.

⁵ Similar disputes may arise as to rights to a decedent’s body for interment. For example, Anna Nicole Smith, who had been catapulted into celebrity status by her May-December marriage to billionaire J. Howard Marshall, died suddenly at the age of thirty-nine on February 8, 2007. *Reality TV Star Anna Nicole Smith Dies at 39*, CNN.COM, Feb. 9, 2007, <http://www.cnn.com/2007/SHOWBIZ/TV/02/08/anna.nicole.collapses/>; see also Nikki Walker, *Over-the-Top-Farewell for Anna Nicole Smith*, MIA. HERALD, Mar. 3, 2007, at A1, A2. She remained a celebrity in death because of the legal battles that ensued thereafter. Her mother filed a lawsuit against Ms. Smith’s infant daughter—represented by a guardian ad litem—and her partner over who had the right to determine the disposition of Ms. Smith’s remains. *In re Estate of Smith*, No. 07-824 (Fla. Cir. Ct. filed Feb. 14, 2007). Ms. Smith finally was laid to rest on March 2, 2007, after the Florida Fourth District Court of Appeal ruled that the guardian for Ms. Smith’s infant daughter had the right to determine the disposition of the body and, thus, Ms. Smith’s wish to be buried in the Bahamas next to her deceased son would be fulfilled. See *Arthur v. Milstein*, 949 So. 2d 1163, 1166 (Fla. Dist. Ct. App. 2007). The Bahamian courts also denied a last-minute motion by Ms. Smith’s mother to stop the Bahamian burial. Walker, *supra* note 5, at A2.

⁶ *Ecofunerales*, 35 PERSPECTIVA AMBIENTAL 3, 8 (2005), available at <http://www.ecoterra.org/data/pa35e.pdf> [hereinafter *Ecofunerales*] (noting that those that are grieving generally are accompanied by other loved ones with whom one could express emotions).

constitute a member of the nuclear family may be one factor “explain[ing] why funeral homes are increasingly finding themselves in the middle of family feuds.”⁷ The concerns of the French government noted in the opening of this article are not unique to them.

Of the many choices available for post-mortem repose,⁸ cremation is on the rise.⁹ As one author stated, “[m]any people do not dig burial.”¹⁰ Although many jurisdictions have statutes regulating crematory and funerary services,¹¹ these statutes do not necessarily resolve the issues of who may request cremation when a decedent’s wishes are unknown or who may ultimately control a decedent’s cremated remains. This article will analyze the resolution of these disputed issues among survivors.¹²

Part II of this article will discuss the history of cremation and the increasing incidence of cremating remains. Part III will address the statutory and common law in various U.S. jurisdictions regarding survivor’s rights to cremation and possession of a decedent’s cremated remains. Part IV will discuss how two civil law countries, France and Spain, are dealing with disputes involving cremated remains. Lastly, Part V analyzes the various findings and concludes with recommendations.

II. FACTS ABOUT CREMATION

Cremation is one of the most economic and hygienic means to dispose of a deceased’s body.¹³ It has become a fully acceptable alternative to burial.¹⁴

The practice of cremation has its roots in ancient history.¹⁵ Archeological evidence dates cremation back to Russia in the Stone Age.¹⁶ By the Bronze

⁷ Stephanie Garry, *Senator Wants Pet in His Casket*, MIA. HERALD, Apr. 10, 2007, at B1. “[D]isagreements over whether a loved one should be cremated or buried have become more common and are particularly prevalent in Florida, where families are often separated by state lines.” *Id.*

⁸ See generally Russell E. Haddleton, *What to Do with the Body? The Trouble with Postmortem Disposition*, 20 PROB. & PROP. 55, 55–60 (2006).

⁹ See generally Monica Hatcher, *Are We Becoming a Cremation Nation?*, MIA. HERALD, Feb. 26, 2006, at 24G.

¹⁰ Haddleton, *supra* note 8, at 55.

¹¹ Christine Daleiden, *Regulations for the Dead*, HAW. B.J., June 2006, at 4, 9.

¹² Although this article will discuss laws regulating crematoriums and other funerary services, it will limit its discussion to disputes among survivors over the disposition of a decedent’s body and the right of retention of ashes after cremation of a decedent’s body. It will not address claims against such entities, nor will this article address tort actions for infliction of emotional distress, or other similar actions against other survivors who may have disposed of ashes.

¹³ FRANCISCO MARCOS, *EL COSTE DE LA MUERTE: COMPETENCIA Y CONSUMO EN EL MERCADO DE SERVICIOS FUNERARIOS* 61 n.178 (2006).

¹⁴ See Haddleton, *supra* note 8, at 57 (examining the different options available for post-mortem disposition of a body).

¹⁵ MARCOS, *supra* note 13, at 60.

Age it had spread across Europe,¹⁷ finally reaching the western-most point of Europe (the Iberian Peninsula) in the 9th Century B.C.¹⁸

Modern cremation began when Italian Professor Brunetti exhibited his model of a crematory chamber at the 1873 Vienna Exposition.¹⁹ Thereafter, the movement toward the practice of modern cremation started in some European countries and spread to the United States.²⁰

Cremation consists of exposing the mortal remains to extreme fire and heat in a crematory oven.²¹ The resultant bone fragments, the cremains,²² are then ground and pulverized to a sand-like consistency—commonly referred to as ashes—to give them a uniform and consistent size.²³ The cremains are now ready for distribution, whether to be given to family members or others, or to be scattered or interred.

Cremation avoids the natural processes of decomposition and the problems derived from burial of a body,²⁴ as well as being more cost effective.²⁵ Where cremation is preferred, there is not always a need to purchase a traditional coffin; the body may be deposited into a wooden, fiber, or clay container before being introduced to the cremation chamber.²⁶ Such alternative practices are more convenient in places where there is a shortage of land.²⁷

¹⁶ Cremation Association of North America, History of Cremation, <http://www.cremationassociation.org/html/history.html> (last visited Oct. 27, 2007).

¹⁷ *Id.*

¹⁸ *Ecofunerales*, *supra* note 6, at 12. The practice of cremation was later abandoned with the onset of Christianity, until the Catholic Church lifted its prohibition. *Id.* at 12, 20; *see also infra* note 33.

¹⁹ Cremation Association of North America, *supra* note 16.

²⁰ *Id.* Crematoriums were opened over health concerns related to cemetery burials. *Id.*

²¹ *Ecofunerales*, *supra* note 6, at 21.

²² "Cremains" is a technical term for the cremated ashes—a portmanteau of "cremation" and "remains." Cremains, <http://www.m-w.com/dictionary/cremains> (last visited Oct. 27, 2007). The ashes represent 30 percent of the human body as the rest is composed of water. *Ecofunerales*, *supra* note 6, at 12.

²³ *Ecofunerales*, *supra* note 6, at 21; Marsha A. Goetting & Claire DelGuerra, *Cremation: History, Process, and Regulations*, 8 F. FOR FAM. & CONSUMER ISSUES 1 (Jan. 2003), available at [http://www.ces.ncsu.edu/depts/fcs/pub/8\(1\)/goetting.html](http://www.ces.ncsu.edu/depts/fcs/pub/8(1)/goetting.html).

²⁴ MARCOS, *supra* note 13, at 60.

²⁵ *See* Hatcher, *supra* note 9; *see also* Goetting & DelGuerra, *supra* note 23 (comparing the cost of cremation in 2001 versus burial).

²⁶ MARCOS, *supra* note 13, at 61–62. In Switzerland, bodies may be incinerated in coffins made of cardboard. *Ecofunerales*, *supra* note 6, at 16. In Colombia, bodies to be cremated are wrapped in a sheet. *Id.* However, in Spain, a coffin must still be purchased for cremation of the body. *Id.* at 13.

²⁷ *See* Goetting & DelGuerra, *supra* note 23 (noting that common reasons for cremation include saving money, saving land, personal preference, and simplicity and convenience). *See also* La

There is an increasing tendency towards the use of cremation as an alternative to burials. The practice is prevalent in many countries,²⁸ in some of which cremation is a cultural and religious practice.²⁹ In 2004, the United States had an overall cremation rate of approximately 31 percent, up from a rate of over 26 percent in 2000.³⁰ The cremation rates of individual states within the United States and the District of Columbia vary considerably.³¹ The popularity of cremation has increased noticeably in the last few years in Spain³² and France³³ as well.

Crémation, <http://www.afif.asso.fr/francais/conseils/conseil33.html> (last visited Apr. 29, 2007) (listing main reasons given for cremations in Canada).

²⁸ The 2005 cremation rate for Great Britain was 72.45 percent. *Table of Cremations Carried Out in the United Kingdom*, PHAROS INT'L (Summer 2006), available at <http://www.cremationassociation.org/docs/UKcremations.pdf>. In 2004, Canada reported an overall rate of 56 percent. Canadian Cremation Figures, <http://www.cremationassociation.org/docs/WebCanFigures.pdf> (last visited Oct. 27, 2007). Rates reported for some other countries for 2001 are as follows: Austria 21.46 percent, China 47.30 percent, Czech Republic 76.04 percent, Denmark 71.30 percent, Japan 98 percent, The Netherlands 49.22 percent, Sweden 69.57 percent, and Switzerland 75.51 percent. *Table of International Statistics*, PHAROS INT'L (Winter 2002), available at <http://www.cremationassociation.org/docs/intstat4.pdf> [hereinafter *Int'l Statistics*].

²⁹ For instance, cremation is a common practice among Hindus and Buddhists. In India, "cremation developed into a central and enduring social institution." *Encyclopedia of Death and Dying: Cremation*, <http://www.deathreference.com/Ce-Da/Cremation.html> (last visited Oct. 27, 2007) [hereinafter *Encyclopedia*]. The practice is so prevalent that it has caused environmental problems, such as deforestation. *Ecofunerales*, *supra* note 6, at 13. Therefore, trial studies are being conducted regarding the use of solar power, rather than funeral pyres, for cremation of the dead. *Id.* at 32–33.

³⁰ Preliminary Final 2004 Statistics, <http://www.cremationassociation.org/docs/WebPrelim.pdf> (last visited Oct. 27, 2007). It is estimated that the rate will increase to approximately 38 percent in 2010 and 51 percent in 2025. *Id.*

³¹ *Id.*

³² In 1999, the cremation rate in Spain was 13 percent. *Encyclopedia*, *supra* note 29. The 2001 rate was estimated at 14.92 percent. *Int'l Statistics*, *supra* note 28. Cremations in Barcelona, Spain have increased to a rate of 30 percent. Rosa Mari Sanz, *Cementerios Solicita que las Cenizas se Dejen en el Recinto*, ELPERIÓDICO.COM, Feb. 9, 2007, http://www.elperiodico.com/default.asp?idpublicacio_PK=46&idioma=CAS&idnoticia_PK=378348&idseccio_PK=1022. The opposition of the Catholic Church was one of the causes of the initially slow movement of cremation in Spain. See MARCOS, *supra* note 13, at 63; *Ecofunerales*, *supra* note 6, at 20. This opposition is a logical consequence of the Church's belief in the resurrection of the flesh of the human being in the physical body of the deceased, which would not otherwise be possible if the body is destroyed in the crematory oven. Nonetheless, changes in cultural traditions and social evolution (such as over-population of cemeteries and the increasing cost of tombs and niches) have motivated an increase in the number of cremations performed, as well as a change in the Catholic Church's posture. The Roman Catholic Church lifted its ban on cremation in 1963. However, the Church did not permit cremated remains to be in the presence of the Liturgical Mass until more recently. Fran Helner, *Cremation: New Options for Catholics*, CATH. UPDATE (Am. Cath. Org.), available at <http://www.americancatholic.org/Newsletters/CU/ac1097.asp> (last visited Oct. 27, 2007).

³³ The rate reported for France for 2001 was 18.91 percent. *Int'l Statistics*, *supra* note 28. The rate rose to 23.5 percent in 2004. *Respect for Ashes*, *supra* note 1.

III. LAW IN THE UNITED STATES REGARDING CREMATION AND CREMAINS

Over the centuries, and particularly in the current one, man has pushed the frontier of knowledge to limits that have oftentimes exceeded the dreams of many. Yet, even with increased knowledge, there comes to each man a time when that spark called life flickers, goes out forever and leaves only a cadaver. Upon those surviving is thrust the duty of consigning the mortal remains to the earth, to the sea or to flames.³⁴

Under early English common law, there was no recognition of property rights in a dead body.³⁵ However, as common law has evolved, courts have recognized a survivor's "quasi property" right to ownership of a decedent's body for burial or preservation of his remains.³⁶ Additionally, U.S. courts have recognized a decedent's right to direct the disposition of his body in a will.³⁷ Unfortunately, with court approval, surviving family members often have circumvented a decedent's wishes.³⁸

A. Statutory Law

Most states have statutes regulating funerary and crematory services.³⁹ The general purpose of these statutes is for consumer protection purposes⁴⁰ or "to guide the funeral home operators by clearly delineating the priority of those persons who are legally authorized to make funeral arrangements for a deceased person."⁴¹ The statutes generally do not resolve private disputes among a decedent's survivors.⁴² However, a review of these statutes provides a necessary background to help define solutions for any disagreements among the survivors. Florida law seems to be one of the most comprehensive in

³⁴ *In re Estate of Barner*, 270 N.Y.S.2d 678, 679 (N.Y. Sup. Ct. 1966).

³⁵ Jennifer E. Horan, "When Sleep at Last Has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples, 2 J. GENDER RACE & JUST. 423, 426 (1999).

³⁶ *Id.* at 430-32; see also Haddleton, *supra* note 8, at 55-56 (noting that giving "quasi-property" rights to the decedent's body is the prevailing rule in the United States and England).

³⁷ Horan, *supra* note 35, at 432.

³⁸ *Id.* at 432-34 (citation omitted) (noting that "[t]he right to testamentary disposition of one's own body, however, has been 'more honoured in the breach than in the observance'").

³⁹ Daleiden, *supra* note 11, at 9. However, it is difficult to conduct research as to these statutes as "[t]here is no uniformity on how they are set forth in the statutory scheme or how they are titled." Haddleton, *supra* note 8, at 56.

⁴⁰ Daleiden, *supra* note 11, at 9.

⁴¹ See *Arthur v. Milstein*, 949 So. 2d 1163, 1165 (Fla. Dist. Ct. App. 2007).

⁴² *But see* D.C. CODE § 3-413.01 (2007) (listing factors the court takes into account in deciding disputes); MINN. STAT. § 149A.80 (2007) (listing factors the court takes into account in deciding disputes).

regulating funerary and crematory services.⁴³ Thus, this section will begin with a discussion of Florida law concerning disposition of a dead body and distribution of cremains.

Generally, in Florida, in the absence of any testamentary directive, the surviving spouse or next of kin has the right to a decedent's body to dispose of as they see fit.⁴⁴ When the will is silent, common law grants this right.⁴⁵

However, there are certain statutory procedures that must be followed when a decedent is to be cremated.⁴⁶ Under Florida Statutes section 497.607(1), when arranging for cremation, the person seeking the cremation is required to declare her intentions with respect to the disposition of the cremated remains in a signed writing.⁴⁷ The cremation cannot "be performed until a legally authorized person gives written authorization for such cremation."⁴⁸ The term "legally authorized person" is defined to include the following in the listed order of priority: the decedent (when he left inter vivos directives); the surviving spouse or an adult child; a parent; an adult sibling; an adult grandchild or a grandparent; and "any person in the next degree of kinship."⁴⁹ The term also includes other individuals if none of those family members exist or are available.⁵⁰ These additional persons may include, "a friend or other person not listed in this subsection who is willing to assume the responsibility as the legally authorized person."⁵¹

A crematorium may rely on any such person's assertions that she is unaware of any objection to cremation by anyone in the same or higher category.⁵² The statutes then provide that if the person does not claim the cremains within 120 days, the crematorium director may dispose of those remains.⁵³

Although the above statutes give a procedure and an order of priority for completing cremations, they fail to address what happens if two people in the same category, such as siblings, disagree over the manner of disposition of

⁴³ See Daleiden, *supra* note 11, at 9.

⁴⁴ Kirksey v. Jernigan, 45 So. 2d 188, 189 (Fla. 1950).

⁴⁵ Arthur, 949 So. 2d at 1166.

⁴⁶ FLA. STAT. § 497.607 (2006).

⁴⁷ *Id.* § 497.607(1).

⁴⁸ *Id.*

⁴⁹ FLA. STAT. § 497.005(37).

⁵⁰ *Id.*

⁵¹ *Id.* § 497.005(37).

⁵² *Id.* The Florida Senate recently approved a proposed bill that gives greater protection to funeral homes concerning cremation authorizations; under the proposed bill, funeral homes will not be liable when an estranged relative challenges cremation after the fact. See S.B. 2856, 2007 Leg., Reg. Sess. (Fla. 2007); See also Garry, *supra* note 7.

⁵³ FLA. STAT. § 497.607(2).

the body or distribution of the cremated remains. Under Florida Statute section 497.383(2), a dispute over the right of any person to provide authorization for cremation is to be resolved in court.⁵⁴ Seemingly, any dispute over who retains the right to keep the ashes would also be resolved in court. Interestingly, Florida includes a provision in its funerary law statutes, which states:

Final “disposition” means the final disposal of a dead human body by earth interment, aboveground interment, cremation, burial at sea, or delivery to a medical institution for lawful dissection if the medical institution assumes responsibility for disposal. *Final “disposition” does not include the disposal or distribution of cremated remains and residue of cremated remains.*⁵⁵

Many other states also have enacted statutes that give an order of priority over the control of the decedent’s remains.⁵⁶ However, as in Florida, most of these statutes fail to specifically address what happens if two people in the same tier, such as siblings, disagree over the manner of disposition.

Nonetheless, three jurisdictions—the District of Columbia, Minnesota, and Pennsylvania—have statutes that provide factors for a court to consider if there is a dispute between two people in the same tier of priority.⁵⁷ In the District of Columbia and Minnesota, courts are instructed to make a decision based on the following factors:

- (1) The reasonableness, practicality, and resources available for payment for the proposed arrangements and final disposition;
- (2) The degree of the personal relationship between the decedent and each of the persons in the same degree of relationship to the decedent;
- (3) The expressed wishes and directions of the decedent and the extent to which the decedent has provided resources for the purpose of carrying out those wishes or directions; and

⁵⁴ FLA. STAT. § 497.383(2).

⁵⁵ FLA. STAT. § 497.005(31) (emphasis added).

⁵⁶ See, e.g., CAL. HEALTH & SAFETY CODE § 7100(a)–(c) (2007); D.C. CODE § 3-413(a) (2007); IDAHO CODE ANN. § 54-1142 (2007); 755 ILL. COMP. STAT. 65/5 (2007); KY. REV. STAT. ANN. § 367.97501(1) (2003); LA. REV. STAT. ANN. § 8:655 (2007); MINN. STAT. § 149A.80 (2006); MO. REV. STAT. § 194.119(2) (2007); N.J. STAT. ANN. § 45:27-22 (West 2007); NEB. REV. STAT. § 71-1339 (2007); N.M. STAT. § 24-12A-2 (2007); N.Y. PUB. HEALTH LAW § 4201(2) (2007); PA. CONST. STAT. ANN. § 305 (West 2007); TEX. HEALTH & SAFETY CODE ANN. § 711.002(a) (2007); UTAH CODE ANN. § 58-9-602 (2007).

⁵⁷ See D.C. CODE § 3-413.01; MINN. STAT. § 149A.80; PA. CONST. STAT. ANN. § 305(d)(2).

(4) The degree to which the arrangements and final disposition will allow for participation by all who wish to pay respect to the decedent.⁵⁸

The Pennsylvania statute states that: “(2) If two or more persons with equal standing as next of kin disagree on disposition of the decedent’s remains, the authority to dispose shall be determined by the court, with preference given to the person who had the closest relationship with the deceased.”⁵⁹

In addition to concerns of survivors situated in the same tier, issues may arise when the statutes fail to recognize the rights of a domestic partner. If the decedent is unmarried, only three jurisdictions—the District of Columbia, New Jersey, and New York—give a domestic partner the same right a surviving spouse would have in controlling the disposition of the decedent’s remains.⁶⁰ This is an important distinction because when a will is silent, many disputes arise between the decedent’s domestic partner and the decedent’s surviving family members.⁶¹ Typically, a domestic partner would need to seek judicial redress, such as a temporary restraining order, to prevent the surviving family, who has the right under state law, from disposing of the remains in a manner that is inconsistent with the wishes of a decedent. States protecting the domestic partner’s rights to the decedent’s remains prevent this dispute from arising.

New Mexico has an interesting provision in its list of persons who may determine how the decedent’s body will be disposed. The statute provides for “an adult who has exhibited special care and concern for the decedent, who is aware of the decedent’s views and desires regarding the disposition of his body and who is willing and able to make a decision about the disposition of the decedent’s body.”⁶² Although it has been argued that this statute may help same-sex couples in obtaining rights over a partner’s dead body,⁶³ the rights of traditional family members—surviving spouse, adult children, parents, and siblings—are recognized before a partner’s right.⁶⁴ In addition,

⁵⁸ D.C. CODE § 3-413.01; MINN. STAT. § 149A.80.

⁵⁹ PA. CONST. STAT. ANN. § 305(d)(2).

⁶⁰ D.C. CODE § 3-413.01(a)(1); N.J. STAT. ANN § 45:27-22(1); N.Y. PUB. HEALTH LAW § 4201(2)(a)(ii-a).

⁶¹ See, e.g., *Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel, Inc.*, 606 N.Y.S.2d 965, 969 (N.Y. Sup. Ct. 1993) (regarding a dispute between decedent’s long-time partner and mother over disposition of decedent’s remains); see also Horan, *supra* note 35, at 423–24 (discussing how same-sex couples are generally precluded from decisions concerning dispositions of a partner’s body upon death).

⁶² N.M. STAT. § 24-12A-2(E) (1995).

⁶³ Horan, *supra* note 35, at 444.

⁶⁴ N.M. STAT. § 24-12A-2 (1995). The last person in line under this statute is an adult heir under New Mexico’s intestate laws. *Id.* § 24-12A-2(F) (1995).

this provision could invite more litigation given its vague language, which may include a variety of interested persons.

B. Disputes and Case Law

Courts are often called upon to resolve disputes as to who has the right to authorize cremation of a decedent's body and who may later make decisions regarding disposition of the ashes. Some statutes require judicial resolution where the statute's mandates do not prevail.⁶⁵

Generally, in the absence of a statutory provision, courts rely upon the "quasi-property" rights concept developed under the common law and rule that a surviving spouse or next of kin may retain the ashes.⁶⁶ Even in jurisdictions that do have statutory or common law "quasi property" rights, these laws do not resolve disputes among survivors who may have competing rights, such as between parents of a deceased child or between children of a deceased single parent.

Although disputes are quite common, there exists a dearth of reported opinions, whether by trial or appellate courts, concerning competing interests. The Superior Court of Pennsylvania noted in its *Kulp v. Kulp* decision that there were no appellate cases in Pennsylvania regarding division of cremated remains, but that two other jurisdictions had decided that issue.⁶⁷ Thus, although there exists some precedent, there is very little case law on the matter and most of these cases are generally not appealed.

Nonetheless, "because ashes can be divided, housed and spread in ways that a body cannot,"⁶⁸ courts may have some flexibility in fashioning a remedy. In *In re Estate of K.A.*, the divorced parents of a deceased minor child, both of whom had authorized cremation, argued over the final disposition of the girl's cremated remains.⁶⁹ After a hearing concerning the deceased girl's wishes regarding her ashes and after rejecting the mother's argument that a custodial parent should have the right to determine disposition of a deceased child's remains, the appellate court affirmed the trial court's decision that the girl's ashes should be divided equally between her parents.⁷⁰ Apparently, the trial court had hoped that the parents would appeal its decision, as the parents in fact did, so as to "establish a proper

⁶⁵ See, e.g., FLA. STAT. § 497.383(2) (2005); D.C. CODE § 3-413.01 (2001); KY. REV. STAT. ANN. § 367.97527(3); MINN. STAT. § 149A.80 (2006).

⁶⁶ See *supra* note 32 and accompanying text.

⁶⁷ *Kulp v. Kulp*, 920 A.2d 867, 872 (Pa. Super. Ct. 2007).

⁶⁸ Paul Tosto, *From Ashes to Acrimony: Puckett Case Shows Cremation Can Breed Strife Among Survivors*, PIONEER PRESS (St. Paul), May 13, 2006, http://www.taph.com/index2.php?option=com_content&do_pdf=1&id=3976.

⁶⁹ *In re Estate of K.A.*, 807 N.E.2d 748, 749 (Ind. Ct. App. 2004).

⁷⁰ *Id.* at 751.

precedent so that no parents would be required to pursue this type of litigation in the future.”⁷¹

The court in *In re Estate of Puckett* similarly fashioned unique remedies in the face of absent binding precedent. In 2006, after a months-long legal battle, an Arizona trial judge decided that the ashes of former Minnesota Twins outfielder, Kirby Puckett, belonged with his minor children and, by extension, with his ex-wife.⁷² Several individuals, including the ex-wife, family members, his fiancée, and his executor gave their accounts of Puckett’s wishes.⁷³ Puckett had left instructions to be cremated but had not stated who should receive his ashes.⁷⁴ In reaching a decision, the trial judge noted that “[t]here is no statute or case law in Arizona regarding who is entitled to possession of the remains of a decedent.”⁷⁵ The court applied Minnesota law, the jurisdiction where Puckett’s cremains were then located.⁷⁶ Since Puckett had no spouse, adult children, or living parents, his siblings had the right to determine final disposition. The siblings decided the ashes belonged with Puckett’s children.⁷⁷

In another case, where a decedent’s partner and mother fought over disposition of the decedent’s remains, the court approved the parties’ settlement, stating:

Displaying the wisdom of King Solomon, who when confronted with two women both claiming to be the mother of a child decided that he would “Divide the living child in two, and give half to the one, and half to the other” (1 Kings 3:16), the parties agreed . . . to cremate [the decedent] and split the ashes.⁷⁸

The parties actually reached the agreement before the appellate court had an opportunity to render a decision.⁷⁹

Yet in *Kulp*, discussed above, the Superior Court of Pennsylvania vacated a trial judge’s order directing that the ashes of a divorcing couple’s only son be divided equally between them, in two separate urns, so that each could

⁷¹ *Id.* at 749.

⁷² *In re Estate of Puckett*, PB 2006-000799, slip op. at 4 (Ariz. Super. Ct. Oct. 23, 2006); see also Editorial, *Take Care of Remaining Issues Now: Puckett Story Reminder We Need to Make Our Wishes Known While We Can*, E. VALLEY TRIB. (Phoenix), Oct. 30, 2006 [hereinafter Editorial].

⁷³ Editorial, *supra* note 72.

⁷⁴ *In re Estate of Puckett*, PB 2006-000799, slip op. at 2.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.* (citing MINN. STAT. § 149A.80).

⁷⁷ *Id.* at 4.

⁷⁸ *Stewart v. Schwartz Bros.-Jeffer Mem’l Chapel, Inc.*, 606 N.Y.S.2d 965, 969 (N.Y. Sup. Ct. 1993).

⁷⁹ *Id.*

place the ashes where each chose.⁸⁰ The appellate court noted that under Pennsylvania statutes the next of kin (the decedent's parents in this case) have the sole authority to make decisions regarding disposition of a decedent's remains.⁸¹ The court further relied on a seminal burial case in stating that "the rights and feelings of . . . the next of kin are paramount." The court remanded the case and directed the trial court to make a determination based on the same factors a court would consider in reviewing a petition for re-interment. The court was concerned with the father's opposition to dividing the ashes and cited *In re Estate of K.A.* for the proposition that one parent "does not have a superior right to determine the disposition of their child's remains."⁸²

Sadly, although there seems to be some solution, King Solomon's wisdom has not prevailed in ending the disputes. A news article regarding the dispute over Puckett's ashes noted that if a decedent does not clearly express directives concerning retention of his ashes, then it "could create an ambiguous situation in which several people who know and love you will want you in the their homes—permanently—and might be setting up some uncomfortable legal action that your survivors should probably do without."⁸³ Anecdotes about disputes over ashes abound.

In Ohio, a stroke victim's children and spouse from a second marriage preternaturally fought over the disposition of the victim's body upon his death.⁸⁴ The wife asserted that her husband would prefer cremation; the children contended that he would prefer burial as a devout Pentecostal Baptist.⁸⁵ Legal experts and a funeral director noted that "[f]amily arguments over funeral decisions are all too common under Ohio's weak laws."⁸⁶

In California, in a case similar to *Kulp*, two parents became involved in a legal battle over the disposition of their deceased son's body.⁸⁷ The mother wanted to bury her son near her.⁸⁸ However, the father insisted that he

⁸⁰ *Kulp v. Kulp*, 920 A.2d 867, 873 (Pa. Super. Ct. 2007).

⁸¹ *Id.* at 870 (citing PA. CONS. STAT. ANN. § 305(c)).

⁸² *Id.* at 872 (citing *In re Estate of K.A.*, 807 N.E.2d 748, 751 (Ind. Ct. App. 2004)).

⁸³ Editorial, *supra* note 72.

⁸⁴ Mark Fisher, *Weak Laws Fuel Family Feuds Over Last Rights; Cremation or Burial? It's Often Up to the Courts*, COLUMBUS DISPATCH, July 5, 2005, at 1A.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Sandra Stokley, *Ordeal: Tragic Death Begets Another Struggle*, PRESS ENTERPRISE (Riverside), Sept. 23, 2005, at B1.

⁸⁸ *Id.*

wanted to cremate his son and preserve the ashes in the deceased son's trophy case.⁸⁹

The casual posting of questions regarding cremation on the internet attests to the increase in disputes over cremated remains. Recently, a reader posted the following question on a web blog: "Without a will, who has control of a parents [sic] cremated remains. The remains are in the center or [sic] a disagreement between the only son and daughter of the deceased."⁹⁰

Given the foregoing, it is clear that some parameters must be established to avoid or quickly solve issues regarding the right to decide about the cremation of a decedent's body and later possession of the ashes. These emotionally fraught disputes should not be a matter for protracted litigation.

IV. CIVIL LAW OF FRANCE AND SPAIN REGARDING CREMATION AND CREMAINS

The countries in continental Europe are governed by the civil law system.⁹¹ The civil law system is based on a codification of a mixed heritage of Roman, Germanic, feudal, canon, and customary law.⁹² The following discusses how two civil law countries, France and Spain, address the issue of ownership of a decedent's ashes.

A. France

In January 1952, French Sergeant Aimé Duron died in the French Indochina War.⁹³ A 1946 French law provided free transportation for return of deceased soldiers and civilian victims of the war to their families.⁹⁴ Two families claimed Duron's body—his natural parents and another family that had cared for him since he was fifteen years old without having legally adopted him.⁹⁵ In 1959, the Appellate Court denied the non-biological family's claim, despite judicial fact-finding that Duron's comrades considered them to be his real parents.⁹⁶ In April 1963, the decision was overturned.⁹⁷ Thus, for

⁸⁹ *Id.* The mother's petition to bury her son was granted. *Pugh v. Castoreale*, No. RIC 436078, slip op. at 1 (Cal. App. Dep't Super. Ct. Sept. 28, 2005).

⁹⁰ Posting to LawGuru, <http://www.lawguru.com/cgi/bbs/mesg.cgi?i=111473315> (Feb. 13, 2007).

⁹¹ See JAMES G. APPLE & ROBERT P. DEYLING, *FED. JUDICIAL CTR., A PRIMER ON THE CIVIL-LAW SYSTEM 1* (1995), available at http://www.au.af.mil/au/awc/awcgate/fjc/civil_law.pdf.

⁹² H. KENSICHER, *MODERN CIVIL LAW PRACTICE FOR MINERAL LAW PRACTITIONERS* (1991). For a comprehensive discussion of the civil law system, see generally APPLE & DEYLING, *supra* note 91.

⁹³ JUAN FRANCISCO PÉREZ GÁLVEZ, *EL SISTEMA FUNERARIO EN EL DERECHO ESPAÑOL* 164 n.47 (1997) (discussing a newspaper account of the matter).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

more than ten years, two families battled for the right to decide the final disposition of Duron's body.⁹⁸

As the case of Aimé Duron demonstrates, disputes between families about the disposition of loved ones also pose a problem in France. These disputes have been ongoing for some time, but its legislature does not seem to have provided a solution. As of today, the proposed legislation regarding the legal status of cremated remains has not been enacted.⁹⁹

French law establishes the absolute prevalence of the deceased's wishes regarding disposition of his body.¹⁰⁰ The decedent may provide written or verbal instructions to relatives.¹⁰¹ The decedent need not have left his wishes in a will or notarized document.¹⁰²

Any authorized person may arrange for the disposition of a decedent's body, whether by burial or cremation.¹⁰³ "The authorities or the funeral parlors require no supporting documentation or attestation for this choice."¹⁰⁴ However, the choice must respect the decedent's wishes.¹⁰⁵ French law provides sanctions for those who act contrary to what the decedent directed.¹⁰⁶

In the absence of any instructions from the decedent, the following have authority to make funerary decisions: the surviving spouse, the decedent's parents or children, next of kin, and, lastly, the person or entity responsible for the funeral expenses.¹⁰⁷ A judge may give preference to a common law spouse or friend, rather than a family member, upon a determination that this would have been the decedent's preference.¹⁰⁸ If there is a dispute between the decedent's survivors, the mayor must be informed in order to stay the funerary process until a judicial decision is reached.¹⁰⁹

⁹⁸ PÉREZ GÁLVEZ, *supra* note 93.

⁹⁹ La Crémation, *supra* note 27. Some have suggested giving ashes the same status as mortal remains; however, this could seemingly diminish a survivor's rights to freely dispose of the ashes. *Id.*

¹⁰⁰ See Choix des Funérailles, available at <http://www.afif.asso.fr/francais/conseils/conseil46.html> (last visited Apr. 29, 2007) (citing Loi du 15/11/1887 sur la liberté des funérailles).

¹⁰¹ La Crémation, *supra* note 27.

¹⁰² *Id.*

¹⁰³ Choix des Funérailles, *supra* note 100.

¹⁰⁴ La Crémation, *supra* note 27.

¹⁰⁵ *Id.*

¹⁰⁶ Choix des Funérailles, *supra* note 100 (citing Art. 433-21-1 CODE PÉN.).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Following cremation, the urn and ashes are handed over to the person who authorized the funeral.¹¹⁰ The ashes may be freely disposed of in many ways, such as by scattering them in specially reserved areas of cemeteries or in a river, stream, or at sea.¹¹¹ Some dispositions require permits, such as when the ashes are interred on private property or disposed of outside of France.¹¹²

Interestingly, French legislation provides for the division of ashes between members of the family or the commingling with ashes of other decedents.¹¹³ No authorization is required for this practice, but it must reflect the express desire of the decedent.¹¹⁴ However, as originally noted, this has not ended disputes among family members.¹¹⁵ “Courts sometimes have to decide who gets the ashes in disputes between relatives, rival spouses of an oft-married person or parents and unmarried partners of a dead person.”¹¹⁶ The legally permitted division of ashes has at times occurred by judicial decision rather than by familial agreement.¹¹⁷ Thus, the French government supports legislation regarding a legal status to ensure respect for cremated remains.¹¹⁸

B. Spain

There is no provision in the Spanish civil code as to who has the right to contract for funerary services once the decedent has passed away.¹¹⁹ In the absence of the decedent’s known wishes, it would seem reasonable to give this decision-making right to the deceased’s closest relatives.¹²⁰

Some court decisions have favored the spouse by analogously applying Article 1894 of the Spanish Civil Code, which addresses cases of conflicts between a surviving spouse and the decedent’s parents.¹²¹ These courts have reasoned that generally, through social custom, the surviving spouse deals

¹¹⁰ *La Crémation*, *supra* note 27 (citing Décret no. 2007-328 du 12 mars 2007).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (citing J.O., June 7, 1999, p. 3851–52).

¹¹⁴ *Id.*

¹¹⁵ *See Respect for Ashes*, *supra* note 1.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *MARCOS*, *supra* note 13, at 71.

¹²⁰ *Id.* at 71 n.221 (discussing the few times familial relationships are mentioned regarding this matter and comparing to U.S. law).

¹²¹ *Id.* at 71 n.222.

with the decisions and circumstances surrounding the deceased's funeral and burial.¹²²

Moreover, relatives generally do not have the power to eschew the decedent's last wishes and modify instructions as to disposition of the body, unless those who will ultimately bear the costs of final disposition financially cannot fulfill those wishes.¹²³ In such a case, the family may be able to choose a different service within the scope established by Article 1894 of the Civil Code.¹²⁴

However, the question remains as to who should have the right to decide when there are several family members with a legitimate interest who may disagree on the matter.¹²⁵ Thus, the legal question of property rights over a body has been much discussed but not yet resolved in Spain.¹²⁶ This concept has been firmly opposed by moral prejudices and a desire for continued respect of the deceased person.¹²⁷ Spanish scholars who have studied the legal nature of the dead body in Spanish civil law have espoused differing philosophies on the matter.¹²⁸ There is no consensus as to whether there should or does exist some ownership rights over a decedent's body.¹²⁹

Instead, the power to legislate funerary and crematory services in Spain has been relegated to the several Autonomous Communities, such as Catalonia, and to local governments.¹³⁰ Currently, Catalonia has no specific

¹²² *Id.*

¹²³ MARCOS, *supra* note 13, at 72.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ PÉREZ GÁLVEZ, *supra* note 93, at 163 n.45.

¹²⁷ *Id.*

¹²⁸ *Id.* at 164 n.47.

¹²⁹ *Id.*

¹³⁰ See, e.g., R.D. 752/2006, de 16 de Junio, Sobre Ampliación de Medios Traspasados a la Generalidad de Cataluña por los Reales Decretos 2210/1979, de 7 de Septiembre; 995/1984, de 25 de Abril, y 1264/1984, de 23 de Mayo, en Materia de Sanidad, B.O.E. 2006, 147, available at http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=2006/11052&txtlen=1000 (last visited Oct. 27, 2007); see also Decret 297/1997, de 25 de Novembre, Pel Qual S'aprova el Reglament de Policia Sanitària Mortuòria, available at http://www.sfsa.es/empresa/pdf_leg/decret297-1997.pdf [hereinafter Decret 297/1997] (last visited Oct. 27, 2007); PRICEWATERHOUSECOOPERS, LOS SERVICIOS FUNERARIOS INTEGRALES EN ESPAÑA: CLAVE DE UN SECTOR EN TRANSFORMACIÓN 2 (2001) [hereinafter SERVICIOS FUNERARIOS INTEGRALES], available at [http://kc3.pwc.es/local/es/kc3/publicaciones.nsf/V1/6DE3363C6AA27E2AC12571450044A483/\\$FILE/Informe_funerarios.pdf](http://kc3.pwc.es/local/es/kc3/publicaciones.nsf/V1/6DE3363C6AA27E2AC12571450044A483/$FILE/Informe_funerarios.pdf) (last visited Apr. 29, 2007). Although there is a national framework, variations may exist in regional or local regulations. *Id.* at 2. This section will limit its discussion of funerary law to only one Spanish regional and local authority, Catalonia and Barcelona, respectively. A review of the law in Catalonia (both on a regional and local level) is especially relevant because Catalonia is working on developing its own civil code. See The Code of Succession, Act 40/1991, 5 (Alpnet Int'l Translation Serv. trans., 2000), available at http://www.genocat.net/justicia/doc/doc_15666646_1.pdf (last visited Apr. 29, 2007) [hereinafter Code of Succession].

legislation concerning rights over a dead body. The only reference made in this respect is found in the Catalan Code of Succession, which provides that a testator may include in his will provisions concerning the disposition of his body, including instructions requiring cremation or regarding the form of burial.¹³¹ Article 318 of the Code of Succession refers to the appointment of a special executor, who, among other matters, may take care of the decedent's testamentary provision requesting cremation of his body.¹³²

Nonetheless, the Parliament of Catalonia has, in turn, given the local municipal governments the authority to regulate funerary services.¹³³ One such municipality is Barcelona, the capital of Catalonia.¹³⁴ Funerary services are administered and regulated in Barcelona by Serveis Funeraris de Barcelona.¹³⁵ According to its applicable regulations, cremation may take place pursuant to either a decedent's express instructions or in the absence of such instructions, a request from the next of kin.¹³⁶ Once the cremation process ends, the ashes are transferred to an urn or other container.¹³⁷ The regulations are silent, however, concerning disputes among survivors as to the form of final disposition of the decedent's body or the disposal of cremains. Thus, Spanish national law and principles would govern, because neither Catalan legislation nor municipal ordinances specifically provide a solution.¹³⁸ However, as discussed above, Spain has not resolved this dilemma in its national laws.¹³⁹

As one last point of interest, in 2004 Spain launched a new practice of handing over ashes to family members or others within four hours after cremation.¹⁴⁰ In Barcelona, special waiting rooms for this purpose have been

¹³¹ Code of Succession, *supra* note 130, at art. 123. The Code of Succession "represents the first pillar" in developing a new Catalan Civil Code. *Id.* at 5.

¹³² *Id.* at art. 318.

¹³³ Llei 2/1997, de 3 d'abril, Sobre Serveis Funeraris, at art. 2, available at http://www.sfbasa.es/empresa/pdf_leg/llei2-1997.pdf (last visited Oct. 27, 2007); see also Decret 297/1997, *supra* note 130, at 1.

¹³⁴ Get to Know Barcelona-Barcelona, Capital of Catalonia: Some History and Geography, <http://www.bcu.cesca.es/angles/lila/pagines/barcelona1.html> (last visited Oct. 27, 2007).

¹³⁵ Presentation—Serveis Funeraris de Barcelona, <http://www.sfbasa.es/empresa/presentacio.asp> (last visited Apr. 29, 2007). This is a joint venture in which the town council of Barcelona owns 51 percent. *Id.*

¹³⁶ See Ordenança de Cementiris, at art. 117, available at http://www.sfbasa.es/empresa/pdf_leg/orden_cementiris.pdf (last visited Oct. 27, 2007); see also *Ecofuneriales*, *supra* note 6, at 16. It has been suggested that a person who desires to be cremated upon death should preferably leave such instructions in a signed document, such as a living will. *Id.* at 16. See *id.* at 38 for a sample living will expressing a person's desires regarding funerary services upon his death.

¹³⁷ Ordenança de Cementiris, *supra* note 93, at art. 125.

¹³⁸ See *Ecofuneriales*, *supra* note 6, at 18.

¹³⁹ See PÉREZ GÁLVEZ, *supra* note 126 and accompanying text.

¹⁴⁰ Tractament de les Cendres, http://www.sfbasa.es/productes_serveis/els_nostres_serveis/tratamiento.asp (last visited Oct. 27, 2007).

prepared at the funeral homes of Collserola and Montjuic.¹⁴¹ However, if there is still uncertainty or disagreement as to final disposition of the ashes, the family (or whoever else is to receive the ashes) may request that the crematorium retain the cremains for a maximum period of six months.¹⁴² This waiting time may either help the survivors resolve any differences or alternatively foster animosity even further.

V. ANALYSIS AND CONCLUSION

As this discussion indicates, none of the statutes analyzed in this article concretely answers the issue as to the appropriation of the dead body or its ashes. Both the civil law and common law systems seem to apply the same general principles in cases of familial disputes regarding a decedent's ashes.

First, the basic principle is that the intent of the deceased must prevail.¹⁴³ Therefore, if there is a valid will, which provides how to dispose of the dead body, these provisions serve as the guideline to be followed.

Second, if the decedent does not give instructions regarding disposal of his remains and family members disagree about the funerary service, extrinsic evidence of the decedent's wishes would determine the necessary steps.

Third, the executor often has the power and duty to arrange for the proper disposal of the decedent's body in the event of a dispute.

Fourth, if the testator did not appoint an executor and there is no agreement among the family members for disposal of the body, the legal systems generally apply a rule defining a priority order. This rule states that the closest relatives would have the right to dispose of the dead body or ashes as they determine proper.

Fifth, if disputes arise that the foregoing principles cannot resolve, the matter must be resolved by judicial determination. Judicial determination, however, may become costly and time-consuming. In addition, litigation may only serve to tear survivors further apart.

Jurisdictions may want to consider other means rather than judicial determination to resolve these types of disputes. For example, the respective legislative bodies could consider enacting or amending statutes to require

¹⁴¹ *Id.*

¹⁴² *Id.* Presumably, after the six-month period, the survivors will have reached a decision as to the disposition of the ashes.

¹⁴³ The International Cremation Federation has adopted a Code of Ethics which, among other things, respects a person's right to choose cremation: "An individual shall have the right to choose cremation and due regard shall be given to such desire wherever this has been registered." Int'l Cremation Fed'n, Code of Ethics, at art. 12, <http://members.aol.com/icfed/ethics.htm> (last visited Oct. 27, 2007).

mediation or other alternative dispute resolution rather than force the parties to enter into a lengthy and expensive litigation process.¹⁴⁴

A more efficient and feasible alternative may be to give a fiduciary the duty to make decisions about the decedent's cremation or ashes where survivors are unwilling to reach an agreement. An executor, whether or not appointed in the will, may be given this task. Alternatively, a guardian ad litem for the "quasi property"—the decedent's body or cremains—may be appointed specially to represent the best interests of the deceased's body or the ashes. This solution may foster a speedier and non-judicial settlement among the disputing parties who may prefer to resolve the issue amongst themselves rather than leave the decision-making power in the hands of a third party.

Another alternative regarding distribution of cremains is for the ashes to be divided over a period of time. This solution would be similar to shared or joint custody of children, wherein each person may possess the ashes for a certain period of time in some predetermined order. However, this would not permit anyone in possession to either scatter or inter the ashes. In addition, there is a risk that a custodian could actually scatter the ashes in contravention of the custody agreement—an irreparable loss.¹⁴⁵

However, in the absence of any evidence indicating the decedent's wishes, the most efficient option would be to invoke "King Solomon" and divide the ashes between or among the survivors as some courts have done.¹⁴⁶ This practice seems to have become commonplace in the funeral industry.¹⁴⁷ Dividing the ashes permits all of the survivors' varying and competing wishes to be fulfilled. Those that desire to inter or scatter the ashes could complete any such ceremonial ritual while others could keep the ashes close to them in their own homes. "Memento urns and keepsakes have been marketed [by the funeral industry] to preserve divided ashes for surviving family members."¹⁴⁸

Finally, it is worth considering the Parliamentary efforts France is making to provide for a specific legal status to a deceased's ashes in order to create a concrete solution for a problem that has been around for so many

¹⁴⁴ See generally Brian L. Josias, Note: *Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies*, 79 NOTRE DAME L. REV. 1141, 1171 (2004) (urging the use of alternative dispute resolutions for post-mortem disputes).

¹⁴⁵ See *Kulp v. Kulp*, 920 A.2d 867, 869 (Pa. Super. Ct. 2007).

¹⁴⁶ See *In re Estate of K.A.*, 807 N.E.2d 748, 751 (Ind. Ct. App. 2004) (requiring that daughter's ashes be divided equally between decedent's parents); *Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel, Inc.*, 606 N.Y.S.2d 965, 969 (N.Y. Sup. Ct. 1993) (approving parties' agreement to divide ashes between the decedent's mother and partner). *But see Kulp*, 920 A.2d at 873 (trial court abused its discretion in dividing ashes between decedent's parents where father opposed division of the remains).

¹⁴⁷ *In re Estate of K.A.*, 807 N.E.2d at 751.

¹⁴⁸ *Id.*

years.¹⁴⁹ Although the general principles applied up until today by all of the legal systems analyzed in this article seem to have helped in the resolution of such disputes, it is worth following France's lead to provide the families with a concrete answer as to who has the right (if any) to request cremation and keep the ashes of a loved one.

¹⁴⁹ See *Respect for Ashes*, *supra* note 1 and accompanying text.