




State of Wisconsin


LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX - **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 02/15/2007 (Per: DAK)





 Appendix A ... Part 03 of 05

 The 2005 drafting file for LRB-3104

has been transferred to the drafting file for

2007 LRB-1482

 This cover sheet, the final request sheet, and the final version of the 2005 draft were copied on yellow paper, and returned to the original 2005 drafting file.

 The attached 2005 draft was incorporated into the new 2007 draft listed above. For research purposes, this cover sheet and the complete drafting file were transferred, as a separate appendix, to the 2007 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-3104/BI P2

DAK: [initials]

mk

D-NOTE

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

central

Repeal

REGENERATE

✓+

1 AN ACT *to repeal and recreate* chapter 154 (title); and *to create* subchapter
2 IV of chapter 154 [precedes 154.30] and 154.32 of the statutes; **relating to:**
3 ~~declarations of final disposition and providing penalties.~~ *of certain human remains*

Analysis by the Legislative Reference Bureau

This bill is drafted in preliminary form. An analysis will be included in a subsequent version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

4 SECTION 1. Chapter 154 (title) of the statutes is repealed and recreated to read:

5 CHAPTER 154

6 ADVANCE DIRECTIVES

7 SECTION 2. Subchapter IV of chapter 154 [precedes 154.30] of the statutes is
8 created to read:

9 CHAPTER 154

10 SUBCHAPTER IV

1 2. Funeral ceremony, memorial service, graveside service, or other last rite.

2 3. Burial, cremation and burial or other disposition, or donation of the
3 individual's body after death.

4 (b) Authorizes a final disposition agent, an alternate final disposition agent,
5 or another individual to carry out the decisions and preferences of the declarant, as
6 expressed in the declarant's declaration of final disposition.

7 **(3) SIGNATURE; WITNESSES.** A declaration of final disposition shall, in the
8 presence of 2 witnesses or in the presence of a notary public, be signed voluntarily
9 by the declarant and, if a final disposition agent or an alternate final disposition
10 agent is specifically named, by the final disposition agent or alternate. If the
11 declarant is physically unable to sign a declaration of final disposition, the
12 declaration shall be signed in the declarant's name by an individual at the declarant's
13 express direction and in his or her presence; such a proxy signing shall take place or
14 be acknowledged by the declarant in the presence of 2 witnesses or a notary public.

15 **(4) FINAL DISPOSITION AGENT.** A declarant may, in the declaration of final
16 disposition, designate an individual to act as final disposition agent in the declarant's
17 behalf with respect to the declarant's decisions and preferences concerning the
18 matters specified in sub. (2), and may designate an alternate individual to serve as
19 his or her final disposition agent in the event that the final disposition agent first
20 designated is unable or unwilling to act as intended. If the declarant does not, in a
21 declaration of final disposition, specify an individual to act as final disposition agent,
22 the following, in the priority listed, may, unless incapacitated, act as a final
23 disposition agent:

24 (a) The declarant's surviving spouse.

25 (b) A surviving adult child of the declarant.

1 (c) A surviving parent of the declarant.

2 (d) A surviving individual, other than an individual specified in par. (a), (b), or
3 (c), who is related in the closest degree of kinship to the declarant, as determined
4 under s. 990.001 (16).

5 (e) Any other person, if the individuals specified in pars. (a) to (d) decline to act,
6 are dead, or are incapacitated.

7 **154.34 Declaration of final disposition; form.** The department shall
8 prepare and provide copies of the declaration and accompanying information for
9 distribution in quantities to funeral directors, crematory authorities, hospitals,
10 nursing homes, county clerks, and local bar associations and individually to private
11 persons. The department shall include, in information accompanying the
12 declaration, at least the statutory definitions of terms used in the declaration, a
13 statement explaining that valid witnesses acting in good faith are statutorily
14 immune from civil or criminal liability, and an instruction to potential declarants to
15 read and understand the information before completing the declaration. The
16 department may charge a reasonable fee for the cost of preparation and distribution.
17 The declaration distributed by the department shall be easy to read, in type size no
18 smaller than 10-point, and in the following form:

DECLARATION OF FINAL DISPOSITION

19 I, (print name, address, and date of birth), being of sound mind, intend by
20 this document to specify the disposition that is to be made of my body after death and
21 that my decisions and preferences in this regard be honored. My executing this
22 document is voluntary.

DESIGNATION OF FINAL DISPOSITION AGENT

1 1. Unless I prefer not to designate a specific final disposition agent, I hereby
2 designate (print name, address, and telephone number) to be my final disposition
3 agent for the purpose of complying with or otherwise carrying out, on my behalf, the
4 decisions or preferences concerning the disposition that is to be made of my body after
5 death that are expressed in this document. If he or she is ever unable or unwilling
6 to do so, I hereby designate (print name, address, and telephone number) to be my
7 alternate final disposition agent for the purpose of complying with or otherwise
8 carrying out, on my behalf, the decisions or preferences concerning the disposition
9 that is to be made of my body after death that are expressed in this document.

10 2. If I prefer not to designate a specific final disposition agent under 1. above,
11 I understand that an individual specified in s. 154.32 (4) (a) to (e), Wis. Stats., may
12 act as my final disposition agent for the purpose of complying with or otherwise
13 carrying out, on my behalf, the decisions or preferences concerning the disposition
14 that is to be made of my body after death that are expressed in this document.

GENERAL STATEMENT OF AUTHORITY GRANTED

15 Unless I have specified otherwise in this document, upon my death I authorize
16 my final disposition agent to comply with or otherwise carry out my following
17 decisions or preferences concerning the disposition that is to be made of my body after
18 death, unless the decisions or preferences that I express exceed available resources
19 from my estate or there is no realistic possibility of compliance with the decisions or
20 desires:

- 21 1. Arrangements for a viewing.....
22 2. Funeral ceremony, memorial service, graveside service, or other last
23 rite.....

1 3. Burial, cremation and burial or other disposition, or donation of my body
2 after death.....

3 4. Any additional desires, special provisions, or
4 limitations.....

5 (THE DECLARANT AND THE WITNESSES MUST SIGN THE DOCUMENT AT THE SAME TIME.)

SIGNATURE OF DECLARANT

(PERSON CREATING THE DECLARATION OF FINAL DISPOSITION)

6 Signature.....Date.....

7 (The signing of this document by the declarant revokes all previous
8 declarations of final disposition.)

STATEMENT OF WITNESSES

9 I know the declarant personally and I believe him or her to be of sound mind
10 and at least 18 years of age. I believe that his or her execution of this declaration of
11 final disposition is voluntary. I am at least 18 years of age.

12 Witness No. 1:
13 (print) Name.....Date.....

14 Address.....

15 Signature.....

16 Witness No. 2:
17 (print) Name.....Date.....

18 Address.....

19 Signature.....

STATEMENT OF FINAL DISPOSITION AGENT AND ALTERNATE FINAL DISPOSITION AGENT

20 (TO BE COMPLETED ONLY IF THE DECLARANT DESIRES TO SPECIFY A FINAL DISPOSITION

21 AGENT AND ALTERNATE FINAL DISPOSITION AGENT.)

1 I understand that (name of declarant) has designated me to be his or her final
2 disposition agent or alternate final disposition agent after his or her death. (name
3 of declarant) has discussed his or her decisions and preferences regarding final
4 disposition with me.

5 Agent's signature.....

6 Address.....

7 Alternate's signature.....

8 Address.....

9 **154.36 Anatomical gift.** This subchapter does not apply to any anatomical
10 gift that the declarant makes under s. 157.06 (2) or that an individual other than the
11 donor is authorized to make under s. 157.06 (3) or (4).

12 **154.38 Reports of death, autopsies, inquests.** This subchapter is subject
13 to the powers and duties of coroners, medical examiners, and other physicians
14 licensed to perform autopsies with respect to the reporting of certain deaths,
15 performance of autopsies, and inquests under ch. 979.

16 **154.40 Revocation of declaration.** A declarant may revoke a declaration of
17 final disposition at any time by any of the following methods:

18 (1) Canceling, defacing, obliterating, burning, tearing, or otherwise destroying
19 the declaration of final disposition or directing some other person to cancel, deface,
20 obliterate, burn, tear, or otherwise destroy the declaration of final disposition in the
21 presence of the declarant.

22 (2) Revoking in writing the declaration of final disposition. The declarant shall
23 sign and date any written revocation under this subsection.

24 (3) Expressing orally his or her intent to revoke the declaration of final
25 disposition.

1 (4) Executing a subsequent declaration of final disposition.

2 **154.42 Immunities.** (1) No funeral director, cemetery, crematory authority,
3 final disposition agent, or alternate final disposition agent may be held civilly or
4 criminally liable, or charged with unprofessional conduct, for any of the following:

5 (a) Complying with or otherwise carrying out, in good faith, the decisions or
6 preferences expressed in a declaration of final disposition.

7 (b) Failing to act upon a revocation of a declaration of final disposition unless
8 the person or facility has actual knowledge of the revocation.

9 (c) Knowingly failing to comply with a declaration of final disposition, unless
10 the decisions or preferences expressed by the declarant exceed available resources
11 from the declarant's estate or if there is no realistic possibility of compliance with the
12 decisions or preferences.

13 (2) No individual who acts in good faith as a witness to a declaration of final
14 disposition under this subchapter may be held civilly or criminally liable for
15 complying with or otherwise carrying out the decisions or preferences expressed in
16 the declaration.

17 **154.44 Penalties.** (1) Any person who intentionally conceals, cancels,
18 defaces, obliterates, or damages the declaration of final disposition of another
19 without the declarant's consent may be fined not more than \$500 or imprisoned not
20 more than 30 days or both.

21 (2) Any person who illegally falsifies or forges the declaration of final
22 disposition of another or conceals the revocation of a declaration of final disposition
23 is guilty of a Class F felony.

24 (3) Any person who knowingly disposes of a body in a manner that is
25 inconsistent with a declaration, unless the decisions or preferences expressed by the

1 declarant exceed available resources from the declarant's estate or if there is no
2 realistic possibility of compliance with the decisions or preferences, may be fined not
3 more than \$500 or imprisoned not more than 30 days or both.

INSERT
9-3
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(END)

D-NOTE

INSERT 9-3

SECTION 1. 157.056 of the statutes is created to read:

157.056 Control of final disposition of certain human remains. (1)

DEFINITIONS. (a) "Authorization for final disposition" means a written, signed document that is acknowledged before a notary public or is witnessed and that is voluntarily executed by a declarant under sub. (8), but is not limited in form or substance to that provided in sub. (8).

(b) "Credential" has the meaning given in s. 440.01 (2) (a).

(c) "Declarant" means an individual who executes an authorization for final disposition.

(d) "Estranged" means being physically and emotionally separated for a period of time, at the time of the decedent's death, and clearly demonstrating an absence of due affection, trust, and regard.

****NOTE: This definition, from the instructions, may be inapt, in part. Two people who are physically separate from each other and who dislike each other extremely may not be "emotionally separate" from each other; in fact, they may share the same emotion--hatred. It seems to me that the language about emotional separation is unnecessary, given the requirement of a clear demonstration of an absence of due affection, trust, and regard.

(e) "Final disposition" means disposition of a decedent's remains, including any of the following:

1. Arrangements for a viewing.
2. A funeral ceremony, memorial service, graveside service, or other last rite.
3. A burial, cremation and burial, or other disposition, or donation of the decedent's body.

(f) "Health care provider" means any person who has a credential to provide health care.

1 (g) "Member of the clergy" has the meaning given in s. 765.002 (1).

2 (h) "Representative" means an individual specifically designated in an
3 authorization for final disposition or, if that individual is unable or unwilling to carry
4 out the declarant's decisions and preferences, a successor representative designated
5 in the authorization for final disposition to do so.

prioritized

6 (2) INDIVIDUALS WITH CONTROL OF FINAL DISPOSITION; ORDER. Except as provided
7 in sub. (3), any of the following, as specified in the following order, who is aged at least
8 18 years old and has not been adjudicated incompetent under ch. 880, may control final
9 disposition, including the location, manner, and conditions of final disposition:

10 (a) A representative of the decedent acting under the decedent's authorization
11 for final disposition that conveys to the representative the control of final disposition.

12 (b) The surviving spouse of the decedent.

13 (c) The surviving child of the decedent, unless more than one child of the
14 decedent survives. In such an instance, the majority of the surviving children has
15 control of the final disposition, except that fewer than the majority of the surviving
16 children may control the final disposition if that minority has used reasonable efforts
17 to notify all other surviving children and is not aware of opposition by the majority
18 to the minority's intended final disposition.

19 (d) The surviving parent or parents of the decedent or a surviving parent who
20 is available if the other surviving parent is unavailable after the available surviving
21 parent has made reasonable efforts to locate him or her.

22 (e) The surviving sibling of the decedent, unless more than one sibling of the
23 decedent survives. In such an instance, the majority of the surviving siblings has
24 control of the final disposition, except that fewer than the majority of the surviving
25 siblings may control the final disposition if that minority has used reasonable efforts

1 to notify all other surviving siblings and is not aware of opposition by the majority
2 to the minority's intended final disposition. ✓

3 (f) In descending order, an individual in the class of the next degree of kinship
4 specified in s. 852.01 (1). ✓

***NOTE: I would suggest that this order of kinship, which is for division of property if a decedent dies without making a will, is much more complex, less easy to understand, and appears to be less appropriate than the degrees of kinship specified in s. 990.001 (16), stats.; it also is confusing in relation to the order already set forth under pars. (a) to (e) of this subsection. ✓

5 (g) The guardian of the person, if any, of the decedent. ✓

6 (h) Any individual other than an individual specified under pars. (a) to (g) who
7 is willing to control the final disposition and who attests in writing that a good-faith
8 effort has been made, to no avail, to contact the individuals under pars. (a) to (g). ✓

***NOTE: Is this individual supposed to make the good-faith effort? If this issue is not clarified, it is entirely uncertain who must perform this task. ✓

9 (3) EXCEPTIONS. (a) All of the following are exceptions to any control conferred
10 under sub. (2): ✓

11 1. The disposition of any unrevoked anatomical gift made by the decedent
12 under s. 157.06 (2) or made by an individual other than the decedent under s. 157.06
13 (3) or (4). ✓

14 2. Any power or duty of a coroner, medical examiner, or other physician licensed
15 to perform autopsies with respect to the reporting of certain deaths, performance of
16 autopsies, and inquests under ch. 979. ✓

17 (b) None of the following is authorized under sub. (2) to control the final
18 disposition: ✓

19 1. An individual who is otherwise authorized to control final disposition under
20 the order of individuals (specified) in sub. (2) but who has been charged with any of
21 the following in connection with the decedent's death and the charges are known to

priority of

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SET

[Handwritten signature]

1 the funeral director or crematory authority, unless the charges are dismissed or the
2 individual is found not guilty of the offense:

****NOTE: Is the "unless" clause realistic here, i.e., does final disposition of a body usually await a trial (with possible appeal) and a finding of not guilty? ✓

- 3 a. First-degree intentional homicide under s. 940.01 (1).
- 4 b. First-degree reckless homicide under s. 940.02.
- 5 c. Second-degree intentional homicide under s. 940.05.
- 6 d. Second-degree reckless homicide under s. 940.06.
- 7 e. Homicide resulting from negligent control of a vicious animal under s.
8 940.07.
- 9 f. Homicide by the negligent operation or handling of a dangerous weapon,
10 explosives, or fire under s. 940.08.
- 11 g. Homicide by intoxicated use of a vehicle or firearm under s. 940.09.
- 12 h. Homicide by the negligent operation of a vehicle under s. 940.10.

DO NOT DELETE

****NOTE: This state does not have the crime of voluntary manslaughter, as Ohio apparently does; please review the crimes that I have specified instead. Please also note that several of these crimes apply to the death of an unborn child; is that what you intend? ✓

13 2. An individual who is otherwise authorized to control final disposition under
14 the order of individuals ^{Priority of SET} specified in sub. (2) but who fails to exercise this
15 authorization within 2 days after he or she is notified of the decedent's death or
16 within 5 days after the decedent's death, whichever is later. ✓

****NOTE: Again, who is to perform the task of notifying individuals specified in sub. (2)?

17 3. The decedent's spouse, if an action under ch. 767 to terminate the marriage
18 of the spouse and the decedent was pending at the time of the decedent's death. ✓

19 4. An individual for whom a determination is made under by the probate court
20 under par. (c) 2. b. that the individual and the decedent were estranged at the time
21 of death. ✓

Priority of SET

1 (c) If the individuals specified in sub. (2) are unable to agree on the final
 2 disposition, the probate court that has jurisdiction for the county in which the
 3 decedent resided at the time of his or her death may designate an individual as most
 4 fit and appropriate to control the final disposition. All of the following apply to a
 5 designation made under this paragraph:

6 1. A petition regarding control of the final disposition may be filed with the
 7 probate court by any of the following:

****NOTE: Shouldn't "may" in this provision be "shall"? It appears to be the only way
 in which the issue is properly before the probate court, at least according to the
 instructions.

- 8 a. Before his or her death, the decedent or his or her legal representative.
- 9 b. After the decedent's death, a relative of the decedent; an individual seeking
 10 control of the final disposition who claims a closer personal relationship to the
 11 decedent than the decedent's next of kin, who has lived with the decedent, and who
 12 was not in the employ of the decedent or the decedent's family; or, if 2 or more
 13 individuals who are otherwise authorized to control the final disposition under the
 14 order of individuals specified in sub. (2) cannot, by majority vote, decide concerning
 15 the final disposition, any of those individuals or the funeral director or crematory
 16 authority that possesses the decedent's remains.

****NOTE: I do not understand this paragraph. Why would the decedent file a
 petition with the probate court rather than signing an authorization? Is this paragraph
 supposed to apply if any individual specified under sub. (2) disagrees, or only if an
 individual in a particular group under the order disagrees with other members of that
 group? If the former, this paragraph seems to mean that a decedent's otherwise-valid
 authorization, or the order of individuals specified, has no meaning if others disagree
 with it. If that is the case, what is the purpose of sub. (2)?

of priority

priority of

17 2. In making a designation under this paragraph, the probate court may
 18 consider all of the following:

- 19 a. The reasonableness and practicality of the proposed final disposition.

1 b. The degree of the personal relationship between the decedent and each of the
2 individuals claiming the right of final disposition, including whether the decedent
3 was estranged from any of the individuals. ✓

4 c. Except as provided in subd. 3., the desires of the individual or individuals
5 who are ready, able, and willing to pay the cost of the final disposition. ✓

6 d. The convenience to and needs of other families and friends who wish to pay
7 final respects to the decedent. ✓

8 e. The express written desires of the decedent. ✓

****NOTE: What does this language mean? Is it referring to a will or to an
authorization of the decedent? If so, wouldn't either of those documents take priority?

9 f. The degree to which any proposed final disposition would permit maximum
10 participation by all individuals who wish to pay final respects to the decedent. ✓

****NOTE: How is this provision different from d., above? ✓

priority of

11 3. An individual's payment or agreement to pay for all or part of the costs of final
12 disposition, or the fact that an individual is the personal representative of the
13 decedent, does not, by itself, provide the individual any greater opportunity to
14 control the final disposition than the individual otherwise has under this section. ✓

15 (4) DECLINING TO EXERCISE CONTROL OR RESIGNING CONTROL. An individual who
16 is otherwise authorized to control final disposition under the order of individuals
17 specified in sub. (2) or who is designated under sub. (3) (c) 2 may accept the control,
18 may decline to exercise the control, or may, after accepting the control, resign it. ✓

19 (5) LIABILITY OF FUNERAL DIRECTOR OR CREMATORY AUTHORITY. (a) If inability to
20 agree exists among any individuals, as specified in sub. (3) (c), no funeral director or
21 crematory authority is liable for his or her refusal to accept the decedent's remains,
22 to inter or otherwise dispose of the decedent's remains, or to complete the
23 arrangements for the final disposition unless specifically directed to do so under an

(intro.)

1 order of the probate court or unless the individuals in disagreement present the
2 funeral director or crematory authority with a written agreement, signed by the
3 individuals, that specifies the final disposition. ✓

4 (b) A funeral director or crematory authority that retains the remains of a
5 decedent for final disposition before individuals specified in sub. (3) (c) (intro.) reach
6 agreement or before the probate court makes a final decision under sub. (3) (c) may
7 embalm or refrigerate and shelter the remains while awaiting the agreement or the
8 probate court's decision and may add the cost of embalming or refrigeration and
9 shelter, as appropriate, to the final disposition costs. ✓

10 (c) If a funeral director or crematory authority brings an action under this
11 subsection, the funeral director or crematory authority may add reasonable legal
12 fees and court costs associated with bringing a petition under sub. (3) (c) to the cost
13 of final disposition. 1.

****NOTE: This paragraph uses the language "brings an action under this subsection." Usually that language refers to a suit of some kind, but this subsection has no provision for a suit. Is it, instead, referring to bringing a petition under sub. (3) (c)?

14 (d) This subsection may not be construed to require or otherwise impose a duty
15 upon a funeral director or crematory authority to bring an action under this
16 subsection, and a funeral director or crematory authority may not be held criminally
17 or civilly liable for failing or omitting to bring an action under this subsection. ✓

****NOTE: Please see the ****Note under par. (c).

18 (e) In the absence of written notice to the contrary from an individual who
19 claims control of the final disposition because of precedence under the order of
20 individuals ^{SET} specified under sub. (2), no funeral director or crematory authority, who
21 relies in good faith on instructions concerning the final disposition from another
22 individual who first claims control of the final disposition but has less precedence

priority of

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priority of

1 under the order of individuals specified in sub. (2), and who acts or omits to act in
2 accordance with these instructions, is civilly or criminally liable or may be found
3 guilty of unprofessional conduct for the action or omission. ✓

****NOTE: Please review this provision carefully. I have combined s. 157.07 (4) and
(5) of the proposed instructions. ✓

4 (6) LIABILITY FOR COSTS OF FINAL DISPOSITION. (a) Liability for the reasonable
5 costs of the final disposition is as follows: ✓

- 6 1. From the decedent's estate, as specified under s. 859.25 (1). ✓
- 7 2. From the individual or individuals exercising control of final disposition, for
8 any claims remaining after payment is made under subd. 1., except as provided in
9 par. (b). ✓

****NOTE: What if the individual exercising control, or who has been designated by
the probate court to exercise control, is the funeral director or crematory authority? ✓

10 (b) If an individual who first exercises control of final disposition subsequently
11 resigns that control under sub. (4) before completion, any reasonable costs of the final
12 disposition that are encumbered by the individual before resigning and that are not
13 paid under par. (a) 1. are the liability of the individual. ✓

****NOTE: Please review this subsection carefully. I have combined s. 157.07 (6) and
(7) of the proposed instructions.

14 (7) JURISDICTION. The probate court for the county in which the decedent last
15 resided has exclusive jurisdiction over matters that arise under this section. ✓

16 (8) AUTHORIZATION FOR FINAL DISPOSITION. (a) An individual who is of sound
17 mind and has attained age 18 may voluntarily execute an authorization for final
18 disposition, which shall take effect on the date of execution. An individual for whom
19 an adjudication of incompetence and appointment of a guardian of the person is in
20 effect under ch. 880 is presumed not to be of sound mind for purposes of this
21 subsection.

1 (b) An authorization for final disposition may express the declarant's special
2 directions, instructions concerning religious observances, and suggestions
3 concerning the source of funds for any of the following: ✓

- 4 1. Arrangements for a viewing. ✓
- 5 2. Funeral ceremony, memorial service, graveside service, or other last rite. ✓
- 6 3. Burial, cremation and burial, or other disposition, or donation of the
7 declarant's body after death. ✓

8 (c) An authorization for final disposition authorizes a representative and one
9 or more named successor representatives to carry out the directions, instructions,
10 and suggestions of the declarant, as expressed in the declarant's authorization for
11 final disposition. ✓

12 (d) An authorization for final disposition shall meet all of the following
13 requirements: ✓

- 14 1. List the name and last-known address, as of the date of execution of the
15 authorization for final disposition, of each representative and each successor
16 representative named, and be signed by each representative and each successor
17 representative named. ✓

***NOTE: The instructions seem to require that the representative, successor
representative, declarant, and witnesses all sign at the same time, which might be
difficult and cumbersome to achieve. ✓

- 18 2. Be signed and dated by the declarant. ✓
- 19 3. Be witnessed by two ^{or 2} witnesses who each have attained age 18 and who are
20 not related by blood, marriage, or adoption to the declarant, or be acknowledged
21 before a notary public. ✓

22 (e) No health care provider, funeral director, crematory authority, employee of
23 a funeral director or crematory authority, or member of the clergy may serve as a

1 representative under the requirements of this subsection unless he or she is related
2 to the declarant by blood, marriage, or adoption.

****NOTE: I have specified "under the requirements of this subsection" for this provision because otherwise there is a conflict with both subs. (2) (h) and (3) (c) 1. b. ✓

3 (f) An authorization for final disposition may be in the following form: ✓

AUTHORIZATION FOR FINAL DISPOSITION

4 I, (print name and address), ✓ being of sound mind, willfully and voluntarily
5 make known by this document my desire that, upon my death, the final disposition
6 of my remains be under the control of my representative under the requirements of
7 section 157.056, Wisconsin Statutes, and, with respect to that final disposition only,
8 I hereby appoint the representative and any successor representative named in this
9 document. All decisions made by my representative or any successor representative
10 with respect to the final disposition of my remains are binding. ✓

****NOTE: This statement does not require that the representative act in accordance with the declarant's desires expressed in the document. ✓

11 Name of representative.....

12 Address.....

13 Telephone number.....

14 If my representative dies, becomes incapacitated, resigns, refuses to act, ceases
15 to be qualified, or cannot be located within the time necessary to control the final
16 disposition of my remains, I hereby appoint the following individuals, each to act
17 alone and successively, in the order specified, to serve as my successor
18 representative: ✓

19 1. Name of first successor representative.....

20 Address.....

21 Telephone number.....

1 2. Name of second successor representative.....

2 Address.....

3 Telephone number.....

4 SUGGESTED SPECIAL DIRECTIONS.....

5 SUGGESTED INSTRUCTIONS CONCERNING RELIGIOUS

6 OBSERVANCES.....

7 SUGGESTED SOURCE OF FUNDS FOR IMPLEMENTING FINAL DISPOSITION DIRECTIONS AND

8 INSTRUCTIONS..... ✓

 ***NOTE: All of these provisions are "suggested" only; what is intended by this? If it is intended that the directions, instructions, etc., are subject to reasonableness, it should say so. In addition, if the "suggested source of funds" is in conflict with s. 157.056 (6), this instruction could not be carried out, and it would be misleading to the declarant to think it could be. ✓

9 This authorization becomes effective upon my death. ✓

10 I hereby revoke any prior authorization for final disposition that I may have
11 signed before the date that this document is signed. ✓

12 I hereby agree that any funeral director or crematory authority that receives
13 a copy of this document may act under it. ✓ Any modification or revocation of this
14 document is not effective as to a funeral director or crematory authority until the
15 funeral director or crematory authority receives actual notice of the modification or
16 revocation. No funeral director or crematory authority may be liable because of
17 reliance on a copy of this document. ✓

18 The representative and any successor representative, by accepting
19 appointment under this document, assume the powers and duties specified for a
20 representative under section 157.056, Wisconsin Statutes, including liability for the
21 reasonable costs of the final disposition of my remains. ✓

 ***NOTE: Note that this provision conflicts with sub. (6) (a).

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Signed thisday of

Signature of declarant.....

I hereby accept appointment as representative for the control of final disposition of the declarant's remains. ✓

Signature of representative.....

I hereby accept appointment as successor representative for the control of final disposition of the declarant's remains. ✓

Signature of first successor representative.....

Signature of second successor representative.....

I attest that the declarant signed or acknowledged this authorization for final disposition in my presence and that the declarant appears to be of sound mind and not subject to duress, fraud, or undue influence. I further attest that I am not the representative or the successor representative appointed under this document, that I am aged at least ⁶⁰eighteen, and that I am not related to the declarant by blood, marriage, or adoption.

Witness (print name).....

Signature.....

Address.....

Date.....

Witness (print name).....

Signature.....

1 Address.....

2 Date.....

3

4 State of Wisconsin

5 County of

6 On (date)....., before me personally appeared

(name of declarant)

7 , known to me or satisfactorily proven to be

8 the individual whose name is specified in this document as the declarant and who

9 has acknowledged that he or she executed the document for the purposes expressed

10 in it. I attest that the declarant appears to be of sound mind and not subject to duress,

11 fraud, or undue influence. ✓

12 Notary public.....

13 My commission expires.....

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3104/P2dn

DAK:whj:rs

(date)

↑
lmk

✓
To Representative Kerkman:

I am continuing to provide you with this draft in preliminary form, because numerous issues that need resolution have arisen in the course of redrafting the first version to incorporate the Ohio language. ✓ I have asked specific questions in ****NOTES embedded in the text of the draft and have these additional comments or questions: ✓

1. I have entitled the power created in the draft as "control" of final disposition, rather than a "right," so as not to confuse the authorization granted with, for instance, a constitutional right or an entitlement. ✓

2. The first draft of this request had the following numerous provisions that are not contained in this draft and that you may wish to include: ✓

a. Proxy signing on behalf of the declarant. ✓

b. The requirement that DHFS prepare and provide copies of the sample form for distribution to various entities, ^{keep} ~~plus a statement of explanation.~~ ^{move}

c. The option to not designate a specific representative. ✓

d. Procedures for revocation (these are especially important and are, in this draft, mentioned only in the form itself). ✓

e. Penalties. ✓

3. Since this draft contains a directive, I'm not entirely sure why the provisions are more appropriately in ch. 157, stats., than in ch. 154, stats. ✓

Please let me know if I may provide you with further assistance with respect to this draft. ✓

Debora A. Kennedy
Managing Attorney
Phone: (608) 266-0137
E-mail: debora.kennedy@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3104/P2dn
DAK:lmk:pg

December 2, 2005

To Representative Kerkman:

I am continuing to provide you with this draft in preliminary form, because numerous issues that need resolution have arisen in the course of redrafting the first version to incorporate the Ohio language. I have asked specific questions in ****NOTES embedded in the text of the draft and have these additional comments or questions:

1. I have entitled the power created in the draft as "control" of final disposition, rather than a "right," so as not to confuse the authorization granted with, for instance, a constitutional right or an entitlement.
2. The first draft of this request had the following numerous provisions that are not contained in this draft and that you may wish to include:
 - a. Proxy signing on behalf of the declarant.
 - b. The requirement that DHFS prepare and provide copies of the sample form, plus a statement of explanation for distribution to various entities.
 - c. The option to not designate a specific representative.
 - d. Procedures for revocation (these are especially important and are, in this draft, mentioned only in the form itself).
 - e. Penalties.
3. Since this draft contains a directive, I'm not entirely sure why the provisions are more appropriately in ch. 157, stats., than in ch. 154, stats.

Please let me know if I may provide you with further assistance with respect to this draft.

Debra A. Kennedy
Managing Attorney
Phone: (608) 266-0137
E-mail: debra.kennedy@legis.state.wi.us

Kennedy, Debora

From: Popp, Sarah
Sent: Tuesday, January 24, 2006 11:24 AM
To: Kennedy, Debora
Subject: FW: DOCS-#13595-v1-Memo_to_Mark_Paget_re_Disposition_Bill.DOC

Attachments: DOCS-#13595-v1-Memo_to_Mark_Paget_re_Disposition_Bill.DOC



DOCS-#13595-v1-
Memo_to_Mark_Pa..

Deborah

Per my call to you. Attached is the 1st of 2 emails relating to LRB3104/P2. If there aren't any questions left with the draft after you review these documents, let's go ahead and get rid of the preliminary status.

Thanks so much for all of your help.

Sarah

Kennedy, Debora

From: Popp, Sarah
Sent: Tuesday, January 24, 2006 11:27 AM
To: Kennedy, Debora
Subject: FW: Scan from a Xerox WorkCentre Pro

Attachments: Scan001.PDF



Scan001.PDF (1
MB)

Deborah

Attached is the 2nd attachment relating to LRB 3104/P2. The first part is some answers to your questions, the second is the actual draft with written changes.

Again, if you have any questions, please do not hesitate to call.

Sarah

M E M O R A N D U M

TO: Mark Paget
FROM: T. Scott Gilligan
DATE: January 23, 2006
RE: **Disposition Bill**

With regard to the points raised by Debora Kennedy in her December 2, 2005 Drafter's Note, I have no problem with characterizing the right of disposition as "control of disposition." Whether we refer to it as a "right" or "control" has no real impact on the fact that the holder is the person with the power and authority to direct the funeral and disposition.

In Section 2 of the Drafter's Note, Ms. Kennedy notes that the current draft of the Bill does not address proxies, the preparation of sample forms by DHFS, the option to not designate a specific representative, procedures for revocation, and penalties. When I prepared changes to the draft Bill along with my letter of December 19, 2005, I also did not address any of these five provisions. I do not believe that any of them are vital to the Bill, but it would certainly be appropriate to address them. If Ms. Kennedy has suggested language, I will be happy to review and comment on it.

In the third section of the Drafter's Note, Ms. Kennedy questions whether it would be more appropriate to put the Bill in Chapter 154 rather than 157. I do not have any preference one way or the other with regard to the chapter that the law would appear in.

Mark, if you have any questions, please give me a call.

Gilligan Law Offices

3734 Eastern Avenue
Cincinnati, Ohio 45226
(513) 871-6332
(513) 871-4749 Fax

T. Scott Gilligan
(513) 871-5297
scott@gilliganlegal.com

December 19, 2005

via Fax (414) 453-9860 and Regular Mail

Mark Paget, Executive Director
Wisconsin Funeral Directors Association
2300 N. Mayfair Road, Suite 595
Wauwatosa, Wisconsin 53226-1508

RE: Right of Disposition Bill

Dear Mark:

I reviewed the questions that have been raised on the preliminary draft of the control of final disposition bill. For the most part, the comments were very insightful and, based on the comments, I have made revisions in the enclosed draft. My comments to the questions are as follows:

- ✓ 1. Definition of "Estranged" (157.056(1)(d)): I do not agree with the comment regarding the definition of "estranged." The commentator felt that the phrase "emotionally separated" would not necessarily apply to persons who hate each other because their emotions would be the same, *i.e.*, hatred. I believe the commentator is misinterpreting the word "separate." However, to address the concern, I would suggest that we use the word "alienated" instead of "separated" in the definition.
- ✓ 2. Order of Priority (157.056(2)(f)): The commentator suggested that instead of using the kinship priority list spelled out in Section 852.01(1) of the Wisconsin Code, it may be easier to utilize the kinship chart set forth in Section 990.001(16). I agree with this comment and revised the draft Bill.
- ✓ 3. Good Faith Effort (157.056(2)(h)): The commentator indicates that it is not clear in Subsection (h) who is to make a good faith effort to locate the next-of-kin. To address that concern, I modified Subsection (h) to provide as follows:

"Any individual other than an individual specified under pars. (a) to (g) who is willing to control the final disposition and who attests

Gilligan Law Offices

Mark Paget
December 19, 2005
Page 2

in writing that he or she has made a good-faith effort, to no avail, to contact the individuals under pars. (a) to (g)."

4. Criminal Liability (157.056(3)(b)1): Currently, this paragraph takes away the control of final disposition from any individual who has been charged with criminally causing the death of the decedent. However, it also provides that if the charges are dismissed or the individual is found not guilty, the control of final disposition is restored. The commentator questions whether the provision restoring the control is realistic since the disposition would probably have occurred prior to any dismissal or acquittal.

The commentator is correct that in nearly every case, the disposition will have occurred prior to any resolution of a criminal action. However, in certain cases, this provision could come into play. For example, a family member that is acquitted and reacquires the control of final disposition may want to seek disinterment and re-interment at a different cemetery. If the remains have been cremated, the person with the reacquired control of final disposition may seek possession of the cremated remains. Therefore, although it is unlikely this provision would come into play often, I believe it is still worthwhile to have the provision in the statute.

The commentator has also listed eight different Wisconsin statutes regarding criminal death. It would be my recommendation that the right of disposition only be taken away in the event of the criminal offenses listed in Subsections (a) through (d). The criminal charges listed in Subsections (e) through (h) all arise out of negligence as opposed to intentional or reckless culpability. I am not certain whether we want to deprive a person of control of the final disposition because of negligence. For example, if a parent failed to restrain a child in a seatbelt and the child died in an accident, does Wisconsin want to take away that parent's right to arrange the funeral for his or her child?

5. Notification of Death (157.056(3)(b)2): This paragraph takes away an individual's control of final disposition if they fail to exercise it within two days after notification of the decedent's death or within five days after the decedent's death, whichever is later. The commentator asks who is to perform the notification. I do not think that it is necessary to list who is to perform the notification. The important thing is that regardless of who provides the notification, the notification starts the running of the clock. In most cases, the funeral director will be the one making the notification. However, I do not think we want to require notification by the funeral director in order to start the ticking of the two-day clock.

change
157.056
(3)(b)1
(inter)
D Note
cr
157.056
(2)(i)

D Note

Gilligan Law Offices

Mark Paget
December 19, 2005
Page 3

6. Probate Court Petition (157.056(3)(c)1): This section provides that a petition regarding control of the final disposition "may" be filed with the probate court. The commentator asks whether the word "may" should be replaced by the word "shall." I would agree with this change.

7. Standing to Sue (157.056(3)(c)1): The commentator questioned the logic of having this paragraph since it appears to contradict the previous portions of the Bill that set out a prioritized list of who holds control of the final disposition. However, it should be pointed out that all this section is stating is who may seek probate court intervention, *i.e.*, who has standing to sue. It does not state that a person filing a challenge will prevail, but only that they have a right to make the challenge.

The Bill is designed to give the probate court the ultimate decision on the control of the final disposition. Therefore, although subsection 2 sets out a priority list, the probate court can supersede that list. For example, if the probate court finds that an authorization for final disposition was obtained by fraud or duress, the judge could set it aside. Additionally, if a question arose as to whether the decedent had mental capacity to make a designation, it would be the probate court that decides the issue.

The commentator also questioned why the decedent during his or her lifetime would seek probate court intervention when the individual could simply sign an authorization. The commentator has a valid point. For that reason, I would recommend we make the changes as set forth in the attached Bill.

8. Expressed Desires of the Decedent (157.056(3)(c)2): One of the six factors that the probate court is to consider in resolving a dispute is the expressed written desires of the decedent. The commentator asked whether this is referring to a will or an authorization. If that is the case, the commentator asked the question as to whether both of these documents would take priority.

The short answer to the commentator's question is that a will or a written authorization that expressed the decedent's preferences regarding a funeral and disposition do not take precedence. Other than anatomical gifts which are binding, the Bill recognizes that the decedent does not have absolute control over funeral and disposition arrangements. While the Bill gives the decedent the ability to appoint a living individual who can control funeral and disposition arrangements, the bottom line is that the decedent's written instructions, whether they be in a will, authorization or some other document, are not absolute binding upon the appointed representative.

Gilligan Law Offices

Mark Paget
December 19, 2005
Page 4

The Bill attempts to strike a balance between following the wishes of a decedent and the emotional needs and resources of survivors. Preferences expressed by a decedent, especially those that were made years before the decedent's death, may be impossible, impractical, or emotionally harmful to survivors. For example, if a young man signed a document in 1980 stating that he wanted his cremated remains to be distributed to a former girlfriend, such a disposition could cause great emotional harm to his wife and children 25 years later. Rather than requiring absolute compliance with these instructions, the Bill provides the decedent with a method to control disposition by the appointment of a representative. However, the appointment of a representative also allows the family and the funeral home to deal with a person who has flexibility to alter plans that are no longer possible, practical or reasonable.

Several states, especially out west, have right of disposition statutes requiring that written preferences of decedents be strictly complied with. While most families honor those wishes, there are cases when the expressed preferences of the decedent are opposed by all of the family members. In those cases, especially when there is no one to insist that the decedent's preferences be followed, it is often the case that the decedent's preferences will be ignored.

We believe this Bill sets up a better, more flexible model. While a decedent no longer has absolute control to decide all funeral and disposition arrangements, he or she can control most aspects by the appointment of a trusted agent. By this method, there will be an individual with the power to control arrangements who survives the decedent and is present to ensure that the decedent's wishes are followed.

The Bill's design also injects a living person into the funeral arrangements who can agree to change a decedent's preferences that may be impossible, impracticable, or do not meet the needs of survivors. For example, if a decedent had requested a funeral in a church that no longer exists, the agent can decide on a substitute church. Or, if a decedent has expressed a preference for a funeral that would cost \$8,000, but left assets totaling only \$2,000, the agent would be able to alter the funeral and disposition arrangements and opt for a less expensive service and disposition.

9. Factors (157.056(3)(c)2): The commentator notes that there appears to be an overlap between the fourth and sixth factor that the probate court is to consider in this subsection. I agree that the two factors appear to be somewhat duplicative. We have deleted the fourth factor and combined it with the sixth factor to address this concern.

Gilligan Law Offices

Mark Paget
December 19, 2005
Page 5

✓ 10. Bring a Petition (157.056(5)(c)): The commentator cites the fact that paragraph (c) contains inconsistent terms. In the first line, it discusses a funeral director or crematory authority "bringing an action under this subsection." Later, it discusses a funeral director or crematory association "bringing a petition under sub. (3)(c)1." To be consistent, we agree with the commentator that the words "brings an action" should be replaced by "brings a petition." We have made the change on the attached draft Bill.

✓ 11. Immunity (157.056(5)(e)): The commentator notes that two sections of the earlier draft had been combined into this paragraph (e). I believe that the revised paragraph (e) would provide adequate immunity to funeral homes and crematories.

✓ 12. Liability for Costs (157.056(6)): The commentator notes that funeral directors and crematory authorities who assume the control of the disposition or who are appointed by a probate court to carry out a disposition should not be responsible for the cost of the disposition. That is a valid point and we have revised subsection (6) accordingly.

✓ 13. Execution of Authorization (157.056(8)(d)): The commentator interprets the instructions for the execution of the final disposition authorization as requiring the representative, successor representative, declarant and witnesses to all sign at the same time. I do not agree with that assessment. I see no indication in the language which would require that the signatures all take place at the same time. Nevertheless, we have revised the sample authorization form on pages 12 and 13 to indicate the date(s) that the representatives sign the form.

I also recommend that subsection 3 be clarified to indicate that it is the declarant's signature that must be witnessed or acknowledged before a notary public. Currently it is not clear whether the signature of the declarant or the signature of the representative is the one that is subject to the witness or acknowledgement requirement. We have added language to clear up that issue.

✓ 14. Excluded Representatives (157.056(e)): Paragraph (e) provides that no health care provider, funeral director, crematory authority, employee of a funeral home or crematory authority, or a member of the clergy may serve as a representative unless they are related by blood, marriage or adoption. The commentator added language to that section to indicate that this exclusion only applies to a representative who is appointed by a final disposition authorization. In other words, these individuals may serve as a representative under subsections (2)(h) and (3)(c)1.b. We agree with the additional language added by the commentator.

Gilligan Law Offices

Mark Paget
December 19, 2005
Page 6

✓ 15. Sample Authorization (157.056(8)(f)): The commentator raised several questions regarding whether stated preferences in the authorization on matters regarding the funeral, religious observations and funding should be binding upon the representative. As we noted in Section 8 of this letter above, it is the intent of the Bill that the representative have final authority to make funeral and disposition arrangements and not be absolutely bound by the instructions of the decedent.

✓ The commentator also noted that the statement in the authorization under which the representative acknowledge liability for the costs of the final disposition conflicts with subsection (6)(a). Subsection (6)(a) places the primary responsibility for funeral costs on the estate. We have revised the authorization language to address this concern.

Mark, if you have any questions regarding our changes or comments, please give me a call.

Sincerely yours,



T. Scott Gilligan

TSG/lab
Enclosure

2005 - 2006 LEGISLATURE

LRB-3104/P2

DAK:lrnk:pg

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT *to create* 157.056 of the statutes; relating to: control of final disposition
2 of certain human remains.

Analysis by the Legislative Reference Bureau

This bill is drafted in preliminary form. An analysis will be included in a subsequent version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 157.056 of the statutes is created to read:
4 **157.056 Control of final disposition of certain human remains. (1)**
5 DEFINITIONS. (a) "Authorization for final disposition" means a written, signed
6 document that is acknowledged before a notary public or is witnessed and that is
7 voluntarily executed by a declarant under sub. (8), but is not limited in form or
8 substance to that provided in sub. (8).
9 (b) "Credential" has the meaning given in s. 440.01 (2) (a).

2005 - 2006 Legislature

- 2 -

LRB-3104/P2
DAK:lmk:pg
SECTION 1

1 (c) "Declarant" means an individual who executes an authorization for final
2 disposition.

3 ✓ (d) "Estranged" means being physically and emotionally ^{alienated} ~~separated~~ for a period
4 of time, at the time of the decedent's death, and clearly demonstrating an absence of
5 due affection, trust, and regard.

***NOTE: This definition, from the instructions, may be inapt, in part. Two people who are physically separate from each other and who dislike each other extremely may not be "emotionally separate" from each other; in fact, they may share the same emotion--hatred. It seems to me that the language about emotional separation is unnecessary, given the requirement of a clear demonstration of an absence of due affection, trust, and regard.

6 (e) "Final disposition" means disposition of a decedent's remains, including any
7 of the following:

- 8 1. Arrangements for a viewing.
- 9 2. A funeral ceremony, memorial service, graveside service, or other last rite.
- 10 3. A burial, cremation and burial, or other disposition, or donation of the
11 decedent's body.

12 (f) "Health care provider" means any person who has a credential to provide
13 health care.

14 (g) "Member of the clergy" has the meaning given in s. 765.002 (1).

15 (h) "Representative" means an individual specifically designated in an
16 authorization for final disposition or, if that individual is unable or unwilling to carry
17 out the declarant's decisions and preferences, a successor representative designated
18 in the authorization for final disposition to do so.

19 (2) INDIVIDUALS WITH CONTROL OF FINAL DISPOSITION: ORDER. Except as provided
20 in sub. (3), any of the following, as prioritized in the following order, who is at least
21 18 years old and has not been adjudicated incompetent under ch. 880, may control
22 final disposition, including the location, manner, and conditions of final disposition:

1 (a) A representative of the decedent acting under the decedent's authorization
2 for final disposition that conveys to the representative the control of final disposition.

3 (b) The surviving spouse of the decedent.

4 (c) The surviving child of the decedent, unless more than one child of the
5 decedent survives. In such an instance, the majority of the surviving children has
6 control of the final disposition, except that fewer than the majority of the surviving
7 children may control the final disposition if that minority has used reasonable efforts
8 to notify all other surviving children and is not aware of opposition by the majority
9 to the minority's intended final disposition.

10 (d) The surviving parent or parents of the decedent or a surviving parent who
11 is available if the other surviving parent is unavailable after the available surviving
12 parent has made reasonable efforts to locate him or her.

13 (e) The surviving sibling of the decedent, unless more than one sibling of the
14 decedent survives. In such an instance, the majority of the surviving siblings has
15 control of the final disposition, except that fewer than the majority of the surviving
16 siblings may control the final disposition if that minority has used reasonable efforts
17 to notify all other surviving siblings and is not aware of opposition by the majority
18 to the minority's intended final disposition.

19 (f) In descending order, an individual in the class of the next degree of kinship
20 specified in s. ~~852.01(1)~~ 990.00(16)

****NOTE: I would suggest that this order of kinship, which is for division of property if a decedent dies without making a will, is much more complex, less easy to understand, and appears to be less appropriate than the degrees of kinship specified in s. 990.001 (16), stats.; it also is confusing in relation to the order already set forth under pars. (a) to (e) of this subsection.

21 (g) The guardian of the person, if any, of the decedent.

he or she has made

1 (h) Any individual other than an individual specified under pars. (a) to (g) who
2 is willing to control the final disposition and who attests in writing that a good-faith
3 effort ~~has been made~~, to no avail, to contact the individuals under pars. (a) to (g).

****NOTE: Is this individual supposed to make the good-faith effort? If this issue is not clarified, it is entirely uncertain who must perform this task.

4 (3) EXCEPTIONS. (a) All of the following are exceptions to any control conferred
5 under sub. (2):

6 1. The disposition of any unrevoked anatomical gift made by the decedent
7 under s. 157.06 (2) or made by an individual other than the decedent under s. 157.06
8 (3) or (4).

9 2. Any power or duty of a coroner, medical examiner, or other physician licensed
10 to perform autopsies with respect to the reporting of certain deaths, performance of
11 autopsies, and inquests under ch. 979.

12 (b) None of the following is authorized under sub. (2) to control the final
13 disposition:

14 1. An individual who is otherwise authorized to control final disposition under
15 the order of priority of individuals specified in sub. (2) but who has been charged with
16 any of the following in connection with the decedent's death and the charges are
17 known to the funeral director or crematory authority, unless the charges are
18 dismissed or the individual is found not guilty of the offense:

****NOTE: Is the "unless" clause realistic here, i.e., does final disposition of a body usually await a trial (with possible appeal) and a finding of not guilty?

19 a. First-degree intentional homicide under s. 940.01 (1).

20 b. First-degree reckless homicide under s. 940.02.

21 c. Second-degree intentional homicide under s. 940.05.

22 d. Second-degree reckless homicide under s. 940.06.

- 1 e. ~~Homicide resulting from negligent control of a vicious animal under s.~~
- 2 ~~940.07.~~
- 3 f. ~~Homicide by the negligent operation or handling of a dangerous weapon,~~
- 4 ~~explosives, or fire under s. 940.08.~~
- 5 g. ~~Homicide by intoxicated use of a vehicle or firearm under s. 940.09.~~
- 6 h. ~~Homicide by the negligent operation of a vehicle under s. 940.10.~~

***NOTE: This state does not have the crime of voluntary manslaughter, as Ohio apparently does; please review the crimes that I have specified instead. Please also note that several of these crimes apply to the death of an unborn child; is that what you intend?

7 2. An individual who is otherwise authorized to control final disposition under
8 the order of priority of individuals specified in sub. (2) but who fails to exercise this
9 authorization within 2 days after he or she is notified of the decedent's death or
10 within 5 days after the decedent's death, whichever is later.

***NOTE: Again, who is to perform the task of notifying individuals specified in sub. (2)?

11 3. The decedent's spouse, if an action under ch. 767 to terminate the marriage
12 of the spouse and the decedent was pending at the time of the decedent's death.

13 4. An individual for whom a determination is made under by the probate court
14 under par. (c) 2. b. that the individual and the decedent were estranged at the time
15 of death.

16 (c) If the individuals specified in sub. (2) are unable to agree on the final
17 disposition, the probate court that has jurisdiction for the county in which the
18 decedent resided at the time of his or her death may designate an individual as most
19 fit and appropriate to control the final disposition. All of the following apply to a
20 designation made under this paragraph:

21 1. A petition regarding control of the final disposition ^{shall} ~~may~~ be filed with the
22 probate court by ~~any of the following:~~

****NOTE: Shouldn't "may" in this provision be "shall?" It appears to be the only way in which the issue is properly before the probate court, at least according to the instructions.

1 ~~a. Before his or her death, the decedent or his or her legal representative.~~

2 ~~b. After the decedent's death,~~ a relative of the decedent; an individual seeking
3 control of the final disposition who claims a closer personal relationship to the
4 decedent than the decedent's next of kin, who has lived with the decedent, and who
5 was not in the employ of the decedent or the decedent's family; or, if 2 or more
6 individuals who are otherwise authorized to control the final disposition under the
7 order of priority of individuals specified in sub. (2) cannot, by majority vote, decide
8 concerning the final disposition, any of those individuals or the funeral director or
9 crematory authority that possesses the decedent's remains.

****NOTE: I do not understand this paragraph. Why would the decedent file a petition with the probate court rather than signing an authorization? Is this paragraph supposed to apply if *any* individual specified under sub. (2) disagrees, or only if an individual in a particular group under the order of priority disagrees with other members of that group? If the former, this paragraph seems to mean that a decedent's otherwise-valid authorization, or the order of priority of individuals, has no meaning if others disagree with it. If that is the case, what is the purpose of sub. (2)?

10 2. The probate court may consider all of the following:

11 a. The reasonableness and practicality of the proposed final disposition.
12 b. The degree of the personal relationship between the decedent and each of the
13 individuals claiming the right of final disposition, including whether the decedent
14 was estranged from any of the individuals.

15 c. Except as provided in subd. 3., the desires of the individual or individuals
16 who are ready, able, and willing to pay the cost of the final disposition.

17 ~~d. The convenience to and needs of other families and friends who wish to pay~~
18 ~~final respects to the decedent.~~

19 d.e. The express written desires of the decedent.

***NOTE: What does this language mean? Is it referring to a will or to an authorization of the decedent? If so, wouldn't either of those documents take priority?

1 *e.g.* The degree to which any proposed final disposition would permit maximum
2 participation by *family members, friends and all others* ~~individuals~~ who wish to pay final respects to the decedent.

***NOTE: How is this provision different from d., above?

3 3. An individual's payment or agreement to pay for all or part of the costs of final
4 disposition, or the fact that an individual is the personal representative of the
5 decedent, does not, by itself, provide the individual any greater opportunity to
6 control the final disposition than the individual otherwise has under this section.

7 (4) DECLINING TO EXERCISE CONTROL OR RESIGNING CONTROL. An individual who
8 is otherwise authorized to control final disposition under the order of priority of
9 individuals specified in sub. (2) or who is designated under sub. (3) (c) may accept the
10 control, may decline to exercise the control, or may, after accepting the control, resign
11 it.

12 (5) LIABILITY OF FUNERAL DIRECTOR OR CREMATORY AUTHORITY. (a) If inability to
13 agree exists among any individuals, as specified in sub. (3) (c) (intro.), no funeral
14 director or crematory authority is liable for his or her refusal to accept the decedent's
15 remains, to inter or otherwise dispose of the decedent's remains, or to complete the
16 arrangements for the final disposition unless specifically directed to do so under an
17 order of the probate court or unless the individuals in disagreement present the
18 funeral director or crematory authority with a written agreement, signed by the
19 individuals, that specifies the final disposition.

20 (b) A funeral director or crematory authority that retains the remains of a
21 decedent for final disposition before individuals specified in sub. (3) (c) (intro.) reach
22 agreement or before the probate court makes a final decision under sub. (3) (c) may
23 embalm or refrigerate and shelter the remains while awaiting the agreement or the

1 probate court's decision and may add the cost of embalming or refrigeration and
2 shelter, as appropriate, to the final disposition costs.

3 (c) If a funeral director or crematory authority brings ^{a petition} ~~an action~~ under ~~this~~
4 ~~subsection~~, ^{sub. (3)(c) 1,} the funeral director or crematory authority may add reasonable legal
5 fees and court costs associated with bringing a petition under sub. (3) (c) 1. to the cost
6 of final disposition.

****NOTE: This paragraph uses the language "brings an action under this subsection." Usually that language refers to a suit of some kind, but this subsection has no provision for a suit. Is it, instead, referring to bringing a petition under sub. (3) (c)?

7 (d) This subsection may not be construed to require or otherwise impose a duty
8 upon a funeral director or crematory authority to bring ^{a petition under sub. 3(c) 1,} ~~an action~~ under this
9 ~~subsection~~, and a funeral director or crematory authority may not be held criminally
10 or civilly liable for failing or omitting to bring ^{a petition} ~~an action~~ under ~~this~~ subsection.

****NOTE: Please see the ****Note under par. (c). ^{that}

11 (e) In the absence of written notice to the contrary from an individual who
12 claims control of the final disposition because of precedence under the order of
13 priority of individuals specified under sub. (2), no funeral director or crematory
14 authority, who relies in good faith on instructions concerning the final disposition
15 from another individual who first claims control of the final disposition but has less
16 precedence under the order of priority of individuals specified in sub. (2), and who
17 acts or omits to act in accordance with these instructions, is civilly or criminally liable
18 or may be found guilty of unprofessional conduct for the action or omission.

****NOTE: Please review this provision carefully. I have combined s. 157.07 (4) and (5) of the proposed instructions.

19 (6) LIABILITY FOR COSTS OF FINAL DISPOSITION. (a) Liability for the reasonable
20 costs of the final disposition is as follows:

- 21 1. From the decedent's estate, as specified under s. 859.25 (1).

*for funeral directors or crematory authorities
carrying out a final disposition or except*

1 2. From the individual or individuals exercising control of final disposition, for
2 any claims remaining after payment is made under subd. 1., except as provided in
3 par. (b).

****NOTE: What if the individual exercising control, or who has been designated by
the probate court to exercise control, is the funeral director or crematory authority?

4 (b) If an individual who first exercises control of final disposition subsequently
5 resigns that control under sub. (4) before completion, any reasonable costs of the final
6 disposition that are encumbered by the individual before resigning and that are not
7 paid under par. (a) 1. are the liability of the individual.

****NOTE: Please review this subsection carefully. I have combined s. 157.07 (6) and
(7) of the proposed instructions.

8 (7) JURISDICTION. The probate court for the county in which the decedent last
9 resided has exclusive jurisdiction over matters that arise under this section.

10 (8) AUTHORIZATION FOR FINAL DISPOSITION. (a) An individual who is of sound
11 mind and has attained age 18 may voluntarily execute an authorization for final
12 disposition, which shall take effect on the date of execution. An individual for whom
13 an adjudication of incompetence and appointment of a guardian of the person is in
14 effect under ch. 880 is presumed not to be of sound mind for purposes of this
15 subsection.

16 (b) An authorization for final disposition may express the declarant's special
17 directions, instructions concerning religious observances, and suggestions
18 concerning the source of funds for any of the following:

- 19 1. Arrangements for a viewing.
- 20 2. Funeral ceremony, memorial service, graveside service, or other last rite.
- 21 3. Burial, cremation and burial, or other disposition, or donation of the
- 22 declarant's body after death.

1 (c) An authorization for final disposition authorizes a representative and one
2 or more named successor representatives to carry out the directions, instructions,
3 and suggestions of the declarant, as expressed in the declarant's authorization for
4 final disposition.

5 (d) An authorization for final disposition shall meet all of the following
6 requirements:

7 1. List the name and last-known address, as of the date of execution of the
8 authorization for final disposition, of each representative and each successor
9 representative named, and be signed by each representative and each successor
10 representative named.

****NOTE: The instructions seem to require that the representative, successor
representative, declarant, and witnesses all sign at the same time, which might be
difficult and cumbersome to achieve.

11 2. Be signed and dated by the declarant. *The signature of the declarant be*

12 3. ~~Be~~ witnessed by 2 witnesses who each have attained age 18 and who are not
13 related by blood, marriage, or adoption to the declarant, or be acknowledged before
14 a notary public.

15 (e) No health care provider, funeral director, crematory authority, employee of
16 a funeral director or crematory authority, or member of the clergy may serve as a
17 representative under the requirements of this subsection unless he or she is related
18 to the declarant by blood, marriage, or adoption.

****NOTE: I have specified "under the requirements of this subsection" for this
provision because otherwise there is a conflict with both subs. (2) (h) and (3) (c) 1. b.

19 (f) An authorization for final disposition may be in the following form:

AUTHORIZATION FOR FINAL DISPOSITION

20 I, (print name and address), being of sound mind, willfully and voluntarily
21 make known by this document my desire that, upon my death, the final disposition

1 of my remains be under the control of my representative under the requirements of
 2 section 157.056, Wisconsin statutes, and, with respect to that final disposition only,
 3 I hereby appoint the representative and any successor representative named in this
 4 document. All decisions made by my representative or any successor representative
 5 with respect to the final disposition of my remains are binding.

****NOTE: This statement does not require that the representative act in
 accordance with the declarant's desires expressed in the document.

6 Name of representative.....

7 Address.....

8 Telephone number.....

9 If my representative dies, becomes incapacitated, resigns, refuses to act, ceases
 10 to be qualified, or cannot be located within the time necessary to control the final
 11 disposition of my remains, I hereby appoint the following individuals, each to act
 12 alone and successively, in the order specified, to serve as my successor
 13 representative:

14 1. Name of first successor representative.....

15 Address.....

16 Telephone number.....

17 2. Name of second successor representative.....

18 Address.....

19 Telephone number.....

20 SUGGESTED SPECIAL DIRECTIONS.....

21 SUGGESTED INSTRUCTIONS CONCERNING RELIGIOUS

22 OBSERVANCES.....

1 SUGGESTED SOURCE OF FUNDS FOR IMPLEMENTING FINAL DISPOSITION DIRECTIONS AND
2 INSTRUCTIONS.....

***NOTE: All of these provisions are "suggested" only; what is intended by this? If it is intended that the directions, instructions, etc., are subject to reasonableness, it should say so. In addition, if the "suggested source of funds" is in conflict with s. 157.056 (6), this instruction could not be carried out, and it would be misleading to the declarant to think it could be.

3 This authorization becomes effective upon my death.

4 I hereby revoke any prior authorization for final disposition that I may have
5 signed before the date that this document is signed.

6 I hereby agree that any funeral director or crematory authority that receives
7 a copy of this document may act under it. Any modification or revocation of this
8 document is not effective as to a funeral director or crematory authority until the
9 funeral director or crematory authority receives actual notice of the modification or
10 revocation. No funeral director or crematory authority may be liable because of
11 reliance on a copy of this document.

12 The representative and any successor representative, by accepting
13 appointment under this document, assume the powers and duties specified for a
14 representative under section 157.056, Wisconsin statutes, including liability for the
15 reasonable costs of the final disposition of my remains. *if my estate has*
insufficient assets to pay for those costs.

***NOTE: Note that this provision conflicts with sub. (6) (a).

16 *by declarant*
Signed thisday of

17 Signature of declarant.....

18 I hereby accept appointment as representative for the control of final
19 disposition of the declarant's remains.

20 Signature of representative.....

Signed by representative this - - - - day of - - - -

Signed by successor representative this ----- day of -----

1 I hereby accept appointment as successor representative for the control of final
2 disposition of the declarant's remains.

3 Signature of first successor representative.....

4 Signature of second successor representative.....

5

6 I attest that the declarant signed or acknowledged this authorization for final
7 disposition in my presence and that the declarant appears to be of sound mind and
8 not subject to duress, fraud, or undue influence. I further attest that I am not the
9 representative or the successor representative appointed under this document, that
10 I am aged at least 18, and that I am not related to the declarant by blood, marriage,
11 or adoption.

12 Witness (print name).....

13 Signature.....

14 Address.....

15 Date.....

16

17 Witness (print name).....

18 Signature.....

19 Address.....

20 Date.....

21

22 State of Wisconsin

23 County of

24 On (date)....., before me personally appeared

25 (name of declarant)....., known to me or

2005 - 2006 Legislature

- 14 -

LRB-3104/P2
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SECTION 1

1 satisfactorily proven to be the individual whose name is specified in this document
2 as the declarant and who has acknowledged that he or she executed the document
3 for the purposes expressed in it. I attest that the declarant appears to be of sound
4 mind and not subject to duress, fraud, or undue influence.

5 Notary public.....

6 My commission expires.....

7 (END)