

Don't Die in Iowa: Restoring Iowans' Right to Direct Final Disposition of Their Bodily Remains

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ABSTRACT: Iowa has long been a bastion of support for a decedent's right to control disposition of her remains. In early 2013, the Iowa Supreme Court made an unprecedented move when it interpreted Iowa's Final Disposition Act as entirely eliminating that right—even when a decedent repeatedly and incontrovertibly expresses her wishes. This Note argues that the Iowa General Assembly did not intend this result, and proposes two modifications to the Act that can both facilitate the Act's purpose and restore the decedent's right to direct disposition of her remains. First, this Note proposes that the Iowa General Assembly modify the Act to require funeral directors to provide their clients with resources that will help them ensure that survivors honor the client's wishes regarding final disposition. Second, this Note proposes that the Iowa General Assembly modify the Act to include a presumption, rebuttable only by clear and convincing evidence to the contrary, that the person entitled to control disposition of a decedent's remains acts in accordance with the decedent's wishes.

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I. INTRODUCTION

Civilizations throughout history have long held sacred a person's wishes regarding her remains,¹ and surviving family members usually feel an obligation to comply with a decedent's wishes as best they can. From time to time, a decedent will leave particularly eccentric instructions regarding final disposition of her remains. For example, the creator of the cylindrical Pringles potato chip container dictated that part of his remains be placed in one of his iconic cans.² The man who invented the Frisbee and created the sport of disc golf wanted his ashes to be molded into one of his own toys.³ A senior editor at Marvel Comics had his ashes mixed with ink and used in the reprinting of one of his comics.⁴ And Gene Roddenberry, the creator of *Star Trek*, had portions of his remains blasted into space.⁵ There is likewise no shortage of people with unusual burial requests. An Ohio man recently requested that his family bury him sitting on his Harley-Davidson motorcycle inside a transparent casket.⁶ Another man, who feared being buried alive, asked to be buried with his phone in hand and instructed that the phone be disconnected

1. This assertion may not apply to all of humanity, but it certainly applies to the United States. See *Wood v. E.R. Butterworth & Sons*, 118 P. 212, 214 (Wash. 1911) (listing cases holding that the "wishes of the deceased" regarding final disposition should control in disputes); Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351, 1389 (2008) ("In resolving disputes over dead bodies, courts have also proclaimed testator intent sacrosanct."). Other civilizations have likewise held these wishes in high regard. *Id.* at 1390 ("Respect for a decedent's testamentary wishes regarding her remains has a long history. Indeed, as American courts have emphasized, that history extends as far back as ancient Rome."). Foster cites *In re Johnson's Estate*, which states that "the Roman law [contains] express recognition of the right of a deceased by testament to direct his burial and to nominate the person to take charge of it." *In re Johnson's Estate*, 7 N.Y.S.2d 81, 89 (Sur. Ct. 1938).

2. *Ashes of Man Who Designed Pringles Packaging Buried in Crisp Can*, GUARDIAN (June 2, 2008, 4:38 PM), <http://www.theguardian.com/world/2008/jun/02/usa2>.

3. Jim Herron Zamora, *Frisbee Pioneer Aimed for the Heavens: Family of 'Steady Ed' Headrick Hopes to Mix His Ashes into Flying Discs to Fund His Museum*, SFGATE (Aug. 14, 2002, 4:00 AM), <http://www.sfgate.com/bayarea/article/Frisbee-pioneer-aimed-for-the-heavens-Family-of-2783761.php> (quoting Headrick's son as stating that Headrick "would be really happy if [family members] actually played Frisbee with his remains He said he wanted to end up in a Frisbee that accidentally lands on someone's roof").

4. *Comic Book's Ink Includes Ashes of Editor*, L.A. TIMES (Aug. 29, 1997), <http://articles.latimes.com/1997/aug/29/news/mn-27069> (quoting Marvel editor-in-chief Mark Harras as saying, "This is something that he really wanted because he really loved comics. He wanted to be part of his work in a very real sense").

5. *Gene Roddenberry, 'Star Trek' Creator, to Reach Final Resting Place in Space*, HUFFINGTON POST (Aug. 20, 2013, 5:12 AM), http://www.huffingtonpost.com/2013/06/20/gene-roddeberrystar-trek-remains-space_n_3474455.html.

6. *Billy Standley, Ohio Man, Buried Astride His Harley Davidson*, HUFFINGTON POST UK (Jan. 2, 2014, 4:59 PM), http://www.huffingtonpost.co.uk/2014/02/01/billy-standley-ohio-man-buried-astride-harley-davidson_n_4708964.html.

only if he had not called after three days.⁷ And multimillionaire Sandra Ilene West asked that she be buried in her Ferrari.⁸

Unique requests regarding the disposition of one's remains are by no means a recent phenomenon,⁹ and they are not limited to the United States.¹⁰ Often, survivors will honor the decedent's instructions.¹¹ Even where survivors are unwilling to do so, courts have been willing to enforce directives regarding final disposition if necessary.¹² The Iowa Supreme Court said it best: "[I]t always has been, and will ever continue to be, the duty of courts to see to it that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out."¹³

But what about circumstances where the decedent's wishes are more mundane, or even ordinary? What if, for example, a decedent merely expresses her wish that her family bury her in a particular cemetery because of some sentimental value that particular location holds for her? Most people would likely consider it a foregone conclusion: Of course the courts should enforce such reasonable requests.¹⁴ But that is not what happened in the case of Mary "Flo" Whalen, whose remains sparked a family dispute that reached

7. DANIEL SPERLING, *POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES* 143 (2008).

8. *Id.*

9. See Clare Gittings, *Eccentric or Enlightened? Unusual Burial and Commemoration in England, 1689-1823*, 12 *MORTALITY* 321, 321-22 (2007) (pointing out that unique burial requests have existed for more than a century at least).

10. See *id.* at 322 (surveying 26 unusual English burial requests).

11. Survivors honored the instructions in each of the examples cited *supra* notes 6-8. *E.g.*, *Billy Standley, Ohio Man, Buried Astride His Harley Davidson*, *supra* note 6 (quoting Mr. Standley's son as saying, "He'd done right by us all these years, and at least we could see he goes out the way he wanted to").

12. See, e.g., *Cohen v. Guardianship of Cohen*, 896 So. 2d 950, 955 (Fla. Dist. Ct. App. 2005) (enforcing the decedent's orally expressed burial wishes over his prior testamentary directives); *Dutcher v. Paradise*, 629 N.Y.S.2d 501, 502 (App. Div. 1995) (determining that the decedent's wishes controlled the location of his burial and that he wished to be buried in his mother's plot and not his father's); *Sports Car Burial OK*, *EVENING NEWS* (Newburgh, N.Y.), Apr. 12, 1977, at A1 (stating that Superior Court Commissioner Franklin Dana "knew of no law preventing [Ms. West's] burial in [a] Ferrari").

13. *Thompson v. Deeds*, 61 N.W. 842, 843 (Iowa 1895); see also *Foster*, *supra* note 1, at 1389-90 (arguing that courts usually defer to the testator's wishes).

14. Many state statutes in fact make compliance with the decedent's wishes mandatory. See N.D. CENT. CODE § 23-06-03(4) (2012) ("If the person with the duty of burial . . . is aware of the decedent's instructions regarding the disposition of the remains, that person shall honor those instructions, to the extent reasonable and possible . . ."); OKLA. STAT. tit. 21, § 1151(D) (2011) (providing for a misdemeanor conviction and a fine of up to \$5000 for noncompliance with a decedent's wishes); TEX. HEALTH & SAFETY CODE ANN. § 711.002(g) (West 2010 & Supp. 2014) ("The person . . . entitled to control the disposition of a decedent's remains . . . shall faithfully carry out the directions of the decedent to the extent that the decedent's estate or the person controlling the disposition are financially able to do so."); see also DEL. CODE ANN. tit. 12, § 264(c) (2007) (providing that, if necessary, the court shall issue a "final judgment [that] shall be consistent with the decedent's last wishes to the extent they are reasonable under the circumstances").

the Iowa Supreme Court in February 2013.¹⁵ In *In re Estate of Whalen*, the court interpreted Iowa's Final Disposition Act¹⁶ (the "Act") as eliminating the longstanding right to control disposition of one's own remains. The decision made Iowa the first and only state to preclude an individual from having any control over her remains.

This Note concerns a person's right to determine the final disposition of her remains and Iowa courts' treatment of that right. It focuses on the recent Iowa Supreme Court decision in *Whalen*, and the court's analysis of the Act. While the question of whether the dead have rights is complicated,¹⁷ the law has traditionally respected and protected an individual's right to dictate the disposition of her remains.¹⁸ Part II of this Note provides a history of the right to control disposition of one's remains in Iowa and gives summaries of both Iowa's Final Disposition Act and the *Whalen* decision. Part III contends that *Whalen* was wrongly decided and that the decision is inconsistent with the respect Iowa has traditionally accorded the wishes of the dead. Part IV proposes two changes to Iowa's Final Disposition Act that can help restore Iowans' right to determine disposition of their own remains.

II. BACKGROUND

This Part is organized into three Subparts. Subpart A examines Iowa's history of according respect to both the dead and their wishes regarding disposition of their remains, Subpart B summarizes the pertinent parts of Iowa's Final Disposition Act, and Subpart C gives a recitation of the facts of *In re Estate of Whalen* and that case's interpretation of the Act.

15. *In re Estate of Whalen*, 827 N.W.2d 184, 185–87 (Iowa 2013).

16. IOWA CODE § 144C (2014).

17. See NORMAN L. CANTOR, AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER 68 (2010) (noting that some philosophers have argued that "only a live person has the authority to assert a legal claim"). *But see* Life Investors Ins. Co. of Am. v. Heline, 285 N.W.2d 31, 36 (Iowa 1979) (Harris, J., dissenting) ("The law has always believed the dead themselves have rights [regarding their final resting place]."); CANTOR, *supra*, at 49–54 (pointing out that American law, in some cases, enforces "[p]rospective autonomy rights," like the right to dictate how a person's real and personal property is distributed after death, as well as the final disposition of a person's remains).

18. *King v. Frame*, 216 N.W. 630, 632 (Iowa 1927) ("By the canon law, a person had a right to direct his place of sepulture."); *see also, e.g.*, *Wales v. Wales*, 190 A. 109, 110 (Del. Ch. 1936) ("That the desires of the deceased person are to be accorded great weight upon the question of the burial of his body, cannot be questioned in the light of the cases."); *Hood v. Spratt*, 357 So. 2d 135, 137 (Miss. 1978) ("Factors to which various courts generally have given consideration in permitting disinterment and removal of a body have included . . . wishes of the decedent . . ."); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 239 (1872) ("[T]he right of a person to provide by will for the disposition of his body has been generally recognized.").

A. IOWA'S HISTORY OF A DECEDENT'S RIGHT TO DIRECT DISPOSITION OF HER
REMAINS

Unsurprisingly, many people are concerned with what happens to their bodies after they die.¹⁹ This interest may stem from religious beliefs,²⁰ an emotional attachment to a particular place,²¹ or a belief that scientific advances may someday enable the person's return.²² Regardless of the reason, people have ascribed great importance to the burial of the dead for thousands of years.²³ That concern endures even today, as many people are anxious about directing the disposition of their own remains.²⁴ And while the human

19. See *Pierce*, 10 R.I. at 239 ("Most people look forward to the proper disposition of their remains, and it is natural that they should feel an anxiety on the subject."); Editorial, *Act Now to Ensure Your Final Wishes Are Honored*, IOWA CITY PRESS-CITIZEN, Mar. 1, 2013, at 7A (encouraging Iowans to name a designee if they want survivors to respect their final wishes).

20. The ancient Egyptians, for example, believed that burial rituals and mummification of the body were essential to eternal life. Joshua J. Mark, *Ancient Egyptian Burial*, ANCIENT HIST. ENCYCLOPEDIA (Jan. 19, 2013), http://www.ancient.eu/Egyptian_Burial/. Societies performed these burial rites as many as 6000 years ago. *Id.*; see also SPERLING, *supra* note 7, at 168 ("A person's wishes regarding the disposal of her body after death represent this person's most precious . . . religious beliefs. Overriding the prior wishes of the deceased is an act against one's . . . religious . . . interest . . ."). The desire to control bodily disposition for religious reasons also extends to survivors. See *id.* at 175 (describing *Thaczyk v. Gallagher*, 222 A.2d 226, 227 (Conn. Super. Ct. 1965), in which a woman's parents sought to prevent her cremation based on her religious background); see also CANTOR, *supra* note 17, at 40 (describing *Lott v. State*, 225 N.Y.S.2d 434, 435-36 (Ct. Cl. 1962), in which a hospital switched the bodies of Jewish and Catholic decedents, causing each corpse to be prepared according to the other's religious practices and leading each family to recover damages).

21. Mrs. Whalen is a prime example. She wanted to be buried in the place where she raised ten children and spent 51 years of her life. *In re Estate of Whalen*, 827 N.W.2d 184, 186 (Iowa 2013).

22. See *Alcor Life Extension Found. v. Richardson*, 785 N.W.2d 717, 719 (Iowa Ct. App. 2010) ("Alcor defines cryonic suspension as [a] procedure [done] with the hope that future medical development will allow the restoration of life and health." (internal quotation marks omitted)); Bryan Curtis, *The Splendid Splinter, Now in Cryo-Freeze*, SLATE (July 8, 2002, 7:20 PM), http://www.slate.com/articles/sports/the_sportspages/2002/07/the_splendid_splinter_now_in_cryofreeze.html.

23. See *In re Johnson's Estate*, 7 N.Y.S.2d 81, 89 (Sur. Ct. 1938) (providing a translation of a passage from 4 THE CIVIL LAW 90 (S.P. Scott trans., 1932), referring to a requirement in Roman law that the executor must comply with the wishes of the deceased as to the funeral in order to be eligible to receive any bequest from the decedent to the executor); Foster, *supra* note 1, at 1390; Ann M. Murphy, *Please Don't Bury Me Down in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381, 400 (2007) ("In the *Iliad*, Priam, the King of Troy and Hector's father, begged Achilles to return Hector's body to him for a proper burial. Achilles relented and both he and Priam wept for their respective losses." (citing HOMER, THE ILIAD 441-45 (Andrew Lang et al. trans., The Modern Library 1935))); Mark, *supra* note 20; see also Foster, *supra* note 1, at 1390 ("Courts have consistently enforced an individual's wishes concerning disposition of her remains regardless of whether she expressed those wishes in a formal instrument or [a] . . . non-formal [one].").

24. In fact, the court record in *Whalen* indicates that not only was this right important to Mrs. Whalen, but also that it was important to her husband. See Executor-Appellee's Brief in Chief at 8-9, *In re Estate of Whalen*, 827 N.W.2d 184 (No. 12-1927), 2013 WL 6516582, at *8-9

body has been considered “quasi-property” to which the decedent’s relatives have a claim,²⁵ many civilizations have nevertheless privileged the decedent’s wishes over those of the living.²⁶

Iowa has traditionally held the decedent’s right to direct disposition of her remains in high regard.²⁷ The Iowa Supreme Court recognized such a right as early as 1895 in *Thompson v. Deeds*.²⁸ *Thompson* involved a family dispute over the erection of a monument in memory of the decedent, where the decedent’s wife threatened to move his body—contrary to the decedent’s expressed wishes—if the decedent’s daughter (the wife’s stepdaughter) did not permit the wife to place the monument at his grave.²⁹ Even though the decedent’s daughter held legal title to the plot in which he was buried, the court nevertheless held that the decedent’s wife had the right to “adorn his last resting place”³⁰ and that his body should remain in the place he had asked to be buried.³¹ The court stated that “there has always existed, in every person, a feeling that leads him to wish that after his death his body shall repose beside those he loved in life. . . . [I]t is a sentiment and belief which the living should know will be respected after they are gone.”³² This respect for the dead and their wishes is representative of the attitude that Iowa’s residents and its courts have held for generations.³³

(pointing out that Mr. Whalen, like his wife, wanted to be buried in a particular place, and that he expected his wishes to be honored).

25. *Rosenblum v. New Mt. Sinai Cemetery Ass’n*, 481 S.W.2d 593, 594 (Mo. Ct. App. 1972); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 234 (1872); *Smart v. Moyer (In re Estate of Moyer)*, 577 P.2d 108, 110 n.5 (Utah 1978) (“[T]he modern view adopted by a majority of courts that have considered the matter recognize that there is a property right of some nature, sometimes referred to as a quasi-property right.”).

26. See SPERLING, *supra* note 7, at 150 (“[The law in ancient Rome was that] ‘the dead bodies be laid out in the house according as the deceased gave order.’” (quoting Richard C. Groll & Donald J. Kerwin, *The Uniform Anatomical Gift Act: Is the Right to a Decent Burial Obsolete?*, 2 LOY. U. CHI. L.J. 275, 275 (1971))); see also *id.* (suggesting that American jurisdictions have been more likely than others to find that the “decedent’s prior wishes as to disposal of her body are compelling”); *id.* at 175 (“[C]ompliance with the testator’s positive direction is not, in my judgment, a light reason but a controlling one.” (quoting *Cooney v. English*, 148 N.Y.S. 285, 286 (Sup. Ct. 1914)) (internal quotation marks omitted)).

27. See *supra* text accompanying note 13 (quoting the Iowa Supreme Court as saying that the duty to fulfill the final disposition wishes of the dead has always existed). The treatment of the right to control one’s body came about as a result of spontaneous order. See Lee Anne Fennell, *Slicing Spontaneity*, 100 IOWA L. REV. (forthcoming 2015) (“[Spontaneous order] emerges from a multiplicity of individual responses to dispersed information signals [concerning a right].”)

28. *Thompson v. Deeds*, 61 N.W. 842, 842–43 (Iowa 1895).

29. *Id.*

30. *Id.* at 843.

31. See *id.* (holding that the lower court erred when it failed to enter a decree enjoining the removal of the decedent’s body).

32. *Id.*

33. See, e.g., *In re Estate of Whalen*, 827 N.W.2d 184, 194–96 (Iowa 2013) (Cady, C.J., dissenting); *King v. Frame*, 216 N.W. 630, 632 (Iowa 1927) (“Most people look forward to the proper disposition of their remains”); *Alcor Life Extension Found. v. Richardson*, 785

Iowa's respect for the wishes of the dead has not diminished in the century since *Thompson*. In 1927, the Iowa Supreme Court recognized an individual's right to determine the disposition of her remains via will.³⁴ Since then, Iowa has affirmed the principle that graves should not be disturbed absent "circumstances of extreme exigency,"³⁵ and that in deciding to allow such a disturbance, the court must consider the dead themselves and the feelings of decedents' relatives.³⁶ Despite this great reluctance to move a body once it is buried, courts have nevertheless held that if a decedent is buried in a manner contrary to her wishes, the extreme exigency standard is met.³⁷ Thus, while Iowa courts have traditionally been strongly inclined to let the dead rest in peace, they have historically held a decedent's burial wishes in even higher regard.

For example, in 2010, an Iowa appellate court determined that a decedent's wishes regarding his remains could supersede the unwritten policy that graves should not be disturbed.³⁸ That case involved a dispute over who had the right to possess the decedent's head.³⁹ Prior to his death, Orville Richardson had contracted with Alcor Life Extension Foundation for the cryogenic preservation of his head, in the hope that science would someday be able to revive him.⁴⁰ When he died, his relatives buried him instead of notifying Alcor of his death.⁴¹ Alcor learned of his passing two months later, and demanded that his relatives deliver his head as an anatomical gift under the Revised Uniform Anatomical Gift Act.⁴² After an exhaustive analysis, the court determined that Orville's head should go to Alcor as he had intended,

N.W.2d 717, 719, 732 (Iowa Ct. App. 2010) (holding that the party who intends to comply with the decedent's wishes has the superior claim).

34. *King*, 216 N.W. at 632 ("[T]he right of a person to provide by will for the disposition of his body has been generally recognized." (citing *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 239 (1872))).

35. *Life Investors Ins. Co. of Am. v. Heline*, 285 N.W.2d 31, 33 (Iowa 1979) (quoting *Thompson*, 61 N.W. at 842).

36. *Id.* at 33-34 (quoting IOWA CODE § 144.34 (1979)); *see also, e.g.*, *State ex rel. Attorney Gen. of Iowa v. Terry*, 541 N.W.2d 882, 889 (Iowa 1995) ("[The G]overnment has a role in ensuring that the resting place of the dead is respected and preserved as a consecrated ground."); *Carter v. Town of Avoca*, 197 N.W. 897, 898 (Iowa 1924) ("The right to have the graves of the dead kept secure from unwarranted disturbance . . . is one that the universal sentiment of all mankind requires should be protected."); *Anderson v. Acheson*, 110 N.W. 335, 339 (Iowa 1907) (stating that even where one does not own the land on which one's dead are buried, the law will permit him to maintain an action against even the rightful owner of the land for disturbing the grave); *Dearinger v. Peery*, 387 N.W.2d 367, 372 (Iowa Ct. App. 1986) (stating that Iowa law "jealously protects" a person's "special interest" in preventing the disturbance of a relative's remains).

37. *See supra* notes 30-31, 35 and accompanying text.

38. *Alcor Life Extension Found.*, 785 N.W.2d at 732.

39. *Id.* at 719.

40. *Id.* at 719-20.

41. *Id.* at 720-21.

42. *Id.* at 721. The Revised Uniform Anatomical Gift Act is the legal mechanism by which Iowans can donate their body parts. *See* IOWA CODE § 142C (2014).

stating that “equity lies with the party that intends to carry out Orville’s wishes.”⁴³ The court ordered that his surviving family members complete an application to disinter Orville’s body,⁴⁴ thus privileging the decedent’s wishes over the public policy that bodies should remain where they lie. The court reasoned that the long history of deference to the decedent’s wishes regarding final disposition required this result.⁴⁵

This history shows that respect for the decedent’s wishes in Iowa is, and has long been, substantial. In fact, Iowa has shown that it holds decedents’ wishes in such high regard that its courts, despite their reluctance to unearth the resting dead, will order a grave’s disturbance, rather than contravene a decedent’s wishes.

B. THE FINAL DISPOSITION ACT

This Subpart gives a brief summary of Iowa’s 2008 Final Disposition Act.⁴⁶ The most important provision of the Act for purposes of this Note is the section entitled “Final disposition of remains—right to control.”⁴⁷ This section lays out the order in which certain individuals receive “[t]he right to control final disposition of a decedent’s remains.”⁴⁸ The first individual entitled to this right under the Act is a “designee”—a person to whom the decedent has delegated responsibility for her remains prior to passing.⁴⁹ If there is no designee, the next person entitled to determine final disposition of the decedent’s remains is the person’s spouse, followed by various other individuals (mainly family members).⁵⁰ The Act is specific as to the manner in

43. *Alcor Life Extension Found.*, 785 N.W.2d at 730.

44. *Id.* at 732.

45. *Id.*

46. IOWA CODE § 144C.

47. *Id.* § 144C.5.

48. *Id.* § 144C.5(1).

49. *Id.* § 144C.5(1)(a).

50. *Id.* § 144C.5(1). The relevant portion of the Act reads as follows:

The right to control final disposition of a decedent’s remains or to make arrangements for the ceremony after a decedent’s death vests in and devolves upon the following persons who are competent adults at the time of the decedent’s death, in the following order:

- a. A designee, or alternate designee, acting pursuant to the decedent’s declaration.
- b. The surviving spouse of the decedent, if not legally separated from the decedent, whose whereabouts is reasonably ascertainable.
- c. A surviving child of the decedent, or, if there is more than one, a majority of the surviving children whose whereabouts are reasonably ascertainable.
- d. The surviving parents of the decedent whose whereabouts are reasonably ascertainable.
- e. A surviving grandchild of the decedent, or, if there is more than one, a majority of the surviving grandchildren whose whereabouts are reasonably ascertainable.

which a decedent may name a designee: She must do so by executing a declaration that complies with the terms of the statute.⁵¹ The Act also states that the “declaration shall not include directives for final disposition of the declarant’s remains and shall not include arrangements for ceremonies planned after the declarant’s death.”⁵² Thus, the individual cannot use a declaration to control the disposition of her remains under the Final Disposition Act.

However, the Act does require that a designee, in determining the final disposition of the decedent’s remains and the “ceremonies to be performed after [her] death,”⁵³ act “in a manner that is reasonable under the circumstances.”⁵⁴ The Act defines “reasonable under the circumstances” to include “consideration of what is appropriate in relation to the declarant’s finances, cultural or family customs, and religious or spiritual beliefs.”⁵⁵ Furthermore, the term “may include but is not limited to consideration of the declarant’s preneed⁵⁶ funeral, burial, or cremation plan.”⁵⁷

Lastly, the decedent’s declaration must conform to specific guidelines under the Act.⁵⁸ It must be written, and it must “substantially compl[y]” with the sample form provided by the statute.⁵⁹ The declaration must also be accompanied by a “durable power of attorney for health care”⁶⁰ and be properly witnessed or notarized.⁶¹ Finally, the Act states that the declaration may—but is not required to—contain information regarding “the location of

f. A surviving sibling of the decedent, or, if there is more than one, a majority of the surviving siblings whose whereabouts are reasonably ascertainable.

g. A surviving grandparent of the decedent, or, if there is more than one, a majority of the surviving grandparents whose whereabouts are reasonably ascertainable.

h. A person in the next degree of kinship to the decedent in the order named by law to inherit the estate of the decedent under the rules of inheritance for intestate succession or, if there is more than one, a majority of such surviving persons whose whereabouts are reasonably ascertainable.

Id. § 144C.5(1)(a)–(h).

51. *Id.* § 144C.3.

52. *Id.* § 144C.3(2).

53. *Id.* § 144C.10(1).

54. *Id.* § 144C.3(3).

55. *Id.* § 144C.2(17).

56. To clarify for the uninitiated, this term might be more readily understood if it were spelled “pre-need.”

57. IOWA CODE § 144C.2(17). It is interesting that there is no similar requirement that other individuals controlling disposition, such as family members, act reasonably. Had such a requirement also existed for spouses, Mrs. Whalen’s estate may have argued that Mr. Whalen was not acting reasonably.

58. *Id.* § 144C.6(2).

59. *Id.*; see also *id.* § 144C.6(1).

60. *Id.* § 144C.6(2).

61. *Id.*

an agreement for prearranged funeral services or funeral merchandise [or] cemetery lots owned by or reserved for the declarant.⁶² The *Whalen* decision interpreted the Final Disposition Act as eliminating a decedent's traditional common law right to determine the disposition of her remains.⁶³ Part III will discuss whether this is actually the case.

C. *THE IOWA SUPREME COURT'S OPINION IN IN RE ESTATE OF WHALEN*

In *In re Estate of Whalen*, the Iowa Supreme Court had its first opportunity to interpret the Final Disposition Act and its effect on the common law right to control disposition of remains. *Whalen* concerned a family dispute regarding the disposition of the remains of Mary "Flo" Whalen.⁶⁴ She and her husband, Michael Whalen, were married in Iowa in 1952 and moved to Billings, Montana, in 1953.⁶⁵ They lived there for 43 years, raising ten children.⁶⁶ They separated in 1996, and Mr. Whalen moved back to Iowa.⁶⁷ Mrs. Whalen, meanwhile, remained in Montana for another eight years, after which she moved to New Mexico to be near her eldest daughter.⁶⁸ She lived there until December 2011, and then, during a visit to Iowa, became so sick that she could not return home.⁶⁹ As a result, she lived with Mr. Whalen until she died six months later.⁷⁰ She and Mr. Whalen never divorced or legally separated.⁷¹

Prior to her death, Mrs. Whalen was very concerned about her burial.⁷² In October 2009, she executed a will in which she stated, "I direct that my bodily remains be buried in a moderately priced wooden coffin . . . in the Holy Cross Cemetery, Billings, Montana. I further direct that my funeral mass be celebrated at Saint Patrick's Co-Cathedral in Billings, Montana, no matter where I die."⁷³ Two witnesses were present and their signatures were notarized.⁷⁴ On April 10, 2012, two months prior to her death, she wrote a letter to Mr. Whalen and all ten of her children in which she again expressed her wish that they bury her in Montana.⁷⁵ Her letter states:

62. *Id.* § 144C.6(3).

63. *In re Estate of Whalen*, 827 N.W.2d 184, 193 (Iowa 2013) ("We hold the Final Disposition Act displaced any common law right requiring a surviving spouse to follow the decedent's instructions on burial.").

64. *Id.* at 185.

65. *Id.*

66. *Id.*

67. *Id.*

68. Appendix at 1, *In re Estate of Whalen*, 827 N.W.2d 184 (No. 12-1927).

69. *In re Estate of Whalen*, 827 N.W.2d at 185.

70. *Id.*

71. *Id.*

72. See Executor-Appellee's Brief in Chief, *supra* note 24, at 7-8.

73. *In re Estate of Whalen*, 827 N.W.2d at 185.

74. *Id.*

75. *Id.*

I am writing this letter to all of you to let you know what I wish done with my earthly remains after my soul has gone hopefully upwards.

I wish to be buried in Billings, Montana which I considered my home when on earth. I spent 51 years of my life in Billings and with the help of my dear husband, raised 10 beautiful children there. I bought a plot many years ago in Holy Cross Cemetery in Billings, in which to be buried and have paid for the opening and closing of my grave. I also have bought a casket made by the [Trappist] Monks in Peosta, Iowa, and they will ship it wherever they are asked at the time they are informed to do so.

I know that you all love me and want to honor my final requests, and that is why I am writing this to you. I just want all of you to know that this is very important to me and because you all love and respect me I know that you will see that my wishes are carried out.⁷⁶

Perhaps Mrs. Whalen's main reason for writing this letter was that she was worried and upset that her husband would not honor her wishes.⁷⁷ Court documents suggest that Mr. Whalen had in fact told her of his intention to do everything he could to have her buried in Iowa.⁷⁸ Both Mrs. Whalen and her children attempted to speak with him about her wishes, but the conversations deteriorated into arguments.⁷⁹ Upon her death, the probate court ruled against Mr. Whalen, determining that the Act's use of the phrase "devolves upon" indicated that the Iowa General Assembly "intended for a decision regarding disposition of remains to be made by an individual delineated in [section] 144C.5 only if a decision had not been made by a decedent."⁸⁰ The court stated that Mrs. Whalen's intent "could not be clearer" and ordered that she be buried according to her wishes.⁸¹ Mr. Whalen appealed and the case went to the Iowa Supreme Court.⁸²

In analyzing the Final Disposition Act, the Iowa Supreme Court first determined that the Act's purpose was to reduce litigation among family members.⁸³ It then held that the Act "displace[s] any common law right requiring a surviving spouse to follow the decedent's instructions on burial."⁸⁴ The court arrived at this conclusion by considering the legislative history⁸⁵

76. *Id.* at 185–86.

77. Appendix, *supra* note 68, at 53–55.

78. *Id.* at 54. Mr. Whalen apparently wanted his wife to be buried with him in Iowa so that "when [they] rise up on the last day, [they] can be side by side." *Id.* at 164.

79. *See id.* at 71.

80. *In re Estate of Whalen*, 827 N.W.2d at 186.

81. *Id.* at 187.

82. *Id.*

83. *Id.* at 189.

84. *Id.* at 193.

85. *Id.* at 187–93.

and concurrent amendments to the Iowa Cemetery Act.⁸⁶ Once it concluded that the Iowa Legislature did intend the Act to abrogate the common law right to direct final disposition, the court contemplated whether it could consider Mrs. Whalen's will to be a declaration naming a designee as defined in the Act.⁸⁷ Answering this question in the negative, the court found that her will did not include the language the Act's sample form requires;⁸⁸ that it was not "contained in or attached to a durable power of attorney for health care";⁸⁹ and that it contained directives as to burial, something that the Act specifically prohibits.⁹⁰ For these reasons, the Iowa Supreme Court reversed the probate court and remanded the case, directing the lower court to allow Mr. Whalen to bury Mrs. Whalen in Iowa as he wished.⁹¹

III. THE IOWA GENERAL ASSEMBLY'S INTENT IN ENACTING THE FINAL DISPOSITION ACT IS AMBIGUOUS, AND THE *WHALEN* COURT SHOULD HAVE TAKEN MORE CARE WHEN ELIMINATING COMMON LAW RIGHTS

This Part reveals the ambiguity of the Iowa General Assembly's intent in enacting the Final Disposition Act, and points out important factors the *Whalen* court should have considered before issuing such a sweeping decision eliminating any right to determine one's own final resting place. Beyond any argument about statutory interpretation, *Whalen* seems wrong on a deeper, intuitive level.⁹² Most people are likely to be concerned with the disposition of their remains when they die.⁹³ Even if they have no particular preference regarding burial, cremation, or other means of disposal, the discourse around death indicates that most people assume that everyone has a right to direct

86. *Id.* at 190 (pointing out that language in the Iowa Cemetery Act allowing a decedent to provide directions as to disposition was replaced by a cross-reference to section 144C.5 of the Iowa Code). The Iowa Cemetery Act regulates cemeteries and the manner in which they dispose of human remains. IOWA CODE § 523I (2014).

87. *In re Estate of Whalen*, 827 N.W.2d at 193–94.

88. *Id.* at 193.

89. *Id.* at 193–94 (quoting IOWA CODE § 144C.6(2) (2013)) (internal quotation marks omitted).

90. *Id.* at 194.

91. *Id.*

92. Critics would likely claim that "feelings" have no place in the law, citing the old adage that "justice is blind" and that feelings are irrelevant. Nevertheless, feelings are important and should at least be acknowledged, since one could argue that it is feelings that give us a sense of the just and unjust.

93. See *King v. Frame*, 216 N.W. 630, 632 (Iowa 1927) (noting that "the public sentiment and secular jurisprudence of civilized nations hold the grave and the dead body in higher and better regard"); see also *supra* notes 19, 24 and accompanying text. Moreover, the default rule, in this case, should favor the deceased as he or she is unable to later bargain for a different allocation of rights. See Herbert Hovenkamp, *Fractured Markets and Legal Institutions*, 100 IOWA L. REV. 617, 648–51 (2015) ("A well-designed default rule assigns the right so that it creates the greater value in most situations, . . . making bargaining unnecessary.")

(or at least have a say in) the disposition of their remains.⁹⁴ Mrs. Whalen, despite having expressed her wishes in the most incontrovertible of terms, was not afforded this right.⁹⁵

However, if the intent of the Final Disposition Act was to prevent disputes by abrogating the right to control disposition of one's remains, then the fact that Mrs. Whalen's husband did not honor her wishes is irrelevant. The best way to eliminate any dispute about the decedent's wishes is, after all, to eliminate any consideration of them. If the court affords those wishes no legal weight, then it will not entertain a dispute as to what they were. Therefore, if the Legislature's intent was indeed to prevent family squabbles over an individual's remains (as the *Whalen* court contends),⁹⁶ then eliminating the common law right to control disposition makes sense. If, however, the Legislature intended some other result when it created the Act, eliminating the common law right to determine disposition of one's own remains may not help achieve the Act's purpose. For this reason, it is important to carefully consider the Iowa Legislature's intent, something that the *Whalen* decision should have more fully analyzed.

One way to determine the Iowa Legislature's intent regarding the Act is to consider the Act's broader purpose.⁹⁷ The *Whalen* majority states that the purpose of the Final Disposition Act is "[p]resumably . . . to avoid protracted family disputes and mini-trials over the decedent's wishes."⁹⁸ The key word here is "presumably." The majority *presumed* that this was the Iowa Legislature's purpose in enacting the Final Disposition Act, but the *Whalen* court's reasoning for this presumption ends here. It does not give any support for this assertion beyond its own bald statement.

94. See, e.g., *Do You Care Where You Are Buried?*, BBC RELIGION & ETHICS (Sept. 27, 2013, 9:16 AM), <http://www.bbc.co.uk/religion/o/24209072> (presenting viewpoints of religious and other community leaders as to their preferences regarding the disposition of their remains); Editorial, *supra* note 19 (characterizing the *Whalen* case as "unfortunate" and urging Iowans to take necessary steps "to ensure their final wishes are followed"); Lucy Townsend, *Where Could I Be Buried if Graveyards Run Out of Space?*, BBC NEWS MAG. (Aug. 25, 2011, 10:23 AM), <http://www.bbc.co.uk/news/magazine-14647010> (speaking of various options for the disposition of the author's remains if space in the United Kingdom is taken up by the remains of others).

95. *In re Estate of Whalen*, 827 N.W.2d at 194 (acknowledging that "[the court's] decision will leave [Mrs. Whalen's] wishes unfulfilled").

96. See *supra* text accompanying note 83; see also *infra* text accompanying note 98.

97. Considering a statute's purpose is, in fact, one of the things Iowa courts consider in determining the Iowa Legislature's intent. *In re Estate of Whalen*, 827 N.W.2d at 195 (Cady, C.J., dissenting) ("To carry out this duty [of giving effect to the Legislature's intent], we discern the intent of the [L]egislature from the words and content of the statute, as well as its purpose." (citing *Auen v. Alcoholic Beverages Div. of the Iowa Dep't of Commerce*, 679 N.W.2d 586, 590 (Iowa 2004))); see also IOWA CODE § 4.6 (2014) ("If a statute is ambiguous, the court, in determining the intention of the [L]egislature, may consider . . . [t]he object sought to be attained.").

98. *In re Estate of Whalen*, 827 N.W.2d at 189.

Given both the lack of evidence to support the court's reasoning regarding the Iowa Legislature's intent and the ambiguity regarding what that intent actually was, the court should not have so casually "presumed" to understand that intent. This Part lays out three factors the court should have considered in determining the Legislature's intent: (1) the Legislature did not clearly express its intent in enacting the Final Disposition Act;⁹⁹ (2) the Legislature's purpose in enacting the statute may have actually been to protect the decedent's right to determine the disposition of her remains;¹⁰⁰ and (3) the Act does not contain an imperative statement abrogating the common law right to determine disposition of one's remains.¹⁰¹

A. *THE IOWA GENERAL ASSEMBLY'S INTENT IN ENACTING THE FINAL DISPOSITION ACT CANNOT HAVE BEEN TO ELIMINATE A DECEDENT'S RIGHT TO CONTROL DISPOSITION OF HER REMAINS*

There are two ways to view the *In re Estate of Whalen* decision: Either the majority is correct and the Iowa General Assembly did in fact intend for the Final Disposition Act to eliminate the decedent's right to direct disposition of her remains, or the Legislature had a different intention.¹⁰² If the Legislature intended to abrogate the decedent's right to control disposition, then the court was correct in ruling that the evidence of Mrs. Whalen's desire to be buried in Montana had no bearing on determining her final resting place. The problem is that interpreting the Act as eliminating all rights to direct the disposition of one's remains produces absurd results, like the one in *Whalen*.¹⁰³

The substantial evidence of Mrs. Whalen's intent demonstrates the degree of that absurdity and helps show that the Legislature cannot possibly have intended outcomes like that reached in *Whalen*. As the probate court

99. IOWA CODE § 144C; S. 473, 82d Gen. Assemb., 2d Sess. (Iowa 2008) (enacted).

100. See *infra* Part III.B. While this Note principally argues that the purpose of the Act is to protect the decedent's wishes, the modifications to the Act that this Note proposes will also help further what the Iowa Supreme Court claimed was the purpose of the Act: reducing family disputes over decedents' wishes. See *supra* text accompanying notes 83, 98; see also *infra* Part IV.

101. IOWA CODE § 144C.

102. There is an argument, of course, that the court was correct about the Legislature's intent, but that it was incorrect in holding that Mrs. Whalen's will did not qualify as a declaration of a designee under the Act. The Act itself, however, seems to clearly foreclose this possibility since it requires that a durable power of attorney for health care accompany the declaration. Even if Mrs. Whalen's will could be considered a declaration, it did not satisfy the durable power of attorney requirement.

103. The fact that a particular statutory interpretation produces absurd results is one way to determine that the Iowa Legislature did not intend the court to apply the statute in a way that produces that result. See *State v. Anderson*, 636 N.W.2d 26, 35 (Iowa 2001) ("In ascertaining the intent of [the] [L]egislature, . . . [w]e attempt to find a reasonable construction that 'serve[s] the purpose of the statute and avoid[s] absurd results.'" (quoting *Sourbier v. State*, 498 N.W.2d 720, 723 (Iowa 1993))).

stated, Mrs. Whalen's wishes "could not be clearer":¹⁰⁴ Witnesses testified as to her clearly expressed intent,¹⁰⁵ which Mrs. Whalen also expressed in her various wills¹⁰⁶ and her letters to family members.¹⁰⁷ Her 2009 will stated that she had been separated from her husband for 13 years, that they no longer owned any property together, and that she had "intentionally omitted" him from her will.¹⁰⁸ She had lived apart from him for 16 years at the time of her death,¹⁰⁹ and only remained in Iowa because of her health.¹¹⁰ This evidence demonstrates that as far as Mrs. Whalen was concerned, her husband was one of the last people she would want to make decisions regarding her final resting place. Indeed, some commentators have said that statutes like the Final Disposition Act are actually meant to *help* people like Mrs. Whalen control the disposition of their remains *in spite* of the wishes of family members.¹¹¹

In any case, it seems unlikely that the Iowa Legislature intended to eliminate Iowans' right to control disposition of their own remains. This right has been part of the law of many jurisdictions throughout the world for

104. *In re Estate of Whalen*, 827 N.W.2d 184, 187 (Iowa 2013).

105. *See, e.g.*, Appendix, *supra* note 68, at 119 ("She expressed to me on numerous occasions and always that she wanted to be buried in Billings, Montana, which was her home for over fifty years."); *id.* at 143 ("Q. Did your mother express to you where she wanted to be buried? A. She absolutely expressed it to me. Q. And over what period of time? A. She mentioned it many times throughout her life, and once when we were in Billings, she showed me the plots that she had bought. Q. And did your mother ever waiver [sic] from that position? A. She did not."); *id.* at 155 ("Q. Did Flo tell you where she wanted to be buried? A. Yes, she did. Q. What did she tell you? A. Billings, Montana.").

106. Each of Mrs. Whalen's four wills includes similar language directing that her family bury her in Billings. The fact that she made minor linguistic changes and corrected typographical errors between wills indicates that she reviewed these provisions and that her wishes never wavered. *See, e.g.*, *id.* at 37 ("I want to be buried . . . in Holy Cross Cemetery, Billings, Montana."); *id.* at 47 ("I direct that my earthly remains be buried in a moderately riced [sic] wood coffin . . . in Holy Cross Cemetery, Billings, Montana."); *id.* at 51 ("I direct that my earthly remains be buried in a moderately priced wood coffin . . . in Holy Cross Cemetery, Billings, Montana."); *id.* at 60 ("I direct that my bodily remains be buried in a moderately priced wooden coffin . . . in the Holy Cross Cemetery, Billings, Montana.").

107. *Id.* at 54 ("[W]hen [Mr. Whalen] says he's going to do what he can to have me buried in Anamosa and against my wishes, I am upset."); *see also supra* text accompanying note 76.

108. Appendix, *supra* note 68, at 57.

109. *See In re Estate of Whalen*, 827 N.W.2d at 185 (pointing out that Mrs. Whalen was separated from her husband in 1996).

110. *See* Appendix, *supra* note 68, at 17 ("[Mrs. Whalen] was in failing health and decided to remain [in Iowa].").

111. One consumer protection and advocacy website gives this advice:

Perhaps the most useful laws are those permitting you to name a designated agent for body disposition. If you are estranged from next-of-kin or were never married to your significant other, the designated agent law allows you to name someone other than a legal spouse or relative to carry out your wishes.

See Who Has the Right to Make Decisions About Your Funeral?, FUNERAL CONSUMERS ALLIANCE, <http://www.funerals.org/forconsumersmenu/your-legal-rights/funeral-decision-rights> (last updated Dec. 2, 2013).

thousands of years,¹¹² and has existed in Iowa since 1895—if not earlier.¹¹³ Many other states have actually codified the decedent's right to determine disposition.¹¹⁴

Iowa courts “presume the [L]egislature intend[s] for the [laws it creates] to yield reasonable results.”¹¹⁵ Likewise, while Iowa courts interpret laws in order to advance the purposes of those laws, it must simultaneously avoid interpretations that create “absurd results.”¹¹⁶ Given the evidence of Mrs. Whalen's intent,¹¹⁷ Iowa's longstanding history of respecting a decedent's right to determine the disposition of her remains,¹¹⁸ and the fact that every other state accords a decedent's wishes at least some weight in determining the disposition of her remains,¹¹⁹ the result in *Whalen* is anything but just and reasonable—it is absurd.

Iowa has not clearly defined the term “absurd.” One court, however, says that “[a] statutory outcome is absurd if it defies rationality.”¹²⁰ That is certainly the case here: It is simply not rational to prevent someone from controlling her own eternal resting place. Another commentator has said that “standard interpretive doctrine . . . defines an ‘absurd result’ as an outcome so contrary to perceived social values that [the Legislature] could not have ‘intended’ it.”¹²¹ Likewise, Iowa's respect for the wishes of the dead is a deeply ingrained

112. See *In re Johnson's Estate*, 7 N.Y.S.2d 81, 89 (Sur. Ct. 1938) (citing ancient Roman law requiring that the executor comply with the decedent's wishes); SPERLING, *supra* note 7, at 150 (stating that in ancient Rome the law required survivors to dispose of bodies in accordance with the decedent's wishes (citing Groll & Kerwin, *supra* note 26, at 275)); Foster, *supra* note 1, at 1390 (citing *In re Johnson's Estate*).

113. See *Thompson v. Deeds*, 61 N.W. 842, 842–43 (Iowa 1895).

114. See *Murphy*, *supra* note 23, at 400 & n.200 (citing to statutes from Colorado, Delaware, Illinois, and Oregon as examples of states that have codified the decedent's right to direct disposition of her remains); see also *supra* note 14 (giving examples of states that mandate survivor compliance with decedents' wishes).

115. *Andover Volunteer Fire Dep't v. Grinnell Mut. Reinsurance Co.*, 787 N.W.2d 75, 86 (Iowa 2010) (citing *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 67 (Iowa 2003)); see also *State v. Iowa Dist. Court for Black Hawk Cnty.*, 616 N.W.2d 575, 578 (Iowa 2000) (“We presume that when the [L]egislature enacts a statute that it intends ‘[a] just and reasonable result.’” (quoting IOWA CODE § 4.4(3) (1999))).

116. *Andover*, 787 N.W.2d at 86 (citing *Heartland Express v. Gardner*, 675 N.W.2d 259, 262 (Iowa 2003)); see *supra* note 103 and accompanying text.

117. See *supra* notes 104–11 and accompanying text.

118. See *supra* Part II.A.

119. *Executor–Appellee's Petition for Rehearing at 8 n.1, In re Estate of Whalen*, 827 N.W.2d 184 (Iowa 2013) (No. 12-1927) (providing a citation from each state explaining the weight that state gives to the decedent's wishes in determining final disposition). The petition for a rehearing was denied.

120. *Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009).

121. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003). Iowa has, however, considered absurdity as a doctrine. See *Anderson v. Iowa*, 801 N.W.2d 1, 7–9 (Iowa 2011) (citing *Sherwin–Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 427 (Iowa 2010)). In that case, the court stated that in order to apply the doctrine, the result must not only be absurd, but also “the literal construction in the particular action [must be] clearly inconsistent

social value,¹²² and the result in *Whalen* is so contrary to that value that the Iowa Legislature cannot have intended it to occur.

If the Legislature intended to abrogate a decedent's right to determine disposition of her remains, it could have easily expressed such an intention, and the court should have required that it do so. The fact that it did not explicitly state such an intention shows that the Legislature wanted to preserve that right—particularly because the Legislature has demonstrated its ability to abrogate common law rights.¹²³

B. THE IOWA GENERAL ASSEMBLY'S INTENT IN ENACTING THE FINAL DISPOSITION ACT MAY ACTUALLY HAVE BEEN TO PROTECT THE DECEDENT'S RIGHT TO DETERMINE DISPOSITION OF HER REMAINS

It is entirely possible that the purpose of the Act was to protect the decedent's rights and her ability to determine the disposition of her remains.¹²⁴ This may at first seem counterintuitive: After all, the Legislature removed language from the Act that would have allowed an individual to provide directives to the designee regarding the disposition of her remains.¹²⁵

with the purposes and policies of the act." *Sherwin-Williams Co.*, 789 N.W.2d at 427 (quoting *Pac. Ins. Co., Ltd. v. Or. Auto. Ins. Co.*, 490 P.2d 899, 901 (Haw. 1971)). The difficulty here, of course, is that the purpose of the Act cannot be conclusively determined. In any case, whether the absurdity doctrine applies here is not really of any consequence, since the ultimate object of this Note is not to show that *Whalen* was wrong, but to prevent its result from recurring by modifying the Act in accordance with Part IV.B, *infra*.

122. Chief Justice Cady, who dissented in *Whalen*, said that "[l]ast wishes are sacrosanct, and every law or statute concerning last wishes has been constructed solidly upon this fundamental, common understanding." *In re Estate of Whalen*, 827 N.W.2d at 195-96 (Cady, C.J., dissenting).

123. The Iowa Supreme Court has previously used this method to determine legislative intent. *See State v. Allison*, 576 N.W.2d 371, 374 (Iowa 1998). "The [L]egislature has previously demonstrated a clear ability to grant" the state the authority to aggregate the value of charges made with stolen credit cards for purposes of classifying a crime as a class "D" felony. *Id.* The court held that "[i]n light of the [L]egislature's failure to include aggregation language . . . the State [is] not entitled to aggregate the value of . . . items purchased with . . . stolen credit cards." *Id.*

Other states have likewise announced similar principles. *See, e.g., State Bldg. & Constr. Trades Council of Cal. v. Duncan*, 76 Cal. Rptr. 3d 507, 520, 534-35 (Ct. App. 2008) (holding that where there are "blanks" in the state's prevailing wage law, and where the legislature has "been active" in regulating that law, the fact that the legislature has not acted to address a particular issue in the law "tips the scales" in favor of the court's continued deference to the legislature); *Ray v. Barber*, 548 S.E.2d 283, 284 (Ga. 2001) (holding that where "the legislature has demonstrated its ability to require different appellate procedures for the state and prisoners," the court will not presume to rewrite those procedures); *Fernandez v. McDonald's*, 292 P.3d 311, 318 (Kan. 2013) (noting that where the legislature demonstrated its ability to delineate the employees to be covered by the State Workers' Compensation Act, the court would not presume that the legislature intended that undocumented minor employees not be covered by the Act without explicit language to that effect).

124. The appellee in *Whalen* made this argument. *See* *Executor-Appellee's Petition for Rehearing*, *supra* note 119, at 6.

125. The original version of section 144C.3 stated: "A declaration shall name a designee and may include one or more of the following directives: a. What final disposition shall be made of the declarant's remains." S. 473, 82d Gen. Assemb., 1st Sess. § 144C(1)(a) (Iowa 2008). This was

However, in the case of a decedent who knows beforehand that her family members are not likely to respect her wishes (as in *In re Estate of Whalen*), the Act can be seen as protecting her rights because she can simply name a designee who she is confident will comply with her wishes. Since the Act forbids consideration of her wishes, family members who wish to dispose of her body in some contrary manner (and may want to present evidence of what they believe were the decedent's wishes) will have no recourse because the designee has full discretion as to final disposition.¹²⁶

The fact that the decedent cannot give any instructions to the designee in her declaration¹²⁷ does not mean she cannot tell the designee what she would like done with her remains—she most certainly can. The Act only precludes a decedent from doing so in the actual declaration, but it does not forbid the decedent from directing the designee through other means.¹²⁸ It seems obvious that a person would only designate a designee that she knew was aware of and would respect her wishes as to disposition of her remains. Having done so, not only would the designee endeavor to fulfill the decedent's wishes, those wishes would also be better able to withstand an attack than if the Act allowed the decedent to include instructions within the declaration. If the Act allowed such instructions, a disgruntled family member could argue that the designee was not interpreting the decedent's directives correctly and sue on that basis. Therefore, it is possible that the Legislature's purpose in amending the Act to eliminate any reference to a decedent's ability to make directives was actually to insulate the decedent's directives from any kind of dispute.¹²⁹

the first version of the Final Disposition Act, introduced in the Iowa Senate on March 12, 2007. It is unclear from the sparse legislative history why the Legislature removed this language. The *Whalen* majority argues that this is evidence of the Legislature's intent to eliminate the decedent's right to determine disposition. *In re Estate of Whalen*, 827 N.W.2d at 192.

126. See *supra* text accompanying notes 94–96 (explaining that the best way to eliminate disputes around the meaning of a decedent's wishes is to eliminate the ability to consider those wishes).

127. IOWA CODE § 144C.3(2) (2014) (“A declaration shall not include directives for final disposition of the declarant's remains and shall not include arrangements for ceremonies planned after the declarant's death.”).

128. The fact that the Act precludes an individual from including certain types of language in her declaration may implicate First Amendment issues that are beyond the scope of this Note. I am indebted to Professor Sheldon F. Kurtz at the University of Iowa College of Law for this insight.

129. Because Iowa is the first state to eliminate a decedent's right to determine disposition of her remains, this situation has rarely been addressed. However, Missouri's “right of sepulcher” law likewise places “[a]n attorney in fact designated in a durable power of attorney” as the first person entitled to determine disposition of the decedent's remains. MO. REV. STAT. § 194.119(2)(1) (Supp. 2013). Though Missouri courts have not yet answered the question of whether the decedent maintains her right to have a say in the disposition of her remains in spite of this statute, at least one commentator has argued that giving the decedent the ability to delegate the right to determine disposition of her remains to a designee is actually designed to protect the rights and wishes of the decedent. Kimberly E. Naguit, Note, *Letting the Dead Bury the Dead: Missouri's Right of Sepulcher Addresses the Modern Decedent's Wishes*, 75 MO. L. REV. 249, 250 (2010).

For example, if Mrs. Whalen had been aware of her ability to designate a designee,¹³⁰ she may have chosen to do so, and might have chosen her sister, Mary Ann McCluskey, to act in that capacity.¹³¹ Mrs. Whalen had spoken with her sister, and her sister was aware of Mrs. Whalen's wishes. As evidenced by the fact that Ms. McCluskey tried to comply with Mrs. Whalen's wishes as her executor, Ms. McCluskey would very likely have complied with them as the designee.¹³² Because Ms. McCluskey would have been able to act at her discretion as to the disposal of Mrs. Whalen's remains (because of the Act's ban on the inclusion of instructions from the decedent to the designee in the declaration), Mr. Whalen would not have been able to attack her decisions regarding final disposition.

This is, in a way, what happened in the actual case, except that Ms. McCluskey was not the one whose discretion was impervious to attack.¹³³ Because the court found that Mrs. Whalen did not properly name a designee, Mr. Whalen, as the surviving spouse, had the discretion to determine the disposition of her remains.¹³⁴ Any attack on Mr. Whalen based on the idea that he was not complying with Mrs. Whalen's wishes would be futile.

If the Act's purpose is to protect the decedent's wishes, the *Whalen* decision illuminates two flaws in the statute that undermine that purpose. First, the Act presumes that the decedent has communicated her wishes to the designee or other individual controlling disposition under section 144C.5. Second, it presumes that the person controlling disposition will honor the decedent's wishes. The introduction of an explicit presumption, as discussed in Part IV.B, is the critical missing piece that can ensure not only respect for the decedent's wishes, but also that those wishes are impervious to interpretive

130. See Appendix, *supra* note 68, at 150 (indicating that Mrs. Whalen's daughter, Annie-Laurie Coogan, did not question the funeral director's answer that only Mr. Whalen could control disposition of Mrs. Whalen's remains nor suggest to Mrs. Whalen that she obtain legal advice on the issue).

131. Executor-Appellee's Brief in Chief, *supra* note 24, at 41. Ms. McCluskey was Mrs. Whalen's personal representative and executor. *In re Estate of Whalen*, 827 N.W.2d 184 (Iowa 2013). Given that Ms. McCluskey sought a court order requiring that Mrs. Whalen's body be returned to Montana and be buried according to her wishes, it is reasonable to assume that Ms. McCluskey would have done the same had Mrs. Whalen named her a designee.

132. Ms. McCluskey originally filed the motion to have Mrs. Whalen's body transported to Billings out of a desire "[t]o accomplish [her] sister's wishes." Appendix, *supra* note 68, at 127; see also *id.* at 141 (quoting testimony of Ms. McCluskey that she would do the best she could to carry out Mrs. Whalen's wishes).

133. It was, of course, Mrs. Whalen's wishes that the court rendered unassailable. *In re Estate of Whalen*, 827 N.W.2d at 194 ("Unless [Mr. Whalen] voluntarily permits [Mrs. Whalen]'s burial in Montana, our decision will leave her wishes unfulfilled.").

134. See *id.*

attack by virtue of the discretion granted to the person controlling disposition.¹³⁵

C. *THE FINAL DISPOSITION ACT DOES NOT CONTAIN AN IMPERATIVE STATEMENT
ELIMINATING THE COMMON LAW RIGHT TO DETERMINE DISPOSITION OF ONE'S
REMAINS*

Perhaps the most compelling reason that the *In re Estate of Whalen* court should not have interpreted the Final Disposition Act as eliminating the common law right to direct disposition of one's remains is the fact that the Act does not explicitly mandate such a result. The court relied on Iowa Code section 4.2, which states: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."¹³⁶ The *Whalen* court determined that in order to promote what it believed to be the object of the Act (preventing family disputes over bodily remains),¹³⁷ it needed to construe the statute as eliminating the common law right to direct disposition of one's own remains.¹³⁸

However, the court overlooked its own repeatedly announced rule that it will not interpret statutes in a way that eliminates common law rights unless the statute "imperatively" eliminates that right.¹³⁹ There is no imperative in the Final Disposition Act requiring that the common law right to direct the disposition of one's own remains cease to exist.¹⁴⁰ The Legislature could have easily added such a command, and evidence that the Legislature knows how to do so is found in the very portion of the Code the court relied on in *Whalen*.¹⁴¹ Section 4.2 states that "[t]he rule of the common law, that statutes in derogation thereof are to be strictly construed, *has no application to this Code.*"¹⁴² The Legislature therefore knows how to prevent the application of the common law and has done so on various occasions.¹⁴³

135. See *infra* Part IV.B (explaining that only clear and convincing evidence would be sufficient to overcome the presumption that the individual controlling disposition acts in accordance with the decedent's wishes).

136. IOWA CODE § 4.2 (2014).

137. See *supra* notes 83, 98 and accompanying text.

138. See *In re Estate of Whalen*, 827 N.W.2d at 192 ("In light of the foregoing legislative history, we believe chapter 144C reflects that the legislature made a deliberate policy choice to favor clarity and certainty over ability of persons to control the final disposition of their own bodies.").

139. *Rieff v. Evans*, 630 N.W.2d 278, 286 (Iowa 2001) (quoting *Collins v. King*, 545 N.W.2d 310, 312 (Iowa 1996)).

140. See IOWA CODE § 144C.

141. *In re Estate of Whalen*, 827 N.W.2d at 189–90.

142. IOWA CODE § 4.2 (emphasis added).

143. Though instances of "imperative statements" are rare in the Iowa Code, section 4.2 is not the only place that the Code preempts the common law. For example, section 822.2(2) states that "it comprehends and takes the place of all other common law, statutory, or other remedies

While instances in which the Iowa Legislature has eliminated a common law right are not myriad,¹⁴⁴ they occur often enough to indicate that the Legislature is familiar with the fact that the courts require such explicit language. Furthermore, the fact that the abrogation of the common law occurs infrequently indicates that the Legislature is reluctant to do away with Iowans' common law rights. In fact, the Iowa Legislature has often taken pains to ensure that the courts do *not* construe its actions as eliminating common law rights.¹⁴⁵

The *Whalen* majority would likely point to the fact that the Iowa Legislature did not include specific language preserving the common law right to determine disposition of one's own remains as evidence that it intended to eliminate that right. However, at best, this merely means that the Legislature's intention is ambiguous, since it did not include an imperative statement either way. Without such a statement, the court should not "presume" to know the Legislature's intent and allow such a widespread and long-held¹⁴⁶ right to be so easily eliminated. It should instead have erred on the side of caution by preserving the right and allowing the Legislature to add an imperative statement if it saw fit. Nevertheless, the modifications to the Final Disposition Act proposed in the next Part can simultaneously remedy this error, reduce litigation, and restore decedents' right to direct disposition of their remains.

formerly available for challenging the validity of [a] conviction or sentence." *Id.* § 822.2(2). The infrequency with which the legislature eliminates common law rights indicates that the legislature is reluctant to do so. Therefore, the court should not unilaterally interpret the Act as eliminating rights without a clear "imperative statement." For other examples of the statutory abrogation of common law rights, see *id.* § 535.17(7) ("This section entirely displaces principles of common law and equity that would make or recognize exceptions to or otherwise limit or dilute the force and effect of its provisions concerning the enforcement in contract law of credit agreements or modifications of credit agreements."); *id.* § 543B.62(1) ("[T]he duties of a licensee specified in this chapter or in rules adopted pursuant to this chapter supersede any fiduciary duties of a licensee to a party to a transaction based on common law principles of agency to the extent that those common law fiduciary duties are inconsistent with the duties specified in this chapter . . ."); *id.* § 557.20 (abolishing the "Rule in Shelley's case" in Iowa).

144. See *supra* note 143 (listing instances in which the Iowa Legislature has specifically eliminated a common law right).

145. Instances in which the Iowa Legislature has expressly protected a common law right are much more common. A review of the Iowa Code reveals at least 30 statutes in which operation of the common law is explicitly preserved. See, e.g., IOWA CODE § 455E.6 (preserving the common law with regard to groundwater protection); *id.* § 455K.9 (preserving the common law with regard to environmental audits); *id.* § 549.8 (preserving the common law with regard to music licensing fees). The fact that the legislature neither explicitly eliminated nor preserved the right to direct disposition of one's own remains merely exacerbates the ambiguity of the legislature's intent. Instead of presuming to understand that intent, the court should have waited for clearer direction from the legislature prior to eliminating Iowans' right to direct disposition of their remains.

146. See *supra* Part II.A (giving a history of a decedent's right to direct disposition of her remains in Iowa).

IV. PROPOSED MODIFICATIONS TO THE FINAL DISPOSITION ACT

This Part introduces proposals for how the Iowa General Assembly can modify the Final Disposition Act, so that the Act fulfills its presumed purpose of reducing litigation while still affording Iowans the right to determine disposition of their own remains. Regardless of whether the purpose of the Act is to reduce litigation,¹⁴⁷ or to protect the decedent's wishes, or both, the proposals introduced below will help accomplish these goals.

One commentator recently argued that in states with statutes giving first opportunity to determine disposition to a designee (so-called "Priority of Decision laws"¹⁴⁸), legislatures can better protect decedents' wishes by allowing the use of other types of documents to name a designee and by instructing courts to consider the actual personal relationship the decedent has with whoever is controlling disposition.¹⁴⁹ The problem with this proposition as applied to Iowa's Final Disposition Act is that such additions would cause the law to revert to its prior, pre-Act state.¹⁵⁰ Modifications like these would reintroduce the possibility of disagreement over what the decedent's true wishes were and whether a particular document qualifies as a designation, thereby engendering litigation and defeating what *Whalen* claimed was the Act's purpose—to prevent litigation among family members over the disposition of remains. Likewise, consideration of the "decedent's actual personal relationships" would invite disagreement over what those relationships were. Whatever the Act's purpose, such modifications would undermine it, because they would both encourage litigation and reopen the possibility of challenging the meaning of the decedent's wishes. Therefore,

147. See *supra* notes 83, 98 and accompanying text.

148. Murphy, *supra* note 23, at 400 (explaining that priority of decision laws are "laws that designate which family members, and in what priority, determine the treatment of remains").

149. Naguit, *supra* note 129, at 250.

150. Prior to the Final Disposition Act, there was nothing prohibiting consideration of the decedent's wishes, and as a result, Iowa courts used the common law to determine who had the right to determine disposition of a decedent's remains. In determining who had that right, courts considered the wishes of the decedent. See *Alcor Life Extension Found. v. Richardson*, 785 N.W.2d 717, 730 (Iowa Ct. App. 2010) ("We believe equity lies with the party that intends to carry out [the decedent]'s wishes."). Likewise, prior to the Act, Iowa courts also considered testamentary directives regarding disposition. See *King v. Frame*, 216 N.W. 630, 632 (Iowa 1927) ("[T]he right of a person to provide by will for the disposition of his body has been generally recognized."). Finally, prior to the Act, Iowa courts considered the decedent's actual personal relationships in determining who had the right to determine disposition. See *Rader v. Davis*, 134 N.W. 849, 850 (Iowa 1912) (stating that where a husband has no right to custody of his son and has forfeited the right to visitation by not making support payments to the mother, he also forfeits the right to have any say in the final disposition or funeral services of his son). Therefore, to reintroduce consideration of these criteria would simply bring back the element of uncertainty and ambiguity that inheres in any consideration of what the decedent wanted, thereby engendering disputes and weakening the degree to which the Act protects a decedent's wishes by eliminating any consideration of them.

such modifications to Iowa's law are undesirable because they would render pointless the changes the Iowa Legislature made to the Act.¹⁵¹

This Part proposes two changes to the Final Disposition Act that will simultaneously protect a decedent's ability to ensure that survivors honor her final disposition wishes and reduce litigation arising out of family disputes. These proposals are: (1) that the Iowa Legislature modify the Act to require funeral homes and funeral directors to have forms on hand that meet the requirements of section 144C.6; and (2) that the Iowa Legislature modify the Act to create a rebuttable presumption that the choices the person controlling disposition makes are in accordance with the decedent's wishes.

A. *THE FINAL DISPOSITION ACT SHOULD BE MODIFIED TO REQUIRE FUNERAL HOMES AND DIRECTORS TO HAVE FORMS ON HAND BY WHICH CLIENTS CAN ELECT DESIGNEES*

The dispute in *In re Estate of Whalen* can unfortunately be traced, in part, to the advice that Mrs. Whalen received from a funeral director who erroneously told her that her husband was the only one who could determine the disposition of her remains, and that there was nothing she could do to change that.¹⁵² If the funeral director had known that Mrs. Whalen could name a designee to control disposition of her remains and informed Mrs. Whalen of this option, she would likely have done so.¹⁵³

The Final Disposition Act should therefore be modified to require funeral homes to have forms on hand that people like Mrs. Whalen could use to easily name a designee in compliance with the Act. However, simply requiring funeral homes to have these designee forms available may not be enough to make people aware of their ability to name a designee. Such a requirement may help educate funeral directors about the legal rights of their clients,¹⁵⁴ but they must also be required to impart that knowledge to others.

151. Such additions to the Act would render it pointless, and Iowa disfavors pointless law. See *Holzhauser v. Iowa State Tax Comm'n*, 62 N.W.2d 229, 234 (Iowa 1953) (stating that the court should avoid interpretations that lead it to conclude "that the Legislature enacted a provision that serves no purpose"); see also *supra* note 125 and accompanying text (outlining legislative history showing that one version of the bill would have allowed a decedent to include directives regarding her remains in her declaration).

152. *In re Estate of Whalen*, 827 N.W.2d 184, 186 (Iowa 2013).

153. Executor-Appellee's Brief in Chief, *supra* note 24, at 41.

154. Simply reading the very first paragraph of the sample language found in section 144C.6 should be sufficient to educate a funeral director, or at least cause him to seek clarification before giving out incorrect information: "My designee shall have the sole responsibility for making decisions concerning the final disposition of my remains and the ceremonies to be performed after my death." IOWA CODE § 144C.6(1) (2014). In any case, it is evident that some form of further education of funeral directors is necessary. Mr. Scranton, the funeral director in *Whalen*, testified that he told Mrs. Whalen that she could not have any say in where she was buried because he believed this to be the case. Appendix, *supra* note 68, at 153-54. He said, "The last time I had ever had a law class . . . which is every two years, nothing had [] changed, and . . . it's supposed to be the next of kin as long as they are mentally sound." *Id.* at 154. Mr. Scranton spoke with Mrs.

The Act must also, therefore, be modified to require funeral directors to present their clients with a copy of this form at the time the parties execute an agreement, so that parties purchasing funeral services can make use of the form, if they so desire. While it is unclear whether such a provision would have helped Mrs. Whalen,¹⁵⁵ it would have at least been likely to make the funeral director aware of Mrs. Whalen's right to name a designee. As such, he would have been more able to inform Mrs. Whalen of her options even if she did not contract for services with him. The funeral industry may resist the application of such a rule simply out of a reluctance to bear the burden, but funeral homes already face substantial regulation in Iowa,¹⁵⁶ and they are the entities in the best position to explain this option to clients. This additional requirement is reasonable and could easily be implemented at funeral homes across the state—it is as simple as the presence of a pad of paper made up of pre-printed designation sheets.¹⁵⁷

B. THE FINAL DISPOSITION ACT SHOULD BE MODIFIED TO CREATE A REBUTTABLE PRESUMPTION THAT THE PERSON CONTROLLING THE DISPOSITION OF A DECEDENT'S REMAINS ACTS IN ACCORDANCE WITH THE DECEDENT'S WISHES

Another modification that would both help ensure that a decedent's wishes are met and reduce litigation would be to introduce a presumption that the person controlling disposition of the decedent's remains acts in accordance with the decedent's wishes.¹⁵⁸ To protect those wishes, however,

Whalen in April and May 2012, but the Final Disposition Act was enacted in 2008. *In re Estate of Whalen*, 827 N.W.2d at 186–87. If the last class Mr. Scranton attended discussed the change in the law, he didn't remember it. See Appendix, *supra* note 68, at 154. In any case, having ready-made forms on hand at funeral homes would be a good first step in providing that education to funeral directors.

155. Whether or not Mrs. Whalen actually contracted with Mr. Scranton's funeral home for services prior to her death is unclear. See Appendix, *supra* note 68, at 138–39. Mr. Scranton did "open a file" for her, but whether this cost her any money is not in the record. *Id.* at 139.

156. See generally IOWA CODE § 156 (containing statutory regulation of the funeral and final disposition industries in Iowa).

157. Enforcement of this proposed provision could be accomplished through the regulation of funeral directors as it currently exists. Section 156.9 of the Iowa Code provides the disciplinary actions that can be taken against funeral directors for "[k]nowingly misrepresenting any material matter to a prospective purchaser of funeral merchandise, furnishings, or services." *Id.* § 156.9(2)(a). These actions include the "restrict[ion], suspen[sion], or revo[ca]tion of a license to practice mortuary science, or plac[ing] a licensee on probation." *Id.* § 156.9(1).

158. While no other state has explicitly enacted such a presumption, a state may require the presentation of substantial evidence to overcome the survivor's wishes. See *Dutton v. Brashears Funeral Home*, 357 S.W.2d 265, 270 (Ark. 1962) (Bohlinger, J., dissenting) ("[I]f the parties were living in the normal relations of marriage, a very strong case will be required to justify a court in interfering with the wish of the survivor." (citation omitted)). Furthermore, the statutes of some states seem to imply the existence of a presumption that the person controlling disposition acts in accordance with the decedent's wishes. See, e.g., CONN. GEN. STAT. ANN. § 45a-318(b) (West 2014) ("No person may challenge a funeral director's decision to carry out the [decedent's] directions for disposition . . . if the funeral director's decision and conduct in carrying out such directions . . . was reasonable and warranted under the circumstances.")

the presumption must also be rebuttable by the presentation of clear and convincing evidence.¹⁵⁹ Other states with statutes analogous to Iowa's Final Disposition Act have similar presumptions.¹⁶⁰

Such a modification would not affect the number of family lawsuits or the degree to which the decedent's wishes are impervious to attack for two reasons. First, the introduction of a rebuttable presumption would not substantially affect the quantity of litigation, because family members who contest the decisions of the designee would have to introduce clear and convincing evidence of the decedent's true wishes. If family members do not have such evidence, or if there is substantial evidence that the designee is acting in accordance with the decedent's wishes, litigants will know that they will be unable to overcome the presumption and thus likely will not litigate the question.¹⁶¹ The number of cases where this is a close question is likely to be small, and therefore will not substantially affect the amount of litigation.

(emphasis added)); GA. CODE ANN. § 31-32-7(b), (f) (2012) (explaining that the person controlling disposition of the decedent's remains should act in the decedent's best interest while exercising "due care to act for the benefit of the [decedent] in accordance with the terms of the advance directive[s]," and that a court can revoke the right to control final disposition if it finds the person "is not acting properly"); *id.* § 31-32-4(5) (form for authorizing the powers of the health care agent); N.Y. PUB. HEALTH LAW § 4201(4)(a) (McKinney 2012) ("*All actions taken reasonably and in good faith based upon such authorizations and directions regarding the disposition of one's remains in such a will shall be deemed valid . . .*" (emphasis added)).

159. This is important because, in situations like that in *Whalen* where the person controlling disposition does *not* act in accordance with the decedent's wishes, the decedent's executor and/or other family members need some avenue by which to demonstrate this fact and ensure that the decedent's desires regarding final disposition are met. It is clear that the substantial evidence of Mrs. Whalen's wishes would have been sufficient to meet the clear and convincing standard. The use of the clear and convincing standard in state final disposition statutes is not unprecedented. *See* 20 PA. CONS. STAT. ANN. § 305(d)(1) (West 2005 & Supp. 2014) (requiring that, upon the presentation of clear and convincing evidence establishing that the person controlling disposition is acting contrary to the wishes of the decedent, "the court shall enter an appropriate order regarding the final disposition"). The Iowa Supreme Court has explained that requiring clear and convincing evidence denotes the existence of a presumption that can only be overcome by that evidence. *See* *Lockard v. Carson*, 287 N.W.2d 871, 874 (Iowa 1980) ("[T]he elements of fraud must be established by a clear and convincing preponderance of the evidence. . . . The purpose of that standard is to give deference to the presumption of fair dealing." (citations omitted) (internal quotation marks omitted)). *But see* WYO. STAT. ANN. § 2-17-101(c) (2013) (stating that a court should use "a preponderance of the evidence" standard in determining whether a particular final "disposition is in accordance with the decedent's wishes").

160. *See supra* note 159.

161. The use of a presumption as a means to reduce litigation is not a new idea. *See In re Fowler*, 349 B.R. 414, 420 (Bankr. D. Del. 2006) ("Presumptions are typically created to avoid litigation." (citing *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 70-71 (3d Cir. 1993))); *In re Palmer*, 224 B.R. 681, 683 (Bankr. S.D. Ill. 1998) (stating that, "[i]n order to reduce litigation costs, some courts . . . have imposed a rebuttable presumption that the contract [interest] rate [on secured claims in bankruptcy proceedings] is equivalent to 'market rate'"); *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 99 (Ky. 2000) (Graves, J., dissenting) (pointing out that "[t]he purpose of [a] presumption" favoring certain doctors' opinions in workers' compensation suits was "to reduce litigation"). The difference here, of course, is that introducing a presumption actually opens the door, albeit ever so slightly, to litigation. As the Act currently stands (according

Second, such a modification would not appreciably diminish the degree to which the decedent's wishes are currently insulated from attack because of the presumption itself. All the people outlined in section 144C.5 would have the benefit of this presumption, whether they are designees or family members acquiring the right to determine disposition by default. It seems reasonable that individuals to whom the ability to determine the final disposition of their remains is important will communicate those wishes to either their designee or to disposition-controlling family members. Likewise, it seems reasonable that those designees and disposition-controlling family members will virtually always endeavor to fulfill a decedent's wishes. For cases in which some family members believe a disposition-controlling family member is *not* acting in accordance with the decedent's wishes (as in *In re Estate of Whalen*), they need only introduce clear and convincing evidence of the decedent's wishes to overcome the presumption.¹⁶²

If such clear and convincing evidence is introduced, the presumption would be rebutted. The court could then order the person controlling disposition of the decedent's remains to dispose of those remains in accordance with the decedent's wishes, as demonstrated by the clear and convincing evidence. In this way, the decedent's wishes would be insulated

to *Whalen*), the person controlling disposition essentially has unfettered discretion—his actions with regard to final disposition can *never* be challenged. See *In re Estate of Whalen*, 827 N.W.2d 184, 189 (Iowa 2013).

The point here is simply that introducing the presumption should not significantly increase the amount of litigation. It is not to say that *no one* will file a lawsuit in spite of a lack of evidence to rebut the presumption—surely some people will do so. However, the litigants who will file these lawsuits are likely the same people who would file a lawsuit even if the rebuttable presumption did not exist. Those individuals are likely to file a lawsuit no matter what the law is, and adding the presumption should not therefore add to the pool of frivolous litigants. Furthermore, even when plaintiffs file such lawsuits, they should be relatively easy to dispose of on summary judgment if there is virtually no evidence to support the claims, much less sufficient evidence to overcome a presumption. In such cases, while there will be costs up to the point of summary judgment, any difference in such costs with the presumption versus without it will be negligible.

162. Admittedly, this is a high burden of proof, but it must be so if the Act is to protect the decedent's wishes. Such a burden of proof will provide protection on both ends. For example, if the decedent has not clearly expressed her wishes in any way other than by verbally telling her spouse, her spouse will likely comply with those wishes and those who would fight for an alternative final disposition will be unsuccessful. On the other hand, if the decedent has clearly expressed her wishes (as in *Whalen*), the presentation of that evidence, if it is clear and convincing, meets the required burden and allows the decedent's wishes to be fulfilled despite the contrary wishes of, for example, a spouse. Imposing a high burden of proof is a legitimate method of serving statutory goals. See *Phillips v. Selig*, No. 1550, 2001 WL 1807951, at *4 n.8 (Pa. Ct. Com. Pl. Sept. 19, 2001) (explaining that a high burden of proof for libel claims in labor disputes is warranted in order to protect against abuse of such claims and against interference in "the free debate that the NLRA envisions"); *State v. Walberg*, 325 N.W.2d 687, 691 (Wis. 1982) (explaining that the state's requirement that criminal defendants present clear and convincing evidence contradicting the presumptive validity of a guilty plea is warranted considering the state's interest in the finality of judgments).

from attack from both sides: The person controlling disposition would be presumed to act in accordance with the decedent's wishes, and the possibility of the presentation of clear and convincing evidence to the contrary allows other family members to bring to light, and honor, the decedent's true wishes.

V. CONCLUSION

The Iowa General Assembly's purpose in enacting the Final Disposition Act is ambiguous and lacks an imperative statement abrogating the common law right of an individual to determine the disposition of her own remains, a right that has existed in Iowa for over a century.¹⁶³ In the face of such legislative ambiguity regarding this age-old right, the Iowa Supreme Court should have exercised more caution before determining that the Legislature intended to become the first state to eliminate this right.¹⁶⁴ However, two simple modifications to the Act will both limit litigation and restore the decedent's right to direct disposition of her remains. Requiring funeral directors to provide clients with boilerplate forms by which individuals can name designees would help educate funeral directors and would inform their clients of their ability to ensure that survivors honor their wishes. Additionally, modifying the Act to include a presumption that the person controlling disposition acts in accordance with the decedent's wishes would limit costly litigation between family members. Making the presumption rebuttable by the presentation of clear and convincing evidence would ensure that survivors honor the decedent's wishes, as Iowa courts have required them to do for many years.

Mrs. Whalen left this world knowing that her remains would not rest comfortably in the place she loved, but in a land to which she had very little connection. No Iowan (or Montanan) should be consigned to this eternal fate. Therefore, the Iowa General Assembly should implement these changes to the Final Disposition Act so that people like Mrs. Whalen, for whom final disposition of their remains is of profound importance, may have their wishes fulfilled.

163. *Thompson v. Deeds*, 61 N.W. 842, 842-43 (Iowa 1895).

164. *Executor-Appellee's Petition for Rehearing*, *supra* note 119, at 8 ("The Court's ruling fails to consider that, if it is not reversed, Iowans will become the *only* citizens in the nation who literally have *no* right to have their wishes concerning final disposition considered.").