

“What’ll you do [with me] when I’m gone” Controlling body disposition: The Law and the Macabre

By Gerry W. Beyer *

Perhaps the most difficult thought to ponder is one’s own mortality. Many people avoid confronting the grim reality that they and their loved ones will eventually die. Estate planners must sensitively urge their clients to face the inevitability of death to obtain well-reasoned dispositions of their property. Many clients are also very concerned with the final disposition of their bodies. For example, some individuals want to be buried while others prefer to be cremated.

An estate planner needs to take steps to help insure that a client’s body will be handled after death in accordance with the client’s wishes. The estate planner must also work to reduce the chances of those wishes being frustrated either by lack of information to the individuals making disposition arrangements or by individuals surviving the client who are unhappy with the deceased’s disposition requests.

Unfortunately, many estate planners ignore or deal superficially with their clients’ body disposition concerns. Accordingly, this month’s *Study* details the techniques which estate planners may use to assist their clients to receive the body disposition they desire, using Texas law as an example.

TYPICAL EVENTS UPON DEATH

Estate planners must understand what happens when a person dies to give insightful advice to their clients. Unless a close family member or friend has died, many of us may not know the chain of events that occur after death. A practical examination of what to expect when death occurs lessens the mystique of death and prepares us to advise our clients competently.

When death occurs, a coroner or medical examiner must pronounce the person’s death. If a person dies at home, the police should be contacted and they will report the death to the appropriate authorities. If the cause of death is uncertain, if a person dies in jail, if a person commits suicide, or if the circumstances surrounding the death are unknown or suspicious, an inquest or autopsy may be required.

If the deceased individual made any anatomical gifts, the family should inform the proper authorities immediately for optimal organ donation.

The person authorized to make disposition arrangements, generally the spouse or next of kin, should contact relatives, locate the deceased’s instructions regarding disposition of the body (if any), and then contact the desired funeral home. The funeral director will arrange to have the body transferred from the place of death or autopsy to the funeral home.

As soon as possible, the funeral home needs to secure written or oral permission to embalm the body because embalming is usually not required by Texas law. Historically, embalming was performed to make sure the person was actually dead. Today, embalming preserves the body for open casket viewing and/or for the transportation of the body to distant locations.

The spouse or next of kin must decide if the family wants to bury the body themselves, have a traditional funeral with

burial, or cremate the body with or without traditional burial services. Over 56% of funerals are now cremations which is over twice the rate of just twenty-five years ago. The highest rate of cremation in 2019 was Nevada (80.7%) and the lowest was Mississippi (27.9%). See National Funeral Directors Association, Industry Statistical Information, <https://www.cremationassociation.org/page/IndustryStatistics> (last visited Jan. 28, 2022). If the family desires to bury its own dead without the assistance of a licensed funeral director, they must obtain a statement of death, a death certificate, and a burial-transit permit. Most local city ordinances, however, prohibit do-it-yourself burials.

In the typical case where the family desires formal services, the spouse or next of kin will meet with the funeral director to complete necessary paper work and make decisions regarding the funeral. The funeral home will usually prepare the death certificate and any desired obituary notice for the local newspaper. State and federal laws require the funeral director to disclose various funeral-related costs (e.g., transportation of the body, embalming, use of facilities for viewing and ceremonies, renting hearses and limousines, caskets, burial vaults, etc.) so that family members may make informed decisions.

Interment is generally more costly than cremation because a more decorative casket is usually selected and a burial vault is normally used. A casket is not mandated by law for a burial, but some type of container is usually required by cemeteries. Likewise, state law does not require a burial vault, but local law or cemeteries often require a durable container to prevent cave-ins.

An alternative to interment is cremation of the body. A casket is not required, but crematoriums often require some type of container to avoid direct handling of the remains. If a viewing or a religious service is planned, the funeral home may have attractive rental caskets available at significantly lower prices than if they were purchased. After cremation, the resulting ashes may be privately scattered, placed in an urn and buried, placed in a niche in a columbarium, or kept at home by a family member or friend.

ANATOMICAL GIFTS

The 2009 Texas Legislature enacted the 2006 version of the Revised Uniform Anatomical Gift Act as Chapter 692A of the Health and Safety Code to replace the 1968 version which has been in effect since 1969. (Texas never adopted the 1987 version of the Uniform Act.) This revision modernizes the law regarding anatomical gifts and makes it easier for a donor to make a gift. The new laws governing anatomical gifts took effect on September 1, 2009. Because Texas did not adopt the intervening 1987 Revised Act, there have been some significant changes to the law governing anatomical gifts as two “upgrades” were performed at one time.

This section examines the Revised Uniform Anatomical Gift Act as enacted by the 2009 Texas Legislature and amended in subsequent sessions with emphasis on the changes from prior law. The reader is warned that not all changes to anatomical gift law in Texas are presented and not all aspects of the changes cited are discussed or analyzed. You must read and study the full text of the statute before relying on it or using it as authority and check any of your state’s specific provisions.

Donors and Donees

1. Persons Authorized to Make Anatomical Gift Before the Donor’s Death

Prior law authorized any individual with testamentary capacity to make an anatomical gift. Accordingly, being of sound mind was relevant to whether an individual could make a gift. The Revised Act does not include the testamentary capacity requirement. Instead, the Revised Act simply authorizes the following individuals to make an anatomical gift before the donor’s death:

- An adult,
- An emancipated minor,
- A parent of an unemancipated minor,
- An unemancipated minor eligible to apply for a driver’s license because the minor is at least 16 years old, if the gift occurs before the minor’s 18th birthday and the minor’s parent gives written, signed consent,
- An agent of the donor, unless prohibited by a medical power of attorney or other document of record, and

- The donor's guardian. TEX. HEALTH & SAFETY CODE §692A.004 (hereinafter cited by section number only).

2. Persons Who May Make Anatomical Gift After the Donor's Death

Under prior law, the following individuals, in the following order of priority, could make a gift of a decedent's body: the spouse, an adult child, either parent, an adult sibling, a guardian of the person who could make a gift at the time of death, and any other person obligated to dispose of the body.

Under §692A.009(a), the list of priority persons authorized to make an anatomical gift of a decedent's body has been expanded to include the following individuals:

- An agent who could have made the gift immediately preceding the decedent's death,
- Adult grandchildren,
- Grandparents,
- "[A]n adult who exhibited special care and concern for the decedent," and
- The hospital administrator.

An agent who could have made the gift immediately preceding death now has top priority for making the anatomical gift decision for a decedent who did not make an anatomical gift during life; the remaining added classes have a lower priority than a spouse, adult child, parent, or adult sibling. Furthermore, whereas prior law prohibited an anatomical gift over the known opposition of a member of the same or a higher priority class, the new law allows for a majority of the members of the highest priority class who are "reasonably available" to make an anatomical gift over the minority's objection.

The individuals listed above may only make an anatomical gift of a decedent's body, meaning they may only make the anatomical gift after the decedent's death. Unlike prior law, they may not make the anatomical gift shortly before the decedent's death.

3. Donee of Anatomical Gifts

The following persons are no longer permissible donees of an anatomical gift: a physician, an approved body storage facility, and a person specified by a physician. Additionally, hospitals may no longer be the donee of an anatomical gift to be used for therapy or transplant.

A donor may now make an anatomical gift to an organ procurement organization for any permissible purpose, a hospital to be used for research, an individual if the individual is to be the transplant recipient of the gift, an eye or tissue bank, certain forensic science programs and organizations that use human remains detection canines, and the Anatomical Board of the State of Texas.

The Revised Act does not contain provisions allowing a donor to specify the physician to perform the procedures for making the anatomical gift.

Under prior law, a donee could not accept an anatomical gift made after the donor's death if the donee or the donee's physician had actual notice that a member of the same or a higher priority class opposed the gift. The Revised Act changes the circumstances under which a donee is prohibited from accepting an anatomical gift. Now, a donee may not accept an anatomical gift if the donee knows the gift was not effectively made or the donor made an unrevoked refusal.

4. Purpose of Anatomical Gifts

The permissible purposes for which an anatomical gift may be used—transplant, therapy, research, or education—are unchanged. The Revised Act adds, however, that when a donor states one of these purposes for his or her anatomical gift, this will not limit other persons authorized to make gifts of the donor's body from making the gift for other purposes in the absence of an express, contrary indication from the donor. Thus, a client who does not want his body to be used for certain purposes should expressly indicate this desire.

5. Default Purpose & Donee

As under prior law, a donor does not have to specify the purpose or the recipient of his or her anatomical gift. The Revised

Act, however, modifies the default purpose or donee for such an anatomical gift:

- If a donor specifies multiple purposes with no priority, the gift will be used for transplant or therapy if possible, and for research or education if not suitable for transplant or therapy.
- If a donor does not name a permissible donee but does specify a purpose for which the gift is to be used, the Act provides that the gift will pass to the Anatomical Board of the State of Texas, a procurement organization, an eye bank, or a tissue bank, depending on the purpose for which the gift is to be used.
- If the donor does not name a permissible donee and does not specify the purpose for which the gift is to be used, the gift may be used for transplant or therapy only, and the donee will be the appropriate eye bank, tissue bank, or procurement organization.

Methods for Making and Refusing to Make A Gift

1. Donation Methods

A donor may still make an anatomical gift in the donor's will, on a donor card, and by authorizing an affirmative statement or symbol of gift to appear on the donor's driver's license or identification card.

A donor card, however, no longer needs to be signed in the presence of two witnesses, unless someone other than the donor signs the donor card at the donor's direction. For someone other than the donor to be eligible to sign the donor's card, the donor must be physically unable to sign, the record must be signed by two adult witnesses, one of whom is a disinterested witness, and the record must state that it is signed by two adult witnesses, one disinterested, at the donor's direction.

The methods by which a donor may make an anatomical gift before death have been expanded to include (1) an authorization of a gift in a donor registry and (2) any form of communication made by the donor to two adults, one being a disinterested witness, during terminal illness or injury. A disinterested witness is anyone other than the following individuals: an adult who exhibited special care and concern for the donor, a potential donee of the anatomical gift, and the donor's spouse, sibling, grandparent, parent, child, grandchild, or guardian.

2. Refusal Methods

Unlike prior law, the Revised Act provides methods by which an individual may expressly refuse to make an anatomical gift. An unrevoked refusal bars all others from making a gift of the person's body or part thereof absent an express, contrary indication from the donor. Thus, a client who does not want an anatomical gift of his or her body to be made should execute a refusal.

The Revised Act provides three methods by which a donor may document his or her refusal.

- *Signed record.* An individual may sign a record evidencing his or her refusal to make an anatomical gift. This record may be signed by another person acting at the potential donor's direction if the potential donor is physically unable to sign, the record is signed by two adult witnesses, one of whom is a disinterested witness, and the record states that it is signed by two adult witnesses, one disinterested, at the potential donor's direction.
- *Will.* The potential donor may refuse to make an anatomical gift in his or her will, regardless of whether the will is probated or invalidated after the potential donor's death.
- *Any form of communication.* A donor may refuse to make an anatomical gift through any form of communication given to two adults, one being a disinterested witness, if the communication occurs during the donor's terminal illness or injury.

3. Revocation and Amendment

The methods for revocation and amendment of an anatomical gift under the prior act were different depending on whether the document of gift had been delivered to the specified donee. The Revised Act does not make a distinction in amendment or revocation methods based on whether the document of gift has been delivered. The Revised Act provides the following methods for amending or revoking an anatomical gift made before the donor's death:

- A donor may amend or revoke a prior anatomical gift by executing a subsequent document of gift that expressly or by inconsistency amends or revokes all or part of a prior gift or by signing a record that amends or revokes the gift.
- An anatomical gift made by will can be amended or revoked by the two methods described above or by any valid method for the amendment or revocation of wills in general.
- A donor may revoke an anatomical gift not made in a will by destroying or canceling the document of gift with intent to revoke or addressing any form of amending or revoking communication to two adults, one of whom must be a disinterested witness, during terminal illness or injury.

A potential donor who makes a refusal is the only person who may subsequently amend or revoke the refusal and may do so by any method for making a refusal, by making a subsequent anatomical gift inconsistent with the refusal, or by destroying or canceling the refusal document or part thereof with intent to revoke.

Procedures Upon Donor's Death

1. General Procedures

Previously, when it was unknown if an individual at or near death wanted to make an anatomical gift, the Code provided the relevant procedure for making this determination. The Revised Act does not contain a specific procedure for this situation. Instead, under hospital protocol requirements, the hospital must timely notify an organ procurement organization when an individual is at or near death. The procurement organization will then search for evidence of an anatomical gift and make donation related inquiries.

2. Preclusive Effects

The Revised Act places greater emphasis on donor autonomy. Previously, a one-sentence provision stated that a gift made by someone at least eighteen years old would be honored without the need for consent or approval from any other person. The Revised Act contains an entire subsection on the preclusive effects of making or refusing to make an anatomical gift.

Absent subsequent revocation or a contrary indication from the donor, all other persons are barred from making, amending, or revoking the (potential) donor's decision to make or refuse to make an anatomical gift. Additionally, if an individual with authority to make anatomical gifts on the donor's behalf during the donor's life makes or amends a gift of the donor's body, that gift cannot be amended or revoked by other persons who may have authority to make an anatomical gift of the donor's body after death.

Two relevant provisions limit the preclusive effect of the rules above.

- An unemancipated minor's gift or refusal may be amended or revoked by the minor's parent.
- Absent an express contrary indication, a donor's anatomical gift of part of his or her body or a revocation of a prior gift will not prevent gifts of other parts of the body by the donor or other authorized persons.

3. Resolving Conflict with Advance Directive

In an entirely new addition to Texas anatomical gift law, the Revised Act proscribes the procedure for resolving a conflict between a donor's desire to make an anatomical gift and the donor's advance directive regarding the withdrawal or withholding of life sustaining treatment. Specifically, withdrawing or withholding support according to the advance directive may conflict with preserving parts of the donor's body for transplant or therapy. If such a conflict arises, Section 692A.021 requires that the conflict be resolved "as expeditiously as possible" in the following manner:

- The donor and donor's physician must confer to resolve the conflict.
- If the donor is incapable of resolving the conflict, the donor's physician must confer with the agent named in the donor's advance directive, or if this agent is not reasonably available, any other person authorized to make healthcare decisions for the donor.
- If the physician conference does not lead to a resolution, an expedited review of the matter by the healthcare facility's ethics committee is required.

- Measures necessary for preserving parts of the donor's body for transplant or therapy cannot be withheld or withdrawn before the conflict is resolved.

CONTROL OF DECEDENT'S REMAINS

Texas Health & Safety Code Section 711.002 contains a prioritized listing of individuals who have the right to control the disposition of a decedent's remains. Top priority is given to the expressed directions of the decedent, second priority to the directions of a special agent the decedent appointed, and last priority to close family members and the decedent's personal representative.

Decedent's Expressed Wishes

At common law, a deceased person's burial instructions were deemed precatory, not mandatory. For a discussion of the historical background of bodily disposition, see James R. Marshall, *Testamentary Rights of Bodily Disposition*, LAW NOTES, Spring 1982, at 31. Texas has modified the common law to accord top priority to the decedent's properly expressed wishes.

1. Methods of Expression

a. Written Instructions

The decedent's instructions must be (1) in writing, (2) contain the decedent's signature, and (3) be acknowledged by a notary. These instructions should cover matters such as those listed below.

- Whether burial or cremation is desired.
- Name of desired funeral home.
- Preferred location of services.
- Preferred person to preside over the services (e.g., a clergy member, a relative, or friend).
- Location of a pre-purchased burial plot, if any, or the desired burial location (country, state, city, or specific cemetery).
- Whether an obituary is desired and, if so, its contents. (Warning: Burglars read obituaries and funeral notices so they can break into the deceased's home while the family is gone. Some families hire security personnel during the viewing and funeral to reduce the chance of these types of losses.)
- Type of headstone and information desired thereon.
- Whether the viewing or funeral is to be open or closed casket.
- Desired burial clothes and jewelry.
- Type of casket and vault desired.
- Names of pallbearers.
- Other directions or preferences such as types of flowers, music selections, prayers, etc.
- In preparation for death, some people record videos to be shown at the funeral which memorialize their lives with pictures, mood music, narration, etc. Survivors appear to receive comfort from these recordings. See Mark Muro, *This Was Your Life*, BOSTON GLOBE, Sept. 16, 1992, at 69.

b. Prepaid Funeral Contract

A client may plan ahead for the funeral with the desired funeral home. A prepaid funeral contract helps assure that the client's particular instructions are followed and relieves the survivors of the heavy burden of making funeral arrangements.

c. Will

A client may also provide instructions in the client's will. These instructions will be carried out immediately without the necessity of probating the will. The directions are valid to the extent to which they are acted on in good faith even if the will is never probated or if a court declares the will invalid for testamentary purposes. The use of will provisions to give body disposition instructions is not recommended, however, because the will may not be found or read until after the funeral.

2. Changing Previously Expressed Wishes

The client may modify or revoke previously expressed written directions only by a subsequent writing which is (1) signed by the client and (2) acknowledged by a notary.

3. Duty of Others to Obey Directions

The person who would be entitled to control body disposition in the absence of instructions as discussed below, must "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."

4. Liability for Following Instructions

A cemetery organization, a business operating a crematory or columbarium or both, a funeral director or an embalmer, or a funeral establishment is not liable for carrying out the decedent's written directions.

Decedent's Surviving Relatives and Personal Representative

If the decedent neither left body disposition instructions nor appointed an agent, the decedent's relatives and personal representative are (1) entitled to control the disposition of the decedent's remains, (2) obligated to inter those remains, and (3) if a family member, is liable for the reasonable cost of the interment or if a personal representative, binds the estate for the reasonable cost but is not personally liable.

Disposition In Other Cases

If the application of the foregoing rules does not determine the person who has the duty to inter, then two default rules apply. If an inquest is held, the person conducting the inquest must inter the remains. If there is no inquest, then the county in which the decedent died has the responsibility of interring the remains.

Other Disposition issues

1. Penalty for Failure to Comply With Decedent's Wishes

a. No Statutory Remedy. The statute provides no penalty for failure to comply with the decedent's wishes or the demands of the decedent's duly appointed agent.

b. Use of Conditional Testamentary Gifts. A client with strong desires regarding body disposition may want to make gifts to relatives who are responsible for body disposition conditioned on following the directions as set forth in an inter vivos document or in the will. The fear of losing a sizable gift may encourage family members hostile to the decedent's bodily disposition plans to carry them out or, at least, not object.

2. Improper Warranting of Decedent's Identity

"A person who represents that the person knows the identity of a decedent and, in order to procure the disposition, including cremation, of the decedent's remains, signs an order or statement, other than a death certificate, warrants the identity of the decedent and is liable for all damages that result, directly or indirectly, from that warrant."

3. Department of Defense Designation

If the decedent has an effective United States Department of Defense designation with respect to a person to control the disposition of the decedent's remains, then these instructions prevail over conflicting instructions in a will, prepaid funeral contract, or other disposition of remains document. The government form is deemed sufficient even if it does not comply with the Texas formalities as long as it is properly completed, signed by the decedent, and witnessed.

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