

# The Case for Disposition of Remains Legislation

## (A.3129-C/S.7136-A)

The right to control how one's body is handled after death injects dignity and simplicity into an area too often fraught with fear and discomfort. Unlike citizens in many other states, New Yorkers are severely limited in their ability to control the disposition of their remains; despite the fact that an individual can donate his body through anatomical gift laws, and direct who should control the disposition for this purpose, one cannot designate a proxy to handle one's remains for a private burial or other services.

Compounding this lack of control are New York's laws relating to the duty of burial; while the spouse is normally charged with this responsibility, in cases where the individual was unmarried, in a relationship with a domestic partner, or in another non-traditional family unit, the duty devolves, to the next of kin. As a consequence, people in alternative family settings who lose a loved one find themselves too often shut out of funeral planning, despite being in the best position to know what the deceased would have preferred.

This legislation seeks to ameliorate inadequacies in the current laws by providing a simple, legally binding form which would allow any individual to designate a proxy to handle the disposition of their remains. In addition, if no proxy had been elected, the law would have another significant impact. It would create a clear and concise priority list, which would replace the broad phrase "next of kin". It would also rank domestic partner on the same priority level as spouse; thus, individuals who choose not to be married, as well as those who are unable to marry, can rest assured that their remains will be handled by their intimate partner.

### ***The Uniform Anatomical Gift Act***

The Uniform Anatomical Gift Act has been enacted in all fifty states and the District of Columbia. Comprehensive in stature, this law has two significant aspects. It endows individuals with *complete control* over their remains with regards to anatomical gifts; any adult may "make an anatomical gift...or refuse to make an anatomical gift." Unif. Anatomical Gift Act § 2, (a)(i-iii) (1987). Additionally, this law provides that if a deceased individual did not express a desire to donate his body, but has also not requested that his body not be gifted, the spouse or another family member may make an anatomical gift on his behalf. To clarify matters, this Act creates a *priority list* which designates the legal authority to control a decedent's remains, in descending priority order. Id. at § 3, (a).

In New York, this Uniform Act, when adopted, replaced Public Health Law § 4201, which had previously addressed the disposition of remains in the state. Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, 159 Misc. 2d 884, 888 (N.Y. Misc., 1993). The precedent exists, in this state and all others, for individuals to retain the power to control their remains for the purposes of anatomical gifts; reason dictates that this public policy approach furthers medical science at no cost to the public. Many other jurisdictions, recognizing that this Act does not adequately address control over disposition in the absence of anatomical gifting, enacted legislation providing individuals with broad control over their remains. See e.g. La R.S. 8:655 (2001), NRS § 451:024 (2003).

### ***Proxy designation for the disposition of remains***

One New York court extended the principles of this Act, explaining that since Public Health Law § 4201 had allowed individuals to direct the disposition of their remains, "this court cannot believe that the legislature intended to abrogate one's right to direct the disposition of their remains by repealing [§ 4201] and not expressly reenacting the above language into its replacement, [the Uniform Anatomical Gift Act] under Article 43." Id. Despite this court interpretation, and the vast amount of legislation providing comprehensive rights to citizens of other states, the law as it stands in New York only provides individuals with the ability to control their remains for the purposes of making an anatomical gift. A. 3129-C/S.7136-A addresses this need, already resolved in numerous other jurisdictions, by providing individuals with greater control over their remains.

New York's stance is not in accordance with the majority of other states, which provide individuals with the ability to designate a proxy to handle their remains. See e.g. Tex. Health & Safety Code § 711.002 (a) (1992), Fla. Stat § 470.002 (2003). These states and others have created the legal mechanism, either through a specific form or through simple written instructions, by which individuals can designate another who will manage the disposition of their remains. Unlike New Yorkers, citizens of these states have the ability to donate their bodies to science, as well as the ability to rest assured that the loved one of their choice will have control of their remains and carry out their wishes after they are deceased.

### ***Priority lists for individuals with no designee or proxy***

Effective planning for the disposition of one's remains is further complicated because the law in New York as it stands currently provides an inadequate default list which assigns the duty of burial to the spouse; unfortunately, if a legal spouse

is not available, the duty devolves to a member of the vague category described as 'next of kin'. See NY CLS Soc Serv § 101 (1) (1984), NY CLS Pub Health § 4210 (3) (1980).

New York's sister states have, for the most part, chosen not to utilize this unclear and ineffective approach. More than half have codified, in an attempt to simplify the difficult period after a loved one's death, priority lists which establish exactly who has the right to control the disposition of remains. See e.g. Code of Ala. § 34-13-11 (2002), Minn. Stat. § 149A.80 (1998). Rather than placing the right to burial with an unidentified group like next of kin, these states have created lists, in descending priority order, of who should be in control of the deceased; North Carolina law, for example, states that if no other arrangements have been made by the decedent the burial right goes first to the spouse, then to the children, followed by the parents, then the siblings of the deceased. N.C. Gen. Stat. § 130A-420 (1997). Understanding the need for clarity, these statutes remove the guesswork which inevitably arises under phrases like "next of kin."

This bill addresses the inherent ambiguity in New York's current law by creating a definitive priority list for individuals who have not designated a proxy. This list clearly and precisely establishes who has the legal right and responsibility to control an individual's remains; the priority list is directly in line with parallel lists in other states, and represents a common sense solution to the frequent problem of determining who should make these difficult decisions.

### ***Protection for Domestic Partners***

Finally, this legislation is significant and timely because it makes a domestic partner equivalent to a spouse for those individuals who have not designated a proxy. Recognizing the increasing number of local and state jurisdictions that are affording legal protections to couples in a domestic partnership, this bill recognizes that while the right to control a loved one's remains is usually given to a legally-recognized spouse, these unmarried couples should not be denied this important and overlooked right just because they are not married.

In New York State, numerous localities have established domestic partnership registries that provide numerous rights and protections to unmarried couples. While the phrase "domestic partners" is often linked exclusively to gays and lesbians, in New York City's registry, the largest in the state, the numbers indicate that an overwhelming 70% of the couples who had signed up were in fact heterosexual couples.

Additionally, New York would not be pioneering the inclusion of domestic partnership language into disposition bills; the District of Columbia and Vermont have already made explicit provisions for same-sex and opposite sex domestic partners, as well as those in civil unions, in their respective laws. D.C. Code § 3-413 (a) (1) (2001), 18 V.S.A. § 5220 (1999).

One funeral director in Albany saw the need for new legislation, stating that there are "situations where...maybe a long time companion or close friend, [who was] more influence in that person's life than the blood relatives, and there's nothing in place that would allow the deceased to choose that individual as a decision maker." Continuing this sentiment, in those situations where the individual has not designated a domestic partner to handle their remains, the partner would nonetheless obtain the legal right to do so, as with married couples.

### ***Summary***

Unmarried couples, gay couples, individuals with HIV/AIDS and other disease groups, as well as countless others across the State are not being served by New York's lack of adequate disposition of remains laws. Addressing those with minimal assets, for whom estate planning is not a priority, this legislation would provide a simple proxy form that would allow them to designate a trusted loved one or friend to handle their remains. For individuals who choose to remain in committed, unmarried relationships, as well as those who cannot legally marry, this bill would allow them to designate that loved one to manage their remains; in cases where they do not designate their partner beforehand, their partner will be legally entitled to do so in accordance with the priority list. Addressing this need, the court in Stewart argued for the rights of a man to control the remains of his partner, due to "the close, spousal-like relationship that existed between the Plaintiff and his 'significant other.'" 159 Misc. 2d 884 at 888. Unfortunately, since the protections offered by this bill were not in place, the court remarked on the danger that "[the deceased's] wishes will effectively be ignored merely because the [partner] does not fit neatly into the legal definition of a spouse or next of kin." Id.

Speaking from his experience in the field, one funeral director summarized the current need in the disposition laws in the State by explaining that "what we hear from families is that if there was something that could be read during the funeral arrangements, they would honor it if they knew it was their loved one's wishes." This legislation addresses the concerns of these family members, by creating a legally binding document that allows anyone to designate a proxy, or to dictate specific instructions regarding their remains. Additionally, domestic partners would assume their rightful place as being equivalent to spouses for the purposes of disposition of their loved one's remains. This legislation, then, represents an opportunity for all the citizens of New York to decide who should handle their affairs, as well as recognizing the growing variety of family units which constitute the diverse cultural tapestry of this State.