



# LAW OF THE DEAD AND SOUTH CAROLINA'S CREMATION STATUTE



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# Law of Disposition of Remains

**A** Roman origins / western culture / Christian doctrine

**B** English common law and English ecclesiastical law

**Limited Common Law:**

- a. Deceased in good standing with the Church of England, Deceased had right to be buried in local parish churchyard at no expense
- b. Duty on landowners to convey the remains to local parish

**Ecclesiastical Law:**

By the time of William the Conqueror, “the temporal and spiritual jurisdiction were severed and control of the churchyards and burial was absorbed by the ecclesiastical authorities” -Percival Jackson, *The Law of Cadavers*

*“We have looked diligently through the common law reports of England, and have found no case in which the civil courts have been appealed to in matters connected with the bodies of the dead. On the contrary, their burial, the graveyards and cemeteries in which they are interred, and the religious ceremonies observed, have been left exclusively to ecclesiastical cognizance, the civil courts universally holding, in the language of Lord Coke, that the burial of the cadaver is nullius in bonis[1].” Simpkins v. Lumbermens Mut. Cas. Co., 200 S.C. 228, 20 S.E.2d 733 (1942).*

*“[I]t is to be remembered that the common law of England had nothing to do with burial of deceased persons, etc., but that the ecclesiastic court had jurisdiction over such matters, and not the courts of common law.” Simpkins v. Lumbermens Mut. Cas. Co., 200 S.C. 228, 20 S.E.2d 733 (1942)*

**C** Concepts continue in English Colonies

Rejection of ecclesiastical law and established church—a vacuum in the law of the dead

*“New York court opinion in 1820 – “Are the principles of natural law, and of Christian duty, to be left unheeded, and inoperative, because we have no ecclesiastical Courts recognized by law?”*

*Beatty v. Kurtz, 27 US 566 (1829) – “in the event of an interference with the sepulchers of the dead, the remedy must be found, if at all, in the protecting power of the court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living.”*

**D** English common law and at cultural norms survive in United States today

**E** 20th century - funeral directors control disposition of remains

[1] Translation: the body belongs to no one

# Decedent's Rights to Control Remains

## Longstanding common law principle—Decedent controls disposition of their remains(manner and location)

**A** Traditional / Historical precedent: Decedent uses will to memorialize intentions about final disposition of remains

Roman law / Canon Law / Ecclesiastical Law origins here too



Example: Benjamin Franklin's will: "I wish to be buried by the side of my wife, if it may be, and that a marble stone, to be made by Chambers, six feet long, four feet wide, plain, with only a small moulding round the upper edge, and this inscription: Benjamin and Deborah Franklin 178- to be placed over us both."

**B** Notion survives that you decide what to do with your own remains

1911 opinion from Washington state—a man should be buried in South Dakota, which were his wishes, over his wife's insistence that he be buried in Washington

**C** South Carolina Law

*"[T]he surviving spouse has a primary right to the possession of the body and to control the burial thereof, unless the decedent has by will or otherwise, made a different disposition."* Simpkins v. Lumbermens Mut. Cas. Co., 200 S.C. 228, 20 S.E.2d 733 (1942) (holding that surviving spouse has right to maintain action for negligent and willful mutilation of a corpse).

### Quasi-Property Right:

*"There is no right of property in a dead body, in the ordinary sense in which the word 'property' is used, but the law recognizes a family right, which descends from generation to generation, to protect the bodies of deceased relatives from indignity, and the ground in which they are interred from unnecessary invasion or disturbance."* Little v. Presbyterian Church of Florence, 68 S.C. 489, 47 S.E.974 (1904).

*"[A] dead body is not property in the strict sense of the common law, it is quasi-property, over which the relatives of the deceased have rights which the court will protect."* Simpkins v. Lumbermens Mut. Cas. Co., 200 S.C. 228, 20 S.E.2d 733 (1942)

# South Carolina Safe Cremation Act

## A Personal Preference Statute


S.C. Code Ann 32-8-315(A): “A person may authorize his or her own cremation and the final disposition of his or her cremated remains by executing a cremation authorization form.”

Requirements for cremation authorization form found in S.C. Code Ann 32-8-315(C): “A preneed authorization...shall specify the final disposition of the cremated remains in accordance with Section 32-8-345.”

Consequence of having cremation authorization outlined in S.C. Code Ann 32-8-315(B): “At the time of death of a person who had executed a cremation authorization form, the person in possession of the executed form and the person charged with making arrangements for the final disposition of the decedent who has knowledge of the existence of the executed form shall ensure that the decedent is cremated and that the final instructions contained on the authorization form are carried out.”

Inconsistent instructions? S.C. Code Ann 32-8-315(C) contemplates that decedent’s wishes in an authorization CAN be overruled by “different or inconsistent” instructions from an agent.

Revocation of Authorization? S.C. Code Ann 32-8-315(A) permits revocation during life by written notice to both funeral establishment and crematory authority.



S.C. Code Ann 32-8-315(D) permits revocation after death! However, there can be no revocation after death “unless full payment for the cremation and disposition of the remains has not been received or guaranteed”

Potential Problems with South Carolina Personal Preference Statute:

- 1 Does South Carolina enforce any other decisions about disposition besides cremation?
- 2 Is South Carolina codifying a common law right for disposition of remains or is it reducing uncertainty and emphasizing pre-need contract and payment for services?
- 3 Different states have different formalities - will another state honor deceased instructions?

# South Carolina Safe Cremation Act

## **B** Designated Agent Statute

S.C. Code Ann. 32-8-320(A): "In the following order of priority these persons may serve as decedent's agent and in the absence of a preneed cremation authorization may authorize cremation of the decedent:"

- (1) person designated as agent for this purpose in "will or other verified and attested document"
- (2) spouse (unless separated, as defined by statute)
- (3) surviving adult children
- (4) surviving parents
- (5) adult siblings
- (6) adult grandchildren
- (7) grandparents
- (8) person appointed by probate court as guardian
- (9) any other persons "authorized or under obligation by law to dispose of the body"
- (10) Under S.C. Code Ann 32-8-315(D), if still no one available to authorize cremation, look to:
  - Executor or legal representative of estate
  - Medical examiner / coroner
  - "adult who exhibited special care and concern for the decedent"

### What about conflicts among individuals in class?

S.C. Code Ann. 32-8-320(B) says even if there is more than one member of a class. *"The authorization to cremate may be made by a member of the class unless the member knows of an objection by another member of the class."*

*"If an objection is known, the authorization to cremate only may be made by a majority of the members of the class who are reasonably available."*

S.C. Code Ann. 32-8-320(E) says if there is a dispute among persons of equal priority concerning cremation, "the matter must be resolved by order of the probate court."

S.C. Code Ann. 32-8-320(C) says if someone in a class above is "reasonably available" to make or object to authorization to cremate, a person cannot execute authorization.

### What does Agent's Authorization have to contain?

S.C. Code Ann. 32-8-325(A)(2) contains requirements, including *"a statement that the agent has the right to authorize the cremation of the decedent...and that the agent is not aware of a person who has a superior priority right to that of the agent or is not aware of a person of equal priority who disagrees with authorizing the cremation."*

S.C. Code Ann. 32-8-320(C) makes an agent *"personally and individually liable for all damages" if they "knowingly provide false information on the cremation authorization form."*

S.C. Code Ann. 32-8-325(D) and S.C. Code Ann. 32-8-350 is limit of liability for cremation authority.

### Agent's power to revoke

Agent can revoke authorization *"within twelve hours of the agent's execution of the authorization form"*  
S.C. Code Ann. 32-8-320(E)

# Hypothetical

North Carolina resident goes to visit her sister in South Carolina and falls ill, doesn't return, and dies in South Carolina. Sister is PR of Estate.

North Carolina resident (spouse is separated, and 1 surviving child) writes a will in North Carolina that states she wants to be buried in a pine box crafted by Trappist monks in a small churchyard.

Child claims there is no one with a higher priority. Even if spouse was not separated, he lives in Chicago and is not "reasonably available". Child claims no known objection within her priority as she is the only child.

Child lives in South Carolina and goes to retrieve the body – claims that mom wanted to be cremated and fills out authorization.

Child cremates mom despite language in her will and a spouse (albeit separated) that would presumably know and understand that she did not want cremation. Can PR stop cremation?