

PROBATE LAW JOURNAL OF OHIO

JANUARY/FEBRUARY 2025 | VOLUME 35 | ISSUE 3



(216) 696-4200
www.sssb-law.com

ELEVATING THE USE OF A WRITTEN DECLARATION OF ASSIGNMENT OF RIGHTS REGARDING DISPOSITION OF REMAINS IN YOUR PRACTICE

*By Jenna Bird, Esq. and Kyle Gee,
Esq.*

© 2025 Thomson Reuters

Tucked away in Revised Code Chapter 2108 (“Human Bodies Or Parts Thereof”) are sections related to disposition of one’s body and remains. Too often it seems, these important topics are not addressed during the estate planning process. In the absence of clear direction, after death occurs, delay and dispute of proper disposition of a deceased’s remains may result. From their perspectives in litigation and estate planning and recent experiences, the authors encourage their colleagues to intentionally discuss these topics with clients and to consider more regular use of what the Code describes as a “written declaration of assignment of rights regarding disposition of remains.”¹

1. What Is The Default If No Written Declaration Of Assignment Is Executed?

If there is no written declaration of assignment of rights regarding disposition of remains, R.C. 2108.81 details the priority order for who has the right to make disposition decisions. Specifically, the right of disposition is first assigned to a decedent’s spouse² (assuming that person is a mentally competent adult who can be located with reasonable effort). Next in priority is the decedent’s surviving child or all children collectively³ followed by other family members, such as surviving parents(s), then surviving sibling(s) (“whether of the whole or of the half-blood”), grandparent(s), grandchildren, and so on. The priority list ends with a catch-all default that states anyone willing to take on the right of disposition, including the personal representative of the estate, can make those decisions. Knowing the statutory default

137

priority list and explaining it to others (or ensuring the client has addressed these topics as part of advance planning with a funeral home) is a start. However, while the statutory defaults may presently appear to be adequate at the time of someone's future death, even a cursory review of the statutory priority list should give estate planning counsel and litigators pause because of potential issues that may foreseeably arise for our clients in a variety of present or future circumstances.

For example, while a surviving spouse is given highest priority, what happens if the decedent and their spouse are still married but estranged? R.C. 2108.77 attempts to deal with this scenario in that upon the motion of any person or the probate court's own motion, the court can determine that the declarant's spouse and the declarant were "estranged" at the time of the declarant's death, and such an "estranged" spouse loses the right of disposition. However, putting that decision in the hands of the court leads to uncertainty, delay, and increased cost. Further, even if the declarant and his spouse are not estranged, if the disposition wishes of the surviving spouse and the disposition wishes of decedent's other family members are at odds, this can also lead to litigation to determine who the proper person(s) is/are to handle the disposition and what disposition will be carried out.

Consider also a scenario in which the surviving spouse is a stepparent and not the parent of decedent's adult children who assume they have a priority or natural right of disposition. Further consider the conflict if the decedent named one of more of her adult child(ren) to be health care agent, agent under a general power of at-

torney, executor, and trustee, but did not leave a written declaration of assignment regarding disposition of her remains. In such a situation the child(ren) are fiduciaries in every other case but disposition of remains, which may not have been decedent's intention.

Consider also the circumstance in which a decedent would have wanted his long-term partner to whom he was not married to handle disposition of his body, but did not leave a written declaration of assignment, but under the statutory default priorities, the right passes to decedent's children, who exercise that right in a way contrary to the preferences of the partner.

Further, if there is no surviving spouse or the surviving spouse is otherwise disqualified, issues can arise when the right passes to a surviving child or children. The statutory default in R.C. 2108.81(B)(2) uses the phrase "if there is more than one surviving child, all of the surviving children, collectively." For example, some clients may only want one child to make decisions or be the voice, or not want any of their children to make decisions, but under the default, *all* children are vested with the right of disposition. Moreover, this raises the question about how disagreements are settled? R.C. 2108.79 attempts to resolve such a scenario by stating the decision(s) of the majority of the persons in the group or class shall prevail.⁴ However, if the majority cannot reach a consensus, the probate court will, by following the criteria set forth in R.C. 2108.82, make the final determination.

Consider the circumstance in which an adult child has died leaving no spouse and no children, but her divorced parents can-

not agree as to disposition decisions. Given the complexity of some family relationships in the current era, the possible scenarios for conflict or delay in disposition (or disinterment) of remains could be numerous.

The default statutory scheme also provides a framework whereby a representative or successor representative may be disqualified or may lose his priority right to disposition. In addition to death, probate court intervention, declination and resignation, and refusal to assume liability for costs of disposition, R.C. 2108.75 provides disqualification rules when a person with a right fails to exercise that right within 48 hours of being notified of the death and if there is no notification, within 72 hours of death or later discovery. R.C. 2108.77 (“Loss of assigned right of disposition”) addresses criminal conduct, domestic violence, acts to terminate a marriage, and estrangement.

Again, if the goal is to promote a proper and timely disposition and avoid uncertainty and expense, it is easy to see how relying on the default statutory structure can lead to the opposite, *i.e.*, litigation and delay.

2. Why Clients Should Consider Executing A Written Declaration of Assignment.

Not every client may need to execute a written declaration of assignment, but the written declaration of assignment is far from an inconsequential document. In fact, it can have several benefits, including lessening confusion as to who may immediately act with authority, avoiding delay after a declarant’s passing, and

potentially reducing or preventing court proceedings.

Usually, people have an idea of how they want their remains to be handled upon their passing, and the written declaration of assignment ensures that those wishes are carried out by the representative(s) of their choosing. In fact, the written declaration leaves little room for error in that the declarant can add specific information about how the right of disposition should be exercised and how to pay for it. The clarity this brings to a declarant and his/her loved ones alone makes the written declaration of assignment a document people can benefit from having.

Moreover, the written declaration of assignment empowers cemetery operators, funeral directors, and the like to quickly carry out the wishes of the declarant and the representative(s) as it relates to disposition without the risk of them incurring liability. If there is a dispute on who has the authority to dispose of a declarant’s remains and no written declaration of assignment exists, the county department holding the body or funeral home may simply wait until receiving direction from a probate court to avoid incurring liability.⁵ The written declaration of assignment, therefore, empowers funeral homes and the like to act quickly upon a declarant’s death because they do not risk incurring liability when they rely on the written declaration of assignment and/or the direction of a designated representative(s).⁶ This ability to ensure the declarant’s wishes regarding his/her disposition are not only accomplished but accomplished quickly may be of particular importance, especially depending on the individual’s religious and cultural beliefs, some of which may neces-

sitate disposition within a certain time-frame, in a specific manner, etc.⁷

If the death occurs outside of Ohio (or there is a later desire to disinter and move the remains, see below as to expansion of Ohio law) a written declaration of assignment can be valuable in coordinating with multiple jurisdictions and third parties who may want to confirm authority.

Likely, the written declaration of assignment's biggest benefit is it can reduce the risk of litigation. While R.C. 2108.81 lists by priority order who has the right of disposition upon the declarant's death, relying upon the default possess risks as discussed *supra*. In fact, the Seventh District, in *Snell v. Seidler*, 2005-Ohio-6785, 2005 WL 3489774 (Ohio Ct. App. 7th Dist. Monroe County 2005), was tasked with determining whether the decedent's long term girlfriend's niece, who carried out the decedent's plans for cremation per his instruction, was liable to the decedent's son after carrying out those wishes. While the Seventh District ruled against the son, if nothing else, *Snell v Seidler* is a cautionary tale that simply telling loved ones what you want done after your passing, sometimes, is not only insufficient but it may lead to lengthy and costly litigation.

3. How To Execute A Written Declaration of Assignment and Contents.

If the decision is made by a client to execute a written declaration of assignment, there are various requirements the document must contain in R.C. 2108.72⁸. Importantly, R.C. 2108.73 requires the declaration "be signed and dated by the declarant in the presence" of a notary public or two witnesses. While many of the requirements

are self-explanatory, some are not, including:

- A statement that all decisions made by the declarant's representative with respect to the right of disposition are binding;
- The name, last known address, and last known telephone number of the representative or, if the representative is a group of persons, the name, last known address, and last known telephone number of each person in the group;
- If the declarant chooses to have a successor representative, a statement that if any person or group of persons named as the declarant's representative is disqualified from serving in such position as described in section 2108.75 of the Revised Code, the declarant appoints a successor representative;
- If applicable, the name, last known address, and last known telephone number of the successor representative or, if the successor representative is a group of persons, the name, last known address, and last known telephone number of each person in the group;
- The declarant's preferences regarding how the right of disposition should be exercised, including any religious observances the declarant wishes the person with the right of disposition to consider;
- One or more sources of funds that may be used to pay for goods and services associated with the exercise of the right of disposition;

- A statement that the declarant’s written declaration becomes effective on the declarant’s death.

Conveniently, R.C. 2108.72(B) provides a sample form that can provide a template.

While entirely optional, the statutory template includes a section for the appointed representative(s) to sign and acknowledge the appointment. It may not always be practical for a representative(s) to sign and acknowledge their appointment, but, if practical, knowing that the appointed representative(s) consents to the appointment and accepts the responsibility can have benefits. For example, if an appointed representative(s) declines the right after the declarant’s death,⁹ the priority order outlined in R.C. 2108.81 controls. Given an individual likely executed a written declaration of assignment to avoid the default, ensuring the representative(s) consents to the assignment before the declarant’s death, while not mandatory, ensures the written declaration of assignment is not rendered meaningless.

As for the type of rights that are bestowed via a written declaration of assignment, there are quite a few. For example, R.C. 2108.70 states that a declarant’s designated representative(s) have the right to:

- direct the disposition, after death, of the declarant’s body or any part of the declarant’s body that becomes separated from the body before death;
- to make arrangements and purchase goods and services for the declarant’s funeral; and/or
- to make arrangements and purchase goods and services for the declarant’s

burial, cremation, or other manner of final disposition.

Additionally, the appointed representative(s) can determine the location, the manner, and the condition of the funeral, cremation or other final disposition. Further, while originally there was some confusion about whether an appointed representative(s)’ rights extended to both disposition and disinterment, recent changes from the Ohio Legislature have brought some clarity on that topic.¹⁰

Specifically, in 2023, the Ohio Legislature revised R.C. 517.23, the Ohio Revised Code Chapter concerning disinterment.¹¹ R.C. 517.23 now clarifies that “[a] designated representative, or successor, to whom the decedent had assigned the right of disposition in a written declaration pursuant to section 2108.70 of the Revised Code and who had exercised such right at the time of the declarant’s death” may apply for disinterment of a declarant’s remains. This revision, which was approved by the Ohio State Bar Association, provides clarity that an appointed representative(s)’ rights extend not only to disposition of a declarant’s remains but also to disinterment. While disputes involving disinterment are not common, for some clients, at least discussing such topics, especially depending on the client’s family dynamics, is important because litigation over disinterment can and does arise.¹²

CONCLUSION

The written declaration of assignment’s benefits combined with the relative ease with which the document can be drafted makes it an extremely beneficial option for clients in a variety of current and future

circumstances and should be discussed more regularly as part of the estate planning process.

ENDNOTES:

¹Reinforcing the timeliness of this topic, see “Bribing a Survivor to Protect Your Cadaver—Part 1,” by William A. Drennan, in the American Bar Association’s Probate & Property, Vol. 39, No. 1 (Jan/Feb 2025), at page 30 (“Estate planners understandably focus a great deal of attention on protecting the client’s property, but what about protecting the client’s corpse from defilement?” and quoting another for the argument that a person’s body is one of the most precious things about which they care, certainly more than their property.).

²R.C. 2108.81(B)(1).

³R.C. 2108.81(B)(2).

⁴R.C. 2108.79(A).

⁵See R.C. 2108.83 and R.C. 2108.84.

⁶See R.C. 2108.83 and R.C. 2108.84.

⁷See e.g., <https://www.jcfs.org/our-services/jewish-community-programs/illness-loss-grief/guide-for-the-grieving/traditional-burial> (burial takes place “as soon after death as possible”).

⁸See R.C. 2108.72(A)(1) to (12). As of late 2024, House Bill 699 was introduced and would, among other changes, legalize alkaline hydrolysis for the disposition of human remains. If passed, House Bill 699 would slightly modify the wording required for a written declaration of assignment. As such, it is advisable to monitor the progression of House Bill 699.

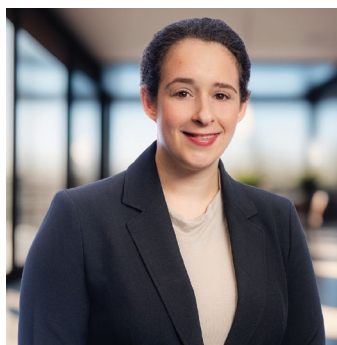
⁹Any person(s) appointed as a representative have a right to decline such appointment pursuant to R.C. 2108.88.

¹⁰See Millonig, *Disinterment vs Right of Disposition Statute*, 30 No. 5 Ohio Prob. L.J. NL 9 (May/June 2020). Prior to this amendment of R.C. 517.23, the interaction between the term disposition and disinterment caused confusion as noted by Michael J. Millonig. See also *In re Disinterment of*

Glass, 2022-Ohio-28, 2022 WL 71855 (Ohio Ct. App. 2d Dist. Montgomery County 2022) (“R.C. Chap. 2108 deals with the initial disposition of bodies, not with disinterment.”). Ideally, this legislative amendment should resolve the confusion.

¹¹ <https://www.legislature.ohio.gov/download?key=20538&format=pdf>.

¹²See e.g., *In re Disinterment of Frobose*, 163 Ohio App. 3d 739, 2005-Ohio-5025, 840 N.E.2d 249 (6th Dist. Wood County 2005); *In re Estate of Eisaman*, 2018-Ohio-1112, 110 N.E.3d 96 (Ohio Ct. App. 3d Dist. Hancock County 2018).



Jenna Bird



Scan the QR code for Jenna's bio, or visit <https://www.sssb-law.com/attorneys/jenna-bird/>



Kyle Gee



Scan the QR code for Kyle's bio, or visit <https://www.sssb-law.com/attorneys/kyle-gee/>



(216) 696-4200

www.sssb-law.com