

CREMATION ARTWORK AND GLASSWORK: ABUSE OF A CORPSE?

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INTRODUCTION

After an individual dies, one method to dispose of the dead body is cremation. Although definitions in state laws differ, cremation is generally understood as a process by which a dead body is reduced to bone fragments and ashes¹ through the application of fire or extreme heat.² Nearly fifty years ago, cremation represented only 4.35% of all funerals in the United States.³ Today, cremation represents 46.8%.⁴

After cremation, the bone fragments and ashes, hereafter referred to as *cremains*,⁵ typically are given to the deceased's agent or next of kin who decide what to do with the cremains. Some recipients choose to retain the cremains in an urn at home, bury the urn in a cemetery plot, or place the urn in a columbarium niche. Others decide to scatter the cremains in a scattering garden,⁶ body of water, or some other place that is meaningful to the deceased or loved one. However, some people choose to dispose of the cremains by incorporating the cremains into paintings or portraits, jewelry, or glasswork.

While cremation paintings or portraits, jewelry, or glasswork are widely available, these practices may be in violation of the law. Incorporating cremains into paintings or portraits, jewelry, or glasswork may involve treating the cremains in a way that does not comport with state abuse of corpse statutes and may also violate laws enacted to control the disposition of cremains. However, this area of law is very unclear and it is uncertain whether any of these laws apply to cremation

¹ What often is referred to as *ashes*, is actually unidentifiable bone fragments that have been pulverized into a course powdery substance after cremation. *All About Cremation Ashes*, CREMATION SOLUTIONS, <http://www.cremationsolutions.com/information/scattering-ashes/all-about-cremation-ashes> (last visited Dec. 28, 2016).

² Another form of cremation, *green cremation*, also known as bio-cremation, flameless cremation, chemical cremation or resomation, involves an alkaline-hydrolysis process that applies heated water and chemicals to dissolve the body. *Alkaline Hydrolysis: "Green Cremation,"* FUNERAL CONSUMERS ALLIANCE OF MINN., <https://fcaofinn.org/alkaline-hydrolysis-green-cremation.html> (last visited Dec. 17, 2016). The end-product of this process is like that of traditional cremation. *Id.* Because the end-product of green cremation is similar, it can be stored or used in the same ways that people store or use the end-product of traditional cremation. Green cremation is not available in all states, and some states do not legally permit it as an option.

³ Douglas J. Davies, *Cremation in 1* ENCYCLOPEDIA OF DEATH & THE HUMAN EXPERIENCE 232, 232 (Clifton D. Bryant & Dennis L. Peck eds., 2009) [hereinafter *Cremation in* ENCYCLOPEDIA]

⁴ *Public Prefers Cremation*, CREMATION ASSOCIATION OF NORTH AMERICA, <http://c.ymcdn.com/sites/www.cremationassociation.org/resource/resmgr/statistics/CANA-Stats2016PRINT.pdf> (last visited Dec. 28, 2016).

⁵ *Cremains* is a term used to refer to the end-product of a cremation. A state may or may not utilize this term in its laws and regulations, and those that do, each have its own definitions of the term.

⁶ A scattering garden is an area within a cemetery designated specifically for the scattering of cremains.

paintings or portraits, jewelry, or glasswork. The legal uncertainty surrounding these practices is largely due to both the historical context and current status of the law of human remains in the United States.

Presently, the law of human remains in the United States is a mix of both common law and statutory law administered almost entirely by the states.⁷ Each state has its own laws that vary from the laws of other states, sometimes significantly. Within each individual state, statutory laws governing human remains are often codified in multiple different parts of a state's laws.⁸ A single state frequently has human remains laws in its probate code, criminal code, professional occupations and businesses code, and health code. The piecemeal nature of human remains law leads to inconsistency, confusion, and gaps, which is one reason for the legal uncertainty in applying this area of law to cremation paintings or portraits, jewelry, or glasswork.

The law of human remains is disjointed because of how it developed. The common law of human remains evolved from English common law and English Ecclesiastical law that was adapted for the secular values of the United States and slowly forged from each case that came before a court.⁹ The statutory law largely developed because of the growth of the funeral and cemetery industries after the American Civil War¹⁰ and the codification or rejection of common law principles by state legislatures.¹¹ Because both the common law and the statutory law developed on a reactionary basis, it lacks the cohesion of other areas of law.

Additionally, the legal uncertainty surrounding these cremation practices may be because judges and legislatures likely did not contemplate cremation nor treatment of cremains in cases and statutes. They likely did not consider cremation nor treatment of cremains since the first modern cremation in the United States did not take place until 1876¹² and then did not become widely used until the end of the twentieth century. Thus, cremation was almost nonexistent during most of the development of both the common law and statutory law. Moreover, American

⁷ The federal government has legislated funeral and cemetery consumer protection, Native American grave sites, national cemeteries, and burial rights of veterans. TANYA MARSH, *THE LAW OF HUMAN REMAINS* 19-28 (2015). Additionally, the United States Postal Service, a federal agency, has implemented several requirements regarding the shipment of human and animal cremains. Currently, it is the only mail service provider that permits the shipment of cremains. Neither UPS nor FedEx will knowingly accept cremains for shipment. *See*, U.S. POSTAL SERVICE, PUBLICATION 52: HAZARDOUS, RESTRICTED, AND PERISHABLE MAIL 102-03 (Mar. 2016), <http://pe.usps.com/cpim/ftp/pubs/Pub52/pub52.pdf>; U.S. POSTAL SERVICE, HOW TO PACKAGE AND SHIP CREMATED REMAINS: PUBLICATION 139 (Oct. 2014), <https://about.usps.com/publications/pub139.pdf>.

⁸ MARSH, *supra* note 7.

⁹ *Id.* at 3-28.

¹⁰ *See Id.*

¹¹ *Id.* at 19.

¹² PAUL E. IRION, *CREMATION* 23 (1968); Douglas J. Davies, *Cremation Movements in* 1 *ENCYCLOPEDIA OF DEATH & THE HUMAN EXPERIENCE* 239 (Clifton D. Bryant & Dennis L. Peck eds., 2009).

mourning practices have fluctuated over time¹³ and whatever practice was trending when a judge decided a case or a legislature enacted a statute could have influenced the decisions and statutes. For instance, portraits, paintings, and photographs of the newly dead were popular practices during the Antebellum period,¹⁴ and memorial jewelry, often made with hair of the deceased, was a popular practice during the Victorian era.¹⁵ Acceptance of these practices may be a reason there are no laws targeted specifically at memorial jewelry or memorial portraits and paintings.

This paper will (i) briefly describe the various practices of incorporating cremains into paintings or portraits, jewelry, or glasswork; (ii) describe and analyze abuse of corpse statutes as they pertain to these practices; and (iii) describe and analyze disposition of cremains laws. Finally, because this area of law lacks clarity and consistency and these practices were not likely contemplated during development of this area of law, the best solution would be for legislatures to amend the laws to directly address these practices or create new laws specifically aimed at these practices. If the legislatures fail to amend the existing laws or create new ones, then the legal uncertainty will endure and people will continue to engage in these practices regardless of the possible illegality.

I. INCORPORATING CREMAINS INTO PAINTINGS OR PORTRAITS, JEWELRY, OR GLASSWORK

A. Paintings or Portraits

There are different techniques to incorporate cremains into paintings or portraits. One method involves combining cremains with oil or acrylic paint and subsequently adding the mixture to an already existing painting or digital print as an accent.¹⁶ The painting or print may be an abstract or modern design,¹⁷ a photo,¹⁸ or a scenic landscape.¹⁹ Another way is to commission an artist to sketch or draw the deceased and have the cremains incorporated into the custom piece.²⁰ Finally, instead of incorporating the cremains as an accent to a painting or print, one artist offers a

¹³ David E. Balk, *The Evolution of Mourning and the Bereavement Role in the United States: Middle- and Upper-Class European Americans in 2* Handbook of Death and Dying 829 (Clifton D. Bryant et al. eds., 2003); Paul David Nygard & Catherine H. Reilly, *The American Family and the Processing of Death Prior to the 20th Century in 2* HANDBOOK OF DEATH AND DYING 567 (Clifton D. Bryant et al. eds., 2003).

¹⁴ Balk, *supra* note 13, at 832; Nygard & Reilly, *supra* note 13, at 570-72.

¹⁵ Nygard & Reilly, *supra* note 13, at 570.

¹⁶ ADAM'S ART GALLERY, <http://adamsartgallery.com/> (last visited Dec. 17, 2016); *Art in Ashes*, MEMORIALS.COM, <http://www.memorials.com/art-in-ashes.php> (last visited Dec. 17, 2016); *Cremation Portraits: Cremation Art*, CREMATION SOLUTIONS, <http://www.cremationsolutions.com/other-cremation-options/cremation-portraits> (last visited Dec. 17, 2016).

¹⁷ *Art in Ashes*, *supra* note 16.

¹⁸ ADAM'S ART GALLERY, *supra* note 16; *Cremation Portraits: Cremation Art*, *supra* note 16.

¹⁹ *Cremation Portraits: Cremation Art*, *supra* note 16.

²⁰ ADAM'S ART GALLERY, *supra* note 16; Liz Fields, *Art to Die For: Artist Paints Portraits with Human Remains*, ABC NEWS (Feb. 13, 2014) <http://abcnews.go.com/US/art-die-missouri-artist-paints-portraits-human-remains/story?id=22496230>; *Cremation Portraits: Cremation Art*, *supra* note 16.

unique method of using the cremains and linseed oil to create a black and white portrait of the deceased that is made entirely with the cremains.²¹

B. Cremation Jewelry

Cremation jewelry²² is jewelry that incorporates cremains into a necklace,²³ ring,²⁴ bracelet,²⁵ or pair of earrings.²⁶ These pieces are made from many different types of materials, including metal, gemstones, glass, and other materials typical of jewelry. Countless designs and styles exist, which may be ordered from any number of vendors found online or through funeral service providers. Many vendors, including individual crafters, also offer custom pieces. Generally, cremains are incorporated into jewelry in two ways: 1) the piece acts as a mini-urn to store cremains,²⁷ or 2) the cremains are fused with the jewelry materials during the jewelry making process, such as in the case of glass beads²⁸ or cremation diamonds.²⁹ Some people wear cremation jewelry, whereas others display the pieces inside their home.

²¹ CREMATION PORTRAITS, <http://cremationportraits.com/> (last visited Dec. 17, 2016); Gail Rubin, *Cremation Portraits*, YOUTUBE (Nov. 4, 2015) <https://www.youtube.com/watch?v=m8f9P9rLXdw>.

²² See, e.g., *Cremation Jewelry*, CREMATION SOLUTIONS, <http://www.cremationsolutions.com/cremation-jewelry-for-ashes/> (last visited Dec. 31, 2016); *Cremation Jewelry*, ETSY, https://www.etsy.com/market/cremation_jewelry (last visited Dec. 31, 2016); *Cremation Jewelry*, EVERLASTING MEMORIALS, <https://www.evrmemories.com/cremation-jewelry/> (last visited Dec. 31, 2016).

²³ See e.g., *Necklaces for Ashes*, STARDUST MEMORIALS, <http://www.stardust-memorials.com/necklaces-for-ashes.html> (last visited Jan. 13, 2017).

²⁴ See e.g., *Cremation Ring Jewelry*, JEWELRY KEEPSAKES, <http://www.jewelrykeepsakes.com/All-Cremation-Rings-s/125.htm> (last visited Jan. 06, 2017).

²⁵ See e.g., *Bracelet Cremation Jewelry*, In the Light Urns, <http://www.inthelighturns.com/bracelet-keepsake-urns.html> (last visited Jan. 06, 2017); *Cremation Bracelet Jewelry*, JEWELRY KEEPSAKES, <http://www.jewelrykeepsakes.com/All-Cremation-Bracelets-s/132.htm> (last visited Jan. 06, 2017).

²⁶ See e.g., *Cremation Earrings*, ETSY, https://www.etsy.com/market/cremation_earrings (last visited Jan. 06, 2017); *Crystal Ball Stainless Steel Cremation Earrings*, PERFECT MEMORIALS, <http://www.perfectmemorials.com/crystal-ball-stainless-steel-cremation-earrings-p-11069.html> (last visited Jan. 06, 2017).

²⁷ See e.g., *Cremation Jewelry for Ashes*, ONE WORLD MEMORIALS, <https://www.oneworldmemorials.com/collections/cremation-jewelry> (last visited Jan. 13, 2017); *Cremation Jewelry*, JEWELRY KEEPSAKES, <http://www.jewelrykeepsakes.com/Cremation-Jewelry-s/20.htm> (last visited Jan. 13, 2017).

²⁸ See e.g., *Ash Beads*, ASH BEADS, <http://ashbeads.com/> (last visited Jan. 13, 2017); *Heartsong Memory Beads by Artist Dolly Libby*, HEARTSONG MEMORY BEADS, http://www.heartsongmemorybeads.com/memory_beads.html (last visited Jan. 13, 2017); *Cremation Beads*, ETSY, https://www.etsy.com/market/cremation_beads (last visited Jan. 13, 2017). Etsy's policy prohibits the sale of human remains on its website. The company includes incorporating human cremains into glasswork in this policy. Thus, the Etsy listings for incorporating cremains into glasswork beads are for pet cremains only. However, many of the glassworkers provide private contact information to purchase the glasswork for human cremains. Mini-urn jewelry that the purchaser fills himself or herself is still readily available on Etsy.

²⁹ See e.g., *Cremation Diamonds*, CREMATION SOLUTIONS, <http://www.cremationsolutions.com/cremation-jewelry-for-ashes/cremation-diamonds-made-from-ashes> (last visited Jan. 06, 2017); HEART IN DIAMOND, <http://www.heart-in-diamond.com/> (last visited Jan. 06, 2017); LIFE GEM, <http://www.lifegem.com/index.php> (last visited Jan. 06, 2017).

C. Glasswork

Cremation glasswork are pieces of glass in which cremains are incorporated into the glass during the glass blowing process.³⁰ These pieces may be components of jewelry, such as beads or pendants, or may be sculptures, paper weights, sun catchers, ornaments, or any other glass construct intended for display in any number of designs, styles, shapes, sizes, and colors. Cremation glasswork is offered by many vendors, including many individual glass blowers. It also allows for custom pieces and creative liberties. The process involves pouring, striking, rubbing, or rolling the cremains into the hot glass during the glass molding stage.³¹

II. ABUSE OF CORPSE STATUTES

“Of all criminal offenses and deviance, offenses against the dead and deviant behavior related to the dead appear to be the most socially repugnant and reprehensible.”³²

Abuse of a corpse was a common law offense derived from reverence for the dead, the right to a decent burial, freedom from outrageous treatment of a corpse, and the family’s right to the deceased’s corpse unchanged from the time of death.³³ Many states codified these common law principles in abuse of corpse statutes that criminalize actions taken against the body of a deceased person that interfere with these rights.³⁴ Not all states have an abuse of corpse statute, and there is wide variance among those that do in what terminology is used to refer to a dead body,³⁵ what behaviors the statute prohibits, and whether the crime is a misdemeanor or felony.

³⁰ See, e.g., *Blown Glass Cremation Art by Tiffany Koehn*, RED MANX STUDIO, <http://www.redmanxstudio.com/> (last visited Dec. 29, 2016); *Crescent Art Glass*, CRESCENT MEMORIAL, <https://www.crescentmemorial.com/Page/View/Crescent-Art-Glass> (last visited Dec. 29, 2016); *Cremation Glass*, ETSY, https://www.etsy.com/market/cremation_glass (last visited Dec. 29, 2016); Michelle Kaptur, SOUL BURSTS, <http://soulbursts.com/soulbursts/> (last visited Dec. 29, 2016); MorBiz, *Artful Ashes – Hand Blown Glass Heart with Your Loved One’s Cremated Remains*, YOUTUBE (Mar. 9, 2014) <https://www.youtube.com/watch?v=GZXInCphdgo>; SPRIT PIECES, <https://www.spiritpieces.com/> (last visited Dec. 29, 2016).

³¹ See e.g., MorBiz, *supra* note 30; Tacoma News Tribune, YOUTUBE (Sept. 25, 2014) <https://youtu.be/aV0RRjTkfig>; Observer Media Group, *Love Ashes – Glass Memorial Art*, YOUTUBE (Sept. 26, 2013) <https://youtu.be/0BBOZOv3XYk>; Amy Kahlen, *Ashes in Glass*, YOUTUBE (Aug. 18, 2013) <https://youtu.be/r5g0SAfsOaY>.

³² Clifton D. Bryant, “Thanatological Crime” *Some Conceptual Notes on Offenses Against the Dead as a Neglected Form of Deviant Behavior* in 2 HANDBOOK OF DEATH AND DYING 974, 974 (Clifton D. Bryant et al. eds., 2003).

³³ MARSH, *supra* note 7, at 80-82.

³⁴ For a survey of the abuse of corpse statutes in each state, see MARSH, *supra*, note 7.

³⁵ States generally fall into one of three categories: 1) those that use the word *corpse*, 2) those that use the words *dead body*, *deceased human body*, or *dead human body*, and 3) those that use the words *remains* or *human remains*. Less than a handful of states use some combination of these terms in their statutes. For instance, Colorado’s abuse of corpse statute states, “A person commits abuse of corpse if . . . [t]reats the *body* or *remains* of any person . . .” COLO. REV. STAT. § 18-13-101(1)(b) (Westlaw through 2d Reg. Sess. of 70th Gen. Assemb. (2016) and amendments adopted through Nov. 8, 2016 Gen. Election) (emphasis added).

A. *Applicability to Cremains*

One of the first issues involved in whether incorporating cremains into a painting or portrait, jewelry, or glasswork violates abuse of corpse statutes is whether the statutes even apply to cremains. Only one state, Maine, explicitly states that its abuse of corpse statute applies to cremains. It states, “A person is guilty of abuse of corpse . . . a human corpse, or any part or the *ashes thereof*.”³⁶ This reading depends on what Maine means by ashes, which is neither defined within the statute nor within its criminal code. If Maine interprets the word ashes in accordance with its plain meaning and considering its dictionary definition,³⁷ especially when viewed in context of the whole statute and that people commonly refer to cremains as ashes, then ashes would mean cremains and the statute would apply.

Most of the rest of the states that have abuse of corpse statutes are completely silent on the issue of whether the statute applies to cremains. However, a few states address this issue through statutory definitions for the term the statute uses to refer to a dead body. New Jersey uses the term human remains, which it defines within its abuse of corpse statute as “the body of a deceased person . . . *but does not include cremated remains*.”³⁸ Thus, New Jersey’s statute clearly does not apply to cremains. Texas’ statute, on the other hand, clearly applies to cremains because it states, “In this section, ‘human corpse’ includes: . . . (2) the cremated remains of a human corpse; or (3)

Although most of these statutes use different terminology to refer to a dead body, the terms seem to be synonymous with one another. The tenth edition of Black’s Law Dictionary does not define the word corpse, but several English language dictionaries define corpse as a “dead body especially of a human being.” *Corpse*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/corpse> (last visited Dec. 31, 2016); *see also Corpse*, FUNKANDWAGNALLS.COM, <http://www.funkandwagnalls.com/?search=corpse> (last visited Dec. 31, 2016); *Corpse*, DICTIONARY.COM, <http://www.dictionary.com/browse/corpse?s=t> (last visited Dec. 31, 2016). Thus, based on these definitions, corpse means dead body and the two terms can be used interchangeably.

Similarly, human remains is synonymous and interchangeable with both dead body and corpse. Black’s Law Dictionary does not define human remains, but there is an entry for “human-remains dog,” which it defines as a “cadaver dog.” *Human-Remains Dog*, BLACK’S LAW DICTIONARY (10th ed. 2014). Based on this definition, cadaver seems to be synonymous and interchangeable with human remains. Since Black’s Law Dictionary defines cadaver as “a dead body; a corpse,” and cadaver is synonymous and interchangeable with human remains, human remains is thus, synonymous and interchangeable with dead body and corpse. *Cadaver*, BLACK’S LAW DICTIONARY (10th ed. 2014).

³⁶ ME. REV. STAT. ANN. tit. 17-A, § 508 (Westlaw through 2015 2d Reg. Sess. of 127th Leg.) (emphasis added).

³⁷ Dictionary.com defines *ash* in several ways. One meaning is “the powdery residue of matter that remains after burning.” An alternative definition under ash is *ashes* the “mortal remains, especially the physical or corporeal body as liable to decay.” *Ash*, DICTIONARY.COM, <http://www.dictionary.com/browse/ash?s=t> (last visited Dec. 31, 2016). Merriam-Webster.com also has several meanings for the word *ash*, including “the solid residue left when combustible material is thoroughly burned or oxidized by chemical means,” and “the remains of the dead human body after cremation or cremation or disintegration.” ²*Ash*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/ash> (last visited Dec. 31, 2016). Finally, Funkandwagnalls.com defines *ash* as “the residue of a substance that has been burnt,” and “remains, as of the dead.” *Ash*, FUNKANDWAGNALLS.COM, <http://www.funkandwagnalls.com/?search=ash> (last visited Dec. 31, 2016).

³⁸ N.J. STAT. ANN. § 2C:22-1 (West, Westlaw through L. 2016, c. 83 and J.R. No. 11) (emphasis added).

any portion of the cremated remains of a human corpse.”³⁹ Similarly, California’s abuse of corpse statute⁴⁰ applies to cremains because its statutory definition of human remains states, “‘Human remains’ . . . means the body of a deceased person, . . . and *cremated remains*.”⁴¹

Three additional states, North Carolina, Utah, and Illinois, provide a statutory definition for the term the statute uses to refer to a dead body, but the definitions in those statutes are silent as to whether the term includes or excludes cremains.⁴² In these states, omission of cremains in these statutory definitions could be interpreted as purposeful, and thus, indicative of intent, when compared to other parts of a state’s law that has a statutory definition for human remains, corpse, or dead body that does include cremains. For instance, although North Carolina’s abuse of corpse statutory definition of human remains does not include cremains, its cemetery act does.⁴³ By comparing the two definitions, it may appear as if the legislature wanted to include cremains in its definition of human remains for the purposes of its cemetery act, but not for the purposes of its abuse of corpse statute.

However, comparisons may only be helpful in those three states that have a definition within its abuse of corpse statute but is silent on cremains. For those abuse of corpse statutes that lack any definition, there is nothing to compare. Moreover, one cannot simply use a definition appearing in another part of a state’s laws and apply it to an abuse of corpse statute because that definition may be specific to the part of the law in which it appears. Attempting to use a definition from another part of a state’s laws to clarify its abuse of corpse statute is further complicated since many states have multiple different definitions for corpse, dead body, or human remains. For instance, Colorado has no less than four different definitions throughout its statutes.⁴⁴ Which of

³⁹ TEX. PENAL CODE ANN. § 42.08(c) (Vernon, Westlaw through end of 2015 Reg. Sess. of 84th Leg.).

⁴⁰ CAL. HEALTH & SAFETY CODE § 7052 (West, Westlaw through 2016 Reg. Sess. laws, Ch. 8 of 2015-2016 2d Ex. Sess., and all propositions on 2016 ballot). California’s abuse of corpse statute is in its health and safety code. It is one of only a handful of states whose abuse of corpse statute is not within its criminal code.

⁴¹ CAL. HEALTH & SAFETY CODE § 7001 (West, Westlaw through 2016 Reg. Sess. laws, Ch. 8 of 2015-2016 2d Ex. Sess., and all propositions on 2016 ballot) (emphasis added). California’s definition is not found within the abuse of corpse statute itself, but in its own section of the health and safety code that applies to the abuse of corpse statute through § 7000. CAL. HEALTH & SAFETY CODE § 7000 (West, Westlaw through 2016 Reg. Sess. laws, Ch. 8 of 2015-2016 2d Ex. Sess., and all propositions on 2016 ballot).

⁴² See, N.C. GEN. STAT. § 14-401.22(f) (Westlaw through end of 2016 Reg. Sess. of Gen. Assemb., pending changes received from Revisor of Statutes); UTAH CODE ANN. § 76-9-704 (LexisNexis, Westlaw through 2016 4th Spec. Sess.); 720 ILL. COMP. STAT. 5/12-20.5 (Westlaw through P.A. 99-920 of 2016 Reg. Sess.); 720 ILL. COMP. STAT. 5/12-20.6 (Westlaw through P.A. 99-920 of 2016 Reg. Sess.).

⁴³ “‘Human remains’ . . . means the bodies of deceased persons, . . . and *cremated remains*.” N.C. GEN. STAT. § 65-48(11) (Westlaw through end of 2016 Reg. Sess. of Gen. Assemb., pending changes received from Revisor of Statutes) (emphasis added).

⁴⁴ In its probate code, it defines last remains as “the deceased’s body or cremains after death.” COLO. REV. STAT. § 15-19-103(5) (Westlaw through 2d Reg. Sess. of 70th Gen. Assemb. (2016) and amendments adopted through Nov. 8, 2016 Gen. Election). In its code for government, human remains are “any part of the body of a deceased human being in any stage of decomposition.” COLO. REV. STAT. § 24-80-1301(3) (Westlaw through 2d Reg. Sess. of 70th Gen. Assemb. (2016) and amendments adopted through Nov. 8, 2016 Gen. Election). Yet, in its statute governing mortuaries, human remains are “the physical remains of a dead human.” COLO. REV. STAT. § 12-54-

these would one choose? On the other hand, if a state has multiple nearly identical definitions in other parts of its laws could these definitions be used to clarify its abuse of corpse statutes?⁴⁵

Since it is unclear from the language of these statutes whether these statutes apply to cremains, normally, the next step would be to review the legislative histories to see if the legislature intended to apply these statutes to cremains. However, examining the legislative histories will probably be unhelpful in obtaining clarification because of the unlikelihood that the legislatures considered cremains when enacting these statutes. Furthermore, Case law also fails to assist in obtaining clarification as there are no cases extending abuse of corpse statutes to cremains either directly or by interpreting the terminology used to refer to a dead body as including cremains. Thus, besides Maine, New Jersey, Texas, and California, no certainty exists as to whether the abuse of corpse statutes even apply to cremains.

B. Actions

If an abuse of corpse statute does extend to cremains, another issue in whether incorporating cremains into paintings or portraits, jewelry, or glasswork violates an abuse of corpse statute is whether these practices involve the actions prohibited by the statutes. States vary in what actions their abuse of corpse statutes prohibit. Some states are narrower and specify certain types of actions that are prohibited, such as mutilate, desecrate, dismember, dissect, damage, or disturb. Other states' statutes are broader and use general language. For instance, treat in an offensive manner or outrage ordinary family sensibilities. A small number of states have both types of prohibitions.

Since no cases involving cremains have been decided under these statutes, to determine if incorporating cremains into paintings or portraits, jewelry, or glasswork involve the actions prohibited by an abuse of corpse statute, one would have to see how case law has interpreted and applied these actions and see if there is some analogous action to these practices. For those states that have adopted the Model Penal Code standard, which uses broad, general language of "outrages

102(14.2) (Westlaw through 2d Reg. Sess. of 70th Gen. Assemb. (2016) and amendments adopted through Nov. 8, 2016 Gen. Election). Finally, its vital statistics definition of a dead body is "a lifeless human body or parts of such body or bones thereof from the state of which it reasonably may be concluded that death recently occurred." COLO. REV. STAT. § 25-2-102(1) (Westlaw through 2d Reg. Sess. of 70th Gen. Assemb. (2016) and amendments adopted through Nov. 8, 2016 Gen. Election). Additionally, Colorado defines cremated remains as human remains. COLO. REV. STAT. § 12-54-102(3) (Westlaw through 2d Reg. Sess. of 70th Gen. Assemb. (2016) and amendments adopted through Nov. 8, 2016 Gen. Election).

⁴⁵ See, e.g., IND. CODE § 25-15-2-18 (Westlaw through all Legis. of the 2016 2d Reg. Sess. of 119th Gen. Assemb.); IND. CODE § 23-14-31-16 (Westlaw through all Legis. of the 2016 2d Reg. Sess. of 119th Gen. Assemb.); IND. CODE § 23-14-33-21 (Westlaw through all Legis. of the 2016 2d Reg. Sess. of 119th Gen. Assemb.).

ordinary family sensibilities,” the Model Penal Code commentaries may provide additional guidance as to what is prohibited.⁴⁶

Furthermore, if incorporating cremains into portraits and paintings, jewelry, or glasswork do not involve the actions prohibited by the statutes, and thus, are not abuse of a corpse, are there things that people do with cremains that may fall within the prohibited actions? For instance, cremains can be shot off and scattered by fireworks,⁴⁷ launched into outer space,⁴⁸ packed into live ammunition that can be fired from a firearm,⁴⁹ and added to cement that is built into a coral reef.⁵⁰ Some people even mix cremains into tattoo ink and get a tattoo with the cremains.⁵¹ Would any of these practices satisfy the action element of the abuse of corpse statutes? Additionally, many abuse of corpse statutes prohibit some type of sexual conduct with a dead body. Would it be abuse of a corpse if a person put cremains into a sex toy and uses it? At least one dildo that stores cremains exists.⁵²

III. DISPOSITION OF CREMAINS

Most states have at least one law that involves what happens to cremains after cremation. These laws can be as simple as merely requiring information regarding the ultimate disposition of the cremains, which is kept on record with either the funeral establishment or crematory or the local vital statistics office or county registrar,⁵³ or these laws can be a lot more detailed in that they list what people can do with the cremains.⁵⁴ Although these statutes seem to be a reaction to the increase in cremation rates, they fail to directly address cremation paintings or portraits, jewelry,

⁴⁶ “This phrasing includes sexual indecency but is not so limited. It also reaches physical abuse, mutilation, gross neglect, or any other sort of outrageous treatment of a corpse. The overarching purpose is to protect against outrage to the feelings of friends and family of the deceased” MODEL PENAL CODE AND COMMENTARIES PART II §§ 240.0 – 251.4, § 250.10 (AM. LAW INST., Official Draft and Revised Comments 1980).

⁴⁷ See, ANGELS FLIGHT, <http://www.angels-flight.net/> (last visited Dec. 30, 2016).

⁴⁸ See, CELESTIS, <http://www.celestis.com/> (last visited Dec. 28, 2016).

⁴⁹ See, HOLY SMOKE, LLC, <http://myholysmoke.com/> (last visited Dec. 28, 2016).

⁵⁰ See, ETERNAL REEFS, <http://www.eternalreefs.com/> (last visited Dec. 30, 2016).

⁵¹ See, DavidGR04, *Kathleen O'Reilly – Memorial Tattoos*, YOUTUBE (Mar. 1, 2016)

<https://youtu.be/oCJyiOfUWw8>; Engrave Ink, *Ashes to Tattoo Ink - A How To: Retaining Your Loved One's Ashes*, YOUTUBE (Jul. 14, 2016) <https://youtu.be/SeqESrneGX4>; National Geographic, *From Ashes to Ink*, YOUTUBE (Mar. 31, 2016) https://youtu.be/svcWlmkpa_Y; PNJ Video, *'Memorial' Tattoos with Cremation Ashes More Popular*, YOUTUBE (Mar. 10, 2012) <https://youtu.be/ktp-dWhbvJs>.

⁵² See, *21 Grams*, ATELIER MARK STURKENBOOM, <http://www.marksturkenboom.com/Works/21-grams> (last visited Dec. 30, 2016). It appears that this item is more of a statement art piece rather than something one can purchase for use. However, what is to stop other people from copying this design for actual use?

⁵³ See, e.g., ALA. CODE § 34-13-122 (Westlaw through end of 2016 Reg. Sess. and through Act 2016–485 of 2016 1st Spec. Sess.).

⁵⁴ See, e.g., Tex. Health & Safety Code Ann. § 716.302 (West, Westlaw through end of 2015 Reg. Sess. of 84th Leg.).

or glasswork. Thus, the legality of these practices under these laws is as uncertain as under the abuse of corpse statutes.

One issue with these statutes is that none of them address cremation paintings or portraits, jewelry, or glasswork. California is the only state that addresses “keepsake urns,” which it defines as “a closed durable container that will accommodate an amount of cremated remains not to exceed one cubic centimeter.”⁵⁵ It permits cremains to be placed in “one or more keepsake urns,”⁵⁶ Although California does not clearly indicate that cremation jewelry urns satisfy this definition, jewelry urns are often small enough to meet the one cubic centimeter requirement and some pieces can be closed durable containers. Furthermore, it is unclear if encasing cremains in glass would fit the “closed durable container” requirement.

California is like some other states that provide a list of disposition options for cremains. The lists typically include burying, placing in a niche or crypt, and scattering. However, a second issue with California and many of the other states’ statutes is that they use the word *may* in the lists.⁵⁷ Because *may* is generally seen as permissive and not mandatory language, it is unclear as to whether these states intend the options in the list to be the only options. If they are the only options, then cremation paintings or portraits, jewelry, or glasswork are not legally permitted in these states. If they are not the only options, then it is still entirely unclear.

However, a few states do use mandatory or limiting language, such as *only* or *shall*. For instance, Kentucky’s statute states, “Cremated remains *shall* be disposed of by placing in a grave, crypt or niche; by scattering in a scattering area; or in any manner on private property of a consenting owner.”⁵⁸ In these handful of states, it seems clear that cremation paintings or portraits, jewelry, or glasswork are not legally permissible under these statutes, unless these practices can be classified as “any manner on private property of a consenting owner.”

Another issue with these statutes is the ambiguity of the “any manner” language in many of these statutes. While it may seem that cremation paintings or portraits, jewelry, or glasswork could be “any manner,” a problem is that the “any manner” must occur on private property with the permission of the property owner. When a person sends the cremains to a glassblower, is that the disposition? Does the glassblower’s studio and the glassblower’s permission satisfy that requirement? Or is it the return of the end-product, when the deceased’s loved one places the cremation painting on the wall in his or her home? If it’s the end-product, then will a person who

⁵⁵ CAL. HEALTH & SAFETY CODE § 7054.6 (West, Westlaw through all 2016 Reg. Sess. laws, Ch. 8 of 2015-2016 2nd Ex. Sess., and all propositions on 2016 ballot).

⁵⁶ § 7054.6 (Westlaw).

⁵⁷ See, e.g., § 7054.6 (Westlaw).

⁵⁸ KY. REV. STAT. ANN. § 367.97524 (West, Westlaw through end of 2016 Reg. Sess.).

wears his or her cremation jewelry out of his or her house and off his or her property violate this statute?

Another type of disposition statute that lacks clarity are those that make delivery or cremation itself the final disposition, such as Iowa.⁵⁹ If cremation or delivery is the final disposition, then it seems that whatever a person does with cremains after cremation or delivery would be legally permissible in these states under these statutes. One unique disposition statute which seems to grant a complete *carte blanche* to the recipient of cremains is Delaware's. It states, "After this delivery, they may be . . . disposed of in such a way as is desired by the person receiving them."⁶⁰ Since Delaware appears to place no limitations on the recipient, cremation paintings or portraits, jewelry, or glasswork may be legally permissible in Delaware so long as the recipient "desires" them.

Thus, even statutes that seem to be enacted as a reaction to the rise in cremation rates present a problem of uncertainty when it comes to cremation paintings or portraits, jewelry, or glasswork.

CONCLUSION

Cremation rates have been steadily increasing since the end of the twentieth century and will continue to rise. While most people choose to keep cremains in an urn at home, place them in a niche or crypt, bury, or scatter them, some people choose to have cremains made into a painting or portrait, put into jewelry, or blown into glass.

These practices may violate abuse of corpse statutes and disposition of cremains statutes. However, the law of human remains lacks clarity and consistency, and it is unclear how these statutes apply to these practices. Beyond abuse of corpse statutes and disposition statutes, further inquiry should be made in how other areas of human remains law pertain to these practices. For instance, extension of the professional requirements of funeral directors, embalmers, crematory operators, and others who handle human remains to the artists, crafters, and glassworkers who provide cremation paintings or portraits, jewelry, or glasswork. These artists, crafters, and glassworkers currently operate with no oversight. If cremains are considered human remains, and they often are under the professional occupation statutes, then these artists, crafters, and glassworkers are handling human remains and should be subject to the same requirements as others who handle human remains. Another area for further inquiry might be whether these practices violate prohibitions against the possession, sale, and trafficking of human remains.

Because of the right of the next of kin to control disposition and the ease of which cremains may be used in these ways, people seem to think they can do what they want with the cremains of

⁵⁹ IOWA CODE § 144C.2 (Westlaw through Legis. from 2016 Reg. Sess.).

⁶⁰ DEL. CODE ANN. tit. 16, § 3161 (Westlaw through 80 L. 2016, ch. 430).

their loved ones, and with no clear laws to guide them, they do. The best way to handle the uncertainties surrounding these practices would be for the legislatures to directly address them in the statutes, either through amending the existing laws or enacting new ones. Failure to directly address these practices will maintain the uncertainty surrounding the legality of cremation paintings or portraits, jewelry, or glasswork. Without direct legislation, not only will people persist in these practices, but also there may be no limit to what people are willing to do with cremains as they invent new ways to commemorate the dead.

Legislatures may be slow to amend these statutes or enact new ones because no one is reporting these practices as violations of law and no states are prosecuting these practices. Yet, there may be other motivating forces. For example, in 2016, the Catholic Church released new guidelines on cremation limiting treatment of cremated remains to burial in a sacred place, such as a cemetery.⁶¹ The guidelines explicitly state that members cannot keep cremated remains in a domestic residence, cannot divide cremated remains among family members, cannot scatter cremated remains in air, land, sea, or some other way, and cannot preserve cremated remains in mementos, jewelry, or other objects.⁶² The Church's guidelines clearly prohibit cremation paintings or portraits, jewelry, or glasswork. Legislatures in states with a heavy Catholic population may respond to these guidelines and amend their state's laws to reflect them accordingly.

⁶¹ *Instruction Ad resurgendum cum Christo Regarding the Burial of the Deceased and the Conservation of the Ashes in the Case of Cremation*, VATICAN, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20160815_ad-resurgendum-cum-christo_en.html (last visited Dec. 27, 2016).

⁶² *Id.*