

1-1-2014

## Unclaimed Remains and Next of Kin: A New Path to the Final Resting Spot

W. Scott Johnson Esquire

Follow this and additional works at: <http://scholarship.richmond.edu/pilr>

 Part of the [Legislation Commons](#), [Other Law Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

W. S. Johnson Esquire, *Unclaimed Remains and Next of Kin: A New Path to the Final Resting Spot*, 18 RICH. J.L. & PUB. INT. 39 (2014).  
Available at: <http://scholarship.richmond.edu/pilr/vol18/iss1/5>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in Richmond Public Interest Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

UNCLAIMED REMAINS AND NEXT OF KIN:  
A NEW PATH TO THE FINAL RESTING SPOT

*By W. Scott Johnson, Esquire\**

\* B.A. Political Science, University of Richmond; Juris Doctor, University of Richmond School of Law.  
Founding Principal, Hancock, Daniel, Johnson, & Nagle, P.C., Richmond, VA.

## I. INTRODUCTION

Healthcare facilities had normal processes and procedures they employed when dealing with unclaimed remains and notification of next of kin that dramatically changed in April of 2013. Before April 2013, any remains left unclaimed became the responsibility of the local sheriff's offices.<sup>1</sup> Sheriff C. T. Woody of the City of Richmond requested an opinion from the Attorney General and it drastically changed the status quo.<sup>2</sup> The opinion interpreted the applicable Virginia statutes to provide that sheriffs were only responsible for taking possession and disposing of unclaimed human remains when they were the subject of an investigation by the Office of the Chief Medical Examiner.<sup>3</sup>

News of the opinion prompted mixed reactions among the sheriffs. Some sheriffs continued to assist hospitals and nursing homes with unclaimed remains and others chose not to.<sup>4</sup> The inconsistency in responsibility prompted many healthcare facilities to search for individual solutions to the discrepancy. Most hospitals have morgues, but only have capacity for one or two remains.<sup>5</sup> Nursing homes do not have morgues; thus concerns for safe and proper storage created more urgency while the staff attempts to reach the next of kin.<sup>6</sup>

<sup>1</sup> See Va. Code Ann. § 32.1-288 (2011) (amended 2014); Va. Dep't of Health, Virginia Office of the Chief Medical Examiner (OCME) Body Storage Guidelines (2012), available at <http://www.vdh.state.va.us/medExam/documents/2012/pdf/OCME%20Hospital%20Body%20Storage%20Guidelines%20Letterhead.pdf>.

<sup>2</sup> Compare Va. Dep't of Health, *supra* note 1 with 2013 Va. Att'y Gen. Op. 13-016 (May 3, 2013), available at <http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/OPINIONS/2013opns/13-016%20Woody.pdf>.

<sup>3</sup> 2013 Va. Att'y Gen. Op. 13-016, *supra* note 2.

<sup>4</sup> See generally Mark Holmberg, *Unclaimed Bodies Get a New Law, Unidentified Bodies Get New Recognition*, WTVR, May 7, 2014, <http://wtvr.com/2014/05/07/unclaimed-bodies-get-a-new-law-unidentified-bodies-get-new-recognition/> (explaining that "this already tough issue threatened to spin out of control last year"); Michael Laris, *Fairfax County Moves Forward With Cemetery For The Poor*, Washington Post, June 23, 2013, [http://www.washingtonpost.com/local/trafficandcommuting/fairfax-moves-forward-with-cemetery-for-the-poor/2013/06/23/fa08cf2a-d378-11e2-a73e-826d299ff459\\_print.html](http://www.washingtonpost.com/local/trafficandcommuting/fairfax-moves-forward-with-cemetery-for-the-poor/2013/06/23/fa08cf2a-d378-11e2-a73e-826d299ff459_print.html) (discussing different approaches in different counties); Calvin Trice, *When Poor People Die, Options Are Limited*, Newsleader, May 4, 2014, <http://www.newsleader.com/story/news/local/2014/05/03/when-poor-people-die-options-are-limited/8676471/> (providing a general overview of the issue in selected Western Virginia counties).

<sup>5</sup> Cf. *White Paper: Scene Operations*, Ohio Funeral Dir. Ass'n – Mortuary Response Team 10, <http://www.ofdamrt.org/panflu/whitepapers/SceneOperationsWhitePaper.pdf> (stating that "[h]ospitals have very limited morgue capacity. . .").

<sup>6</sup> See *Survivors Guide (Retiree Preparation Guide)*, Fort Lee Cas. Assistance Ctr. 15 (Sept. 2013), <http://www.lee.army.mil/hrd/documents/Survivor%20Assistance%20Guide%20%28Retirees%29%2020>

The main issue with the change in policy is who would bear the burden of the cost for unclaimed remains. Originally, when it was the sheriff's duty to accept the unclaimed remains, the locality where the decedent died or last resided bore the cost of disposition (burial or cremation).<sup>7</sup> Now that the sheriff is only required to accept remains in medical examiner cases, the cost of disposing of unclaimed remains shifted to the healthcare facility or person in possession of the decedent. This change meant that hospitals and nursing homes would most often bear the cost.

Funeral service establishments became more leery of taking possession of unclaimed remains because possession would indicate an acceptance responsibility to pay for the disposition.<sup>8</sup> Liability is another concern because the statute did not extend the same type of immunity to hospitals, nursing homes, cemeteries or crematories that the sheriffs enjoy in accepting the unclaimed remains.<sup>9</sup>

In response to requests from health care facilities, law enforcement agencies, and funeral service establishments, Senator Kenny Alexander (D-Norfolk) convened a workgroup of stakeholders to rewrite the statutes dealing with unclaimed remains and next of kin.<sup>10</sup> In addition to serving the General Assembly, Senator Alexander owns several prominent funeral service establishments and is a funeral service licensee.<sup>11</sup> His experience proved invaluable to the process. The stakeholder meetings began in the fall of 2013 and culminated in the introduction of Senate Bill 304 in the 2014 Session of the Virginia General Assembly.<sup>12</sup> The bill passed without a single negative vote through both the Senate and the House of Delegates of Virginia.<sup>13</sup> Because the legislation contained an emergency clause, it became law on March 7, 2014 once Governor McAuliffe signed it.<sup>14</sup> Ultimately, the legislation provided much-needed details regarding appropriate pro-

---

13%20%282%29.pdf.

<sup>7</sup> Va. Code Ann. § 32.1-288(B) (2011).

<sup>8</sup> E.g., Larry Clow, *Unclaimed Ashes: Funeral Homes Regularly Faced with Dilemma*, Fosters.com (Sept. 5, 2010), [http://www.fosters.com/apps/pbcs.dll/article?AID=/20100905/GJNEWS\\_01/709059919](http://www.fosters.com/apps/pbcs.dll/article?AID=/20100905/GJNEWS_01/709059919)

<sup>9</sup> Va. Code Ann. § 32.1-288(F) (West, Westlaw through 2013 Reg. Sess.); see Va. Code § 32.1-288 (2013) (amended 2014); S.B. 304, 2014 Gen. Assemb., Reg. Sess. (Va. 2014), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0228>.

<sup>10</sup> *Next of Kin and Unclaimed Remains*, Client Advisory (Hancock, Daniel, Johnson & Nagle, P.C., Richmond, Va.) Mar. 26, 2014, at 1 available at [http://www.hdjn.com/pdfs/advisories/2014/ClientAdvisory-NextOfKin\\_UnclaimedRemains3.26.14.pdf](http://www.hdjn.com/pdfs/advisories/2014/ClientAdvisory-NextOfKin_UnclaimedRemains3.26.14.pdf).

<sup>11</sup> *Bio*, Kenneth Cooper Alexander: Senate of Virginia, <http://senatorkennethalexander.com/bio> (biography of Senator Kenneth C. Alexander).

<sup>12</sup> *Next of Kin and Unclaimed Remains*, *supra* note 10, at 1.

<sup>13</sup> *SB 304*, Virginia Legislative Information System, <http://leg1.state.va.us/cgi-bin/legp504.exe?141+vo+t+SV0103SB0304+SB0304> (last visited May 16, 2014).

<sup>14</sup> S.B. 304.

cedures and deadlines for handling unclaimed remains to healthcare facilities and funeral service establishments.

The legislation will improve health care facilities' and funeral home establishments' ability to coordinate with law enforcement when handling unclaimed remains. The legislation has three primary foundations. First, the legislation created a new Code section providing for a more detailed process for the identification of the decedent and for next of kin assuming responsibility for the unclaimed remains.<sup>15</sup> Second, the legislation created a new Code section that clearly indicated that local jurisdictions would be responsible for the payment of expenses for disposition of the decedent when the next of kin is unable to pay or refuses to accept responsibility.<sup>16</sup> Third, the legislation expands who may identify remains for purposes of cremation when there is no next of kin willing or able to serve.<sup>17</sup> From a structural perspective, the legislation relocated certain Code sections and deleted several unnecessary ones.<sup>18</sup>

## II. IDENTIFICATION OF DECEDENT AND NEXT OF KIN

SB 304 created Va. Code § 32.1-309.1 to address the process by which a decedent and the next of kin would be identified.<sup>19</sup> Patients may present to hospital emergency rooms in full arrest or die after arrival and have no means of identification and no next of kin in attendance or readily identifiable. The first portion of the new Code section clarifies "next of kin" to have the same meaning as defined in Va. Code § 54.1-2800.<sup>20</sup> In the absence of a next of kin, a person designated to make arrangements for the decedent's burial or disposition pursuant to § 54.1-2825, an agent named in an advance directive under § 54.1-2984, or a guardian appointed pursuant to Chapter 20 of Title 64.2 may fulfill the duties of a next of kin.<sup>21</sup>

---

<sup>15</sup> S.B. 304, Act of March 7, 2014, ch. 228, 2014 Va. Acts (to be codified at Va. Code Ann. § 32.1-309.1).

<sup>16</sup> *Id.* (to be codified at Va. Code Ann. § 32.1-309.2).

<sup>17</sup> *Id.* (to be codified at Va. Code Ann. § 54.1-2818.1).

<sup>18</sup> S.B. 304.

<sup>19</sup> *Id.*

<sup>20</sup> Va. Code Ann. § 54.1-2800 (West 2006) (defining *Next of Kin* as any of the following "persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825, the legal spouse, child over 18 years of age, custodial parent, noncustodial parent, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, material siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship.").

<sup>21</sup> Va. Code Ann. § 64.2-2000 (West 2012) (defining *Guardian* as a person "appointed by the court who

If any of these persons fails to or refuses to fulfill the role of next of kin, the statute newly authorizes “any person 18 years of age or older who is able to provide positive identification of the decedent and is willing to pay the costs associated with the disposition of the decedent’s remains shall be authorized to make arrangements for such disposition of the decedent’s remains.”<sup>22</sup> In practice, this could be a church member, a fellow Rotarian, an Army buddy, or just a friend. Increasingly, healthcare facilities and funeral service establishments are able to identify next of kin who acknowledge their relationship to the decedent, but who do not have financial means to pay for the disposition of the remains. However, there could be a friend or church member who is ready, willing, and able to act. Unfortunately, the law did not authorize them to act in that capacity.

The statute further clarifies the obligation of any person or institution (most likely a hospital or nursing home) having initial custody of the decedent to attempt to identify the decedent, if the identity is not known, and attempt to notify next of kin of the decedent’s death.<sup>23</sup> If the next of kin fails or refuses to claim the body within 10 days, then the body will be disposed of pursuant to new provisions of Va. Code § 32.1-309.2, the second new code section created by SB 304.<sup>24</sup>

If the person or institution having initial custody of the decedent is unable to determine the identity of the decedent or notify next of kin, the person or institution shall contact the primary law enforcement agency for the locality.<sup>25</sup> The primary law enforcement agency must then make a good faith effort to identify the decedent and notify next of kin.<sup>26</sup> If law enforcement is able to identify next of kin and the next of kin wishes to claim the remains, the next of kin shall be authorized to do so and bear the expenses of disposition of the remains.<sup>27</sup> If law enforcement is unable to identify the decedent or, despite good faith efforts, next of kin is not identifiable or is not willing or refuses to accept the remains, primary law enforcement

---

is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person’s support, care, health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence.”).

<sup>22</sup> S.B. 304, 2014 Gen. Assemb., Reg. Sess., Act of March 7, 2014, ch. 228, 2014 Va. Acts, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0228> (amending by adding § 32.1-309.1 of the Code of Virginia, relating to identification of decedent, next of kin; disposition of claimed dead body).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (amending by adding § 32.1-309.2 of the Code of Virginia, relating to disposition of unclaimed dead body; how expenses paid).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> S.B. 304, Act of March 7, 2014, ch. 228, 2014 Va. Acts.

shall notify the person or healthcare facility having initial custody and the body shall be disposed of in accordance with Va. Code § 32.1-309.2.<sup>28</sup>

When a next of kin wishes to claim a decedent's remains but is unable to pay the costs of disposition, the county or city in which the decedent resided or where the death occurred if the decedent resided out of state, is responsible to bear the cost.<sup>29</sup> The locality may either recover the cost of burial from the decedent's estate, or seize such assets for that purpose.<sup>30</sup> These provisions restore what had been the practice prior to the issuance of the Attorney General's opinion.

In any case that requires an investigation by the medical examiner, the statute clarifies that the person or institution having custody of the remains must adhere to the requirements of the medical examiner's office prior to transfer or disposition.<sup>31</sup>

Under the prior law sheriffs had immunity when dealing with unclaimed remains.<sup>32</sup> The new legislation grants immunity to all parties that have a role in disposing of unclaimed remains.<sup>33</sup> Specifically, any "sheriff or primary law enforcement officer, county, city, health care provider, funeral service establishment, funeral service licensee, or other person or institution that acts under the statute regarding the acceptance for disposition of a decedent" who play a role in disposing the remains enjoy immunity from simple negligence.<sup>34</sup>

Interestingly enough, during the conversations in drafting this legislation, the issue of immunity was the common thread that hampered the willingness of stakeholders to act or take responsibility. During the stakeholder discussions, the first point of common ground was that everyone wanted immunity and, if that could be secured, then stakeholders were willing to pave a pathway to a workable solution.<sup>35</sup> All stakeholders shared the ethical commitment to take all reasonable steps to assure the proper disposition of

---

<sup>28</sup> S.B. 304, 2014 Gen. Assemb., Reg. Sess., Act of March 7, 2014, ch. 228, 2014 Va. Acts, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0228>.

<sup>29</sup> *Next of Kin and Unclaimed Remains*, *supra* note 10, at 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> E-mail from W. Scott Johnson, Director, Hancock, Daniel, Johnson & Nagle, P.C., to Richard Forzani, Lead Articles Editor, Richmond Journal of Law and the Public Interest (June 17, 2014, 07:07 EST) (on file with the Richmond Journal of Law and the Public Interest).

unclaimed remains.<sup>36</sup> Once they all had immunity they were able to fulfill their ethical commitments.<sup>37</sup>

The primary law enforcement varies between different jurisdictions, and could be a sheriff's department or a police department. Some jurisdictions have both a sheriff's department and a police department. In those circumstances, one is deemed the primary law enforcement agency and the other is deemed other law enforcement agency.<sup>38</sup> The other law enforcement agency may coordinate with the primary law enforcement office to handle unclaimed remains or the primary law enforcement agency may retain responsibility for unclaimed remains.<sup>39</sup>

For example, in Henrico County, the primary law enforcement agency is the police department.<sup>40</sup> The police department has worked out an arrangement with the sheriff's department to handle unclaimed remains.<sup>41</sup> The statute creates formal authorization for primary law enforcement to coordinate with other law enforcement in handling unclaimed remains. Therefore, it is recommended that healthcare facilities and funeral home establishments determine who bears responsibility on the law enforcement front in the locality with which they are dealing.

### III. DISPOSITION OF UNCLAIMED REMAINS – EXPENSES

There is a second process for the disposing of unclaimed remains in the new legislation if either primary law enforcement is unable to identify the decedent or next of kin of the decedent or if the next of kin refuses or fails to accept the remains within 10 days. In those instances, primary law enforcement shall notify the attorney for the county or city in which the remains are located. In the event there is no county or city attorney, law enforcement must contact the Commonwealth's Attorney. That attorney shall obtain an order authorizing the person or institution having initial custody of the decedent to transfer custody to a funeral service establishment for final disposition.<sup>42</sup> The reasonable expenses of the disposition shall be borne

---

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See also Sheriff's Responsibilities*, Virginia Sheriff's Association, <https://vasheriff.org/sheriffs-resources/sheriffs-offices-responsibilities> (last visited May 19, 2014).

<sup>39</sup> *See* Trice, *supra* note 4.

<sup>40</sup> *About Us*, Henrico Cnty. Va. Police, <http://www.co.henrico.va.us/police/about-us/> (last visited May 19, 2014).

<sup>41</sup> *See* County of Henrico Department of General Services, Annual Contract for Removal of Human Remains (Oct. 1, 2012), *available at* <http://www.co.henrico.va.us/pdfs/purchasing/bids/12-9326-9SS.pdf>.

<sup>42</sup> S.B. 304, 2014 Gen. Assemb., Reg. Sess., Act of March 7, 2014, ch. 228, 2014 Va. Acts, *available at*

by the county or city in which the decedent resided at the time of his or her death. If the decedent is not a resident of Virginia or if his or her locality cannot be identified, the expenses shall be borne by the county or city where the death occurred.<sup>43</sup> The court order must enumerate the payment of the expenses.<sup>44</sup>

Since the issuance of the Attorney General's opinion in 2013, a number of hospital system and funeral service establishments employ a similar practice in dealing with unclaimed remains; the new statute codifies this practice.<sup>45</sup> The statute advises the stakeholders to enter into agreements whereby the remains will be stored by a funeral service establishment until the next of kin can be located or identified.<sup>46</sup> These agreements commonly provide for the disposition of the remains at a reduced cost because the private establishments bear for the cost rather than the local government. The statute clarifies that even though a funeral service establishment may have possession of the remains pursuant to an agreement, the person or institution that has initial custody continues to bear the obligation to identify the decedent and next of kin.<sup>47</sup>

The statute also clarifies that where a court order is entered for the disposition of the remains, any estate or funds available to the decedent may be seized or used to cover the costs of the disposition.<sup>48</sup> The statute grants immunity similar to that granted in § 32.1-309.1 for individuals accepting or disposing of remains.<sup>49</sup> The language of the statute authorizes primary law enforcement and other law enforcement to work together to determine who is responsible for the duties under this statute.<sup>50</sup>

---

<http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0228>.

<sup>43</sup> *Id.* (to be codified at Va. Code Ann. § 32.1-309.2(a)).

<sup>44</sup> *Id.* Note that the statute addresses the handling of remains that were in the custody of the Department of Corrections or the Department of Behavioral Health and Developmental Services. However, a full discussion of this issue is not within the scope of this work. *See id.* (to be codified at Va. Code Ann. § 32.1-309.2(b)-(c)).

<sup>45</sup> *Id.* (to be codified at Va. Code Ann. § 32.1-309.2(d)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (to be codified at Va. Code Ann. § 32.1-309.1(b)).

<sup>48</sup> S.B. 304, 2014 Gen. Assemb., Reg. Sess., Act of March 7, 2014, ch. 228, 2014 Va. Acts, *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0228> (to be codified at Va. Code Ann. § 32.1-309.1(e)).

<sup>49</sup> *Id.* (to be codified at Va. Code Ann. § 32.1-309.1(g)).

<sup>50</sup> *Id.* (to be codified at Va. Code Ann. § 32.1-309.1(h)).

## IV. PREREQUISITES FOR CREMATION

The final foundation addressed in this legislation deals with who is permitted to provide visual identification of remains when the remains are going to be cremated. Va. Code § 54.1-2818.1 currently provides that remains cannot be cremated without permission of the medical examiner and without visual identification by next of kin, a representative authorized to make arrangements for the decedent's burial, or an agent named in an advance directive.<sup>51</sup> Amendments to this section include visual identification by any guardian appointed pursuant to Chapter 20 of Title 64.2.<sup>52</sup> Where there is no next of kin, representative, agent or guardian willing or able to make such identification, then primary law enforcement of the county or city in which the person or institution having initial custody of the body is located shall identify the decedent pursuant to a court order.<sup>53</sup>

For example, if an individual dies in a hospital located in Chesterfield County and, after a good faith effort by the hospital and law enforcement under the code sections referenced herein, a next of kin cannot be identified or a next of kin is not willing to accept responsibility, then the hospital can obtain an order for the decedent's remains to be cremated. Pursuant to that order, primary law enforcement or the law enforcement who has agreed to assume responsibility in that jurisdiction will make the visual identification.

Similar to the other two new sections of the Code, this new section provides immunity for funeral service establishments, funeral service licensees, crematories, cemeteries, primary law-enforcement officers, sheriffs, counties, and cities for their acts, decisions, or omissions regarding cremation unless such acts, decisions, or omissions resulted from bad faith or malicious intent.<sup>54</sup> This section also recognizes the ability of primary law enforcement and other law enforcement to coordinate responsibilities for the visual identification necessary for cremation.<sup>55</sup>

The statute encourage health care facilities and funeral service establishments to ascertain a clear understanding of the identity of the primary law enforcement in surrounding jurisdictions or what agreements primary law enforcement are in place with other law enforcement in the jurisdiction

---

<sup>51</sup> Va. Code Ann. § 54.1-2818.1 (2013).

<sup>52</sup> See Dead Human Bodies; Absence of Next of Kin, Disposition of Remains, Prerequisites for Cremation, S.B. 77, 2014 Gen. Assemb., Reg. Sess. (Va. 2014) (to be codified at Va. Code Ann. § 54.1-2818.1), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?141+sum+SB77>.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

for handling unclaimed remains. Waiting to make this determination after there are unclaimed remains in a facility's possession can lead to unnecessary telephone calls and wasted time.

Health care facilities, law enforcement agencies or funeral service establishments can help facilitate the process for the county or city attorneys who are charged with securing the order under these Code sections by providing a detailed chronology of efforts made to locate the next of kin or confirm the next of kin's ability to afford the cost of disposition. They should include this information in the request for the order from the court. It is preferable to track and document this information while making the efforts to locate the next of kin instead of creating the documentation after the fact.

#### V. CONCLUSION

The passage of Senate Bill 304 will better enable health care facilities to work with law enforcement in the handling of unclaimed remains in an overall process very similar to that which existed prior to the issuance of the Attorney General opinion. The statutes together provide a detailed checklist approach to deadlines and steps to be taken. This bill encourages health care facilities and funeral service establishments to establish working agreements regarding the handling of unclaimed remains. Since most nursing homes do not have morgues and most hospitals have morgues with very limited space, these agreements can be very beneficial in an orderly process on the road to the final resting place.