ENROLLED

COMMITTEE SUBSTITUTE

for

H. B. 4118

(By Delegate Moore)

[Passed March 10, 2012; in effect ninety days from passage.]

AN ACT to amend and reenact §30-6-3 and §30-6-22 of the Code of West Virginia, 1931, as amended; to amend said code by adding thereto a new section designated §30-6-22a; and to amend and reenact §61-12-9 of said code, all relating to cremation, preneed funeral contracts and disposition of remains generally; adding a definition of persons authorized to order cremation; clarifying required inquiry about deceased's desires; prioritizing individuals authorized to express desires of the deceased; clarifying funeral directors responsibilities; establishing the right to control the disposition of the remains of a deceased person; determining who has that right; setting forth how that right may be forfeited; adding a definition of person authorized to agree to a cremation contract; and establishing an order of precedence among persons as to cremation and disposition of remains.

Be it enacted by the Legislature of West Virginia:

That §30-6-3 and §30-6-22 of the Code of West Virginia,
1931, as amended, be amended and reenacted; that said code be amended by adding thereto a new section designated §30-6-22a; and that §61-12-9 of said code be amended and reenacted, all to read as follows:

CHAPTER 30. PROFESSIONS AND OCCUPATIONS.

ARTICLE 6. BOARD OF FUNERAL SERVICE EXAMINERS.

§30-6-3. Definitions.

As used in this article, the following words and terms have the following meanings, unless the context clearly indicates otherwise:

(a) “Apprentice” means a person who is preparing to become a licensed funeral director and embalmer and is learning the practice of embalming, funeral directing or cremation under the direct supervision and personal instruction of a duly licensed embalmer or funeral director.

(b) “Authorized representative” means a person legally authorized or entitled to order the cremation of the deceased, as established by rule. An authorized representative may include in the following order of precedence:

(1) The deceased, who has expressed his or her wishes regarding the disposal of their remains through a last will and testament, an advance directive or preneed funeral contract, as defined in section two, article fourteen, chapter forty-five of this code;

(2) The surviving spouse of the deceased, unless a petition to
dissolve the marriage was pending at the time of decedent’s death;

(3) An individual previously designated by the deceased as the
person with the right to control disposition of the deceased’s
remains in a writing signed and notarized by the deceased:
Provided, That no person may be designated to serve in such
capacity for more than one nonrelative at any one time;

(4) The deceased’s next of kin;

(5) A court order;

(6) A public official who is charged with arranging the final
disposition of an indigent deceased; or

(7) A representative of an institution who is charged with
arranging the final disposition of a deceased who donated his or
her body to science.

(c) “Board” means the West Virginia Board of Funeral Service
Examiners.

(d) “Certificate” means a certification by the board to be a
crematory operator.

(e) “Courtesy card holder” means a person who only practices
funeral directing periodically in West Virginia and is a licensed
embalmer and funeral director in a state which borders West
Virginia.

(f) “Cremated remains” or “cremains” means all human remains,
including foreign matter cremated with the human, recovered after
the completion of cremation.

(g) “Cremation” means the mechanical or thermal process
whereby a dead human body is reduced to ashes and bone fragments
and then further reduced by additional pulverization, burning or recremating when necessary.

(h) “Crematory” means a licensed place of business where a deceased human body is reduced to ashes and bone fragments and includes a crematory that stands alone or is part of or associated with a funeral establishment.

(i) “Crematory operator” means a person certified by the board to operate a crematory.

(j) “Crematory operator in charge” means a certified crematory operator who accepts responsibility for the operation of a crematory.

(k) “Deceased” means a dead human being for which a death certificate is required.

(l) “Embalmer” means a person licensed to practice embalming.

(m) “Embalming” means the practice of introducing chemical substances, fluids or gases used for the purpose of preservation or disinfection into the vascular system or hollow organs of a dead human body by arterial or hypodermic injection for the restoration of the physical appearance of a deceased.

(n) “Funeral” means a service, ceremony or rites performed for the deceased with a body present.

(o) “Funeral directing” means the business of engaging in the following:

(1) The shelter, custody or care of a deceased;

(2) The preparation of a deceased for burial or other disposition;
(3) The arranging or supervising of a funeral or memorial service for a deceased; and

(4) The maintenance of a funeral establishment for the preparation, care or disposition of a deceased.

(p) “Funeral director” means a person licensed to practice funeral directing.

(q) “Funeral establishment” means a licensed place of business devoted to: the care, preparation and arrangements for the transporting, embalming, funeral, burial or other disposition of a deceased. A funeral establishment can include a licensed crematory.

(r) “Funeral service licensee” means a person licensed after July 1, 2003, to practice embalming and funeral directing.

(s) “License” means a license, which is not transferable or assignable, to:

(1) Practice embalming and funeral directing;

(2) Operate a crematory or a funeral establishment.

(t) “Licensee” means a person holding a license issued under the provisions of this article.

(u) “Licensee in charge” means a licensed embalmer and funeral director who accepts responsibility for the operation of a funeral establishment.

(v) “Memorial service” means a service, ceremony or rites performed for the deceased without a body present.

(w) “Mortuary” means a licensed place of business devoted solely to the shelter, care and embalming of the deceased.
(x) “Person” means an individual, partnership, association, corporation, not-for-profit organization or any other organization.

(y) “Registration” means a registration issued by the board to be an apprentice to learn the practice of embalming, funeral directing or cremation.

(z) “State” means the State of West Virginia.

§30-6-22. Disposition of body of deceased person; penalty.

(a) No public officer, employee, physician or surgeon, or other person having a professional relationship with the deceased, shall send, or cause to be sent to an embalmer, funeral director or crematory operator the body of a deceased without first inquiring the desires of the deceased who has designated his or her wishes regarding the disposal of their remains through a last will and testament, an advance directive or preneed funeral contract, as defined in section two, article fourteen, chapter forty-five of this code; the surviving spouse of the deceased, unless a petition to dissolve the marriage was pending at the time of decedent’s death; and, an individual previously designated by the deceased as the person with the right to control disposition of the deceased’s remains in a writing signed and notarized by the deceased: Provided, That no person may be designated to serve in such capacity for more than one nonrelative at any one time. If there is no last will and testament, advance directive or preneed funeral contract, surviving spouse, or designated person, then the authority and direction of any next of kin or person who may be chargeable with the funeral expenses of the deceased shall be used
as to the disposal of the body of the deceased. The provisions of
this subsection are not applicable if the remains of the decedent
are subject to disposition pursuant to subsection (b) of this
section.

(b) Notwithstanding any provision of this code to the
contrary, a United States Department of Defense Record of Emergency
Data Form (DD Form 93) executed by a declarant who dies while
serving in a branch of the United States Military as defined in 10
U. S. C. §1481 constitutes a valid form of declaration instrument
and governs the disposition of the declarant’s remains. The person
named in the form as the person authorized to direct disposition of
the remains may arrange for the final disposition of the
declarant’s last remains.

(c) Any person who violates the provisions of this section is
guilty of a misdemeanor and, upon conviction thereof, shall be
fined not less than $500, nor more than $1,000, or imprisoned not
less than ten days nor more than ninety days, or both.

§30-6-22a. Right of disposition; preneed contract; affidavit on
disposition of remains; role of county commission; liability
of funeral home.

(a) Notwithstanding section twenty-two of this article, a
person who is eighteen years of age or older and of sound mind, by
entering into a preneed funeral contract, as defined in section
two, article fourteen, chapter forty-seven of this code, may direct
the location, manner and conditions of the disposition of the
person's remains and the arrangements for funeral goods and services to be provided upon the person's death. The disposition directions and funeral prearrangements that are contained in a preneed funeral contract are not subject to cancellation to revision unless any resources set aside to fund the preneed funeral contract are insufficient under the terms of the preneed funeral contract to carry out the disposition directions and funeral prearrangements contained in the contract.

(b) As to any matter not addressed in a preneed funeral contract as described in subsection (a) of this section and except as provided in subsection (c) of this section, the right to control the disposition of the remains of a deceased person, the location, manner and conditions of disposition, and arrangements for funeral goods and services to be provided vests in the following, in the order named, provided that the person is eighteen years or older and is of sound mind:

(1) (A) A person designated by the decedent as the person with the right to control the disposition in an affidavit executed in accordance with paragraph (B) of this subdivision; and

(B) A person who is eighteen years of age or older and of sound mind wishing to authorize another person to control the disposition of his or her remains may execute an affidavit before a notary public in substantially the following form:

"I, ________________, do hereby designate _______________ with the right to control the disposition of my remains upon my death. I ___ have/ ____ have not attached specific directions
concerning the disposition of my remains with which the designee shall substantially comply, provided that these directions are lawful and there are sufficient resources in my estate to carry out the directions.

______________________________
Signed

State of _______________
County of _______________

I, _________________________, a Notary Public of said County, do certify that _____________________________________, as principal whose name is signed to the writing above bearing date on the ______ day of _________, 20____, has this day acknowledged the same before me.

Given under my hand this _____ day of _____, 20__.  
My commission expires:______________________________

______________________________
Notary Public”;

(2) The surviving spouse of the decedent;

(3) The sole surviving child of the decedent or, if there is more than one child of the decedent, the majority of the surviving children. However, less than one half of the surviving children shall be vested with the rights under this section if they have used reasonable efforts to notify all other surviving children of their instructions and are not aware of any opposition to those instructions on the part of more than one half of all surviving children;

(4) The surviving parent or parents of the decedent. If one
of the surviving parents is absent, the remaining parent shall be vested with the rights and duties under this section after reasonable efforts have been unsuccessful in locating the absent surviving parent;

(5) The surviving brother or sister of the decedent or, if there is more than one sibling of the decedent, the majority of the surviving siblings. However, less than the majority of surviving siblings shall be vested with the rights and duties under this section if they have used reasonable efforts to notify all other surviving siblings of their instructions and are not aware of any opposition to those instructions on the part of more than one half of all surviving siblings;

(6) The surviving grandparent of the decedent or, if there is more than one surviving grandparent, the majority of the grandparents. However, less than the majority of the surviving grandparents shall be vested with the rights and duties under this section if they have used reasonable efforts to notify all other surviving grandparents of their instructions and are not aware of any opposition to those instructions on the part of more than one half of all surviving grandparents;

(7) The guardian of the person of the decedent at the time of the decedent's death if one had been appointed;

(8) The personal representative of the estate of the decedent;

(9) The person in the classes of the next degree of kinship, in descending order, under the laws of descent and distribution to inherit the estate of the decedent. If there is more than one
person of the same degree, any person of that degree may exercise
the right of disposition;

(10) If the disposition of the remains of the decedent is the
responsibility of the state or a political subdivision of the
state, the public officer, administrator or employee responsible
for arranging the final disposition of decedent's remains; or

(11) In the absence of any person under subdivisions (1)
through (10) of this subsection, any other person willing to assume
the responsibilities to act and arrange the final disposition of
the decedent's remains, including the funeral director with custody
of the body, after attesting in writing that a good-faith effort
has been made to no avail to contact the individuals under
subdivisions (1) through (10) of this subsection.

(c) A person entitled under law to the right of disposition
forfeits that right, and the right is passed on to the next
qualifying person as listed in subsection (b) of this section, in
the following circumstances:

(1) Any person charged with murder or voluntary manslaughter
in connection with the decedent's death and whose charges are known
to the funeral director. However, if the charges against that
person are dismissed or if the person is acquitted of the charges,
the right of disposition is returned to the person;

(2) Any person who does not exercise his or her right of
disposition within two days of notification of the death of
decedent or within three days of decedent's death, whichever is
earlier;
(3) If the person and the decedent are spouses and a petition to dissolve the marriage was pending at the time of decedent's death.

(d) Any person signing a funeral service agreement, cremation authorization form or any other authorization for disposition shall be deemed to warrant the truthfulness of any facts set forth therein, including the identity of the decedent whose remains are to be buried, cremated or otherwise disposed of, and the party's authority to order the disposition. A funeral home has the right to rely on that funeral service agreement or authorization and shall have the authority to carry out the instructions of the person or persons the funeral home reasonably believes holds the right of disposition. The funeral home has no responsibility to independently investigate the existence of any next of kin or relative of the decedent where a means of disposition is fully set forth in a preneed funeral contract or other written directive of the deceased in accordance with this section. If there is more than one person in a class who are equal in priority and the funeral home has no knowledge of any objection by other members of that class, the funeral home may rely on and act according to the instructions of the first person in the class to make funeral and disposition arrangements, if no other person in that class provides written objections to the funeral home.

(e) No funeral establishment or funeral director who relies in good faith upon the instructions of a preneed funeral contract, written directive of the deceased, or an individual claiming the
right of disposition in accordance with this section shall be subject to criminal or civil liability or subject to disciplinary action under this section for carrying out the disposition of the remains in accordance with those instructions.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 12. POSTMORTEM EXAMINATIONS.

§61-12-9. Permits required for cremation; fee.

(a) It is the duty of any person cremating, or causing or requesting the cremation of, the body of any dead person who died in this state, to secure a permit for the cremation from the Chief Medical Examiner, the county medical examiner or county coroner of the county wherein the death occurred. Any person who willfully fails to secure a permit for a cremation, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $200. A permit for cremation shall be acted upon by the Chief Medical Examiner, the county medical examiner or the county coroner after review of the circumstances surrounding the death, as indicated by the death certificate. The person requesting issuance of a permit for cremation shall pay a reasonable fee, as determined by the Chief Medical Examiner, to the county medical examiner or coroner or to the Office of the Chief Medical Examiner, as appropriate, for issuance of the permit.

(b) Any person operating a crematory who does not perform a cremation pursuant to the terms of a cremation contract, or pursuant to the order of a court of competent jurisdiction, within
the time contractually agreed upon, or, if the cremation contract does not specify a time period, within twenty-one days of receipt of the deceased person’s remains by the crematory, whichever time is less, is guilty of a misdemeanor.

(c) Any person operating a crematory who fails to deliver the cremated remains of a deceased person, pursuant to the terms of a cremation contract, or pursuant to the order of a court of competent jurisdiction, within the time contractually agreed upon, or, if the cremation contract does not specify a time period, within thirty-five days of receipt of the deceased person’s remains by the crematory, whichever time is less, is guilty of a misdemeanor.

(d) Any person convicted of a violation of the provisions of subsection (b) or (c) of this section shall be fined not less than $1,000 nor more than $5,000 or confined in jail for a period not to exceed six months, or both.

(e) In any criminal proceeding alleging that a person violated the time requirements of this section, it is a defense to the charge that a delay beyond the time periods provided for in this section were caused by circumstances wholly outside the control of the defendant.

(f) For purposes of this section, “cremation contract” means an agreement to perform a cremation, as a “cremation” is defined in subsection (g), section three, article six, chapter thirty of this code. A cremation contract is an agreement between a crematory and any authorized person or entity, including, but not limited to, the
following persons in order of precedence:

(1) The deceased, who has expressed his or her wishes regarding the disposal of their remains through a last will and testament, an advance directive or preneed funeral contract, as defined in section two, article fourteen, chapter forty-five of this code;

(2) The surviving spouse of the deceased, unless a petition to dissolve the marriage was pending at the time of decedent’s death;

(3) An individual previously designated by the deceased as the person with the right to control disposition of the deceased’s remains in a writing signed and notarized by the deceased: Provided, That no person may be designated to serve in such capacity for more than one nonrelative at any one time;

(4) The deceased person’s next of kin;

(5) A public official charged with arranging the final disposition of an indigent deceased person or an unclaimed corpse;

(6) A representative of an institution who is charged with arranging the final disposition of a deceased who donated his or her body to science;

(7) A public officer required by statute to arrange the final disposition of a deceased person;

(8) Another funeral establishment; or

(9) An executor, administrator or other personal representative of the deceased.