

**RIGHTS AND RITES: UNDERSTANDING THE FIDUCIARY
OBLIGATIONS OF DESIGNATED FUNERAL
REPRESENTATIVES**

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Editor's synopsis: Michigan Public Act 57 of 2016 added a new operative, the "funeral representative," to the cast of fiduciaries subject to Michigan's Estates and Protected Individuals Code. This Article canvasses the peculiarly fiduciary aspects of a designated funeral representative's power to make funerary decisions, focusing on the breadth of the funeral representative's discretion and the identity of the holders of rights correlative to the funeral representative's fiduciary duties.

I. INTRODUCTION

Michigan Public Act 57 of 2016 (Act) added a new operative, the "funeral representative," to the cast of fiduciaries subject to Michigan's Estates and Protected Individuals Code (EPIC).¹ The Act constitutes the funeral representative as:

[A]n individual designated to have the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body, including, but not limited to, decisions about cremation, and the right to [retrieve from the funeral establishment and] possess cremated remains of the decedent [immediately after cremation].²

But exercise of a funeral representative's "right and power to make [funerary] decisions" is evidently subject to *fiduciary* constraint, for the Act adds the newly minted term 'funeral representative'³ to EPIC's

1. See MICH. COMP. LAWS ANN. § 700.1104(j) (West 2016) (defining 'funeral representative'); see also *id.* § 700.1104(e) (defining 'fiduciary' to include a funeral representative). The Act's June 27, 2016 effective date is determined by "enacting section 2" of 2016 Mich. Pub. Acts 57, according to which the Act's amendments take effect ninety days after enactment, the Act having been approved by the Governor (and filed with the Michigan Secretary of State) on March 29, 2016. See MICH. LEGISLATIVE WEBSITE, Senate Bill 0551 (2015), [http://www.legislature.mi.gov/\(S\(tfycwzgjnnkkssozfsruo4\)\)/mileg.aspx?page=Get-Object&objectname=2015-SB-0551](http://www.legislature.mi.gov/(S(tfycwzgjnnkkssozfsruo4))/mileg.aspx?page=Get-Object&objectname=2015-SB-0551).

2. See MICH. COMP. LAWS ANN. §§ 700.1104(j), 700.3206(1) (West 2016) (section quoted in text and source of bracketed material, respectively). "'Funeral establishment' means a place of business used in the care and preparation for burial or transportation of a dead human body or a place where a person represents that the person is engaged in the profession of undertaking or the practice of mortuary science." *Id.* § 339.1801(a) (Occupational Code definition); see *id.* § 700.1104(i) (EPIC definition adverting to Occupational Code's).

3. Here we adopt the convenient, technical convention (common among logicians) of using single quotation marks "to construct a name for the [marked] expression." ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 6

denotative definition of ‘fiduciary’: “‘Fiduciary’ includes, but is not limited to, a personal representative, *funeral representative*, guardian, conservator, trustee, plenary guardian, partial guardian, and successor fiduciary.”⁴

The aim of this Article is to describe the funeral representative’s power to make funerary decisions as a *fiduciary* power informed by the breadth of the funeral representative’s discretion and the identity of the holders of rights correlative to the funeral representative’s fiduciary duties. We shall conclude in Part VII of the Article that the holders of rights correlative to the funeral representative’s fiduciary duties are the heirs, devisees, and beneficiaries of the “declarant,” the *declarant* being the person who designated the funeral representative as such; and that the funeral representative does not owe a fiduciary duty to the declarant. We shall conclude in Part VI of the Article that the decision to heed (or not to heed) funerary desires, instructions, or guidelines expressed by the declarant is discretionary with the funeral representative and therefore subject to a deferential standard of judicial scrutiny.

But before deriving those results, we shall treat as preliminary matters the discretionary nature of fiduciary relations in general (Part II of the Article), the elementary logic of right-duty ascriptions (Part III), and some instructive points of comparison between a funeral representative, on the one hand, and a fellow creature of statute, EPIC’s “patient advocate,” on the other (Part IV). Then, in Part V of the Article, we examine the funeral representative’s rights and powers as the Act itself sets them out, that is, prescinded from the fiduciary restraint with which they are required to be exercised, pursuant to EPIC’s general provisions on fiduciary obligation, by the Act’s insertion of ‘funeral representative’ in EPIC’s denotative definition of ‘fiduciary.’

II. DUTY, DISCRETION, AND SOURCE OF LAW

It follows from the Act’s description of the funeral representative, not only as “designated to make [funerary] *decisions*,”⁵ but also (by the definitional device) as a *fiduciary*⁶ that the funeral representative’s function is to some extent *discretionary*, for the discretion appropriate to

n.4 (1990). (We shall use “[d]ouble quotes . . . in the many looser ways quotation marks can be used, often to mention a word and use it in the same breath.” *Id.*).

4. MICH. COMP. LAWS ANN. § 700.1104(e) (West 2016) (emphasis added). This definition of ‘fiduciary’ is “denotative” in the sense that it consists entirely of examples—examples of fiduciaries. See generally RICHARD ROBINSON, DEFINITION 108 (1972).

5. See MICH. COMP. LAWS ANN. § 700.1104(j) (West 2016) (emphasis added).

6. See *id.* § 700.1104(e).

decision making is in the very nature of fiduciary relations: “fiduciaries are persons who take decisions on behalf of their principals. Fiduciary relationships, at least in their core sense, are relationships in which the fiduciary has a *discretion* in the way he chooses to meet his obligations to take these decisions.”⁷

Now the standard for judicial supervision of discretionary powers is abuse of discretion,⁸ which implies deference.⁹ If discretion is conferred, for example,

upon [a] *trustee* in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not dishonest motive, or fails to use his judgement, or acts beyond the bounds of a reasonable judgement. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee.¹⁰

And the presumption is that a fiduciary’s functions are discretionary: the exercise of a *trust* power, for example, “is discretionary *except to the extent to which its exercise is required* by the terms of the trust or by the principles of law applicable to the duties of trustees.”¹¹ So, a fiduciary’s discretion is a salient feature of her fiduciary duty—it is either characteristically broad or distinctively narrow.¹² A claim that a given

7. J. E. PENNER, *THE LAW OF TRUSTS* ¶¶ 2.12–2.13 (8th ed. 2012). See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 901 (“If the relationship, as the parties structure it, does not confer discretion on the ‘fiduciary,’ then his actions are not subject to the fiduciary constraint”).

8. See, e.g., MICH. COMP. LAWS ANN. § 700.7815(1) (West 2012) (trustee’s abuse of discretion under discretionary trust provision); RESTATEMENT (THIRD) OF TRUSTS § 87 (2007). The same standard of judicial scrutiny is sometimes referred to as the “arbitrary-and-capricious standard.” See John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 218 (“abuse-of-discretion standard is simply the arbitrary-and-capricious standard by another name”).

9. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. b (2007).

10. RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. e (1959) (emphasis added).

11. *Id.* at cmt. a (emphasis added). “In other words, discretion does not depend upon an explicit grant in the instrument. The trustee has discretion unless the instrument or some particular doctrine of trust law denies discretion. Discretion is the norm.” Langbein, *supra* note 8, at 219.

12. The abuse-of-discretion standard applies to non-trustee fiduciaries as well as trustees. “Under the common law courts will not review the discretionary decisions of trustees *and other fiduciaries de novo*, but will look only for the [fiduciary’s] abuse of its discretionary authority.” *Exbom v. Cent. States Welfare Fund*, 900 F.2d 1138, 1142 (7th Cir. 1990) (emphasis added). See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 6 cmt. b

fiduciary breached her fiduciary duty¹³ by exercising or failing to exercise a particular power on some occasion always involves the question whether, in the circumstances, restraint or exercise of the power was obligatory or discretionary. And the presumption favors discretion.

As the reference (above) to “principles of law”¹⁴ suggests, the scope of a fiduciary’s discretion is determined ultimately by the source(s) of law governing the relevant matter(s) for decision.¹⁵ The scope of discretion that may be given a trustee, for example, has been established primarily by developments at common law.¹⁶ And much the same may

(1959) (an executor given special powers generally has the same responsibilities a trustee would as to those powers).

13. The repetition of the adjective ‘fiduciary’ in the text is not superfluous, for not every duty a fiduciary owes someone with whom she stands in a fiduciary relation is a *fiduciary* duty. In a contractual setting, for example, the duty of a fiduciary to use proper skill and care in the discharge of her functions is a duty *of a fiduciary* (*viz.*, the one in question), but not *qua* fiduciary, and so is not properly described as one of the fiduciary’s *fiduciary* duties. See *Bristol & W. Bldg. Soc’y v. Mothewe* [1998] AC 1 at 16 (Eng.) (discussed in PENNER, *supra* note 7, ¶ 12.1); see also R. P. Austin, *Moulding the Content of Fiduciary Duties*, in *TRENDS IN CONTEMPORARY TRUST LAW* 153, 155 (A. J. Oakley ed., 1996). For an example of a duty of a funeral representative that is not a fiduciary duty, see *infra* notes 174–77 and accompanying text.

14. See Langbein, *supra* note 8, at 219.

15. ‘Source of law’ is used here in a technical sense meaning the institution(s) from which a legal norm derives validity. See, e.g., RUPERT CROSS, *PRECEDENT IN ENGLISH LAW* 147 (2d ed. 1968). Thus, legislation and the *rationes decidendi* of cases decided by superior courts are sources of law in the English and American systems. See *id.*

16. Throughout this Article, ‘common law’ is used without regard to the former separation of the jurisdictions of the King’s (or Queen’s) Bench, on the one hand, and the Court of Chancery, on the other; as used here, the term refers to the confluence of judge-made rules and principles, legal *and* equitable, applicable in common-law jurisdictions since the statutory unification of law and equity in England at the end of the nineteenth century. See generally PENNER, *supra* note 7, ¶¶ 1.10–1.15, at 5–7 (discussing the unification of the jurisdictions in England); F. W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 15–20 (A. H. Chaytor & W. J. Whittaker eds., rev. by John Brunyate, 2nd ed. 1936) (same); see also WILLIAM S. HOLDSWORTH, *The Influence of Roman Law on English Equity*, in *ESSAYS IN LAW AND HISTORY* 188, 188 (A. L. Goodhart & H. G. Hanbury eds., 1964) (discussing the former separation of the English legal system into the two departments of law and equity); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, 265–66 (1992) (“merger of Law and Equity first accomplished [in the United States] in the New York Field Code of 1848”).

The lines of English precedent on the enforcement of dispositive discretions (and the certainty of objects appropriate to valid discretionary trusts and powers of appointment) that collided in the House of Lords’ decision in *McPhail v. Doulton* [1971] AC 424 (HL) (appeal taken from Eng.), provide a striking example of the kind of development referred to in the text. See PENNER, *supra* note 7, ¶¶ 3.46–3.60; HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, *MODERN EQUITY* 62–65, 96–98, 106–08 (Jill E. Martin ed., 13th ed. 1989); J. W. Harris, *Trust, Power and Duty*, 87 L.Q. REV. 31 *passim* (1971).

be said of the scope of a personal representative's discretion.¹⁷ But the funeral representative, conceived as occupying a distinct fiduciary *office*, is a creature of statute—a discrete operative unknown to the common law.¹⁸ Hence the contours of the funeral representative's fiduciary duties, including the scope of her discretion in making funerary decisions, must ultimately be drawn from the Act as the relevant source of law and the particular authority relative to which the funeral representative exercises discretion.¹⁹ If analogies to common-law operatives such as trustees and personal representatives are relevant, it is because the Act makes them so.²⁰

III. DUTY AND CORRELATIVE RIGHTS

Another salient contour of a fiduciary's duty is the identity of correlative right holders. According to the axioms of analytical jurisprudence,²¹ all legal relations are relations between legal persons,²²

17. The personal representative is a fiduciary distinct from a trustee at common law. *See, e.g.,* Comm'r of Stamp Duties (Queensland) v. Livingston [1965] AC 694 (PC) 707 (appeal taken from Austl.); PENNER, *supra* note 7, ¶ 2.69; HANBURY & MAUDSLEY, *supra* note 16, at 55–60. Indeed, trustees and personal representatives originally sprang from distinct sources of law: the personal representative originated in the ecclesiastical court or court Christian, whereas the trustee originated in Chancery. *See* HANBURY & MAUDSLEY, *supra* note 16, at 54; MAITLAND, *supra* note 16, at 48–49; HOLDSWORTH, *supra* note 16, at 191; S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 14–15, 176–77, 205–10 (1969).

18. *See, e.g.,* HANBURY & MAUDSLEY, *supra* note 16, at 287, 566 (listing various fiduciary relations recognized at common law); *see also* Austin, *supra* note 13, at 156 (same).

19. “The concept of discretion is at home [] only . . . when someone is in general charged with making decisions subject to standards set by a particular authority.” Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32 (1967).

20. “[W]here an area is substantially one of creation, the judges are reluctant to admit the use of common law principles to interpret or to supplement the legislative ‘code.’” RUPERT CROSS, STATUTORY INTERPRETATION 44 (John Bell & George Engle eds., 3rd ed. 2005); *see also* CROSS, *supra* note 15, at 1, 161, 163 (indicating the sense in which precedent is subordinate to legislation as a source of law).

21. Analytical jurisprudence is the department of jurisprudence concerned with the analysis of legal concepts—rights and duties, property, legal personality, etc. *See, e.g.,* CROSS, *supra* note 15, at 1; A. W. B. SIMPSON, *The Analysis of Legal Concepts*, in LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 335, 335 (1987); H. F. JOLOWICZ, LECTURES ON JURISPRUDENCE 8 (J. A. Jolowicz ed., 1963). (The remaining province of jurisprudence is conventionally said to comprise legal theory (concerning the nature and definition of law) and the study of sources of law (in the sense described *supra* note 15). *See* CROSS, *supra* note 15, at 1.)

22. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 14, 72, 93 (Walter W. Cook ed., 1964); Albert Kocourek, *The Hohfeld System of Fundamental Legal Concepts*, 15 ILL. L. REV. 24, 25

each such relation is ultimately analyzable, as of any given moment, in terms of one or more discrete legal relations between exactly two legal persons,²³ and rights and duties are strictly correlative, so that the assertion that a legal person *A* has a legal duty to do (or refrain from doing) something in certain circumstances *entails* that there is a distinct legal person *B* (at least one natural person or legal entity not identical with *A*) who has a right in the sense of a legal *claim* to *A*'s doing (or refraining from doing) that thing in those circumstances.²⁴ Whether this conception is sufficient in itself to yield a fully satisfactory account of lawyers' and judges' ascriptions of rights and duties is controversial.²⁵ But the controversy (properly understood) is about the *sufficiency*, not the *correctness* of the conception in question.²⁶ So, whatever else it may

(1920); *see also* 3 FREDERICK WILLIAM MAITLAND, *Moral Personality and Legal Personality*, in THE COLLECTED PAPERS 304, 307 (H. A. L. Fisher ed., 1911) (describing a legal person as "a right-and-duty-bearing unit").

23. *See* HOHFELD, *supra* note 22, at 14, 72, 92–93; Kocourek, *supra* note 22, at 26; Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 165 (1919).

24. *See* HOHFELD, *supra* note 22, at 38–39; 4 JOHN FINNIS, *Rights: Their Logic Restated*, in PHILOSOPHY OF LAW: COLLECTED ESSAYS 375, 375–76 (2011); Harris, *supra* note 16, at 48–49. Paul Matthews, for example, has described the history of the law of trusts in terms of these jurisprudential axioms:

The jurisprudence of the Court of Chancery built up the twin ideas of (i) the obligation of the *feoffee to uses*, or trustee, to hold the property for the benefit of the *cestui que use*, or beneficiary, and (ii) the right of the beneficiary to obtain the use of the property. These notions stood back to back: the trustees' obligation with regard to the property was correlative to the beneficiary's right in it. . . . And rights were—and are—to be exercised, and property owned, by *people*, not by things.

Paul Matthews, *The New Trust: Obligations without Rights?*, in TRENDS IN CONTEMPORARY TRUST LAW, *supra* note 13, at 1, 1–2; *see also* JOHN A. BORRON, JR. ET AL., THE LAW OF FUTURE INTERESTS § 871 (3d ed. 2003) (describing powers of appointment in terms of the same axioms).

25. *See, e.g.*, A. M. Honoré, *Rights of Exclusion and Immunities Against Divesting*, 34 TUL. L. REV. 453, 456–57 (1960).

26. John Finnis, for example, referring to the view in question as "Hohfeldian" (after Wesley Newcomb Hohfeld, the author of the first work cited *supra* note 22), suggests that the relation between the Hohfeldian account of right-duties as sets of particular, two-party relations between legal persons at particular moments, on the one hand, and an alternative account that would directly credit lawyers' and judges' talk of rights as relations between legal persons and "subject-matter[s]" over time, on the other, is like that between statements about phenomena and our common-sense statements about material objects: "the practical legal consequences of any 'lawyers'-right' may be *identical* with those of some set of Hohfeldian rights, but are not *exhaustively* analysable into those." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 227 (1980) (emphasis added). (Readers wanting help with the nonlegal side of Finnis's analogy may see, e.g., G. E. MOORE, *The Nature and Reality of Objects of Perception*, in PHILOSOPHICAL STUDIES 31, 77–90 (1922); GEORGE EDWARD MOORE, *A Defense of Common Sense*, in PHILOSOPHICAL PAPERS 32, 53–55 (1959).) Thus, Finnis treats the Hohfeldian view as

involve analytically, a claim that someone has (as of a particular time) a fiduciary (or other legal) duty *by its very nature* invites the question, “To whom?”

And, of course, the answer to that question informs the duty. A personal representative, for example, certainly owes fiduciary duties to *some* legal persons interested in the decedent’s estate,²⁷ but whether the decedent’s creditors (for example) are among them may crucially affect what the personal representative’s fiduciary duty requires of her in particular circumstances.²⁸ Here, as with the scope of the funeral representative’s discretion,²⁹ we must look to the Act as the source of law: the identity of the holders of rights correlative to the funeral representative’s fiduciary duty must be gleaned from the Act because, again, the funeral representative is a creature of statute, and (again) if analogies to common law operatives such as trustees and personal representatives are relevant, it is because the Act makes them so.

IV. A DISANALOGOUS FELLOW CREATURE OF STATUTE

In respect of both breadth of discretion and the identity of correlative right holders, it is useful to compare the funeral representative with another creature of statute, EPIC’s *patient advocate*. EPIC constitutes the patient advocate as “an individual designated to exercise powers concerning another individual’s care, custody, and medical or mental health treatment or authorized to make an anatomical gift on behalf of another.”³⁰ Like the funeral representative’s, the patient advocate’s powers are subject to fiduciary constraint (though by express reference to “the standards of care applicable to fiduciaries” rather than by inclusion

being logically correct but arguably wanting as a complete account of lawyers’ ascriptions of rights and duties. *See id.* at 201–02; *see also* SIMPSON, *supra* note 21, at 349–51 (criticizing Hohfeld for *identifying* “legal conceptions with the logical functions of words”).

27. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 700.1104(e) (West 2016) (including ‘a personal representative’ in EPIC’s denotative definition of ‘fiduciary’), 700.1212 (West 2010) (describing the fiduciary relation to heirs, devisees, and beneficiaries), 700.3703(1) (listing the duties of personal representative); *see also* HANBURY & MAUDSLEY, *supra* note 16, at 54–55, 59.

28. *See* Shoaff v. Woods, 733 N.W.2d 419, 426–27 (Mich. Ct. App. 2007), *aff’d*, 739 N.W.2d 868 (Mich. 2007) (finding no fiduciary relation between personal representative and creditor of estate). *But cf.* MICH. COMP. LAWS ANN. § 700.3711 (West 2010) (personal representative’s power over estate assets held “in trust” for creditors as well as others interested in the estate).

29. *See supra* text accompanying notes 19–20.

30. *See* MICH. COMP. LAWS ANN. § 700.1106(k) (West 2010); *see also id.* § 700.5506(1) (West 2008) (describing the patient advocate’s powers). As to the patient advocate’s being a creature of statute, *see supra* note 18.

of ‘patient advocate’ in EPIC’s denotative definition of ‘fiduciary’).³¹ But whereas, as we shall see, the funeral representative is not required to inform her “decisions about funeral arrangements and the handling, disposition, or disinterment of [the] decedent’s body”³² in any particular way,³³ the patient advocate has to:

take reasonable steps to follow the desires, instructions, or guidelines given by the patient [that is, the person who appointed the patient advocate as such] while the patient was able to participate in decisions regarding care, custody, medical treatment, or mental health treatment, as applicable, whether given orally or as written in the designation.³⁴

And whereas, as we shall see, the funeral representative owes her fiduciary duties to heirs, devisees, or beneficiaries of the “declarant” (the *declarant* being the person who designated the funeral representative *as* funeral representative),³⁵ the patient advocate owes *her* fiduciary duties to the “patient,” the very person who appointed the patient advocate as such.³⁶

The former of these contrasts—that the patient advocate’s discretion *is*, whereas the funeral representative’s discretion is *not*, circumscribed by desires, instructions, or guidelines expressed by the person who designated the advocate or representative as such³⁷—evidently reflects a difference of policy. For it was within the legislature’s election to treat the two fiduciaries symmetrically in this respect: indeed, there is precedent in EPIC’s treatment of one of the funeral representative’s fellow fiduciaries, the personal representative, whose authority (subject to the decision-making priority conferred by the Act on a designated

31. “A patient advocate shall act in accordance with the standards of care applicable to fiduciaries in exercising his or her powers.” MICH. COMP. LAWS ANN. § 700.5509(1)(a) (West 2016); *see also id.* § 700.5507(4)(6.) (required declaration for effective acceptance by patient advocate); *cf. supra* note 4 and accompanying text (no reference to patient advocate in EPIC’s denotative definition of ‘fiduciary’).

32. MICH. COMP. LAWS ANN. §§ 700.1104(j), 700.3206(1) (West 2016).

33. *See infra* Part VI.C.

34. MICH. COMP. LAWS ANN. § 700.5509(1)(b) (West 2016) (discussed *infra* Part VI.B).

35. *See id.* §§ 700.1104(e), 700.1212 (West 2010), 700.1308 (discussed *infra* Part VII.B); *see also id.* § 700.3206(2)(a) (West 2016) (defining ‘declarant’ for purposes of funeral representative designation).

36. *See id.* § 700.5507(4)(6) (West 2008); *see also id.* § 700.5506(2) (defining ‘patient’ for purposes of patient advocate designation).

37. *See id.* § 700.1104(j) (West 2016); *cf. id.* § 700.5509(1)(b).

funeral representative or other)³⁸ regarding “the decedent’s body, funeral, and burial arrangements” is said in one place, *viz.*, EPIC section 3701, to be authority only to “carry out the decedent’s *written* [funerary] *instructions*.”³⁹ So, though it did *not*, the legislature *could have* limited the funeral representative’s discretion by mandating attentiveness to desires, instructions, or guidelines expressed by the person who designated the funeral representative as such.⁴⁰

But the latter of the contrasts we have drawn—that rights correlative to the patient advocate’s fiduciary duties *are*, whereas rights correlative to the funeral representative’s fiduciary duties are *not*, held by the very person who designated the advocate or representative as such⁴¹—is an analytical necessity that the legislature could not coherently have resisted. For whereas the “patient”⁴² is bound to be alive when the patient advocate renders service “concerning [the patient’s] care, custody, and medical or mental health treatment,”⁴³ “the authority under a funeral representative designation is exercisable by a funeral representative *only after the death of the declarant*.”⁴⁴ By that time, the “declarant” (that is, the person who designated the funeral representative as such),⁴⁵ having died, will have ceased to be a *legal person*⁴⁶ and will therefore no longer

38. *See id.* § 700.3206. As described *infra* Part V.A, a decedent’s personal representative or nominated personal representative who is not effectively designated by the decedent as the decedent’s funeral representative will have priority in making funerary decisions under EPIC section 3206 only if absence or default forfeits the priority of any service-branch designee, any funeral representative designated by the decedent, the decedent’s surviving spouse, all of the decedent’s descendants, parents, and grandparents, all descendants of the decedent’s parents, all descendants of the decedent’s grandparents, and anyone who may have been acting as the decedent’s guardian immediately before the decedent’s death. *See infra* notes 55–70 and accompanying text.

39. MICH. COMP. LAWS ANN. § 700.3701 (West 2016) (emphasis added) (discussed *infra* Part VI.B).

40. *See infra* text accompanying notes 145–49.

41. *See* MICH. COMP. LAWS ANN. § 700.1104(e) (West 2016); *cf. id.* § 700.5507(4)(b) (West 2008).

42. *See supra* note 36 and accompanying text.

43. MICH. COMP. LAWS ANN. §§ 700.1106(k) (West 2010) (quoted *supra* text accompanying note 30); *id.* § 700.5506(1) (West 2016).

44. *Id.* § 700.3206a(3) (West 2016) (emphasis added); *see also id.* § 700.3206(2)(c) (defining ‘declarant’ for purposes of funeral representative designation as the person making such designation).

45. *See id.* § 700.3206(2)(c).

46. That a decedent is not a legal person is a cardinal feature of our law reflected in the origin of the personal representative (*see* MILSOM, *supra* note 17, at 13–14), in death’s termination of agencies (*see, e.g.,* Chrysler Corp. v. Blozic, 255 N.W. 399, 399–400 (Mich. 1934)) and marriages (*see, e.g.,* Woodward v. Soc. Sec. Comm’r, 760 N.E.2d 257, 266–67 (Mass. 2002)), in the necessity of survival-of-actions legislation (*see, e.g.,* E. Wyndham White, Note, *Survival of Causes of Action*, 2 MOD. L. REV. 278, 278 (1939)),

be capable of relations that obtain only between legal persons, including the legal relation that subsists (at any given time) between a fiduciary and each holder (at that time) of a right correlative to the fiduciary's duties.⁴⁷

So, the elementary logic of juridical relations⁴⁸ entails that legal duties are owed ultimately only to the living—directly to living natural persons and indirectly to the living natural persons whose interests compose (at any given moment) each legal entity (extant at that moment).⁴⁹ And thus we can deduce from the time for the funeral representative's performance under the Act⁵⁰ that the funeral representative owes no legal duty to the declarant, the person who appointed the funeral representative as such. The Act tells us, as we shall see, that the funeral representative's fiduciary duties are owed rather to the declarant's heirs, devisees, or beneficiaries.⁵¹

V. RIGHTS AND POWERS

The funeral representative's *right* under the Act is a *right of way* in the sense that the duties correlative to the funeral representative's right⁵² are duties *not to interfere* with effectuation of the funeral representative's funerary decisions.⁵³ And the correlative duty holders are those over whom the Act gives the funeral representative priority in funerary decision making.⁵⁴

etc. See generally MAITLAND, *supra* note 22 (describing a legal person as “a right-and-duty-bearing unit”). And it is not peculiar to the Anglo-American legal system: “We have so far [in the quoted work] been concerned with *the legal clothing which a man wears in life—his rights and duties*. Any system of law must make some provision for the disposal of that clothing when life ends.” BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 234 (3d ed. 1962) (emphasis added); see also H. F. JOLOWICZ, *ROMAN FOUNDATIONS OF MODERN LAW* 111 (1957) (“As a man's capacity begins at his birth, so it ends at his death” said apropos of “The End of Natural Personality”).

47. See *supra* notes 21–24 and accompanying text.

48. I.e., the axioms of analytical jurisprudence described *supra* Part III.

49. See generally MAITLAND, *supra* note 22, *passim*.

50. See *supra* note 44 and accompanying text.

51. See *infra* Part VII.B.

52. See *supra* note 24 and accompanying text.

53. “The following have the rights and powers [that a funeral representative may be designated to exercise] in the following order of priority . . .” MICH. COMP. LAWS ANN. § 700.3206(3) (West 2016).

54. See *id.*

A. *Right by Priority in Decision Making*

That priority is not absolute. The funeral representative's right to make funerary decisions is subject to that of "a person designated to direct the disposition of [a] service member's remains according to a statute of the United States or regulation, policy, directive, or instruction of the Department of Defense" "[i]f the decedent was a service member at the time of the decedent's death."⁵⁵ The effect of this exception to the funeral representative's decision-making priority depends, as far as the Act is concerned, on promptitude as well as authority in the service branch,⁵⁶ for like everyone else whose priority the Act acknowledges, the service-branch designee has to "notify[] the funeral establishment in possession of the decedent's body of [the designee's] decision to exercise [her] rights or powers"⁵⁷ "within 48 hours of receiving notice of the decedent's death"⁵⁸ in order to preserve the service-branch designee's presumptive right to make funerary decisions (and others' correlative duties not to interfere).⁵⁹

But if no service branch has the relevant authority, or the authorized service-branch designee either fails timely to notify the relevant funeral establishment of her decision to exercise her right and power to dispose of the decedent's body⁶⁰ or affirmatively declines to exercise that right and power,⁶¹ the Act gives a properly designated funeral representative

55. *Id.* § 700.3206(3)(a); *see also id.* § 700.3206(14)(a), (e), (g) (pertinent definitions of 'armed forces,' 'Michigan National Guard,' and 'service member'). The service-branch exception to the funeral representative's presumptive decision-making priority contemplates, for example, that a designation of a "PADD" (i.e., "person authorized to direct disposition") in a U.S. Department of Defense Record of Emergency Data (DD Form 93) may trump a funeral representative designation (of a different designee) in circumstances in which Department of Defense procedures control. *See* 10 U.S.C.A. §§ 1481 (West 2016) (decedents covered by military authorization for recovery, care, and disposition of human remains), 1482(c)(1) (persons who may be designated to direct disposition of remains of a decedent covered by section 1481). For examples of the kinds of "regulation, policy, directive, or instruction of the Department of Defense" referred to in the Michigan statute (*viz.*, MICH. COMP. LAWS § 700.3206(3)(a)), *see* HEADQUARTERS U.S. CENT. COMMAND, REG. NO. 638-1, DECEASED PERSONNEL: MORTUARY AFFAIRS SUPPORT (2014) and the references in Appendix A thereto.

56. The point of the qualification, "as far as the Act is concerned" in the sentence this footnote tags is just that the source of a service branch's authority could raise conflict-of-laws questions. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. c (1971) (describing federal-state law conflicts as an example of conflicts *not* dealt with in the instant Restatement).

57. MICH. COMP. LAWS ANN. § 700.3206(4) (West 2016).

58. *Id.*

59. *See id.*

60. *See supra* notes 57–59 and accompanying text.

61. *See* MICH. COMP. LAWS ANN. § 700.3206(4) (West 2016).

presumptive priority over everyone else whose right to make funerary decisions (in *some* circumstance) the Act recognizes,⁶² viz., the decedent's surviving spouse, descendants, parents, and grandparents;⁶³ descendants of the decedent's parents;⁶⁴ descendants of the decedent's grandparents;⁶⁵ someone who was acting as the decedent's guardian immediately before the decedent's death;⁶⁶ the decedent's personal representative or nominated personal representative;⁶⁷ any special fiduciary;⁶⁸ the director of the department of corrections (if the decedent was incarcerated immediately before her death in a state correctional facility);⁶⁹ or the medical examiner for the county in which the decedent was domiciled immediately before her death.⁷⁰

B. Priority by Presumption

The funeral representative's priority over these other potential funerary decision makers is *presumptive*: "a funeral representative . . . is *presumed* to have the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body."⁷¹ That presumption may be "rebutted" in a court proceeding authorized by EPIC section 3207, which may be initiated by anyone claiming decision-making priority under the Act or by an interested person without claim to such priority, including a funeral establishment that has custody of the decedent's body.⁷²

A section 3207 proceeding thus provides the court an opportunity to alter, at the instance of an interested person, the priority otherwise determined by the Act. But relative to those potential funerary decision makers over whom the Act gives a designated funeral representative priority,⁷³ the presumption in favor of the funeral representative is clearly a *weighted* presumption, for section 3207 includes among the factors that

62. See *id.* § 700.3206(3)(b).

63. See *id.* § 700.3206(3)(c)–(d)(i)–(iv).

64. See *id.* § 700.3206(3)(d)(v)–(vi).

65. See *id.* § 700.3206(3)(d)(vii).

66. See *id.* § 700.3206(7).

67. See *id.* § 700.3206(6); see also *id.* § 700.3206(14)(f) (pertinent definitions of 'nominated personal representative').

68. See *id.* § 700.3206(8); see also *id.* § 700.3614 (appointment of special personal representative).

69. See *id.* § 700.3206(9)(b).

70. See *id.* § 700.3206(9)(a).

71. *Id.* § 700.3206(1) (emphasis added).

72. See *id.* § 700.3207(1).

73. I.e., those *other than* service branch personnel described *id.* § 700.3206(3)(a). See *supra* Part V.A.

must inform the court's decision in such a proceeding the fact of a funeral representative designation (if there is one) itself.⁷⁴ Still, in order to posit a functioning, "right-and-duty-bearing"⁷⁵ funeral representative, we have to assume, not only that the service-branch exception to the funeral representative's presumptive priority⁷⁶ is inoperative, but also that the presumption of that priority has not been effectively "rebutted" in a proceeding under EPIC section 3207.⁷⁷

C. Power by Authorized Designation, Acceptance, and the Fact of Declarant's Death

We have also to assume, of course, that the hypothesized funeral representative was effectively designated.⁷⁸ Effective designation entails that the "declarant"⁷⁹ was an adult of sound mind at the time the designation was made,⁸⁰ and that the designee is an adult of sound mind as of the time of service.⁸¹ It entails that the designation was made in writing, dated, and signed (of the declarant's free will, either by the declarant or by a notary public on the declarant's behalf)⁸² either in the presence of two subscribing witnesses or before a notary public.⁸³ The designation must not have been revoked by the declarant,⁸⁴ the

74. See MICH. COMP. LAWS ANN. § 700.3207(5)(d) (West 2016).

75. Borrowing from MAITLAND, *supra* note 22, at 307.

76. See *supra* Part V.A.

77. See *supra* note 72 and accompanying text.

78. See MICH. COMP. LAWS ANN. § 700.3206(1) (West 2016) (presumption of funeral representative's right and power a function of designation under the Act).

79. See *id.* § 700.3206(2)(a) (defining 'declarant' for purposes of funeral representative designation).

80. See *id.* § 700.3206(2) (West 2016); see also *id.* § 700.1106 ('minor' defined as person under eighteen years of age).

81. See *id.* § 700.3206(2).

82. See *id.* § 700.3206(2)(b). A funeral representative designation made in a will may be valid without regard to whether the will is admitted to probate. See *id.*

83. See *id.* A witness for this purpose cannot be the designated funeral representative, any of various health professionals or representatives of health facilities involved in the decedent's care during her final illness or immediately before her death, or any of various representatives of a cemetery or crematory involved in the disposition of the decedent's body. See *id.* § 700.3206(2)(b)–(c)(ii)–(iv); see also *id.* § 700.3206(14)(b)–(d) (pertinent definitions of 'health facility,' 'health professional,' and 'medical treatment'). A representative of a "funeral establishment," however, *can* act as a witness to a funeral representative designation. See *id.* § 700.3206(2)(b)–(c)(i). For the definition of 'funeral establishment,' see *supra* note 2.

84. See MICH. COMP. LAWS ANN. § 700.3206b(b)–(c) (West 2016) (express or implied revocation by declarant); see also *id.* § 700.2807(1)(a)(iii) (revocation by declarant's divorce from, or annulment of declarant's marriage to, designee).

designee,⁸⁵ or certain events beyond the control of either.⁸⁶ As of the time for the funeral representative's service, it must not be the case that the designee has been convicted of feloniously and intentionally killing (or of committing abuse, neglect, or exploitation of) the declarant.⁸⁷ And if a marriage between the designee and the declarant was annulled or dissolved by divorce after the designation was made, then the designation itself, a court order, or a property settlement agreement must expressly have preserved the designation.⁸⁸

The Act contemplates that a funeral representative designation may be declined,⁸⁹ but a designee may *accept* the designation simply by acting as funeral representative.⁹⁰ She may also accept by signing an acceptance.⁹¹ The latter mode of acceptance suggests that it may be possible for a designee to accept a designation as funeral representative before the declarant's death, but as we have already noted,⁹² it is not possible for the designee to *act* as a funeral representative while the declarant is living: "authority under a funeral representative designation is exercisable by a funeral representative only after the death of the declarant."⁹³ So, another assumption we have to make in order to posit a functioning, right-and-duty-bearing funeral representative is that the declarant has died.

D. *Duty by Definition*

Let us suppose, then, (to construct a very simple case) that the declarant has just died having effectively designated an individual named *FR* as funeral representative and without ever having been either divorced or a "service member,"⁹⁴ that the designation was never

85. *See id.* § 700.3206b(a)(i), (iii) (revocation by funeral representative's resignation or refusal to act); *see also id.* §§ 700.2803(2)(a)(iii) (revocation by designee's conviction for felonious and intentional killing, or of committing abuse, neglect, or exploitation, of declarant), 700.2807(1)(a)(iii) (revocation by designee's divorce from, or annulment of designee's marriage to, declarant).

86. *See id.* § 700.3206b(a)(ii) (revocation by funeral representative's unavailability).

87. *See id.* § 700.2803(2)(c); *see also id.* § 700.3206(12) (funeral representative criminally charged with intentionally killing declarant cannot exercise right to make funerary decisions while criminal charge pending).

88. *See id.* § 700.2807(1)(c).

89. *See id.* § 700.3206a(1).

90. *See id.* § 700.3206a(2).

91. *Id.*

92. *See supra* text accompanying note 44.

93. MICH. COMP. LAWS ANN. § 700.3206a(3) (West 2016).

94. Within the meaning of *id.* § 700.3206(3)(a). *See supra* note 55 and accompanying text.

revoked, that *FR* has not been accused of killing (abusing, neglecting, or exploiting) the declarant, and that no one has offered (by initiating a proceeding under EPIC section 3207) to “rebut” the presumption that *FR* has priority as funerary decision maker.⁹⁵ In that case, under the Act, *FR* has “the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of [the declarant’s] body.”⁹⁶

We understand *FR*’s *right* to make those decisions in terms of her priority over the other potential funerary decision makers the Act recognizes⁹⁷ and over others generally—her right entails a duty of noninterference on the parts of all such others (excepting attempts to “rebut” *FR*’s priority as funerary decision maker by petition pursuant to EPIC section 3207).⁹⁸ We must now endeavor to understand *FR*’s *power* to make funerary decisions as a *fiduciary* power, in light of the Act’s addition of ‘funeral representative’ to the list of fiduciaries that comprises EPIC’s denotative definition of ‘fiduciary.’⁹⁹

VI. DISCRETION

In his 1967 article *The Model of Rules*,¹⁰⁰ Ronald Dworkin helpfully distinguishes (for his own purposes in criticizing the legal positivism of H. L. A. Hart)¹⁰¹ three senses of the word ‘discretion’ to be met with in ordinary talk, two of them “weak” relative to a third sense that Dworkin calls “strong.”¹⁰²

A. *Weak and Strong Discretion*

Dworkin’s paradigm of the first “weak” sense of ‘discretion’ involves a sergeant who has been competently ordered to take her “five most experienced” soldiers on patrol.¹⁰³ The point of saying the sergeant has *discretion* under this order, Dworkin says, is only that “the standards [the sergeant] must apply [in furnishing her patrol] cannot be applied mechanically but demand the use of judgment.”¹⁰⁴ The paradigm of

95. See *supra* Part V.A.–C.

96. See *supra* note 2.

97. See *supra* Part V.A.

98. See *supra* notes 52–54 and accompanying text and Part V.B.

99. See *supra* notes 3–4 and accompanying text.

100. Dworkin, *supra* note 19.

101. See *id.* at 17.

102. See *id.* at 32–33.

103. See *id.* at 32.

104. *Id.*

Dworkin's second weak sense of 'discretion' is the second base umpire who has to decide whether the ball or the runner reached second base first (on a particular occasion in the course of a regulation game in which the umpire is officiating).¹⁰⁵ The point of saying that the second base umpire has discretion in this situation, Dworkin says, is that her decision on the particular matter in question "cannot be reviewed and reversed by [the head umpire or] any other official."¹⁰⁶

Dworkin's paradigm of the stronger sense of 'discretion' is the judge in a dog show to whom it is left, by the governing rulebook, to determine the order of breed-heats, whether "to judge airedales before boxers [or *vice versa* when] *the rules do not stipulate an order of events*."¹⁰⁷ The point of saying here that the order of events is within the judge's discretion, Dworkin says, is not that the judge "must use judgement in applying" certain standards set for her by the rulebook, nor that no one will review her decision, but rather that the judge "is simply not bound [on this question] by standards set by the [rulebook]."¹⁰⁸ Dworkin is quick to add, however, that:

We must avoid one tempting confusion. The strong sense of discretion is not tantamount to license, and does not exclude criticism. Almost any situation in which a person acts (including those in which there is no question of decision under special authority, and so no question of discretion) makes relevant certain standards of rationality, fairness, and effectiveness. We criticize each other's acts in terms of these standards, and there is no reason not to do so when the acts are within the center rather than beyond the perimeter of the doughnut of special authority. So we can say that . . . the judge who had discretion in the order of viewing dogs made a mistake because he took boxers first although there were only three airedales and many more boxers. An official's discretion [in the "strong" sense] means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion.¹⁰⁹

105. *Id.* at 33.

106. *See id.* at 32–33.

107. *Id.* at 33 (emphasis added).

108. *Id.*

109. *Id.* at 33–34; *see also id.* at 32 (doughnut metaphor for restrictions generally governing a particular decision maker in light of which we can sensibly speak of the decision maker's having discretion).

B. *Weak Fiduciary Discretion*

The evidence of our investigation so far is that both of the “weak” senses of ‘discretion’ Dworkin distinguishes in ordinary usage are to be met with in the law of fiduciaries. The first weak sense is clearly exemplified in a patient advocate’s “exercise [of] powers concerning [the patient’s] care, custody, and medical or mental health treatment”.¹¹⁰ (1) it makes sense to speak of the patient advocate’s having discretion because the patient advocate must “act in accordance with the standards of care applicable to fiduciaries in exercising . . . her powers,”¹¹¹ and by its nature, a fiduciary relation entails discretionary decision-making;¹¹² (2) since the patient advocate is a creature of statute,¹¹³ the statute creating her office is the particular authority setting the standards to which her decisions are subject;¹¹⁴ and (3) the statute requires the patient advocate “to follow the desires, instructions, or guidelines given by the patient while the patient was able to participate in decisions regarding care, custody, medical treatment, or mental health treatment.”¹¹⁵

Of course, the patient’s desires, instructions, or guidelines may be more or less detailed and well-expressed, but the patient advocate will likely not be able to follow them, in any case, “mechanically [and without] the use of judgment.”¹¹⁶ Given that the patient advocate is bound to follow the patient’s desires, instructions, or guidelines, we can see that to the extent such desires, instructions, or guidelines *are* detailed and well-expressed, the patient advocate’s discretion will be like that of a sergeant under competent orders to select her five most experienced soldiers.¹¹⁷ And to the extent the patient has expressed relevant desires, instructions, or guidelines *at all*, the patient advocate’s discretion will *not* be like that of a judge in a dog show who must determine whether “to judge airedales before boxers [or *vice versa* when] the rules do not stipulate an order of events.”¹¹⁸

110. See *supra* note 30 and accompanying text; see also MICH. COMP. LAWS ANN. § 700.5506(2) (West 2008) (defining ‘patient’ for purposes of patient advocate designation).

111. See *supra* note 31.

112. See *supra* note 7 and accompanying text.

113. See *supra* note 30.

114. See *supra* text accompanying notes 18–19. See generally MICH. COMP. LAWS ANN. § 700.5509 (West 2005).

115. MICH. COMP. LAWS ANN. § 700.5509(1)(b).

116. See *supra* note 104 and accompanying text.

117. See *supra* text accompanying notes 103–04; see also MICH. COMP. LAWS ANN. § 700.5509(1)(b) (West 2005).

118. See *supra* notes 107–08 and accompanying text.

We can similarly analyze a personal representative's EPIC section 3701 authority regarding the decedent's body, funeral, and burial arrangements,¹¹⁹ but because that authority is subject to the decision-making priority conferred by the Act on a designated funeral representative,¹²⁰ it presents an interpretive question. For section 3701's permissive, conditional authority for a personal representative or nominated personal representative to carry out written funerary instructions, on the one hand, and the right and power of a funeral representative to make funerary decisions under the Act, on the other, will be held simultaneously by the same person if the declarant effectively designated her personal representative (or nominated personal representative) as funeral representative.¹²¹ The same is true if the personal representative (or nominated personal representative) obtains priority pursuant to EPIC section 3206(6) by the absence or default of certain other potential funerary decision makers recognized by the Act.¹²²

In either case, presumably, if the decedent leaves no written funerary instruction, the personal-representative-designated-funeral-representative will nevertheless be able to make funerary decisions, given that EPIC section 3701 is expressly made subject to section 3206, and that unlike section 3701, section 3206 does *not* direct the attention of the funerary decision maker (whether a designated funeral representative, or a personal representative, or nominated personal representative acting pursuant to section 3206(6)) to desires, instructions, or guidelines expressed (in writing or otherwise) by the decedent.¹²³

But what if the personal representative was effectively designated as the decedent's funeral representative and the decedent-declarant *did* leave written funerary instructions? Does EPIC section 3701 apply in that case to the personal representative's actions *as funeral representative* so as to limit the personal representative's right and power as funeral representative to the right and power to carry out the decedent's written instructions? That seems implausible as a matter of statutory construction. Though both sources of the personal-

119. See MICH. COMP. LAWS ANN. § 700.3701 (West 2016) (described *supra* in the text accompanying note 39).

120. See *id.*

121. See *supra* note 62.

122. See *supra* notes 38, 67.

123. See MICH. COMP. LAWS ANN. § 700.3701 (West 2016) (permissive authority for personal representative to carry out written funerary instructions expressly made subject to EPIC section 3206); *id.* § 700.3206 (priority in funerary decision making given to funeral representative, personal representative, or nominated personal representative without requiring that decedent's expressed desires, instructions, or guidelines be followed or consulted).

representative-designated-funeral-representative's authority in funerary matters (EPIC section 3701 and section 3206 as amended by the Act) expressly refer to personal representatives (and nominated personal representatives), section 3701 concerns a personal representative's powers and duties generally, whereas section 3206 concerns funerary decisions in particular.¹²⁴ Thus, on the question of a personal-representative-designated-funeral-representative's right and power to make funerary decisions, section 3206 is arguably the more "specific" of the relevant provisions for purposes of the canon of construction or maxim "*generalia specialibus non derogant*" (roughly, *a general provision does not diminish a specific one*).¹²⁵

We can add to that construction that the relevant authority under EPIC section 3701 is merely permissive: the modal auxiliary used in the section is 'may,' "*may* carry out the decedent's written instructions," not 'shall.'¹²⁶ So, it is not as if the one provision *requires* the personal representative to carry out the decedent's written funerary instructions, and the other makes it discretionary; logically the respective powers described in sections 3206 and 3701 are *additive* in situations to which both sections apply. On that reading, the role of the personal-representative-designated-funeral-representative *as funeral representative* predominates in funerary matters over her role (in those matters) as personal representative, and to that extent, EPIC section 3206 provides broader authority than section 3701. The upshot is that a funeral representative who happens also to be the declarant's personal representative has the same discretion when deciding whether or not to heed written funerary instructions of the declarant as does a funeral representative who is not also a personal representative.¹²⁷

So, if we want to speak of a personal representative's EPIC section 3701 authority regarding the decedent's body and funeral arrangements *in isolation*, we have to posit a personal representative who does *not* have decision-making priority under section 3206 (either as the decedent's funeral representative or by default under section 3206(6)).¹²⁸ In that case, the personal representative's EPIC section 3701 authority in funerary matters exemplifies the first of Dworkin's "weak" senses of 'discretion': (1) it makes sense for us to speak of the personal representative's having discretion in the matter because a personal

124. See *id.* §§ 700.3701, 700.3206 (West 2016).

125. See, e.g., *Regents of Univ. of Michigan v. Auditor Gen.*, 66 N.W. 956, 957 (1896). See generally CROSS, *supra* note 20, at 5, 77.

126. See MICH. COMP. LAWS ANN. § 700.3701 (West 2016); see also CROSS, *supra* note 20, at 51–52 ('shall' as imperative in legislation).

127. As to the breadth of that discretion, see *infra* Part VI.C.

128. See *supra* notes 121–22 and accompanying text.

representative is a fiduciary,¹²⁹ and fiduciary relations entail discretionary decision-making;¹³⁰ (2) although the limits of a personal representative's discretion have been established largely by developments at common law,¹³¹ precedent is subordinate to legislation as a source of law;¹³² and (3) section 3701 authorizes the personal representative only to "carry out the decedent's written [funerary] instructions."¹³³ However detailed and well-expressed those instructions may be, the personal representative will not likely be able to carry them out "mechanically [and without] the use of judgment."¹³⁴ But carry them out she must if she acts pursuant to this particular authority. So, once the personal representative has decided to exercise her EPIC section 3701 authority over funerary matters, her discretion regarding implementation of the decedent's written funerary instructions is like that of a sergeant under competent orders to select her five most experienced soldiers,¹³⁵ *not* like that of a dog-show judge who must determine whether "to judge airedales before boxers [or *vice versa* when] the rules do not stipulate an order of events."¹³⁶

The second weak sense of 'discretion' Dworkin distinguishes is exemplified by fiduciary decision-making within "the bounds of . . . reasonable judgement," honesty, and proper motivation recognized by the abuse-of-discretion standard for judicial supervision of discretionary powers.¹³⁷ The relation between the court and a fiduciary who is acting (subject to the court's jurisdiction) within her discretion (even if her discretion is *weak* in Dworkin's first sense) can obviously be likened to that between the head (or home-plate) umpire and a base umpire officiating in the same game: the head umpire might have judged differently from the plate, but that is not a ground on which the base umpire's call (as to whether the ball or the runner reached second base first) can be overruled;¹³⁸ likewise, it may be that "if the [fiduciary's] discretion had been conferred upon the court, the court would have exercised the [fiduciary's] power differently, [but that] is not a sufficient reason for [the court to] interfere[]." ¹³⁹

129. *See supra* note 4.

130. *See supra* note 7 and accompanying text.

131. *See supra* note 17.

132. *See supra* note 20.

133. *See supra* note 39 and accompanying text.

134. *See supra* note 104 and accompanying text.

135. *See supra* notes 103–04 and accompanying text.

136. *See supra* notes 107–08 and accompanying text.

137. *See supra* note 8–12 and accompanying text.

138. *See supra* notes 105–06 and accompanying text.

139. *See supra* note 10 and accompanying text.

C. *Strong Fiduciary Discretion*

The abuse-of-discretion standard means that because every fiduciary has *some* discretion in decision-making (if only in the first of Dworkin's weak senses)¹⁴⁰ every fiduciary has, *to that extent*, discretion in the second of Dworkin's weak senses: within the scope (whether broad or narrow) of each fiduciary's discretion, that fiduciary's decisions "cannot [properly] be reviewed and reversed by [the court or] any other official"¹⁴¹ unless the fiduciary's decisions are "beyond the bounds of . . . reasonable judgement," honesty, and proper motivation.¹⁴² So, as to a given decision pertinent to her fiduciary function, a fiduciary's having discretion in the second weak sense is consistent (thanks to the abuse-of-discretion standard) with her having either discretion in Dworkin's first weak sense or discretion in the strong sense.

But as to any particular matter for decision, discretion in the first weak sense, on the one hand, and strong discretion, on the other, are mutually exclusive, for *these* senses pertain to the *scope*, rather than the *review*, of discretion. A fiduciary is bound to have discretion in one or the other of these senses, given that every fiduciary has *some* discretion in decision-making, but she cannot have discretion in both the first weak sense and the strong sense regarding the same decision, for we cannot say of a fiduciary who "is simply not bound [in making the particular decision in question] by standards set by the authority [that governs her decisions generally]"¹⁴³ that the standards she is *required* by that authority to apply in making the decision "cannot be applied mechanically but demand the use of judgment."¹⁴⁴ By hypothesis, there *are* no standards that the fiduciary is required by the relevant authority to apply in making the decision in question!

The evidence of the Act is that a serving funeral representative like *FR* in our example (at the end of Part V above) has discretion in the *strong* sense when deciding whether or not to heed desires, instructions, or guidelines expressed (in writing or otherwise) by the declarant, for nothing in the Act (the source of law that governs the funeral representative's decisions)¹⁴⁵ directs the funeral representative's attention to such expressions¹⁴⁶—there is nothing in the Act analogous to the requirements in light of which we concluded that a patient advocate

140. See *supra* note 7 and accompanying text.

141. See *supra* note 106 and accompanying text.

142. See *supra* note 10 and accompanying text.

143. See *supra* note 108 and accompanying text.

144. See *supra* note 104 and accompanying text.

145. See *supra* note 19 and accompanying text.

146. See 2016 Mich. Pub. Acts 57.

generally and a personal representative when acting strictly on her EPIC section 3701 authority over funerary matters have discretion only in Dworkin's *weak* senses.¹⁴⁷ And "[t]he exercise of a [fiduciary] power is discretionary [for purposes of the abuse-of-discretion standard] except to the extent to which its exercise is required by the [relevant authority]."¹⁴⁸ As already noted, the case of the personal representative acting strictly on EPIC section 3701 authority in funerary matters demonstrates that the legislature *could have* required the funeral representative to follow or otherwise give special weight to desires, instructions, or guidelines expressed by the declarant.¹⁴⁹ But an examination of the Act reveals that the legislature did not do that.

The upshot is that *FR may* decide to follow express instructions given by the declarant, but if she does, the significant thing from the point of view of the Act is *her decision* to follow the instructions, not the instructions themselves or the declarant's having expressed them. On the other hand, *FR may* decide *not* to follow express instructions given by the declarant, and if so, the court cannot properly interfere unless it finds that *FR* has acted "dishonestly, or with an improper even though not a dishonest motive, or fail[ed] to use [] judgement, or act[ed] beyond the bounds of a reasonable judgement"—the mere fact that if *FR's* discretion had been conferred upon the court, the court would have followed the declarant's instructions is not a sufficient reason for the court to interfere with *FR's* exercise of her power under the Act.¹⁵⁰

147. *See supra* Part VI.B.

148. *See supra* note 11 and accompanying text (presumption of discretion for trustees); *see also supra* note 12 (presumption of discretion for non-trustee fiduciaries as well as trustees).

149. *See supra* text accompanying notes 37–40.

150. *See supra* note 10 and accompanying text. We should note in this context that a party's willingness to follow or otherwise give weight to desires, instructions, or guidelines expressed (in writing or otherwise) by the decedent is *not* among the factors the court must take into account in deciding, pursuant to EPIC section 3207, whether the statutory "presumption" of a given funerary decision maker's priority is "rebutted." *See* MICH. COMP. LAWS ANN. § 700.3207(5) (West 2016) (discussed *supra* text accompanying note 74). Those factors include:

[t]he reasonableness and practicality of the funeral arrangements or the handling or disposition of the body proposed by the person bringing the action in comparison with the funeral arrangements or the handling or disposition of the body proposed by 1 or more individuals with the rights and powers under [EPIC] section 3206(1).

Id. § 700.3207(5)(a). But there is no reference to the decedent's funerary wishes. *See id.* § 700.3207(5).

VII. THOSE TO WHOM FIDUCIARY DUTY IS OWED

By hypothesis, though, *FR* is acting in a fiduciary capacity when she decides (in our example above) to follow or not to follow the declarant's express instructions and, indeed, to do anything else pursuant to her right and power as funeral representative.¹⁵¹ To whom are *FR*'s fiduciary duties owed?

A. *A Negative Answer for Starters*

As we have already noted, (1) precisely the same question can be put by asking: Who are the holders of the rights correlative to *FR*'s fiduciary duties?¹⁵² and (2) this reformulation of the question allows us to make an easy start on an answer, for the holders of legal rights are legal persons;¹⁵³ *FR* is incapable of acting in any capacity as a funeral representative until the declarant has died;¹⁵⁴ and decedents are not legal persons.¹⁵⁵ So, whoever the holders of the rights correlative to *FR*'s fiduciary duties are the declarant is not one of them.¹⁵⁶

The point to be emphasized here is that there is nothing inconsistent in our saying, on the one hand, that *FR* owes no duty to the declarant and, on the other, that the legislature *could have* required *FR*—though it did not—to follow or otherwise give special weight to desires, instructions, or guidelines expressed by the declarant.¹⁵⁷ A personal

151. See *supra* notes 3–4 and accompanying text.

152. See *supra* note 24 and accompanying text.

153. See *supra* notes 21–24, 46–47 and accompanying text.

154. See *supra* note 44 and accompanying text.

155. See *supra* note 46 and accompanying text.

156. To conclude otherwise would involve us in skeins of nonsense. A fiduciary must act for the benefit, or in the best interest of the person(s) for whom she is a fiduciary. See, e.g., MICH. COMP. LAWS ANN. §§ 700.1212 (West 2016) (fiduciary relations), 700.1214 (West 2010) (conflict of interest); PENNER, *supra* note 7, ¶ 12.2. But how should we think, for example, about what is for the benefit, or in the best interest, *as of time* T_n , of “someone” who died at time T_{n-1} ? What evidence can we have that a dead “person” has ever been helped or harmed by a human action? These problems evidently had not occurred to the author(s) of the Senate Fiscal Agency analysis of the Act, according to which “[a] funeral representative would function as a fiduciary with an obligation to act *in the interests of the person who has died.*” S. FISCAL AGENCY, S.B. 551: ANALYSIS AS ENROLLED, 98, at 7 (2016) (emphasis added). The author(s) of the House Fiscal Agency analysis confess the same levity in writing, “the funeral representative would have to act in the person’s best interests” (H. FISCAL AGENCY, LEGISLATIVE ANALYSIS, FUNERAL REPRESENTATIVE: SENATE BILL 551 (SUBSTITUTE H-1 WITH FLOOR AMENDMENT), 98, at 2 (2016)) if, as seems likely from the context, ‘the person’ here refers to *the declarant*.

157. See *supra* text accompanying notes 37–40, 149.

representative ordinarily has a duty to follow the decedent's will,¹⁵⁸ and a trustee ordinarily has a duty to follow the terms of a testamentary trust,¹⁵⁹ but in neither case is the rationale that the fiduciary owes a duty to the deceased testator. In each case, the law reflects the political judgement that it is well for *living* would-be testators and living would-be settlors to expect that their testamentary declarations will ordinarily be enforced after they have died.¹⁶⁰ And the law supports this expectation by recognizing, as two sides of the same coin,¹⁶¹ the fiduciary's duty to adhere to the will or trust instrument and correlative rights in the testator's *beneficiaries*.¹⁶²

Similarly, the legislature *could have* elected—though it did not—expressly to support an expectation that funerary instructions left by a decedent (with requisite formality at any rate) should ordinarily be followed. It *could have* done that—though it did not—by specifically directing the funeral representative's attention to such instructions. Several states have enacted statutes that require funerary instructions left by a decedent to be followed (assuming the instructions are practicable, legal, and adequately funded). According to the Colorado legislature, for example, “[a] competent adult individual has the right and power to direct the disposition of . . . her remains after death and should be protected from interested persons who may try to impose their wishes regarding such disposition contrary to the deceased's desires.”¹⁶³

158. See, e.g., MICH. COMP. LAWS ANN. § 700.3703(1) (West 2010) (duties of personal representative); PENNER, *supra* note 7, ¶ 2.65; HANBURY & MAUDSLEY, *supra* note 16, at 59.

159. See, e.g., MICH. COMP. LAWS ANN. § 700.7801 (West 2010) (duty of trustee); PENNER, *supra* note 7, ¶ 2.2.

160. See, e.g., A. W. B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 179–80 (1961) (The Pilgrimage of Grace (1536), “political reason,” and “all sorts of attractive possibilities in the way of power to the divisor” in the confluence of the Statute of Uses (1535) and Statute of Wills (1540)).

161. “[T]he right of [a person] *J* is but one phase of the total relation between *J* and [another person] *K*, and the duty of *K* is another phase of the same relation—that is, the whole ‘right duty’ relation may be viewed from different angles.” HOHFELD, *supra* note 22, at 73; see also Matthews, *supra* note 24, at 1.

162. Using ‘beneficiaries’ loosely here to comprehend heirs, devisees, legatees, annuitants, etc. See *infra* Part VII.B.

163. COLO. REV. STAT. ANN. § 15–19–102(1)(a) (West 2010); see also, e.g., CAL. HEALTH & SAFETY CODE § 7100 (West 2012) (funerary instructions of decedent to be faithfully carried out); DEL. CODE ANN. tit. 12, § 264 (West 2010) (decedent may control disposition of last remains through declaration); MINN. STAT. ANN. § 149A.80 (2010) (“[p]ersons entitled to control the final disposition . . . shall faithfully carry out the reasonable and otherwise lawful directions of the decedent,”); UTAH CODE ANN. §§ 58–9–601, 58–9–602 (West 2016) (person designated to control disposition of remains shall carry out decedent's “advance directions”).

Other states have taken the alternative approach exemplified by the Act: their statutes sanction the decision-making priority of a designated funeral representative and leave the weight to be accorded the declarant's instructions to the funeral representative's discretion. In Ohio, for example, "[a]n adult who is of sound mind may execute . . . a written declaration *assigning* to a representative . . . [t]he right to direct the disposition, after death, of the declarant's body" and make other funerary arrangements.¹⁶⁴ The declaration must include "[a] statement that all decisions made by the declarant's representative with respect to the right of disposition are binding," and "[a] space where the declarant may indicate 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*."¹⁶⁵

The point is that the Michigan legislature made a choice and though it chose not expressly to support an expectation that funerary instructions left by a declarant will ordinarily be followed, it could have done that *without* the jurisprudential nonsense of imagining that a funeral representative acting after the declarant's death could somehow owe a legal duty, *at that time*, to the declarant. So, again, we have a clear *negative* answer to the question, To whom are *FR*'s fiduciary duties owed?: the holders of the rights correlative to *FR*'s fiduciary duties do *not* include the declarant.¹⁶⁶

B. *EPIC's Positive Answer*

Like everything else about *FR*'s office, the identities of the holders of the rights correlative to *FR*'s fiduciary duties have to be gleaned from the Act.¹⁶⁷ The Act identifies those right-holders indirectly by (1) directly identifying the funeral representative as a "fiduciary" within the meaning of EPIC,¹⁶⁸ and (2) otherwise saying nothing about the funeral representative's fiduciary obligations. In so doing, the Act assimilates the funeral representative, for purposes of EPIC's rules of fiduciary conduct,

164. OHIO REV. CODE ANN. § 2108.70(B) (West 2009) (emphasis added).

165. *Id.* § 2108.72(A)(7) (emphasis added); *see also, e.g.*, R.I. GEN. LAWS ANN. §§ 5-33.3-3, 5-33.3-4(b) (West 1999) (permitting designation of "funeral planning agent" in a writing apropos of which the "principal" is encouraged by the statute to review her "wishes" regarding manner of disposition with the "agent"); VA. CODE ANN. § 54.1-2825 (West 2010) (permitting designation of "an individual who shall make arrangements and be otherwise responsible for his funeral and the disposition of his remains, including cremation, interment, entombment, or memorialization").

166. *See supra* notes 152-56 and accompanying text.

167. *See supra* text accompanying note 29.

168. *See supra* note 4 and accompanying text.

to personal representatives and trustees, the other fiduciaries listed in EPIC's denotative definition of 'fiduciary' whose constituent functions do not necessarily involve either a "protected individual," that is, "someone for whom a conservator has been appointed or other protective order" entered,¹⁶⁹ or a "ward," that is, someone for whom a guardian has been appointed.¹⁷⁰ Again, for EPIC's purposes, "'Fiduciary' includes, but is not limited to, a *personal representative, funeral representative, guardian, conservator, trustee, plenary guardian, partial guardian, and successor fiduciary.*"¹⁷¹

Thus, by ignoring (as irrelevant) references to protected individuals and wards, we learn from EPIC's general provisions on fiduciary obligation that the holders of the rights correlative to *FR*'s fiduciary duties are the declarant's heirs, devisees, and beneficiaries. The fountainhead of learning on this point is EPIC section 1212 (on the nature of fiduciary relations):

A fiduciary stands in a position of confidence and trust with respect to each *heir, devisee, beneficiary*, protected individual, or ward for whom the person is a fiduciary. A fiduciary shall observe the standard of care described in section 7803 (on trustee impartiality and prudence) and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between *heirs, devisees, and beneficiaries* . . . Except in response to legal process, in cases expressly required by law, or in the necessary or proper administration of the estate, a fiduciary shall not disclose facts or knowledge pertaining to property in the fiduciary's possession or to the affairs of those for whom the fiduciary is acting in any manner without the consent of *the heirs, devisees, beneficiaries*, protected individuals, or wards. . . . This subsection's restriction on disclosure does not apply in an action or proceeding in which the fiduciary and the fiduciary's *heir, devisee, beneficiary*, protected individual, or ward are parties adverse to each other after the identity and relationship is determined and established.¹⁷²

169. MICH. COMP. LAWS ANN. § 700.1106(v) (West 2010) (definition of 'protected individual').

170. *See id.* § 700.1108(a) (definition of 'ward').

171. *Id.* § 700.1104(e) (West 2016) (emphasis added).

172. *Id.* § 700.1212(1)–(2) (West 2010) (emphasis added); *see id.* § 700.1103(l)–(m) ('devisee' defined to include a legatee, the recipient of a bequest, etc.).

And we learn the same thing from EPIC section 1308 (on remedies for breach of fiduciary duty): “[a] violation by a fiduciary of a duty the fiduciary owes to *an heir, devisee, beneficiary*, protected individual, or ward for whom the person is a fiduciary is a breach of duty.”¹⁷³

Not all of *FR*'s duties are fiduciary duties. A funeral establishment,¹⁷⁴ for example, has a right to be paid for services rendered in the disposition of the decedent's body, and the Act makes an acting funeral representative a guarantor of that payment.¹⁷⁵ But an action for payment brought against *FR* by a funeral establishment would not be an action for breach of fiduciary duty; it would be an action on a contract to which the Act makes *FR* liable. For, again, the Act creates the funeral representative a fiduciary merely *by definition*, that is, by adding ‘funeral representative’ to EPIC's denotative definition of ‘fiduciary’¹⁷⁶ without more. This leaves the specification of the funeral representative's fiduciary duties to EPIC's general provisions on fiduciary obligation, and the report of those provisions is that *FR* owes her fiduciary duties to the declarant's heirs, devisees, and beneficiaries.¹⁷⁷

VIII. CONCLUSION

By amending EPIC's denotative definition of ‘fiduciary’ to include funeral representatives and otherwise saying nothing about the contours of a funeral representative's fiduciary obligations, the Act subjects a funeral representative to the various fiduciary duties EPIC imposes on fiduciaries generally: “the duties of undivided loyalty; impartiality [as] between heirs, devisees, and beneficiaries; care and prudence in actions; . . . segregation of assets held in the fiduciary capacity”;¹⁷⁸ confidentiality;¹⁷⁹ the duty to avoid conflicts of interest;¹⁸⁰ and the duty to file court-ordered accounts.¹⁸¹ In the same way, the Act determines

173. *Id.* § 700.1308(1) (emphasis added).

174. *See supra* note 2.

175. *See* MICH. COMP. LAWS ANN. § 700.3206(13) (West 2016).

176. *See supra* notes 3–4 and accompanying text.

177. *See supra* notes 171–72.

178. *See* MICH. COMP. LAWS ANN. § 700.1212(1) (West 2010).

179. *See id.* § 700.1212(2).

180. *See id.* § 700.1214.

181. *See id.* § 700.1308(2). The possibility of the court's ordering a funeral representative to provide information to the declarant's heirs, devisees, or beneficiaries picks out another implication of our conclusion (*supra* Part VI.C) that the decision to heed (or not to heed) funerary desires, instructions, or guidelines expressed by the declarant is discretionary with the funeral representative, for a court will generally be reluctant to order disclosure of information that informs a fiduciary's decision to exercise (or refrain from exercising) a discretionary power on any particular occasion. *See*

that the funeral representative owes these fiduciary duties to the “declarant’s” heirs, devisees, and beneficiaries—that the holders of the rights correlative to the funeral representative’s fiduciary duties are the heirs, devisees, and beneficiaries of the person who designated the funeral representative as such.¹⁸² The elementary logic of juridical relations determines that the funeral representative does not owe a fiduciary duty to the declarant.¹⁸³ And the Act’s forbearance expressly to direct the funeral representative’s attention to funerary desires, instructions, or guidelines expressed by the declarant determines that the decision whether or not to heed such expressions is within the funeral representative’s discretion and is thus subject to the deferential abuse-of-discretion standard of judicial scrutiny.¹⁸⁴

generally SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 197–200 (3d ed. 2011).

Suppose, for example, that the declarant who designated *FR* in our hypothetical *supra* at the end of Part V had written *FR* a letter about her wishes for the disposition of her bodily remains and exequies, intimating that she had not broached these matters in the instrument of designation (which she understood might be subject to disclosure pursuant to the Act (*see* MICH. COMP. LAWS ANN. §§ 700.3206a(5), 700.3207(5)(d) (West 2016))) for fear of causing dissension among her beneficiaries; one of those beneficiaries, *B*, having learned of the letter, asks *FR* to show it; *FR* declines, explaining that she received the letter in confidence; whereupon *B* petitions the court for disclosure pursuant to EPIC section 1308(2). In that case, given the Act’s assimilation of the funeral representative, *qua* fiduciary, to trustees and personal representatives (*see supra* notes 167–71 and accompanying text) and given the breadth of the funeral representative’s discretion in this matter (*see supra* Part VI.C), the court is likely to feel the force of analogies to cases that hold beneficiaries are not entitled to see a letter, accessory to the trust instrument, in which the settlor tells trustees how she hopes they will exercise their discretion. *See, e.g.*, *Breakspear v. Ackland* [2008] EWHC (Ch) 220 (Eng.) (discussed in GARDNER, *supra*, at 199); *see also* David Hayton, *The Irreducible Core of Trusteeship*, in TRENDS IN CONTEMPORARY TRUST LAW, *supra* note 13, at 45, 52.

182. *See supra* Part VII.B.

183. *See supra* Part VII.A.

184. *See supra* Part VI.C.