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Disputes Over Possession Of A Decedent's Body At Death

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What happens to the remains of a loved one upon death is an extremely sensitive situation. Family members often have conflicting ideas and desires as to how the decedent's funeral will take place. Such disputes involve the location of the funeral and whether the funeral will be a religious ceremony and if so, which religion. In addition, family members may disagree over whether the decedent will be cremated or buried. If the decedent is cremated, family members may dispute over who should have possession of the cremains, or how the cremains will be buried or scattered. If the decedent is buried, loved ones may debate over where the decedent should be buried. This article provides instruction regarding issues related to the disposition of a decedent's remains.



Family members should be aware of the need to act quickly, since courts will consider a challenge to possession of a body moot after burial occurs. In *Leadingham v. Wallace*, a dispute arose between the decedent's ex-wife and an ex-girlfriend, each the mother of two of the decedent's children, as to who should have the right to bury him.¹ The circuit court appointed the decedent's ex-girlfriend as curator of his estate for the sole purpose of burying him. The record on appeal reflected that the decedent was buried. In affirming the circuit court's decision the Fifth District Court of Appeal held "after burial occurs, a further challenge for possession of the body is moot."² The Fifth District Court of Appeal explained "an appellate court will not determine a controversy where the issues have become moot."³

Family members should also be aware of potential financial liability. In *Kirksey v. Jernigan*, after a five-year old child was accidentally shot and killed, an undertaker took the child's body to his establishment without the mother's knowledge or consent.⁴ The child's mother went to the establishment within two hours after the accident and made demand for the body. The undertaker refused to surrender the body at that time and refused to surrender the body upon repeated requests thereafter. The Supreme Court of Florida held that "unlawfully withholding the body from the relative entitled thereto is an actionable wrong, for which substantial damages may be recovered."⁵ The Supreme Court of Florida held that damages for unlawfully withholding a body can include punitive damages as well as damages for mental suffering and anguish.⁶

In addition to financial damages, family members may be affected mentally and emotionally by the court process. The decedent's remains could be held by the medical examiner's office for many months while a court conducts evidentiary hearings. This could contrast with a decedent's religious beliefs,

continued, page 41

which may require burial within days of death. The Fourth District Court of Appeal has explained that "[i]t is a sorrowful matter to have relatives disputing in court over the remains of the deceased.... [T]here is no solution that will bring peace to all parties. We express our sympathies to both sides in their loss, which must be magnified by these proceedings."⁷

There are no statutes that substantively govern the disposition of remains. The Florida Probate Code has one provision. Fla. Stat. §732.804 (2018) provides that "[b]efore issuance of letters, any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements. The fact that cremation occurred pursuant to a written direction signed by the decedent that the body be cremated is a complete defense to a cause of action against any person acting or relying on that direction." This statute provides a release of liability, but it does not provide any substantive instruction on disposition of remains.

Practitioners need to be aware of two statutory red herrings. In *Arthur v. Milstein*, a dispute arose between a guardian ad litem (who had been appointed to represent the decedent's minor child) and the decedent's mother, as to who should have the right to handle the decedent's remains.⁸ The circuit court determined that child's guardian ad litem was authorized to handle the decedent's remains instead of the decedent's mother. The circuit court relied on Fla. Stat. § 406.50 (2006), which governs the disposition of unclaimed remains by medical examiners. Fla. Stat. § 406.50 (2006) was amended after the case was decided, but the version of the statute in place at the time stated that preference should be given according to who would inherit under the laws of intestacy. On appeal, the decedent's mother argued that the circuit court should have ruled in her favor because she was the sole "legally authorized person" under Fla. Stat. § 497.005 (2006). Chapter 497 governs funeral, cemetery, and consumer services. Fla. Stat. § 497.005(37) (2006), Florida Statute defines a "legally authorized person" and outlines the priority of those persons that funeral homes and cemeteries are legally authorized to deal with, which differs from the priority outlined under the laws of intestacy.

The Fourth District Court of Appeal ultimately affirmed the lower court's decision, but the decision was affirmed on different grounds. The Fourth District Court of Appeal held that neither Fla. Stat. § 406.50 (2006) nor § 497.005 (2006) controlled the outcome of the case.⁹ The Fourth District Court of Appeal explained that the sections relate to whether a funeral home or medical examiner is liable for a decision that it made with respect to the disposition of a decedent's remains.¹⁰ The court further explained "that the intent of those statutes is to guide the funeral home operators by clearly delineating the priority of those persons who are legally authorized to make funeral arrangements for a deceased person."¹¹ The court held

that the statutes did not control the outcome of cases that involved private parties engaged in a pre-burial dispute as to the decedent's remains.¹² In the absence of applicable statutes, the Fourth District Court of Appeal held that common law is dispositive.¹³

As a general rule, under common law, if a decedent has provided burial instructions exclusively in his or her will, the burial instructions articulated in the will should be followed. In *Kasmer v. Guardianship of Limner*, the decedent's will contained a directive that his remains be cremated.¹⁴ The personal representatives refused to cremate the decedent's body due to "reasons of conscience." The Third District Court of Appeal ordered the personal representatives to follow the directives in the will explaining "Florida courts have long held that testamentary directions are to be complied with to the fullest extent possible. [...] There is no higher duty nor greater responsibility on the courts than that of seeing to it, in proper cases, that the will of the dead is honored."¹⁵

However, confusion arises when a decedent's burial instructions in will are contradicted by his or her later actions. According to the Florida Probate Code, a will disposes of property that the decedent owned at death.¹⁶ Courts have held that a decedent's remains are not property, and therefore a directive in a will regarding the disposition of a body does not have the same force and effect as do provisions directing the disposition of property.¹⁷ Accordingly, courts have concluded that "a written testamentary disposition is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that he intended another disposition for his body."¹⁸ A trial court may hear contrary and convincing oral or written evidence that the decedent changed his or her mind regarding the disposition of their remains after the will was signed.¹⁹

Evidence that the decedent changed his or her mind after the will was signed may include (1) purchasing of a prepaid funeral plan, (2) purchasing or selling a burial plot, (3) converting to a religion that does not believe in cremation, (4) death bed conversations with relatives, and (5) any other conduct of the decedent that conflicts with the provisions in the will. The burden of proof is clear and convincing evidence.²⁰ However, if a decedent *exclusively* expressed his or her intentions regarding the disposition of their remains through a will, then the instructions will be honored.²¹

Confusion also arises when the decedent did not provide burial instructions in his or her will. Since courts have held that a decedent's remains are not property, neither the person serving as guardian over the decedent while the decedent was alive, nor the personal representative of the decedent's estate has the authority to decide what happens to the decedent's remains in the absence of a testamentary disposition.²² The Supreme Court of Florida addressed the issue for the first time in *Dunahoo v. Bess*.²³ In this case, a husband sued a funeral home for breach

continued, page 42

of contract and negligence, alleging that the funeral home embalmed his wife's body in a careless and negligent manner that caused mental anguish. The Supreme Court of Florida held "the right of the surviving spouse to have, protect and dispose of the remains of the other is a right recognized by law." The Supreme Court of Florida clarified this holding in *Kirksey*. In determining that a mother had the right to possess her deceased son's body, the Supreme Court of Florida held that "in the absence of a testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulcher or other lawful disposition which they may see fit."²⁴

Fla. Stat. § 744.102 (2018) defines "next of kin" as "those persons who would be heirs at law of the ward or alleged incapacitated person if the person were deceased." Fla. Stat. § 731.201 (2018), defines "heirs at law" as the persons "who are entitled under the statutes of intestate succession to the property of the decedent." Intestate succession is governed by Fla. Stat. § 732.102 (2018) and Fla. Stat. § 732.103 (2018). Pursuant to these statutes, generally, the surviving spouse followed by the decedent's children would have priority. If the decedent's children are "too young to express an opinion, a guardian could be appointed for them to act in their behalf."²⁵ If the decedent was not survived by a spouse and did not have any children, the decedent's parents, followed by the decedent's brothers and sisters, would have priority.

However, the common law decisions in Florida do not provide a clear roadmap for practitioners under all circumstances. To begin with, they do not clearly state whether a surviving spouse would have priority over other heirs at law, such as a child from a prior marriage. In addition, the common law decisions do not provide guidance in circumstances where heirs at law, who would inherit equally according to the laws of intestacy, disagree. This can happen if a child dies and the parents are divorced, or if the decedent is not survived by a spouse, and the decedent's children do not get along. Further, the common law decisions do not address scenarios where there are many heirs at law at different levels on the chart of consanguinity who disagree. Finally, common law decisions do not address situations where a decedent may have expressed burial instructions or purchased a prepaid funeral, but the burial instructions were not expressed in the decedent's will.

In conclusion, if the decedent expressed an intention regarding the disposition of their remains through a will, then the court will defer to the will unless an opponent can prove by clear and convincing evidence that the decedent changed their mind. If the decedent never expressed an intention regarding the disposition of their remains in a will, then the court will defer to the next of kin. The next of kin are the heirs at law under the laws of intestacy. The law is unclear as to who has priority when the next of kin disagree. One solution might be to give preference to the persons who are closest in relation

on the chart of consanguinity. Another solution could be to give preference to the majority in interests of the intestate heirs, similar to who is given preference in appointment as personal representative under Fla. Stat. § 733.301(b) (2018). The disposition of one's remains is a sensitive decision that is best made by the decedent exclusively through their will.²⁴



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Endnotes

- 1 *Leadingham v. Wallace*, 691 So. 2d 1162 (Fla. 5th DCA 1997).
- 2 *Id.* at 1163 (citing *Mills v. Heenan*, 382 2d 1317, 1318 (Fla. 5th DCA 1980)).
- 3 *Id.* (citing *DeHoff v. Imeson*, 15 So. 2d 258 (Fla. 1943)).
- 4 *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950).
- 5 *Id.* at 190.
- 6 *Id.*
- 7 *Cohen v. Guardianship of Cohen*, 896 So. 2d 950, 955 (Fla. 4th DCA 2005).
- 8 *Arthur v. Milstein*, 949 So. 2d 1163 (Fla. 4th DCA 2007).
- 9 *Id.* at 1165.
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* at 1166.
- 14 *Kasmer v. Guardianship of Limner*, 697 So. 2d 220 (Fla. 3d DCA 1997).
- 15 *Id.* at 221.
- 16 Fla. Stat. § 732.6005(2) (2018).
- 17 *Cohen* at 954.
- 18 *Arthur* at 1166 (citing *Cohen* at 954).
- 19 *Cohen* at 955.
- 20 *Arthur* at 1166 (citing *Cohen* at 954).
- 21 *Id.* at 953.
- 22 *Id.* at 954.
- 23 *Dunahoo v. Bess*, 146 Fla. 182, 200 So. 541 (1941).
- 24 *Kirksey* at 189.
- 25 *Leadingham* at 1163.