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The Right Of Rites: Funeral Law

BY MICHAEL A. BURGER

Who has the right to bury the dearly departed?

This question has come up a few times in my practice. This article may assist other lawyers in counseling clients on this difficult and sensitive issue.

Case In Point

A couple of years ago, a client, call him William, contacted me at home one evening and tearfully told me that his grandmother had passed away. William asked me to help his family give his grandmother a proper burial.

It seems that another relative had taken control of the decedent's body at an undisclosed location and planned to make all the funeral arrangements without my client's input. The relative refused to compromise and did not get along with William or his family.

William and his brother enjoyed a very close, loving relationship with their grandmother. Their father, the decedent's only son, and their grandfather, had both predeceased their grandmother.

William was grief-stricken. Left with no choice and feeling a strong obligation to his grandmother, William elected to seek and obtain a court order permitting him to bury her in the manner she deserved.

The General Rule: Next Of Kin Has Funeral Rights

Generally, a decedent's next of kin has funeral rights over a decedent's body. Next of kin is defined as a "distributee" under New York's Estates Powers and Trust Law (EPTL) § 2-1.1. A distributee is a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution under EPTL § 1-2.5.

Wills and estates practitioners will be familiar with these rules as they set forth the laws of intestacy (death without a will). The statute governing descent and distribution gives priority to a decedent's spouse or, if she is not survived by a spouse, to her issue, and so on according to the statute, EPTL § 4-1.1(a)(3).

The courts have ruled on this issue.

"Generally, the surviving next of kin have a right to the



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immediate possession of the decedent's body for preservation and burial and damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body," *Booth v. Huff*, 273 AD2d 576, 708 NYS2d 757 (Third Dept. 2000) (quoting *Estate of Finn v. City of New York*, 76 Misc2d 388, 389, 350 NYS2d 552, quoting *Lott v. State of New York*, 32 Misc2d 296, 297-98, 225 NYS2d 434); see also *Finley v. Atlantic Transport Co.*, 220 NY 249, 115 NE 715 (1917).

The Will May Direct Funeral Arrangements

The law does not regard a body as personal property, passing under a will. While a testator, in her will, may direct the manner of the disposition of her remains, an executor does not otherwise have standing to override the funeral and burial wishes of the next of kin.

"In absence of testamentary direction, right to possession of dead body, for purpose of preservation and burial, belongs to the surviving spouse or next of kin," *In re Bower*, 17 Misc2d 936, 187 NYS2d 270 (Sup. Ct. 1959) (quoting *In re Billman*, 143 Misc 765, 257 NYS 491); see *Stewart v. Schwartz Brothers-Jeffers Memorial Chapel, Inc.*, 159 Misc2d 884, 606 NYS2d 965 (Sup. Ct. 1993).

"The general rule giving the right to determine the method of disposal of a decedent's remains to the family is far from being absolute (see *Yome v. Gorman*, 242 NY 395, 402 [1926] ["The wishes of wife and next of kin are not always supreme and final though the body is yet unburied"]) especially in the present case where the relations between Stanton and his family were strained. (*Feller v. Universal Funeral Chapel*, 124 NYS2d 546; see also, *Matter of Eichner*, 173 Misc 644.),"

— *Stewart v. Schwartz Brothers-Jeffers Memorial Chapel, Inc.*, 159 Misc2d 884, 888 (Sup. Ct. 1993).

The courts and the Legislature have recognized one's right to direct the disposition of her remains:

"The right of every individual to direct the disposition of their remains has clearly been recognized by the Legislature (see, Public Health Law art. 43; former § 4201 [repealed L1970, ch 466; formerly Penal Law § 2210]) and courts of this state. (*Darcy v. Presbyterian Hosp.*, 202 NY 259; *Matter of Bower*, 17 Misc2d 936; *In re Harlam*, 57

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NYS2d 103.) Where the directions are expressed in a will they are usually paramount to all other considerations, including the objections of the next of kin. (*Matter of Eichner*, 173 Misc 644, *supra*; *Cooney v. English*, 86 Misc 292.) Public Health Law former § 4201, the statute upon which many of the aforementioned cases rely, provided that, 'A person has the right to direct the manner in which his body shall be disposed of after his death.' While this statute has been repealed, this court cannot believe that the Legislature intended to abrogate one's right to direct the disposition of their remains by repealing it and not expressly reenacting the above language into its replacement, Public Health Law article 43. Rather, it appears that section 4201 was repealed merely because of its obsolescence in the face of the adoption of the Uniform Anatomical Gift Act of 1968 under article 43, which was promulgated in an effort to unify all 50 States under one set of standards. (Uniform Anatomical Gift Act, 8A ULA 15 [1983] [amended 1987].) Therefore, in this court's judgment the law associated with this right still exists. (See, 2 *Warren's Heaton, Surrogates' Court* § 126[3][b] [sixth ed 1993]),"

— *Id.*, 159 Misc2d 884, 888, 606 NYS2d 965.

Accordingly, especially when there is family strife, a client may wish to incorporate the disposition of his body into his testamentary plan to spare his family and loved ones the pain and expense of conflict.

Other Exceptions To The 'Next-Of-Kin' Rule

Where the decedent and his next of kin were estranged, or where there is other evidence of the deceased's wishes for her sacred last rites, the courts may direct that someone other than next of kin take control over funeral arrange-

ments. Again, the *Stewart* case is instructive:

"Parol or nonformal directions, like the ones claimed to have been made by Stanton, regarding the disposition of one's remains have also been found to be effective (*Feller v. Universal Funeral Chapel*, 124 NYS2d 546, *supra*; 888 *Matter of Johnson*, 169 Misc 215, *supra*; *Matter of Scheck*, 172 Misc 236, *supra*)," *Id.*, 159 Misc2d 884 at 887-88.

The practitioner faced with a funeral rights case should not shrink from presenting any evidence of the deceased true wishes, even if they are at odds with his written directions.

New York State courts have held that "under certain circumstances [parol or nonformal] directions can be sufficient enough to override express provisions to the contrary in a will," *Id.* (citation omitted).

Conclusion

One difficulty with a case like this is that an estates practice is not ordinarily fast-paced. However, when issues of this nature arise they require a rapid response under stressful and rushed conditions. Time may be of the essence and nerves may be raw due to the family being divided, non-traditional, remote or adherent to religious beliefs requiring rapid burial or other special arrangements.

Attending to a loved one's final needs can have a tremendous impact on the grieving process. This was certainly true for William and his family who have moved on with their lives secure in the knowledge that their grandmother can rest in peace.

Michael A. Burger is a litigator and a member of the law firm Dible, Miller & Burger, PC. He offers thanks to "William" and his family for their trust and to paralegal Donna N. Parsons and co-counsel Kristine M. Demo-Vasquez for their compassion and hard work.