

Client Newsletter

Dibble & Miller, P.C.

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D&M^{P.C.}

From the
Law Offices of

Dibble & Miller, P.C.

55 Canterbury Road
Rochester, NY 14607

Tel: (585) 271-1500
Fax: (585) 271-0118

When a Loved One Dies You may not be Able to Control the Burial

Benjamin Franklin once said that, "In this world nothing can be said to be certain, except death and taxes." We all will die one day. Unfortunately, the death of a loved one can bring out the worst in the decedent's remaining family members and others who will often fight over the right to control the disposition of the decedent's remains.

Moreover, decedents frequently fail to leave clear or consistent instructions regarding how they wish their remains to be disposed of when they die or who they want to make their memorial decisions, which even further exacerbates the possibility for post-death discord.

As an example, we are aware of a case where a dispute arose between the parents of a deceased son and the son's estranged wife over the disposition of the son's remains. At the time of his death, the son had been living with his parents for over one year and had not commenced divorce proceedings or formally separated from his wife. However, upon the son's death, the estranged wife took control of the funeral arrangements, barred the parents from attending the son's calling hours and memorial service, refused the parents' request to hold a funeral mass, and, over the strong objection of his parents, chose to cremate the son and scatter his cremains in Vermont instead of burying the son in the family cemetery plot as he would have wanted.

The Common-Law "Right of Sepulcher"

Under the common law (i.e., court-determined) "right of sepulcher," a decedent's next of kin is afforded the absolute right to the immediate possession of the decedent's body for preservation and burial or other disposition of the remains. The "right of sepulcher" also allows for damages to be awarded against any person who unlawfully interferes with the right or improperly deals with the decedent's body.

This rule of law has been used in the past not only to determine who could exercise rights over the remains of a decedent, but also to award monetary damages to family members who were deprived of the ability to effectuate the proper burial of a loved one due to the negligence of another. For example, in one case, the parents of a still-born child were awarded monetary damages when a hospital misplaced their child's remains for several days, thereby preventing the parents from having a proper funeral for their child.

Enactment of New York State Public Health Law §4201

In August, 2006, the New York State legislature enacted Public Health Law

§4201, titled "*Disposition of remains; responsibility therefor*," in response to the tragic events of September 11, 2001. In enacting this law, the legislature codified the common-law "right of sepulcher" and determined a hierarchical list of persons who are empowered to make decisions regarding the "care, disposal, transportation, burial, cremation, or embalming of the body" of a deceased person.

The highest priority of decision-making authority is given to a person designated by the decedent in a written instrument executed pursuant to PHL §4201 titled "*Appointment of Agent to Control Disposition of Remains*". While the designation of a person to control the disposition of one's remains or directions regarding the disposition of remains set forth in a Last Will and Testament will be considered a reflection of the intent of the decedent, such designations will be superseded by the appointment of a PHL §4201 agent.

In the absence of a written instrument, the persons enumerated in PHL §4201 who can make post-death decisions include, from greatest priority to least, the surviving spouse or domestic partner, any surviving children, the decedent's parents, any surviving siblings, a court-appointed guardian, any person who is entitled to share in the decedent's estate, a duly-appointed fiduciary of the estate, and any close friend or relative who is reasonably familiar with the decedent's wishes. All decision makers must be 18 years of age or older.

If an individual is not available, is unwilling or is not competent to serve, decision-making responsibility goes to the next succeeding level until someone is found to make decisions regarding the decedent's remains.

The "Appointment of Agent to Control Disposition of Remains"

In addition to setting the priority of rights, PHL §4201, provides for the execution of a legal document titled "*Appointment of Agent to Control Disposition of Remains*" (an "Appointment") in which an individual can appoint an "agent" to make post-death decisions, even if the appointed agent is not the individual's next of kin. Such an appointment can eliminate most problems associated with funeral arrangements and control of the disposition of one's body.

The advantage to using an Appointment is that it immediately identifies the person who is to be entrusted with making final arrangements; it can specify what those arrangements should be, e.g., choice of a particular funeral home and burial site, directions regarding cremation and the manner of disposition for the decedent's cremains, or any other post-death considerations which may be important to the individual, and it is strongest evidence of one's intentions regarding post-death planning.

However, if an Appointment has been executed, it should be kept as current as possible in order to avoid the scenario where someone is empowered to make post-death decisions (e.g., an ex-spouse) when the decedent would not have otherwise wanted that person to be able to do so.

While it is common to include provisions concerning funeral arrangements and burial in a last will and testament, and such provisions will be honored, even before the probate of a will, a will is not the best instrument for this purpose because original wills are often not available quickly after the decedent's death. Instructions in an Appointment can and should be left with the person who is named as the agent, where they will be readily and promptly available.

Look to Dibble & Miller, P.C. for your Estate Planning Needs

Please do not hesitate to contact Dibble & Miller, P.C., if you wish to ensure that your post-death wishes are followed by executing an "Appointment of Agent to Control Disposition of Remains" or to discuss any of your estate planning needs.

DIBBLE & MILLER, P. C.

ATTORNEYS AT LAW

55 CANTERBURY ROAD, ROCHESTER, NEW YORK 14607

PHONE: 585-271-1500 FAX: 585-271-0118

WEB SITE: www.dibblelaw.com

WE THANK YOU FOR USING OUR FIRM.

PLEASE REMEMBER THAT WE HAVE AN EXTENSIVE PRACTICE TO SERVE YOU:

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 - *Preparation, Filing and Negotiation of Offers in Compromise*
 - *Negotiation of Tax Installment Agreements and Tax Payment Plans*
 - *Innocent & Injured Spouse Defense*

*** IF YOU NEED LEGAL ADVICE, PLEASE CONTACT US FOR A FREE CONSULTATION ***