



FEATURE: ESTATE PLANNING & TAXATION

By **Amy F. Altman**

Preventing **Morbid** Litigation

Ask clients about their funeral arrangements

As estate planners, we're accustomed to asking our clients for personal information, such as their finances and family dynamics, to obtain a good grasp of their estate-planning goals. Without such questions and forthright answers, a planner would be at a loss in terms of how to appropriately plan for their clients. The result of this dialogue is the foundation of any well thought-out estate plan. One of a planner's ultimate objectives is to create a plan that works under any set of circumstances, from natural disaster to unborn children. However, how often are we as planners asking our clients about their funeral arrangements? Practitioners should always ask clients a simple series of questions, such as: (1) who they want to be in charge of their final disposition, (2) whether they prefer burial over cremation, and (3) where they wish to be buried or interred. Practitioners may be reluctant to ask such questions possibly because the questions raise the issue of the client's mortality. The same may be said about the client's willingness to answer.

For some, this topic may be overwhelming, morbid and an issue they would rather avoid. Not surprisingly, some clients may reason that the individual nominated as executor will also be responsible for the disposition of their remains. In some jurisdictions, the nominated executor may not be the one to control the disposition of remains. Further, the funeral home may not wait for the nominated executor to be appointed. Depending on your state, this may take several weeks to months. If the answers aren't clear when creating the estate plan, then on the client's death, her heirs will have no choice but to rely on state law as a default. These uncertainties can

create disputes among family members if they don't all agree about who should be in control of the disposition or regarding the funeral arrangements themselves. This situation leaves a family to deal with litigation during what may be a very difficult loss of a loved one.

Litigation Risk

Thus, it's no surprise that litigation continues to arise when critical questions regarding disposition of remains aren't asked or clarified. Many of these cases raise two crucial questions: First, who's the individual designated by the client, now the decedent, to have the authority to dispose of her remains? Second, how did the decedent want her remains disposed of? Occasionally, a third question arises of where the client wanted to be buried or where she wanted her ashes interred or scattered. No estate planner wants to see his client's heirs endure litigation based on an estate plan that didn't take the simple precaution of clarifying the ultimate disposition.

History of Burial Rights

It may be surprising to learn that there's no right of property in a dead body.¹ In 1753, Sir William Blackstone opined that:

Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried.²

This view stems back to the English common law in which churches held the right of sepulcher (sometimes



Amy F. Altman is an associate at Meltzer, Lippe, Goldstein & Breitstone LLP in Mineola, N.Y.



spelled “sepulchre”) and the responsibility of burying the dead.³ In the United States, the national consciousness with respect to burial rights was born out of the Civil War, when there was no system in place for identifying soldiers killed in battle, and families waited for months to obtain information, much less bury the dead.⁴ After the war, volunteers who reported deaths to the families advocated for more efficient ways to relay this information to families.⁵

In modern times, some states have declared that a quasi-property right vests in the nearest relatives of the deceased for the purposes of burial or other lawful disposition of the body.⁶ Thus, the quasi-property right exists for the limited purpose of determining custody of the body for burial. This right is sometimes called “the right of sepulcher.” The right simply encompasses the power to ensure that the corpse is handled properly and laid to rest.⁷ This right doesn’t have an economic value per se; however, if breached, the heirs may have a right of action for damages. The right to dispose of the body and prevent it from any defacement clearly isn’t property that would be included in the estate, and therefore, it’s not within the control of the executor under common law.⁸ In many jurisdictions within the United States, courts have ruled that “the right to possession of a body for the purpose of burial belongs to the surviving spouse” or, in the absence of such a spouse, “the next of kin.”⁹ Thus, if the decedent leaves no direction on the disposition of her remains, and there’s no surviving spouse, the right of burial of a dead body rests with the next of kin in the order of their relation to the decedent.¹⁰ If the right of proper burial is breached, the next of kin may have an action for the breach of that right.¹¹

State Statutes

Many states have revised their statutes to allow for the designation in a separate form of an agent to authorize funeral arrangements, or in certain states, incorporated this information into the state’s health care proxy (HCP) or power of attorney (POA). The form is called the “Designation of Agent for Final Disposition” or “Authorization of Final Disposition Form.” Generally, the written instrument provides for: (1) designation of an individual who will have the right to control the disposition of a deceased person; and (2) the client’s preferences for burial versus cremation or any special instructions to give guidance to the person appointed. A

funeral home will be obligated to follow the instructions provided. The use of this form or a provision under an HCP or POA will entitle the individual named to make all decisions regarding disposition (unless specific instructions were delineated on the form, such as burial versus cremation). Every jurisdiction has its own laws regarding disposition of remains, which you should review. “Designating an Agent,” p. 18, lists each jurisdiction’s statute regarding disposition of remains and the relevant website where one can find the disposition of remains form.

Morbid Litigation

A recent case that occurred in New York demonstrates the caustic vitriol that can emerge when burial wishes aren’t properly and clearly documented. In *Lipiner v. Plaza Jewish Community Chapel*, the decedent’s sister brought an action against the decedent’s children to disinter the decedent from her grave in Queens, N.Y.¹² She argued that the decedent should have been buried in Jerusalem, Israel, in a plot that the decedent purchased.¹³ In this case, because the decedent didn’t sign a disposition of remains form, the court analyzed New York’s statute, New York’s Public Health Law Section 4201, which prioritizes persons authorized to control a decedent’s remains. Under the statute, the decedent’s children had priority over the decedent’s sister. However, the court in an interim decision decided that the sister had standing to question whether the decedent’s wishes were followed. The court ordered an evidentiary hearing, where two home health aides testified that the decedent wanted to be buried in Israel and not in Queens next to her “bastard” ex-husband. The court found the son’s decision to ignore the fact that his mother had a plot in Israel “inexcusable” and ruled that the decedent’s remains be disinterred and moved to Israel for burial. The entire case may have been avoided had the decedent signed a disposition of remains form designating her sister as her agent and/or clearly expressing her desire to be buried in Israel as opposed to Queens.

Celebrity cases are similarly instructive. The death of Vicki Lynn Marshall, also known as Anna Nicole Smith, brought furious litigation over the question of who had the right of sepulcher, her mother or the guardian for her sole surviving heir, her infant daughter, Dannielynn.¹⁴ Anna’s mother wanted her body buried in Texas. The court of appeals in Florida ruled against her mother and



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Designating an Agent

An overview of state laws

Jurisdiction	Designated Agent?	Law	Website
Alabama	Yes	AL §34-13-11	www.fsb.alabama.gov/pdfs/June2015Forms/AuthorizingAgentAffidavit.pdf
Alaska	Yes	AK §13.75.030 (2013)	http://law.justia.com/codes/alaska/2013/title-13/chapter-13.75/section-13.75.030/
Arizona	Yes	AZ §36-3221	www.azleg.gov/ars/36/03224.htm
Arkansas	Yes	A.C.A. §20-17-102	www.arkansas.gov/fdemb/pdf/Cremation_Final_Disposition_Rights_Form.pdf
California	Yes	CHSC §7100	www.cfb.ca.gov/enforcement/1705form.pdf (cremation)
Colorado	Yes	CRS §15-19-104	http://coloroadvancedirectives.com/wp-content/uploads/2014/07/Colorado-Declaration-Disposition-of-Last-Remains.pdf
Connecticut	Yes	C.G.S. §45a-318	http://law.justia.com/codes/connecticut/2011/title45a/chap802b/Sec45a-318.html
District of Columbia	Yes	D.C. Code §3-413	https://beta.code.dccouncil.us/dc/council/code/sections/3-413.html
Delaware	Yes	12 Del. Code Ann. §264 (right to dispose of remains); 24 Del Code Ann. §3121 (cremation)	http://delcode.delaware.gov/title12/c002/sc03/index.shtml
Florida	Yes	F.S.A. §497.005(43)	www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0400-0499/0497/0497.html
Georgia	Yes	GA Code Title 31, Chapter 36	www.negr.org/user_files/1316786486_GEORGIA%20ADVANCE%20DIRECTIVE%20FOR%20HEALTH%20CARE10.pdf
Hawaii	Yes	Senate Bill 341	www.qeep.com/blog/wp-content/uploads/2014/02/2013-hawaii-designated-agent.pdf
Idaho	Yes	Idaho Statutes §54-1142	https://legislature.idaho.gov/statutesrules/idstat/Title54/T54CH11/SECT54-1142/
Illinois	Yes	755 ILCS §65/1	www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2737&ChapterID=60
Indiana	Yes	Indiana Code §29-2-19-9	http://codes.findlaw.com/in/title-29-probate/in-code-sect-29-2-19-9.html
Iowa	Yes	Final Disposition Act, §144C	www.pdfFiller.com/61049654-RSRAIFeD8_aQ2Qum3S7fF9nkhF2MU-Iowa-Disposition-Agent-Form-funerals-Various-Fillable-Forms
Kansas	Yes	Kansas Statutes §65-1734	www.kansaslegalservices.org/sites/kansaslegalservices.org/files/DURABLE%20POWER%20OF%20ATTORNEY%20FOR%20HEALTH%20CARE%20DECISIONS%20GENERAL%20STATEMENT%20OF%20AUTHORITY%20GRANTED_1.pdf
Kentucky	Yes	K.R.S. Chapter 367	www.funerals.org/wp-content/uploads/2016/08/2016-4-5-Kentucky-Designated-Agent-Form.pdf
Louisiana	Yes	L.R.S. §37:876(A)	http://law.justia.com/codes/louisiana/2011/rs/title37/rs37-876 <i>A representative to carry out final wishes may be designated in a separate document signed by a notary</i>

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left the right to bury Anna's body to the guardian for Dannielynn. Finally, after a 3-week battle, Anna's body was buried in the Bahamas, next to her 20-year-old son who'd died five months earlier.

The death of Boston Red Sox player Ted Williams also resulted in an interesting lawsuit among his surviving children. Ted's son proffered a handwritten note on a napkin indicating that a family pact had been signed by Ted stating that he wanted to be cryo-preserved, while his will clearly requested cremation.¹⁵ Ted's daughter, Bobby-Jo, filed suit to have him cremated as per Ted's instructions in his will. Eventually she gave up this fight because the cost of litigation would have been too burdensome for her family.¹⁶

When Mickey Rooney died, his conservator filed a motion to halt Rooney's son and wife from moving Rooney's body against his express wishes.¹⁷ His wife wanted him buried in a plot they purchased together years earlier, with the intention that they be buried next to one another.¹⁸ The conservator and his estate

attorneys disagreed since Rooney was separated from his wife and didn't ultimately wish to be buried next to her.¹⁹ Instead, they said Rooney wanted either a military or Hollywood burial.²⁰ The parties ultimately agreed to bury him at Hollywood Forever cemetery.²¹

In the heart wrenching case of *Wilson v. Wilson*, a divorced couple sought the partition of the cremated remains of their 23-year-old son who died in a car accident.²² The Florida District Court of Appeal's decision had to analyze whether the remains were considered "property" similar to the analysis of the burial of a body under Florida law. The court ruled against partition, honoring Florida precedent in a similar case:

It is a sorrowful matter to have relatives disputing in court over the remains of the deceased. In this case in particular, there 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. Cases such



Photo courtesy of the South Dakota Department of Tourism

South Dakota Trust Company LLC

201 S. Phillips Avenue – Suite 200
Sioux Falls, South Dakota 57104
Pierce McDowell – (605) 338-9170
piercemcdowell@sdtrustco.com

South Dakota Planning Company

10 East 40th Street – Suite 1900
New York, New York 10016
Al King – (212) 642-8377
alking@sdplanco.com

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Designating an Agent *(continued)*

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Maine	Yes	Title 22, §2843-A, no. 2	www.themha.org/policy-advocacy/Issues/End-of-Life-Care/advdirectivesform.aspx
Maryland	Yes	Annotated Code, MD §5-408.1	www.marylandattorneygeneral.gov/Health%20Policy%20Documents/adirective.pdf
Massachusetts	No	Mass. Reg. CMR §239, 3:09	www.mass.gov/ocabr/licensee/dpl-boards/em/regulations/rules-and-regs/239-cmr-300.html#3.09
Michigan	No	MCL §700.3206	www.legislature.mi.gov/(S(qvfapgl4wpcsdowhu30fxvbj))/mileg.aspx?page=GetObject&objectname=mcl-700-3206
Minnesota	Yes	Minn. Statutes §149A.80	www.revisor.mn.gov/statutes/?id=149A.80
Mississippi	No	MS Code §73-11-58 (2013)	http://law.justia.com/codes/mississippi/2013/title-73/chapter-11/state-board-of-funeral-service/section-73-11-58
Missouri	Yes	Mo. Statutes §194.119	www.moga.mo.gov/mostatutes/stathtml/1940001191.HTML http://parkmort.com/frStRt0fSepl.pdf
Montana	Yes	MCA §37-19-904	http://leg.mt.gov/bills/mca/37/19/37-19-904.htm
Nebraska	Yes	NE REV ST §38-1425	http://codes.findlaw.com/ne/chapter-38-health-occupations-and-professions/ne-rev-st-sect-38-1425.html
Nevada	Yes	NRS §451.024	www.leg.state.nv.us/nrs/nrs-451.html#NRS451Sec024
New Hampshire	Yes	NH §209-17	http://law.justia.com/codes/new-hampshire/2013/title-xxvi/chapter-290/section-290-17
New Mexico	Yes	NM Statutes §24-12A-1 (authorization of cremation); §45-3-701(b) (designation of agent)	www.qeepr.com/blog/wp-content/uploads/2014/02/New-Mexico-Cremation-Authorization-2010.pdf
New Jersey	Yes	NJ Statute §45:27-22	http://law.justia.com/codes/new-jersey/2013/title-45/section-45-27-22
New York	Yes	NY §4201 Public Health Law	www.health.ny.gov/forms/doh-5211.pdf
North Carolina	Yes	NCGS §32A-15 through 32A-27	www.aarp.org/content/dam/aarp/relationships/caregiving/2011_01/ad/NorthCarolina.pdf
North Dakota	No	ND Code Chapter 23-06	www.legis.nd.gov/cencode/t23c06.pdf
Oklahoma	Yes		www.pdfFiller.com/en/project/88026590.htm?f_hash=9378f8
Ohio	Yes	Ohio Code §2108.70	www.ohioabar.org/ForLawyers/MemberResources/Documents/Ohio-Appointment-of-Representative-for-Disposition-of-Bodily-Remains.pdf
Oregon	Yes	ORS §97.130	www.oregon.gov/mortcem/compliance_issues_related/cremationauthorization.doc
Pennsylvania	Yes	PA Statute §20-3-305	www.legis.state.pa.us/WU01/LI/LI/CT/PDF/20/20.PDF
Rhode Island	Yes	RI Statute §5-33.3-4	http://webserver.rilin.state.ri.us/Statutes/TITLE5/5-33.3/5-33.3-4.HTM
South Carolina	Yes	SC Statute §32-8-320	www.scstatehouse.gov/code/t32c008.php
Tennessee	Yes	TN Statute §34-6-204(b)(3)	www.lawservers.com/law/state/tennessee/tn-code/tennessee_code_34-6-204




Designating an Agent (continued)

Jurisdiction	Designated Agent?	Law	Website
Texas	Yes	Health and Safety Code, §711.002	http://fcant.org/pdf/texasforms/appoint_agent_control_disposition_remains_v20101009.pdf
Utah	Yes	Utah Statute §58-9-601	https://le.utah.gov/xcode/Title58/Chapter9/C58-9-P6_180001018000101.pdf
Vermont	Yes	VT Statute §18-231	http://legislature.vermont.gov/statutes/chapter/18/231
Virginia	Yes	Code of Virginia, §54.1-2825	https://vacode.org/2016/54.1/III/28/5/54.1-2825/
Washington	Yes	RCW §68.50.160	http://apps.leg.wa.gov/rcw/default.aspx?cite=68.50.160
West Virginia	Yes	WV Code §30-6-22a	www.legis.state.wv.us/wvcode/ChapterEntire.cfm?chap=30&art=6&section=22A
Wisconsin	Yes	Wis. Stat Chapter 154.30	www.dhs.wisconsin.gov/forms/f0/f00086.pdf
Wyoming	Yes	WY Statute §2-17-101	http://law.justia.com/codes/wyoming/2012/title2/chapter17/section2-17-101

— Amy F. Altman

as this require the most sensitive exercise of the equitable powers of the trial courts. We are confident that the experienced trial judge exercised his power with due regard for the serious and emotional issues presented.²³

Cases like *Lipiner* and *Wilson*, as well as celebrity cases, underscore the need to have the discussion with your client regardless of her age regarding her preferences. If permitted by state law, your client should consider completing a disposition of remains form (in whatever form that’s allowable under the particular jurisdiction’s laws), together with advanced directives that comprise a good estate plan, such as an HCP, living will and POA. This will create clarity with respect to the sensitive issues surrounding burial and likely stem the tide of litigation during a family’s most difficult hour of grief. 

Endnotes

- 22A Am.Jur.2d, “Dead Bodies,” Section 5, “Property rights in body—Quasi property rights” (2016).
- Sir William Blackstone, *Commentaries on the Laws of England in Four Books* 429 (1893), <http://oll.libertyfund.org/title/2140>.
- Melfi v. Mount Sinai Hospital*, 877 N.Y.S.2d 300 (1st Dep’t 2009).
- Mary L. Clark, “Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death,” 58 *Rutgers L. Rev.* 45 (2005).

5. *Ibid.*
6. *Arkansas Bd. Of Embalmers and Funeral Directors v. Reddick*, 233 S.W.3d 639 (2006); *Evanstone Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377 (Texas 2012).
7. *Bauer v. North Fulton Medical Center, Inc.*, 527 S.E.2d 240 (1999).
8. *Seals v. H. & F, Inc.*, 301 S.W.3d 237 (Tenn. 2010); *McRae v. Booth*, 938 So.2d 432 (Ala. Civ. App. 2006).
9. *Cottingham v. McKee*, 821 So.2d 169 (Ala. 2001).
10. *Fischer’s Estate v. Fischer*, 117 N.E.2d 855 (1st Dist. 1954); *Shiple v. City of New York*, 908 N.Y.S.2d 425 (2d Dep’t 2010).
11. *Riley v. St. Louis County of Mo.*, 153 F.3d 627 (8th Cir. 1998).
12. *Lipiner v. Plaza Jewish Community Chapel*, 156059/16, NYLJ 1202768492953, at *1 (Sup., N.Y., Sept. 16, 2016).
13. *Ibid.*
14. *Arthur v. Milstein*, 949 So.2d 1163, 1165 (Fla. 4th DCA 2007).
15. Brian L. Josias, “Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies,” 79 *Notre Dame L. Rev.* 1141, 1180 (2004).
16. *Ibid.*
17. Victoria Kim, “Rooney Family Ends Dispute, Agrees to Bury Actor at Hollywood Forever,” *LA Times* (April 10, 2014), <http://articles.latimes.com/2014/apr/10/local/la-me-ln-mickey-rooney-burial-20140410>.
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Wilson v. Wilson*, 138 So.3d 1176 (Fla. 4th DCA 2014).
23. *Cohen v. Guardianship of Cohen*, 896 So.2d 950, 954 (Fla. 4th DCA 2005) (“a dead body is not properly viewable as property or assets”).