

The Law and You

Advance Directions for Your Funeral and Burial

About three and a half years ago I wrote about a newly enacted law governing funeral and burial directions. In this month's column, I will treat that same law in the context of a "Will Contest" case.

A brief review is necessary before getting into an actual case.

The 2003 law is found in Chapter 9 of Title 58. It is known as the "Funeral Services Licensing Act."

In particular, Part 6, which begins at Section 58-9-601 and continues through 604, provides for the "Control of Disposition" of a deceased's remains.

It is now possible for you to direct the preparation, type, and place where your remains will be disposed. This can include designating a particular funeral home or providing directions for your burial arrangements. It can also include specific directions for your cremation.

These directions must be in writing and dated and must be witnessed by at least two unrelated individuals. It can be a separate writing, or it can be included in a Will or Trust.

If you include it in a Trust, however, the Trust will require the signatures of two, unrelated witnesses. Signatures in a Trust are usually notarized and not witnessed. So, your attorney may have to adapt to this requirement.

If you specify your burial or funeral plans in your Will, you can always change your mind without amending or revoking your Will. All that is necessary is for you to provide written notice to the person named as your Personal Representative and also to the particular funeral home, if your Will designates a funeral establishment.

The new Act also establishes the priority of those who can make decisions about the

disposition of your remains. First priority goes to the person that you designate in a witnessed statement or Will.

If no such person is designated in a writing or a Will, then your surviving spouse has second priority. After that, the majority of your surviving children must concur on a particular disposition.

A funeral service director must carry out your wishes, if your wishes conform to the new Act and you have provided sufficient funds to pay for whatever services you have requested.

Now let me introduce a recent case where the Act should have played an essential role.

The decedent died with a Will in which he expressly designated that his Personal Representative have complete control of the decedent's funeral and disposition of the decedent's body. The Will (we'll call it "Will 1") was executed three months prior to the decedent's death.

However, a competing Will ("Will 2"), executed more than three years prior to Will 1, surfaced. The contestants of Will 2 filed a Petition for a Temporary Restraining Order ("TRO") and demanded that they be given control over the decedent's funeral and burial.

Because of the TRO, burial was delayed and the decedent's body was refrigerated pending a hearing.

The Personal Representative ("PR"), based on the decedent's requests, requested that only a grave side service be held, that no religion be a part of such service, that the decedent not be embalmed, and that the decedent be buried next to his deceased wife.

During the TRO hearing, the court chose to completely ignore the decedent's directions contained in Will 1. According to the court, the decedent didn't really have any written

directions for the disposition of his body.

That is, the court ignored the decedent's express designation that his PR be in total control over his funeral and burial. Because the decedent merely designated his PR to be in charge and did not specify the details for the disposition of his remains, the court ignored the decedent's wishes. That was a tragedy.

The statute contains the following language:

“written directions regarding the decedent's disposition.”

Apparently the court did not consider the designation of a person, in this case the PR, to qualify as “written directions” and therefore ignored the decedent's wishes.

The court's disregard of the decedent's wishes may be sufficient cause for our Legislature to amend the laws. Hopefully, they will do so.

In amending the statute, the Legislature should also consider clarifying which Will controls, the latest one or an earlier one that is being offered in a “Will Contest.”

To ensure that your wishes are carried out, you should consult a knowledgeable Elder Law Attorney. Check your local Yellow Pages or the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at www.naela.com.