

Next of Kin:

When Should You Proceed with Caution?

When it comes to cremation and next of kin, you need to tread carefully.

Just consider these scenarios that funeral professionals deal with regularly ...

Scenario 1: Jane Smith contacts your funeral home to make arrangements for the direct cremation of her late husband, John Smith. Sweet and soft spoken, she comes in to meet with you to discuss details and, teary eyed, carefully dots all of the I's and crosses the T's – including the ones in her listed title of “wife” and name – “Mrs. Jane Smith” – on your cremation authorization form. She immediately tenders full payment in cash and promptly picks up the cremated remains once ready, without issue. Imagine your surprise when a week later you receive a call from a hysterical *Jill* Smith, screaming something about how you cremated her father before she had a chance to say goodbye and then released his cremated remains to her evil stepmother – well, former stepmother before the divorce, that is – without her permission as his

surviving daughter. A week later, you are served with a lawsuit alleging tortious interference with human remains seeking \$1 million in punitive damages for emotional distress allegedly caused by the wrongful cremation of Jill Smith's father without authorization by the proper next of kin. Meanwhile, Jane Smith is long gone, never to be heard from again.

Scenario 2: Jill Smith contacts your funeral home to make arrangements for the direct cremation of her dearly departed father, John Smith. She comes in to meet with you to discuss details, lists herself as next of kin on your cremation authorization form and writes you a check for payment in full on the spot. During the memorial service, you are approached by *Jane* Smith who is devastated that her husband was

cremated against his religious beliefs, which he had verbalized to her on several occasions during their 30-year marriage. Jill Smith frantically interrupts to explain that this is the first time she has seen her mother in well over a decade, insisting that she had no idea that her father was religious and had been under the impression that her estranged parents finalized their divorce years ago. The next day, you turn on the news to see Jane Smith in tears, as she is comforted by her attorney who proceeds to accuse your funeral home of maliciously desecrating her late husband's remains such that he would never be able to get into heaven, leaving her to suffer for all eternity alone in the afterlife, etc. Needless to say, this is not good for business – and neither is the \$1 million lawsuit that is sure to follow.

Scenario 3: Jill Smith contacts your funeral home, same facts as above – only this time, at the memorial service, you are approached by her three other siblings, John Jr., James and Jacqueline Smith. During the arrangement conference, Jill Smith had explained that her mother, Jane Doe Smith, died years ago but never mentioned any siblings. And you live in a state where consent from a majority of the living adult children is required to authorize disposition. This causes a media frenzy spanning several states. Litigation ensues, and so forth – which, worst-case scenario, could potentially put you out of business.

What the Law Says

While there is no property right, in the ordinary sense, in a dead body, there is a “quasi-property” interest in the possession of a decedent’s remains in order to determine the time, manner and place of disposition. Who has a right to decide the manner of disposal of a dead body – and, it follows, who has legal recourse in the event of allegedly wrongful acts in connection therewith – has presented a challenge to the courts since the early days of English common law. Our common law likewise does not recognize traditional property rights in human

remains. As a result, both the legislative and judicial branches of government have often relied upon claims in tort principles to ensure that survivors have meaningful recourse in the event of the unlawful disposition of human remains.

In the absence of express testamentary intent, the right of possession of a dead body usually defaults to the surviving spouse or the next of kin. The strict legal meaning of the phrase “next of kin” is next or nearest in blood, according to the common law line of consanguinity. As such, proper identification of the next of kin with the right to authorize disposition is of the utmost importance for funeral service providers – and extra precautions must be taken in light of the irreversible nature of cremation.

Ever-climbing divorce rates, retention of maiden names or hyphenates, increased societal acceptance of long-term cohabitation without marriage and more children being born to single parents, collectively mean that modern families do not look like they used to. Particularly problematic are cases of family members who have not seen each other in years – e.g. children, siblings or legally separated spouses, which in turn tasks funeral directors with the difficult responsibility of explaining that, contrary to the

heightened emotions and frustration experienced during an arrangement conference caused by tumultuous family dynamics, the legal designation as next of kin remains and may nevertheless entitle an estranged individual or individuals with the right to disposition, absent a court decision determining otherwise.

If a decedent does not expressly elect a method of disposition – or in the alternative designate an individual to elect the method on his or her behalf, state law permitting – the legal right to direct the disposition of human remains typically descends to the following parties, in order of priority: (1) the spouse of the decedent; (2) adult children of the decedent; (3) parents of the decedent; (4) adult siblings of the decedent; (5) adult grandchildren of the decedent; (6) grandparents of the decedent; and (7) an adult who has exhibited special care and concern for the decedent. That said, state laws vary significantly, particularly when it comes to the lower, more removed levels of the hierarchy. As such, the importance of becoming familiar with and staying current on changes to a particular state’s statutory next-of-kin hierarchy for purposes of disposition cannot be stressed enough. It is an absolute must for all funeral directors and staff members – without exception.

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For example, as referenced in Scenario 3 – some states require a majority of adult children – or any given group on the same hierarchical tier of next of kin – to authorize disposition, while others do not. Some states require both parents (if living), while others require one parent, and so forth. As such, simply relying on a family member or members who participate in the arrangement conference to be forthcoming is not enough, given the huge risks to be faced as a result of doing so. That is not to say that any such misrepresentations are even going to be intentional – for example, see Scenario 2 where the funeral director confirmed that Jill Smith’s parents were divorced – in which case there would be better grounds for a good faith defense in the event of a lawsuit.

Fortunately, there are best practices that can – and unequivocally should – be taken on the front end to effectively avoid the potential for liability in the first place, by incorporating provisions including, but not limited to, the following, into your cremation authorization form:

- A clause affirming and expressly asserting that the individual or individuals participating in the arrangement conference are autho-

riized and entitled to control the disposition of the decedent’s remains, to be signed by any and all such individuals.

- A clause further representing that he/she/they are the person or persons having legal priority to control the disposition of the decedent’s remains in accordance with state law, including a verbatim excerpt outlining the hierarchy of next-of-kin priority, as set forth in the statute – to be reviewed, and initialed upon review, by any and all such individuals, reaffirming the accuracy of the previous clause.

- A fill-in-the-blank worksheet identifying all living individuals in the highest and second-highest applicable tiers in the hierarchy of next of kin, including sufficient space for contact information, when available.

- An affirmation that the next of kin has no knowledge of any objections to the means of disposition selected by any other members of the highest tier in the hierarchy of next of kin.

- An affirmation that the next of kin has no knowledge that the decedent executed a will containing directions for the disposition of his or her remains, or authorized an agent by executing a written instrument pursuant to state law,

citing the pertinent statute(s) pertaining thereto – also to be reviewed, and initialed upon review, by any and all such individuals.

At the end of the day, it is important to keep in mind that state law merely provides the minimum requirement of people required to consent. Notably, these statutes generally do not provide a means for resolving disputes among next of kin in the same level on the hierarchy of authority – which is an entirely different topic for discussion, in and of itself. That said, many funeral homes now go so far as to request that all parties at the same level of kinship sign a cremation authorization. This ensures all people with a legal right to decide are aware cremation has been chosen as the method of final disposition. While not necessarily feasible in every situation, it is worth considering doing so as a best practice when possible to avoid potential lawsuits down the road due to unreliable, improper and/or insufficient next of kin.

Finally, keep in mind that disposition statutes typically do not have any record-keeping requirements. However, since you are already legally required to both request and receive a signed cremation authorization first to ensure that you are protected from liability when acting on the direction of next of kin, the best way to establish your due diligence and good faith reliance on the representations made therein is simply by taking an extra step and retaining copies of completed forms for at least the statute of limitations for related actions in your particular state – i.e. typically three years. Because at the end of the day, even though state laws generally provide significant legal protections for funeral directors, these protections only apply if you acted reasonably and in good faith. That means always going above and beyond the bare minimum to ensure that you and your staff are using best practices and the proper due diligence, as well as operating by the usual high standards of care, honesty and integrity for which funeral directors are renowned. •

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