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## Who Protects a Decedent's Wishes Regarding Disposition of Remains?

by Marjorie M. Smith

Courts of law have historically been hesitant to intrude into private affairs concerning the disposition of a decedent's remains. As Justice Lumpkin stated in 1905, "A corpse in some respects is the strangest thing on earth. ...[T]he law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron." Louisville & N.R. Co. v. Wilson, 51 S.E. 24 (Ga. 1905). Despite these concerns, there being no ecclesiastical courts in the United States to address matters concerning decedents' remains, courts have been forced to furnish rules when problems arose.

Though both the courts and General Assembly have provided rules and guidance regarding the disposition of decedent's remains, how they work together in the event of conflict is still unclear. As technological advances provide a multitude of new choices for handling a decedent's body and as the number of blended families increases, the potential for conflict among family members is heightened. Who decides when such conflict arises?

At common law, no property right was held to exist in a dead body; a dead body was not property to be owned but rather property to be taken care of. Today, the rule in Georgia is that the duty to show respect for the dead gives the surviving spouse or, if none, the next of kin a personal, "quasi-property" right, protected by the courts, to ensure a corpse's proper handling. Pollard v. Phelps, 193 S.E. 102, 106 (Ga. Ct. App. 1937); Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985). Thus, a decedent's surviving spouse, children, parents, and siblings, in that order, have priority to determine the time, manner and place of burial for their family members. Pollard, 193 S.E. at 106; Habersham Memorial Park, Inc. v. Moore, 297 S.E.2d 315, 318 (Ga. Ct. App. 1982).

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The existence of this right given to the next of kin does not settle matters, however. It may be trumped if an individual takes certain action during his or her lifetime. First, the quasi-property right will not arise where a testamentary disposition is provided. Pollard, 193 S.E. at 106. Where a decedent's will includes a statement regarding the disposition of his or her body at death, the executor has the duty to ensure that it be followed. Thus, to the extent a will includes preferences regarding disposition of a decedent's body, the executor's or administrator CTA's priority is ahead of the family's. See Northside Hospital, Inc. v. Ruotanen, 541 S.E.2d 66, 68 (Ga. Ct. App. 2000). However, using the will for giving instructions poses two problems: first, an individual's will might not be found or reviewed until after his or her burial, and second, the executor's power terminates after final disposition of the body. Thereafter, the next of kin has the right to control the remains. Welch v. Welch, 505 S.E.2d 470, 472 (Ga. 1998).

The temporary nature of the executor's power allows for strange results. For example, the Supreme Court of Georgia has held "if an executor has any duty or authority relating to burial or disposition of a body, that duty or authority terminates after initially discharging any such obligation in accordance with the testamentary direction. *Thereafter, disinterment and reburial may be sought by the surviving spouse, or by the next of kin in the absence of a surviving spouse, under the provisions of O.C.G.A. § 31-10-20(f).*" Id. (emphasis added) (disallowing a second disinterment and reburial). Thus, while the executor's power intervenes to prevent the next of kin's rights from vesting, it does so only temporarily. Although the burden is high for disinterment and reburial, requiring a determination of necessity or "laudable purposes," the very possibility of a decedent's stated preferences being avoided seems less than desirable.

The right of the next of kin may also be trumped if an individual designates an agent to have power over the disposition of his or her body at death. To the extent an instrument empowers an agent to direct the final disposition of the declarant's body, the decisions of the agent shall be deemed to be the decisions of the declarant. O.C.G.A. §§ 31-32-5(b), 31-32-8(4). Thus, if a health care power of attorney, advance directive for health care, or similar document designates an agent for decision-making about the disposition of the declarant's remains after death, that agent should have the power to make all decisions on such matters – whether he or she is buried or cremated, all funeral or memorial arrangements, how the headstone reads, what happens with the remains after cremation, etc. If an agent stands in the shoes of the declarant, the agent's power should trump the decision-making power of the next of kin as well as an executor or administrator CTA. However, it is suggested by the statement of facts in an intentional infliction of emotional distress case that the rights of an executor supersede the rights of agent. Northside Hospital, 541 S.E.2d at 68. These issues have not been specifically addressed by courts or statute to provide any level of certainty.

The lack of certainty about how the judicial opinions and legislative statutes work together when family members and fiduciaries cannot agree makes it difficult for planners working to ensure client's wishes are followed. Since no single approach is above challenge, if clients have strong

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opinions about these issues, it is essential that they execute documents that consistently and expressly state their instructions. Planners must then ensure that copies of such documents are distributed to and understood by family members, agents and fiduciaries, so that they are followed.