

“Who Can Dispose of Her Body”

Disposition of the Remains of a Decedent under Florida Law

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I. Jurisdiction and Choice of Law Issues.

A. What state has jurisdiction to make a determination regarding the disposition of the body?

1. The state where the remains are located has jurisdiction to make such a determination as it has in rem jurisdiction over the res (the remains). *See Resnick v. State*, 319 So. 2d 167 (Fla. 1st DCA 1975), in which the appellate court held that a trial court in the State of Florida had no jurisdiction to order the authorities of another state to exhume the remains of a decedent for purposes of examination during a murder trial.
2. The state where the remains are located has jurisdiction to make the determination even though the decedent was domiciled in a foreign state at the time of his death. *See Rosenblum v. New Mt. Sinai Cemetery Assn.*, 481 S.W.2d 594 (Mo. Ct. App. 1972), which provides that the jurisdiction in possession of the remains has a public policy interest in ensuring that the disposition of the dead body in their possession is properly carried out.

B. What jurisdiction’s laws apply if the decedent was not a resident/domiciled in the state in possession of the body?

1. For example, in the case of Anna Nicole Smith, she had lived in California for an extended period of time, then moved to the Bahamas and applied for residency in that country. While the application for residency was apparently granted, there have been issues raised as to whether she actually met the requirements for residency in the Bahamas. Her only connection to the State of Florida was that she was in Broward County for the purpose of purchasing a yacht when she unexpectedly died at the Seminole Hard Rock Hotel & Casino in Broward County, Florida.
2. Under these circumstances should the laws of the forum apply or should the laws of a foreign state where the decedent was domiciled at the time of his or her death? While this issue was extensively briefed by counsel for

Howard K. Stern, who contended that Bahamian law should apply, neither the order of the trial court nor the appellate decision address the choice of law issue but simply applied Florida law in reaching their decisions.

3. There is no case law in the State of Florida addressing choice of law issues for the disposition of the remains of a decedent who was not domiciled in Florida at the time of his or her death. The difficulty in analyzing the choice of law issue in these cases is that there is no established authority regarding conflicts of law for disposition of dead bodies and it does not really fit into any established conflicts of law category (i.e. - torts or contracts).
4. There is a case in Missouri which did address this exact issue and determined that the law of the forum should be applied rather than the law of the domicile of the decedent at the time of death. *See Rosenblum*, supra.
 - a. In *Rosenblum*, the Decedent was a long time resident of Illinois at the time of his death. Several months before his death, the Decedent had traveled to Missouri to attend the funeral of his sister-in-law. Rather than return to Illinois after the funeral, the Decedent stayed with his brother in Missouri until his death several months later. Upon his death, the Decedent's wife instituted an action to force the brother of the Decedent to return the body to the wife for burial in Illinois. The Decedent's brother refused to do so alleging that the Decedent had expressed a desire to be buried in the family plot in St Louis, Missouri, rather than in Illinois.

-Despite the arguments asserted by the surviving spouse that the law of Illinois (the Decedent's domicile) should apply in determining the disposition of the body, the Missouri court determined that the forum state had the greater interest and that Missouri law should control, ". . . . because of the paramount interest of the state in seeing that the burial of all dead persons within its boundaries is properly carried out by those within its jurisdiction who have that duty."¹ *Id.* at 594.

-Note - The *Rosenblum* case has been cited with approval several times by the Fifth District Court of Appeal although not for the choice of law issues. *See Andrews v. McGowan*, 739 So. 2d 132 (Fla. 5th DCA 1999) and *Millar v. Millar*, 704 So. 2d 212 (Fla. 5th DCA 1998).

¹ As will be examined later in this outline, the *Rosenblum* case is also significant in that the court held that oral expressions of a decedent as to his wishes regarding burial were competent evidence and should be considered by the court in making a determination as to the disposition of the remains of the decedent.

II. Disposition of the remains of a decedent and the preference given to the intent of the decedent.

A. The common law of the majority of the states:

1. The common law of the majority of states provides that the intent of the Decedent as to the disposition of his or her body should control absent public policy considerations to the contrary or should at least be given considerable weight in making the determination. But there are a minority of states that either do not take the Decedent's wishes into consideration or afford them little weight preferring to have the next of kin make the determination. Absent any expressed intent of the Decedent, the next of kin have been determined to have a "quasi-property right" in the remains for the limited purpose of disposition.
2. See 54 A.L.R. 3d 1037-1067 which discusses the enforcement of the expressed preferences of the decedent as to the disposition of his or her remains,

An examination of the cases discussed in this annotation reveals that it has always been extremely problematical whether a person's attempted oral or nontestamentary written disposition of his body will be enforced . . . For the most part, it has been recognized in cases collected herein that a decedent's expressed preference must be considered in the light of the surrounding circumstances and the wishes of interested parties . . . and the persons entitled to be heard by reason of association with, or relationship to the decedent, primarily his surviving spouse and next of kin. - The next of kin is entitled to the body unless it appears to the court that the decedent has expressed a desire that can be determined by competent evidence.

3. Also see 22A Am. Jur. 2d Dead Bodies §24 which provides,

In some jurisdictions the view is followed that a preference expressed by a decedent with regard to the disposition of his or her body should normally be given precedence over other interests . . . and that the expressed intention of the decedent as to disposition of his or her remains should be carried out if it can be ascertained unless a valid reason not to comply is established. However, there is also some authority for the view that the wishes of a decedent as to the disposition of his or her body . . . are not controlling, though they may deserve consideration under some circumstances.

4. Cases of importance from around the country.

- a. *Wales v. Wales*, 190 A. 109 (Del. 1936) – Delaware case which held that the intent of the Decedent is to be afforded great consideration and oral expressions are admissible to determine that intent.
- b. *Bruning v. Eckman Funeral Home*, 693 A.2d 164 (N.J. Super. Ct. App. 1997). New Jersey case which interprets a New Jersey statute regarding disposition of the remains of the deceased person which permits non-testamentary directions to be honored. Case also cites numerous cases from other districts which address the issue of disposition of remains.
- c. *Rosenblum v. New Mt. Sinai Cemetery Assn.*, 481S.W.2d 594 (Mo. Ct. App. 1972), Missouri court held that the expressed desires of a decedent, whether oral or in writing, are entitled to consideration and substantial weight in determining the proper disposition of the remains. The Missouri court also held that mental competence of the decedent at the time the statements are made is a factor to consider and such statements of intent may be disregarded if made at a time when the decedent's mental capacity was severely diminished.

B. Florida Statutory Law.

Florida law appears to place great weight on the intent of the Decedent but there are still unanswered questions and apparent contradictions in the case law and statutes.

1. Chapter 497, Florida Statutes – FUNERAL, CEMETARY, AND CONSUMER SERVICES. Addressed towards funeral homes and cemeteries and the regulation of those entities.

-Focus of Anna Nicole Smith litigation was F.S. § 497.005(37) which provides a definition of “Legally Authorized Person”,

‘Legally authorized person’ means, in the priority listed, the decedent, when written inter vivos authorizations and directions are provided by the decedent; the surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. [741.28](#) that resulted in or contributed to the death of the deceased; a son or daughter who is 18 years of age or older; a parent; a brother or sister who is 18 years of age or older; a grandchild who is 18 years of age or older; a grandparent; or any person in the next degree of kinship. In addition, the term may include, if no family member exists or is available, the guardian of the dead person at the time of death; the personal representative of the deceased; the attorney in fact of the dead person at the time of death; the health care surrogate of the dead person at the time of death; a public health officer; the medical

examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator; a representative of a nursing home or other person not listed in this subsection who is willing to assume the responsibility as the legally authorized person. Where there is a person in any priority class listed in this subsection, the funeral establishment shall rely upon the authorization of any one legally authorized person of that class if that person represents that she or he is not aware of any objection to the cremation of the deceased's human remains by others in the same class of person making the representation or of any person in a higher priority class.

-While F.S. § 497.005(37) provides a definition of “Legally Authorized Person”, the statute is only a definitional section and does not provide what acts “Legally Authorized Persons” can perform or what rights they have under Chapter 497 of the Florida Statutes.

-None of the other provisions in Chapter 497, Florida Statutes, address the issue of who has the right to control the place and manner of the disposition of a dead body if the matter is subject to a dispute. The only statutes in Chapter 497, Florida Statutes, which use the term “Legally Authorized Persons” are F.S. §§ 497.152, 497.171, 497.383, 497.384, 497.606 and 497.607 (F.S. §497.607 actually uses the term “legally authorized person” rather than “legally authorized persons”).² See *Arthur v. Milstein, et al.*, 32 Fla. L. Weekly D611 (Fla. 4th DCA February 28, 2007) which held that the intent of F.S. § 470.002(18) is to provide guidance to funeral home operators by delineating the priority of persons who are authorized to make funeral arrangements, but the statute does not control when there is dispute between private parties as to the disposition of a body. But see *Andrews v. McGowan*, 739 So.2d 132 (5th DCA 1999) holding that F.S. § 470.002(18), the predecessor to F.S. § 497.005(37), is not simply a regulatory statute for the protection of funeral home directors but actually creates a “priority of rights” regarding who has the legal authority to control the burial of a decedent.

2. Chapter 406, Florida Statutes – MEDICAL EXAMINERS; DISPOSITION OF DEAD BODIES. This statute is known as the “Medical Examiners Act”.

² It is interesting to note that F.S. § 497.002(2) contains a declaration of legislative intent which provides, “Subject to certain interests of society, the Legislature finds that every competent adult has the right to control the decisions relating to her or his own funeral arrangements.”

-F.S. § 406.50 – UNCLAIMED DEAD BODIES OR HUMAN REMAINS; DISPOSITION, PROCEDURE. Subsection (4) of the statutes provides, “In the event more than one legally authorized person claims a body for interment, the requests shall be prioritized in accordance with 732.103.”

-The flush language in F.S. 406.50 further provides, “For purposes of this chapter, the term “unclaimed” means a dead body or human remains that is not claimed by a legally authorized person, as defined in s. 497.005, for interment at that person’s expense.”

-This statute has the same deficiency as Chapter 497 in that it never explicitly states who has the right to control the place and manner of the disposition of a dead body if the matter is subject to a dispute. Also, there is no provision regarding consideration of the intent of a decedent in this regard.

-Query - Why should a different person be entitled to control the disposition of a dead body simply because it is being held by a funeral home vs. the medical examiner? Neither a funeral home nor the medical examiners office should have to consider the intent of the Decedent prior to turning a body over to the relatives, but clearly intent can be considered in Florida as detailed below in this outline.

-These statutes are intended to insulate the funeral home and medical examiners office from liability for releasing the remains to a third party.

3. F.S. § 732.804 – PROVISIONS RELATING TO THE DISPOSITION OF THE BODY. Before issuance of letters, any person may carry out written instructions of the decedent relating to the decedent’s body and funeral and burial arrangements.

-The statute does not explicitly state that a person must follow those instructions and does not provide whether those instructions are controlling if the matter of the burial of a decedent is brought before a court for resolution.

-Query - Does the exclusion of a reference to oral instructions by a decedent in the statute implicitly exclude oral statements of a decedent?

C. Florida case law.

1. Rights of the survivors of a decedent regarding the burial and disposition of the remains.

- a. *Dunahoo v. Bess*, 200 So. 541 (Fla. 1941) – “The right of the surviving spouse to have, protect and dispose of the remains of the other is a right recognized by law.”
 - b. *Crocker v. Pleasant*, 778 So. 2d 978 (Fla. 2001) at 987 - A body is not property and is not subject to being devised. At law, a body is quasi-property, “[W]e conclude in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition. We also find that referring to the interest as a ‘legitimate claim of entitlement’ most accurately describes the nature of the interest.”
 - c. *Knowles v. City of Key West*, 32 Fla. L. Weekly D204 (Fla. 3rd DCA Jan. 10, 2007) – “[I]n Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition These rights to a deceased’s remains, however, exist only for purposes of burial, or for other statutory purposes, and nothing further.”
2. Effect of the expressed intent of the Decedent regarding burial, and what forms of expression of intent are allowed as evidence in Florida.
- a. *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950) - The Supreme Court of Florida created a bright line rule regarding what types of evidence could be considered in ascertaining the intent of the decedent regarding burial,

It is well settled that, in the absence of testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition which they may see fit.³

-The Florida Supreme Court cites to the *Dunahoo* case as authority for this proposition, but the *Dunahoo* case never addressed the issue of the Decedent’s intent.

³ The validity of the *Kirksey* rule appears questionable after the enactment of F.S. § 732.804 in its present form in 2001 which indicates that any person may carry out written instructions of the decedent relating to the decedent’s body and funeral and burial arrangements. It is interesting to note that the appellate courts have continued to quote the *Kirksey* rule even after enactment of F.S. § 732.804. See *Cohen v. Guardianship of Cohen*, 896 So. 2d 950 (Fla. 4th DCA 2005) and *Arthur v. Milstein, et al*, 32 Fla. L. Weekly D611 (Fla. 4th DCA February 28, 2007).

- In *Kirksey*, a 5 year old boy died, an undertaker took possession of the body and unlawfully withheld the body from the mother. Intent of the Decedent regarding burial was not an issue in the *Kirksey* case and the rule cited above is dicta as it was not necessary to reach the result.

- b. This same language was re-quoted by the Florida Supreme Court in *Crocker v. Pleasant*, 778 So. 2d 978 (Fla. 2001), also as dicta. In *Crocker*, the court needed to find an entitlement under state law in order that a lawsuit for violation of procedural due process could be brought. The issue of the intent of a decedent regarding burial was not an issue in the case. See *Crocker* at 987.
- c. *Leadingham v. Wallace*, 691 So. 2d 1162 (Fla 5th DCA 1997) – In *Leadingham*, the Decedent left a suicide note directing that he be buried in Florida. The court appeared to honor that intent although the reasoning of the court is hard to follow.

-The court stated in a footnote after citing to *Kirksey*, “We know of no requirement that a deceased's undisputed wishes concerning the method of his disposal or the place of his burial must be in writing and formally witnessed in order to be honored.” This statement seems to contradict the rule as stated by the Florida Supreme Court in *Kirksey* and *Crocker*.

-The result in *Leadingham* is consistent with F.S. § 732.804 which provides that any person may carry out written instructions of the decedent.

-*Leadingham* was decided two years prior to the *McGowan* case (see below). *McGowan*, which is also a 5th DCA decision appears to be in conflict with *Leadingham*. Specifically, the *Leadingham* court indicated that the next of kin who would have priority to determine where to bury the body of the decedent would be the minor children of the decedent,

Mrs. *Leadingham* next argues that the court erred in not requiring that the wishes of the next-of-kin, Mr. *Leadingham*'s father, be followed. But his father was not Mr. *Leadingham*'s next-of-kin. His children were. Mrs. *Leadingham* seems to acknowledge this but argues that since they were too young to express an opinion, the 'adult' next-of-kin should make the decision. But again, the father is not the next-of-kin. If the children are too young, then a guardian could be appointed for them to act in their behalf.

- d. *Andrews v. McGowan*, 739 So. 2d 132 (5th DCA 1999) involved a dispute between a separated/estranged spouse and the decedent's adult lineal descendants as to whom would control the disposition of the ashes of the Decedent. The lineal descendants sued a funeral home for

releasing the remains to the decedent's estranged spouse without the consent of the lineal descendants. The descendants also brought an action against the funeral home which ultimately received possession of the remains for return of those remains. The court entered summary judgment in favor of the funeral homes finding that pursuant to F.S. § 470.002(18), which is the predecessor to F.S. § 497.005(37), the estranged spouse had the right to make the determination regarding burial of the decedent. The decedent's intent regarding burial was never interjected into the proceedings.

-The *McGowan* court found that F.S. § 470.002(18), is not simply a regulatory statute for the protection of funeral home directors but actually creates a "priority of rights" regarding who has the legal authority to control the burial of a decedent,

[A]ppellants argue that the statute [F.S. § 470.002(18)] is merely regulatory in nature, that if the legislature intended to create a priority of rights of burial, it would have done so in our probate code While there is some logic to this assertion, an equally if not more compelling case could be made that section 470.002(18) was designed as much to give guidance to funeral home operators by clearly delineating the priority of those persons who are legally authorized to make funeral arrangements for a deceased person Section 470.002(18) was designed to establish a priority of rights Under Florida statutory law, William McGowan, as lawful husband of the decedent, was the legally authorized person to direct the disposition of the decedent's remains.

-If F.S. § 497.005(37) in fact creates a "priority of rights" regarding the disposition of the remains of a decedent, then the *Leadingham* decision is in conflict with *McGowan*. F.S. § 497.005(37) clearly provides that only a child who is 18 years of age or older is a legally authorized person. If F.S. § 497.005(37) was applied to the *Leadingham* facts, the father would have been considered the next of kin rather than the minor children.

-While the intent of the decedent was not an issue in the case, if the *McGowan* court is correct, the result is that the intent of the Decedent may only be considered when, "[w]ritten inter vivos authorizations and directions are provided by the decedent." Oral declarations of the decedent would not be relevant. Furthermore, if this type of evidence regarding the intent of the Decedent is not present, the minor children of the Decedent (i.e. – a seventeen year old child) would have no input into the burial of their parent even if they are considered the next of kin under the Florida common law.

-The *McGowan* case stretches the application of F.S. § 497.005(37) beyond its plain language. It appears to be in conflict with the 4th DCA decision *Arthur v. Milstein, et al*, 32 Fla. L. Weekly D611 (Fla. 4th DCA February 28, 2007) as discussed below.

- e. *Cohen v. Guardianship of Cohen*, 896 So. 2d 950 (Fla 4th DCA 2005) involved an oral expression by a decedent as to burial which contradicted the instructions contained in the decedent's will. Specifically, there was a direction in the will that the decedent's body was to be buried in New York, the state in which he was residing at the time he executed the will. Subsequent to executing the will, the decedent moved to Florida where he resided for an extended period of time prior to his death. During his residency in Florida, he orally expressed on numerous occasions that it was his desire to be buried in Florida.

-*Cohen* clearly states that when the testator has expressed his intention in a will it should be honored. The case also holds that a testamentary provision need not be honored if it can be shown by clear and convincing evidence that the decedent intended another disposition of his or her body and that such evidence can be through oral communications,

We instead affirm the trial court's ruling, adopting the majority view that provisions in a will regarding burial instructions are not conclusive of a testator's intent, and the trial court may take evidence that the testator changed his or her mind regarding disposition of his body to hold otherwise could cause untoward results.

-The case does not address the issue of whether in the absence of any testamentary declaration the intentions of the decedent with regard to disposition of his or her body will be honored. The only case addressing a nontestamentary written direction in Florida is the *Leadingham* case.

-The issue which has still not been addressed by any Florida court is whether an oral declaration of the decedent is controlling where there is no written expression? The logic of the *Cohen* case would seem to support this conclusion but there is no language in the case which addresses this issue.

- f. *Arthur v. Milstein, et al*, 32 Fla. L. Weekly D611 (Fla. 4th DCA February 28, 2007) – Involved a dispute regarding where to bury Anna Nicole's remains between Vergie Arthur, the decedent's mother,

Howard K. Stern, the decedent's "companion"⁴ and the person designated as the personal representative under the decedent's will, and the minor child of the decedent, Dannielynn Hope Marshall Stern, through her Guardian Ad Litem, Richard Milstein, Esq.

-Vergie Arthur wanted the decedent buried in Texas where the decedent was raised as a child. Howard K. Stern wanted the decedent buried in the Bahamas where she was residing at the time of her death. The Guardian Ad Litem also reached the conclusion that the decedent should be buried in the Bahamas beside her predeceased son.

-Vergie Arthur relied on F.S. § 497.005(37) alleging that she was the "legally authorized person" as defined under that statute and had the sole right to determine the place of burial. She relied on the *McGowan* case for the proposition that that statute was not simply designed to regulate funeral homes but rather created a "priority of rights" in her as the legally authorized person to determine where the remains of her daughter should be buried. Mrs. Arthur indicated that the minor child of Anna Nicole Smith had no right to participate in the decision as only "a son or daughter who is 18 years of age or older" qualifies as a "legally authorized person" under the statute.

-Richard Milstein, the Guardian Ad Litem, relied on F.S. § 406.50 as he correctly pointed out to the court that the remains of the decedent were not located in a funeral home but rather at the medical examiner's office. He argued that both he, as the guardian ad litem, and Vergie Arthur qualified as legally authorized persons pursuant to F.S. § 497.005(37). F.S. § 406.50(4) provides that if there is more than one legally authorized person claiming the body, the requests shall be prioritized pursuant to F.S. § 732.103. Under the provisions of that statute, the minor child is given priority over a parent as the next of kin.

-Howard K. Stern relied on the expressed intent of the Decedent that she be buried in the Bahamas next to her predeceased son, Daniel. The evidence presented at trial was a combination of oral declarations of the decedent regarding her desires and two documents when read together could arguably form a written expression of intent. Specifically, a prepaid funeral contract was introduced in which two double plots were purchased in the Bahamas but the contracts were signed by Howard K. Stern and the documents listed him as the purchaser. Stern testified during trial that he purchased them on her behalf based on her specific directions. The other piece of evidence introduced during the trial was a

⁴ The word "companion" is used as there was conflicting testimony in the trial regarding the exact nature of the relationship between Anna Nicole Smith and Howard K. Stern.

letter signed by Anna Nicole Smith to her bank in the Bahamas directing that funds from her account be transferred to the funeral home to pay for the plots which were purchased by Howard K. Stern. These documents were not referenced in either the trial court's order or the appellate opinion as a basis for the rulings.⁵

-The trial court, citing to both common law and F.S. § 406.50, awarded custody and control of the remains of Anna Nicole Smith to the Guardian Ad Litem of Daneilynn Hope Marshall Stern with the direction that he act in the best interests of the minor child. Specifically, the trial court found that Danielynn Hope Marshall Stern was the next of kin entitled to possession of the remains.

-The 4th DCA invoked the "tipsy coachman doctrine" in affirming the trial court's order finding that the trial court reached the right result but for the wrong reason.

-Specifically, the 4th DCA held that neither F.S. § 497.005(37) nor F.S. § 406.50 controlled the outcome of the case and that common law was dispositive,

We find that neither section 497.005(37), nor section 406.50, control the outcome of this case, which in essence involves private parties engaged in a pre-burial dispute as to the decedent's remains. Otherwise stated, the trial court was not being asked to consider whether a funeral home or medical examiner was liable for its decision with respect to the disposition of a decedent's remains . . . In this case, common law is dispositive.⁶

⁵ In fact, the introduction portion of the trial court's Order contained the following statement, "Had Anna Nicole Smith's affairs been settled prior to her passing, for example, by her putting in writing how (and by whom) she wished her funeral to be conducted and her having a will that protected her daughter, and it is quite possible that the matters before this Court would never have been subject to litigation." Additionally, a footnote on p. 12 of the trial court's order states, "Of course, where a decedent has incorporated instructions into a will or taken similar steps to determine how his or her remains are to be handled, a different situation may arise. However, no such formal directions from Dannielynn's Mother have been presented in these proceedings."

⁶ This result is supported by language in *Matsumoto v. American Burial and Cremation Services*, 32 Fla. L. Weekly D36 (Fla. 2d DCA Dec. 20, 2006), in which the court held that F.S. § 497.005 does not impose a duty on the funeral homes to investigate whether they are releasing the body to the person with the highest priority under the statute, "The statute does not impose a due diligence requirement on funeral homes. Nor does it require

-The court factually distinguishes the *McGowan* case and concludes it is not applicable under the facts presented, but it appears that the cases are in conflict. As the 4th DCA did not certify a conflict and the *Arthur* decision was not appealed to the Florida Supreme Court we are left with the apparent conflict.

-The 4th DCA never specifically addressed the issue of whether oral expressions by the decedent as to the disposition of their remains without any accompanying writing controls over the contrary wishes of the next of kin. But the court did find that the decedent's wishes were dispositive in this case,

To the extent that sections 497.005(37) and 406.05(4) provide guidance, the priorities therein could set forth a presumption, rebuttable by clear and convincing evidence of the decedent's intent, as was the will in *Cohen*, and as found here Herein, the trial court found that 'Anna Nicole Smith's last ascertainable wish with respect to the disposition of her remains was that she be buried in the Bahamas next to her son Daniel Wayne Smith.' This finding is not essentially disputed. In light of the trial court's extensive findings and comments associated with Smith's intent, coupled with the Guardian Ad Litem's representation and commitment to a burial in the Bahamas, we conclude that there is no need to remand the case for further proceedings.

funeral homes to provide others with higher priority notice of a family member's death. We decline to impose such obligations on the funeral home.”

Select Year:

The 2006 Florida Statutes

Title XXXIII
REGULATION OF TRADE, COMMERCE,
INVESTMENTS, AND SOLICITATIONS

Chapter 497
FUNERAL, CEMETERY, AND
CONSUMER SERVICES

View Entire
Chapter

497.005 Definitions.--As used in this chapter:

- (1) "Alternative container" means an unfinished wood box or other nonmetal receptacle or enclosure, without ornamentation or a fixed interior lining, that is designed for the encasement of human remains and that is made of fiberboard, pressed wood, composition materials (with or without an outside covering), or like materials.
- (2) "At-need solicitation" means any uninvited contact by a licensee or her or his agent for the purpose of the sale of burial services or merchandise to the family or next of kin of a person after her or his death has occurred.
- (3) "Bank of belowground crypts" means any construction unit of belowground crypts that is acceptable to the department and that a cemetery uses to initiate its belowground crypt program or to add to existing belowground crypt structures.
- (4) "Belowground crypts" consist of interment space in preplaced chambers, either side by side or multiple depth, covered by earth and sod and known also as "lawn crypts," "westminsters," or "turf-top crypts."
- (5) "Board" means the Board of Funeral, Cemetery, and Consumer Services.
- (6) "Burial merchandise," "funeral merchandise," or "merchandise" means any personal property offered or sold by any person for use in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains or cremated remains, including, but not limited to, caskets, outer burial containers, alternative containers, cremation containers, cremation interment containers, urns, monuments, private mausoleums, flowers, benches, vases, acknowledgment cards, register books, memory folders, prayer cards, and clothing.
- (7) "Burial right" means the right to use a grave space, mausoleum, columbarium, ossuary, or scattering garden for the interment, entombment, inurnment, or other disposition of human remains or cremated remains.
- (8) "Burial service" or "service" means any service offered or provided in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains or cremated remains.
- (9) "Care and maintenance" means the perpetual process of keeping a cemetery and its lots, graves, grounds, landscaping, roads, paths, parking lots, fences, mausoleums, columbaria, vaults, crypts, utilities, and other improvements, structures, and embellishments in a well-cared-for and dignified condition, so that the cemetery does not become a nuisance or place of reproach and desolation in the community. As specified in the rules of the licensing authority, "care and maintenance" may include, but is not limited to, any or all of the following activities: mowing the grass at reasonable intervals; raking and cleaning the grave spaces and adjacent areas; pruning of shrubs and trees; suppression of weeds and exotic flora; and maintenance, upkeep, and repair of drains, water lines, roads, buildings, and other improvements. "Care and maintenance" may include, but is not limited to, reasonable overhead expenses necessary for such purposes, including maintenance of machinery, tools, and equipment used for such purposes. "Care and maintenance"

may also include repair or restoration of improvements necessary or desirable as a result of wear, deterioration, accident, damage, or destruction. "Care and maintenance" does not include expenses for the construction and development of new grave spaces or interment structures to be sold to the public.

(10) "Casket" means a rigid container that is designed for the encasement of human remains and that is usually constructed of wood or metal, ornamented, and lined with fabric.

(11) "Cemetery" means a place dedicated to and used or intended to be used for the permanent interment of human remains or cremated remains. A cemetery may contain land or earth interment; mausoleum, vault, or crypt interment; a columbarium, ossuary, scattering garden, or other structure or place used or intended to be used for the interment or disposition of cremated remains; or any combination of one or more of such structures or places.

(12) "Cemetery company" means any legal entity that owns or controls cemetery lands or property.

(13) "Centralized embalming facility" means a facility in which embalming takes place that operates independently of a funeral establishment licensee and that offers embalming services to funeral directors for a fee.

(14) "Cinerator" means a facility where dead human bodies are subjected to cremation.

(15) "Closed container" means any container in which cremated remains can be placed and closed in a manner so as to prevent leakage or spillage of the remains.

(16) "Columbarium" means a structure or building that is substantially exposed above the ground and that is intended to be used for the inurnment of cremated remains.

(17) "Common business enterprise" means a group of two or more business entities that share common ownership in excess of 50 percent.

(18) "Control" means the possession, directly or indirectly, through the ownership of voting shares, by contract, arrangement, understanding, relationship, or otherwise, of the power to direct or cause the direction of the management and policies of a person or entity. However, a person or entity shall not be deemed to have control if the person or entity holds voting shares, in good faith and not for the purpose of circumventing this definition, as an agent, bank, broker, nominee, custodian, or trustee for one or more beneficial owners who do not individually or as a group have control.

(19) "Cremated remains" means all the remains of the human body recovered after the completion of the cremation process, including processing or pulverization that leaves only bone fragments reduced to unidentifiable dimensions and may include the residue of any foreign matter, including casket material, bridgework, or eyeglasses that were cremated with the human remains.

(20) "Cremation" means any mechanical or thermal process whereby a dead human body is reduced to ashes and bone fragments. Cremation also includes any other mechanical or thermal process whereby human remains are pulverized, burned, re-cremated, or otherwise further reduced in size or quantity.

(21) "Cremation chamber" means the enclosed space within which the cremation process takes place. Cremation chambers covered by these procedures shall be used exclusively for the cremation of human remains.

(22) "Cremation container" means the casket or alternative container in which the human remains are transported to and placed in the cremation chamber for a cremation. A cremation container

should meet substantially all of the following standards:

- (a) Be composed of readily combustible materials suitable for cremation.
- (b) Be able to be closed in order to provide a complete covering for the human remains.
- (c) Be resistant to leakage or spillage.
- (d) Be rigid enough to be handled with ease.
- (e) Be able to provide protection for the health, safety, and personal integrity of crematory personnel.

(23) "Cremation interment container" means a rigid outer container that, subject to a cemetery's rules and regulations, is composed of concrete, steel, fiberglass, or some similar material in which an urn is placed prior to being interred in the ground and that is designed to support the earth above the urn.

(24) "Department" means the Department of Financial Services.

(25) "Direct disposal establishment" means a facility licensed under this chapter where a direct disposer practices direct disposition.

(26) "Direct disposer" means any person licensed under this chapter to practice direct disposition in this state.

(27) "Director" means the director of the Division of Funeral, Cemetery, and Consumer Services.

(28) "Disinterment" means removal of a dead human body from earth interment or aboveground interment.

(29) "Division" means the Division of Funeral, Cemetery, and Consumer Services within the Department of Financial Services.

(30) "Embalmer" means any person licensed under this chapter to practice embalming in this state.

(31) "Final disposition" means the final disposal of a dead human body by earth interment, aboveground interment, cremation, burial at sea, or delivery to a medical institution for lawful dissection if the medical institution assumes responsibility for disposal. "Final disposition" does not include the disposal or distribution of cremated remains and residue of cremated remains.

(32) "Funeral" or "funeral service" means the observances, services, or ceremonies held to commemorate the life of a specific deceased human being and at which the human remains are present.

(33) "Funeral director" means any person licensed under this chapter to practice funeral directing in this state.

(34) "Funeral establishment" means a facility licensed under this chapter where a funeral director or embalmer practices funeral directing or embalming.

(35) "Grave space" means a space of ground in a cemetery intended to be used for the interment in the ground of human remains.

(36) "Human remains" or "remains," or "dead human body" or "dead human bodies," means the body of a deceased human person for which a death certificate or fetal death certificate is required under chapter 382 and includes the body in any stage of decomposition.

(37) "Legally authorized person" means, in the priority listed, the decedent, when written inter vivos authorizations and directions are provided by the decedent; the surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased; a son or daughter who is 18 years of age or older; a parent; a brother or sister who is 18 years of age or older; a grandchild who is 18 years of age or older; a grandparent; or any person in the next degree of kinship. In addition, the term may include, if no family member exists or is available, the guardian of the dead person at the time of death; the personal representative of the deceased; the attorney in fact of the dead person at the time of death; the health surrogate of the dead person at the time of death; a public health officer; the medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator; a representative of a nursing home or other health care institution in charge of final disposition; or a friend or other person not listed in this subsection who is willing to assume the responsibility as the legally authorized person. Where there is a person in any priority class listed in this subsection, the funeral establishment shall rely upon the authorization of any one legally authorized person of that class if that person represents that she or he is not aware of any objection to the cremation of the deceased's human remains by others in the same class of the person making the representation or of any person in a higher priority class.

(38) "License" includes all authorizations required or issued under this chapter, except where expressly indicated otherwise, and shall be understood to include authorizations previously referred to as registrations or certificates of authority in chapters 470 and 497 as those chapters appeared in the 2004 edition of the Florida Statutes.

(39) "Licensee" means the person or entity holding any license or other authorization issued under this chapter, except where expressly indicated otherwise.

(40) "Mausoleum" means a structure or building that is substantially exposed above the ground and that is intended to be used for the entombment of human remains.

(41) "Mausoleum section" means any construction unit of a mausoleum that is acceptable to the department and that a cemetery uses to initiate its mausoleum program or to add to its existing mausoleum structures.

(42) "Monument" means any product used for identifying a grave site and cemetery memorials of all types, including monuments, markers, and vases.

(43) "Monument establishment" means a facility that operates independently of a cemetery or funeral establishment and that offers to sell monuments or monument services to the public for placement in a cemetery.

(44) "Net assets" means the amount by which the total assets of a licensee, excluding goodwill, franchises, customer lists, patents, trademarks, and receivables from or advances to officers, directors, employees, salespersons, and affiliated companies, exceed total liabilities of the licensee. For purposes of this definition, the term "total liabilities" does not include the capital stock, paid-in capital, or retained earnings of the licensee.

(45) "Net worth" means total assets minus total liabilities pursuant to generally accepted accounting principles.

(46) "Niche" means a compartment or cubicle for the memorialization or permanent placement of a container or urn containing cremated remains.

(47) "Ossuary" means a receptacle used for the communal placement of cremated remains without benefit of an urn or any other container in which cremated remains may be commingled with other cremated remains and are nonrecoverable. It may or may not include memorialization.

(48) "Outer burial container" means an enclosure into which a casket is placed and includes, but is not limited to, vaults made of concrete, steel, fiberglass, or copper; sectional concrete enclosures; crypts; and wooden enclosures.

(49) "Person," when used without qualification such as "natural" or "individual," includes both natural persons and legal entities.

(50) "Personal residence" means any residential building in which one temporarily or permanently maintains her or his abode, including, but not limited to, an apartment or a hotel, motel, nursing home, convalescent home, home for the aged, or a public or private institution.

(51) "Practice of direct disposition" means the cremation of human remains without preparation of the human remains by embalming and without any attendant services or rites such as funeral or graveside services or the making of arrangements for such final disposition.

(52) "Practice of embalming" means disinfecting or preserving or attempting to disinfect or preserve dead human bodies by replacing certain body fluids with preserving and disinfecting chemicals.

(53) "Practice of funeral directing" means the performance by a licensed funeral director of any of those functions authorized by s. 497.372.

(54) "Preneed contract" means any arrangement or method, of which the provider of funeral merchandise or services has actual knowledge, whereby any person agrees to furnish funeral merchandise or service in the future.

(55) "Preneed sales agent" means any person who is licensed under this chapter to sell preneed burial or funeral service and merchandise contracts or direct disposition contracts in this state.

(56) "Principal" means and includes the sole proprietor of a sole proprietorship; all partners of a partnership; all members of a limited liability company; regarding a corporation, all directors and officers, and all stockholders controlling more than 10 percent of the voting stock; and all other persons who can exercise control over the person or entity.

(57) "Processing" means the reduction of identifiable bone fragments after the completion of the cremation process to unidentifiable bone fragments by manual means.

(58) "Profession" and "occupation" are used interchangeably in this chapter. The use of the word "profession" in this chapter with respect to any activities regulated under this chapter shall not be deemed to mean that such activities are not occupations for other purposes in state or federal law.

(59) "Pulverization" means the reduction of identifiable bone fragments after the completion of the cremation and processing to granulated particles by manual or mechanical means.

(60) "Refrigeration facility" means a facility that is operated independently of a funeral establishment, crematory, or direct disposal establishment, that maintains space and equipment for the storage and refrigeration of dead human bodies, and that offers its service to funeral directors, funeral establishments, direct disposers, direct disposal establishments, or crematories for a fee.

(61) "Religious institution" means an organization formed primarily for religious purposes that has

qualified for exemption from federal income tax as an exempt organization under the provisions of s. 501(c)(3) of the Internal Revenue Code of 1986, as amended.

(62) "Removal service" means any service that operates independently of a funeral establishment or a direct disposal establishment, that handles the initial removal of dead human bodies, and that offers its service to funeral establishments and direct disposal establishments for a fee.

(63) "Rules" refers to rules adopted under this chapter unless expressly indicated to the contrary.

(64) "Scattering garden" means a location set aside, within a cemetery, that is used for the spreading or broadcasting of cremated remains that have been removed from their container and can be mixed with or placed on top of the soil or ground cover or buried in an underground receptacle on a commingled basis and that are nonrecoverable. It may or may not include memorialization.

(65) "Servicing agent" means any person acting as an independent contractor whose fiduciary responsibility is to assist both the trustee and licensee in administering their responsibilities pursuant to this chapter.

(66) "Solicitation" means any communication that directly or implicitly requests an immediate oral response from the recipient.

(67) "Statutory accounting" means generally accepted accounting principles, except as modified by this chapter.

(68) "Temporary container" means a receptacle for cremated remains usually made of cardboard, plastic, or similar material designated to hold the cremated remains until an urn or other permanent container is acquired.

(69) "Urn" means a receptacle designed to permanently encase cremated remains.

History.--s. 3, ch. 59-363; s. 1, ch. 65-288; ss. 12, 35, ch. 69-106; s. 210, ch. 71-377; ss. 1, 2, ch. 72-78; s. 3, ch. 76-168; s. 2, ch. 76-251; s. 1, ch. 77-457; ss. 4, 39, 40, ch. 80-238; ss. 2, 3, ch. 81-318; s. 3, ch. 85-16; s. 2, ch. 85-202; s. 1, ch. 89-8; ss. 40, 122, ch. 93-399; s. 3, ch. 96-400; s. 1142, ch. 97-103; s. 2, ch. 98-268; s. 2, ch. 2000-195; s. 2, ch. 2001-120; s. 550, ch. 2003-261; s. 6, ch. 2004-301; s. 2, ch. 2005-155.

Note.--Former s. 559.32.

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PART II

DISPOSITION OF DEAD BODIES

- 406.50 Unclaimed dead bodies or human remains; disposition, procedure.
- 406.51 Disposition of unclaimed deceased veterans; contract requirements.
- 406.52 Retention of bodies before use; unfit or excess number of bodies, disposition procedure.
- 406.53 Death of indigents; notice; delivery to the anatomical board when unclaimed; exceptions; assessment of fees.
- 406.54 Bodies may be claimed after delivery to anatomical board.
- 406.55 Contracts for delivery of body after death prohibited.
- 406.56 Acceptance of bodies under will.
- 406.57 Distribution of dead bodies.
- 406.58 Fees; authority to accept additional funds; annual audit.
- 406.59 Institutions receiving bodies.
- 406.60 Disposition of bodies after use.
- 406.61 Selling, buying, or conveying bodies outside state prohibited; exceptions, penalty.

406.50 Unclaimed dead bodies or human remains; disposition, procedure. --All public officers, agents, or employees of every county, city, village, town, or municipality and every person in charge of any prison, morgue, hospital, funeral parlor, or mortuary and all other persons coming into possession, charge, or control of any dead human body or remains which are unclaimed or which are required to be buried or cremated at public expense are hereby required to notify, immediately, the anatomical board, whenever any such body, bodies, or remains come into its possession, charge, or control. Notification of the anatomical board is not required if the death was caused by crushing injury, the deceased had a contagious disease, an autopsy was required to determine cause of death, the body was in a state of severe decomposition, or a family member objects to use of the body for medical education and research.

(1) The person or entity in charge or control of the dead body or human remains shall make a reasonable effort to determine:

(a) The identity of the deceased person and shall further make a reasonable effort to contact any relatives of such deceased person.

See (1)

(b) Whether or not the deceased person is entitled to burial in a national cemetery as a veteran of the armed forces and, if so, shall make arrangements for such burial services in accordance with the provisions of 38 C.F.R. For purposes of this subsection, "a reasonable effort" includes contacting the county veterans service office or regional office of the United States Department of Veterans Affairs.

(2) Such dead human bodies as described in this chapter shall be delivered to the anatomical board as soon as possible after death.

(3) Nothing herein shall affect the right of a medical examiner to hold such dead body or remains for the purpose of investigating the cause of death, nor shall this chapter affect the right of any court of competent jurisdiction to enter an order affecting the disposition of such body or remains.

(4) In the event more than one legally authorized person claims a body for interment, the requests shall be prioritized in accordance with s. 732.103.

For purposes of this chapter, the term "anatomical board" means the anatomical board of this state located at the University of Florida Health Science Center, and the term "unclaimed" means a dead body or human remains that is not claimed by a legally authorized person, as defined in s. 497.005, for interment at that person's expense.

History.--s. 6, ch. 28163, 1953; ss. 15, 35, ch. 69-106; s. 22, ch. 73-334; s. 1, ch. 91-168; s. 1, ch. 96-251; s. 1, ch. 2002-204; s. 141, ch. 2004-301.

Note.--Former s. 245.06.

406.51 Disposition of unclaimed deceased veterans; contract requirements.--Any contract by a local governmental entity for the disposal of unclaimed human remains must provide for compliance with s. 406.50(1) and require that the procedures in 38 C.F.R., relating to disposition of unclaimed deceased veterans, be followed.

History.--s. 2, ch. 2002-204; s. 43, ch. 2003-1.

406.52 Retention of bodies before use; unfit or excess number of bodies, disposition procedure.--All bodies received by the anatomical board shall be retained in receiving vaults for a period of not less than 48 hours before allowing their use for medical science; if at any time more bodies are made available to the anatomical board than can be used for medical science under its jurisdiction, or if a body shall be deemed by the anatomical board to be unfit for anatomical purposes, the anatomical board may notify, in writing, the county commissioners or other legally authorized person, as defined in s. 497.005, in the county where such person died, to cause it to be buried or cremated in accordance with the rules, laws and practices for disposing of such unclaimed bodies. However, prior to having any body buried or cremated, the county shall make a reasonable effort to determine the identity of the body and shall further make a reasonable effort to contact any relatives of the deceased person. If a relative of the deceased person is contacted and expresses a preference for either burial or cremation, the county shall make a reasonable effort to accommodate the request of the relative. For purposes of this section, the county commissioners of the county where

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| ESTATES AND TRUSTS | PROBATE CODE: INTTESTATE SUCCESSION AND WILLS | |

732.804 Provisions relating to disposition of the body.--Before issuance of letters, any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements. The fact that cremation occurred pursuant to a written direction signed by the decedent that the body be cremated is a complete defense to a cause of action against any person acting or relying on that direction.

History.--s. 1, ch. 74-106; s. 43, ch. 75-220; s. 971, ch. 97-102; s. 58, ch. 2001-226.

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IN THE CIRCUIT COURT IN AND FOR
BROWARD COUNTY, FLORIDA
PROBATE DIVISION

File Number: 07-00824 (61)

Division: Seidlin

IN RE:

VICKIE LYNN MARSHALL
a/k/a Anna Nicole Smith,

Deceased.

Filed In Open Court,
HOWARD C. FORMAN,
CLERK

ON 2/22/07
BY HR

(RESERVED FOR CLERK OF COURT)

**ORDER GRANTING DANNIELYNN HOPE MARSHALL STERN'S
MOTION TO RECOGNIZE HER SOLE RIGHT TO
DETERMINE THE DISPOSITION OF HER MOTHER'S REMAINS**

THIS CAUSE came before the Court commencing on February 15, 2007, on (i) the Emergency Verified Petition for Release of Remains for Burial filed by Howard K. Stern, (ii) Dannielynn Hope Marshall Stern's Motion to Recognize Her Sole Right to Determine the Disposition of Her Mother's Remains, and (iii) the Cross-Petition for Declaratory Judgment filed by Virgie Arthur. The Court conducted an extensive proceeding lasting several days on the matters raised in these filings, hearing argument from counsel, testimony from witnesses, and reviewing the exhibits and documents submitted. The Court has also reviewed the parties' other filings, and heard from counsel for Larry Birkhead, who asserts an interest in these proceedings through Case No. 07-001909, also pending in this Court.

I. INTRODUCTION

In *Cohen v. Guardianship of Cohen*, 896 So. 2d 950 (Fla. 4th DCA 2005), the Fourth District Court of Appeal provided valuable advice to trial courts faced with this type of dispute:

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 as these require the most sensitive exercise of the equitable powers of the trial courts.

Id. at 955. This Court is faced with a similarly sensitive conflict requiring a delicate resolution that attempts to recognize the concerns of the parties, while simultaneously protecting the rights implicated by this proceeding. Accordingly, based on the facts presented and the applicable law, the proper resolution of the issue before the Court is to award Dannielynn Hope Marshall Stern (“Dannielynn”) the custody and control of the remains of her mother, Vickie Lynn Marshall a/k/a Anna Nicole Smith (hereinafter, “Anna Nicole Smith”). Furthermore, in that Dannielynn is a minor, Dannielynn’s authority over the remains shall be exercised through Richard C. Milstein, Esq., of Akerman Senterfitt, as Guardian Ad Litem acting in the best interest of Dannielynn, to determine the disposition of her mother’s remains.

Recognizing the public nature of this dispute, it is the Court’s fervent hope that everyone reading this decision will take at least one message to heart: These proceedings are the poster child for why it is necessary for every individual—whether or not an international celebrity—to make proper arrangements to avoid litigation upon their demise. With proper planning by Anna Nicole Smith, much of the dispute before the Court would not exist, although it may well be that the disputants would still be fighting in some venue(s) over any or all of the issues raised. However, the Court must play the hand it has been dealt.

At the heart of the matter are two persons, one deceased and one just starting on life’s path. For the Court, protecting the dignity of the former is a significant concern; however, the rights and future of the child are paramount. Anna Nicole Smith lived a very public life and achieved her dreams of stardom, and then her life was tragically cut short not long after having given birth to her daughter, Dannielynn Hope Marshall Stern (“Dannielynn”), only days after her brother Daniel Wayne Smith passed away at the young age of twenty-one. The Court can only do

so much to protect the dignity and memory of Anna Nicole Smith, because many of the issues surrounding her affairs are beyond its purview and much of her private life is on public display; however, the Court can—and must—do everything within its power to protect the rights and interests of Dannielynn to the extent those rights and interests are within the jurisdiction of the Court.

In many ways, the Court's involvement is the result of a random fluke of a mysterious universe. Had Anna Nicole Smith not come to Florida in February 2007, her demise would have not involved the judiciary of this State. Had Anna Nicole Smith's affairs been settled prior to her passing by, for example, her putting in writing how (and by whom) she wished her funeral to be conducted and her having a will that protected her daughter, and it is quite possible that the matters before this Court would never have been subject to litigation. Had there not been the multitude of familial disputes involved with Anna Nicole Smith that has lead to litigation of issues arguably better resolved in private, no court—or, at least, not this Court—would have been required to be involved in disputes giving rise to the various actions that have been filed in United States and beyond. However, the dominos of the universe laid a path to this Court's door at this time, placing one of the many issues involved in Anna Nicole Smith's demise in this Court's lap. Accordingly, it is now the duty of the Court determine the sole issue before the Court: Who is entitled to the custody of the remains of Anna Nicole Smith?

The Court has been presented with three claimants to the remains. This action was initiated on February 14, 2007—a Valentine's Day present to no one, including to the filer—by Howard K. Stern ("Stern") through his Emergency Verified Petition for Release of Remains for Burial ("Stern's Emergency Petition"), which sought release of Anna Nicole Smith's remains from the custody and control of the Broward County Medical Examiner. Upon reviewing Stern's Emergency Petition and recognizing that the interests of Dannielynn were implicated by the

issues raised, the Court appointed Richard C. Milstein, Esq. ("Milstein"), of Akerman Senterfitt, as Dannielynn's Guardian Ad Litem on February 15, 2006, confirming that appointment by written order entered the following day. In response to the Stern's Emergency Petition, Virgie Arthur ("Arthur") filed a Motion to Dismiss Petition for Lack of Standing ("Arthur's Motion to Dismiss"). Arthur subsequently filed a Cross-Petition for Declaratory Relief ("Arthur's Cross-Petition") on February 21, 2007, in which she demanded that Anna Nicole Smith's remains be released to her. Finally, acting on behalf of Dannielynn, Milstein filed Dannielynn Hope Marshall Stern's Motion to Recognize Her Sole Right to Determine the Disposition of Her Mother's Remains ("Dannielynn's Motion").

These filings gave rise to six days of hearing, from February 15 to February 22, 2007. In addition to Stern, Arthur, and Milstein, the Court allowed Larry Birkhead ("Birkhead") and his counsel to participate, as Birkhead has some interest in the question before the Court and Birkhead's testimony is material to that issue. However, despite Birkhead's counsel's best efforts to inject the full panoply of the issues related to Dannielynn's paternity into these proceedings, this Court has no jurisdiction over those matters and they are not properly for this Court's adjudication, although the paternity question has some relevance to the question before the Court.

Because of the emergency circumstances, the Court has been forced to expedite the proceedings dramatically, limiting direct and cross-examination, allowing documents into evidence without requiring that the predicates be laid, and taking it upon itself to conduct some of the witness examination. These procedural shortcuts have been required, however, because the initiation of this litigation caused a delay in embalming of Anna Nicole Smith's body and that delay, as relayed to the Court and the litigants by the Broward County Medical Examiner on February 20, 2007, has lead to some potential deterioration of the body's condition. The litigants

are unanimous on few issues; however, they unanimously agree that Anna Nicole Smith's appearance was a paramount issue to her. Consequently, it was not possible for the rules applicable to a normal action to be followed. Indeed, all parties and the Court were equally handicapped by these procedural exigencies, a situation made more complicated by the repeated attempts by all parties to litigate certain issues beyond the purview of this Court (absent unanimous consent of the parties). However, despite the various winding paths down which the litigants have taken (and tried to take) the Court, the facts material to the issue before the Court have been presented fully, the proper issues addressed sufficiently, and the Court is more than adequately apprised of the relevant facts and applicable law required to reach a ruling.

II. FINDINGS OF FACT

Dannielynn was born on September 7, 2006, in Nassau, Bahamas. Although she had one living sibling at that time, Daniel Wayne Smith, Mr. Smith passed away three days later, on September 10, 2006, and was ultimately buried in the Bahamas. Accordingly, shortly after her birth, Dannielynn became her Mother's sole child and only heir, since her Mother had not legally married after being widowed.

On February 8, 2007, Dannielynn's Mother passed away in Broward County, Florida, while visiting Florida as a declared resident of the Bahamas. Since on or about that date, her remains have been held in the custody and control of the Broward County Medical Examiner.

Arthur

Arthur is Anna Nicole Smith's mother and Dannielynn's maternal grandmother.¹ Although Arthur's Motion to Dismiss asserts that she is the "next of kin of the decedent," *id.* at ¶ 2, she is not—Dannielynn is. Arthur seeks possession of the remains in order to have them

¹ Neither Dannielynn's father nor any other grandparent has made an appearance in these proceedings.

shipped to Texas for burial. In addition, Arthur testified that she plans to institute proceedings in the Bahamas to exhume Daniel Wayne Smith so that his remains can also be shipped to Texas for burial.

Anna Nicole Smith lived in Texas with Arthur or Arthur's sister until approximately seventeen years of age. At points during that period, Arthur testified that she and Anna Nicole Smith discussed where Anna Nicole Smith would be buried, with Arthur claiming that Anna Nicole Smith stated a desire to be buried in Texas. However, Arthur also testified that Anna Nicole Smith resided in California subsequent to leaving home, that Anna Nicole Smith had long expressed a desire to be like Marilyn Monroe and, in fact, to be buried next to her in California, and, most significantly, that Arthur had had little substantive contact with Anna Nicole Smith in the ten years prior to her death. Indeed, the Court notes that Arthur testified that she had not met Birkhead until shortly before Anna Nicole Smith died and that the evidence presented indicates that Anna Nicole Smith traveled to Texas on multiple occasions without visiting Arthur.

Arthur did not dispute that Stern and Anna Nicole Smith had a substantial and long standing relationship. In addition, Arthur testified that Stern's and Anna Nicole Smith's relationship commenced after Anna Nicole Smith had become distant from Anna Nicole Smith's Texas relatives, including Arthur.

Although the Court viewed a videotape of an interview of Anna Nicole Smith made shortly before her death in which Anna Nicole Smith discusses her relationship with her family, the Court disregards it. However, the testimony of Arthur, Stern, and Birkhead was fairly consistent to the effect that in the last ten years of her life, Arthur's relationship with Anna Nicole Smith was troubled and that they had significant disagreements. Moreover, Arthur herself testified that Daniel Wayne Smith did not visit her in Texas in the last few years of his life and that their contact was relatively infrequent.

Arthur, as does every litigant before the Court as discussed below, has evident vested interests in obtaining possession of her daughter's remains. The Court notes particularly that Arthur testified that she did not discuss with her sister-in-law the fact that her sister-in-law sold a videotape of Arthur's visit to Daniel Wayne Smith's grave in the Bahamas to a media outlet called Splash Media and also testified that she did not discuss the February 21, 2007, viewing of Anna Nicole Smith at the Broward County Medical Examiner's office with a Splash Media journalist, despite having traveled to the viewing in the journalists' vehicle.² In addition, the Court finds that Arthur's testimony to the effect that she had not received and had no anticipation of receiving remuneration arising from the death of Anna Nicole Smith or her subsequent burial to be less than credible.

Birkhead

As noted above, although not a party to this action, the Court allowed Birkhead to participate in these proceedings. Birkhead and Anna Nicole Smith had a substantial romantic relationship from roughly August 2004 to May 2006, one result of which, according to Birkhead, was Dannielynn. Although the paternity issue is not within the province of the Court, it not denied by Arthur or Stern that Birkhead and Anna Nicole Smith were romantically involved for a substantial period of time and that Birkhead is well qualified to address the question before the Court. Birkhead presently resides in California and testified that, in the event he is successful in his paternity action, he intends to take Dannielynn wherever his professional career takes him to be raised.

² Given the number of persons seated at Arthur's table in the courtroom, the Court finds it curious that it was necessary that a journalist's vehicle was required to take Arthur to the viewing. Indeed, the Court is troubled by the fact that Arthur chose to ride in that particular vehicle less than an hour after agreeing in a telephonic hearing with the Court that "all circumstances of and events relating to" that viewing were "strictly confidential" and that she was "not to discuss or disclose any of these circumstances and events with any person (including both individuals and legal entities)." See February 21, 2007, Order of Confidentiality at ¶¶ 1-2.

Consistent with Arthur's testimony, Birkhead testified that Anna Nicole Smith appeared to be distant from Arthur. Birkhead confirmed Anna Nicole Smith's interest in Marilyn Monroe, including her interest in being buried in the same cemetery in California where Marilyn Monroe is interred. Birkhead also testified that Stern and Anna Nicole Smith had a strong, long-term relationship, although Birkhead denied that the Stern's relationship with Anna Nicole Smith ever became intimate.

As did both Stern and Arthur, Birkhead testified that Anna Nicole Smith's relationship with her son Daniel was extremely close. Indeed, that is one issue on which Stern, Arthur, and Birkhead are extremely consistent: Anna Nicole Smith loved her son Daniel more than anyone else and he was the light of her life.

Like Arthur and Stern, Birkhead has vested interests in this proceeding. The Court notes that Birkhead is a professional photographer and that a substantial component of Birkhead's income arises from his status as the exclusive photographer of Anna Nicole Smith for a substantial period of time and that his photographs include both Anna Nicole Smith and Daniel Wayne Smith. Given the obvious media interest in these proceedings, it is undeniable that Birkhead's photographic repertoire appears likely to increase in value. In addition, Birkhead's and Stern's adversarial positions with respect to Dannielynn's paternity create an obvious personal interest for Birkhead; however, that disputes leads the Court to find Birkhead's positive comments about Stern (and vice versa) to be particularly credible.

The Court finds Birkhead's testimony generally credible. Indeed, on the question ultimately presented, the Court finds particularly credible Birkhead's testimony to the effect that while Birkhead would prefer that Anna Nicole Smith be buried in California, the fact that Daniel Wayne Smith is buried in the Bahamas presents a significant obstacle to this wish. Significantly, Birkhead did not testify that Texas was even in consideration as the proper resting place for

Anna Nicole Smith. Birkhead also testified that Anna Nicole Smith wanted to be buried next to Daniel.


Stern

Stern is the named ~~██████████~~ father on Dannielynn's birth certificate; however, Dannielynn's paternity is in dispute, with Birkhead and Stern litigating that issue in several venues. Stern bases his standing in this matter on the claim that he is the "nominated Executor" under the Mother's purported "Will of Vickie Lynn Marshall" ("Will"). See *id.* at ¶ 1.³ Stern presently resides in the Bahamas. Stern appeared before the Court voluntarily upon the Court's promise that he would be served with no other actions while in Florida; Stern has remained in Florida during these proceedings under Court order to remain until the proceedings are concluded. Stern seeks the remains for purposes of burial in the Bahamas next to the plot in which Daniel Wayne Smith is interred.

Stern testified that he and Anna Nicole Smith had a strong relationship of approximately ten years, which evolved from initially being a professional relationship to becoming a romantic one. Although Birkhead denied this, whether or not Stern and Anna Nicole Smith were romantically involved is not relevant; what is relevant is that each of Arthur, Birkhead, and Stern, testified that Stern had a strong, constant relationship with Anna Nicole Smith for the past decade.

Stern testified (without contradiction) that he and Anna Nicole Smith investigated possibly burying Daniel Wayne Smith in California and acquiring adjacent plots for Anna Nicole Smith; however, for logistical, expense, and other reasons, Anna Nicole Smith decided not to

³ Although much of the dispute was over the validity and provenance of this document, whether the Will can properly be probated is irrelevant to the issue before the Court and the Court takes no position on that question. The Will is most relevant for what it lacks: any discussion of where Anna Nicole Smith desired to be buried.

bury Daniel in California. The Court finds this testimony particularly significant, in that it establishes that Anna Nicole Smith's choice to bury Daniel in the Bahamas was not a snap decision made in the heat of the moment. Indeed, Stern's testimony of the effect on Anna Nicole Smith of Daniel's death makes the approximately one-month delay between Daniel's death and Daniel's burial a significant fact demonstrating a conscious choice by Anna Nicole Smith of where to bury her most-loved one.

Without significant dispute by any other witness, Stern testified that Anna Nicole Smith desired to be buried in the Bahamas next to her son Daniel. Similar to the testimony of Arthur and Birkhead, Stern testified to the effect that Daniel was the center of Anna Nicole Smith universe. Indeed, the Court particularly notes Stern's observation that, because Anna Nicole Smith had Daniel at such a young age (approximately nineteen), in many ways they grew up together. In one of the saddest comments of the trial, Stern testified that although Anna Nicole Smith died in February 2007, in many respects she died emotionally in September 2006, when Daniel died.

As with Arthur and Birkhead, Stern may have vested interests in Anna Nicole Smith remains. The Court notes that Anna Nicole Smith has been Stern's primary means of support for the past few years; however, the Court similarly notes that, in this day and age, the stereotype that "men go to work" and "women stay at home" should have been erased long ago. Stern testified that he presently lives in a house titled in Anna Nicole Smith' name in the Bahamas and that he currently has no income.

While the Court also finds Stern generally credible, on the sole question before the Court, Stern testified that Anna Nicole Smith bought four burial plots in the Bahamas with the specific intention of being buried in the one next to Daniel. On this particular issue, the Court finds Stern's testimony extremely credible.

Dannielynn

Dannielynn was born on September 7, 2006, in Nassau, Bahamas, to Anna Nicole Smith and has lived there since that date. Dannielynn is Anna Nicole Smith's sole heir. She is now five and a half months old. Accordingly, Milstein was appointed by the Court to represent and protect her rights and interests in this proceeding. Dannielynn's paternity is disputed; however, she is the next of kin of Anna Nicole Smith.

Anna Nicole Smith

Anna Nicole Smith, obviously, did not testify. However, much of the testimony was about her, her life, and her wishes. Most of that testimony was of questionable relevance to the issue before the Court; however, the participants were granted substantial leeway in developing their cases in the expedited and unusual circumstances presented by this litigation.

* * * * *

Based on the testimony presented and the Court's evaluation of the credibility of the witnesses, the Court finds the following facts with respect to Anna Nicole Smith to have been shown by clear and convincing evidence:

- Daniel Wayne Smith was the most important person in Anna Nicole Smith life.
- The choice of Daniel Wayne Smith's final resting place was the most significant choice Anna Nicole Smith made in the last months of her life.
- Anna Nicole Smith had planned to be buried next to her son Daniel Wayne Smith for many years before his death.
- Daniel Wayne Smith is buried in the Bahamas.
- Anna Nicole Smith's last ascertainable wish with respect to the disposition of her remains was that she be buried in the Bahamas next to her son Daniel Wayne Smith.

III. CONCLUSIONS OF LAW

A. As "Next Of Kin," Dannielynn Has the Right to Determine the Disposition of Anna Nicole Smith's Remains

Under Florida common law, Dannielynn is entitled to determine where her mother is to be buried.⁴ Although a purported Will has been submitted to the Court, the Will has no bearing on the question here. "Until admitted to probate in this state or in the state where the decedent was domiciled, the will shall be ineffective to prove title to, or the right to possession of, property of the testator." Fla.Stat. § 733.103 (emphasis added). Anna Nicole Smith Will has not been probated anywhere. Therefore, even if a decedent's remains could constitute part of the probate estate, Stern has no standing in this proceeding. Moreover, under Florida law, a decedent's remains are not part of her estate because "[the] rights to a deceased's remains . . . exist only for purposes of burial, or for other statutory purposes, and nothing further." *Key West v. Knowles*, No. 3D06-366, 2007 WL 57603, *2 (Fla. 3d DCA Jan. 10, 2007).

A decedent's child is the decedent's "next of kin." *See, e.g., Lowrimore v. First Sav. & Trust Co. of Tampa*, 140 So. 891, 893 (Fla. 1932) ("'[N]ext of kin' . . . is interpreted to mean those blood relations who under the law would, in the absence of a devise of the property, take it as heirs of the testator."). Under the common law, it has long been recognized by Florida courts that the next of kin is entitled to possession of the deceased's body and to determine the manner of disposition.

It is well settled that, in the absence of a testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition which they may see fit.

⁴ Of course, where a decedent has incorporated instructions into a will or taken similar steps to determine how his or her remains are to be handled, a different situation may arise. However, no such formal directions from Dannielynn's Mother have been presented in these proceedings.

Kirksey v. Jernigan, 45 So. 2d 188, 189 (Fla. 1950) (emphasis added). Thus, in addressing a claim by parents of an unconstitutional deprivation of rights in their son's remains, the Florida Supreme Court recently relied, *inter alia*, on *Kirksey* in concluding that "in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition." *Crocker v. Pleasant*, 778 So. 2d 978, 987-88 (Fla. 2001) (emphasis added) (citing *Kirksey*, 45 So. 2d at 189).⁵ See also *Key West*, 2007 WL 57603 at *2 (same) (quoting *Crocker*, 778 So. 2d at 988).

Just two years ago, the Fourth District Court of Appeal reaffirmed this principle in *Cohen*, in which that court addressed a ruling in a dispute between a decedent's wife and his siblings over the disposition of his remains. See 896 So. 2d at 951-52. The court's language could not be clearer:

In the absence of a testamentary disposition, the spouse of the deceased or the next of kin has the right to possession of the body for burial or other lawful disposition.

Id. at 953 (emphasis added) (citing *Kirksey*, 45 So. 2d at 189). Moreover, as noted above, the *Cohen* court's recognition of the delicate nature of the issue is particularly appropriate to the situation presented here. As in *Cohen*, this dispute calls for "the most sensitive exercise of the equitable powers of the trial courts." *Id.* at 955. However, unlike *Cohen*, there are no disputing siblings and there is no spouse; instead, there is only Dannielynn, who as "next of kin" has the sole claim to her Mother's remains.

⁵ In reaching this holding, the Court noted that "Florida law also contains a number of indicia . . . in statutes . . . that recognize the rights of next of kin in their dead relatives' remains." *Id.* at 987 (citing Fla.Stat. §§ 245.07, 732.912(3), 732.912(4) & 732.9185(1)(b)).

B. Florida's Statutory and Regulatory Scheme Governing the Disposition of Remains Gives Dannielynn, as "Next of Kin," the Right to Decide How Her Mother's Remains Are to Be Disposed.

Anna Nicole Smith's body is presently in the custody and control of the Broward County Medical Examiner, whose authority and duties are established by the Medical Examiners Act, Fla.Stat. § 406.01, *et seq.* As relevant to these proceedings, Part I creates the Medical Examiners Commission and provides for the adoption of rules to implement the provisions of Chapter 406. *See* Fla.Stat. §§ 406.02 & 406.04. Part II governs the disposition of bodies held by the State's medical examiners. *See* Fla.Stat. § 406.50, *et seq.* Under this statutory and regulatory scheme, as "next of kin," Dannielynn is entitled to determine the disposition of her Mother's remains.

1. The rules governing the Broward County Medical Examiner require notification to be provided to the Mother's "next of kin"—i.e., Dannielynn—when the remains are to be released.

Pursuant to the authorization in Fla.Stat. § 406.04, the Medical Examiner's Commission has adopted rules governing the State's Medical Examiners, which are located in Chapter 11G of the Florida Administrative Code. Relevant to the issue before the Court is Rule 11G-2.001(5), which provides:

If the medical examiner determines that jurisdiction for an investigation under Section 406.11(1)(a) or (b), F.S.,⁶ does exist, he shall . . . (f) promptly notify the next of kin, authorized funeral home, or other representative when the body can be released, provided the identification and location of the next of kin or representative is known.

(emphasis added). Thus, as "next of kin," Dannielynn is entitled, at minimum, to notification when her Mother's remains can be released.

⁶ Fla.Stat. § 406.11(1)(a) requires the medical examiner to investigate a death of a person, *inter alia*, "when in apparent good health" or "[i]n any suspicious or unusual circumstance."

2. The statutory framework addressing multiple claims to a decedent's remains require that they be provided to the Mother's "next of kin"—i.e., Dannielynn.

In this case, more than one person asserts an entitlement to the remains of Anna Nicole Smith. Accordingly, the Court's inquiry is guided by Fla.Stat. § 406.50(4), which states, in relevant part:

In the event more than one legally authorized person claims a body for interment, the requests shall be prioritized in accordance with s. 732.103.

(emphasis added). The definition of "legally authorized person" is found in Fla.Stat. § 497.005(37).⁷ In relevant part, that provision states:

"Legally authorized person" means, in the priority listed, the decedent, when written inter vivos authorizations and directions are provided by the decedent; the surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased; a son or daughter who is 18 years of age or older; a parent; a brother or sister who is 18 years of age or older; a grandchild who is 18 years of age or older; a grandparent; or any person in the next degree of kinship. In addition, the term may include, if no family member exists or is available, the guardian of the dead person at the time of death; the personal representative of the deceased; the attorney in fact of the dead person at the time of death; the health surrogate of the dead person at the time of death; a public health officer; the medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator; a representative of a nursing home or other health care institution in charge of final disposition; or a friend or other person not listed in this subsection who is willing to assume the responsibility as the legally authorized person. Where there is a person in any priority class listed in this subsection, the funeral establishment shall rely upon the authorization of any one legally authorized person of that class if that person represents that she or he is not aware of any objection to the cremation of the deceased's human remains by others in the same class of the person making the representation or of any person in a higher priority class.

⁷ Although the portion of § 406.50 defining "legally authorized person" defines that phrase with reference to unclaimed remains and not in the discussion of multiple claimants, "[w]hen a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless a contrary intent clearly appears." *Nicholson v. State*, 600 So. 2d 1101, 1103 (Fla. 1992). Therefore, as there is no indication of any contrary intent in § 406.50, "legally authorized person" must be read consistently throughout the statute as defined by § 497.005(37).

(emphasis added). In addition, Fla.Stat. § 497.005(49) states, “‘Person,’ when used without qualification such as ‘natural’ or ‘individual,’ includes both natural persons and legal entities.” Thus, Milstein, as the Guardian Ad Litem for Dannielynn appointed by this Court because of her minority, constitutes a “legally authorized person” under Fla.Stat. § 497.005(37).⁸

3. Only Dannielynn is entitled to the remains of Anna Nicole Smith.

At present, there are three putative recipients of Dannielynn’s Mother’s remains: (i) Stern, (ii) Arthur, and (iii) Dannielynn. Of the three, Dannielynn alone is entitled to control the disposition of the remains.

With respect to Stern, he falls into no category recognized by § 497.005(37). The Will has not been probated and Stern was not the Mother’s spouse; moreover, there is a “family member [who] exists or is available”—*i.e.*, Dannielynn. Therefore, Stern is not a “legally authorized person” under § 497.005(37).

With respect to Arthur, she qualifies as a “legally authorized person” under Fla.Stat. § 497.005, since she is a parent of Anna Nicole Smith. However, Dannielynn, whose interests are represented by Milstein as Guardian Ad Litem, is also a “legally authorized person.” Therefore, there is more than one “legally authorized person” before the Court. In these circumstances, Chapter 406 establishes that the requests to a medical examiner with respect to disposition of Dannielynn’s Mother’s remains “shall be prioritized in accordance with [Fla.Stat. §] 732.103.” Fla.Stat. § 406.50(4) (emphasis added). The first priority in § 732.103 is “the lineal descendants of the decedent”—*i.e.*, Dannielynn. Therefore, under the statutory and regulatory framework, Dannielynn alone is entitled to determine how her Mother’s remains are to be disposed.

⁸ It bears noting that the central purpose of Chapter 497 (and its predecessor chapter, Chapter 470), is for the protection of funeral homes. *See, e.g., Matsumoto v. American Burial and Cremation Servs., Inc.*, No. 2D06-1299, 2006 WL 3733310, *2 (Fla. 2d DCA Dec. 20, 2006) (each time the Legislature has amended Chapter 470, it “broaden[ed] the scope of priority upon which the funeral home can rely in relation to the disposition of remains”).

C. Florida Common Law and Florida Statutes Compel But One Conclusion: The Choice as to the Disposition of Her Mother's Remains Is to Be Made by Dannielynn.

As in *Cohen*, this Court must exercise its equitable powers sensitively in view of the competing demands with respect to the disposition of the remains of Anna Nicole Smith. In one corner of the boxing ring, you have Arthur, who wishes to have the remains transported to Texas; in another corner of the ring, you have Stern, who wishes to have the remains transported to the Bahamas to be buried next to Dannielynn's brother. In the third corner, although not one with standing on the question before the Court, you have Birkhead, who recognizes the paramount importance to Anna Nicole Smith of her being buried next to her son Daniel. Finally, in the fourth corner, you have Dannielynn, whose interests are championed by Milstein; she is her mother's only surviving child and immediate next of kin. Under these circumstances, particularly in view of the equities of the situation, in accordance with both Florida common law and Florida statutes, the choice of disposition is not Arthur's, not Stern's, and not Birkhead's. The winner of this boxing match must be Dannielynn; therefore, the choice of how to dispose of the remains of Anna Nicole Smith is held by Dannielynn.

IV. AS GUARDIAN AD LITEM, MILSTEIN IS AUTHORIZED TO EXERCISE DANNIELYNN'S CHOICE, GUIDED BY HER BEST INTEREST

Dannielynn is barely five months old, and obviously incapable of making any choice with respect to the remains of Anna Nicole Smith at this time. Recognizing the need for a representative to protect Dannielynn's interests in these proceedings, the Court has appointed Milstein as Dannielynn's Guardian Ad Litem. Under Florida law, a guardian ad litem is empowered to make a multitude of choices and take a multitude of actions on behalf of his ward; in this case, those powers authorize Milstein to exercise Dannielynn's choice with respect to disposition of the remains of Anna Nicole Smith, guided by the principle—applicable to all such decisions—that such exercise must reflect the best interests of Dannielynn.

Florida's statutes and rules governing guardians provide them with wide-ranging powers in order to enable them to fulfill their primary duty: protecting their wards' best interests. "A guardian ad litem shall have the powers, privileges, and responsibilities to the extent necessary to advance the best interest of the child . . ." Fla.Stat. § 61.403 (emphasis added). Similarly, the legislative intent underpinning the Florida Guardianship Law, Fla.Stat. § 744.101, *et seq.*, reflects this broad concern for persons lacking capacity to make their own decisions, whether suffering from incapacity through minority or for some other reason impeding a person's ability to protect her rights and dignity under the law:

Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that . . . assists such persons in . . . protecting their rights . . . This act shall be liberally construed to accomplish this purpose.

Fla.Stat. § 744.1012 (emphasis added). Like Fla.Stat. § 61.401, the Florida Guardianship Law also provides for the appointment of guardians ad litem: "'guardian ad litem' means a person who is appointed by . . . a court in which a particular legal matter is pending to represent a ward in that proceeding." Fla.Stat. § 744.102(10). Indeed, Fla.Stat. § 744.1075(4)(a) expressly provides for appointment of a guardian ad litem on an emergency basis "to protect the physical or mental health or safety or property of the ward." Similarly, Fla.Stat. § 744.3025, "Claims of minors," provides for appointment of a guardian ad litem "if the court believes a guardian ad litem is necessary to protect the interests of the minor." Finally, Fla.R.Civ.P. 1.210(b), "Infants or Incompetent Persons," provides that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action . . . for the protection of the infant or incompetent person" (emphasis added).

These broad authorizations to Florida's courts for the appointment of guardians ad litem and the broad powers granted to such guardians for acting on their wards' behalves strongly support the argument that, in this instance, Milstein may properly exercise Dannielynn's power

to determine the disposition of her the remains of Anna Nicole Smith, as guided by Dannielynn's best interest. Indeed, the Court should note that the Florida Supreme Court held in *Crocker* that the right of the next of kin to possession of a decedent's remains is a sufficiently substantial civil right that a claim under 42 U.S.C. § 1983—which creates a cause of action against state officials for “deprivation of any rights, privileges, or immunities secured by the [U.S.] Constitution and laws”—could arise for interference with this right. *See* 778 So. 2d at 987-89. Thus, Milstein is precisely within his authority in exercising Dannielynn's right to make the choice at issue here.

Finally, while there appears to be no Florida decision directly on point, *Leadingham v. Wallace*, 691 So. 2d 1162 (Fla. 5th DCA 1997), is instructive. In *Leadingham*, the ex-wife and ex-girlfriend of the decedent were contesting the disposition of his remains; both women had two children by the decedent. *Id.* at 1162. Although the dispute was over which woman was entitled to be appointed as curator of the estate, *see id.*, in resolving that dispute, the *Leadingham* court specifically addressed the issue before this Court:

Mrs. *Leadingham* next argues that the court erred in not requiring that the wishes of the next-of-kin, Mr. *Leadingham*'s father, be followed. But his father was not Mr. *Leadingham*'s next-of-kin. His children were. Mrs. *Leadingham* seems to acknowledge this but argues that since they were too young to express an opinion, the “adult” next-of-kin should make the decision. But again, the father is not the next-of-kin. If the children are too young, then a guardian could be appointed for them to act in their behalf. The problem with this, of course, is that the children again divide two by two. And no guardian was requested or even suggested below.

Id. at 1163 (emphasis added). Thus, *Leadingham* expressly recognizes that a guardian would be entitled to make the choice with respect to the disposition of a parent's remains on behalf of one too young to make it. Indeed, *Leadingham* recognizes that the choice is properly that of the “next-of-kin”—*i.e.*, here, Dannielynn—and no one else.

This Court is not hamstrung by the problem that the *Leadingham* trial court would have faced if it had appointed a guardian, because Dannielynn is the only living child of Anna Nicole

Smith.. Accordingly, where a guardian has been appointed and there is only one child—Dannielynn—whose best interest is to be considered, the Court concludes as a matter of law that Milstein, as Guardian Ad Litem, is empowered to make the choice on Dannielynn's behalf.

V. CONCLUSION

The Court and the participants in the matter before it have taken a long journey in a very compressed period of time. Although a host of matters have been touched on and a multitude of issues have been raised, there is only one issue before this Court to decide: Who is entitled to custody of the remains of Anna Nicole Smith? There can be only one proper and equitable answer to that question: Dannielynn, Anna Nicole Smith's only child, heir, and next of kin. Therefore, based on the Court's review and analysis of argument, testimony, and materials presented to it, the Court ORDERS and ADJUDGES as follows:

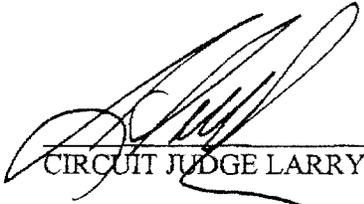
1. Dannielynn's Motion is GRANTED.
2. Stern's Verified Petition is DENIED.
3. Arthur's Motion to Dismiss is DENIED as MOOT.
4. Arthur's Cross-Petition is DENIED.
5. Richard C. Milstein, Esq., of Akerman Senterfitt, as Guardian ad Litem for

Dannielynn Hope Marshall Stern, is awarded custody of the remains of Anna Nicole Smith, and the Broward County Medical Examiner is ordered to release those remains to Milstein in accordance with Milstein's directives.

6. Milstein is directed to consult with Arthur, Birkhead, and Stern with respect to the disposition of Anna Nicole Smith's remains. However, the manner, means, and all aspects of handling of those remains from their release by the Broward County Medical Examiner to their final interment are within Milstein's sole and absolute discretion, guided as always by the best interest of Dannielynn Hope Marshall Stern.

7. Any other pending motions are denied as moot.
8. This case is CLOSED.

Feb 22, 2007



CIRCUIT JUDGE LARRY SEIDLIN

Copies to:
Counsel to the parties in Case No. 07-00824
Richard C. Milstein, Esq., Guardian ad Litem for Dannielynn Hope Marshall Stern
Courtesy copies to the parties in Case No. 07-001909

1 of 1 DOCUMENT

**VIRGIE ARTHUR, Appellant, v. RICHARD C. MILSTEIN, Guardian Ad Litem
for Dannielynn Hope Marshall Stern, and HOWARD K. STERN, Appellees.**

No. 4D07-715

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

2007 Fla. App. LEXIS 2842; 32 Fla. L. Weekly D 611

February 28, 2007, Decided

SUBSEQUENT HISTORY: Released for Publication February 28, 2007.

App. P. [*2] n1 We affirm the trial court's decision and address the second of the three points raised.

PRIOR HISTORY: [*1] Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Larry Seidlin, Judge; L.T. Case No. 07-00824(61).

n1 The parties in their filings and at oral argument stipulated to treatment of the case either as a certiorari proceeding or a final appeal. *See* § 9.040(c), *Fla. R. App. P.*

DISPOSITION: Affirmed.

COUNSEL: Roberta G. Mandel of Stephens, Lynn, Klein, Lacava, Hoffman & Puya, P.A., Miami, for appellant.

Christopher S. Carver and Richard C. Milstein of Akerman Senterfitt, Miami, for Appellee-Richard C. Milstein.

June Galkoski Hoffman of Fowler White Burnett P.A., Miami, for Appellee-Howard K. Stern.

JUDGES: STONE, POLEN AND SHAHOOD, JJ., concur.

OPINION: PER CURIAM.

Virgie Arthur, as natural mother and next of kin of the decedent, Vickie Lynn Marshall a/k/a Anna Nicole Smith, has filed an emergency petition for writ of certiorari. Through the petition, she asks this court to quash the trial court's February 22, 2007 order that granted Dannielynn Hope Marshall Stern's motion to recognize her sole right to determine the disposition of Smith's remains and the related ruling directing that the Guardian Ad Litem direct all aspects with respect to the handling of those remains consistent with the best interest of that child. We re-designate the case as an appeal from a final order and have expedited relief accordingly. § 9.110(a)(2), *Fla. R.*

The trial court found that Arthur and the Guardian Ad Litem, on behalf of the child, both qualified as a "legally authorized person" as that term is defined in *Florida Statute section 497.005(37)*. In finding that both were legally authorized, *Florida Statute section 406.50(4)* directs that priority to the remains pass in accordance with *section 732.103* of the probate code. Under *section 732.103*, the lineal descendants of the decedent have priority.

Arthur argues that she, alone, is the "legally authorized person" to take possession of the remains, and the trial court erred in finding that the Guardian Ad Litem is an additional "legally authorized [*3] person." The phrase "legally authorized person" is found in *Florida Statute section 497.005(37)* (2006), which provides:

(37) "Legally authorized person" means, in the priority listed, the decedent, when written inter vivos authorizations and directions are provided by the decedent; the surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased; a son or daughter who is 18 years of age or older; a parent; a brother or sister who is 18 years of age or older; a grandchild who

is 18 years of age or older; a grandparent; or any person in the next degree of kinship. In addition, the term may include, if no family member exists or is available, the guardian of the dead person at the time of death; the personal representative of the deceased; the attorney in fact of the dead person at the time of death; Where there is a person in any priority class listed in this subsection, the funeral establishment shall rely upon the authorization of any one legally authorized person of that class if that person represents [*4] that she or he is not aware of any objection to the cremation of the deceased's human remains by others in the same class of the person making the representation or of any person in a higher priority class.

In the event more than one legally authorized person claims a body in the custody of the medical examiner for interment, *section 406.50(4)* provides that the requests shall be prioritized in accordance with *section 732.103*. *Florida Statute section 732.103* of the Florida Probate Code provides that the part of the intestate estate not passing to the surviving spouse under *section 732.102*, or the entire intestate estate if there is no surviving spouse, descends first to the lineal descendants of the decedent, and if there is no lineal descendant, to the decedent's father and mother equally, or to the survivor of them.

The trial court relied upon *section 406.50(4)* to determine that Dannielynn had priority over Arthur. Arthur's position is that dependence on *section 406.50(4)* was error in this case as she is the sole "legally authorized person" as contemplated by *section 497.005(37)*, and as such, she is entitled to make decisions regarding the disposition [*5] of the decedent's remains.

We find that neither *section 497.005(37)*, nor *section 406.50*, control the outcome of this case, which in essence involves private parties engaged in a pre-burial dispute as to the decedent's remains. Otherwise stated, the trial court was not being asked to consider whether a funeral home or medical examiner was liable for its decision with respect to the disposition of a decedent's remains. Compare *Matsumoto v. American Burial and Cremation Services*, 2006 Fla. App. LEXIS 21210, 32 Fla. L. Weekly D26 (Fla. 2d DCA Dec. 20, 2006) (addressing daughter's suit against funeral home and recognizing that *section 497.005* does not impose a due diligence requirement on the funeral home and that the applicable statutes dictate the funeral home's duties); *Andrews v. McGowan*, 739 So. 2d 132 (Fla. 5th DCA 1999) (lineal descendant sued funeral homes after one home released the decedent's remains to another without the

personal representative's authorization); *Jackson v. Rupp*, 228 So. 2d 916 (Fla. 4th DCA 1969) (next of kin sued medical examiner). See also *McRae v. Booth*, 938 So. 2d 432 (Ala. Civ. App. 2006). [*6] Collectively, those cases indicate that the intent of those statutes is to guide the funeral home operators by clearly delineating the priority of those persons who are legally authorized to make funeral arrangements for a deceased person. See also § 497.002(2), Fla. Stat. (2006) (noting the purpose and intent of Chapter 497 expressly provides that subject to certain interests in society, "the Legislature finds that every competent adult has the right to control the decisions relating to his or her own funeral arrangements.").

In this case, common law is dispositive. *Kirksey v. Jernigan*, 45 So. 2d 188, 189 (Fla. 1950); *Cohen v. Guardianship of Cohen*, 896 So. 2d 950 (Fla. 4th DCA 2005); *Leadingham v. Wallace*, 691 So. 2d 1162 (Fla. 5th DCA 1997). Generally, in the absence of a testamentary disposition, the spouse of the deceased or the next of kin has the right to the possession of the body for burial or other lawful disposition. *Kirksey*. In *Cohen*, we held that a written testamentary disposition is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that [*7] he intended another disposition for his body. *Cohen* looked to decisions of other states which determined that whether to enforce the will provisions regarding disposition of the testator's body depends upon the circumstances of the case.

Having recognized certain property rights in dead bodies, many courts have announced the rule that a person has the right to dispose of his own body by will. However, courts, while paying lip service to the doctrine of testamentary disposal, have in certain instances permitted the wishes of the decedent's spouse or next of kin to prevail over those of the testator. In other instances, courts have accepted and acted upon evidence that indicated that the decedent's wishes concerning the disposition of his body had changed since the execution of his will.

Id. at 953 (quoting B.C. Ricketts, Annotation, Validity and Effect of Testamentary Direction as to Disposition of Testator's Body, 7 A.L.R.3d 747 § 1[b] (1966)).

Cohen noted that there were "no cases in Florida or across the country in which a testamentary disposition has been upheld even though credible evidence has been introduced to show that the testator [*8] changed his or her mind as to the disposition of his/her body." 896 So.

2d at 954. There, we found no abuse of discretion associated with the trial court's finding of the decedent's intent. See also *Leadingham*. We note that even under section 497.005(37), the first priority is to the wishes of the decedent "when written inter vivos authorizations and directions are provided" and that the remaining list of legally authorized persons are those who are most likely to know and follow those wishes. To the extent sections 497.005(37) and 406.05(4) provide guidance, the priorities therein could set forth a presumption, rebuttable by clear and convincing evidence of the decedent's intent, as was the will in *Cohen*, and as found here.

The "tipsy coachman" doctrine, allows an appellate court to affirm a trial court that "reaches the right result, but for the wrong reasons" so long as "there is any basis which would support the judgment in the record." *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002)(citing *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999)), which cited

Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). [*9]

Herein, the trial court found that "Anna Nicole Smith's last ascertainable wish with respect to the disposition of her remains was that she be buried in the Bahamas next to her son Daniel Wayne Smith." This finding is not essentially disputed. In light of the trial court's extensive findings and comments associated with Smith's intent, coupled with the Guardian Ad Litem's representation and commitment to a burial in the Bahamas, we conclude that there is no need to remand the case for further proceedings.

Affirmed.

No rehearing will be entertained and the Clerk of the Court is directed to issue the mandate forthwith.

STONE, POLEN AND SHAHOOD, JJ., concur.