

**SIMON**  
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Presenter: Ortavia D. Simon, Esq.

# Blueprint of Presentation

- Relevance
- Fla. Stat. 497.005(39) Defined
- Case Law
- Application
- Contact

# Objective

- Upon conclusion of this presentation, participants should gain:
  - An introduction to Fla. Stat. 497.005(39)
  - Knowledge of the statute and its location in determining legally authorized persons
  - An understanding of how the statute is defined
  - An in depth understanding of the priority of a legally authorized person
  - A breakdown of the requirements for each category of person eligible to be a legally authorized person pursuant to the statute
  - A thorough understanding of how the statute directly correlates to all methods of disposition
  - The ability to identify legally authorized persons in real time after seeing the application of 497.005(39) in past situations
  - An ability to assess and correctly identify legally authorized persons

# General Rule

- 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. See *Kirksey v. Jernigan*, 45 So.2d 188, 189 (Fla.1950)

## NOTE:

The following list of “legally authorized person” as defined by the Florida Statutes are listed in order of priority. Members licensed by the Board of Funeral Directors should start with one and proceed down only if no one meets the criteria as defined per the statute.

# Florida Statute 497.005(39)

Legally authorized persons are:

1. Decedent
2. Individual + Designated + Authorized by Decedent who served as a member of the Armed Forces
3. Surviving Spouse
4. Children
5. Parent
6. Sibling
7. Grandchild
8. Grandparent
9. 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."*

# Fla. Stat. 497.005(39)(a)

- The decedent, when written *inter vivos* (while alive) authorizations and directions are provided by the decedent (**Standard is clear and convincing evidence**)
  - *Simply put you need: written instructions made by the decedent while ALIVE*
  - If NO writing exists, proceed to the next person on the list

# Fla. Stat. 497.005(39)(b)

- The person designated by the decedent as authorized to direct disposition pursuant to Pub. L. No. 109-163, s. 564, as listed on the decedent's United States Department of Defense Record of Emergency Data, DD Form 93, or its successor form, if the decedent died while serving military service as described in 10 U.S.C. s. 1481(a)(1)-(8) in any branch of the United States Armed Forces, United States Reserve Forces, or National Guard
  - *If the decedent was not actively serving at the time of death, this provision is not applicable and you may proceed to the next legally authorized person listed in the statute.*
  - If you are unsure of service, do your due diligence by asking relatives, friends, or doing a basic internet search.

# Fla. Stat. 497.005(39)(c)

- 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
  - 741.28(2) Domestic Violence = assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death...
  - *Simply put: Spouse is alive AND he/she did NOT cause the death of decedent*
  - If there is NO surviving spouse OR the surviving spouse caused the death of the decedent, proceed next on the list

# Fla. Stat. 497.005(39)(d)

- A son or daughter who is 18 years of age or older
  - Son or daughter needs to be by birth or by legal adoption
  - If no children exist, proceed to the next person authorized

# Fla. Stat. 497.005(39)(e)

- A parent
  - Birth mother **or** legally adoptive mother of decedent **or**
  - Birth father or legally adoptive father of decedent

# Fla. Stat. 497.005(39)(f)

- A brother or sister who is 18 years of age or older
  - Brother or sister from mother by birth or legal adoption
  - Brother or sister from father by birth or legal adoption
  - *Step brothers and step sisters do not apply here*

# Fla. Stat. 497.005(39)(g)

- A grandchild who is 18 years of age or older
  - Grandchild must be the birth or legally adopted son/daughter of decedents' son/daughter

# Fla. Stat. 497.005(39)(h)

- Grandparent
  - Grandparent must be by direct bloodline or by legal adoption

# Fla. Stat. 497.005(39)(i)

- Any person in the next degree of kinship.

# As a Last Resort:

If no family member exists OR if no family member is available:

1. The guardian of the dead person at the time of death
2. The personal representative of the deceased
3. The attorney in fact of the dead person at the time of death
4. The health surrogate of the dead person at the time of death
5. A public health officer
6. The medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator
7. A representative of a nursing home or other health care institution in charge of final disposition
8. A friend or other person not listed in this subsection who is willing to assume the responsibility as the legally authorized person.

# NOTE:

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 *all methods of final disposition* 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.

949 So.2d 1163  
District Court of Appeal of Florida,  
Fourth District.

Virgie ARTHUR, Appellant,  
v.  
Richard C. MILSTEIN, **Guardian** Ad  
Litem for Dannielynn Hope Marshall  
Stern, and Howard K. Stern, Appellees.

No. 4D07-715. | Feb. 28, 2007.

**Synopsis**

**Background:** Proceeding was brought to determine entitlement to dispose of decedent's body. The Seventeenth Judicial Circuit Court, Broward County, [Larry Seidlin, J.](#), entered order granting decedent's infant daughter the sole right to determine disposition of the body, and directing daughter's **guardian** ad litem to make the arrangements consistent with daughter's best interests. Decedent's mother filed emergency petition for writ of certiorari, which was treated as an appeal from a final order.

**[Holding:]** The District Court of Appeal held that **guardian** ad litem would be permitted to determine the disposition of decedent's body.

**Affirmed.**

**Attorneys and Law Firms**

\*1164 [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.

**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.App. P. <sup>1</sup> We affirm the trial court's decision and address the second of the three points raised.

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 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 \*1165 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 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 Darvvielynn 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 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, 949 So.2d 1054,

2006 WL 3733310 (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). 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 \*1166 decisions relating to his or her own funeral arrangements.").

[1] [2] 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 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 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 [406.50\(4\)](#) 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.

[3] 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).

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.*

\*1167 No rehearing will be entertained and the Clerk of the Court is directed to issue the mandate forthwith.

[STONE](#), [POLEN](#) and [SHAHOOD](#), JJ., concur.

All Citations

949 So.2d 1163, 32 Fla. L. Weekly D611

# Summary of Arthur v. Millstein

*In the case of Arthur v. Milstein, 949 So. 2d 1163 (Fla. Dist. Ct. App. 2007), Arthur as natural mother and next of kin of the decedent, Anna Nicole Smith, and Howard K. Stern as the person named Personal Representative in her Last Will and Testament, could not agree on where Anna Nicole should be buried. Another individual in this controversy was Richard Milstein, who had been appointed by the court as the guardian ad litem of Dannielynn Hope Marshall Stern, the daughter and minor child of the decedent. He spoke on behalf of Anna Nicole's daughter. As her mother, Vergie argued that she had the decision-making power because of Florida Statute 497.005(37). Mr. Milstein, on behalf of Anna Nicole's only living child, argued that he had the right to make the decision based upon Florida Statute 406.50 because the body had been kept at the Medical Examiner's Office and the Medical Examiner's Act therefore controlled.*

The Court found 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.

# *Arthur v. Millstein takeaways*

- The individual who gets PRIORITY as a legally authorized person is the decedent IF the decedent expressed his wishes in writing while alive.
- The remaining persons who qualify as a legally authorized person are individuals who most likely knew the decedent in the courts best efforts to getting to as close to the decedent's wishes as possible.
- The "priority list" in the statute can be disputed. In the event the legally authorized person is questioned concerning their knowledge or ability to make the decisions that the decedent would have wanted, the court will use a clear and convincing standard to determine the decedent's intent.
- The ultimate goal in selecting a legally authorized person is to honor the wishes of the decedent of how the decedent would have wanted their body disposed of.

739 So.2d 132  
District Court of Appeal of Florida,  
Fifth District.

Deborah M. ANDREWS, John S.  
Andrews, Etc., et al., Appellants,

v.

William T. McGOWAN, David  
K. McGowan, et al., Appellees.

No. 98-2883. | July 16, 1999. |  
Rehearing and Certification Denied Aug. 18, 1999.

Decedent's lineal descendants sued funeral homes after one home released decedent's remains to the other without personal representative's authorization, alleging tortious interference with lawful rights of burial, conversion, intentional infliction of emotional distress, civil conspiracy, fraud and deceit, and negligence. The Circuit Court, Orange County, [Richard F. Conrad, J.](#), granted funeral homes' motions for summary judgment. Descendants appealed. The District Court of Appeal, [Cobb, J.](#), held that surviving spouse who had been judicially separated retained rights of burial and disposition of decedent's remains.

Affirmed.

Attorneys and Law Firms

\*133 Christopher W. Boyden, North Palm Beach and Jack W. Shaw, Jr. of Shaw Stedman, P.A., Orlando, for Appellants.

[Jamie Billoette Moses](#) and [Reinald Werrenrath III](#) of Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, P.A., Orlando, for Appellee Levitt Weinstein Memorial Chapels, Inc.

[Christopher C. Skambis](#) and [Brian J. Moran](#) of Moran & Shams, P.A., Orlando, for Appellee Woodlawn Memorial Park, Inc.

No Appearance for Appellees McGowan.

Opinion

[COBB, J.](#)

The issue presented by this appeal is whether, under Florida law, a surviving spouse who has been judicially separated by a final judgment of separate maintenance nevertheless retains the rights of burial and disposition of the remains of a deceased spouse. The trial court answered in the affirmative, granting motions for summary judgment filed by Levitt Weinstein Memorial Chapels, Inc. (Levitt Weinstein) and Woodlawn Memorial Park, Inc. (Woodlawn), the appellees herein. <sup>1</sup>

The appellants, with the exception of Deborah Andrew's husband, John Andrews, are all lineal descendants of the decedent, Evelyn McGowan, who died on July 12, 1996 as a domiciliary of Orange County, Florida. Evelyn and her husband, William T. McGowan, separated in 1993 after 40 years of marriage and never cohabited again. Evelyn resided in Orange County and William in Broward County. A final judgment of separate maintenance was entered by the Orange County Circuit Court in 1993. The final judgment ordered William to maintain existing health insurance coverage for Evelyn. William was also ordered to pay Evelyn monthly support.

In July 1993, Evelyn executed a will nominating her daughter, Deborah Andrews, as personal representative. No provision was made for her husband, nor for the disposition of her remains. On July 12, 1996, Deborah notified her father \*134 by telephone of Evelyn's passing. Deborah further notified him that Woodlawn was handling funeral arrangements and that Woodlawn requested a written authorization from William for cremation since no final judgment of dissolution of marriage had been entered. William indicated he would cooperate. Deborah signed a contract with Woodlawn for cremation and Woodlawn took custody of Evelyn's body.

Later that day, David McGowan, Deborah's brother, contacted Deborah and demanded that he and his father, William, have a private viewing or "she would be sorry." Deborah advised that there would be no private viewing. William McGowan thereafter made arrangements through Levitt Weinstein to pick up Evelyn's body from Woodlawn for funeral and cremation services in South Florida. Pursuant to William's written authorization, Levitt Weinstein took possession of the decedent's body on July 13, 1996. Woodlawn released the body without obtaining Deborah's authorization. On July 15, 1996, a funeral service and viewing

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 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 Darvuielyrn 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 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, 949 So.2d 1054,

2006 WL 3733310 (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). 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 \*1166 decisions relating to his or her own funeral arrangements.").

[1] [2] 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); Leedingham 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 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

Woodlawn argues that this subsection creates a priority of rights regime for disposition of human remains (which is consistent with the Florida case law previously set out) and that Evelyn's remains were accordingly subject to disposition by her surviving spouse. Appellants challenge the application of the statute, arguing initially that its applicability was not timely raised but that, even if it was, the statute is simply part of the regulatory scheme for funeral homes and in no way was intended to decide, among survivors, the legal right to dispose of the remains of another.

[2] [3] The initial contention of the appellants lacks merit. It is predicated upon the fact that when Judge Sprinkel granted the initial motion to dismiss, he found that "Florida does not have a statute that governs the right to dispose of a decedent's body" and found out-of-state case law "persuasive authority for the premise that a surviving spouse who is separated from the decedent at the time of the decedent's death does not have the spousal right to possession of the decedent's remains." Judge Conrad, however, found [section 470.002\(18\)](#) controlling and appellants argue this violates concepts of law of the case and res judicata. Such concepts, however, apply only to final adjudications. See [Albrecht v. State](#), 444 So.2d 8 (Fla.1984). Interlocutory rulings are subject to reconsideration by the trial court prior to entry of a final order in the cause. [Bettez v. City of Miami](#), 510 So.2d 1242 (Fla. 3d DCA, 1987). Judge Conrad had the authority to revisit what he perceived to be an erroneous interlocutory legal ruling in the cause.

[4] As to the merits of the application of [section 470.002\(18\)](#), appellants argue that the statute 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, Chapters 732, 733, Florida Statutes. While there is some logic to this assertion,<sup>2</sup> 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. The instant dispute would seem to be a classic \*136 case for utilization of such a statute which provides clear and simple guidance to the funeral home operator. Necessary authorization can be determined quickly so that disposition of the decedent's remains can be accomplished expeditiously and with minimal disruption.<sup>3</sup>

[Section 470.002\(18\)](#) was designed to establish a priority of rights, and the appellants' contention that judicially separated spouses should be treated differently in this regard than other spouses is more properly taken up with the legislature, which can determine whether public policy warrants a differing treatment. It may be that the existence of an estrangement between spouses should warrant different treatment.

Some states recognize that where spouses have separated, the surviving spouse does not have the right to determine disposition of the decedent's remains. See, e.g., [Dutton v. Brashears Funeral Home](#), 235 Ark. 120, 357 S.W.2d 265 (1962); [Estes v. Woodlawn Memorial Park, Inc.](#), 780 S.W.2d 759 (Tenn.App.1989); [Rosenblum v. New Mt. Sinai Cemetery Ass'n](#), 481 S.W.2d 593 (Mo.App.1972). Perhaps the best summary of the state of the law on this issue is found at 22A Am.Jur.2d Dead Bodies § 23:

If the decedent and his spouse were living in the normal relations of marriage, a very strong case will be required to justify a court in interfering with the wish of the survivor, and a widow's waiver of the right to administer the estate of her deceased husband will not include a waiver of her right to control the interment of his body unless this right has been expressly waived. A different result will generally obtain if the decedent and his spouse were separated or divorced at the time of the decedent's death. In this regard, even though a surviving spouse who has been living apart from the decedent has some rights concerning the decedent's funeral and burial, and there is authority for the view that the estrangement or separation of a decedent from his spouse at the time of death is only one factor to be considered, along with relevant other circumstances, in the determination whether a widow will be awarded custody of her husband's body in contravention of his expressed preference, such estrangement or separation may nevertheless constitute a deciding factor in determination, upon weighing all the circumstances. Some courts have followed the view that, due to the separation of the decedent from the spouse, the right to control the burial no longer rests in the surviving spouse, the waiver of such right having been implied, in certain instances, from the separation.

In at least one jurisdiction, in order for an individual to defeat the surviving spouse's right to custody of the

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decedent's body for purposes of burial, he is statutorily required to show not only that the decedent and the spouse were separated at the time of the death, but also that the spouse had abandoned the decedent.

It would appear that, by definition, a person who has been divorced from the decedent is not a "surviving spouse" entitled, under applicable statutory provisions, to custody of the decedent's body for purposes of burial or disposal. [Footnotes omitted].

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. Thus, as a matter of law, Woodlawn is not liable to the appellants in tort.

\*137 The summary judgment for Woodlawn Memorial is

AFFIRMED.

[GOSHORN](#) and [GRIFFIN, JJ.](#), concur.

All Citations

739 So.2d 132, 24 Fla. L. Weekly D1684

Footnotes

- [1](#) This appeal has been stayed in respect to Levitt Weinstein which is in bankruptcy. This opinion, therefore, disposes only of the appeal of the summary judgment for appellee, Woodlawn.
- [2](#) See, e.g., [section 732.901, Florida Statutes](#), dealing with anatomical gifts (organ donations).
- [3](#) Under Florida law a cremation may not be performed until a legally authorized person gives written authorization but once this is done, the cremation "must be performed within 48 hours after a specified time which has been agreed to in writing by the person authorizing the cremation." [§ 470.0255\(1\), Fla. Stat.](#) This statute reflects that time is of the essence in matters such as cremation.

# *Summary of Andrews v. McGowan*

After authorizing his wife's remains to be picked up from one funeral home and delivered to another, decedent's daughter filed suit, asking the court to order her mother's remains be turned over to her. An order was entered and decedent's daughter followed up with suit against both funeral homes, and decedent's spouse for releasing her mother's remains without her consent to her father. Appellee cited 470.002(18). As such, appellants challenged the application of the statute, arguing the statute was simply part of regulatory scheme for funeral homes and in no way was intended to decide, among survivors, the legal right to dispose of the remains of another. The court held on appeal that surviving spouse, as lawful husband of the decedent, was the legally authorized person to direct the disposition of the decedent's remains. Furthermore, the court determined that the then Florida Statute, 470.002(18), gave guidance to funeral home operators by clearly delineating the priority of those persons who were legally authorized to make funeral arrangements for a deceased person.

# *Andrews v. McGowan takeaways*

- Pursuant to case law, courts will interpret the statute for a legally authorized person, to provide the surviving spouse with priority to make decisions regarding final disposition IF there was no testamentary direction made in writing while the decedent was alive.
- If there is no surviving spouse, next of kin will follow.
- In the event spouses are legally separated or divorced at the time of the decedent's death, estrangement or separation is only ONE factor to be considered, in addition to other relevant factors.
- In order to defeat the surviving spouse's right to make decisions regarding final disposition, the individual contesting the surviving spouse's decision will need to show:
  - Separation at time of death of decedent AND
  - The surviving spouse abandoned decedent
- Surviving spouses although legally separated is priority in determining final disposition
- Separation is **NOT** divorce. Divorce severs the relationship and therefore no rights vest in making final dispositions

# Factual Scenario #1

- Tom and Mary are married with two (2) minor children. Mary is deeply religious and has always told Tom that she wants to be buried and never cremated. Unbeknownst to Tom, Mary has a will she drafted on a receipt from Popeyes chicken locked in a safe deposit box at the local SunTrust bank, just in case anyone ever needs to know how she wants her body to be cared for after death. Mary's mother knows all about the safe deposit box and its contents but doesn't plan to ever tell anyone because she would actually prefer to use the insurance money from her daughter's death for a less expensive service. Mary's mother knows Tom plans to spend all of the insurance money he receives from his wife's death on a new BMW and she'll be stuck with making the arrangements and paying the funeral home. Sadly, Mary got really ill and appointed her brother as her Power of Attorney. Mary later died, from a heart condition, while in hospice care, just three (3) months after she appointed her brother as Power of Attorney.

Assume that the will Mary drafted met all the requirements to establish a valid will and the appointment of her brother as Power of Attorney was valid. Now, assume Mary's mother met with you to plan the services for her daughter and there is a dispute regarding who is the legally authorized person to handle Mary's final disposition. How do you resolve the dispute?

# Factual Scenario #2

- Jay and Tay are long time domestic partners. They've always wanted to be married and eventually did so after the Supreme Court legalized same sex marriage. One day, Jay and Tay got into a huge domestic dispute and Jay was arrested and sent to county jail for a few months. While in jail, Jay received a call from Tay's mother informing him that Tay had been killed in a terrible car accident on his way to Texas. Tay and Jay were always very uncomfortable with the conversation of death and never discussed how they wanted their final dispositions to be carried out. Day, Tay and Jay's adult adoptive son always recalled Tay saying he wanted to be cremated but wasn't sure if he really meant it. Tragically, on the way to the funeral home to plan Tay's arrangements, Day was hit by a train while crossing the train tracks as he was listening to Beyonce's "lemonade" with his Beats by Dre headphones. Upon hearing the news of Day's untimely death, Tay's mother had a heart attack and fell dead in Publix. Eager to lay her friend's body to rest, Tay's best friend came to the funeral home to plan his services. Because Tay's body was in Texas, the funeral director sent a letter to Jay, while in county Jail and asked him to sign the letter authorizing a Houston medical examiner to release his husband's body to a local funeral home to ship back to Florida. Jay signed the letter and mailed it back to the funeral home. Seven (7) days later, after being released from jail, Jay contacted the funeral home to plan his husband's arrangements but learned that arrangements had already been made by Tay's best friend.

Assume Tay has no other living relatives but has a will, which is locked away in a safe located in his vacation cabin. Assume no one knows about the will. Who is the legally authorized person?

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