

Trusts and Estates Law Section Newsletter



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First Things First: Addressing Burial and Cemetery Issues

By Raymond M. Planell and Matthew G. Parisi

From time to time trust and estate attorneys find it necessary to delve into the laws, regulations and rulings regarding cemetery matters, particularly if there is a dispute among a decedent's family members regarding the proper disposition of a decedent's remains or a need to determine the unique rights and responsibilities of various parties having an interest in a cemetery lot. The following is an outline of some of the most frequent issues that arise and the principles that apply in resolving these issues.

I. Control of the Disposition of the Decedent's Remains

An initial question in many disputes involves the identification of the person who has the right to control the disposition of the decedent's remains. Section 4201 of the Public Health Law (PHL) provides the list "in descending priority" of those with "the right to control." A person designated in a written instrument executed by the decedent has the highest priority. PHL § 4201(3) provides a form of designation and also recognizes a designation by Will "in the absence of a written instrument made pursuant to subdivision three."¹

In lieu of a written designation, the priority list grants the right of control first to the surviving spouse, then a surviving domestic partner (as defined by statute), then any child over the age of eighteen years, then either of the decedent's parents and next to any of the decedent's siblings over the age of eighteen years. After close family, the priority list continues with the decedent's guardians (Articles 17 or 17-A of the Surrogate's Court Procedure Act (SCPA) or Article 81 of the Mental Hygiene Law), intestate distributees (after siblings), the fiduciary of the decedent's estate, a "close friend or relative" and finally, a public administrator or others appointed pursuant to Article twelve or thirteen of the SCPA.

Despite this clear statutory priority list, disputes may arise. This is particularly so where several persons with equal priority (several children, for instance) fail to agree, or the validity of a written designation is challenged, or several persons claim to be the surviv-

ing spouse or domestic partner. The statute requires all such disputes to be "resolved by a court of competent jurisdiction pursuant to a special proceeding under article four of the civil practice laws and rules."² It also contains provisions that allow cemeteries, funeral homes and others to rely upon statements of persons claiming the right to control.³ Importantly, the statute also authorizes those providing services relating to the disposition of a decedent's remains to refuse to provide services if there is a dispute regarding control:

No person providing services relating to the disposition of the remains of a decedent shall be held liable for refusal to provide such services, when control of the disposition of such remains is contested, until such person receives a court order or other form of notification signed by all parties or their legal representatives to the dispute establishing such control.⁴

The application of PHL § 4201 was discussed in *Mack v. Brown*.⁵ The decedent's body had been cremated pursuant to an authorization signed by a woman (Brown) who identified herself as the decedent's surviving spouse. Another woman (Mack) also claimed to be the decedent's surviving spouse. Mack and the decedent's issue commenced the action to recover damages for emotional distress. One of the defendants, Green-Wood Cemetery, had disposed of the decedent's remains in accordance with the wishes of Brown, before learning that the decedent may have instead been married to Mack at the time of his death. Green-Wood Cemetery appealed the order of the Supreme Court, Kings County, which denied its motion for summary judgment. The Appellate Division reversed, providing, in pertinent part, that:

We need not determine, however, whether the marriage between the decedent and Brown was void. Green-Wood's liability does not depend upon whether Brown's marriage is void, but instead depends upon whether its own actions were taken 'reasonably and in good faith' (Public Health Law §4201 [7]) under the circumstances.

The clear intent of the statute is, *inter alia*, to shield cemeteries, crematories,

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and funeral firms from civil liability, so long as they reasonably rely in good faith upon the directions of persons with apparent authority to control the disposition of human remains, and obtain the documentation set forth in the statute. The Legislature, in enacting the 2005 version of Public Health Law §4201, effective August 2, 2006, could not have intended for cemeteries, crematories, and funeral firms possessed of duly-executed authorizations, death certificates, and related documentation, such as Green-Wood was here, to cross-examine grieving widows or widowers, children, parents, siblings, or others to confirm the validity of the familial or personal status claimed under the Public Health Law, or to conduct independent investigations of such persons to protect themselves from potential liability. Naturally, if a cemetery, crematory, or funeral firm receives incomplete or suspicious documents or other information that would cast doubt upon an individual's authority to control a decedent's remains, further inquiry would be indicated. Here, however, the plaintiffs proffered no evidence in admissible form to suggest that Green-Wood had any reason not to rely upon Brown's seemingly valid authorization and marriage certificate naming her as the decedent's surviving spouse. To require Green-Wood to conduct further examination or investigation of Brown's marital status would render meaningless the civil liability protections now afforded to it by Public Health Law §4201. Consequently, the Supreme Court should have granted Green-Wood's cross motion for summary judgment dismissing the complaint insofar as asserted against it.⁶

II. Control of the Memorial

The person with the right to control a decedent's remains also has the right to arrange for memorialization. The Rules of the New York State Cemetery Board provide, in pertinent part, that the "right to memorialize . . . shall belong to the person having the right to

possession of the body."⁷ Any memorialization must comply with the cemetery's specific rules and regulations. When memorialization cannot be agreed upon by those with equal priority, a Court proceeding would be required to resolve the dispute.

III. Burial Rights and Control of the Place of Burial

Sometimes, the person in charge of the decedent's remains will arrange for a place of burial to be purchased post-mortem. However, in many cases, the decedent may have burial rights that were acquired (1) by pre-death purchase, (2) pursuant to statute or (3) as a result of designation by those controlling the burial rights. The statutory framework for these rights with respect to cemeteries regulated by the State Cemetery Board is found in NPCL Article 15.

NPCL § 1502(e) sets forth the fundamental concept that a person who purchases a cemetery lot acquires the "right of use thereof for burial purposes," not fee simple title. "It is an established principle that the purchaser of a cemetery lot does not acquire a fee title, but a right, in the nature of an easement, to use the lot for purposes of interment . . ."⁸ Consequently, the applicable statute provides that a "deceased person shall have the right of interment in any lot, plot or part thereof of which he or she was the owner or co-owner at the time of his or her death . . ."⁹ Spouses, children and parents of a living owner also have burial rights "without the consent of any person" claiming an interest in the lot. Those rights, however, can be superseded in certain cases if the owner files an objection at least 30 days prior to the death of a spouse, child or parent who would otherwise have burial rights.

A surviving spouse of a deceased owner also has burial rights in the lot and "shall have in common [with the owners of the lot] the possession, care and control of such lot . . ."¹⁰ A deceased owner's interest will pass to his or her surviving joint tenant(s), or tenant by the entirety, if any, or, if none, will pass to his or her devisees, if "effectually devised" or, if not, to his or her descendants, or if none, to the surviving spouse, or, if none, to his or her intestate distributees.¹¹ A devise is effectual only "if the lot . . . is specifically referred to [in the deceased lot owner's Will]."¹²

This latter provision gives rise to family disputes when it is assumed by a residuary beneficiary under the lot owner's Will that he or she is entitled to ownership of the cemetery lot. The issue is particularly acute when the surviving spouse is the residuary beneficiary, but learns that the children have become the actual owners of the lot. A surviving spouse may not want to share "possession, care and control" of the lot, particularly if the decedent's children are children of a prior marriage.

For example, in *Hammerstein v. Woodlawn Cemetery*, the plaintiff surviving spouse and sole beneficiary of the deceased purported owner's Will had not "as she claims, succeeded to the rights of her late husband under his Will" because "no interest in the cemetery lot devolved on the plaintiff" under her husband's Will since the Will did not provide a specific reference to the lot.¹³ Despite this statutory rule, however, the Court of Appeals in *Saulia v. Saulia*¹⁴ determined that a Will which specifically devised a cemetery lot to a surviving spouse also should be construed to continue burial rights for the decedent's son from a prior marriage. The Court held that "whatever power and rights were conferred by the devise did not include destruction of the statutory right of burial that the son possessed until his father's death. Thus analyzed, while the widow retains the ownership of the plot and the possession, care and control, the son has a right to be buried in the plot."¹⁵

Cemeteries will often require lot owners to provide an affidavit, commonly referred to as an "Affidavit of Heirship," certifying those "entitled to the possession, care and control" of the lot if more than one person is so entitled.¹⁶ Generally, the affidavit is provided when a lot owner dies and his or her interest passes to devisees, descendants or other distributees. Likewise, if a lot is purchased post mortem, the executor or administrator "shall . . . file with the corporation, an affidavit setting forth the names and places of residence of all of the decedent's distributees . . ."¹⁷ The cemetery is entitled to rely upon the truth of the statements contained in such an affidavit.

Those with "possession, care and control" of a lot have the right to select monuments, plants, shrubs and flowers for the lot, subject to the cemetery's rules and regulations (and any rights of memorialization of a person having control of the decedent's body). They also have the right to designate those who will have interment rights or restrict those who will have ownership rights. NPCL § 1512(f) allows lot owners and surviving spouses with a right of interment, to:

- (A) designate the person or person or class of persons who may thereafter be interred in said lot or in a tomb in such lot and the places of their interment;
- (B) direct that upon the interment of certain named persons, the lot or tomb in such lot shall be closed to further interments;
- (C) direct that the title of the lot shall upon the death of any one or more of the owners, descend in perpetuity to his or her or their distributees, unaffected by any devise.

Designations are frequently used to restrict burial rights to specific persons, to the exclusion of others who may otherwise, by virtue of statutory provisions,

acquire burial rights and/or succeed to ownership rights. For example, in *Application of Von Gross*,¹⁸ the Court found that an owner's friend, whose remains were interred at the request of the owner who died subsequently, could not be removed to provide space for the owner's spouse and children to be buried in the lot. The Court held that "if, as provided by statute . . ., the decedent could in his lifetime have designated in writing the names of those to be buried in his plot, even after his death, then certainly it is in accordance with the statutory scheme that the decedent have the power to accomplish the same objective by his unequivocal act during his lifetime of interring the remains of his friend in his cemetery plot."¹⁹

IV. Disinterment: Exercising a Benevolent Discretion

The *Von Gross* opinion also reviews precedents regarding disinterment applications and provides the following quotation found in *In re Currier (Woodlawn Cemetery)*:²⁰

The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned. . . . While the disposition of each case is dependent upon its own peculiar facts and circumstances and while no all-inclusive rule is possible, the courts, *exercising a "benevolent discretion,"* will be sensitive "to all those promptings and emotions that men and women hold for sacred in the disposition of their dead." . . . *And looming large among the factors to be weighed are the wishes of the decedent himself.*²¹

NPCL § 1510(e) provides the statutory requirements for disinterment. Removal is permitted with the consent of the cemetery, the lot owners, and the spouse, children (if of full age) and parents of the decedent. "If the consent of any such person or of the corporation cannot be obtained, permission by the county court of the county, or by the supreme court in the district, where the cemetery is situated, shall be sufficient."

At times, the cemetery may oppose a disinterment, thus requiring a Court Order, in an effort to honor the decedent's wishes, despite the contrary wishes of surviving family members. *In re Currier (Woodlawn Cemetery)* held in favor of the family and against Woodlawn Cemetery in such a circumstance, referring to the cemetery as "at best, a formal party."²² Judge Conway's dissent, however, cited *Smith v. Green-Wood Cemetery*,²³ wherein an application of the grandchildren of the original owners seeking to disinter the remains of the original owners and their son and daughter was

denied. The Supreme Court opinion noted that the cemetery refused to consent to the disinterment (which consent was required by the cemetery's rules) and stated that there "can be no question about the intention of the purchaser of the plot to procure for himself and the members of his family a final resting place, and I can see no substantial reason why his wishes should not be respected."²⁴ Similarly, in *Brand v. Elmwier Cemetery Assoc.*,²⁵ the cemetery refused to consent to a surviving spouse's application to remove the remains of her deceased husband's first spouse. The Supreme Court held that the wishes of the deceased husband could not be overridden by the second spouse's desire to be buried side by side with her husband and daughter.

A Court Order will also be required if the person whose remains are sought to be disinterred has no surviving spouse, children or parents. Justice DiBella so held in *In re Stewart Bauman*²⁶ in which he denied petitioners' application to disinter and transfer the remains of petitioners' great-grand aunt. The Court described petitioners' rationale and the Court Order requirement as follows:

Petitioners seek to remove the body of their great grand Aunt, Marion Stewart, from its present place of burial in Grave 6 and to transfer and inter her body in the same lot to Grave 4. A court Order is required because there is no surviving spouse, child or parents of the deceased to give consent. See Section 1510(e) of the New York Not-For-Profit Corporation Law. If granted this relief, petitioners would thereafter disinter their father Leslie Stewart Jr. from Grave 4 and re-inter his body in Grave 6. This would leave room for the eventual burial in Grave 6 of Gillian Stewart, the second wife of Leslie Stewart Jr.²⁷

V. Transfers of Burial Lots

In addition to being subject to a cemetery's rules and regulations (which must be approved by the New York State Cemetery Board if the cemetery is subject to State regulation) and New York's statutory disinterment requirements, a lot owner's rights are limited with respect to conveyances or resales. The general statutory rules state that: (1) only cemetery corporations may sell or convey cemetery lots;²⁸ (2) it is unlawful to purchase a cemetery lot for purposes of resale;²⁹ and (3) after a burial in a lot, the lot is inalienable.³⁰

Several exceptions to these general statutory rules are likewise contained in Article 15: (1) a membership or religious corporation or unincorporated association or society which provides burial benefits for its members may purchase cemetery lots in bulk and resell

these rights to its members; (2) before a burial in the lot (or after removal of all bodies) and assuming that the original purchase was not made for the purpose of resale, a lot owner may sell or convey the lot, subject to the cemetery's right of first refusal to re-purchase the lot for a price equal to the price paid by the lot owner together with simple interest at the rate of four percent per annum; (3) even after a burial in a lot, a sole owner may "give his entire interest, or, if not prohibited by the rules and regulations of the cemetery corporation, any portion thereof to any person within the third degree of consanguinity to the owner, or, in the event that no such person exists, within the fourth degree of consanguinity to such owner"; and (4) an owner may release his or her interest to other owners.³¹

The provisions of NPCL § 1513(c) regarding a cemetery's right of first refusal have been challenged on the basis that they are "confiscatory because the price of the plot as determined by the statute is far below the market price."³² Nonetheless, Federal District Judge Weinstein held that NPCL § 1513 (c) "is a valid exercise of the state's police power. The legislature could rationally have believed it necessary to prevent the commercial exploitation of cemetery plots intended to be devoted to eleemosynary purposes."

The inability of a lot owner to exploit ownership of a cemetery lot for commercial purposes is implicitly recognized by the Internal Revenue Service in Treas. Reg. § 20.2033-1(b), which provides in pertinent part that: "A cemetery lot owned by the decedent is part of his gross estate, but its value is limited to the salable value of that part of the lot which is not designed for the interment of the decedent and the members of his family."

Lot owners (or their attorneys) sometimes seek to arrange for lot ownership rights to be transferred to a trust. NPCL Article 15 does not appear to permit trust ownership since, as noted by the Court of Appeals in *Saulia v. Saulia*, "ordinary concepts of title, ownership and devolution of title applicable to real property do not apply to cemetery plots."³³ Simply put, the statutory framework which governs the rights of lot owners only makes sense if lot owners are individuals who obtain burial rights for themselves, and those related to them or designated by them.

VI. Tax Impact of Payments to Cemeteries

Lot owners often ask whether payments to cemeteries are tax deductible. All New York-regulated cemeteries are required to be not-for-profit³⁴ and, consequently, should be tax exempt under Internal Revenue Code (IRC) § 501(c)(13). IRC § 170 (c)(5) allows for the income tax deduction of contributions to a § 501(c)(13) cemetery if the funds are dedicated to the care of the cemetery as a whole and not for the purchase or care of a specific lot. Conversely, IRC § 2055 (estate tax) and §

2522 (gift tax) do not have provisions similar to § 170(c) (5) so bequests and gifts to non-religious cemeteries are not deductible with respect to those taxes.³⁵ But, “reasonable expenditure for a tombstone, monument, or mausoleum, or for a burial lot, either for the decedent or his family, including a reasonable expenditure for its future care may be deducted” as a funeral expense for estate tax purposes, if the expenditure is allowable under local law.³⁶

VII. Conclusion: Consider Burial Issues as Part of a Client’s Estate Planning

As with other planning issues, consideration of the alternatives and the execution of appropriate documents in advance will generally avoid disputes regarding the rights and responsibilities of lot owners and their family members. A situation that most families will want to avoid is a failure to provide enough space for all those who wish to be interred in the family lot. A March, 2000 Bulletin issued by the New York State Division of Cemeteries provides the following tongue-in-cheek description of the problem:

If all the grave spaces in a lot are occupied, bodies cannot be removed to “make room.” When there is only one vacant grave and several “co-owners,” the logical policy is “first-come/first-served.” Our division often finds itself embroiled in family disputes where “ownership” of a single (remaining) grave is challenged. The only way these issues can be resolved to the satisfaction of a complainant is for him or her to “pass away” and fill the grave before anyone else in the family. When informed about the laws of ownership and the first-come/first-served nature of lot ownership, these complaints are quickly withdrawn!

Further information regarding many of the cemetery issues described in this article is available on the website of Division of Cemeteries: www.dos.ny.gov/cmtty. Attorneys may also contact the New York State Association of Cemeteries (website: www.nysac.com) for guidance and assistance.

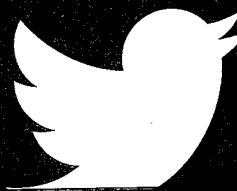
Endnotes

1. PHL § 4201(4).
2. PHL § 4201(8).
3. PHL § 4201(7).
4. PHL § 4201(8).
5. 82 A.D. 3d 133, 919 N.Y.S.2d 166 (2d Dep’t 2011).
6. *Id.* at 141,142.
7. Cemeteries, except municipal cemeteries, family or private cemeteries and those which are operated, supervised or controlled by religious corporations, are regulated by the New York State

Cemetery Board, established by Section 1504 of the Not-For-Profit Corporation Law (NPCL). The State Cemetery Board operates within the Division of Cemeteries of the Department of State. 19 NYCRR § 201.15.

8. *Hammerstein v. Woodlawn Cemetery*, 21 Misc. 2d 42, 45, 194 N.Y.S.2d 385 (Sup. Ct., N.Y. Co. 1960).
9. NPCL § 1512(d).
10. NPCL § 1512(b).
11. *Id.*
12. *Id.*
13. *Hammerstein*, 21 Misc. 2d at 46.
14. 25 N.Y. 2d 80, 302 N.Y.S.2d 775 (1969).
15. *Id.* at 85.
16. NPCL § 1512(e)(1).
17. NPCL § 1512(c).
18. 56 Misc. 2d 275, 288 N.Y.S.2d 308 (County Ct., Orange Co. 1968).
19. *Id.* at 278.
20. 300 N.Y. 162, 90 N.E.2d 18 (1949).
21. *Id.* at 164 (emphasis added) (internal citations omitted).
22. *Id.*
23. 173 Misc. 215, 17 N.Y.S.2d 706 (Sup. Ct., N.Y. Co. 1940).
24. *Id.* at 216.
25. 59 Misc. 2d 408, 299 N.Y.S.2d 573 (Sup. Ct., N.Y. Co. 1968).
26. Sup. Ct., West. Co., Index No. 19442/08.
27. *See also In re Estate of Hyman Elman*, 152 Misc. 2d 656, 578 N.Y.S.2d 95 (Sup. Ct., Queens Co. 1991).
28. NPCL § 1513 (a) (1).
29. NPCL § 1513 (a) (2).
30. NPCL § 1512 (a).
31. NPCL § 1513.
32. *Warschauer Sick Support Society v. New York*, 754 F. Supp. 305, 307 (E.D.N.Y. 1991).
33. 25 N.Y. 2d 80, 85, 302 N.Y.S.2d 775 (1969).
34. NPCL § 1501 (“cemeteries shall be conducted on a non-profit basis”).
35. *See Rev. Rul.* 67-170.
36. Treas. Reg. § 20.2053-2.

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