

Over My Dead Body: The Role of The Illinois Disposition Of Remains Act In Disputes Over A Decedent's Remains

By Mitchell B. Goldberg

When one thinks of the various disputes that might arise among family members at the close of the life of a loved one, subjects might include end of life medical decision-making, will and trust disputes, and arguments over expenditures from joint accounts. Yet, a frequent fight arises over what to do with a decedent's remains. Diverse families frequently differ over the proper action. Orthodox Jews, for example, are religiously opposed to cremation, favoring burial without any embalming. They might find themselves at odds with others who favor donating a body to science. Even within communities and families, some could be opposed to organ donation, while others view it as the highest virtue. Discussions also may center on the nature of any memorial service.

Apart from heated emotions, these disputes are time sensitive. Bodies decompose. And death certificates must be timely filed and accurately reflect the method of disposition of the deceased. Failure to do this could result in regulatory problems for the hospitals, nursing homes, hospice care centers, and funeral homes that frequently find themselves caught in the middle of these disputes.

Fortunately, the Illinois Disposition of Remains Act, 755 ILCS 65/1 et seq. ("IDRA"), provides mechanisms to prevent these disputes. The IDRA also provides procedural avenues by which regulated businesses sucked into a dispute may seek help from the courts.

This article will briefly address the following: (i) who is empowered to make decisions as to disposition of remains; (ii) how can a person designate an agent to direct the disposition of remains; and (iii) what protections are afforded to service providers who may take custody of remains.

The IDRA lists priorities regarding who has the right to make decisions

Section 5 of the IDRA governs the right to control disposition of the decedent. (755 ILCS 65/5). It governs how the decedent can designate an agent to oversee the disposition of the body, and establishes a hierarchy among potential agents. The IDRA recognizes that authority to make decisions will be recognized in this order:

- The person designated in written instructions drafted under the IDRA;
- Any person serving as executor or legal representative of the decedent's estate and acting according to written instructions contained in the decedent's will;
- The decedent's surviving spouse;
- The majority of the decedent's surviving competent adult children; though fewer than a majority if they have used reasonable efforts to notify other surviving children of their instructions and are unaware of any opposition to those instructions on the part of a majority of surviving competent adult children;
- A religious, civic, community, or fraternal organization willing to assume legal and financial responsibility;
- For indigents, a public administrator, medical examiner, coroner, state appointed guardian, or other public official charged with making arrangements for disposition; or
- Any other person or organization that is willing to assume legal and financial responsibility.

A person listed will be deemed to have the right, duty, and liability only if there is no person in a priority listed before the person. (755 ILCS 65/20.) Moreover, the right to control disposition will be deemed invalid (and passed to the next person in priority) should that person be charged with first or second degree murder or manslaughter in connection with the death of the decedent. (*Id.*) For military service personnel who have executed a valid U.S. Department of Defense Record of Emergency Data Form, the person designated in that form will have the right to control disposition of the decedent's remains. (755 ILCS 65/5.) Generally, whoever asserts the right to direct disposition of the decedent's remains will be deemed liable for all reasonable costs of the disposition. (*Id.*)

Acceptable written instructions as to disposition

It is not uncommon for a decedent's surviving spouse or children to have different religious or philosophical opinions regarding the disposition of remains. These differing opinions may be grounded in sincere religious belief or conviction. Often they are based on what is believed to be the desires or wishes of the decedent. Absent a written authorization to direct the disposition of remains, however, the person with the priority under the IDRA *will* have the power to make those decisions. Where there is no single decision-maker (for instance, where there is no surviving spouse and two competent adult children of different religious beliefs), disputes can result in a stalemate that prevents action. Whether or not there is an identified person with authority to act, sometimes these disputes can cause substantial discord in a family. The best way to prevent these disputes is by drafting suitable written instructions directing disposition of remains as part of an estate plan.

The IDRA permits a person to provide written instructions as to the disposition of his or her remains in a separate written instrument designating an agent to direct disposition (755 ILCS 65/10 and 755 ILCS 65/16), or in a will, a prepaid funeral contract, a valid healthcare power of attorney, or a cremation authorization form which complies with the Crematory Regulation Act (755 ILCS 65/40).

IDRA provides sample language that will be deemed acceptable to designate an agent to direct disposition of remains in a specific written instrument. (755 ILCS 65/10.) Of course, whenever a statute offers sample language, the wisest practice may be to follow that language. Regardless of the specific text used, a written authorization must designate a proposed agent and both the decedent and proposed agent should sign it. (755 ILCSW 65/15.) Further, the signature of the decedent must be notarized. (*Id.*)

And the agent's authority to act will not be deemed effective until the agent signs the instrument. If the directions are in a will, the IDRA authorizes immediate compliance with the directions before probate. Even if the will is later set aside, the directions for disposition will be deemed valid so long as the directions were acted on in good faith.

Protections under the IDRA to service providers caught in a dispute

Oftentimes people die unexpectedly. But even when death is anticipated (an illness or injury), various service providers are placed under time constraints to transfer or dispose of a decedent's remains. For hospitals, hospice care providers, nursing homes or other medical provider, this can include laws and regulations governing health and cleanliness. For funeral directors, crematoria, or other funeral providers, these constraints require efforts and resources to be used for preservation of the remains until properly interred or cremated. The law also requires the timely filing or amending of a truthful and accurate recitation of the disposition of the deceased's remains in a death certificate. Given these constraints, service providers often seek to work with family or other decision-makers as to the disposition of remains quickly.

Under the IDRA, certain businesses are afforded good-faith protections from liability. Section 45 of the IDRA protects any cemetery organization, business operating a crematory or columbarium, funeral director or an embalmer, or funeral establishment from liability for carrying out the written directions of a decedent. It also protects organizations or individuals who carry out the directions of a person who represents that he or she is entitled to control disposition of the decedent's remains. (755 ILCS 65/45.) This protection does not affect liability of the organization or individuals for gross negligence or willful acts, however. (*Id.*)

If a dispute arises among persons authorized under the IDRA concerning the right to control the disposition of a decedent's remains, including cremation, a court of competent jurisdiction must resolve it. (755 ILCS 65/50.) To the extent the remains have not yet been accepted, where a dispute exists, a cemetery organization or funeral establishment will not be liable for refusing to accept the decedent's remains, or to inter or otherwise dispose of the decedent's remains, until it receives a court order or other suitable confirmation of the dispute's resolution or settlement. *Id.*; *Carlson v. Glueckert Funeral Home, LTD.*, 407 Ill. App. 3d 257 (1st Dist. 2011).

This protection from liability does not extend to those funeral service providers who are already in custody of the remains when a dispute arises. Those persons or entities may seek to initiate a proceeding, effectively seeking injunctive relief, by filing a petition to seek a court order directing disposition. In the experience of the author, courts addressing this appreciate evidence of multiple attempts to provide notice of proceedings to all interested parties through, for example, facsimile, electronic mail, regular and certified mail, and delivery. The petition should include various bases of the need for expeditious resolution, including costs, use of facilities, decomposition, and the need to properly record or amend a death certificate.

Conclusion

The provisions IDRA provides for control over the disposition of remains by a decedent. To protect a decedent's desires, practitioners should include written designations of control and wishes for desired disposition into clients' estate plans. These desires can either be provided for in the decedent's will or an appropriate form conforming to the formalities required in the IDRA. Like a living will, it is also helpful that the wishes of the decedent be disseminated to health care providers and relatives.

Knowing the wishes of a loved one can prevent disputes during a time when emotions run high. Regardless, the IDRA does provide certain protections to those relying on purported authorizations to determine the disposition of remains, as well as mechanisms for those providers or businesses caught in any dispute to seek judicial instruction to offer finality, and to permit a decedent's remains to be laid to rest.

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