

Estate Planners Should Include Directions Regarding a Decedent's Remains

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The decision about what should happen to one's body following death is often overlooked by estate planners. Oklahoma law does not automatically grant the power to control a decedent's remains to a named personal representative in a last will and testament. In fact, Oklahoma provides numerous methods by which a person can make their wishes known and binding upon their survivors.

The Oklahoma Legislature in 21 O.S. 1158 sets out a hierarchy of persons who are entitled to control a decedent's remains. The first is a pre-planning contract with a funeral director executed by the decedent. 21 O.S. 1158(1). The second would apply to certain wills and less formal documents such as an affidavit pertaining only to a person's remains. "A representative appointed by the decedent by means of an executed and witnessed document meeting the requirements of the State of Oklahoma." 21 O.S. 1158(2). The statute includes only those wills which specifically contain reference to the power to dispose of remains and plan for a funeral. Most wills lack this language in a personal representative's powers and the Oklahoma Probate Code does not confer this power anywhere upon an estate administrator by virtue of the appointment.

In the absence of any document which specifically states (1) the assignment of the right of control and (2) nomination of persons to exercise the right of control, then the surviving spouse is entitled to recognition. 21 O.S. 1158(3). This can cause conflict in the cases of extended families or civil strife, which leads to yet another area of the statutory scheme in 21 O.S. 1151a which allows interested persons to petition the district court to determine the right of control and override a surviving spouse in certain circumstances. An evidentiary hearing is required and evidence to be taken on whether or not the surviving spouse holds a due regard for the decedent (and not what the decedent would have wanted or whether the decedent held due regard for the surviving spouse). Estate planners should seek to avoid the calamity that may be caused by holding evidentiary hearings to prove estrangement at such a complex time.

It would therefore be wise to include in all testamentary documents the power of the administrator to control the decedent's remains. Inclusion of such required language will eliminate the potential for litigation at a most unpleasant time.

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