Anna Nicole Smith and the Right to Control Disposition of the Dead

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The recent media circus surrounding the death of "celebrity" Vickie Lynn Marshall, a/k/a Vickie Lynn Smith, a/k/a Vickie Lynn Hogan, a/k/a Anna Nicole Smith, has brought into public scrutiny an ancient legal issue—who decides the place and method of disposal of the bodies of the dead. That very fundamental question has been addressed many times, none more clearly than by the preeminent book in the field, by Percival E. Jackson, *The Law of Cadavers and of Burial and Burial Places* 41-55 (2d ed. 1950). According to that lengthy tome, the ancient Greeks and Romans, and those who followed them in the Christian era, were ordinarily careful to honor the express directions of the deceased regarding the final disposition of his or her body, including the right to demand cremation, should that be the decedent's clearly expressed desire. In each case, however, the equity court considered the particular circumstances, and might let the sentiments of a surviving spouse trump the dead spouse's request; this was far less likely in the event of the wishes of remoter relations such as children, parents or siblings. The desires of the dead may be preserved in writing in a will or other testamentary document, or even merely expressed orally. If a decedent did not express a preference for the place and manner of burial, then that was determined by the surviving spouse, and if there is no surviving spouse, then by the next of kin in the order of adult children, parents, siblings or more distant kin. This principle might be altered to take into consideration circumstances of special intimacy or association with the dead relation. *See also* Hugh Y. Bernard, *The Law of Death and Disposal of the Dead* 19-21 (2d ed. 1979) (short summary of law regarding burial of dead bodies). If the person entitled to determine the right of burial is a minor, then the decision ordinarily was left to the adult next of kin to the decedent from the minor. Thus, a grandmother's decision on burial prevailed over the wishes of a minor brother of the deceased, and three brothers selected the funeral spot of the parent of two minor children.

Who Decides?

Turning to the case at hand, In re *Marshall*, No. 07-00824 (61) (Fla. Broward Co. Cir. Ct. Feb. 22, 2007), *aff'd sub nom. Arthur v. Milstein*, 2007 WL 602630 (Fla. Dist. Ct. App. Feb. 28, 2007), Anna Nicole Smith was survived, for all essential purposes, by no spouse (she never legally married her attorney/lover, Howard K. Stern); one five-month-old infant minor child, Dannielynn Hope Marshall Stern; and her long-estranged mother, Virgie Arthur. Three days after the September 7, 2006 birth of Dannielynn in Nassau, Bahamas, Ms. Smith's 21-year-old son, Daniel Wayne Smith, with whom Ms. Smith was particularly close, had died in Ms. Smith's Nassau hospital room of a drug overdose and ultimately was buried in the

Bahamas. Ms. Smith, herself, died on February 8, 2007 of a drug overdose while visiting Broward County, Fla., as a declared resident of the Bahamas. Ms. Smith left no written instructions regarding disposal of her last remains, either in her will or elsewhere.

Minor or Mother?

Ms. Arthur alleged she was Ms. Smith's next of kin, and sought possession of Ms. Smith's remains to bury her in her native state of Texas (Ms. Arthur also indicated she wanted to have Daniel Wayne Smith exhumed and shipped to Texas for interment). Ms. Arthur alternatively testified in the Broward County proceeding that Ms. Smith had told her she wanted to be buried in Texas and in California next to actress Marilyn Monroe (whom Ms. Smith idolized and sought in her lifetime to emulate), but acknowledged she had had little contact with Ms. Smith during the last ten years of her life. There was other testimony, and the court so found, that Ms. Smith intentionally chose to bury her son, Daniel, in the Bahamas, that she wished to be buried next to him, and that she had purchased four burial plots in the Bahamas with the specific intention of being buried in the one next to Daniel. The court ruled that since Ms. Smith had left no written instructions as to her choice of burial spot the decision as to her place of interment was, pursuant to Florida case law, up to her next of kin, Dannielynn, as represented by her guardian ad litem. *See Kirksey v. Jernigan*, 45 So. 2d 188, 189 (Fla. 1959) ("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 for the purpose of burial, sepulcher or other lawful disposition which they may see fit."). *But cf. Cohen v. Guardianship of Cohen*, 896 So. 2d 950, 954-55 (Fla. Dist. Ct. App. 2005) (court disregarded instructions in decedent's will directing that he be buried in Jewish cemetery in New York and instead ordered burial in Florida cemetery next to his wife of 40 years pursuant to his frequently expressed oral wishes after execution of his will that he be interred there). The court, in particular, cited a Florida precedent, *Leadingham v. Wallace*, 691 So. 2d 1162 (Fla. Dist. Ct. App. 1997), which held that a decedent's minor children, as represented by their guardian, rather than the decedent's father, were the next of kin to the decedent. Thus, the court ordered Ms. Smith's remains released to Dannielynn's guardian to be disposed of within his sole and absolute discretion, being at all times guided by the best interests of Dannielynn. The guardian chose burial in the Bahamas next to Daniel Wayne Smith.

The Wishes of the Deceased

On appeal to the Florida Fourth District Court of Appeal, Ms. Arthur argued on several grounds that she was entitled to determine the disposition of Ms. Smith's remains. However, the court denied her claim on the sole basis that Ms. Smith clearly had orally expressed her intention that she be buried in the Bahamas next to her son Daniel, and that doing so was consistent with the holdings in *Kirksey, Cohen* and *Leadingham*. *See also Kasmer v. Guardianship of Limner*, 697 So. 2d 220 (Fla. Dist. Ct. App. 1997) (requiring personal representative to cremate decedent pursuant to express provision in decedent's will). Clear and convincing evidence of Ms. Smith's wishes convinced the court, which never addressed the relative rights of Ms. Arthur and Dannielynn as next of kin to Ms. Smith to determine the burial site. *Arthur*, 2007 WL 602630, at *2-*3. This decision was consistent with rulings in other states. *See* Jackson, *supra*, at 47-48; 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).

Kentucky Courts

How would a Kentucky court decide a case like In re *Smith?* Disregarding the case's sensational aspects, it would reach a result like that in Florida based on Kentucky's respect for the common law of burial rights discussed above. Several Kentucky cases have observed that the express wishes of the decedent, whether testamentary or otherwise, control disposition of a dead body for burial purposes. *E.g., Haney v. Stamper*, 125 S.W.2d 761, 762 (Ky. 1939); *Streipe v. Liberty Mut. Ins. Co.*, 47 S.W.2d 1004, 1005 (Ky. 1932); *Neighbors v. Neighbors*, 65 S.W. 607, 608 (1901). Many Kentucky cases have cited to the seminal decision of *Larson v. Chase*, 50 N.W. 238 (Minn. 1891), which held that burial rights are held by the surviving spouse, followed by the next of kin, "*in the absence of any testamentary disposition*." *Id.* at 239 (emphasis added). Since Anna Nicole Smith clearly had orally expressed her wish that she be buried in the Bahamas beside her son Daniel, her yearning would trump the desires of her next of kin, be they her mother (who had her own plan for disposition of her daughter's remains) or the guardian ad litem for her five-month-old daughter (who agreed to honor the expressed request of the deceased). Incidentally, a Kentucky case, *Terrill's Adm'r v. Davis*, 199 S.W.2d 130, 131 (Ky. 1947), upheld the right, in that case, for the brother of the decedent to take charge of burial arrangements in priority over an estranged wife and minor daughter. Kentucky apparently has no case like *Leadingham v. Wallace* where the guardian of minor children took priority over an adult parent of the deceased, but such a result would be consistent with the general law of burial rights, which Kentucky follows. As the Smith case indicates, it is important that attorneys encourage their clients to state, either in their wills or other written documents, their choice for burial arrangements (the author of this article and his wife both have left written instructions regarding the final disposition of their bodies and have orally discussed the matter with one another). Lacking that, they at least orally should indicate their desires on that subject to their next of kin.

For more on the common law right of sepulcher, which protects the right of the buried dead to be left undisturbed, and the issue of property rights to dead bodies, *see* James T. R. Jones, *Evidentiary Autopsies*, 61 U. Colo. L. Rev. 567, 570-77 (1990), *reprinted in* 40 Def. L.J. 251, 254-63 (1991).

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