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MEMBER



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AFTER-DEATH DECISIONS BY STEPHEN TAYLOR

Many people are surprised to learn that while Virginia law identifies those individuals with the legal right and authority to make burial arrangements for a deceased party, the law does not prioritize the right and authority of those individuals. This means that at your death, any number of individuals may be able to direct the funeral home regarding the disposition of your remains (such as burial vs. cremation), even when such direction conflicts with your wishes. Consider, for example, the following:

The decedent, John, dies and leave behind a wife, Jill, and two children from a previous marriage, Mark and Mary. Several years prior to his death, John purchased two burial plots in Virginia Beach so Jill and he could be buried next to each other. Jill plans to honor John's wishes and have him buried in one of the plots. Mark and Mary, however, have never been particularly fond of their stepmother, Jill, so they decide that they will direct the funeral home to cremate their father's remains. But before Jill, Mark or Mary can get to the funeral home to direct the disposition of John's remains, John's brother, Bill, has his brother's remains buried on the family farm in Isle of Wight County. Under Virginia law, Bill's actions are valid, and Jill, Mark and Mary likely have no recourse against Bill or the funeral home.

Virginia law provides that a decedent's "next of kin" may make arrangements for the disposition of the decedent's remains upon his death. "Next of kin" encompasses a broad range of individuals, including the decedent's (i) spouse, (ii) child over 18 years of age, (iii) custodial parent, (iv) noncustodial parent, (v) siblings over 18 years of age, (vi) guardian of a minor child, (vii) guardian of a minor sibling, (viii) maternal grandparents, (ix) paternal grandparents, (x) maternal siblings over 18 years of age, (xi) paternal siblings over 18 years of age, or (xii) any other relative in the descending order of blood relationship. Yet, while providing this extensive "next of kin" list, Virginia law does give priority to any "next of kin" to make funeral and burial decisions. The determination of who gets to make such decisions

often is guided by the application of a simple, but longstanding, legal principle: "first in time, first in right."

As one noted Virginia legal scholar recently opined, "[the] absence of any priorities among a decedent's 'successors' (to use a neutral term) has already created too many problems, and it is likely to lead to an increasing number of problems in the future because of the increasing incidence of cultural intermarriage, religious conversions, population mobility, [and] family division following divorce." J. Rodney Johnson, "Annual Survey of Virginia Law: Wills, Trusts, and Estates," 45 U. Rich. L. Rev. 403, 413 (2010).

One step towards rectifying this problem was taken in 2010 when the General Assembly amended Virginia Code § 54.1-2825. This section of the Code permits a person to designate, in a notarized writing, an individual who shall make arrangements and be otherwise responsible for his funeral and the disposition of his remains – including cremation, interment, entombment, memorialization, or some combination thereof – upon his death. More importantly, however, the Code was amended to provide that such designee shall have priority over all persons otherwise entitled to make such arrangements, provided that a copy of the signed and notarized writing is provided to the funeral home and/or cemetery no later than 48 hours after the funeral home receives the decedent's remains.

In light of these amendments to Virginia law, it is a good idea for individuals to discuss with their estate planning attorneys the designation of someone to make arrangements for a funeral and the disposition of remains. Such a designation should be a key element to many, if not most, estate plans.

The attorneys at Oast & Hook can assist clients with their estate, financial, insurance, long-term care, veterans' benefits, and special needs planning issues.

Stephen Taylor is an elder law attorney with Oast & Hook, and he practices in the areas of estate planning, estate and trust administration, business planning, and litigation. Mr. Taylor is licensed to practice law in Virginia and North Carolina.

Ask Allie

O&H: Allie, we've heard about the first inductee into the Surf Dog Hall of Fame. Please tell us about him.

Allie: Sure! Buddy is a 14-year-old Jack Russell Terrier who has been surfing with his human, Bruce Hooker, off the coast of Ventura County, California, for the past ten years. Buddy will be inducted into the Surf Dog Hall of Fame on September 11th, as part of the Helen Woodward Animal Center's Surf Dog Surf-A-Thon. This is the world's largest dog surfing event, and the tournament has grown from 10 dogs to 80. Buddy has won several tournaments, including the first four Surf Dog Surf-A-Thons, and he has appeared on Animal Planet, Pet Star, ESPN, CNN, NBC, and the CBS Morning Show. The organizer of the Surf Dog Surf-a-Thon, Nedra Abramson, said that the tournament decided to honor

Buddy because “Buddy does it for the right reasons. He loves to surf – and he does turns! It’s like he’s a reincarnated surfer. He’s brought the sport great notoriety.” Congratulations Buddy! I’m glad he likes the water because it’s sure not for me! See you next week!

Speakers

If you are interested in having an Oast & Hook attorney speak at your event, phone Darcee Hale at 757-967-9702 or e-mail her at hale@oasthook.com. Past topics include estate planning, long-term care planning and veterans benefits.

Distribution of This Newsletter

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