

# Disposition of Remains Act versus Health Care Power of Attorney

**A** RECENT APPELLATE COURT case affects everyone who has a statutory form health care power of attorney and has attorneys talking to each other, as well as their clients. The issue under discussion is whether the Disposition of Remains Act, 755 ILCS 65/1 *et. al.*, (“DORA” or the “Act”), nullifies a decedent’s appointment of an agent for the disposition of his or her remains under an Illinois statutory Health Care Power of Attorney (“HCPOA”). This case is intended to resolve a “question of first impression”, but instead, it reveals that the Act is in need of serious amendment. The case is currently being appealed to the Illinois Supreme Court.

Although the Court also addressed the question of whether the HCPOA was valid and in effect (another very interesting issue well worth reading), that issue was not raised until a year after the burial, when the relatives were seeking damages from the funeral home. (The lower court found the HCPOA invalid and the appellate court reversed.) That part of the decision is not addressed in this article.

## **Carlson v. Glueckert Funeral Home, Ltd.**

In *Carlson v. Glueckert Funeral Home, Ltd.*, No. 1-10-0158, Fifth Division, First District Appellate Court, Case #08 L 10138, decided February 4, 2011, the Court refused to recognize the higher priority of a designated agent under a HCPOA to direct



the disposition of a decedent's remains, over another child of the decedent.

Scott, Eleanor Carlson's son and health care agent, initially made arrangements with the funeral home for the burial of his mother's remains and the funeral was scheduled. The funeral home refused to move forward because of his estranged sister's demand for more expensive arrangements.

Eleanor's remains were not interred until a month after her death, after Scott obtained a court order releasing the body to another funeral home. The suit for damages was brought a year after the burial and involves that delay and the extensive decay of the decedent's body due partially to inadequate refrigeration. Only after the suit was brought was the validity of the HCPOA questioned.

The Court said that the funeral home was not liable for those damages because the "dispute" created by the daughter's demand for a more expensive funeral required resolution by the Court under Section 50 of DORA. The Court disregarded Scott's authority to direct the disposition of Eleanor's remains under her HCPOA.

### The Unless Clause

What the Court failed to grasp was that Scott, as agent under the HCPOA, was of a higher priority to direct the disposition of remains than the decedent's daughter by virtue of Section 40 and the "Unless Clause" of Section 5 of the Act.

The Unless Clause is of paramount importance in this case. It states: "Unless a decedent has given directions in writing for the disposition of remains or designated an agent to direct the disposition of the principal's remains as provided in Section 65 of the Crematory Regulation Act or in subsection (a) of Section 40 of this Act," then certain individuals in the priority listed have the right to control the disposition of remains as long as they agree to be liable for the cost of the disposition.

Subsection 40(a) specifies five methods by which an individual can give those directions or designate an agent to dispose of the individual's remains in a manner consistent with the individual's wishes:

- In a will;
- In a prepaid funeral or burial contact;

- In a statutory short form HCPOA that contains a power to direct the disposition;
- In a cremation authorization form complying with the Crematory Regulation Act, 410 ILCS 18/1 *et seq.*; or
- In a written instrument that satisfies Sections 10 ("Appointment of Agent to Control Disposition of Remains") and 15 (a form substantially similar to the form provided in Section 10) of DORA.

There is no discussion in Section 40 of a priority ranking among the directions or the agencies listed in the event of a conflict. Even though not addressed in *Carlson*, this oversight needs to be rectified.

Since Eleanor used one of the five methods referenced in the Unless Clause, the funeral home should have been able to rely on the direction of the health care agent without liability. Section 45 absolves of liability "a cemetery organization, a business operating a crematory or columbarium or both, a funeral director or an embalmer, or a funeral establishment that carries out the written directions of a decedent or the directions of any person who represents that the person is entitled to control the disposition of the decedent's remains." Under this Section, the funeral home in *Carlson* had every right to rely on Scott's authority under the HCPOA without fear of liability and failed to do so.

Further, the Power of Attorney for Health Care Law gives the agent under the HCPOA priority over others to dispose of the principal's remains. "If and to the extent a health care agency empowers the agent to... (3) direct the disposition of the principal's remains, the decision by an authorized agent as to... remains disposition shall be deemed the act of the principal and shall control over the decision of other persons who might otherwise have priority; and each person to whom a direction by the agent in accordance with the terms of the agency is communicated shall comply with such direction." 755 ILCS 45/4-7(d).

### Priority List

After the Unless Clause, Section 5 goes on to identify "the following persons, in the priority listed, have the right to control the disposition, including cremation, of the

decedent's remains and are liable for the reasonable costs of the disposition:"

- The person designated in a written instrument that satisfies Sections 10 ("Appointment of Agent to Control Disposition of Remains") and 15 (a form substantially similar to the form provided in Section 10);
- Any person serving as executor or legal representative of the decedent's estate and acting according to the decedent's written instructions contained in the will;
- The surviving spouse of the decedent;
- The sole surviving child of the decedent; otherwise a majority of the decedent's adult children (with some stipulations on reasonable efforts to locate the children);
- The surviving parents of the decedent;
- The surviving adult in next degree of kinship;
- In the case of an indigent or others who are the responsibility of the state, the state;
- In the case of individuals who have donated their bodies to science or whose death occurred in a nursing home or private institution, who executed cremation authorization forms and the institution is charged with disposing of the remains, a representative of the institution;
- Anyone else willing to assume legal and financial responsibility for the disposition.

It seems clear that the legislature intended that individuals referenced in the introductory paragraph of Section 5 (the Unless Clause) and Subsection 40(a) take precedence over the list of individuals in Section 5 (1)–(9). If not, the Unless Clause is superfluous and an individual's wishes regarding disposition of his or her remains will be ignored under DORA. By ignoring the Unless Clause and failing to recognize the higher priority of Scott, as Eleanor's agent, the court basically nullified Eleanor's expressed wishes concerning the disposition of her remains.

### What Disputes Must Be Resolved By A Court under Section 50

The Court agreed with the funeral home's argument that "regardless of whether Scott has the right to direct the disposition of

Eleanor's remains, a dispute concerning that right existed between Scott and Denise." The Court went on to say that "it is not the role of funeral homes and cemeteries to judge the relative legal rights of feuding family members."

Section 50 of DORA provides: "Any dispute among persons listed in section 5 concerning their right to control the disposition, including cremation, of a decedent's remains shall be resolved by a court. A cemetery organization or funeral establishment shall 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 that the dispute has been resolved or settled."



The Court's literal interpretation of Section 50 does not differentiate between varying levels of priority provided in Section 5. Even though the *Carlson* Court characterizes the dispute as being between siblings (equal priority under Section 5(4)), under the literal interpretation, even the individual identified in Section 5(9)—"anyone willing to assume legal and financial responsibility for the disposition"—could trigger a dispute with the individual identified in Section 5(1)—an agent under DORA—that would require resolution by a court. Therefore, no one has a higher priority than anyone else to direct the disposition of the decedent's

remains if there is a dispute, no matter how trivial.

One purpose of DORA and the Power of Attorney Act is to identify those individuals who have priority in making decisions regarding the disposition of a decedent's remains so the funeral home or cemetery can rely on those decisions without liability and without having to have the matter resolved in court. One would think that in the interest of judicial economy the court would support those acts rather than eviscerating them. Section 50 needs clarification.

### What is a Dispute?

The Court noted that Section 50 did not define "dispute." What is a real dispute? Anna Nicole Smith is a recent example of

a real dispute that required resolution by the court. In that case, the decedent left no instructions about disposition of her remains nor did she appoint an agent to direct the disposition. In the case of Ted Williams, there was a real dispute among the decedent's children about conflicting documentation and direction as to the disposition of the famed baseball player's remains, whether the remains should be cryogenically preserved, cremated and/or buried. In both cases, thousands of dollars were spent on determining who had the right to direct the disposition of her remains.

It is clear that the intent of DORA and the Health Care Power of Attorney Act is that an individual should have the right to designate a specific person to direct the disposition of his or her remains or leave directions as to the disposition that will be honored and avoid potential disputes, particularly the minor ones.

### Legislative Intent

The Court is most likely correct that the principal intent of the legislation was to protect the funeral industry and related organizations from liability (and to make sure they get paid). Without the Unless Clause, the health care agent is not one of the individuals ranked in the second part of Section 5. It is unlikely that the legislature would intend to nullify the authority of an agent under the Health Care Power of Attorney Act to dispose of a principal's remains by leaving the agent out of the list.

Historically, in a statutory form HCPOA, 755 ILCS 45/4-10, the principal gives the agent authority to dispose of the principal's remains (unless the principal deletes that authority from the form). Until DORA, that authority was almost universally respected. By disregarding the health care agent's high priority, DORA is in opposition to the Illinois Power of Attorney Act and nullifies that health care agent's authority and the wishes of the principal.

Further, DORA establishes an advance directive for a principal to appoint an agent solely for disposition of remains. Under the *Carlson* decision, given the Court's strict interpretation of Section 50, even an agency created under DORA would not have priority. This result would be contrary to legislative intent.

It appears that the legislative intent was to (1) identify and prioritize written directions and designations of agents on which the funeral industry could rely without liability; (2) prioritize the individuals who would have priority and absolve the industry from liability for relying on the direction of those individuals; and (3) provide a means to resolve conflicts or disputes: (a) among the written directions and designated agents; and (b) among those who are in equal priority to dispose of the decedent's remains.

If the appellate court is correct, DORA fails to achieve its intended purpose on several counts.

### The Solution

First and foremost, if *Carlson* is the correct interpretation of DORA, in the interest of judicial economy, Section 50 needs to be rewritten to clarify which disputes require court resolution.

Section 5 should be divided into two parts, the first part identifying and prioritizing a decedent's written directions. The current statute gives no guidance on resolving such potential conflicts. One suggestion is to recognize the most recently executed document as having priority, so that if a funeral home were presented with two differing directions, the most recent would take precedence and the funeral home could rely on it without liability.

Of course, the funeral industry wants someone to sign the contract and assume liability for reasonable costs of the disposition. If the purpose of Section 5 is to identify those individuals in priority ranking willing to take on that liability, then an

agent under a HCPOA having the authority to dispose of the principal's remains should be high on that list, perhaps only second after the agent appointed in a form that conforms to DORA requirements. With regard to the priority list, Section 50 should apply only to disputes between individuals of equal priority.

### Summary

The Disposition of Remains Act is in need of significant amendment in order to clarify that an individual's wishes regarding the disposition of his or her remains are honored, whether those wishes are expressed in a written direction or expressed by an agent entrusted with authority to dispose of the individual's remains.

As a result of *Carlson*, individuals can no longer be assured that their wishes regarding the disposition of their remains will be honored. The priority of written directions should be addressed and the agent under a HCPOA having authority to dispose of a decedent's remains must be added to the list at a high priority level.

As DORA currently stands under the

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*Carlson* decision, just about anyone can object to a health care agent's directives regarding the disposition of remains and a court will be required to resolve the dispute. DORA needs help. ■

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