"HOW DO I MAKE ARRANGEMENTS FOR MY FUNERAL?"

Many people like to make their own funeral arrangements or leave funeral instructions for their family. The motivations are varied but usually include a desire that their own wishes be followed, a desire to remove an emotional burden from surviving family members, or a desire to provide funeral arrangements in anticipation that the family may not be in agreement.

Texas law appears to provide more protection that your written wishes regarding disposition of your remains (cremation, burial or entombment) will be followed than is provided for written instructions for funeral arrangements (choice of funeral home, visitation, memorial service, memorial contributions, notifications, and pallbearers). Your choice of funeral home will almost always be followed if you have a prepaid funeral contract and the existence of that contract is known to your family.

Disposition of Remains

Directions for the disposition of your remains may be included in your will, but including them in your will is not the normal way of providing directions. Arrangements are usually made by the family within hours of death. Many times the family only consult the will several days after death and after the funeral. Directions in a will can only be changed by signing another will or making a codicil. For these reasons, directions are best left in documents other than the will.

If the directions are contained in your will, the directions are to be carried out immediately, without waiting for the probate of the will. If your will is not offered for probate or for some reason is declared invalid and not probated, the directions in your will are still valid to the extent they are acted on in good faith. Yet, including directions in your will is not preferred.

Most funeral homes will let you make pre-need funeral arrangements. Normally, this is something done only by persons who are near death or advanced in age enough that the possibility of death is greater than remote. Prepayment of expenses should only be done if you are very sure that you will be living in the community in which you are making the arrangements.
Pre-Need Arrangements

There are three basic types of pre-need arrangements: unfunded, pre-paid trust, and insurance.

Unfunded pre-need arrangements need not be in any particular form and can be as little as a letter or a list of requests for what matters the most: the location, the casket, where buried, etc. The funeral home may have a helpful form. In unfunded arrangements, the price of merchandise or services are not fixed, so they can rise overtime and financing is left to the family at the time of need.

Pre-paid trusts address the financing for the merchandise and services and fix the prices. The funeral home places funds into a common trust fund. Upon death, the funds paid and any interest is paid to the funeral home. Before making prepayment, ask what the funeral home's cancellation policy is and ask to see it in writing. Under Texas law, upon cancellation at least 90% of the money paid must be refunded.

Another form of pre-paid contract is through insurance. When making arrangements, you buy an insurance policy and assign the proceeds to the funeral home. The price of the merchandise and services is fixed. The insurance policy usually can be transferred, but if transferred to another home, the price of the funeral services and merchandise will be at the new home's then current prices. If the policy is cancelled, you will receive a refund of the policy's cash value, an amount probably less then the amount paid. The death benefit may increase over time. Check your contract -- the funeral home may be entitled to claim all or a portion of the increase. If the then current price of the funeral services and merchandise is less then the increase in the policy, or if the family elects a less expensive service, the excess is paid to the your estate.

The terms of a prepaid funeral contract are almost always followed by the family. Because the arrangements are prepaid, they do not impose an additional financial burden on the estate nor the family. Under Texas law, the person entitled to control the disposition of your remains (explained below) is to faithfully carry out your directions to the extent that your estate or that person is financially able to do so. With a prepaid
funeral contract the qualifier about financial ability is removed and it appears that your directions must be followed in all events.

**Appointment of Agent**

You may also provide directions regarding the disposition of your remains in a written instrument signed in front of a notary. The statute provides a form, but the form primarily deals with appointing an agent or successor agents to control the disposition of your remains. The form also contains a special directions section where you can direct the disposition of your remains.

The statutory form is included and the "Special Directions," section has already been revised to incorporate a non-statutory form, "Funeral Arrangement Directions," which includes a section entitled "Disposition of My Remains." That section will let you indicate your desires regarding your remains -- burial, entombment, cremation, embalming, casket and final resting place.

If you do not name an agent to control the disposition of your remains, the law gives the following persons, with priority in the order listed, authority to make disposition of your remains: your surviving spouse, your surviving adult children, your surviving parents, your adult brothers and sisters, and the persons in the next degree of kinship\(^1\) entitled to inherit your estate under the laws of intestacy. Some parts of the law say these persons have *a duty* to dispose of your remains. If you leave written instructions, these persons are to faithfully carry out your instructions.

If you have particular requests regarding your funeral, you can also place them in a letter to your family. Such a letter might state how you want your remains disposed. The letter might also include the type of service that you want, the religion of the service, its location, the speaker and the music. A letter may not impose a legal obligation on your family, but they may honor them out of respect to you.

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\(^1\) This is the exact terminology in the statute, which is interesting because the Texas heirs-at-law are not based upon degrees of kinship. Apparently this would include the person who is both (i) closest in degree of kinship and (ii) entitled to inherit under the laws of descent and distribution. This discussion is largely academic and has no practical application because of the quickness in which funeral arrangements must be made.
Funeral Arrangements

The law is not as clear that your family is required to follow your directions regarding funeral arrangements (choice of funeral home, visitation, memorial service, memorial contributions, notification and pallbearers). It appears that if you include instructions regarding these aspects of your funeral in "Special Instructions" section of the form Appointment of Agent to Control Disposition of Remains, that the agent is obligated to follow them.

The Funeral Arrangement Instructions referred to in the statutory form contains blanks regarding your funeral arrangements that you can complete. Remember, the funeral is for the benefit of the surviving family and friends. Any matter that is important to you should be specifically stated because you will not be here to explain what you mean or add to your instructions.

Notifications

Completing the "Funeral and Death Notifications" list is optional, but the list may be very useful where your family and friends may not be known by the agent who will be in charge of making or implementing the funeral arrangements.

Additional Arrangements

You might also choose a cemetery plot or crypt. All plots and crypts should be registered on the books of the cemetery. Otherwise, if final arrangements are made on a weekend, the family may have to wait until a business day so they can obtain copies of the plot contract or deed that you placed in your safe deposit box.

Financial Responsibility

The agent you name or the family member who controls the disposition of your remains is financially responsible for the costs of making disposition of your remains and following your funeral arrangement directions.
Reimbursement can be received from your estate for reasonable expenses. Reasonable expenses normally include preparation, transport and burial or entombment of the body; costs of conducting the services; the cost of the plot or tomb and the costs of the casket or cremation; honorarium for the minister and musicians; flowers; costs for the meal for family and friends; and travel expenses of the chief mourner of the funeral. Your agent or family member may be personally liable for the expenses if the funeral expenses and other creditor claims exceed the assets in your estate or they are not reasonable. Funeral expenses and expenses of last sickness for a reasonable amount not to exceed $5,000 receive the top priority for payment from the estate, but if the expenses of last sickness are substantial, the amount of funeral expenses receiving the top priority may be substantially less than $5,000.

Emergency Intervention

What happens if the person who has authority to control disposition of your remains does not want to be liable for the funeral expenses? The person with authority can get up to $5,000 of funeral expenses approved in advance by the probate court in a procedure called "emergency intervention."

An applicant may file with the clerk of the court in the county of domicile of the deceased person an application requesting emergency intervention by a court exercising probate jurisdiction. The application request can cover the payment of funeral and burial expenses. The application cannot be filed earlier than the third day after the date of death and not later than the 90th day after the date of death.

The application for emergency intervention can be filed by:

(a) The person named as executor in the will.

(b) The surviving spouse.

(c) The principal devisee or legatee of the testator (deceased person who leaves a will).

(d) Any devisee or legatee of the testator.

(e) The next of kin of the deceased, the nearest in order of descent first, and so on, and the next of kin includes a person and his descendants who legally
adopted the deceased or who have been legally adopted by the deceased.

(f) A creditor of the deceased.

(g) Any person of good character residing in the county.

(h) Any other person not disqualified; disqualified persons include (i) a minor; (ii) an incompetent; (iii) a convicted felon who is not pardoned or had his civil rights restored; (iv) a non-resident (natural person or corporation) of Texas who has not appointed a resident agent to accept service or process in all actions or proceedings with respect to the act as a fiduciary in Texas; or (v) a person whom the court finds unsuitable.

The application will probably require the services of an attorney to prepare and that will increase the administration expenses of the estate. The application must contain:

(a) the name, address, social security number, and interest of the application;

(b) the facts showing an immediate necessity for the issuance of an emergency intervention order by the court;

(c) the date of the decedent's death, place of death, decedent's residential address, and the name and address of the funeral home holding the decedent's remains;

(d) any known or ascertainable heirs and advisees of the decedent and the reason:

(1) the heirs and devisees cannot be contacted; or

(2) the heirs and devisees have refused to assist in the burial;

(e) a description of funeral and burial procedures necessary and a detailed and itemized description of the cost of the funeral and burial procedures;
(f) the name, location, and identification of property or persons in possession of the decedent's property;

(g) whether any written instructions from the decedent relating to a funeral or burial exist.

If written instructions exist, the instructions are to be attached to the application or filed with the court before the funeral or burial. The applicant is to fully comply with the instructions.

If written instructions do not exist, the application shall provide for the funeral or burial, unless the applicant obtains court approval for cremation of the remains.

If the court finds that emergency intervention is necessary, the court may order funds of the decedent held by an employer, individual, or financial institution to be paid directly to a funeral home for funeral and burial expenses. The expenses cannot exceed $5,000 but should be sufficient to provide the decedent with a reasonable, dignified, and appropriate funeral and burial.

If emergency intervention sounds like a complicated procedure, you are probably right. This is a relatively new procedure, and the attorneys fees may be relatively expensive. But, without a prepaid funeral contract, it is the only way that the person making the funeral arrangements can be certain the funeral expenses will be paid from the estate.

**Funeral Expense Payment from Trusts**

If the deceased person was a beneficiary of a trust and at the time of death was eligible to receive distributions from the trust, the trustee in the trustee's discretion may pay the funeral expenses of the beneficiary. The trustee must give consideration to the grantor's probable intention and find that the trustee's action would be consistent with the grantor's probable intention. This provision does not apply to a charitable remainder annuity trust, charitable remainder unitrust, or a pooled income fund that is intended to qualify for a federal tax deduction under Section 644, Internal Revenue Code.

Payment of funeral expenses from a trust does not require that the trustee get court approval and there is no
Certain Limitations

One does not normally plan on being murdered, particularly by one's spouse. The limitations in the next paragraph complete the discussion of funeral arrangements but is inapplicable for planning purposes.

The Executor named in your will or your next of kin (other than your spouse) may petition the court for an order limiting your surviving spouse's right to control your burial, interment or cremation, if that person can show to the court that there is good cause to believe that the surviving spouse is the principal or an accomplice in a willful act that resulted in your death. In issuing the order, the court must designate a person to make the funeral arrangements.

Summary

Making funeral arrangements may relieve a huge emotional burden from your family. Making the financial arrangements in advance may also relieve them of a financial burden. Remember, while the service is for you, it is really for them.