

The Urn or the Tombstone: What Happens If the Child Dies?

By **Vesselin Mitev**

Your client, while a defendant in a divorce, comes to you with terrible news: the divorcing couple's 16-year-old child has tragically died in a car accident. Now, the opposing party, who had temporary (de facto) custody, has noticed they will seek an order from the matrimonial court allowing the child to be cremated.

Your client opposes this vehemently, arguing that the child should be buried instead, on the basis that as the non-custodial parent he had less access to the child; his family and the child's grandparents had even less access to the child, and now that the child is gone they would like a place where they can come and mourn, grieve, and commemorate — a gravesite.

The tragic heartstring issues aside (and since you yourself are long dead inside, on account of being a divorce lawyer), you begin to analyze the jurisdictional issues surrounding this weighty problem.

Public Health Law 4201 governs the disposition of human remains. The statute contains a hierarchical order of who gets “the right to control the disposition of the remains” of a decedent, starting with someone named in a written document specifying same, then the decedent's surviving spouse, domestic partner, children, parents or surviving siblings over 18 (not an exhaustive list).

In relevant part, PHL 4201 provides that “either of the decedent's surviving parents” may so decide. This doesn't help the situation, but only complicates it further, since both parents have an equal, prima facie right to direct what happens with the body.

At common law, and continued throughout the case law, the right of sepulcher also contemplates damages against any person who unlawfully or improperly impedes that right or mishandles the decedent's body, (*Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 31, 877 N.Y.S.2d 300.

And, PHL 4200 expressly provides that: “Except in the cases in which a right to dissect it is expressly conferred by law, every body of a deceased person, within this state, shall be decently buried or incinerated within a reasonable time after death.”

Finally, the Second Circuit prevailing view is that there is no fundamental liberty interest in association with (no right to) a child as the non-custodial parent, (*Uwadiogwu v. County of Suffolk*, 639 Fed.Appx. 13 (2d. Cir. 2016) sharpening an argument that a noncustodial parent with no true right to the child in life (per 2nd Circuit fiat) would not have any greater right to the child in death.

There have been no reported decisions



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squarely on point, as to what happens in a custody dispute with the now deceased body; or for that matter, what would happen if the parties were already divorced and delineated as the custodial/noncustodial parent in a final judgment/stipulation of settlement.

One logical view is that the child has now been transmuted into a marital asset (its ashes) or its body and burial plot being property subject to equitable distribution. Another, equally cogent point is that depending on the age of a child, there may be a jurisdictional impediment to even considering the argument in a matrimonial court since the court would ostensibly lack jurisdiction if the child was over the age of 21 at the time of death.

The argument that only Surrogate's Court can make the decision is also a facially appealing one; however, both courts have concurrent jurisdiction and the matter at bar involves, quite arguably, the disposition of marital assets.

The crux of the case law surrounding what to do with the body of a person who died without advising how he or she wished to be buried (or cremated) centers on three issues: the person's religious beliefs, if any; the person's expressed wishes to others while they were alive as to whether they would like to be buried or cremated, and what to do if their ashes (scatter

them into the sea, bury them in the backyard next to the dog, etc.); and the degree, if any, to which a particular disposition would entitle interested persons in carrying out mourning and commemoration of the decedent.

The last factor, I submit, weighs heaviest in favor of a burial, rather than cremation, not to moot the point that ashes can be buried in a burial plot as well, with a tombstone erected to commemorate the deceased child's life, rather than keeping them in an urn up on the fireplace mantle.

In sum, a review of the applicable law and cases reveal that the matter is properly within the court's jurisdictional penumbra and, absent a written document to the contrary, both the “custodial” and “noncustodial” parent, per statute, have equal rights in determining how to dispose of the body, subject, of course, to the court's equitable intervention.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, LLP, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.