



# Broadcaster



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DEDICATED TO THE  
FURTHERANCE OF  
EFFECTIVE CEMETERY  
MANAGEMENT &  
OPERATION FOR  
BETTER COMMUNITY  
SERVICE

## THE BROADCASTER

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## Q: WHAT DO WE NEED TO KNOW ABOUT THE NEW DEATH CARE PROXIES?

### A: READ THIS ARTICLE!

by Timothy G. Griffin -- June, 2007

Recently, New York State has enacted into law an amendment to the Public Health Law which permits an individual to designate the party who will control the disposition of their remains. Further, the statute defines the party responsible for the disposition of the remains. It is the purpose of this article to alert the reader to this recent amendment to assist the reader in understanding the particular amendment and to provide the particular form prescribed by statute for the designation of the party who will control the disposition of the remains.

This amendment has been referred to as the "Death Care Proxy", an obvious reference to the "Health Care Proxy" where an individual designates a third party to make medical decisions on their behalf in the event that the designating party is unable to do so. The parallels are obvious and the new statute does provide a means to avoid disputes concerning the disposition of remains.

The new statute is specific and it is important for the reader to implement the provisions in accordance with the terms of the statute. The statute provides definitions for the following terms, unless the context otherwise requires:

(a) "Cremation" means the incineration of human remains. (b) "Disposition" means the care, disposal, transportation, burial, cremation or embalming of the body of a deceased person, and associated measures. (c) "Domestic partner" means a person who, with respect to another person: (i) is formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of the United States or any state, local or foreign jurisdiction, or registered as the domestic partner of the person with any registry maintained by the employer of either party or any state, municipality, or foreign jurisdiction; or (ii) is formally recognized as a beneficiary or covered person under the other person's employment benefits or health insurance; or (iii) is dependent or mutually interdependent on the other person for support, as evidenced by the totality of the circumstances indicating a mutual intent to be domestic partners including but not limited to: common ownership or joint leasing of real or personal property; common householding, shared income or shared expenses; children in common; signs of intent to marry or become domestic partners under subparagraph (i) or (ii) of this paragraph; or the length of the personal relationship of the persons.

Each party to a domestic partnership shall be considered to be the domestic partner of the other party. "Domestic partner" shall not include a person who is related to the other person by blood in a manner that would bar marriage to the other person in New York State. "Domestic partner" shall also not include any person who is less than eighteen years of age or who is the adopted child of the other person or who is related by blood in a manner that would bar marriage in New York State to a person who is the lawful spouse of the other person. As defined in the statute a "person" means a natural person eighteen years of age or older.

The statute also sets forth a hierarchical order, in descending priority, of persons who shall have the right to control the disposition of the remains of such decedent. That order is as follows: (i) the person designated in a written instrument executed pursuant to the provisions of the statute; (ii) the decedent's surviving spouse; (ii-a) the decedent's surviving domestic partner; (iii) any of the decedent's surviving children eighteen years of age or older; (iv) either of the decedent's surviving parents; (v) any of the decedent's surviving siblings eighteen years of age or older; (vi) a guardian appointed pursuant to article seventeen or seventeen-a of the surrogate's court procedure act or article eighty-one of the mental hygiene law; or (vii) a duly appointed fiduciary of the estate of the decedent such as an executor or administrator.

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If a person designated to control the disposition of a decedent's remains, pursuant to this subdivision, is not reasonably available, unwilling or not competent to serve, and such person is not expected to become reasonably available, willing or competent, then those persons of equal priority and, if there be none, those persons of the next succeeding priority shall have the right to control the disposition of the decedent's remains.

The person in control of disposition, pursuant to this section, is obliged to faithfully carry out the directions of the decedent to the extent lawful and practicable, including consideration of the financial capacity of the decedent's estate and other resources made available for disposition of the remains. The person in control of disposition shall also dispose of the decedent in a manner appropriate to the moral and individual beliefs and wishes of the decedent provided that such beliefs and wishes do not conflict with the directions of the decedent.

The statute permits the person in control of disposition may seek to recover any costs related to the disposition from the fiduciary of the decedent's estate in accordance with the Surrogate's Court Procedure Act.

The New York Legislature recognized that at times a funeral director may be designated as the agent who controls the disposition of the remains. A funeral director, undertaker, embalmer or person with an interest in, or who is an employee of any funeral firm, cemetery organization or business operating a crematory, columbarium or any other business who also controls the disposition of remains may not receive compensation or otherwise receive a financial benefit for the disposing of the remains of a decedent.

The statute provides that an individual may through a written instrument which has been signed and properly witnessed control the disposition of the decedent's remains. A form setting forth the statutorily approved written instrument appears at the end of this article.

The statute addresses directions concerning the disposition of the remains made in decedents' wills executed prior to and subsequent to the effective date of the statute. In the absence of a written instrument made pursuant the statute, the designation of a person for the disposition of one's remains or directions for the disposition of one's remains in a will executed pursuant to the laws of the state of New York prior to the effective date of the statute, or otherwise executed pursuant to the laws of a jurisdiction outside the state of New York, shall be: (i) considered reflective of the intent of the decedent with respect to the disposition of the decedent's remains; and (ii) superseded by a written instrument subsequently executed pursuant to this statute, or by any other subsequent act by the decedent evidencing a specific intent to supersede the designation or direction in such a will with respect to the disposition of the decedent's remains.

The significance of this provision of the statute is that if a will has been executed prior to the effective date of this statute which provides for the disposition of remains, that provision is considered reflective of the intent of the decedent, but it is not controlling if the decedent has executed a written instrument set forth in the statute or has engaged in subsequent acts evidencing a specific intent to supersede the designation or direction in such a will with respect to the disposition of the decedent's remains.

All actions taken reasonably and in good faith based upon such authorizations and directions regarding the disposition of one's remains in such a will shall be deemed valid regardless of whether such a will is later probated or subsequently declared invalid.

In the absence of a written instrument made pursuant to this statute, the designation of a person for the disposition of one's remains or directions for the disposition of one's remains in a will executed pursuant to the laws of the state of New York on or after the effective date of the statute, shall be considered a reflection of the intent of the decedent with respect to the disposition of the decedent's remains, provided that the person who represents that he or she is entitled to control the disposition of remains of the decedent has complied either in the will or by written instrument authorized by the statute or that individual has signed a written statement stating that that individual has no knowledge that the decedent has signed a written designation authorized by this statute or that there exists a similar provision in a will and the individual is the person having priority under the statute.

A written instrument executed under this statute shall be revoked upon the execution by the decedent of a subsequent written instrument, or by any other subsequent act by the decedent evidencing a specific intent to revoke the prior written instrument. Further, directions on disposition and agent designations in a will shall be superseded by a subsequently executed will or written instrument made pursuant to the statute, or by any other subsequent act of the decedent evidencing a specific intent to supersede the direction or designation. The designation of the decedent's spouse or domestic partner as an agent in control of disposition of remains shall be revoked upon the divorce or legal separation of the decedent and spouse, or termination of the domestic partnership, unless the decedent specified in writing otherwise.

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A person acting reasonably and in good faith, shall not be subject to any civil liability for: (a) representing himself or herself to be the person in control of a decedent's disposition; (b) disposing of a decedent's remains if done with the reasonable belief that such disposal is consistent with this section; or (c) identifying a decedent.

No cemetery organization, business operating a crematory or columbarium, funeral director, undertaker, embalmer, or funeral firm shall be held liable for actions taken reasonably and in good faith to carry out the written directions of a decedent as stated in a will or in a written instrument executed pursuant to the statute.

No cemetery organization, business operating a crematory or columbarium, funeral director, undertaker, embalmer or funeral firm shall be held liable for actions taken reasonably and in good faith to carry out the directions of a person who represents that he or she is entitled to control of the disposition of remains, provided that such action is taken only after requesting and receiving written statement that such person:

(a) is the designated agent of the decedent designated in a will or written instrument executed pursuant to this section; or

(b) that he or she has no knowledge that the decedent executed a written instrument pursuant to this section or a will containing directions for the disposition of his or her remains and that such person is the person having priority under subdivision two of this section.

Disputes concerning the disposition of the remains are handled by courts of competent jurisdiction pursuant to the provisions dealing with special proceedings in the New York Civil Practice Law and Rules of the State of New York. Further, no person providing services relating to the disposition of the remains of a decedent shall be held liable for refusal to provide such services, when control of the disposition of such remains is contested, until such person receives a court order or other form of notification signed by all parties or their legal representatives to the dispute establishing such control.

This statute effectively resolves a recurring problem concerning the right to control the disposition of remains. While the disposition of remains are most often addressed by family members without incident, at times when disputes exist between various factions of a family concerning the disposition of remains, this statute provides a concise way to resolve issues of control. If the decedent has appointed an agent to control the disposition of remains, that agent will control over all other designations. Decedents who designate the disposition of their remains in a will are deemed to be reflective of the intent of the decedent and shall be respected. Finally, the statute creates a hierarchical order of those charged with the disposition of human remains.

*Appointment of Agent Form on page 22*

## DO YOU HAVE A QUESTION FOR AN EXPERT IN CEMETERY LAW?

If so, Send it by fax (585) 381-5252  
or email [andrea.vittum@choiceonemail.com](mailto:andrea.vittum@choiceonemail.com)  
to Broadcaster Editor Andrea Vittum.

We will pick one question to answer in the Fall issue.  
Any appropriate questions not answered in the Broadcaster  
will be added to the questions for next spring's  
Public Affairs Seminar in Albany.

APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF REMAINS

I, \_\_\_\_\_ being of sound mind, willfully and voluntarily make known my desire that,
(Your name and address)
upon my death, the disposition of my remains shall be controlled by \_\_\_\_\_
(name of agent)

With respect to that subject only, I hereby appoint such person as my agent with respect to the disposition of my remains.

SPECIAL DIRECTIONS:

Set forth below are any special directions limiting the power granted to my agent as well as any instructions or wishes desired to be followed in the disposition of my remains:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Indicate below if you have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law for funeral merchandise or service in advance of need:

- [ ] No, I have not entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.
[ ] Yes, I have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.

(Name of funeral firm with which you entered into a pre-funded pre-need funeral agreement to provide merchandise and/or services)

AGENT:

Name: \_\_\_\_\_
Address: \_\_\_\_\_
Telephone Number: \_\_\_\_\_

SUCCESSORS:

If my agent dies, resigns, or is unable to act, I hereby appoint the following persons (each to act alone and successively, in the order named) to serve as my agent to control the disposition of my remains as authorized by this document:

- 1. First Successor

Name: \_\_\_\_\_
Address: \_\_\_\_\_
Telephone Number: \_\_\_\_\_

- 2. Second Successor

Name: \_\_\_\_\_
Address: \_\_\_\_\_
Telephone Number: \_\_\_\_\_

DURATION:

This appointment becomes effective upon my death.

PRIOR APPOINTMENT REVOKED:

I hereby revoke any prior appointment of any person to control the disposition of my remains.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. \_\_\_\_\_
(Signature of person making the appointment)

Statement by witness (must be 18 or older)

I declare that the person who executed this document is personally known to me and appears to be of sound mind and acting of his or her free will. He or she signed (or asked another to sign for him or her) this document in my presence.

Witness 1: \_\_\_\_\_ Address: \_\_\_\_\_
(signature)

Witness 2: \_\_\_\_\_ Address: \_\_\_\_\_
(signature)

ACCEPTANCE AND ASSUMPTION BY AGENT:

- 1. I have no reason to believe there has been a revocation of this appointment to control disposition of remains.
2. I hereby accept this appointment.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. \_\_\_\_\_
(Signature of agent)