



Lisa Sandberg

Final Analysis
Legislative Service Commission

Sub. H.B. 426

126th General Assembly
(As Passed by the General Assembly)

Reps. Dolan, Chandler, Yuko, Fessler, Wagoner, Reidelbach, J. McGregor, Willamowski, DeGeeter, Harwood, Allen, Bulp, Carano, Cassell, Collier, Combs, DeBose, Distel, Domenick, Flowers, Gibbs, Hartnett, Hughes, Key, Law, Martin, Miller, Otterman, T. Patton, Perry, Sayre, Schlichter, Schneider, Seitz, Setzer, G. Smith, Walcher, Williams, Wolpert

Sens. Kearney, Roberts, Zurz

Effective date: October 12, 2006

ACT SUMMARY

- Grants the probate court exclusive jurisdiction over actions related to the right of disposition created by the act and the disinterment and reinterment of human remains.
- Authorizes an adult of sound mind to execute a written declaration assigning to a representative the rights to direct the disposition, after death, of the declarant's body or any part of the declarant's body that becomes separated from the body before death and to make arrangements and purchase goods and services for the declarant's funeral and burial, cremation, or other final disposition.
- Sets forth the requirements of form and content for a declaration assigning the right of disposition.
- Establishes the powers, qualifications, and liability of representatives and successor representatives to whom the right of disposition has been assigned.
- Establishes an order of priority for the right of disposition in the absence of a valid declaration or of representatives qualified to exercise the right of disposition.

- Sets forth criteria for the disqualification of a person from serving as a declarant's representative or successor representative and from having a statutory right of disposition.
- Requires that preneed funeral contracts, preneed cemetery and merchandise contracts, and antemortem cremation authorization forms contain a notice regarding the right of disposition.
- Gives to a person having the right of disposition the authority to consent to an autopsy or post-mortem examination.
- Designates the person having the right of disposition as the authorizing agent for cremation of the body or body parts and modification or cancellation of an antemortem cremation authorization.
- Sets forth the rights and immunities of funeral homes in the event of a dispute over the right of disposition.
- Increases the value of the assets of an estate that may qualify for a summary release from administration, the amount that may be spent for funeral expenses by an applicant for a summary release from administration, and the amounts that may be allocated to funeral expenses by an executor or administrator and makes other changes related to the administration of estates.

TABLE OF CONTENTS

Overview; definitions relating to the right of disposition of a person's remains or body parts	3
Jurisdiction of probate court.....	4
Declaration assigning the right of disposition to a representative	4
Rights that may be assigned	4
Contents of declaration.....	5
Revocation of declaration.....	6
Effect of anatomical gifts	6
Representatives under a declaration of disposition	7
Vesting of right.....	7
Successor representatives	7
Disqualification of representatives	7
Disagreement among group representatives.....	9
Resignation or refusal to serve	9
Liability of representatives	9

Notice of right of disposition in contracts and forms related to disposition	9
Statutory right of disposition in the absence of a valid declaration or qualified representative	10
Consent to autopsy.....	12
Authority to consent to autopsy.....	12
Rights of guardians.....	13
Cremation	13
Authorizing agent for the cremation of a dead body or body parts.....	13
Modification or cancellation of antemortem cremation authorization.....	14
Rights and immunities of funeral home or other person assisting in final disposition in case of a dispute over the right of disposition	15
Matters related to estate administration and funeral expenses	16
Summary release from administration.....	16
Credits allowed by probate court.....	17
Application of estate assets	17
Reimbursement for funeral expenses	18
Payments by fiduciary before letters issued	18
Technical amendment.....	19

CONTENT AND OPERATION

Overview; definitions relating to the right of disposition of a person's remains or body parts

The act deals with a person's right to make certain arrangements relating to the person's funeral or other disposition of his or her remains. New Revised Code sections 2108.70 through 2108.90 grant a person authority to appoint a representative to oversee the disposition of his or her remains through a written declaration and provide for the right of disposition in the absence of a declaration. As used in this analysis, "declaratory right of disposition" means a right of disposition based on a written declaration, and "statutory right of disposition" means a right of disposition granted by statute in the absence of a valid declaration or other document assigning a right of disposition.

The act sets forth the following definitions for purposes of R.C. 2108.70 to 2108.90 (R.C. 2108.70(A)):

- (1) "Adult" means an individual who is 18 years of age or older.
- (2) "Declarant" means an adult who has executed a written declaration (see "*Declaration assigning the right of disposition to a representative,*" below).

(3) "Representative" means an adult or a group of adults, collectively, to whom a declarant has assigned the right of disposition.

(4) "Right of disposition" means one or more of the rights that a declarant chooses to assign to a representative in a written declaration (see "**Rights that may be assigned**," below) or all of the rights that are assigned to a person who has a statutory right of disposition (see "**Statutory right of disposition in the absence of a valid declaration or qualified representative**," below).

(5) "Successor representative" means an adult or group of adults, collectively, to whom the right of disposition for a declarant has been reassigned because the declarant's representative is disqualified from exercising the right under R.C. 2108.75.

Jurisdiction of probate court

The act gives to the probate court for the county in which a declarant or deceased person resided at the time of death or the county in which a living person whose post-death arrangements are the subject of dispute resides exclusive jurisdiction to hear and determine actions relating to the exercise of the right of disposition in accordance with R.C. 2108.90 and actions relating to the disinterment and reinterment of human remains as provided for in R.C. 517.23. Pursuant to this grant of exclusive jurisdiction, the probate court has exclusive jurisdiction over any action that results from R.C. 2108.70 to 2108.89. (R.C. 2101.24(A)(1)(dd) and (ee) and 2108.90.)

Declaration assigning the right of disposition to a representative

Rights that may be assigned

The act authorizes an adult who is of sound mind to execute at any time a written declaration assigning to a representative one or more of the following rights (R.C. 2108.70(B)):

(1) The right to direct the disposition, after death, of the declarant's body or any part of the declarant's body that becomes separated from the body before death. This right includes the right to determine the location, manner, and conditions of the disposition of the declarant's bodily remains.

(2) The right to make arrangements and purchase goods and services for the declarant's funeral. This right includes the right to determine the location, manner, and condition of the declarant's funeral.

(3) The right to make arrangements and purchase goods and services for the declarant's burial, cremation, or other manner of final disposition. This right

includes the right to determine the location, manner, and condition of the declarant's burial, cremation, or other manner of final disposition.

Contents of declaration

The act requires that the declaration include all of the following (R.C. 2108.72(A)):

- (1) The declarant's legal name and present address;
- (2) A statement that the declarant, an adult being of sound mind, willfully and voluntarily appoints a representative to have the declarant's right of disposition for the declarant's body upon the declarant's death;
- (3) A statement that all decisions made by the declarant's representative with respect to the right of disposition are binding;
- (4) The name, last known address, and last known telephone number of the representative or, if the representative is a group of persons, the name, last known address, and last known telephone number of each person in the group;
- (5) If the declarant chooses to have a successor representative, a statement that if any person or group of persons named as the declarant's representative is disqualified from serving in such position (see "**Disqualification of representatives**" under "**Representatives under a declaration of disposition**," below), the declarant appoints a successor representative;
- (6) If applicable, the name, last known address, and last known telephone number of the successor representative or, if the successor representative is a group of persons, the name, last known address, and last known telephone number of each person in the group;
- (7) A space where the declarant may indicate the declarant's preferences regarding how the right of disposition should be exercised, including any religious observances the declarant wishes the person with the right of disposition to consider;
- (8) A space where the declarant may indicate one or more sources of funds that may be used to pay for goods and services associated with the exercise of the right of disposition;
- (9) A statement that the declarant's written declaration becomes effective on the declarant's death;

(10) A statement that the declarant revokes any written declaration that the declarant executed in accordance with the act prior to the execution of the present written declaration.

(11) A space where the declarant can sign and date the written declaration;

(12) A space where a notary public or two witnesses can sign and date the written declaration.

A declaration must be signed and dated by the declarant in the presence of either a notary public, who must make the certification required for an acknowledgment (R.C. 147.53, not in the act), or two witnesses who are adults and who are not related by blood, marriage, or adoption to the declarant. A declarant who executes a declaration in accordance with these requirements warrants the truthfulness of the entire content of the declaration. (R.C. 2108.73 and 2108.74.)

The act creates a statutory form of declaration that a declarant may use (R.C. 2108.72(B)).

Revocation of declaration

A declarant may revoke a written declaration by indicating his or her desire to revoke the declaration in a document signed and dated by the declarant in the presence of either a notary public who must make the certification required for an acknowledgment (R.C. 147.53, not in the act) or two witnesses who are adults and are not related by blood, marriage, or adoption to the declarant (R.C. 2108.80).

Effect of anatomical gifts

If a declarant or deceased adult has made a valid declaration of an anatomical gift by will or any other document or means described in R.C. 2108.04,¹ any person who has a declaratory or statutory right of disposition is bound by the declaration of the anatomical gift and must follow the instructions associated with the gift before making any decisions or taking any other actions associated with the right (R.C. 2108.78).

¹ R.C. 2108.04, not in the act, specifies the ways in which a person may make an anatomical gift. Anatomical gifts may be made by wills, other documents, designation on a driver's license, and orally under circumstances specified in the statute.

Representatives under a declaration of disposition

Vesting of right

The assignment or reassignment of a right of disposition by a declaration vests in a representative or successor representative at the time of the declarant's death (R.C. 2108.71).

Successor representatives

A declarant may designate a successor representative. If a representative is a group of persons rather than one person and not all members of the group are disqualified from serving as the representative (see "**Disqualification of representatives**," below), the persons in the group who are not disqualified constitute the representative who has the right of disposition. The assignment or reassignment of a right of disposition to a representative or successor representative supercedes a statutory right of disposition. (R.C. 2108.70(C) and (D).)

Disqualification of representatives

Under the act, a person is disqualified from serving as a representative or successor representative or from having a statutory right of disposition if any of the following occurs: (1) the person dies, (2) a probate court declares or determines that the person is incompetent, (3) the person resigns or declines to exercise the right (see "**Resignation or refusal to serve**," below), (4) the person refuses to exercise the right within two days after notification of the declarant's death, (5) the person cannot be located with reasonable effort, (6) the person meets the criteria described in R.C. 2108.76 (former spouse) or 2108.77 (misconduct) (see the following paragraphs). (R.C. 2108.75(A).)

In general, if the person named as the declarant's representative or successor representative in the written declaration was the declarant's spouse at the time the declaration was executed but is not the declarant's spouse at the time of the declarant's death, the former spouse no longer is qualified to serve as representative or successor representative. However, a former spouse is qualified to serve as a declarant's representative or successor representative if, after the termination of the marriage, the declarant signs and dates a document stating his or her intent that the former spouse be the representative or successor representative. The document must be notarized or witnessed in the same manner as a declaration. (R.C. 2108.76.)

A person who meets any of the following criteria is disqualified from serving as a declarant's representative or successor representative and from having a statutory right of disposition (R.C. 2108.77):

(1) The person has been charged with murder, aggravated murder, or voluntary manslaughter. The right is restored to the person if the charges are dismissed or the person is acquitted of such charges.

(2) The person has been charged with an act of domestic violence under R.C. 2919.25 (not in the act) and it has been alleged in the charging instrument or accompanying papers that the act resulted in or contributed to the declarant's death. The right is restored to the person if the charges are dismissed or the person is acquitted of such charges.

(3) The person and the declarant or deceased adult are spouses and an action to terminate the marriage pursuant to R.C. Chapter 3105. (divorce, annulment, and dissolution) was pending at the time of the declarant's or deceased adult's death.²

(4) The person and the declarant or deceased adult are spouses and a probate court, on the motion of any other person or its own motion, determines that the declarant's or deceased adult's spouse and the declarant were estranged at the time of the declarant's or deceased adult's death. "Estranged" means that a declarant's or a deceased adult's spouse and the declarant or deceased adult were physically and emotionally separated from each other at the time of the declarant's or deceased adult's death and had been separated for a period of time that clearly demonstrates an absence of due affection, trust, and regard between spouse and the declarant or deceased adult.

The act prohibits an owner, employee, or agent of a funeral home, cemetery, or crematory providing funeral, burial, or cremation services for a declarant from serving as a representative or successor representative for the declarant unless the owner, employee, or agent is related to the declarant by blood, marriage, or adoption (R.C. 2108.75(B)).

Subject to the provisions regarding group representatives (see "**Successor representatives**," above), if a person is disqualified from serving as the declarant's representative or successor representative or from having the statutory right of disposition, the right is automatically reassigned to, and vests in, the next person

² R.C. 2108.75 and 2108.77 refer to "deceased adults." These sections probably should refer instead to "deceased persons."

who has the right pursuant to the declarant's written declaration or to the order of priority for the statutory right of disposition. (R.C. 2108.75(C).)

Disagreement among group representatives

If a declarant's representative or successor representative is a group of people in whom the right of disposition has vested or if a class of persons has the statutory right of disposition, and if the persons in the group or class disagree regarding how the right is to be exercised, the decisions of the majority of the persons in the group or class prevail. If, after reasonable efforts, less than all of the persons in the group or class have been located, the decisions of the majority of the persons in the group or class who have been located prevail. If a majority of persons cannot reach a decision under either of the preceding sentences, the probate court of the county in which the declarant or deceased person resided at the time of death makes the decision after considering the same criteria as when the court assigns a statutory right of disposition (see "**Statutory right of disposition in the absence of a valid declaration or qualified representative,**" below). (R.C. 2108.79 and 2108.82(B).)

Resignation or refusal to serve

A person to whom a declarant's or deceased person's right of disposition has been assigned or reassigned pursuant to a declaration or to statute may decline to exercise the right or resign after beginning to exercise the right. A person who resigns after beginning to exercise the right is subject to a representative's liability (see "**Liability of representatives,**" below). (R.C. 2108.88.)

Liability of representatives

The following persons are liable for the reasonable costs of any goods or services purchased in connection with the exercise of the right of disposition for a declarant or deceased person: (1) a representative or successor representative who assumes liability for the cost of goods and services by signing a written declaration that states that such an assumption is made, and (2) a person to whom the statutory right of disposition has been assigned and who has purchased goods or services associated with an exercise of the right. (R.C. 2108.89.)

Notice of right of disposition in contracts and forms related to disposition

The act requires that every preneed funeral contract, preneed cemetery and merchandise contract,³ and antemortem cremation authorization form entered into

³ *The notice provision in R.C. 1721.211(C)(3) refers to a "preneed cemetery and merchandise contract." The reference should be to a "preneed cemetery merchandise and services contract."*

or executed on or after the act's effective date include a notice that the person holding the right of disposition of the remains of the beneficiary of the contract or the right of disposition under a declaration or statute has the right to make funeral arrangements (preneed funeral contract), purchase cemetery merchandise or services (preneed cemetery and merchandise contract), or cancel the cremation arrangements, modify the arrangements for the final disposition of the cremated remains, or make alternate arrangements for the final disposition of the decedent's body (antemortem cremation authorization form) that are inconsistent with the contract or form. The notice must encourage the beneficiary of the contract or the person who executes the form to state his or her preferences as to funeral arrangements or the manner of final disposition (whichever applies) in a declaration including that the arrangements in the contract or form be followed. (R.C. 1111.19(B)(2), 1721.211(C)(3), and 4717.21(B)(2).) The act also requires that every preneed funeral contract entered into or executed on or after the act's effective date include a notice that the purchaser of the contract will be notified in writing when the trustee of the contract has received a deposit of the funds the purchaser paid the seller under the contract. The notice also must state that if the person does not receive the notice within 60 days of the date the purchaser paid the funds to the seller, the purchaser should contact the trustee. (R.C. 1111.19(B)(2).)

Continuing law allows a trustee to charge a fee for managing a preneed funeral contract trust. The fee cannot exceed the amount regularly or usually charged for similar services rendered by the financial institution when serving as a trustee and must be paid only from the income on that trust. The act requires the trustee of a preneed funeral contract to notify the purchaser of the contract in writing of the amount of any deposit with the trustee of a payment under the contract within 15 days of receiving the deposit from the seller of the contract. (R.C. 1111.19(E)(2).)

Statutory right of disposition in the absence of a valid declaration or qualified representative

The act establishes an order of priority for the right of disposition when a person has not executed a written declaration that remains in force or when each person to whom the right of disposition has been assigned or reassigned pursuant to a written declaration is disqualified from exercising the right. In such cases, subject to the preceding provision and R.C. 2108.75 (disqualification of representatives) and 2108.79 (disagreement among group representatives), the right of disposition is assigned to the following persons, if they are mentally competent adults who can be located with reasonable effort, in the following order of priority (R.C. 2108.81):

- (1) The deceased person's surviving spouse;

(2) The sole surviving child of the deceased person or, if there is more than one surviving child, all of the surviving children, collectively;

(3) The deceased person's surviving parent or parents;

(4) The deceased person's surviving sibling, whether of the whole or of the half blood or, if there is more than one sibling of the whole or of the half blood, all of the surviving siblings, collectively;

(5) The deceased person's surviving grandparent or grandparents;

(6) The lineal descendants of the deceased person's grandparents, as described in R.C. 2105.06(I) (intestate succession), not in the act;

(7) The person who was the deceased person's guardian at the time of the deceased person's death, if a guardian had been appointed;

(8) Any other person willing to assume the right of disposition, including the personal representative of the deceased person's estate or the licensed funeral director with custody of the deceased person's body, after attesting in writing that a good faith effort has been made to locate the persons in listed in paragraphs (1) through (7) above.

Notwithstanding the foregoing prioritization, the probate court for the county in which the declarant or deceased person resided at the time of death may, on its own motion or the motion of another person, assign to any person the right of disposition for a declarant or deceased person. In making the determination, the court must consider the following (R.C. 2108.82(A) and (B)):

(1) Whether evidence presented to or in the possession of the court demonstrates that the person who is the subject of the motion and the declarant or deceased person had a close personal relationship;

(2) The reasonableness and practicality of any plans that the person who is the subject of the motion may have for the declarant's or deceased person's funeral, burial, cremation, or final disposition, including the degree to which such plans allow maximum participation by all persons who wish to pay their final respects to the deceased person;

(3) The willingness of the person who is the subject of the motion to assume the responsibility to pay for the declarant's or deceased person's funeral, burial, cremation, or final disposition and the desires of that person;

(4) The convenience and needs of other families and friends wishing to pay their final respects to the declarant or deceased person;

- (5) The express written desires of the declarant or deceased person.

Except to the extent considered under paragraph (3) above, neither a person who is willing to assume the responsibility to pay for the declarant's or deceased person's funeral, burial, cremation, or final disposition nor the personal representative of the declarant or deceased person has any greater right to the right of disposition than that person would otherwise have pursuant to law (R.C. 2108.82(C)).

Consent to autopsy

Authority to consent to autopsy

Under prior law, an autopsy or post-mortem examination could be performed upon the body of a deceased person by a licensed physician or surgeon if consent has been given in the order named by one of the following persons of sound mind and 18 years of age or older in a written instrument executed by the person or on the person's behalf at the person's express direction (R.C. 2108.50(A)):

- (1) The deceased person during the deceased person's lifetime;
- (2) The decedent's spouse;
- (3) If there is no surviving spouse, if the address of the surviving spouse is unknown or outside the United States, if the surviving spouse is physically or mentally unable or incapable of giving consent, or if the deceased person was separated and living apart from such surviving spouse, then a person having the first named degree of relationship in the following list in which a relative of the deceased person survives and is physically and mentally able and capable of giving consent may execute consent: (a) children, (b) parents, (c) brothers or sisters.
- (4) If there are no surviving persons of any degree of relationship listed in paragraph (3), above, any other relative or person who assumes custody of the body for burial;
- (5) A person authorized by written instrument executed by the deceased person to make arrangements for burial;
- (6) A person who, at the time of death of the deceased person, was serving as guardian of the person for the deceased person.

The act eliminates this entire list and gives the right of consent for an autopsy or post-mortem examination to the person who has the right of disposition under the act's provisions (R.C. 2108.50(A)).

Rights of guardians

Under continuing law, the guardian of the person of a ward who has died may consent to an autopsy or post-mortem examination upon the body of the deceased ward as described above in "**Authority to consent to autopsy.**" If the deceased ward did not have a guardian of the estate and the estate is not required to be administered by a probate court, the guardian of the ward's person may authorize the burial or cremation of the ward. A guardian who gives consent or authorization must notify the probate court as soon as possible after doing so. The act restricts the guardian's powers to consent to an autopsy or post-mortem examination and to authorize burial or cremation to those cases in which a person having a declaratory or statutory right of disposition for the ward has not made a decision regarding whether or not consent to an autopsy or post-mortem examination or regarding the disposition of the ward's body or remains. (R.C. 2111.13(D), (E), and (F).)

Cremation

Authorizing agent for the cremation of a dead body or body parts

Prior law provided as follows regarding the cremation of a body or body parts:

(1) It establishes a list of persons, in order of priority, who may serve as an authorizing agent for the cremation of a dead human body, including a dead human body that was donated to science for medical education or research (see **COMMENT**) (R.C. 4717.22(A)).

(2) If body parts were removed from a living person, the person from whom the body parts were removed or that person's *guardian, custodian, or other personal representative who is authorized by law or contract to arrange for the disposition of the body parts* may serve as the authorizing agent for the cremation of the body parts (R.C. 4717.22(B)).

(3) If body parts were removed from a decedent whose body was donated to science for purposes of medical education or research, the medical education or research facility to which the body was donated may serve as the authorizing agent for the cremation of the body parts (R.C. 4717.22(C)).

The act eliminates the list in the **COMMENT** to paragraph (1) and the italicized language in paragraph (2), above, and in both cases designates as the

authorizing agent for the cremation of the body parts the person who has the right of disposition under a declaration or a statutory right of disposition. With regard to paragraph (3), above, the act provides that the person who has the declaratory or statutory right of disposition may serve as the authorizing agent for the cremation of the body parts, but it allows the medical education or research facility to serve as the authorizing agent if the person having the right of disposition with respect to the cremation of such body parts does not act. (R.C. 4717.22.)

Modification or cancellation of antemortem cremation authorization

Under prior law, a person could authorize his or her own cremation by executing an antemortem cremation authorization form. If certain statutory conditions have been met,⁴ an operator of a crematory facility who has possession of both a properly executed antemortem cremation authorization form and the decedent to which the antemortem authorization pertains and has been paid or is otherwise assured of payment for cremation services and final disposition of the cremated remains must cremate the decedent and dispose of the remains in accordance with the instructions in the authorization form *unless a person identified as being entitled to act as the authorizing agent for the cremation of the decedent in the absence of the antemortem authorization under R.C. 4717.22(A)(1) or (A)(4) to (8) (see COMMENT) has made written modification to the arrangements for the final disposition of the cremated remains or has canceled the cremation and made alternative arrangements for the final disposition of the decedent's body* (R.C. 4717.21(C)).

The act eliminates the above italicized provision and provides instead that a person with a declaratory right of disposition may cancel the arrangements for the decedent's cremation, modify the arrangements for the final disposition of the decedent's cremated remains, or make alternative arrangements for the final disposition of the decedent's body. If a person with the right of disposition takes any such action, the operator must disregard the instructions contained in the cremation authorization form and follow the instructions of the person with the right. The authority granted by this provision to a person who has the declaratory right of disposition is subject to the person's not having been disqualified (see "**Disqualification of representatives**," above).

Prior law stated that notwithstanding the existence of an antemortem cremation authorization, a person identified under R.C. 4717.22(A)(1) or (A)(4) to (8) as being entitled to act as the authorizing agent for the cremation of the

⁴ R.C. 4717.23, not in the act, prohibits the operator of a crematory facility from cremating a human body or body parts unless required permits and authorizations have been received and the required waiting period has elapsed.

decedent named in the antemortem authorization (see **COMMENT**), in the descending order of priority in which they are listed, may modify, in writing, the arrangements for the final disposition of the cremated remains of the decedent set forth in the authorization form or may cancel the cremation and claim the decedent's body for purposes of making alternative arrangements for the final disposition of the decedent's body. The revocation of an antemortem cremation authorization form or the cancellation of the cremation of the person named in the antemortem authorization or modification of the arrangements for the final disposition of the person's cremated remains does not affect the validity or enforceability of any contract entered into for the cremation of the person named in the antemortem authorization or for the final disposition of the person's cremated remains. (R.C. 4717.21(D).)

The act takes the power of modification or cancellation from the persons listed in R.C. 4717.22(A)(1) or (A)(4) to (8) (see **COMMENT**) and gives it to the person having the declaratory or statutory right of disposition (R.C. 4717.21(D)).

Rights and immunities of funeral home or other person assisting in final disposition in case of a dispute over the right of disposition

The act establishes the following rights and immunities of a funeral home, funeral director, crematory operator, cemetery operator, cemetery organization, or other person asked to assist with a declarant's or deceased person's funeral, burial, cremation, or other manner of final disposition (hereafter referred to as "funeral home") in the event of a dispute regarding the right of disposition:

(1) The funeral home is not liable for damages of any kind for refusing to accept the remains, refusing to inter, cremate, or otherwise dispose of the remains, or refusing to complete funeral or other arrangements pertaining to final disposition until the funeral home receives a court order or other written document notarized or witnessed in the manner required under the act for a written declaration that clearly expresses how the right of disposition is to be exercised (R.C. 2108.83).

(2) If the funeral home is in possession of a declarant's or deceased person's remains while a dispute over disposition is pending, it may embalm or refrigerate and shelter the remains to preserve them and may add the cost of embalming, refrigeration, and sheltering to the final disposition costs to be charged. (This provision does not apply to cemetery operators or organizations.) (R.C. 2108.84.)

(3) If the funeral home brings a legal action for purposes of either of the preceding two paragraphs, it may add court costs incurred and reasonable legal fees to its charges for the goods and services provided. This right may not be

construed to require or impose a duty on a funeral home to bring a legal action, and the funeral home may not be held criminally or civilly liable for not bringing an action. (R.C. 2108.85.)

(4) A funeral home may rely on the content of a written declaration and the instructions of the person or group of persons whom the funeral home reasonably believes has the right of disposition. When there is no written declaration or other document, notarized or witnessed in the manner required for a declaration, that clearly assigns to a person or group of persons the right of disposition or when each person to whom the right of disposition has been assigned or reassigned pursuant to a written declaration is disqualified from exercising the right, a funeral home may rely on the instructions of the person or group of persons it reasonably believes has the statutory right of disposition pursuant to the prioritization established by the act. If a funeral home relies in good faith on the contents of a written declaration or on the instructions of the person or group of persons it reasonably believes has the right of disposition, it is not subject to criminal or civil liability or to disciplinary action for taking an action or not taking an action in such reliance or for otherwise complying with the act's provisions regarding the right of disposition. (R.C. 2108.86.)

(5) A funeral home may, but does not have a duty to, independently investigate the existence of, or locate or contact, a representative or successor representative named in a written declaration or a person listed in the priority list for the statutory right of disposition (R.C. 2108.87).

Matters related to estate administration and funeral expenses

Summary release from administration

Under continuing law, any person who is not a surviving spouse and who has paid or is obligated in writing to pay the decedent's funeral and burial expenses may apply to the probate court for an order granting a summary release from administration⁵ if the value of the assets of the decedent's estate does not exceed the lesser of \$2,000 or the amount of the decedent's funeral and burial expenses. A surviving spouse may apply for summary release from administration if the

⁵ *Summary release from administration relieves the decedent's estate from administration (i.e., the formalities normally required in the handling of an estate's assets and liabilities under Probate Court supervision), directs the delivery to the applicant of the decedent's personal property together with the title to that property, directs the transfer to the applicant of the title to any interests in real property included in the decedent's estate, and eliminates the need for the written consent of the tax commissioner prior to the delivery, transfer, or payment to the applicant of an asset of the decedent's estate (R.C. 2113.031(D), in the act but not amended by the act).*

decedent's funeral and burial expenses have been prepaid and the value of the assets of the decedent's estate does not exceed the total of the statutory allowance for support made to the surviving spouse and the decedent's minor children and an amount not exceeding \$2,000 for the decedent's funeral and burial expenses. A surviving spouse may also apply for a summary release from administration if the decedent's funeral and burial expenses have not been prepaid, the decedent's surviving spouse has paid or is obligated in writing to pay the decedent's funeral and burial expenses, and the value of the assets of the decedent's estate does not exceed the totals set forth in the preceding sentence. A probate court must grant an application for summary release from administration upon receipt of an application in proper form, including, if appropriate to the application, a receipt, contract, or other document confirming the applicant's payment or obligation to pay the decedent's funeral and burial expenses or the prepayment of those expenses and only if the court finds that all of the requirements for summary release have been met. (R.C. 2113.031(B), (C), and (D).)

The act increases the maximum amount that an applicant for summary release from administration may spend for funeral and burial expenses or the maximum amount of the prepayment of those expenses, whichever is applicable, from \$2,000 to \$5,000. It specifically includes persons described in R.C. 2108.89 (see "*Liability of representatives*," above) among the persons other than the surviving spouse who may apply for summary release. It also specifies that the document that confirms the applicant's payment or obligation to pay the decedent's funeral and burial expenses or the prepayment of those expenses may be a written declaration. (R.C. 2113.031(B)(1), (B)(2)(a)(ii), (C)(1), and (C)(3)(a).)

Credits allowed by probate court

Under continuing law, the probate court, in settlement of an executor's or administrator's account, may allow as a credit to the executor or administrator a just amount expended for a tombstone or monument for the deceased and a just amount paid to a cemetery association or corporation as a perpetual fund for caring for and preserving the lot on which the deceased is buried. The executor or administrator is not obligated to procure a tombstone or monument or to pay anything into such a perpetual fund. The act provides that a person who has a declaratory or statutory right of disposition has the same rights as an executor or administrator to a credit allowed by the probate court in settlement of an account under this provision and is not obligated to procure a tombstone or monument or to pay any sum into such perpetual fund. (R.C. 2113.37.)

Application of estate assets

Continuing law specifies the order in which an executor or administrator must apply the assets of an estate in paying the decedent's debts. The second item,

after the costs and expenses of administration, is an amount not exceeding \$2,000 for funeral expenses included in the funeral director's bill and other funeral expenses approved by the probate court and an amount not exceeding \$2,000 for burial and cemetery expenses, including that portion of the funeral director's bill allocated to cemetery expenses and paid by the funeral director. If the total bill of a funeral director for funeral expenses exceeds \$2,000, an excess amount of not more than \$1,000 for funeral expenses included in the funeral director's bill that exceed \$2,000, is listed sixth in the order of priority. The part of the funeral director's bill that is over \$3,000 for funeral expenses and for burial and cemetery expenses described in the two preceding sentences is lumped together with "other debts" in the ninth and last order of priority. The act increases the amounts in the second item to \$4,000 for funeral expenses and \$3,000 for burial and cemetery expenses and the amount in the sixth item to the excess but not more than \$2,000. Amounts for funeral or burial expenses in the bill of the funeral director over \$6,000 fall into the ninth category. (R.C. 2117.25(A)(2), (A)(6), and (B).)

The act provides that a claim against an estate under a funeral director's bill arises only after the death of the decedent and is not in satisfaction of an individual's personal obligation during the individual's lifetime. If during the decedent's lifetime the decedent purchased an irrevocable preneed funeral contract pursuant to R.C. 1111.19, not in the act, the estate is not liable for the decedent's funeral expenses and the debts that must be paid in listed order of priority do not include the funeral director's bill. (R.C. 2117.251.)

Reimbursement for funeral expenses

Under continuing law, a surviving spouse who pays for funeral expenses of the deceased spouse is entitled to reimbursement from the deceased spouse's estate to the extent that the rights of other creditors of the estate will not be prejudiced by the reimbursement. The act expands the right of reimbursement to include burial expenses and gives the right of reimbursement to a person who has a declaratory or statutory right of disposition as well as to the surviving spouse. (R.C. 2106.20.)

Payments by fiduciary before letters issued

Under continuing law, no act or transaction by a fiduciary is valid before a probate court issues letters of appointment to the fiduciary. However, an executor named in a will or an executor nominated pursuant to a power of nomination granted in a will may pay funeral expenses or perform necessary acts for the preservation of the trust estate prior to the issuance of such letters. The act extends these rights of payment and preservation to a person who has a declaratory or statutory right of disposition. (R.C. 2109.02.)

Technical amendment

The act corrects the designation of divisions in a section of the Revised Code that regulates funeral processions (R.C. 4511.451).

COMMENT

The Revised Code establishes the following list of persons, in order of priority, who may serve as an authorizing agent for the cremation of a dead human body (R.C. 4717.22(A)):

- (1) The spouse of the decedent at the time of the decedent's death;
- (2) Any person acting on the instructions of a decedent who authorized the decedent's own cremation by executing an antemortem cremation authorization form in accordance with R.C. 4717.21;
- (3) A person serving as the executor or legal representative of the decedent's estate who is acting in accordance with the decedent's written instructions for the final disposition of the decedent's body;
- (4) The decedent's surviving adult children. If the decedent is survived by more than one adult child, any of them who states on the cremation authorization form authorizing the cremation of the decedent executed in accordance with R.C. 4717.24 that all of the decedent's other adult children have been notified of the decedent's death and of the plans to cremate the decedent and that none of them have expressed an objection to the cremation may serve as the authorizing agent.
- (5) The decedent's surviving parent or, if the decedent was under 18 years of age at death, a surviving parent or the guardian or custodian of the decedent. If the decedent is survived by both parents, either of them may serve as the authorizing agent by stating on the cremation authorization form authorizing the cremation of the decedent executed in accordance with R.C. 4717.24 that the other parent has been notified of the decedent's death and of the plans to cremate the decedent and that the other parent expressed no objection to the cremation.
- (6) The person in the next degree of kinship to the decedent in the order named in R.C. 2105.06 to inherit the estate of the decedent if the decedent had died intestate. If there is more than one person of that degree of kinship, any of them may serve as the authorizing agent.
- (7) If the decedent was an indigent person or other person the final disposition of whose body is the responsibility of the state or a political

subdivision of the state, the public officer or employee responsible for arranging the final disposition of the decedent's body;

(8) In the case of an individual who has donated the individual's body to science for purposes of medical education or research, or whose death occurred in a nursing home, rest home, or home for the aging licensed under R.C. Chapter 3721., an adult care facility licensed under R.C. Chapter 3722., or a hospital registered under R.C. 3701.07, and who has executed an antemortem cremation authorization form in accordance with R.C. 4717.21 in which the medical education or research facility, nursing home, rest home, home for the aging, adult care facility, or hospital is designated to make arrangements for the final disposition of the decedent's body, a representative of that facility or institution;

(9) In the absence of any of the parties named in paragraphs (1) through (8), any person willing to assume the responsibility of an authorizing agent under R.C. 4717.23 through 4717.30.

HISTORY

ACTION	DATE
Introduced	11-15-05
Reported, H. Judiciary	02-14-06
Passed House (93-0)	02-22-06
Reported, S. Judiciary - Civil Justice	05-17-06
Passed Senate (33-0)	05-23-06
House concurred in Senate amendments (94-0)	05-24-06

06-hb426-126.doc/jc