



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

RIGHT TO CONTROL DISPOSITION OF REMAINS

LEGISLATIVE PROPOSAL (T&E 2011-07)

TO: Saul Bercovitch, Legislative Counsel
State Bar Office of Governmental Affairs

FROM: Jayne C. Lee, Member, Trusts and Estate Executive Committee

DATE: January 18, 2010

RE: Right to Control Disposition of Remains
A proposal to amend § 7100 of the Health and Safety Code

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: January 16, 2010
Approval vote: Unanimous

Contact Information	Section Legislative Co-Chairs
Jayne C. Lee Alameda County Superior Court 2120 Martin Luther King Jr. Way Berkeley, CA 94704 Phone: 510-647-4459 Fax: 510-647-4428 jalee@alameda.courts.ca.gov	Edward J. Corey, Jr. Weintraub Genshlea & Chediak 400 Capitol Mall 11 th Flr Sacramento CA 95814 Phone: 916-558-6017 Fax: 916-446-1611 ecorey@weintraub.com
	Richard L. Ehrman Thoits Love Hershberger & McLean 285 Hamilton Ave, Ste 300 Palo Alto, CA 94301 Phone: 650-327-4200 Fax: 650-325-5572 rehman@thoits.com

SUMMARY OF PROPOSAL:

This proposal would add the conservator of the person and conservator of the estate to the list of persons who may control the disposition of the decedent's remains.

ISSUES AND PURPOSE:

Existing law lists the person or persons who, in an order of priority, have the right to control and duty of disposition of the remains of a deceased person (decedent) if other directions have not been given by the decedent. Currently, conservators of the person or estate, appointed by a court under Division 4, Part 3 of the Probate Code (commencing with Section 1800), are not included in the order of priority. This creates a problem because conservators of the person or the estate may sometimes be the only persons who have a relationship with the decedent. This proposal would add the conservator of the person and conservator of the estate to the list of persons who may control the disposition of the decedent's remains. It would place the priority of the conservator of the person and the conservator of the estate below all persons who are in any degree of kinship with the deceased person and only above that of the public administrator. It would impose the duty of disposition of the remains on the conservator of the person and the conservator of the estate only if the deceased has sufficient assets.

HISTORY: TEXCOM is not aware of any similar bills that have been introduced to modify this statute in the manner described.

IMPACT ON PENDING LITIGATION: TEXCOM is not aware of any litigation currently pending regarding the issues addressed by the proposal.

LIKELY SUPPORT & OPPOSITION:

<u>Support</u>	Conservators who would like to have the ability to control the disposition of the conservatee’s bodily remains.
<u>Oppose</u>	None anticipated.

FISCAL IMPACT: No anticipated fiscal impact.

GERMANENESS: Drafting a proposal such as this requires an understanding of the disposal of bodily remains and conservatorships. The members of the Trusts and Estates Executive Committee have interest and expertise in these areas.

TEXT OF PROPOSAL:

SECTION 1: Section 7100 of the Health and Safety Code is amended to read:

7100 (a) The right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services to be provided, unless

other directions have been given by the decedent pursuant to Section 7100.1, vests in, and the duty of disposition and the liability for the reasonable cost of disposition of the remains devolves upon, the following in the order named:

(1) An agent under a power of attorney for health care who has the right and duty of disposition under Division 4.7 (commencing with Section 4600) of the Probate Code, except that the agent is liable for the costs of disposition only in either of the following cases:

(A) Where the agent makes a specific agreement to pay the costs of disposition.

(B) Where, in the absence of a specific agreement, the agent makes decisions concerning disposition that incur costs, in which case the agent is liable only for the reasonable costs incurred as a result of the agent's decisions, to the extent that the decedent's estate or other appropriate fund is insufficient.

(2) The competent surviving spouse.

(3) The sole surviving competent adult child of the decedent, or if there is more than one competent adult child of the decedent, the majority of the surviving competent adult children. However, less than the majority of the surviving competent adult children shall be vested with the rights and duties of this section if they have used reasonable efforts to notify all other surviving competent adult children of their instructions and are not aware of any opposition to those instructions by the majority of all surviving competent adult children.

(4) The surviving competent parent or parents of the decedent. If one of the surviving competent parents is absent, the remaining competent parent shall be vested with the rights and duties of this section after reasonable efforts have been unsuccessful in locating the absent surviving competent parent.

(5) The sole surviving competent adult sibling of the decedent, or if there is more than one surviving competent adult sibling of the decedent, the majority of the surviving competent adult siblings. However, less than the majority of the surviving competent adult siblings shall be vested with the rights and duties of this section if they have used reasonable efforts to notify all other surviving competent adult siblings of their instructions and are not aware of any opposition to those instructions by the majority of all surviving competent adult siblings.

(6) The surviving competent adult person or persons respectively in the next degrees of kinship, or if there is more than one surviving competent adult person of the same degree of kinship, the majority of those persons. Less than the majority of surviving competent adult persons of the same degree of kinship shall be vested with the rights and duties of this section if those persons have used reasonable efforts to notify all other surviving competent adult persons of the same degree of kinship of their instructions and are not aware of any opposition to those instructions by the majority of all surviving competent adult persons of the same degree of kinship.

(7) *A conservator of the person appointed under Division 4, Part 3 of the Probate Code (commencing with Section 1800) when the decedent has sufficient assets.*

(8) *A conservator of the estate appointed under Division 4, Part 3 of the Probate Code (commencing with Section 1800) when the decedent has sufficient assets.*

~~(9)~~ (9) The public administrator when the deceased has sufficient assets.

(b)(1) If any person to whom the right of control has vested pursuant to subdivision (a) has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent's death and those charges are known to the funeral director or cemetery authority, the right of control is relinquished and passed on to the next of kin in accordance with subdivision (a).

(2) If the charges against the person are dropped, or if the person is acquitted of the charges, the right of control is returned to the person.

(3) Notwithstanding this subdivision, no person who has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent's death to whom the right of control has not been returned pursuant to paragraph (2) shall have any right to control disposition pursuant to subdivision (a) which shall be applied, to the extent the funeral director or cemetery authority know about the charges, as if that person did not exist.

(c) A funeral director or cemetery authority shall have complete authority to control the disposition of the remains, and to proceed under this chapter to recover usual and customary charges for the disposition, when both of the following apply:

(1) Either of the following applies:

(A) The funeral director or cemetery authority has knowledge that none of the persons described in paragraphs (1) to (6 8), inclusive, of subdivision (a) exists.

(B) None of the persons described in paragraphs (1) to (6 8), inclusive, of subdivision (a) can be found after reasonable inquiry, or contacted by reasonable means.

(2) The public administrator fails to assume responsibility for disposition of the remains within seven days after having been given written notice of the facts. Written notice may be delivered by hand, U.S. mail, facsimile transmission, or telegraph.

(d) The liability for the reasonable cost of final disposition devolves jointly and severally upon all kin of the decedent in the same degree of kinship and upon the estate of the decedent.

However, if a person accepts the gift of an entire body under subdivision (1) of Section 71.55.5, that person, subject to the terms of the gift, shall be liable for the reasonable cost of final disposition of the decedent.

(e) This section shall be administered and construed to the end that the expressed instructions of the decedent or the person entitled to control the disposition shall be faithfully and promptly performed.

(f) A funeral director or cemetery authority shall not be liable to any person or persons for carrying out the instructions of the decedent or the person entitled to control the disposition.

(g) For purposes of this section, "adult" means an individual who has attained 18 years of age, "child" means a natural or adopted child of the decedent, and "competent" means an individual who has not been declared incompetent by a court of law or who has been declared competent by a court of law following a declaration of incompetence.