

Senate Bill No. 417

(By Senator Fanning)

[Introduced January 25, 2012; referred to
the Committee on the Judiciary.]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §30-6-22a, relating to establishing the right to control the disposition of the remains of a deceased person; determining who has that right; setting forth how that right may be forfeited; setting forth the role of the county commission; and limiting the liability of funeral homes.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §30-6-22a, to read as follows:

ARTICLE 6. BOARD OF FUNERAL SERVICE EXAMINERS.

**§30-6-22a. Right of disposition; preneed contract; affidavit on
disposition of remains; role of county commission;
liability of funeral home.**

1 (a) Notwithstanding section twenty-two of this article, a
2 person who is eighteen years of age or older and of sound
3 mind, by entering into a preneed funeral contract, as defined
4 in section two, article fourteen, chapter forty-seven of this
5 code, may direct the location, manner and conditions of the
6 disposition of the person's remains and the arrangements for
7 funeral goods and services to be provided upon the person's
8 death. The disposition directions and funeral prearrange-
9 ments that are contained in a preneed contract is not subject
10 to cancellation or substantial revision unless the cancellation
11 or substantial revision has been ordered by a person the
12 decedent has appointed in the preneed contract as the person
13 authorized to cancel or revise the terms of the preneed
14 contract or unless any resources set aside to fund the preneed
15 contract are insufficient under the terms of the preneed
16 contract to carry out the disposition directions and funeral
17 prearrangements contained in the contract.

18 (b) Except as provided in subsection (c) of this section,
19 the right to control the disposition of the remains of a

20 deceased person, the location, manner and conditions of
21 disposition, and arrangements for funeral goods and services
22 to be provided vests in the following, in the order named,
23 provided that the person is eighteen years or older and is of
24 sound mind:

25 (1)(A) A person designated by the decedent as the person
26 with the right to control the disposition in an affidavit
27 executed in accordance with paragraph (B) of this subdivi-
28 sion; and

29 (B) A person who is eighteen years of age or older and of
30 sound mind wishing to authorize another person to control
31 the disposition of his or her remains may execute an affidavit
32 before a notary public in substantially the following form:

33 “I, _____, do hereby designate
34 _____ with the right to control the disposi-
35 tion of my remains upon my death. I ___ have/ ___ have not
36 attached specific directions concerning the disposition of my
37 remains with which the designee shall substantially comply,
38 provided that these directions are lawful and there are
39 sufficient resources in my estate to carry out the directions.

40 _____

41 Signed

42 State of _____

43 County of _____

44 I, _____, a Notary Public of said

45 County, do certify that _____,

46 as principal whose name is signed to the writing above

47 bearing date on the _____ day of _____, 20____, has this

48 day acknowledged the same before me.

49 Given under my hand this _____ day of _____, 20__.

50 My commission expires: _____

51 _____

52 Notary Public”;

53 (2) The surviving spouse of the decedent;

54 (3) The sole surviving child of the decedent or, if there is

55 more than one child of the decedent, the majority of the

56 surviving children. However, less than one half of the

57 surviving children shall be vested with the rights under this

58 section if they have used reasonable efforts to notify all other

59 surviving children of their instructions and are not aware of

60 any opposition to those instructions on the part of more than

61 one half of all surviving children;

62 (4) The surviving parent or parents of the decedent. If one

63 of the surviving parents is absent, the remaining parent shall

64 be vested with the rights and duties under this section after
65 reasonable efforts have been unsuccessful in locating the
66 absent surviving parent;

67 (5) The surviving brother or sister of the decedent or, if
68 there is more than one sibling of the decedent, the majority
69 of the surviving siblings. However, less than the majority of
70 surviving siblings shall be vested with the rights and duties
71 under this section if they have used reasonable efforts to
72 notify all other surviving siblings of their instructions and
73 are not aware of any opposition to those instructions on the
74 part of more than one half of all surviving siblings;

75 (6) The surviving grandparent of the decedent or, if there
76 is more than one surviving grandparent, the majority of the
77 grandparents. However, less than the majority of the surviv-
78 ing grandparents shall be vested with the rights and duties
79 under this section if they have used reasonable efforts to
80 notify all other surviving grandparents of their instructions
81 and are not aware of any opposition to those instructions on
82 the part of more than one half of all surviving grandparents;

83 (7) The guardian of the person of the decedent at the time
84 of the decedent's death if one had been appointed;

85 (8) The personal representative of the estate of the
86 decedent;

87 (9) The person in the classes of the next degree of
88 kinship, in descending order, under the laws of descent and
89 distribution to inherit the estate of the decedent. If there is
90 more than one person of the same degree, any person of that
91 degree may exercise the right of disposition;

92 (10) If the disposition of the remains of the decedent is
93 the responsibility of the state or a political subdivision of the
94 state, the public officer, administrator or employee responsi-
95 ble for arranging the final disposition of decedent's remains;
96 or

97 (11) In the absence of any person under subdivisions (1)
98 through (10) of this subsection, any other person willing to
99 assume the responsibilities to act and arrange the final
100 disposition of the decedent's remains, including the funeral
101 director with custody of the body, after attesting in writing
102 that a good-faith effort has been made to no avail to contact
103 the individuals under subdivisions (1) through (10) of this
104 subsection.

105 (c) A person entitled under law to the right of disposition
106 forfeits that right, and the right is passed on to the next

107 qualifying person as listed in subsection (b) of this section,
108 in the following circumstances:

109 (1) Any person charged with murder or voluntary
110 manslaughter in connection with the decedent's death and
111 whose charges are known to the funeral director. However,
112 if the charges against that person are dismissed or if the
113 person is acquitted of the charges, the right of disposition is
114 returned to the person;

115 (2) Any person who does not exercise his or her right of
116 disposition within two days of notification of the death of
117 decedent or within three days of decedent's death, whichever
118 is earlier;

119 (3) If the person and the decedent are spouses and a
120 petition to dissolve the marriage was pending at the time of
121 decedent's death; or

122 (4) Where the county commission pursuant to subsection
123 (d) of this section determines that the person entitled to the
124 right of disposition and the decedent were estranged at the
125 time of death. For purposes of this subdivision, the term
126 "estranged" means a physical and emotional separation from
127 the decedent at the time of death which has existed for a

128 period of time that clearly demonstrates an absence of due
129 affection, trust, and regard for the decedent.

130 (d) Notwithstanding subsections (b) and (c) of this
131 section, the county commission for the county where the
132 decedent resided may award the right of disposition to the
133 person determined by the court to be the most fit and
134 appropriate to carry out the right of disposition and may
135 make decisions regarding the decedent's remains if those
136 sharing the right of disposition cannot agree. The following
137 provisions shall apply to the court's determination under this
138 subsection:

139 (1) If the persons holding the right of disposition are two
140 or more persons with the same relationship to the decedent
141 and they cannot, by majority vote, make a decision regarding
142 the disposition of the decedent's remains, any of these
143 persons or a funeral home with custody of the remains may
144 file a petition asking the county commission to make a
145 determination in the matter;

146 (2) In making a determination under this subsection, the
147 county commission shall consider the following:

148 (A) The reasonableness and practicality of the proposed
149 funeral arrangements and disposition;

150 (B) The degree of the personal relationship between the
151 decedent and each of the persons claiming the right of
152 disposition;

153 (C) The desires of the person or persons who are ready,
154 able and willing to pay the cost of the funeral arrangements
155 and disposition;

156 (D) The convenience and needs of other families and
157 friends wishing to pay respects;

158 (E) The desires of the decedent; and

159 (F) The degree to which the funeral arrangements would
160 allow maximum participation by all wishing to pay respect;

161 (3) In the event of a dispute regarding the right of
162 disposition, a funeral home shall not be liable for refusing to
163 accept the remains or to inter or otherwise dispose of the
164 remains of the decedent or complete the arrangements for
165 the final disposition of the remains until the funeral home
166 receives a court order or other written agreement signed by
167 the parties in the disagreement that decides the final disposi-
168 tion of the remains. If the funeral home retains the remains
169 for final disposition while the parties are in disagreement,
170 the funeral home may embalm or refrigerate and shelter the
171 body, or both, in order to preserve it while awaiting the final

172 decision of the county commission and may add the cost of
173 embalming or refrigeration and sheltering to the final
174 disposition costs. If a funeral home brings an action under
175 this subsection, the funeral home may add the legal fees and
176 court costs associated with a petition under this subsection
177 to the cost of final disposition. This subsection may not be
178 construed to require or to impose a duty upon a funeral home
179 to bring an action under this subsection. A funeral home and
180 its employees shall not be held criminally or civilly liable for
181 choosing not to bring an action under this subsection; and

182 (4) Except to the degree it may be considered by the
183 county commission under paragraph (C), subdivision (2) of
184 this subsection, the fact that a person has paid or agreed to
185 pay for all or part of the funeral arrangements and final
186 disposition shall not give that person a greater claim to the
187 right of disposition than the person would otherwise have.
188 The personal representative of the estate of the decedent
189 does not, by virtue of being the personal representative, have
190 a greater claim to the right of disposition than the person
191 would otherwise have.

192 (e) Any person signing a funeral service agreement,
193 cremation authorization form or any other authorization for

194 disposition shall be deemed to warrant the truthfulness of
195 any facts set forth therein, including the identity of the
196 decedent whose remains are to be buried, cremated or
197 otherwise disposed of, and the party's authority to order the
198 disposition. A funeral home has the right to rely on that
199 funeral service agreement or authorization and shall have
200 the authority to carry out the instructions of the person or
201 persons the funeral home reasonably believes holds the right
202 of disposition. The funeral home has no responsibility to
203 contact or to independently investigate the existence of any
204 next of kin or relative of the decedent. If there is more than
205 one person in a class who are equal in priority and the
206 funeral home has no knowledge of any objection by other
207 members of that class, the funeral home may rely on and act
208 according to the instructions of the first person in the class
209 to make funeral and disposition arrangements, if no other
210 person in that class provides written objections to the
211 funeral home.

212 (f) No funeral establishment or funeral director who
213 relies in good faith upon the instructions of an individual
214 claiming the right of disposition shall be subject to criminal
215 or civil liability or subject to disciplinary action for carrying

216 out the disposition of the remains in accordance with those
217 instructions.

(NOTE: The purpose of this bill is to establish the right to control the disposition of the remains of a deceased person. The bill determines who has that right and how that right may be forfeited. The bill sets forth the role of a county commission. The bill also limits the liability of funeral homes that act in good faith.

This section is new; therefore, strike-throughs and underscoring have been omitted.)