

First Supplement to Memorandum 2001-38

AB 1278 (Wayne): Health Care Decisions Law Revisions

The California Funeral Directors Association has raised some concerns with the proposed amendment of Health and Safety Code Section 7100 in AB 1278, the Health Care Decisions Law follow-up bill. After discussing the matter with CFDA representatives, along with Jamie Morgan from Assembly Member Wayne's office, it appears that the issue is one of drafting clarity rather than policy. Background from the Commission's recommendation is attached. See *Health Care Decisions Law: Miscellaneous Revisions*, 29 Cal. L. Revision Comm'n Reports 621, 630-32, 635-38 (2000).

The amendment of Health and Safety Code Section 7100 currently included in AB 1278 reads as follows:

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 governed by Division 4.7 (commencing with Section 4600) of the Probate Code. Unless the agent specifically agrees, the agent does not have a duty or liability under this section. If the agent assumes the duty under this section, 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.

...

In order to make the two liability rules clearer, the staff proposes to substitute the following amendment in Section 7100 (a)(1):

(1) An agent under a power of attorney for health care governed by Division 4.7 (commencing with Section 4600) of the Probate Code, except that the existence of the agent's right and duty is determined under Division 4.7 (commencing with Section 4600) of the Probate Code, and the agent is not liable for the costs of disposition except in one 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.

The staff proposes to revise the Comment as follows:

Comment. Subdivision (a)(1) of Section 7100 is amended to make clear that an agent under a power of attorney for health care is not automatically liable for the costs of disposition of remains. ~~Nor does the agent have a duty greater than that agreed to under the Health Care Decisions Law, Probate Code Section 4600 et seq.~~ The agent can be liable under this section, however, if the agent (1) makes a specific agreement to pay the costs of disposition or (2) makes decisions, in the absence of an agreement, that result in costs. ~~Even if~~ In the latter case, where there is no specific agreement to pay, the agent is not liable unless the estate or other fund is insufficient. See Section 7100.1; see also Prob. Code §§ 11421 (payment of funeral expenses from estate), 11446 (funeral expenses from estate, not community property). The limitations on liability in subdivision (a)(1) ~~applies~~ apply only to the person when acting as agent and not where the statute imposes liability based on some other relationship, such as a spouse under subdivision (a)(2) or child under subdivision (a)(3).

Subdivision (a)(1) is also amended to make clear that the rights and duties of agents under powers of attorney for health care are subject in the first instance to determination under the Health Care Decisions Law. Thus, if an agent has been granted authority to direct disposition of remains under Probate Code Section 4683(b)(3), then the agent would fall within this section, if the agent assumes that authority, and would be liable as provided in subparagraphs (A) and (b) of subdivision (a)(1). But if the agent has not been granted that authority, either explicitly or by a general grant of authority under the Health Care Decisions Law, the agent does not have any rights, duties, or liabilities under Section 7100.

Respectfully submitted,

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Agent's Liability for Disposition of Remains

The Health and Safety Code sets up a detailed scheme defining rights, duties, and liabilities of surviving family members and other persons, including agents and public guardians, pertaining to disposition of remains.¹⁶ An agent under a power of attorney for health care has priority over all others to control the disposition of a decedent's remains.¹⁷ The statutory scheme also includes provisions making it a misdemeanor to fail to perform the statutory duty and providing liability for treble damages.¹⁸

The top priority for health care agents was added to the law by an amendment of Health and Safety Code Section 7100 in 1998.¹⁹ The 1998 legislation focused on the problem of a person charged with the decedent's murder having priority in disposition of the remains.²⁰ The legislative committee analyses do not discuss or recognize the potential effect of the amendment on the liability of attorneys-in-fact, nor is the purpose of adding attorneys-in-fact explained.

16. See generally Health and Safety Code §§ 7100-7117.

17. Health & Safety Code § 7100. This section was amended in 1998 to provide that an attorney-in-fact under a durable power of attorney has the top priority to control disposition of remains. See 1998 Cal. Stat. ch. 253, § 1 (SB 1360). The liability and duty provisions were already in place. In 1999, this section was amended to conform to the terminology of the Health Care Decisions Law. See 1999 Cal. Stat. ch. 658, § 5.5 (AB 891). The latter amendment was made on Commission recommendation as a conforming revision, but the Commission did not reexamine the language or underlying policy of Section 7100 at that time.

18. Health & Safety Code § 7103. In addition, Section 7105(a) provides that a cemetery authority has a cause of action against a person with a duty of interment.

19. 1998 Cal. Stat. ch. 253, § 1 (SB 1360).

20. See, e.g., Senate Committee on Business and Professions, Analysis of SB 1360, as amended April 1, 1998 (hearing date April 13, 1998); Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development, Analysis of SB 1360, as amended June 10 1998 (hearing date June 23, 1998); Senate Rules Committee, Floor Analysis of SB 1360, as amended July 2, 1998.

The Commission has received reports that some potential agents, when informed of the apparent liability under the Health and Safety Code, are reluctant to agree to act as agents, and persons preparing powers of attorney for health care are worried about imposing such a liability on their relatives or friends whom they want to name as agents.²¹ Clarifying the relation between the Health and Safety Code provisions and the Probate Code, and resolving internal inconsistencies in the Health and Safety Code provisions, are outside the scope of this recommendation.²² But it is important to insulate agents under powers of attorney for health care from this apparently unintended imposition of liability, which can act to defeat the fundamental purpose of the Health Care Decisions Law of effectuating patient autonomy through the use of advance health care directives.

Accordingly, the Commission recommends that Health and Safety Code Section 7100 be amended to make clear that, unless they agree otherwise, agents do not have an enforceable duty to direct the disposition of the principal's remains and are not liable under that section for failure or refusal to act. Furthermore, in a case where an agent does exercise the

21. See, e.g., Letter from Theresa Drought, Ph.D., RN, Ethics Committee Chair, Kaiser Oakland Medical Center, to Stan Ulrich (Oct. 5, 2000) (attached to Third Supplement to Commission Staff Memorandum 2000-62, Oct. 5, 2000).

22. Some of these provisions, including Section 7100, may be misleading when read in isolation. The decedent's estate is primarily liable, and some courts have declined to apply the literal statutory rule. See *In re Kemmerrer*, 114 Cal. App. 2d 810, 251 P.2d 345 (1952); *Benbough Mortuary v. Barney*, 196 Cal. App. 2d Supp. 861, 16 Cal. Rptr. 811 (1961). Section 7100(d) provides that liability for the reasonable cost of final disposition "devolves jointly and severally upon all kin of the decedent in the same degree of kindred and upon the estate of the decedent." If the decedent has given instructions for disposition, the cost is payable from designated funds or the decedent's estate, as provided in Section 7100.1. See also Prob. Code §§ 11421(a) (funeral expenses as priority claim on decedent's estate), 11446 (funeral expenses charged against estate, not community share of surviving spouse, notwithstanding any other statute or whether spouse or "any other person is also liable for the expenses").

authority to direct disposition of remains, the agent should be liable only for reasonable costs that cannot be satisfied out of the principal's estate or other appropriate fund. The proposed liability limitation would apply only to the person when acting as agent and not in situations where the statute imposes liability based on some other relationship, such as a spouse, child, or parent.

PROPOSED LEGISLATION

Health & Safety Code § 7100 (amended). Right to control disposition of remains

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 governed by Division 4.7 (commencing with Section 4600) of the Probate Code. *Unless the agent specifically agrees, the agent does not have a duty or liability under this section. If the agent assumes the duty under this section, 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 one-half of the surviving 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 on the part of more than one-half 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 surviving competent adult person or persons respectively in the next degrees of kindred. If there is more than one surviving competent adult person of the same degree of kindred, the majority of those persons. Less than the majority of surviving competent adult persons of the same degree of kindred 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 kindred of their instructions and are not aware of any opposition to those instructions on the part of one-half or more of all surviving competent adult persons of the same degree of kindred.

(6) 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 (5), inclusive, of subdivision (a) exists.

(B) None of the persons described in paragraphs (1) to (5), 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 kindred and upon the estate of the decedent. However, if a person accepts the gift of an entire body under subdivision (a) of Section 7155.5, 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.

Comment. Subdivision (a)(1) of Section 7100 is amended to make clear that an agent under a power of attorney for health care is not automatically liable for the costs of disposition of remains. Nor does the agent have a duty greater than that agreed to under the Health Care Decisions Law, Probate Code Section 4600 *et seq.* Even if the agent assumes the duty to make decisions under this section, the agent is not liable unless the estate or other fund is insufficient. See Section 7100.1; see also Prob. Code §§ 11421 (payment of funeral expenses from estate), 11446 (funeral expenses from estate, not community property). The limitation on liability in subdivision (a)(1) applies only to the person when acting as agent and not where the statute imposes liability based on some other relationship, such as a spouse under subdivision (a)(2) or child under subdivision (a)(3).