

PHILADELPHIA COURT OF COMMON PLEAS  
ORPHANS' COURT DIVISION

Estate of Rose Weiss, Deceased  
O.C. No.1463 DE of 2009  
Control No. 092512

OPINION

***Introduction***

The Petition filed by Michael Weiss raises the painful and delicate issue of who should determine the disposition of a deceased mother's remains in a dispute between her two grieving sons. For the reasons set forth below, the petitioner has established his authority to determine the final care and disposition of his mother's body under section 305 of the PEF code and controlling precedent.

***Factual Background***

On September 24, 2009, Rose Weiss ("Rose") died testate. She was a resident of Philadelphia who was domiciled at Cathedral Village. Rose was survived by her two sons: the petitioner Michael Weiss ("Michael") and his brother Marc J. Weiss ("Marc"). Three days after his mother's death, Michael filed an emergency petition to approve cremation of his deceased mother's body in accordance with 20 Pa.C.S. § 305. A hearing was held on September 30, 2009 to consider this petition. Both Michael and Marc attended represented by counsel.

During the hearing, the petitioner presented credible testimony by himself, his mother's sister and his mother's attorney that at various points in her life the decedent, Rose Weiss, had expressed the intent that upon her death her bodily remains should be cremated just as had happened to the bodies of her husband and parents. No testimony was presented that Rose had expressed an intent that her bodily remains be buried rather than cremated.

Evidence was also presented at the hearing that prior to her death, Rose Weiss had expressed her confidence in her son Michael by appointing him power of attorney over matters involving her health and welfare as well as a joint power of attorney over her financial matters.

### *Legal Analysis*

This court has jurisdiction over the control of a decedent's burial under Section 711(1) of the PEF Code. 20 Pa.C.S. 711(1). The PEF code also sets forth rules for determining the right "to dispose of a decedent's remains." Under Section 305(c) of the PEF Code, if a decedent is not survived by a spouse, "absent an allegation of enduring estrangement, incompetence, contrary intent or waiver and agreement which is proven by clear and convincing evidence, the next of kin shall have sole authority in all matters pertaining to the disposition of the remains of the decedent." 20 Pa.C.S. §305(c). In the present case, both Michael and Marc are next of kin with equal standing. Unfortunately, they disagree over whether their mother's body should be cremated. Section 305 provides that in such cases, a court shall decide which brother shall have authority to make the determination of disposition of the decedent's body "with preference given to the person who had the closest relationship with the deceased:"

If two or more persons with equal standing as next of kin disagree on disposition of the decedent's remains, the authority to dispose shall be determined by the court, with preference given to the person who had the closest relationship to the deceased." 20 Pa.C.S. §305(d)(2). See also Estate of N.P., 22 Fid. Rep. 2d 473 (Berks Cty. O.C. 2002)(applying "closeness test").

There is no doubt based on the testimony at the hearing that both Michael and Marc deeply cared for and loved their mother. Determining which of Rose's two sons had the "closest" relationship for the purposes of section 305 in no way reflects on their love or seeks to judge it. Instead, there are more objective criteria in this case that leave no doubt that Michael

should have the authority to determine the disposition of his mother's body. According to the testimony at the hearing, Rose expressed her special confidence in Michael by naming him as her power of attorney regarding her health and welfare. She also named him a joint power of attorney together with her attorney for her financial affairs. While the authority Rose granted to Michael as her agent during life expired upon her death, her underlying intent survives to support the conclusion that she felt closer to him to decide such matters as the final disposition of her body.

In addition to the criteria set forth in Section 305(d)(2) for determining which son should have authority in this matter, the wishes of the decedent are also germane. Although the statutory language of Section 305 became effective in 1998, the recent appellate precedent of Kulp v. Kulp, 2007 Pa. Super. 70, 920 A.2d 867 (2007) emphasizes that the provisions of section 305 should be construed in light of the prior relevant precedent. According to the Kulp court, the Pennsylvania Supreme Court decision of Pettigrew v. Pettigrew, 207 Pa. 313, 56 A. 878 (1904) “ is a central case in Pennsylvania law concerning burial rights.” Kulp, 920 A.2d at 871. Pettigrew offers guidance for resolution of the present dispute where the decedent is not survived by her spouse. In such cases, the Pettigrew court suggested that the wishes of the decedent should be carefully considered by the court:

Secondly, if there is no surviving husband or wife, the right [to determine disposition of a decedent's bodily remains] is in the next of kin in the order of their relation to the decedent, as children of proper age, parents, brothers and sisters, or more distant kin, modified it may be by circumstances of special intimacy or association with the decedent.

Thirdly, how far the desires of the decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes especially if strongly and recently expressed, should usually prevail. Pettigrew v. Pettigrew, 207 Pa. 313,319, 56 A. 878 (1904)(emphasis added).

The petitioner testified that at various points in her life his mother had expressed the intent that her body be cremated as had happened with the bodies of her husband and parents. Rose's sister and attorney likewise testified that she had expressed this intent that her body be cremated. No testimony was offered that Rose had ever expressed an intent that upon death her body be buried rather than cremated.

***Conclusion***

Based on this evidence both of the decedent's closeness to her son Michael and her desire that her body be cremated, this court grants Michael's petition and concludes that he should have authority to determine the disposition of his mother's body. The request for attorney fees, bond, costs and expenses of the proceeding is denied due to lack of support in the statute.

Date: \_\_\_\_\_

BY THE COURT:

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John W. Herron, J.