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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Charles M. Perine
Executive Secretary
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Funeral Service, Board of – Funerals –
Agents – Affidavits

When completing the affidavit prescribed in section 34-13-11(a)(2) of the Code of Alabama, specific directions are not required to be attached to the affidavit. If specific instructions are not attached to the affidavit, the authorized agent designated in the affidavit still maintains control of the disposition of the decedent's remains over the next of kin.

Dear Mr. Perine:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

(1) Under section 34-13-11(a)(2) of the Code of Alabama, does an individual who is completing an affidavit before his or her death have to attach specific directions concerning disposition of his or her remains?

(2) If an individual completes the affidavit naming an authorizing agent, but does not attach instructions, and the "true" next of kin disagrees with the choices of the designated authorizing agent, then who has the right to control the disposition?

FACTS AND ANALYSIS

The Alabama Board of Funeral Service (“ABFS”) regulates the funeral service industry in Alabama. By passing Act 2011-623, the Legislature amended section 34-13-11 of the Code and laid out the parameters of who may serve as an authorizing agent of a decedent to control the disposition of the decedent’s remains. Pursuant to section 34-13-11(a) of the Code, “the right to control the disposition of the remains of a deceased person as an authorizing agent, including the location, manner, and conditions of disposition and arrangements for funeral goods and services to be provided, shall vest . . .” to a person by priority, as outlined in subsections (a)(1) through (a)(12). ALA. CODE § 34-13-11(a) (Supp. 2013). In order of priority, the second-listed priority is a “person designated by the decedent in an affidavit[.]” ALA. CODE § 34-13-11(a)(2) (Supp. 2013).

You seek clarification regarding how the affidavit in section 34-13-11(a)(2) of the Code should be interpreted. Specifically, you ask whether specific directions concerning the disposition of the decedent’s remains have to be attached to the affidavit and who ultimately has the right to control the disposition of the decedent’s remains if specific directions are not attached to the affidavit.

The prescribed language in the sample affidavit in section 34-13-11(a)(2) clearly states that specific directions are not required to be attached to the affidavit. Pursuant to section 34-13-11(a)(2), the affidavit should contain language substantially similar to the following:

State of Alabama

County of _____

I, _____ designate
_____ to control the disposition of
my remains upon my death. I ___ have ___ have not
attached specific directions concerning the disposition
of my remains. If specific directions are attached, the
designee shall substantially comply with those
directions, provided the directions are lawful and there
are sufficient resources in my estate to carry out those
directions.

Subscribed and sworn to before me this ____ day of the
month of _____ of the year _____.

(signature of notary public)

Id.

By requiring language in the affidavit that reads “I ____ have ____ have not attached specific directions concerning the disposition of my remains” and “[i]f specific directions are attached, the designee shall substantially comply with those directions[,]” the affiant is given the option whether to attach specific directions to the affidavit. Thus, it is the opinion of this Office that, because the affiant is given this option, the affiant is not required to attach specific directions to the affidavit.

As to your second question, in passing Act 2011-623 and amending section 34-13-11 of the Code, the Legislature addressed the matter of who ultimately has the right to control the disposition of the decedent’s remains if specific directions are not attached to the affidavit. Simply stated, the right to control the disposition of the decedent’s remains is governed by the priority list outlined in sections 34-13-11(a)(1) through 34-13-11(a)(12) of the Code. According to the priority list, an authorized agent designated by affidavit trumps the next of kin in order of priority. *See* ALA. CODE § 34-13-11(a)(1) to 34-13-11(a)(12) (Supp. 2013).

Additionally, the decision of the Alabama Supreme Court in *Cottingham v. McKee* provides some direction to your second question. 821 So. 2d 169, 171 (Ala. 2001). In *Cottingham*, the Court held that, “if a testator unambiguously expresses in his will how his body is to be disposed of, it is incumbent upon the executor and the court to honor the testate’s wishes.” *Id.* at 172. In coming to its decision, the Court stated that “‘the wishes of a decedent in respect of the disposition of his remains are paramount to all other consideration,’ including the next of kin.” *Id.* at 171, *citing In re Eichner’s Estate*, 173 Misc. 644, 644, 18 N.Y.S.2d 573, 573 (1940). Furthermore, the Court continued by stating that “[a] person’s expressed wish or direction as to the disposal of her body after death is entitled to respectful consideration by the court and should be carried out as far as possible[.]” *Cottingham*, 821 So. 2d at 171, *citing Tkaczyk v. Gallagher*, 26 Conn.Supp. 290, 292, 222 A.2d 226, 227 (1965).

Although *Cottingham* specifically deals with the question of who controls the disposition of the decedent’s remains between the executor of a will and the next of kin, the court’s rationale supports the Legislature’s intent in placing a designated, authorized agent in an affidavit ahead of the next of kin in order of

priority, as outlined in section 34-13-11(a)(1) through 34-13-11(a)(12) of the Code. Specifically, if the decedent, prior to death, designates an authorized agent in an affidavit to control the disposition of his or her remains, whether or not specific directions are given concerning the disposition of the remains, the affiant's wishes must be recognized and honored just as that of a testator. Therefore, it is the opinion of this Office that the authorized agent named in the affidavit controls the disposition of the decedent's remains rather than the next of kin, regardless of whether specific directions were attached to the affidavit.

CONCLUSION

When completing the affidavit prescribed in section 34-13-11(a)(2) of the Code, specific directions are not required to be attached to the affidavit. If specific instructions are not attached to the affidavit, the authorized agent designated in the affidavit still maintains control of the disposition of the decedent's remains over the next of kin.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact me.

Sincerely,

LUTHER STRANGE
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By:



BRENDA F. SMITH
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