

Your Memorial Instructions – New Light on Memorial Planning

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For many years, we have been advising our estate planning clients to leave instructions for their funeral or memorial services and burial or cremation arrangements for their personal representative and family to follow. A Memorial Instructions tab with a Memorial Letter to complete is included in our Estate Planning Portfolio binders and directions to your Personal Representative and Trustees may also be included in your will and trust.

A recent substantial change in Michigan law governing funeral and burial arrangements (Public Act 299 of 2006) that affects the authority of surviving family members and others to give directions for services and disposition of remains makes this subject more important than before. The Act provides that immediate family members are presumed to have the right and power to decide upon funeral and burial arrangements for the decedent in the following order of priority: (1) surviving spouse, if any; (2) closest surviving blood relatives in the order of inheritance if the decedent died intestate without a will (first children if any, then parents, then siblings, etc.). If no individual in this order of priority exists or can be located and exercises their rights to make decisions about the funeral and remains, the Personal Representative named in the will may exercise the rights and powers by default.

This new law also provides that, in the event of a disagreement among family members with priority or others with priority (including a personal representative or guardian) regarding the funeral and body, a family member, personal representative or a funeral home having custody of the body may petition the Probate Court to enter an order determining their rights. Any other persons without priority such as a trustee, step-child, domestic partner, close friend or neighbor can sue in Circuit Court to challenge the presumption of authority regarding the arrangements.

This Act could allow an untested general law to override the desires and well thought out plans that the decedent laid out in his or her Memorial Instructions, Will or Trust. It could also lead to precisely what the person who carefully puts their affairs in order through estate planning most hopes to prevent – conflicts, controversy and even litigation among the grieving family and friends.

As a result, we urge our estate planning clients to complete their Memorial Instructions letter, leaving detailed directions regarding their desired funeral and burial arrangements. This is a first step, and of equal importance is making sure that the spouse, descendants and fiduciaries know that the Memorial Instructions exist and where they may be found (in the Portfolio, Will and/or Trust).

You can also include a statement in your will or trust that any beneficiary under your estate plan who has actual knowledge of your written memorial instructions and fails to abide by or contests them will be penalized by a reduction in the dollar amount or share provided for them in excess of any minimum share the person may be entitled to under law. It has been our experience that as a rule, in a great majority of cases the decedent's family and friends honor and conscientiously carry out any memorial and burial directions even if they do not fully agree with them or would have chosen otherwise themselves. The threat of a financial penalty should deter most if not all of those who are inclined to act otherwise for any reason.

Memorial instructions are more important in blended or non-traditional families where step-children, adopted children, a domestic partner or recently married spouse survives. We also emphasize the importance of family members in addition to the spouse becoming involved in and aware of the fact (if not all details) of estate plans and memorial instructions. We encourage our clients to invite family members to attend planning and annual review meetings at our office, although the choice is of course up to them.