
To: Members of The House Health & Government Operations Committee

From: MSBA Estate & Trust Law Section

Date: March 6, 2020

Subject: **HB1229** – Public Health – Disposition of Remains – Authorizing Agent

Position: **Support**

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports House Bill 1229 – Public Health – Disposition of Remains – Authorizing Agent.**

Sections 5-408.1 and 5-509 of the Health – General Article of the Maryland Code (and parallel provisions of the Health Occupations Article) allow any individual to designate someone, through the individual’s last will and testament or otherwise, to make decisions regarding the disposition of the individual’s bodily remains (or, alternatively, to leave instructions for such disposition). Section 5-509 also sets forth the order of priority for determining who may make such decisions; this section was amended in the 2019 legislative session to provide that, under certain circumstances, a person’s right to direct the disposition of a decedent’s remains may be forfeit.

Funeral directors and morticians desire clear, practical rules that may readily be followed. The existing language of the statute invites confusion, resulting from the interplay between subparagraph (c)(6) and paragraph (a) of § 5-509, as to whether the decedent’s designation of an authorizing agent (if made in an instrument other than a last will and testament) supersedes the right of certain family members to make decisions regarding disposition of remains. In practice, Marylanders are often including disposition-of-remains instructions in their advance medical directives (AMDs). The AMD often includes provisions specifically designating someone (an “authorizing agent”) to make decisions regarding disposition of remains—in fact, the suggested form found in Health – General § 5-603 contains such a provision, leading consumers to believe that this is the appropriate way to make such a designation.

The AMD can often be a more practical place than the last will and testament to include disposition-of-remains instructions: it is an instrument that stakeholders are looking at in the final days of the signer’s life, and its validity is necessarily determined prior to death (whereas the will may not yet have been found and certainly has not yet been admitted to probate at the time decisions must be made regarding disposition of bodily remains); many people have AMDs who do not have wills; and the AMD’s “authorizing agent” section is specifically intended for the purpose. Funeral directors and morticians routinely rely on this language in an AMD, and they would like reassurance that their reliance on an AMD’s designation of an authorizing agent is proper.

Further, the existing statute fails to make clear whether an authorizing agent may disregard, or is bound by, any pre-need contract that the decedent may have entered into with a funeral home, or arrangements the decedent may have made with a crematory or cemetery.

HB1229 would revise both § 5-408.1 and § 5-509 of Health – General (and parallel provisions of the Health Occupations Article) to provide that a decedent’s designation of someone to act as authorizing agent will control; such designee will have first priority to serve as authorizing agent, whether the designation is made under a will, an AMD, or any other document that has been properly signed and witnessed. This will enable funeral directors and morticians to rely on the AMD and provide Marylanders with assurance that their designated authorizing agent will have priority to serve.

In addition, HB1229 makes clear that the authorizing agent is bound by the terms of any pre-need contract entered into by the decedent with a funeral director or mortician (or other signed and witnessed expression of the decedent’s wishes with respect to disposition of the decedent’s bodily remains).

Finally, HB1229 clarifies confusing language of subparagraph (c)(6) of Health – General § 5-509 (and parallel provisions of the Health Occupations Article), relating to the order of priority of persons who may have the right to arrange for final disposition of a body, to make clear that it does not contradict paragraph (a) of that section.

HB1229 provides needed clarification of the ordering rules that determine who has authority to make disposition-of-remains decisions, bolsters the usefulness of the suggested-form AMD provided to Marylanders in Health – General § 5-603, and recognizes the increasingly prevalent practice of naming an agent for these decisions in an AMD rather than in a last will.

For the reasons stated above, the MSBA **supports HB1229 and urges a favorable committee report.**

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