



LAW OFFICE OF IAN W. MACLEAN, LLC

100 PARK AVENUE, 20TH FLOOR

NEW YORK, NY 10017

T. (212) 682-1555

F. (212) 682-6999

E. INFO@MACLEAN-LAW.COM

W. MACLEAN-LAW.COM

NEWSLETTER
SUMMER 2006

New Law Addresses Who Will Have Control Over Your Remains – Domestic Partners Included

On June 7, 2006, Governor Pataki signed into law a bill that provides a means by which a person can designate, in a writing separate from one's will, another person ("agent") to have control over the disposition of the person's remains and can give that agent directions for the disposition of his or her remains. The new law goes into effect on August 2, 2006.

The legislation is particularly important because a separate written instrument provides a method by which a person can ensure with reasonable certainty that his or her wishes regarding the disposition of his or her remains can and will be followed without the necessity of approval from the Surrogate's Court. (Remember, in New York, a will is not "proved" valid until the Surrogate admits the will to probate and issues authority to your executor(s) in the form of "letters testamentary.")

Moreover, having such a document in place should help you to eliminate or substantially reduce litigation over who has control over where you will be buried or your ashes interred. Unfortunately, many families have found themselves litigating over this emotionally charged issue.

Important for all to note is that the statute provides an order of priority specifying which individual shall have control over the disposition of a decedent's remains, should such a decedent fail to designate an agent either in a separate written instrument or in a will. The statute also provides a structure for prioritizing designations in existing wills, subsequently written wills, and separate written instruments.

In addition, the new law includes a form that may be followed to create a separate written instrument for designating your agent. And the statute also provides significant protection for funeral homes, cemeteries, crematoriums, and related entities which act and rely in good faith on representations of persons holding themselves out to have authority under a will or separate written instrument.

Of particular significance is that for the second time in as many years, the legislature has incorporated domestic partners into important legislation. The new law places domestic partners on the same level as married spouses in the order of priority of persons who have control over the dispositions of the decedent's remains absent a writing to the contrary. Who qualifies as a domestic partner is defined in the statute (see below). This definition may be considered another step by New York

State in formally recognizing rights of domestic partners. Given the Court of Appeals decision on July 6th that the New York State Constitution does not compel the recognition of same-sex marriages, it is up to the state legislature to act, or not. Stay tuned.

The new statute is not without flaws, however. For example, certain provisions could be misinterpreted to mean that a subsequently written instrument may revoke dispositions in non-New York wills and in New York wills that predate the statute, but not in New York wills that postdate the statute. Also, a cross-reference in paragraph (b) of subdivision four to subdivision five is clearly an error; the cross-reference should be to subdivision six. Accordingly, the Trusts and Estates Law Section of the New York State Bar Association is working on amendments for consideration by the Legislature.

Despite its imperfections, the new law brings New York State forward in addressing the emotionally charged and often litigious issue of who has control over the disposition of a decedent's remains. If you would like to read the new law in full, it can be found at <http://public.leginfo.state.ny.us/menugetf.cgi>

If you have questions about how to provide for the disposition of your remains or about any other estate planning concerns, please contact us at info@maclean-law.com or (212) 682-1555.