

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 95-F-07

Date issued: September 15, 1995

Requested by: Mr. Jeff Rotering, Adams County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a board of county commissioners may provide funds for the cremation of the bodies of indigent decedents but not for burial, and require others to pay any additional expenses for services beyond cremation.

II.

Whether the statutory minimum of \$1,500 for burial services applies to cremation as well as to burial.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a county may choose to cremate the bodies of indigent decedents as being more cost effective. It is my further opinion that the county may adopt a policy that the family may have a more expensive burial or funeral if the family pays the difference.

II.

It is my opinion that the \$1,500 minimum applies when a body is buried by the county, whether in a casket or after cremation. It is my further opinion that the \$1,500 minimum does not apply if the body is cremated but the ashes are not subsequently buried.

- ANALYSES -

I.

State law governing the county's duty to bury a deceased indigent person under certain circumstances was recently amended to allow for cremation and to change the amounts paid for providing these services. 1995 N.D. Sess. Laws ch. 252,

H. Bill No. 1300, 54 N.D. Leg. (1995). As amended,<sup>1</sup> N.D.C.C. § 23-06-03(4) states:

If the deceased is not survived by a person described by subsection 1 or 2 and did not leave sufficient means to defray funeral expenses, including the cost of a casket, the county social service board of the county in which the deceased had residence for county general assistance purposes or if residence cannot be established, then the county social service board of the county in which the death occurs, shall employ some person to arrange for and supervise the burial or cremation. Each board of county commissioners may negotiate with the interested funeral directors or funeral homes regarding cremation expenses and burial expenses, but the total charges for burial services, including transportation of the deceased to the place of burial, the grave box or vault, grave space, and grave opening and closing expenses, may not be less than one thousand five hundred dollars. The county social service board shall pay the charge for funeral expenses as negotiated by the board of county commissioners, less any amount left by the deceased to defray the expenses.

Before this subsection was amended to specifically include cremation in addition to burial, it was determined that the legislative distinctions between burial and cremation meant that a county social service board was not authorized to provide cremation as an alternative to burial of indigent decedents. Letter from Attorney General Nicholas J. Spaeth to Robert G. Hoy (January 13, 1986).

N.D.C.C. § 23-06-03 imposes a duty to bury the body of a deceased person upon various persons in order of priority. If the decedent did not leave a spouse and did not leave kindred possessing sufficient means to pay the expenses, then the duty of burial is placed on the appropriate county social service board. Although N.D.C.C. § 23-06-03 imposes a duty on the county, it is a general duty where the specific details must be interpreted and which may ultimately be reviewed by the courts. See Fargo Education Association v. Paulsen, 239 N.W.2d 842, 845 (N.D. 1976).

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<sup>1</sup> N.D.C.C. § 23-06-03(4) was also amended by 1995 N.D. Sess. Laws ch. 456, S. Bill No. 2037, 54th N.D. Leg. (1995).

Generally, the right to possess a dead body and control the burial or other disposition of that body is not absolute, and the right may be subject to judicial review considering the expressed wishes of the deceased, a surviving spouse, or next of kin. 22 Am. Jur.2d Dead Bodies §§ 21 through 34. Ordinarily a decedent's instructions for the disposition of his or her body or funeral services or burial should be respected and followed in preference to opposing wishes of others, such as the decedent's survivors, but, where the primary purpose of the decedent has become impossible through circumstance, a court may allow the wishes of the decedent's surviving spouse and children to take precedence. Holland v. Metalious, 198 A.2d 654, 656 (N.H. 1964). See generally, 7 A.L.R.3d 742. Neither the wishes of a decedent nor of a surviving spouse concerning the disposition of the remains are absolute, and the disposition is subject to judicial control. In re Baskin's Appeal from Probate, 484 A.2d 934, 939 (Conn. 1984). However, where a county is under a statutory duty to bury the bodies of deceased indigents, it was held that the county is not required to fulfill the desires of the decedent's relatives regarding the burial, such as providing transportation for burial at a location which is distant from the county. Quiroz v. Latulip, 536 N.Y.S.2d 350, 351 (A.D. 4 Dept. 1988).

If the duty to bury a deceased person's body is placed upon the county, then the county social service board must "employ some person to arrange for and supervise the burial or cremation." The legislative intent of this directive must be sought from the language of the statute, and unless words in the statute are defined in the code, they are to be given their plain, ordinary, and commonly understood meaning. Kim-Go v. J.P. Furlong Enterprises Inc., 460 N.W.2d 694, 696 (N.D. 1990). To arrange means to put into a specific order or relation, to dispose, to plan or prepare for. The American Heritage Dictionary, 129 (2d coll. ed. 1991). Supervise means to direct and inspect the performance of or to superintend. The American Heritage Dictionary, 1221 (2d coll. ed. 1991). This person, presumably a funeral director, would make the arrangements for and supervise the burial or cremation, but the statute does not say that this person shall decide whether it will be a burial or cremation.

The person charged with burying a dead body generally may make the necessary arrangements. "Ordinarily, the person who has the right of burial is entitled to select the place of burial, giving due consideration to expressed wishes of the decedent." 22 Am. Jur.2d Dead Bodies § 10. "The right to 'decent burial' is one which has long been recognized at common law, and in

which the public as well as the individual has an interest." Holland v. Metalious, 198 A.2d 654, 656 (N.H. 1964). Where the duty of burial lies with the county, the county may select the means and method for final disposition of the body subject to the order of a court having jurisdiction.

Where a state having responsibility for the final disposition of a dead child tried, but was unable to locate the mother of the child, and the father and family of the child did not tell the state of any objection to cremation, the state was not liable for wrongful disposal of the body even though the state did not inform the father or other family members that it would cremate the body. McKinnon v. Pengree, 455 So.2d 1134, 1135 (Fla. App.2 Dist. 1984). The court did not undertake a significant analysis of the situation and left open the possibility that liability could have been found under other circumstances. Id.

A county is not subject to the duty of burial unless no one else has become subject to this duty. N.D.C.C. § 23-06-03. Therefore, if the county chooses cremation, the county must provide for the disposition of the ashes. Although for some purposes the cremation of a dead human body is the final disposition of that body, see N.D. Admin. Code. § 33-05-01-06, actions may still be maintained for wrongful acts relating to cremated remains. 22 Am.Jur.2d Dead Bodies § 41. See also Schmidt v. Schmidt, 267 N.Y.S.2d 645, 646-647 (N.Y. Sup. Ct. 1966). The right to decency in the treatment of a dead human body applies without regard to whether the body is to be embalmed and buried in a casket, entombed in a mausoleum, or if the body is to be cremated and the remaining ashes are buried, placed in a vault, scattered, or if relatives request custody for proper care.

After cremation, the crematorium will return any ashes and bone fragments for their ultimate disposition. N.D. Admin. Code § 25-05-01-07. If cremated remains that have been returned to a funeral home have not been claimed within 12 months after the cremation, the funeral home is authorized to dispose of the remains after providing notice to the person who is responsible for the cremation. N.D.C.C. § 43-10-26. The State Board of Funeral Service will establish the appropriate means to dispose of unclaimed cremated remains held by a funeral home. N.D.C.C. § 43-10-06.1. However, the county would be responsible for the cremation and, therefore, for any cost of disposing of the remains.

Therefore, it is my opinion that a county may choose to cremate the bodies of indigent decedents as being more cost

effective than burial. I recommend the county consider adopting a written policy governing the determination of whether a body would be buried or cremated. Consideration, for example, could be given to strongly expressed desires or religious convictions of the decedent or the decedent's family. See generally State v. Rivinius, 328 N.W.2d 220 (N.D. 1982); Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb et seq. It is my further opinion that the county may adopt a policy that the family may have a more expensive burial or funeral if the family pays the difference. See N.D.C.C. § 1-08-04. However, amounts left by the deceased may not be used for this purpose because such amounts are to be used to defray the county's expenses. N.D.C.C. § 23-06-03(4).

## II.

The Legislature described several categories of expenses relating to indigent funerals. All of the expenses entailed in an indigent funeral were described as "funeral expenses," as found in the first sentence of N.D.C.C. § 23-06-03(4) and in new language found in the last sentence of subsection 4. 1995 N.D. Sess. Laws ch. 252. The Legislature directed that each board of county commissioners may negotiate regarding "cremation expenses" and "burial expenses." Then, in the same sentence, the Legislature used the phrase "burial services" when referring to the \$1,500 minimum payment. If the \$1,500 minimum was intended to apply to both cremation expenses and to burial expenses, there would be no need to have described this minimum with the words "burial services." In order to provide meaning for each word of subsection 4, the phrase "for burial services" must have significance. See Stewart v. Ryan, 520 N.W.2d 39, 45 (N.D. 1994). This significance can be found in distinguishing burials from cremation. See Letter from Attorney General Nicholas J. Spaeth to Robert G. Hoy (January 13, 1986).

Further, legislative intent that the \$1,500 minimum applies only to burials and not to cremation is demonstrated by the description of the items chargeable for burial services as including "transportation of the deceased to the place of burial, the grave box or vault, grave space, and grave opening and closing expenses." N.D.C.C. § 23-06-03(4). The phrase burial services is a general term which is limited to include only items similar in nature to the specifically enumerated items. See Resolution Trust v. Dickinson Econo-Storage, 474 N.W.2d 50, 52-53 (N.D. 1991).

Therefore, it is my opinion that the \$1,500 minimum applies whenever the body of an indigent is buried by the county,

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whether in a casket or after cremation. It is my further opinion that the \$1,500 minimum does not apply if the body is cremated but the ashes are not subsequently buried.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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ATTORNEY GENERAL

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Assistant Attorney General

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