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CLIENT ADVISORY

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Next of Kin and Unclaimed Remains

The process and procedures by which health care providers dealt with unclaimed remains and notification of next of kin was largely uneventful prior to April of 2013. Until that time, any remains left unclaimed became the responsibility of the local sheriffs' offices. An Attorney General opinion requested by Sheriff C. T. Woody of the City of Richmond drastically changed the status quo.¹ The opinion interpreted the applicable Virginia statutes to provide that a Sheriff was only responsible for taking possession and disposing of unclaimed remains if the remains were a Medical Examiner's case.

In response to requests from health care providers, law enforcement agencies, and the funeral industry, Senator Kenny Alexander (D Norfolk) convened a workgroup of stakeholders to rewrite the statutes dealing with unclaimed remains and next of kin. These efforts culminated in the introduction of Senate Bill 304 in the 2014 Session of the Virginia General Assembly. This legislation has been signed by the Governor and, because it contained an emergency clause, the legislation became law on March 7, 2014.²

The legislation has three primary foundations. First, a new Code section was created providing for a more detailed process regarding the identification of the decedent and for next of kin assuming responsibility for the unclaimed remains. Second, another new Code section was created clearly placing the responsibility on local jurisdictions for the payment of expenses for the disposition of the decedent when the next of kin is unable to pay or refuses to accept responsibility. Third, the legislation expands who may identify remains for purposes of cremation when there is no next of kin willing or able to serve.

I. Identification of Decedent and Next of Kin

SB 304 created Va. Code § 32.1-309.1 to address the process for the identification of the decedent and next of kin. The first portion of the new Code section clarifies "next of kin" to have the same meaning as defined in Va. Code § 54.1-2800. In the absence of a next of kin, a person designated to make arrangements for the decedent's burial or disposition pursuant to § 54.1-2825, an agent named in an advance directive under § 54.1-2984, or a guardian appointed pursuant to Chapter 20 of Title 64.2 may fulfil the duties of a next of kin. If any of these persons fails to or refuses to fulfil the role of next of kin, the statute newly authorizes "any person 18 years of age or older who is able to provide positive identification of the decedent and is willing to pay the costs associated with the disposition of the decedent's remains shall be authorized to make arrangements for such disposition of the decedent's remains." In practice, this could be a church member, a fellow Rotarian, an Army buddy, or just a friend.

The statute clarifies the obligation of any person or institution (most likely a hospital or nursing home) having initial custody of the decedent to attempt to identify the decedent, if the identity is not known, and attempt to notify next of kin of the decedent's death. If the next of kin fails or refuses to claim the body within 10 days then the body will be disposed of pursuant to new provisions of Va. Code § 32.1-309.2, the second new code section created by SB 304.

If the person or institution having initial custody of the decedent is unable to determine the identity of the decedent or notify next of kin, the person or institution shall contact the primary law enforcement agency for the locality. The primary law enforcement agency must then make a good faith effort to identify the decedent and notify next of kin. If law enforcement is able to identify next of kin and the next of kin wishes to claim the remains, the next of kin shall be authorized to do so and bear the expenses of disposition of the remains. If law enforcement is unable to

¹ 2013 Op. Att'y Gen. 13-016 (May 3, 2013), available at <http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/OPINIONS/2013opns/13-016%20Woody.pdf>.

² SB 304, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=141&typ=bil&val=sb304>.

identify the decedent or, despite good faith efforts, next of kin is not identifiable or is not willing or refuses to accept the remains, primary law enforcement shall notify the person or institution have initial custody and the body will be disposed of in accordance with Va. Code § 32.1-390.2.

Where a next of kin wishes to claim decedent's remains but the next of kin is unable to pay the costs of disposition, the costs are to be paid by the county or city in which the decedent resided or where the death occurred if the decedent resided out of state. The locality may recover from the decedent's estate the cost of burial and may seize such assets for that purpose.

The statute clarifies that in any case which requires an investigation by the medical examiner, the person or institution having custody of the remains must abide by the requirements of the medical examiner's office prior to transfer or disposition.

Under the prior law, Sheriffs had immunity when dealing with unclaimed remains, and now, under the new legislation, immunity has been granted to all parties that may play a part in disposing of unclaimed remains. Specifically, immunity from simple negligence has been granted to any "sheriff or primary law enforcement officer, county, city, health care provider, funeral service establishment, funeral service licensee, or other person or institution that acts under the statute regarding the acceptance for disposition of a decedent."

In some jurisdictions, the primary law enforcement may be a sheriff's department and in other jurisdictions it may be a police department. Law enforcement, such as a sheriff's office, may coordinate with a primary law enforcement office of a police department to handle unclaimed remains or the primary law enforcement office may retain responsibility for unclaimed remains. For example, in Henrico County, primary law enforcement is the police department but the police department has worked out an arrangement with the sheriff's department to handle unclaimed remains. The statute authorizes primary law enforcement to coordinate with other law enforcement in handling remains. Therefore, it is recommended that you determine who bears responsibility on the law enforcement front in the locality with which you are dealing.

II. Disposition of Unclaimed Remains—Expenses

The second process for disposing of unclaimed remains in the new legislation is triggered when primary law enforcement is unable to identify the decedent or next of kin of the decedent or where next of kin refuses or fails to accept the decedent's remains within 10 days. In that instance, primary law enforcement shall notify the attorney for the county or city in which the person is located or if there is no county or city attorney, law enforcement must contact the Commonwealth's Attorney and such attorney shall obtain an order authorizing the person or institution having initial custody of the decedent to transfer custody to a funeral service establishment for final disposition. The reasonable expenses of the disposition shall be borne by the county or city in which the decedent resided at the time of his death or the county or city where the death occurred if the decedent was not a resident of Virginia or if his locality cannot be identified. Payment of the expenses must be enumerated by the court order.³

The statute also codifies a practice that has been employed by a number of hospital and health care systems and funeral service establishments since the issuance of the Attorney General's opinion. Basically, these parties have been encouraged to enter into agreements whereby the remains will be stored by the funeral service establishment until location or identification of next of kin can be obtained. Also these agreements commonly will provide for the disposition of the remains at a reduced cost as such cost has been borne by hospital and health care systems, not the local government, pending passage of this legislation. The statute clarifies that even though a funeral service establishment may have possession of the remains pursuant to an agreement, the obligation to identify the decedent and next of kin continues to be borne by the person or institution that had initial custody.

The statute again clarifies that where a court order is entered for the disposition of the remains any estate or funds available to the decedent may be seized or used to cover the costs of the disposition. Immunity is also granted in this statute similar to that granted in § 32.1-309.1 for individuals accepting or disposing of remains.

³ Note that the statute addresses the handling of remains which were in the custody of the Department of Corrections or the Department of Behavioral Health and Developmental Services; however a fully discussion of this issue is not within the scope of this Client Advisory

Likewise, language is tracked in this statute authorizing primary law enforcement and other law enforcement to work together to determine who is responsible for the duties under this statute.

III. Prerequisites for Cremation

The final procedure established in this legislation deals with who is permitted to provide visual identification of remains when the remains are going to be cremated. Va. Code § 54.1-2818.1 currently provides that no remains can be cremated without permission of the medical examiner and without visual identification by next of kin, a representative authorized to make arrangements for the decedent's burial, or an agent named in an advance directive. Amendments to this section include visual identification by any guardian appointed pursuant to Chapter 20 of Title 64.2. Where there is no next of kin, representative, agent or guardian willing or able to make such identification, then identification shall be made by primary law enforcement of the county or city in which the person or institution having initial custody of the body is located pursuant to a court order.

For example, if a decedent dies in a hospital located in Chesterfield County and after a good faith effort by the hospital and law enforcement under the code sections referenced herein, a next of kin cannot be identified or a next of kin is not willing to accept responsibility, then an order can be obtained for the decedent's remains to be cremated and, pursuant to that order, primary law enforcement will make the visual identification pursuant to the court order.

As with the two other new sections of the Code, this new section provides immunity protections to funeral service establishments, funeral service licensees, crematories, cemeteries, primary law-enforcement officers, sheriffs, counties, and cities for their acts, decisions, or omissions regarding cremation unless such acts, decisions, or omissions resulted from bad faith or malicious intent. In addition, this section again recognizes the ability of primary law enforcement and other law enforcement to coordinate responsibilities for the visual identification necessary for cremation.

In addition, this section again recognizes the ability of primary law enforcement and other law enforcement to coordinate responsibilities.

In conclusion, the passage of Senate Bill 304 will better enable health care providers to work with law enforcement in the handling of unclaimed remains in an overall process very similar to that which existed prior to the issuance of the Attorney General opinion. The statutes together provide a detailed and cookbook approach as to deadlines and steps that are to be taken. Health care providers and funeral service establishments are encouraged to have in place working agreements regarding the handling of unclaimed remains. Since most nursing homes do not have a morgue and most hospitals have a morgue with very limited space, these agreements can be very beneficial in an orderly process.

If you have any questions related to SB 304 or the disposition of unclaimed remains, please contact W. Scott Johnson (sjohnson@hdjn.com) or Clay Landa (clanda@hdjn.com). They can be reached by phone at (866) 967-9604. Additional information about Hancock, Daniel, Johnson & Nagle, P.C., is available on the firm's website at www.hdjn.com.

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