Longtime Norfolk residents, Mary and John were married for 25 years and had three wonderful children. John died in 2001 and was buried in the family plot he had purchased years ago at Woodlawn Memorial Gardens in Norfolk. Several years passed before Mary met Walter at The Fifth National Banque in Norfolk while square dancing. Walter, a widower, had moved to Norfolk from Tennessee where he had been married and lived for 45 years. His deceased wife, Sue, was buried in Tennessee. Walter and Sue had two children, one of whom was stationed in the Navy and living in Norfolk with his wife and two children. This is why Walter had moved to Norfolk following Sue’s death. Walter and Mary had discussed their preferences for their funeral arrangements and both understood that if Mary passed away first she wanted to be buried beside John in Norfolk and that if Walter passed away first he wanted to be buried beside Sue in Tennessee. After five years of wedded bliss Walter suffered a massive heart attack while he and Mary were square dancing one Saturday evening at The Banque. Mary decided that despite the fact that Walter had expressed a preference to be buried with his first wife, she wanted him buried in the family plot with her first husband so that at her death she would be with both the men she had dearly loved. Walter’s son is stationed on an aircraft carried overseas in the Gulf of Oman and she’s had no contact with his other child, a daughter who had not spoken to Mary since she and Walter married. Mary makes all the arrangements for Walter’s burial at Rosewood Memorial Gardens. When Walter’s children find out where their father has been buried they are furious and want to sue Mary and the funeral home for disregarding their father’s wishes.

Although this is not a situation that occurs frequently, there are at least two Virginia cases where disputes have arisen and litigation has resulted over the question of where a person should have been buried. In Grisso v. Nolen, the former husband of the deceased sought to have his former wife’s body disinterred and reburied at a location she had indicated to him she wanted to be buried. They had been married for thirty-eight years before their divorce. Despite their divorce six years earlier, they had cohabitated intermittently up until her death. Their daughter had made the funeral arrangements and did not want her mother disinterred. Litigation ensued. In Mazur v. Woodson the deceased, Mrs. Mazur, suffered from Alzheimer’s. She had been moved by her husband into her aunt’s home. Later, Mrs. Mazur’s brother, Mr. Woodson, had moved her in with him without the knowledge of Mr. Mazur. Mr. Woodson later was appointed as her guardian. This appointment was challenged by Mr. Mazur. Mrs. Mazur died while the challenge was pending. Following her death Mr. Woodson made arrangements for Mrs. Mazur’s funeral and burial. Mr. Mazur and his children later sued the funeral home and Mr. Woodson alleging negligent and intentional mishandling of her body.

When there is a dispute between the deceased’s next of kin over the disposition of the deceased’s remains, some states rely on common law while others have laws designating the priority of next of kin to determine whose wishes prevail. In 1989, the Virginia General Assembly added §54.1-2825, which expressly granted the right of a person to designate “an individual who shall make arrangements for his burial or the disposition of his remains, including cremation, upon his death.” Prior to that, the only guidance provided in the Virginia Code for determining whose wishes governed disposition appeared in Section 54.1-2807(B), stating (in part) that “The authority and directions of any next of kin shall govern the disposal of the body.” However, the statute did not specify an order of priority among the next of kin’s authority and in effect, granted authority to the first to make their wishes known. This phenomenon became known as the “rush to the funeral home.” Although many thought
that §54.1-2825 had solved the problem, an advisory opinion issued by the Virginia Attorney General in 2009 clouded the issue by ruling that “burial” is not synonymous with “funeral” and that a person designated under §54.1-2825 to make arrangements to dispose of a decedent’s remains was simply “any next of kin” included in the nonhierarchical definition of next of kin under §54.1-2825.

In April of 2010, the Virginia General Assembly amended § 54.1-2825 of the Virginia Code to address the issues raised in the Mazur opinion and the Attorney General advisory opinion of 2009. This change became effective July 1, 2010. A designee now has the authority to make all arrangements relating to the disposition of the deceased’s remains, regardless of the type of arrangements made. The word “burial” in subsection A has been replaced with “funeral,” thus nullifying the distinction made by the Attorney General between the two terms. Further, the amendments address the priority issue discussed in the Attorney General Opinion, as the statute now specifies that a designee has priority over all other persons considered next of kin in terms of making such arrangements.

It is recommended that in situations where an individual believes there might be any possibility of a disagreement of where he or she is to be buried or what the funeral arrangements might be or the type of service that is to be held, the individual should take advantage of §54.1-2825 and appoint an agent to carry out his or her wishes. The appointment must be “in a signed and notarized writing” by the principal appointing the agent and it must be “accepted in writing by the person so designated.” The statute provides that the “designee shall have priority over all persons otherwise entitled to make such arrangements, provided that a copy of the signed and notarized writing is provided to the funeral service establishment and to the cemetery, if any, no later than 48 hours after the funeral service establishment has received the remains.”

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