

In the Matter of the Estate of Mary Florence Whalen, Deceased

By Tanya D. Marsh

excerpted from *Asserting the Rights of the Dead* (unpublished manuscript)

The 2013 case of Mary Florence Whalen¹ (“Flo”) illustrates the conflict between the common law right of decedents to control the disposition of their remains and modern statutory law regarding the authority of persons to dispose of human remains.

Michael and Flo Whalen were married in Iowa in 1952 and moved to Billings, Montana in 1953.² In 1996, the couple informally separated and Michael returned to Iowa.³ Flo moved to New Mexico in 2004 to be near one of their daughters.⁴ In 2009, Flo executed a last will and testament in New Mexico which included a provision stating that she “directed” her body to be buried in a “moderately priced wooden coffin” in a grave that she had already purchased at Holy Cross Cemetery in Billings.⁵

Flo’s will named her sister, Mary Ann as her personal representative and executor.⁶ In late 2011, Flo visited Iowa. She became ill and was unable to return to New Mexico.⁷ In April 2012, Flo wrote a letter in the presence of her son that was addressed to and delivered to her sister, her husband, and their ten adult children. The letter read in part:

I am writing this letter to all of you to let you know what I wish done with my earthly remains after my soul has gone hopefully upwards.

I wish to be buried in Billings, Montana which I considered my home when on earth. I spent 51 years of my life in Billings and with the help of my dear husband, raised 10 beautiful children there. I bought a plot many years ago in Holy Cross Cemetery in Billings, in which to be buried and have paid for the opening and closing of my grave. I also have bought a casket made by the [Trappist] Monks in Peosta, Iowa, and they will ship it wherever they are asked at the time they are informed to do so.

I know that you all love me and want to honor my final requests, and that is why I am writing this to you. I just want all of you to know that this is very important to me and because you all love and respect me I know that you will see that my wishes are carried out.⁸

Prior to Flo’s death, she visited a local funeral home in Anamosa, Iowa with her sister, Mary Ann, and one of her daughters. They were erroneously instructed by the funeral director that Iowa law provided that Michael was the only person who could decide where Flo would be buried and that there was “nothing” she could do to change that.⁹

In fact, the 2008 Iowa Final Disposition Act includes a “designated agent” statute that permits a decedent to name a designated agent through a “declaration.”¹⁰ The designated agent has the “right to control final disposition of a decedent’s remains or to make arrangements for the ceremony after a decedent’s death.”¹¹ If no person has been appropriately appointed as a designated agent, the right to control final disposition is determined by a statutory priority list.¹² The person with the next highest priority is the surviving spouse of the decedent, if not legally separated from the decedent.¹³

The Iowa Final Disposition Act defines a “declaration” as a written instrument, contained in or attached to a durable power of attorney for health care, which names a designee to control final disposition.¹⁴ The declaration is required to be witnessed by two people or notarized.¹⁵ In other words, at the time that Flo was told by the funeral director that she could not ensure that her wishes were carried out, Iowa law provided that Flo could have executed a declaration under Iowa law naming her sister (or anyone else) as her designee.

The Iowa Final Disposition Act, however, specifically states that a declaration can only appoint a designee, but “shall not include directives for final dispositions of the decedent’s remains.”¹⁶ In other words, Iowa has a designated agent statute, but no personal preference statute.

For the last six months of her life, Flo lived in her husband’s home in Anamosa, Iowa. She died on June 9, 2012.¹⁷ Following Flo’s death, Mary Ann, returned to the local funeral home and asked the funeral director to transport Flo’s remains to Billings, Montana to be buried in the plot that she had purchased. Michael instructed the funeral director to bury his wife in a local cemetery in Anamosa. The funeral director refused to follow either party’s instructions and agreed to hold Flo’s remains pending a final court order regarding their disposition.¹⁸

Flo’s will was admitted to probate in Jones County, Iowa on June 22, 2012, and the court appointed Mary Ann as executor of the estate.¹⁹ Mary Ann moved for an order to have Flo’s remains transported to Montana for burial, per the decedent’s wishes as expressed in her will and the letter.²⁰ Michael opposed the motion and asked for a ruling that he had the sole authority to control her remains pursuant to the Iowa Final Disposition Act.²¹ In a newspaper interview, Michael, then age 93, stated: “I wanted her to be buried in Iowa because she wanted to be buried here, and I loved her and she was my wife.”²² The probate court ruled in favor of Mary Ann, finding that:

[A]ll evidence convincingly establishes that Mary Florence Whalen made the decision to have her remains buried in Billings, Montana, and she did not intend for anyone else to make that decision for her. Her intent could not be clearer. The Court’s statutory interpretation, when combined with the Court’s duty to see that Mary Florence Whalen’s wishes are carried out as to her final resting place and the Court’s deference to the testator’s wishes regarding the method and location of burial supports a conclusion that the Executor’s Motion should be granted.²³

Michael appealed and the Supreme Court of Iowa accepted the appeal on expedited review.²⁴

The basic question before the Supreme Court was whether the Iowa Final Disposition Act, which sets forth a clear procedure to allow a person to appoint a designated agent through a declaration, but which does not permit a person to set forth their preferences in the declaration, preempts the common law principle that a decedent has the right to dictate the method and location of the disposition of her remains.²⁵ Similar to the common law in other states, Iowa courts have consistently held that “the duty of courts [is] to see to it that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out.”²⁶

As the court succinctly stated the issue before them: “The dispute in this case turns on whether Iowa’s Final Disposition Act allows a surviving spouse to disregard the decedent’s will directing disposition of her bodily remains.”²⁷ Mary Ann argued that the Iowa statutes are only relevant on this point if the decedent did not clearly express her wishes. In a case where the decedent did clearly express them, those wishes should supercede the contrary intentions of a surviving spouse or other person with statutory authority to control the body.²⁸ In other words, Mary Ann argued that the paramount concern in harmonizing the common and statutory laws should be effectuating the decedent’s intent and the statute should simply be a mechanical method of choosing the person to implement that intent. In the alternative, Mary Ann argued that Flo’s will should function as a declaration under Iowa law and have the effect of appointing her as the designated agent.²⁹

In a split decision, the Supreme Court of Iowa rejected Mary Ann’s reasoning, concluding that the Iowa Final Disposition Act preempted any conflicting common law. The court also rejected Mary Ann’s argument that Flo’s New Mexico will should function as a declaration under Iowa state law because it was not attached to a durable health care power of attorney as explicitly required by the Iowa statute.³⁰ The court noted that

[T]he legislature nowhere required enforcement of the decedent's wishes in the 2008 enactments. To the contrary ... the 2008 legislature removed a related statutory provision that specifically gave the decedent control over disposition of his or her remains and substituted language giving sole control to the decision maker identified under section 144C.5. The legislature also rejected proposed language that would have required designees to effectuate decedents' instructions.³¹

After a review of legislative history, the Iowa Supreme Court concluded that “[the Iowa Final Disposition Act] reflects that the legislature made a deliberate policy choice to favor clarity and certainty over ability of persons to control the final disposition of their own bodies.”³² It appears that the legislative history of the Iowa Final Disposition Act did not fully communicate the purpose of the statute to the Iowa Supreme Court. In fact, the purpose of the Act was to strengthen the common law right for decedents to control the disposition of their remains.

In 2008, the Iowa legislature considered two versions of the Final Disposition Act: SF 473 and HF 2088. The Senate version, SF 473, was the product of a working group including approximately 30 stakeholders, including the Iowa Insurance Division, the Iowa Department of Elder Affairs, the Iowa Attorney Generals Office, the Iowa Department of Public Health, and the Iowa Bar Association.³³ Although the Iowa Funeral Directors Association participated in early meetings to draft SF 473, it eventually parted ways with the working group and proposed an alternative: HF 2088.³⁴ It was the Senate version that ultimately was adopted by the Iowa legislature. Joel Greer, the President of the Iowa State Bar Association explained the purpose of the bill to the Des Moines Register in February 2008:

The idea is to allow the person who's going to die to decide. You get to decide who gets your kids, who gets your money, who gets your car [and also should control what happens to your remains].³⁵

The Iowa Bar Association lobbied for SF 473 because “Iowa lawyers would be able to advise their clients with certainty as to what steps they could take to ensure their bodies are disposed of according to their wishes.”³⁶ In other words, the purpose of the bill was to reinforce the common law right, not to weaken it.

It is clear, however, that the Iowa Funeral Directors Association, championing the other bill, thought that the common law right should be erased.³⁷ HF 2088 began with the following words:

A funeral director licensed pursuant to this chapter or operator of a cremation establishment licensed pursuant to this chapter shall consult with and may reasonably rely upon an authorized person when making funeral arrangements for a decedent including but not limited to embalming, cremation, funeral services, and the disposition of human remains.³⁸

Absolution from liability was the clear legislative goal of the Iowa funeral directors. A legislative update from the Iowa Bar Association starkly differentiated between the House and Senate proposals:

HF 2088 ... gives a funeral director or operator of a cremation establishment leeway to not follow the wishes of the decedent. Section 1 of HF 2088 states that the funeral director or operator of a cremation establishment “shall consult with and may reasonably rely upon an authorized person when making funeral arrangements for a decedent...”. Unlike SF 473, HF 2088 does not require the funeral director and “authorized person” to follow the directives of the decedent concerning their funeral/burial decisions. SF 473, in contrast, makes a decedent’s written declaration legally binding upon the survivors and the designee. SF 473 will ensure that individuals can truly determine during their lifetime how their body/remains will be disposed of after their death.³⁹

Eliminating any doubt about their view of the right of decedents to control the disposition of their remains, a letter to the editor by the executive director of the Iowa Funeral Directors Association clarified the industry's view of funerals:

Iowa funeral directors have always believed funerals are about loved ones gathering to commemorate the deceased person's memory. Funeral ceremonies are not about the dead forcing their intentions on loved ones.⁴⁰

The Iowa Funeral Directors Association similarly criticized the designated agent statute contained in SF 473:

Funeral directors bring families together to decide how to remember the dead. SF 473, backed by the Iowa State Bar Association, allows a "final disposition directive," which forces everyone to listen to a document, and not to the emotional needs of survivors.⁴¹

Although SF 473 was adopted and became the Iowa Final Disposition Act, it did not operate in the *Whalen* case as either the Iowa State Bar Association or the Iowa Funeral Directors Association anticipated. Flo was not able to ensure that her wishes were carried out; the funeral director was not able to bring the Whalen family together to commemorate Flo's life and satisfy the emotional needs of her survivors.

"Unless Michael voluntarily permits Flo's burial in Montana, our decision will leave her wishes unfulfilled," the court concluded.⁴² "If Flo had properly designated her sister pursuant to chapter 144C, Flo's remains would be buried in Montana today."⁴³ Although decisions regarding the disposition of human remains have been traditionally heard at equity, the court did not discuss the equities involved with the funeral director's misstatement of Iowa law to Flo and Mary Ann, nor the fact that Michael is an attorney who was in a better position to know Iowa law than his wife or her sister. The court seemed sympathetic to Flo and hoped that her husband would defer to her clear wishes, but it held that decedents may only appoint a designated agent if they strictly adhere to the formalistic requirements of the statute.

The Chief Justice of the Supreme Court of Iowa dissented, concluding that:

[t]he Act is totally independent of the autonomy of a person to make his or her own decision prior to death. The legislature sought only to resolve disputes that occur when a decedent leaves no directions behind, not deprive decedents of the right to make the decisions.⁴⁴

He referred to the common law right to dictate the disposition of one's own remains as "timeless and fundamental."⁴⁵

Endnotes

¹ *In the Matter of the Estate of Mary Florence Whalen, Deceased*, 827 NW 2d 184 (Iowa 2013).

² *Id.* at 185.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 185-6.

⁹ *Id.* at 186.

¹⁰ I.C.A. § 144C.3 (2011) ("A declaration shall name a designee who shall have the sole responsibility and discretion for making decisions concerning the final disposition of the declarant's remains and the ceremonies planned after the declarant's death.")

¹¹ I.C.A. § 144C.5 (2011).

¹² *Id.*
¹³ *Id.*
¹⁴ I.C.A. § 144C.2 (2011).
¹⁵ I.C.A. § 144C.6 (2011).
¹⁶ I.C.A. § 144C.3(2) (2011) (“A declaration shall not include directives for final disposition of the declarant's remains and shall not include arrangements for ceremonies planned after the declarant's death.”)
¹⁷ 827 NW 2d at 185.
¹⁸ *Id.* at 186.
¹⁹ *Id.*
²⁰ *Id.*
²¹ *Id.*
²² Woman must be buried in Iowa, despite her wishes, Supreme Court rules, *The Gazette* (February 22, 2013).
²³ 827 NW 2d at 186-7.
²⁴ *Id.*
²⁵ *Id.* at 187.
²⁶ *Thompson v. Deeds*, 61 N.W. 842, 843 (Iowa 1895). *See also King v. Frame*, 216 N.W. 630, 632 (Iowa 1927) (“[T]he right of a person to provide by will for the disposition of his body has been generally recognized.”).
²⁷ 827 NW 2d at 187.
²⁸ *Id.*
²⁹ *Id.*
³⁰ *Id.* at 194.
³¹ 827 NW 2d at 190.
³² *Id.* at 192 citing Legis. Servs. Agency, 2008 Summary of Legislation, S.F. 473—Disposition of Human Remains—Authorization and Consent (Iowa 2008), available at [https://www.legis.iowa.gov/DOCS/GA/82GA/Session.2/Summary/summary 2008.pdf](https://www.legis.iowa.gov/DOCS/GA/82GA/Session.2/Summary/summary%2008.pdf). “This Act responds to a perceived need for clarity as to who will determine the disposition of a decedent's remains.”
³³ Jim Carney and Jenny Tyler, *Legislative Report: Whatever Happened to Ted Williams’ Head?*, *The Iowa Lawyer* 25 (March 2008)
³⁴ Carney and Tyler, *supra* note 33 at 25-6.
³⁵ Grant Schulte, *Bill gives deceased control of remains*, *Des Moines Register* (February 14, 2008)
³⁶ Carney and Tyler, *supra* note 33 at 25. (“Senate File 473, the “Final Disposition Directives Act” is a bill that was drafted by a working group of approximately 30 different stakeholders, including the Iowa Insurance Division, the Iowa Department of Elder Affairs, the Iowa Attorney General’s Office, the Iowa Department of Public Health and The Iowa State Bar Association. SF 473 allows competent adults to execute a legally binding, written declaration that expresses their directives concerning how their remains should be disposed of upon death; their preferences regarding the ceremony, if any, to be performed after their deaths; and who is designated to oversee these matters. Today, without passage of SF 473, there are no provisions in Iowa law that legally require survivors to honor a person’s wishes as to the disposition of his or her body or remains after he or she dies.”)
³⁷ Schulte, *supra* note 35 (“If you trust someone to make your decisions throughout life, they should be able to carry your wishes’ through death, said Suzanne Gebel, executive director of the Funeral Directors Association.”)
³⁸ <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&ga=82&menu=text&hbill=HF2088>
³⁹ Carney and Tyler, *supra* note 33 at 26.
⁴⁰ Suzanne M. Gebel, *Letter to the Editor*, *Des Moines Register* (February 22, 2008).
⁴¹ *Id.* (“... The association’s proposal could conflict with other legal instruments. What if the decedent’s will, pre-need funeral contract and final disposition all request burial, but in different cemeteries? What if the final disposition designates some distant cousin to be in charge? Our bill, HF 2088 extends the rights of the durable power of attorney for health care through disposition of the body, as is done in other states.”)
⁴² *Id.*
⁴³ *Id.* at 192.
⁴⁴ *Id.* at 195 (Cady, C.J. dissenting)
⁴⁵ *Id.* at 194.