

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1087

Date: 16-Feb-07
From: Steve Leimberg's Estate Planning Newsletter
Subject: Anna Nicole Smith - Guidance for Burial Disputes

Just prior to walking into our Valentine's Day dinner with our wives, **Bob LeClair** pulled me aside and mentioned that his mother-in-law Helen, who joined us for the festivities, was going to be asking me questions about the legalities of **Anna Nicole Smith's** after-life troubles.

It seems the immediate world has suddenly become interested.

Helen, this one's for you!

(And for all LISI members who would like a great insight into the serious legalities of some vexing probate issues).

And who better to fill in LISI members than **Jeffrey A. Baskies** of **Ruden McClosky** in Fort Lauderdale, Florida who is very much alert to the latest on this case. Jeff is a Florida bar certified specialist in wills, trusts and estates law, and practices probate law at the largest firm in Broward county (where the Smith case is being heard). He is frequently quoted in USA Today, the New York Times and on national television and radio.

EXECUTIVE SUMMARY:

After Ted Williams' death, the national spotlight focused on Florida probate courts, where a soap opera unfolded regarding the disposition of his body – ultimately cryogenically frozen in Arizona. You would think one such national burial dispute per decade is enough.....Then came Anna Nicole Smith.

FACTS:

Other than having the misfortune of dying in a Hollywood, Florida Casino, Anna appeared to have no ties to Florida at all. But just like that, Florida probate courts and Florida law regarding burial disputes has again grabbed national attention.

Since the dispute started about a week ago, many people have asked: "Does Florida law provide any guidance as to where Anna Nicole Smith's body will be buried?"

Ironically, the answer is that the most recent and leading Florida case regarding a dispute for the disposition of a deceased's remains came right out of the same courthouse where a Judge is hearing Anna Nicole Smith's case. *Cohen v. Guardianship of Cohen*, 896 So.2d 950 (Fla. 4th DCA 2005).

FLORIDA LAW ON BURIAL DISPUTES: INTENT OF DECEDENT AS EXPRESSED IN WILL COMES FIRST

In March 2005, Florida's 4th District Court of Appeal (the same one which would hear any appeal from Anna Nicole Smith's case) affirmed a ruling of Broward County Probate Judge Mel Grossman holding that, given sufficient

evidence of the decedent's intent, the court should try to carry out the intent of the decedent regarding funeral and burial arrangements.

Basically, the Appellate Court said that the job of the trial court in a burial dispute is to first determine (if that is possible) what the decedent wanted regarding her funeral, and only in the absence of her clear direction should the wishes of the family be considered.

Based on the Cohen ruling, the first test for Judge Larry Seidlin is looking at Anna Nicole Smith's Last Will. If she expressed a clear and exclusive intention regarding her burial in her Will

http://www.attorneystrust.com/documents/AnnaNicoleSmith_will.pdf

then unless there is clear and convincing evidence to show that she altered her intent, then her wishes expressed in her will should be honored. There is a long line of Florida cases supporting this test.

Supporting its ruling that the trial court should enforce the intent expressed in the Will if it is clear and, if it has not been altered or revoked, the Court in Cohen v. Guardianship of Cohen cited to Kasmer v. Guardianship of Limner, 697 So.2d 220 (Fla. 3d DCA 1997). In that case, the Personal Representative refused to carry out a cremation direction in the Will. The Personal Representative argued he could not carry out the direction as a matter of conscience. The Kasmer court found the language in the Will to be clear and found no evidence that the testator changed his mind, and then held that the Personal Representative *had* to carry out the direction.

Thus, if Anna Nicole's Will contains a clear and unambiguous burial direction, and if it was recently executed, it will be very important evidence of her intentions. In that case, the burden of proof to overcome that evidence becomes significant. Instead of a "preponderance of the evidence" test, the burden to overcome an express term in the Will grows to a "clear and convincing" level (which is obviously harder to prove).

BUT WILL DIRECTION NOT CONCLUSIVE IF CLEAR AND CONVINCING EVIDENCE TO CONTRARY:

However, as the Cohen case found, a direction in a Will is not 100% conclusive. As a person's body is not considered her property, the Court in Cohen held that a disposition in a Will (which passes all of the *property* of a decedent at death) is not binding if there is "clear and convincing" evidence that the decedent changed her mind. The Court ruled:

"In Florida, as in New York, a will is construed to pass all *property* that the testator owns at death ... [but] the testator's body is not considered property. Therefore, just as in New York, a directive in a will regarding the disposition of a body does not have the same force and effect as do provisions directing the disposition of property. We therefore conclude that a testamentary disposition is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that he intended another disposition for his body."

Therefore, it is possible that a later writing and/or even oral directions may prove the Anna Nicole Smith changed her mind.

Thus, in Anna Nicole's case, even if there is a direction in her Will, the parties

may argue they have sufficient evidence that she changed her mind. For example, if she paid for a funeral, or if she bought a burial plot, that is evidence of her intentions. While we do not know just what the full extent of the evidence is, if there is a direction in the Will or not, there is a chance that the litigants are trying to offer extrinsic evidence of Anna Nicole Smith's intent. If they have clear and convincing evidence of her subsequent wishes, then the Judge should try to carry out the changed intent.

IF YOU WANT IT, SAY IT - IN YOUR WILL!

If there is no clear intention expressed in her Will, but Anna Nicole Smith evidenced her burial intentions by telling persons of her intent, by buying a burial plot and/or by arranging her burial, that evidence can also be offered for the Judge to rule on.

As we do not know what is contained in her Will or any other writing, we cannot predict what will happen. But we should note that if there is a direction in the Will and/or if there is written proof of Anna Nicole's intentions regarding her burial, then the intentions and wishes of her friends, family and even her executors probably will not matter.

However, if there is no testamentary disposition and if there is no other clear evidence of Anna Nicole's intentions regarding her burial, then the Judge should consider the intentions of the next of kin.

As noted above, Florida common law does not recognize a property right in the body of a decedent. Thus, if the deceased's intentions cannot be discerned, the Personal Representative does not have a right to dispose of the remains like he/she would have a right to control the deceased's property.

WHO CONTROLS IF NO TESTAMENTARY DISPOSITION:

Instead, Florida law says that, in the absence of a testamentary disposition, first the spouse of the deceased or if none, the next of kin should have the right to possession of the body for purposes of arranging burial or other disposition. *See Jackson V. Rupp*, 228 So.2d 916 (Fla. 4th DCA 1969); *see also Kirskey v. Jernigan*, 45 So. 2d 188 (Fla. 1950).

That explains why Anna Nicole Smith's mother is fighting to be heard. If there is no clear indication of Anna Nicole Smith's intentions, then it seems likely that her mother's desires – not her boyfriend/Personal Representative's - should be considered. The fact that Anna and her mother may have been estranged seems to be legally insignificant. In one Florida case, the court held that a spouse who was legally separated from the decedent still had the right to dispose of his late wife's remains – even though her son and daughter objected. *Andrews v. McGowan*, 739 So.2d 132 (Fla. 5th DCA 1999). Although, I guess that the issue of next of kin is also being contested and maybe there is a father who will argue he should have a say in this determination.

Thus, in Anna Nicole Smith's case, Judge Seidlin will struggle with all of the evidence to attempt to parse her intentions regarding her burial. The court will be guided first by any written directions, particularly her Will. In the absence of a clear direction in her Will, the Judge may listen to other evidence regarding her intentions – such as a pre-paid funeral plan (if any) or her

contract with a cemetery (if she purchased a burial plot). If Anna Nicole Smith's intentions cannot be determined, then the Judge will likely hold that the next of kin should make the decision about burial. Like everything else in this matter, even the next of kin issue is clouded.

INSIDE BASEBALL

There have been a number of critics of Judge Seidlin who have complained about his statements regarding Anna Nicole Smith's body. A Sun-Sentinel article stated: *"he shocked many television viewers who watched as the robed Seidlin, leaning back in his chair in chambers, pronounced that Anna Nicole Smith's "body belongs to me now" and "that baby is in a cold, cold storage room."* The *New York Post* labeled him a "wacky judge." CNN's Nancy Grace, who is not renowned for sensitivity, remarked on the air that it was not how she would refer to *"the dead body of a lady waiting to be buried."*

These comments are typical of Judge Seidlin. He shoots from the hip. Most of the lawyers I know think Judge Seidlin is a great guy and he's generally a popular person. But in yet another ironic twist to a case in which the nation awaits his ruling, Judge Seidlin is semi-famous for avoiding ruling on litigated matters. He's a Judge who unabashedly encourages parties to settle. He is often known to say things like: *"you all seem to be smart people, and you have an interesting case, and you are all represented by excellent attorneys, really, but isn't there a way for you to resolve things?"* And then as if to punctuate his plea for a settlement, Judge Seidlin has been known to hear matters and then not rule on them for ages. This judicial tactic has been effective in the past, as eventually, the litigants decide they have no choice but to settle.

Given the media attention on this case and the pressure he will feel to resolve it, the odds of dragging the matter on just to pursue a settlement seem slight, but a speedy conclusion to the case would also be unexpected.

HOPEFULLY SOME GOOD COMES FROM THIS CASE

How often does the nation seem interested in probate disputes? A real national focus on issues about Wills is infrequent.

Hopefully, spectacles like this will remind the average citizens of just how important estate planning is. When they see families fight like this, let's hope it is a reminder to everyone to either create or to revisit an estate plan.

Not only is the disposition of one's wealth a concern, but so is the disposition of one's body. I hope families will be encouraged to talk about their intentions. Even if they are not in a Will, a person's burial instructions can be communicated to loved ones.

And while taking lessons from Anna Nicole Smith's case, the other fight brewing is over the guardianship of her baby. Again, everyone with a minor child should be sure to have a will to designate a guardian.

Let's hope the media spotlight on this case reminds the nation of the importance of estate planning.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Jeff Baskies

CITE AS:

Steve Leimberg's Estate Planning Newsletter # 1087 (February 16, 2007) at <http://www.leimbergservices.com> Copyright 2007 Leimberg Information Services, Inc. (LISI). Reproduction in Any Form or Forwarding to Any Person Prohibited - Except With Specific Permission.

P.S.

Bob Moss on the ABA-PTL noted that, "Anna Nicole Smith's will has been released. It is a 2001 Will and was not updated following the birth of her daughter. It leaves everything to her (now deceased) son in trust with Howard K stern as Trustee.

But more importantly it says:

"FAMILY DECLARATIONS AND STATUTORY DISINHERITANCES I am unmarried. I have one child DANIEL WAYNE SMITH. I have no predeceased children nor predeceased children leaving issue.

Except as otherwise provided in this Will, I have intentionally omitted to provide for my spouse and other heirs, including future spouses and children and other descendants now living and those hereafter born or adopted, as well as existing and future stepchildren and foster children."

All of the property of my estate (the "residue"), after payment of any taxes or other expenses of my estate as provided below, including property subject to a power of appointment exercised hereby, shall be distributed to HOWARD STERN, Esq., to hold in trust for my child under such terms as he and a court of competent jurisdiction may declare, such that my children are distributed sufficient sums for the health, education, and support according to their accustomed manner of living from either the income or principal of the trust until age twenty five;

It provides that if anyone contests the Will they should be cut out of the Will. and repeats the intentional disinheritance 6.2. General Disinheritance.

Except as otherwise provided herein and in the Trust, I have intentionally omitted to provide for any of my heirs, or persons claiming to be my heirs, whether or not known to me.

Stern is named Guardian of her son.

So since the son is dead and she has specifically and intentionally provided that all of her heirs and future children (including her daughter) shall not take under the will who takes under the intestacy statute?

§ 732.103. Share of other heirs

The part of the intestate estate not passing to the surviving spouse under s.

732.102, or the entire intestate estate if there is no surviving spouse, descends as follows:

- (1) To the lineal descendants of the decedent.
- (2) If there is no lineal descendant, to the decedent's father and mother equally, or to the survivor of them.
- (3) If there is none of the foregoing, to the decedent's brothers and sisters and the descendants of deceased brothers and sisters.
- (4) If there is none of the foregoing, the estate shall be divided, one-half of which shall go to the decedent's paternal, and the other half to the decedent's maternal, kindred in the following order:
 - (a) To the grandfather and grandmother equally, or to the survivor of them.
 - (b) If there is no grandfather or grandmother, to uncles and aunts and descendants of deceased uncles and aunts of the decedent.
 - (c) If there is either no paternal kindred or no maternal kindred, the estate shall go to the other kindred who survive, in the order stated above.
- (5) If there is no kindred of either part, the whole of the property shall go to the kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died intestate entitled to the estate.