

**ARIZONA BOARD OF FUNERAL DIRECTORS AND EMBALMERS
SUBSTANTIVE POLICY STATEMENT 2007-1
SUMMARY OF SB1023, HB2125, SB1099, EFFECTIVE SEPTEMBER 19, 2007**

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona Administrative Procedure Act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties, you may petition the agency under Arizona Revised Statutes § 41-1033 for a review of the statement.

The purpose of this substantive policy statement is to summarize three legislative bills, SB1023, HB 2125, and SB1099, effective September 19, 2007, which affect licensees of the Arizona Board of Funeral Directors and Embalmers (Board). This substantive policy statement is not meant to be a comprehensive statement of all of the requirements in the bills, but to provide guidance to the public concerning the bills and must be read together with existing laws. This substantive policy statement may be viewed on the Board's website at www.funeralbd.state.az.us. For questions about this substantive policy statement, please contact Rudy Thomas, Executive Director, at 602-542-8152 or rudy.thomas@funeralbd.state.az.us.

Senate Bill 1023

SB1023 made several changes to existing law that impact how families and licensees will make decisions about how a disposition will take place including:

- What happens when disagreements occur within a family about a disposition decision?
- What happens when the person or group of persons responsible for making a disposition decision fails to make the disposition decision?
- How persons may communicate and record their disposition decisions?

The Authorizing Agent

A.R.S. § 36-831 establishes categories that designate in devolving order the individual or groups of individuals who are responsible for disposition decisions. A.R.S. § 32-1365.02 provides that the order of preference for determining the authorizing agent is the same as stated in A.R.S. § 36-831.

Before the enactment of SB1023, Arizona law did not clearly address how to resolve a situation in which an authorizing agent refused to make a disposition decision or could not be located to make a disposition decision. Funeral establishments had to choose whether to go to court or wait for the authorizing agent to act. A.R.S. § 32-1365.02(K) addresses this issue, by providing a time frame (15 days) and a guiding principle (whether the person is "reasonably available") to govern the disposition decision making process in order to avoid delays in the disposition decision making process. The legislature defined the term "reasonably available" to mean "a person who is able to be contacted by a crematory, cemetery, or funeral establishment without undue effort and

who is willing and able to act within 15 days after the initial contact by the crematory, cemetery, or funeral establishment.”

The Board will follow a “rule of reason” approach regarding A.R.S. § 32-1365.02(K). Funeral establishments have every reason to work with families to bring about an expeditious process to allow a disposition to take place. Time tested measures exist for funeral establishments to identify those who may be the authorizing agent and to undertake reasonable efforts to contact these people to receive the permission that is required by law for a disposition to take place. It has been the Board’s experience that when a family member learns of the death of a loved one, the family member responds to a funeral establishment within a matter of hours rather than days.

The Board expects a funeral establishment to document in writing the funeral establishment’s efforts to contact the person presumed to be the authorizing agent. All documents and contemporaneous notes about the efforts should be dated and maintained by the funeral establishment. Recording the date is important to establish when the 15 day period articulated in A.R.S. § 1365.02(K) has expired. If the funeral establishment has not been given the required permission to make final arrangements and can demonstrate that the time has expired, the funeral establishment may move to the next class of individuals listed in A.R.S. §§ 36-831 and 32-1365.02 to obtain disposition authorization.

Majority Rule

Before the enactment of SB1023, Arizona law did not clearly indicate the level of agreement required within a family for a disposition decision to be made. Some funeral establishments took the position that the disposition decision rested with the individual who signed the statement of goods and services. Others required unanimous agreement among all members of a category. Still others followed a “majority rule” approach.

SB1023 clarifies this issue by amending A.R.S. §§ 36-831(D) and 32-1365.02(D) to provide that disposition decisions will be governed by the choice made by a majority of the members of the category empowered by law to make the decision.

The Board believes that the legislature, through its enactment of SB1023, intended that families work together during the time when disposition decisions are to be made to reach agreement about how a disposition is to take place. The legislature’s selection of a “majority rule” framework clarifies and provides instructions for families about the disposition decisions to be made and for funeral establishments to know whose direction to follow.

Waiver of “Status”

A person or group of persons holding the status of “authorizing agent,” may not be reasonably available or may be unable to act to make disposition decisions. To address this situation, the legislature included language in A.R.S. § 32-1365.02(H) to permit a person to waive the statutory provision to act as the authorizing agent and pass the

person's right to be authorizing agent to the next person or category of persons as stated in A.R.S. § 36-831.

The Legislature may have been prompted to enact this language to account for a situation in which, a spouse may be unable to make disposition-related decisions. In such a case, A.R.S. § 32-1365.02(H) and A.R.S. § 36-831(B) permit the spouse to waive the right to act as the authorizing agent and to pass the right to the next category of persons described in A.R.S. § 36-831(A) as the authorizing agent. A.R.S. § 36-831(B) requires the waiver be executed during the lifetime of the person on whose behalf disposition decisions will be made upon death.

Healthcare Power of Attorney

SB1023 expanded the uses for which a health care power of attorney may be used. A.R.S. § 36-3224 provides a sample form that may be used to create a health care power of attorney and includes provisions that:

- Permit a person to state the person's disposition decision about whether the person wishes to be buried or cremated
- Permit a person to provide specific instructions about a burial or cremation
- Designate that the person's agent may make funeral and burial disposition decisions

According to A.R.S. § 36-3221, an adult person may designate another adult to make health care decisions on that person's behalf by executing a written health care power of attorney. SB 1023 adds a provision that allows the person designated as a health care power of attorney to provide funeral and disposition arrangements in the event of the person's death. Thus, the health care power of attorney does not always terminate at death. The Board interprets this new provision as also allowing the health care power of attorney to make decisions about whether organ donation or whether an autopsy should be performed. The sample form in A.R.S. § 36-3224 also includes provisions for authorizing autopsies, organ donations and funeral and burial dispositions.

Order of Priority

As many persons have noted, the current law in A.R.S. §§ 32-1365.02, 36-327 and 36-831 contain several provisions with conflicting orders of priority, depending upon whether the disposition involves burial, cremation or disinterment. Senate Bill 1023 clarifies the order of priority by repealing the order of priority currently in A.R.S. § 32-1365.02 and referring to A.R.S. § 36-831 as the only statute that determines priority. The order of priority in A.R.S. § 36-831 reads in part as follows:

A. The duty of burying the body of or providing other funeral and disposition arrangement for a dead person devolves in the following order:

1. If the dead person was married, on the surviving spouse unless:
 - (a) The dead person was legally separated from the person's spouse.

(b) A petition for divorce or for legal separation from the dead person's spouse was filed before the person's death and remains pending at the time of death.

2. The person who is designated as having power of attorney for the decedent in the decedent's most recent durable power of attorney.
3. If the dead person was a minor, on the parents.
4. On the adult children of the dead person.
5. On the dead person's parent.
6. On the dead person's adult sibling.
7. On the dead person's adult grandchild.
8. On the dead person's grandparent.
9. On an adult who exhibited special care and concern for the dead person.
10. On the person who was acting as the guardian of the person of the dead person at the time of death.
11. On any other person who has the authority to dispose of the dead person's body.
12. If none of the persons named in paragraphs 1 through 10 of this subsection are financially capable of providing for the burial or other funeral and disposition arrangements, or cannot be located on reasonable inquiry, on any person or fraternal, charitable or religious organization willing to assume responsibility.

A.R.S. § 36-831(A).

The Board notes that SB1023 does not expressly address the connection that exists between the order of priority statute in A.R.S. § 36-831 and the health care power of attorney provisions in A.R.S. §§ 36-3221 and 36-3224. Nevertheless, the Board understands that great attention should be paid to a family's choices about the disposition of a person. Indeed, the language of the health care power of attorney statutes expressly permits a person "to provide funeral and disposition arrangements in the event of the person's death by executing a written health care power of attorney . . ." A.R.S. § 36-3221(A). To give effect to this statutory language, the Board believes that if a person has executed a valid health care power of attorney, the health care power of authority

document reflecting the person's funeral and disposition wishes would take precedence over the provisions in the priority statutes in A.R.S. § 36-831.

The Immunity Doctrine

A.R.S. § 32-1365.01(E) currently contains a provision often referred to as the "Immunity Doctrine" for a crematory, cemetery or funeral establishment that cremates or otherwise provides for lawful disposition. This provision states:

"A crematory, cemetery or funeral establishment that cremates or otherwise provides for the lawful disposition of a dead human body in good faith reliance on an apparently genuine document executed pursuant to this section is immune from criminal and civil liability and is not subject to professional discipline. The decision of a crematory, cemetery or funeral establishment to cremate or otherwise provide for the lawful disposition of a dead human body in reliance on a document executed pursuant to this section is presumed to be made in good faith."

The Board anticipates that questions may arise about whether there are statutes that contain protections similar to the "Immunity Doctrine" in A.R.S. § 32-1365.01(E) for a health care power of attorney or funeral licensee who carries out disposition directives consistent with a power of attorney. The Board believes comparable protections exist in A.R.S. § 36-3203(D), which addresses a person who carries out disposition directives under a health care power of attorney, called a surrogate, and a person who acts under the surrogate's direction. A.R.S. § 36-3203(D) states:

"A surrogate who makes good faith health care decisions for a patient is not subject to civil or criminal liability for those decisions. Acts and refusals to act made in reliance on the provisions of a health care directive are presumed to be made in good faith. A court shall base a finding of an absence of good faith on information known to the surrogate and shall enter its finding only after it has made a determination of bad faith in written findings of fact based on clear and convincing evidence of improper motive. For the purposes of this subsection, "good faith" includes all health care decisions, acts and refusals to act based on a surrogate's reasonable belief of a patient's desires or a patient's best interest if these decisions, acts or refusals to act are not contrary to the patient's express written directions in a valid health care directive."

In light of this language, the Board believes that the law establishes comparable protections for funeral licensees when carrying out, in good faith, funeral and other disposition arrangements selected by the person under the cremation statutes or by the surrogate, when acting under a valid health care power of attorney.

In Senate Bill 1099, the legislature revised the Uniform Anatomical Gift Act in A.R.S. § 36-841 through 36-863. Two provisions particularly affect funeral board licensees.

A.R.S. § 36-853 (B). provides that if “there has been an anatomical gift, the institution where the removal of any donated parts occurs shall notify the funeral director or the person acting in that capacity who first assumes custody of the body about the removal of the body parts.” This provision requires that donation-related information be provided to funeral homes to facilitate the disposition process. The Board believes this language will help to ensure that funeral directors have accurate and timely information about the condition of the body to be prepared for disposition and are able to communicate with family members about the process that will be involved in preparing a body for disposition from a logistics, appearance, and time standpoint.

A.R.S. § 36-852(H) provides in part that ‘subject to the terms of the document of gift and this article, a person who accepts an anatomical gift of an entire body may allow embalming, burial or cremation and use of remains in a funeral service.’ This provision also states that “[i]f the gift is of a part, the person to which the part passes pursuant to A.R.S. § 36-850, on the death of the donor and before embalming, burial or cremation, shall cause the part to be removed without unnecessary mutilation.”

House Bill 2125

Medical examiners throughout the state play an important role in the investigation of deaths. A.R.S. § 11-593 describes the circumstances of death that automatically fall under the investigative jurisdiction of a medical examiner. HB2125 expands the list of deaths that must be reported for investigation by a medical examiner. This investigation function has a significant impact on families, which in turn has an impact on funeral board licensees. Other major revisions to the medical examiners statutes at A.R.S. § 11-591 through § 11-600 took place in HB2125.

During the legislative session, the Legislature received information that many deaths that are required to be reported to the medical examiner pursuant to A.R.S. § 11-593 may not create the need for the medical examiner to take steps beyond the immediate release of a body to a funeral establishment after the medical examiner obtains a tissue and body fluid sample from the body. This situation results in the body being released by the medical examiner to a funeral home before either laboratory or other test results have been returned to the medical examiner or the cause of death is known. Before HB2125, this practice raised questions about when a funeral director or embalmer had permission to proceed with dispositions. HB2125, provides clarification as follows:

“Embalming, cleansing of the surfaces of the body or other alteration of the appearance or state of the body, clothing or personal effects shall not be performed until the permission of the county medical examiner or alternate medical examiner has been obtained. A funeral director or embalmer who receives custody of a human body from a county medical examiner or alternate medical examiner is deemed to have the permission required by this subsection, unless permission is expressly withheld by the county medical examiner or alternate medical examiner.”

A.R.S. § 11-596(B) (emphasis added).

The Board interprets this statute to mean that a funeral director or embalmer who receives custody of a body from the medical examiner before laboratory or other test results have been returned to the medical examiner may embalm, cleanse the surfaces of the body, or alter the appearance or state of the body after the body is released by the medical examiner, "unless permission is expressly withheld."