

## Outside Counsel

## Expert Analysis

# Public Health Law Protections For Funeral Homes Affirmed

The tragic events of Sept. 11, 2001, led to revisions in the Public Health Law seeking to protect those identifying, handling and disposing of human remains. One component of the revisions allows for planning for the assignment of an agent for the disposition of remains. While formerly these issues could be addressed in a will, often wills are not probated or even looked at before people are buried. Had such an assignment been made by the decedent in the case of *Mack v. Brown*, 919 N.Y.S.2d 166, decided March 8, 2011, a great deal of emotional angst and resulting litigation could have been avoided. Instead, the issue in *Mack* became whether or not the hospital, crematory or funeral home could be held responsible upon cremation of a bigamous man who appears to have been married to two women at the time of his death, when one of the wives and her children claimed they were denied the right of sepulcher, or the right to the immediate possession of the decedent's body for preservation and disposition of the remains. *Id.*

This case is significant in that it contemplates and provides insight into the legislative intent of the revisions to the Public Health Law that have not been previously

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addressed or considered by the courts, providing protection from liability for funeral homes and related entities as set forth more extensively below.

### New Protection

What was explored and developed in *Mack v. Brown*, *supra*, is essentially how the change in Public Health Law §4201 acts as a shield, protecting those identifying the remains of a decedent, those holding themselves out as authorized to control the decedent's remains or those disposing of the remains including hospitals, crematories and funeral homes from liability in the disposal or handling of human remains. It requires only that such entities act "reasonably and in good faith." Public Health Law §4201(7).

As noted in the Second Department's decision in *Mack*, Public Health Law §4201 Disposition of Remains, "addresses two broad aspects of the care, disposal, transportation, burial, cremation, or embalming of the body of a deceased person—one regarding who shall have the right to control the disposi-

tion of a decedent's remains and the second regarding the liability of others in carrying out the directions of a person who represents that he or she is entitled to control the disposition of remains." *Id.* at 169.

The Second Department also specifically noted that "Public Health Law §4201 underwent significant revisions by amendments effective Aug. 2, 2006, Aug. 1, 2007, and Oct. 25, 2009, respectively (see L. 2005, ch. 768 §1; L. 2006, ch. 76. §1; L. 2007, ch. 401, §1; L. 2009, ch.348, §4)," and pointed out that the most important revisions, as relevant to the *Mack* case, were those effective Aug. 2, 2006, from which, it noted, very little case law had been generated. *Id.* at 169.

First, the statute lists the people who have the right to dispose of a decedent's remains in descending priority (see Public Health Law §4201[2][a]). Second, it provides legal protection against civil liability upon a person either identifying the decedent, representing themselves as authorized to control the decedent's remains or disposing of the remains (see Public Health Law §4201[6][a-c]; §4201[7]). The Second Department clearly stated that "Public Health Law §4201(7) specifically provides, *inter alia*, that no cemetery organization, crematory or funeral firm shall be liable 'for actions taken reasonably and in good faith to carry out the directions of a person who represents that he or she is entitled to control of the disposition of remains.'" *Id.* at 170.

## Facts and Analysis

In *Mack v. Brown*, 919 N.Y.S.2d 166 (2d Dept. 2011), the plaintiffs, Shirley Major Mack and her children, were the wife and children of decedent Joseph F. Mack who died at New York Methodist Hospital in Brooklyn on Nov. 2, 2008. The certificate of death issued by the hospital reflected that Mr. Mack's surviving spouse was Regina Brown. Two days later, Ms. Brown authorized cremation of Mr. Mack's body, using her married name of Mack, and identifying herself as Mr. Mack's wife and the executor of his estate. The authorization for cremation reflected that the decedent left no written instructions for the disposal of his body and that his near relatives had been informed of the proposed cremation and did not express any objection to it. Ms. Brown provided a Certificate of Marriage identifying her as the decedent's spouse.

The plaintiffs sued the hospital, the funeral home and the crematory claiming that they all violated their rights of sepulcher by cremating the remains of their husband and father pursuant to the direction of the decedent's second wife. On appeal of the denial of the crematory's motion for summary judgment, not only did the Appellate Division, Second Department reverse and dismiss the claims against the crematory, it searched the record and granted summary judgment in favor of the funeral home as well, for the same reasons it dismissed the claims against the crematory.

The Second Department held that the crematory, Green-Wood Cemetery Mausoleums & Crematory, made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that it did not violate the defendants' rights to sepulcher, as its actions in cremating the remains of the decedent, at the direction of what appeared to be the decedent's wife, was satisfactory on its face to meet the requirements of Public Health Law §4201(7). Green-Wood was found to have no reason to question Ms. Brown's authority to act as the decedent's surviving spouse.

Mr. Mack's first wife and children had argued that the marriage between Mack and Brown was bigamous, and took place after the marriage of the decedent and Shirley Major Mack, which would thus render the marriage to Ms. Brown void ab initio, negating Ms. Brown's authority to control the disposition of Mr. Mack's remains. However, this is a red herring, as, if true, Ms. Brown would not have been a surviving spouse authorized to control Mr. Mack's remains and order the cremation. But regardless, the Second Department made it clear that Green-Wood's liability would not depend on the validity of Ms. Brown's marriage, but on whether its own actions were reasonable and taken in good faith under the circumstances. *Id.* at 172.

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'Mack' examines and construes revisions to the Public Health Law that have not been interpreted by the courts.

The Second Department went on to conclude that, "the intent of the statute is to shield cemeteries, crematories and funeral firms from civil liability, so long as they reasonably rely in good faith upon the directions of persons with apparent authority to control the disposition of human remains and obtain the documentation set forth in the statute." The court recognized the weight of the burden it would place on cemeteries, crematories and funeral homes if they were required to investigate more deeply than required by the Public Health Law, noting that going farther would require such institutions to "cross-examine grieving widows, widowers, children, parents, siblings, or others" to confirm the status of relationships.

But the court did leave the possibility open that if documents provided were incomplete or suspicious that further inquiry would be required. *Mack v. Brown*, 919 N.Y.S.2d 166 at 172. However, under the circumstances of the *Mack* case, to require Green-Wood to

conduct further investigation of Ms. Brown's marital status would render the civil liability protections set forth in Public Health Law §4201 meaningless.

## Conclusion

As previously noted, a review of this case is important as it examines and construes revisions to the Public Health Law that have not been interpreted by the courts. It holds the funeral entities specifically to the requirements of the law as it now reads, and provides the protections from liability as stated within them to the letter of the law, requiring no more and no less than the standard set forth within it, that the funeral entities acted "reasonably" and "in good faith," even in a difficult scenario where it is arguable that the right of sepulcher should have been with the wife and mother from the first, and longest standing marriage.

However, the court properly refused to place the burden of investigating what appears to be either the ignorance of or the withholding of information from the funeral facilities on the part of the second wife, Ms. Brown, when proper valid proof of marriage was provided. As so eloquently stated by the court, to place any higher burden on the court would "render meaningless the civil liability protections now afforded to it by Public Health Law §4201."