

IN THE CIRCUIT COURT IN AND FOR
BROWARD COUNTY, FLORIDA
PROBATE DIVISION

File Number: 07-00824 (61)

Division: Seidlin

IN RE:

VICKIE LYNN MARSHALL
a/k/a Anna Nicole Smith,

Deceased.

Filed In Open Court,
HOWARD C. FORMAN,
CLERK

ON 2/22/07

BY HR

(RESERVED FOR CLERK OF COURT)

**ORDER GRANTING DANNIELYNN HOPE MARSHALL STERN'S
MOTION TO RECOGNIZE HER SOLE RIGHT TO
DETERMINE THE DISPOSITION OF HER MOTHER'S REMAINS**

THIS CAUSE came before the Court commencing on February 15, 2007, on (i) the Emergency Verified Petition for Release of Remains for Burial filed by Howard K. Stern, (ii) Dannielynn Hope Marshall Stern's Motion to Recognize Her Sole Right to Determine the Disposition of Her Mother's Remains, and (iii) the Cross-Petition for Declaratory Judgment filed by Virgie Arthur. The Court conducted an extensive proceeding lasting several days on the matters raised in these filings, hearing argument from counsel, testimony from witnesses, and reviewing the exhibits and documents submitted. The Court has also reviewed the parties' other filings, and heard from counsel for Larry Birkhead, who asserts an interest in these proceedings through Case No. 07-001909, also pending in this Court.

I. INTRODUCTION

In *Cohen v. Guardianship of Cohen*, 896 So. 2d 950 (Fla. 4th DCA 2005), the Fourth District Court of Appeal provided valuable advice to trial courts faced with this type of dispute:

It is a sorrowful matter to have relatives disputing in court over the remains of the deceased. In this case in particular, there is no solution that will bring peace to all

parties. We express our sympathies to both sides in their loss, which must be magnified by these proceedings. Cases such as these require the most sensitive exercise of the equitable powers of the trial courts.

Id. at 955. This Court is faced with a similarly sensitive conflict requiring a delicate resolution that attempts to recognize the concerns of the parties, while simultaneously protecting the rights implicated by this proceeding. Accordingly, based on the facts presented and the applicable law, the proper resolution of the issue before the Court is to award Dannielynn Hope Marshall Stern (“Dannielynn”) the custody and control of the remains of her mother, Vickie Lynn Marshall a/k/a Anna Nicole Smith (hereinafter, “Anna Nicole Smith”). Furthermore, in that Dannielynn is a minor, Dannielynn’s authority over the remains shall be exercised through Richard C. Milstein, Esq., of Akerman Senterfitt, as Guardian Ad Litem acting in the best interest of Dannielynn, to determine the disposition of her mother’s remains.

Recognizing the public nature of this dispute, it is the Court’s fervent hope that everyone reading this decision will take at least one message to heart: These proceedings are the poster child for why it is necessary for every individual—whether or not an international celebrity—to make proper arrangements to avoid litigation upon their demise. With proper planning by Anna Nicole Smith, much of the dispute before the Court would not exist, although it may well be that the disputants would still be fighting in some venue(s) over any or all of the issues raised. However, the Court must play the hand it has been dealt.

At the heart of the matter are two persons, one deceased and one just starting on life’s path. For the Court, protecting the dignity of the former is a significant concern; however, the rights and future of the child are paramount. Anna Nicole Smith lived a very public life and achieved her dreams of stardom, and then her life was tragically cut short not long after having given birth to her daughter, Dannielynn Hope Marshall Stern (“Dannielynn”), only days after her brother Daniel Wayne Smith passed away at the young age of twenty-one. The Court can only do

so much to protect the dignity and memory of Anna Nicole Smith, because many of the issues surrounding her affairs are beyond its purview and much of her private life is on public display; however, the Court can—and must—do everything within its power to protect the rights and interests of Dannielynn to the extent those rights and interests are within the jurisdiction of the Court.

In many ways, the Court's involvement is the result of a random fluke of a mysterious universe. Had Anna Nicole Smith not come to Florida in February 2007, her demise would have not involved the judiciary of this State. Had Anna Nicole Smith's affairs been settled prior to her passing by, for example, her putting in writing how (and by whom) she wished her funeral to be conducted and her having a will that protected her daughter, and it is quite possible that the matters before this Court would never have been subject to litigation. Had there not been the multitude of familial disputes involved with Anna Nicole Smith that has lead to litigation of issues arguably better resolved in private, no court—or, at least, not this Court—would have been required to be involved in disputes giving rise to the various actions that have been filed in United States and beyond. However, the dominos of the universe laid a path to this Court's door at this time, placing one of the many issues involved in Anna Nicole Smith's demise in this Court's lap. Accordingly, it is now the duty of the Court determine the sole issue before the Court: Who is entitled to the custody of the remains of Anna Nicole Smith?

The Court has been presented with three claimants to the remains. This action was initiated on February 14, 2007—a Valentine's Day present to no one, including to the filer—by Howard K. Stern ("Stern") through his Emergency Verified Petition for Release of Remains for Burial ("Stern's Emergency Petition"), which sought release of Anna Nicole Smith's remains from the custody and control of the Broward County Medical Examiner. Upon reviewing Stern's Emergency Petition and recognizing that the interests of Dannielynn were implicated by the

issues raised, the Court appointed Richard C. Milstein, Esq. ("Milstein"), of Akerman Senterfitt, as Dannielynn's Guardian Ad Litem on February 15, 2006, confirming that appointment by written order entered the following day. In response to the Stern's Emergency Petition, Virgie Arthur ("Arthur") filed a Motion to Dismiss Petition for Lack of Standing ("Arthur's Motion to Dismiss"). Arthur subsequently filed a Cross-Petition for Declaratory Relief ("Arthur's Cross-Petition") on February 21, 2007, in which she demanded that Anna Nicole Smith's remains be released to her. Finally, acting on behalf of Dannielynn, Milstein filed Dannielynn Hope Marshall Stern's Motion to Recognize Her Sole Right to Determine the Disposition of Her Mother's Remains ("Dannielynn's Motion").

These filings gave rise to six days of hearing, from February 15 to February 22, 2007. In addition to Stern, Arthur, and Milstein, the Court allowed Larry Birkhead ("Birkhead") and his counsel to participate, as Birkhead has some interest in the question before the Court and Birkhead's testimony is material to that issue. However, despite Birkhead's counsel's best efforts to inject the full panoply of the issues related to Dannielynn's paternity into these proceedings, this Court has no jurisdiction over those matters and they are not properly for this Court's adjudication, although the paternity question has some relevance to the question before the Court.

Because of the emergency circumstances, the Court has been forced to expedite the proceedings dramatically, limiting direct and cross-examination, allowing documents into evidence without requiring that the predicates be laid, and taking it upon itself to conduct some of the witness examination. These procedural shortcuts have been required, however, because the initiation of this litigation caused a delay in embalming of Anna Nicole Smith's body and that delay, as relayed to the Court and the litigants by the Broward County Medical Examiner on February 20, 2007, has lead to some potential deterioration of the body's condition. The litigants

are unanimous on few issues; however, they unanimously agree that Anna Nicole Smith's appearance was a paramount issue to her. Consequently, it was not possible for the rules applicable to a normal action to be followed. Indeed, all parties and the Court were equally handicapped by these procedural exigencies, a situation made more complicated by the repeated attempts by all parties to litigate certain issues beyond the purview of this Court (absent unanimous consent of the parties). However, despite the various winding paths down which the litigants have taken (and tried to take) the Court, the facts material to the issue before the Court have been presented fully, the proper issues addressed sufficiently, and the Court is more than adequately apprised of the relevant facts and applicable law required to reach a ruling.

II. FINDINGS OF FACT

Dannielynn was born on September 7, 2006, in Nassau, Bahamas. Although she had one living sibling at that time, Daniel Wayne Smith, Mr. Smith passed away three days later, on September 10, 2006, and was ultimately buried in the Bahamas. Accordingly, shortly after her birth, Dannielynn became her Mother's sole child and only heir, since her Mother had not legally married after being widowed.

On February 8, 2007, Dannielynn's Mother passed away in Broward County, Florida, while visiting Florida as a declared resident of the Bahamas. Since on or about that date, her remains have been held in the custody and control of the Broward County Medical Examiner.

Arthur

Arthur is Anna Nicole Smith's mother and Dannielynn's maternal grandmother.¹ Although Arthur's Motion to Dismiss asserts that she is the "next of kin of the decedent," *id.* at ¶ 2, she is not—Dannielynn is. Arthur seeks possession of the remains in order to have them

¹ Neither Dannielynn's father nor any other grandparent has made an appearance in these proceedings.

shipped to Texas for burial. In addition, Arthur testified that she plans to institute proceedings in the Bahamas to exhume Daniel Wayne Smith so that his remains can also be shipped to Texas for burial.

Anna Nicole Smith lived in Texas with Arthur or Arthur's sister until approximately seventeen years of age. At points during that period, Arthur testified that she and Anna Nicole Smith discussed where Anna Nicole Smith would be buried, with Arthur claiming that Anna Nicole Smith stated a desire to be buried in Texas. However, Arthur also testified that Anna Nicole Smith resided in California subsequent to leaving home, that Anna Nicole Smith had long expressed a desire to be like Marilyn Monroe and, in fact, to be buried next to her in California, and, most significantly, that Arthur had had little substantive contact with Anna Nicole Smith in the ten years prior to her death. Indeed, the Court notes that Arthur testified that she had not met Birkhead until shortly before Anna Nicole Smith died and that the evidence presented indicates that Anna Nicole Smith traveled to Texas on multiple occasions without visiting Arthur.

Arthur did not dispute that Stern and Anna Nicole Smith had a substantial and long standing relationship. In addition, Arthur testified that Stern's and Anna Nicole Smith's relationship commenced after Anna Nicole Smith had become distant from Anna Nicole Smith's Texas relatives, including Arthur.

Although the Court viewed a videotape of an interview of Anna Nicole Smith made shortly before her death in which Anna Nicole Smith discusses her relationship with her family, the Court disregards it. However, the testimony of Arthur, Stern, and Birkhead was fairly consistent to the effect that in the last ten years of her life, Arthur's relationship with Anna Nicole Smith was troubled and that they had significant disagreements. Moreover, Arthur herself testified that Daniel Wayne Smith did not visit her in Texas in the last few years of his life and that their contact was relatively infrequent.

Arthur, as does every litigant before the Court as discussed below, has evident vested interests in obtaining possession of her daughter's remains. The Court notes particularly that Arthur testified that she did not discuss with her sister-in-law the fact that her sister-in-law sold a videotape of Arthur's visit to Daniel Wayne Smith's grave in the Bahamas to a media outlet called Splash Media and also testified that she did not discuss the February 21, 2007, viewing of Anna Nicole Smith at the Broward County Medical Examiner's office with a Splash Media journalist, despite having traveled to the viewing in the journalists' vehicle.² In addition, the Court finds that Arthur's testimony to the effect that she had not received and had no anticipation of receiving remuneration arising from the death of Anna Nicole Smith or her subsequent burial to be less than credible.

Birkhead

As noted above, although not a party to this action, the Court allowed Birkhead to participate in these proceedings. Birkhead and Anna Nicole Smith had a substantial romantic relationship from roughly August 2004 to May 2006, one result of which, according to Birkhead, was Dannielynn. Although the paternity issue is not within the province of the Court, it not denied by Arthur or Stern that Birkhead and Anna Nicole Smith were romantically involved for a substantial period of time and that Birkhead is well qualified to address the question before the Court. Birkhead presently resides in California and testified that, in the event he is successful in his paternity action, he intends to take Dannielynn wherever his professional career takes him to be raised.

² Given the number of persons seated at Arthur's table in the courtroom, the Court finds it curious that it was necessary that a journalist's vehicle was required to take Arthur to the viewing. Indeed, the Court is troubled by the fact that Arthur chose to ride in that particular vehicle less than an hour after agreeing in a telephonic hearing with the Court that "all circumstances of and events relating to" that viewing were "strictly confidential" and that she was "not to discuss or disclose any of these circumstances and events with any person (including both individuals and legal entities)." See February 21, 2007, Order of Confidentiality at ¶¶ 1-2.

Consistent with Arthur's testimony, Birkhead testified that Anna Nicole Smith appeared to be distant from Arthur. Birkhead confirmed Anna Nicole Smith's interest in Marilyn Monroe, including her interest in being buried in the same cemetery in California where Marilyn Monroe is interred. Birkhead also testified that Stern and Anna Nicole Smith had a strong, long-term relationship, although Birkhead denied that the Stern's relationship with Anna Nicole Smith ever became intimate.


As did both Stern and Arthur, Birkhead testified that Anna Nicole Smith's relationship with her son Daniel was extremely close. Indeed, that is one issue on which Stern, Arthur, and Birkhead are extremely consistent: Anna Nicole Smith loved her son Daniel more than anyone else and he was the light of her life.

Like Arthur and Stern, Birkhead has vested interests in this proceeding. The Court notes that Birkhead is a professional photographer and that a substantial component of Birkhead's income arises from his status as the exclusive photographer of Anna Nicole Smith for a substantial period of time and that his photographs include both Anna Nicole Smith and Daniel Wayne Smith. Given the obvious media interest in these proceedings, it is undeniable that Birkhead's photographic repertoire appears likely to increase in value. In addition, Birkhead's and Stern's adversarial positions with respect to Dannielynn's paternity create an obvious personal interest for Birkhead; however, that disputes leads the Court to find Birkhead's positive comments about Stern (and vice versa) to be particularly credible.

The Court finds Birkhead's testimony generally credible. Indeed, on the question ultimately presented, the Court finds particularly credible Birkhead's testimony to the effect that while Birkhead would prefer that Anna Nicole Smith be buried in California, the fact that Daniel Wayne Smith is buried in the Bahamas presents a significant obstacle to this wish. Significantly, Birkhead did not testify that Texas was even in consideration as the proper resting place for

Anna Nicole Smith. Birkhead also testified that Anna Nicole Smith wanted to be buried next to Daniel.

Stern

Stern is the named  father on Dannielynn's birth certificate; however, Dannielynn's paternity is in dispute, with Birkhead and Stern litigating that issue in several venues. Stern bases his standing in this matter on the claim that he is the "nominated Executor" under the Mother's purported "Will of Vickie Lynn Marshall" ("Will"). *See id.* at ¶ 1.³ Stern presently resides in the Bahamas. Stern appeared before the Court voluntarily upon the Court's promise that he would be served with no other actions while in Florida; Stern has remained in Florida during these proceedings under Court order to remain until the proceedings are concluded. Stern seeks the remains for purposes of burial in the Bahamas next to the plot in which Daniel Wayne Smith is interred.

Stern testified that he and Anna Nicole Smith had a strong relationship of approximately ten years, which evolved from initially being a professional relationship to becoming a romantic one. Although Birkhead denied this, whether or not Stern and Anna Nicole Smith were romantically involved is not relevant; what is relevant is that each of Arthur, Birkhead, and Stern, testified that Stern had a strong, constant relationship with Anna Nicole Smith for the past decade.

Stern testified (without contradiction) that he and Anna Nicole Smith investigated possibly burying Daniel Wayne Smith in California and acquiring adjacent plots for Anna Nicole Smith; however, for logistical, expense, and other reasons, Anna Nicole Smith decided not to

³ Although much of the dispute was over the validity and provenance of this document, whether the Will can properly be probated is irrelevant to the issue before the Court and the Court takes no position on that question. The Will is most relevant for what it lacks: any discussion of where Anna Nicole Smith desired to be buried.

bury Daniel in California. The Court finds this testimony particularly significant, in that it establishes that Anna Nicole Smith's choice to bury Daniel in the Bahamas was not a snap decision made in the heat of the moment. Indeed, Stern's testimony of the effect on Anna Nicole Smith of Daniel's death makes the approximately one-month delay between Daniel's death and Daniel's burial a significant fact demonstrating a conscious choice by Anna Nicole Smith of where to bury her most-loved one.

Without significant dispute by any other witness, Stern testified that Anna Nicole Smith desired to be buried in the Bahamas next to her son Daniel. Similar to the testimony of Arthur and Birkhead, Stern testified to the effect that Daniel was the center of Anna Nicole Smith universe. Indeed, the Court particularly notes Stern's observation that, because Anna Nicole Smith had Daniel at such a young age (approximately nineteen), in many ways they grew up together. In one of the saddest comments of the trial, Stern testified that although Anna Nicole Smith died in February 2007, in many respects she died emotionally in September 2006, when Daniel died.

As with Arthur and Birkhead, Stern may have vested interests in Anna Nicole Smith remains. The Court notes that Anna Nicole Smith has been Stern's primary means of support for the past few years; however, the Court similarly notes that, in this day and age, the stereotype that "men go to work" and "women stay at home" should have been erased long ago. Stern testified that he presently lives in a house titled in Anna Nicole Smith' name in the Bahamas and that he currently has no income.

While the Court also finds Stern generally credible, on the sole question before the Court, Stern testified that Anna Nicole Smith bought four burial plots in the Bahamas with the specific intention of being buried in the one next to Daniel. On this particular issue, the Court finds Stern's testimony extremely credible.

Dannielynn

Dannielynn was born on September 7, 2006, in Nassau, Bahamas, to Anna Nicole Smith and has lived there since that date. Dannielynn is Anna Nicole Smith's sole heir. She is now five and a half months old. Accordingly, Milstein was appointed by the Court to represent and protect her rights and interests in this proceeding. Dannielynn's paternity is disputed; however, she is the next of kin of Anna Nicole Smith.

Anna Nicole Smith

Anna Nicole Smith, obviously, did not testify. However, much of the testimony was about her, her life, and her wishes. Most of that testimony was of questionable relevance to the issue before the Court; however, the participants were granted substantial leeway in developing their cases in the expedited and unusual circumstances presented by this litigation.

* * * * *

Based on the testimony presented and the Court's evaluation of the credibility of the witnesses, the Court finds the following facts with respect to Anna Nicole Smith to have been shown by clear and convincing evidence:

- Daniel Wayne Smith was the most important person in Anna Nicole Smith life.
- The choice of Daniel Wayne Smith's final resting place was the most significant choice Anna Nicole Smith made in the last months of her life.
- Anna Nicole Smith had planned to be buried next to her son Daniel Wayne Smith for many years before his death.
- Daniel Wayne Smith is buried in the Bahamas.
- Anna Nicole Smith's last ascertainable wish with respect to the disposition of her remains was that she be buried in the Bahamas next to her son Daniel Wayne Smith.

III. CONCLUSIONS OF LAW

A. As “Next Of Kin,” Dannielynn Has the Right to Determine the Disposition of Anna Nicole Smith’s Remains

Under Florida common law, Dannielynn is entitled to determine where her mother is to be buried.⁴ Although a purported Will has been submitted to the Court, the Will has no bearing on the question here. “Until admitted to probate in this state or in the state where the decedent was domiciled, the will shall be ineffective to prove title to, or the right to possession of, property of the testator.” Fla.Stat. § 733.103 (emphasis added). Anna Nicole Smith Will has not been probated anywhere. Therefore, even if a decedent’s remains could constitute part of the probate estate, Stern has no standing in this proceeding. Moreover, under Florida law, a decedent’s remains are not part of her estate because “[the] rights to a deceased’s remains . . . exist only for purposes of burial, or for other statutory purposes, and nothing further.” *Key West v. Knowles*, No. 3D06-366, 2007 WL 57603, *2 (Fla. 3d DCA Jan. 10, 2007).

A decedent’s child is the decedent’s “next of kin.” *See, e.g., Lowrimore v. First Sav. & Trust Co. of Tampa*, 140 So. 891, 893 (Fla. 1932) (“[N]ext of kin’ . . . is interpreted to mean those blood relations who under the law would, in the absence of a devise of the property, take it as heirs of the testator.”). Under the common law, it has long been recognized by Florida courts that the next of kin is entitled to possession of the deceased’s body and to determine the manner of disposition.

It is well settled that, in the absence of a testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition which they may see fit.

⁴ Of course, where a decedent has incorporated instructions into a will or taken similar steps to determine how his or her remains are to be handled, a different situation may arise. However, no such formal directions from Dannielynn’s Mother have been presented in these proceedings.

Kirksey v. Jernigan, 45 So. 2d 188, 189 (Fla. 1950) (emphasis added). Thus, in addressing a claim by parents of an unconstitutional deprivation of rights in their son's remains, the Florida Supreme Court recently relied, *inter alia*, on *Kirksey* in concluding that "in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition." *Crocker v. Pleasant*, 778 So. 2d 978, 987-88 (Fla. 2001) (emphasis added) (citing *Kirksey*, 45 So. 2d at 189).⁵ See also *Key West*, 2007 WL 57603 at *2 (same) (quoting *Crocker*, 778 So. 2d at 988).

Just two years ago, the Fourth District Court of Appeal reaffirmed this principle in *Cohen*, in which that court addressed a ruling in a dispute between a decedent's wife and his siblings over the disposition of his remains. See 896 So. 2d at 951-52. The court's language could not be clearer:

In the absence of a testamentary disposition, the spouse of the deceased or the next of kin has the right to possession of the body for burial or other lawful disposition.

Id. at 953 (emphasis added) (citing *Kirksey*, 45 So. 2d at 189). Moreover, as noted above, the *Cohen* court's recognition of the delicate nature of the issue is particularly appropriate to the situation presented here. As in *Cohen*, this dispute calls for "the most sensitive exercise of the equitable powers of the trial courts." *Id.* at 955. However, unlike *Cohen*, there are no disputing siblings and there is no spouse; instead, there is only Dannielynn, who as "next of kin" has the sole claim to her Mother's remains.

⁵ In reaching this holding, the Court noted that "Florida law also contains a number of indicia . . . in statutes . . . that recognize the rights of next of kin in their dead relatives' remains." *Id.* at 987 (citing Fla.Stat. §§ 245.07, 732.912(3), 732.912(4) & 732.9185(1)(b)).

B. Florida's Statutory and Regulatory Scheme Governing the Disposition of Remains Gives Dannielynn, as "Next of Kin," the Right to Decide How Her Mother's Remains Are to Be Disposed.

Anna Nicole Smith's body is presently in the custody and control of the Broward County Medical Examiner, whose authority and duties are established by the Medical Examiners Act, Fla.Stat. § 406.01, *et seq.* As relevant to these proceedings, Part I creates the Medical Examiners Commission and provides for the adoption of rules to implement the provisions of Chapter 406. *See* Fla.Stat. §§ 406.02 & 406.04. Part II governs the disposition of bodies held by the State's medical examiners. *See* Fla.Stat. § 406.50, *et seq.* Under this statutory and regulatory scheme, as "next of kin," Dannielynn is entitled to determine the disposition of her Mother's remains.

1. The rules governing the Broward County Medical Examiner require notification to be provided to the Mother's "next of kin"—i.e., Dannielynn—when the remains are to be released.

Pursuant to the authorization in Fla.Stat. § 406.04, the Medical Examiner's Commission has adopted rules governing the State's Medical Examiners, which are located in Chapter 11G of the Florida Administrative Code. Relevant to the issue before the Court is Rule 11G-2.001(5), which provides:

If the medical examiner determines that jurisdiction for an investigation under Section 406.11(1)(a) or (b), F.S.,⁶ does exist, he shall . . . (f) promptly notify the next of kin, authorized funeral home, or other representative when the body can be released, provided the identification and location of the next of kin or representative is known.

(emphasis added). Thus, as "next of kin," Dannielynn is entitled, at minimum, to notification when her Mother's remains can be released.

⁶ Fla.Stat. § 406.11(1)(a) requires the medical examiner to investigate a death of a person, *inter alia*, "when in apparent good health" or "[i]n any suspicious or unusual circumstance."

2. The statutory framework addressing multiple claims to a decedent's remains require that they be provided to the Mother's "next of kin"—i.e., Dannielynn.

In this case, more than one person asserts an entitlement to the remains of Anna Nicole Smith. Accordingly, the Court's inquiry is guided by Fla.Stat. § 406.50(4), which states, in relevant part:

In the event more than one legally authorized person claims a body for interment, the requests shall be prioritized in accordance with s. 732.103.

(emphasis added). The definition of "legally authorized person" is found in Fla.Stat. § 497.005(37).⁷ In relevant part, that provision states:

"Legally authorized person" means, in the priority listed, the decedent, when written inter vivos authorizations and directions are provided by the decedent; the surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased; a son or daughter who is 18 years of age or older; a parent; a brother or sister who is 18 years of age or older; a grandchild who is 18 years of age or older; a grandparent; or any person in the next degree of kinship. In addition, the term may include, if no family member exists or is available, the guardian of the dead person at the time of death; the personal representative of the deceased; the attorney in fact of the dead person at the time of death; the health surrogate of the dead person at the time of death; a public health officer; the medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator; a representative of a nursing home or other health care institution in charge of final disposition; or a friend or other person not listed in this subsection who is willing to assume the responsibility as the legally authorized person. Where there is a person in any priority class listed in this subsection, the funeral establishment shall rely upon the authorization of any one legally authorized person of that class if that person represents that she or he is not aware of any objection to the cremation of the deceased's human remains by others in the same class of the person making the representation or of any person in a higher priority class.

⁷ Although the portion of § 406.50 defining "legally authorized person" defines that phrase with reference to unclaimed remains and not in the discussion of multiple claimants, "[w]hen a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless a contrary intent clearly appears." *Nicholson v. State*, 600 So. 2d 1101, 1103 (Fla. 1992). Therefore, as there is no indication of any contrary intent in § 406.50, "legally authorized person" must be read consistently throughout the statute as defined by § 497.005(37).

(emphasis added). In addition, Fla.Stat. § 497.005(49) states, “‘Person,’ when used without qualification such as ‘natural’ or ‘individual,’ includes both natural persons and legal entities.” Thus, Milstein, as the Guardian Ad Litem for Dannielynn appointed by this Court because of her minority, constitutes a “legally authorized person” under Fla.Stat. § 497.005(37).⁸

3. Only Dannielynn is entitled to the remains of Anna Nicole Smith.

At present, there are three putative recipients of Dannielynn’s Mother’s remains: (i) Stern, (ii) Arthur, and (iii) Dannielynn. Of the three, Dannielynn alone is entitled to control the disposition of the remains.

With respect to Stern, he falls into no category recognized by § 497.005(37). The Will has not been probated and Stern was not the Mother’s spouse; moreover, there is a “family member [who] exists or is available”—*i.e.*, Dannielynn. Therefore, Stern is not a “legally authorized person” under § 497.005(37).

With respect to Arthur, she qualifies as a “legally authorized person” under Fla.Stat. § 497.005, since she is a parent of Anna Nicole Smith. However, Dannielynn, whose interests are represented by Milstein as Guardian Ad Litem, is also a “legally authorized person.” Therefore, there is more than one “legally authorized person” before the Court. In these circumstances, Chapter 406 establishes that the requests to a medical examiner with respect to disposition of Dannielynn’s Mother’s remains “shall be prioritized in accordance with [Fla.Stat. §] 732.103.” Fla.Stat. § 406.50(4) (emphasis added). The first priority in § 732.103 is “the lineal descendants of the decedent”—*i.e.*, Dannielynn. Therefore, under the statutory and regulatory framework, Dannielynn alone is entitled to determine how her Mother’s remains are to be disposed.

⁸ It bears noting that the central purpose of Chapter 497 (and its predecessor chapter, Chapter 470), is for the protection of funeral homes. *See, e.g., Matsumoto v. American Burial and Cremation Servs., Inc.*, No. 2D06-1299, 2006 WL 3733310, *2 (Fla. 2d DCA Dec. 20, 2006) (each time the Legislature has amended Chapter 470, it “broaden[ed] the scope of priority upon which the funeral home can rely in relation to the disposition of remains”).

C. Florida Common Law and Florida Statutes Compel But One Conclusion: The Choice as to the Disposition of Her Mother's Remains Is to Be Made by Dannielynn.

As in *Cohen*, this Court must exercise its equitable powers sensitively in view of the competing demands with respect to the disposition of the remains of Anna Nicole Smith. In one corner of the boxing ring, you have Arthur, who wishes to have the remains transported to Texas; in another corner of the ring, you have Stern, who wishes to have the remains transported to the Bahamas to be buried next to Dannielynn's brother. In the third corner, although not one with standing on the question before the Court, you have Birkhead, who recognizes the paramount importance to Anna Nicole Smith of her being buried next to her son Daniel. Finally, in the fourth corner, you have Dannielynn, whose interests are championed by Milstein; she is her mother's only surviving child and immediate next of kin. Under these circumstances, particularly in view of the equities of the situation, in accordance with both Florida common law and Florida statutes, the choice of disposition is not Arthur's, not Stern's, and not Birkhead's. The winner of this boxing match must be Dannielynn; therefore, the choice of how to dispose of the remains of Anna Nicole Smith is held by Dannielynn.

IV. AS GUARDIAN AD LITEM, MILSTEIN IS AUTHORIZED TO EXERCISE DANNIELYNN'S CHOICE, GUIDED BY HER BEST INTEREST

Dannielynn is barely five months old, and obviously incapable of making any choice with respect to the remains of Anna Nicole Smith at this time. Recognizing the need for a representative to protect Dannielynn's interests in these proceedings, the Court has appointed Milstein as Dannielynn's Guardian Ad Litem. Under Florida law, a guardian ad litem is empowered to make a multitude of choices and take a multitude of actions on behalf of his ward; in this case, those powers authorize Milstein to exercise Dannielynn's choice with respect to disposition of the remains of Anna Nicole Smith, guided by the principle—applicable to all such decisions—that such exercise must reflect the best interests of Dannielynn.

Florida's statutes and rules governing guardians provide them with wide-ranging powers in order to enable them to fulfill their primary duty: protecting their wards' best interests. "A guardian ad litem shall have the powers, privileges, and responsibilities to the extent necessary to advance the best interest of the child" Fla.Stat. § 61.403 (emphasis added). Similarly, the legislative intent underpinning the Florida Guardianship Law, Fla.Stat. § 744.101, *et seq.*, reflects this broad concern for persons lacking capacity to make their own decisions, whether suffering from incapacity through minority or for some other reason impeding a person's ability to protect her rights and dignity under the law:

Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that . . . assists such persons in . . . protecting their rights This act shall be liberally construed to accomplish this purpose.

Fla.Stat. § 744.1012 (emphasis added). Like Fla.Stat. § 61.401, the Florida Guardianship Law also provides for the appointment of guardians ad litem: "'guardian ad litem' means a person who is appointed by . . . a court in which a particular legal matter is pending to represent a ward in that proceeding." Fla.Stat. § 744.102(10). Indeed, Fla.Stat. § 744.1075(4)(a) expressly provides for appointment of a guardian ad litem on an emergency basis "to protect the physical or mental health or safety or property of the ward." Similarly, Fla.Stat. § 744.3025, "Claims of minors," provides for appointment of a guardian ad litem "if the court believes a guardian ad litem is necessary to protect the interests of the minor." Finally, Fla.R.Civ.P. 1.210(b), "Infants or Incompetent Persons," provides that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action . . . for the protection of the infant or incompetent person" (emphasis added).

These broad authorizations to Florida's courts for the appointment of guardians ad litem and the broad powers granted to such guardians for acting on their wards' behalfs strongly support the argument that, in this instance, Milstein may properly exercise Dannielynn's power

to determine the disposition of her the remains of Anna Nicole Smith, as guided by Dannielynn's best interest. Indeed, the Court should note that the Florida Supreme Court held in *Crocker* that the right of the next of kin to possession of a decedent's remains is a sufficiently substantial civil right that a claim under 42 U.S.C. § 1983—which creates a cause of action against state officials for “deprivation of any rights, privileges, or immunities secured by the [U.S.] Constitution and laws”—could arise for interference with this right. *See* 778 So. 2d at 987-89. Thus, Milstein is precisely within his authority in exercising Dannielynn's right to make the choice at issue here.

Finally, while there appears to be no Florida decision directly on point, *Leadingham v. Wallace*, 691 So. 2d 1162 (Fla. 5th DCA 1997), is instructive. In *Leadingham*, the ex-wife and ex-girlfriend of the decedent were contesting the disposition of his remains; both women had two children by the decedent. *Id.* at 1162. Although the dispute was over which woman was entitled to be appointed as curator of the estate, *see id.*, in resolving that dispute, the *Leadingham* court specifically addressed the issue before this Court:

Mrs. Leadingham next argues that the court erred in not requiring that the wishes of the next-of-kin, Mr. Leadingham's father, be followed. But his father was not Mr. Leadingham's next-of-kin. His children were. Mrs. Leadingham seems to acknowledge this but argues that since they were too young to express an opinion, the “adult” next-of-kin should make the decision. But again, the father is not the next-of-kin. If the children are too young, then a guardian could be appointed for them to act in their behalf. The problem with this, of course, is that the children again divide two by two. And no guardian was requested or even suggested below.

Id. at 1163 (emphasis added). Thus, *Leadingham* expressly recognizes that a guardian would be entitled to make the choice with respect to the disposition of a parent's remains on behalf of one too young to make it. Indeed, *Leadingham* recognizes that the choice is properly that of the “next-of-kin”—*i.e.*, here, Dannielynn—and no one else.

This Court is not hamstrung by the problem that the *Leadingham* trial court would have faced if it had appointed a guardian, because Dannielynn is the only living child of Anna Nicole

Smith.. Accordingly, where a guardian has been appointed and there is only one child—Dannielynn—whose best interest is to be considered, the Court concludes as a matter of law that Milstein, as Guardian Ad Litem, is empowered to make the choice on Dannielynn’s behalf.

V. CONCLUSION

The Court and the participants in the matter before it have taken a long journey in a very compressed period of time. Although a host of matters have been touched on and a multitude of issues have been raised, there is only one issue before this Court to decide: Who is entitled to custody of the remains of Anna Nicole Smith? There can be only one proper and equitable answer to that question: Dannielynn, Anna Nicole Smith’s only child, heir, and next of kin. Therefore, based on the Court’s review and analysis of argument, testimony, and materials presented to it, the Court ORDERS and ADJUDGES as follows:

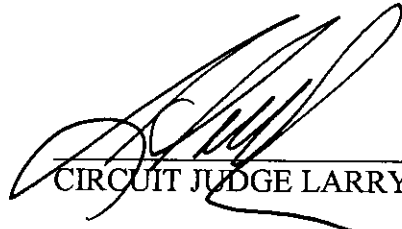
1. Dannielynn’s Motion is GRANTED.
2. Stern’s Verified Petition is DENIED.
3. Arthur’s Motion to Dismiss is DENIED as MOOT.
4. Arthur’s Cross-Petition is DENIED.
5. Richard C. Milstein, Esq., of Akerman Senterfitt, as Guardian ad Litem for

Dannielynn Hope Marshall Stern, is awarded custody of the remains of Anna Nicole Smith, and the Broward County Medical Examiner is ordered to release those remains to Milstein in accordance with Milstein’s directives.

6. Milstein is directed to consult with Arthur, Birkhead, and Stern with respect to the disposition of Anna Nicole Smith’s remains. However, the manner, means, and all aspects of handling of those remains from their release by the Broward County Medical Examiner to their final interment are within Milstein’s sole and absolute discretion, guided as always by the best interest of Dannielynn Hope Marshall Stern.

7. Any other pending motions are denied as moot.
8. This case is CLOSED.

Feb 22, 2007



CIRCUIT JUDGE LARRY SEIDLIN

Copies to:

Counsel to the parties in Case No. 07-00824

Richard C. Milstein, Esq., Guardian ad Litem for Dannielynn Hope Marshall Stern

Courtesy copies to the parties in Case No. 07-001909