



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2015-068

October 5, 2015

The Honorable Robert T. Rodgers, II  
Prosecuting Attorney  
202 North Springfield  
P.O. Box 536  
Berryville, Arkansas 72616

Dear Mr. Rodgers:

I am writing in response to your request for an opinion on the following two questions:

1. Is it lawful for a county to pay burial/cremation expenses for an individual with located relatives who are unable to pay?
2. Is it lawful for a county to pay burial/cremation expenses for an individual with located relatives who refuse to pay?

**RESPONSE**

I take both your questions as referring to the burial/cremation of an unclaimed body.<sup>1</sup> In order to answer your questions, I will need to examine their presuppositions: namely, that it is lawful for a county to order a burial/cremation and pay its expenses. For reasons explained below, I conclude (1) that, at least in certain circumstances, it is lawful for a county to order a burial/cremation and to pay its expenses; and (2) that if the located relatives have waived their right to custody of the decedent's body, then their unwillingness or inability to pay the burial/cremation expenses is irrelevant to the county's authority to pay.

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<sup>1</sup> I will use the term "unclaimed body" to refer to a dead body as to which—despite the county's diligent search for a person or organization with a legal right to the custody of the decedent's body—either (a) no person or organization with a right to the body was found or (b) such a person or organization was found but declined or waived the right to custody. *See* Ark. Code Ann. § 20-17-102 (Repl. 2014).

## DISCUSSION

I take both your questions as referring to the burial/cremation of an unclaimed body. Your questions presuppose that the county has the authority both to order a burial/cremation and to pay for it. In my opinion, both presuppositions are, in certain circumstances, correct. Because an explanation of why those presuppositions are correct helps resolve your two questions, I will first examine those presuppositions before directly addressing the questions.

No statute directly authorizes counties to order the burial/cremation of an unclaimed body. But two statutes (when read together) seem to indicate that, after conducting a detailed but unfruitful search for the decedent's nearest relatives, the county has the authority to dispose of the unclaimed body.

The rules governing the search for the nearest relatives help explain how the county gets authority to dispose of the body. Arkansas law establishes a detailed framework for a county to follow when it obtains legal control or custody of an unclaimed body.<sup>2</sup> The county must conduct a diligent, sequential search for certain relatives. By both common law and by statute, relatives can waive their rights to the custody or control of the decedent's body.<sup>3</sup> By statute, one waives the right to control by, among other things, being "unwilling to assume the liability for the costs of such [funeral and burial] arrangements."<sup>4</sup>

At the conclusion of that search, Arkansas law seems to assume—without explicitly declaring—that the county has the authority to order and pay for the burial/cremation of the unclaimed body. One statute states that if, after the diligent search, the county cannot find any relatives who will exercise their right to custody and control of the decedent's body, then "[t]he right to control the disposition of the remains...the location manner, and conditions of disposition[,] and arrangements for funeral goods and services to be provided vests in...any representative of...a political subdivision thereof that has the statutory obligation to provide for the disposition of the remains of the decedent..."<sup>5</sup> The problem

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<sup>2</sup> Ark. Code Ann. §§ 20-17-701 to -710 (Repl. 2014) (the unclaimed bodies act), and § 20-17-102 (the Arkansas Final Disposition Rights Act).

<sup>3</sup> Ark. Code Ann. § 20-17-102(e)(1); *see, infra*, note 11.

<sup>4</sup> Ark. Code Ann. § 20-17-102(e)(1)(c).

<sup>5</sup> Ark. Code Ann. § 20-17-102(d)(1)(J).

with this language is that there are no other *statutes* that *obligate* political subdivisions to dispose of the remains of unclaimed bodies.

A similar problem arises with another statute that addresses unclaimed bodies. Section 20-17-703(a) states that if, at the conclusion of the search for relatives, no relatives can be found, then the county must notify the “head of the Division of Anatomical Education” at the University of Arkansas for Medical Sciences “that the body, if unclaimed, is available for use in the advancement or study of medical science.”<sup>6</sup> If the body is deemed unsuitable for anatomical study or research, the county must ensure that the body is “disposed of in accordance with *existing laws, rules, and practices* for disposing of unclaimed bodies.”<sup>7</sup>

There are no “existing laws” that clearly and directly govern how a county is supposed to dispose of unclaimed bodies. But there are longstanding practices and rules governing a county’s authority over unclaimed bodies. When the foregoing, emphasized language was added to Arkansas’s law in 1959, a longstanding statute clearly made it the county court’s duty to make allowance for the burial of paupers.<sup>8</sup> While this statute no longer exists, the statute gave rise to a *practice* of counties having the authority to order and pay for burial/cremation of unclaimed bodies.

The foregoing shows that the county does have the authority to order and pay for the burial of some unclaimed bodies, but that authority is conditional. That is, the authority is conditioned on the outcome of the county’s diligent search for relatives. There are three possible outcomes of that search:

- **Scenario 1—no relatives found.** The search could result in no relatives being found. In that case, the county would have the authority, pursuant to the foregoing analysis, to order and pay for the burial/cremation of the unclaimed body.
- **Scenario 2—relatives found, body claimed.** The search might result in finding nearest relatives who exercise their right to custody and control of the decedent’s body. This right is an ancient common-law right known as

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<sup>6</sup> Ark. Code Ann. § 20-17-703(a).

<sup>7</sup> Ark. Code Ann. § 20-17-708(b).

<sup>8</sup> This act was repealed by Act 742 of 1977. Opinion No. 2006-011 goes into more detail on the history leading up to the 1977 repeal.

the “right of sepulcher,”<sup>9</sup> which is now codified at Ark. Code Ann. § 20-17-102.<sup>10</sup> Because this scenario moots your questions, I will not address it further.

- **Scenario 3—relatives found, body unclaimed.** Finally, the search might result in finding relatives who have a right—under the right of sepulcher—to the decedent’s body but, for whatever reason, refuse to exercise that right. As noted above, the relative’s right can be waived by inaction (after a certain amount of time) or by refusing “to assume liability for the costs” of the funeral and interment.<sup>11</sup> As explained below, this refusal “to assume liability for the costs” of a funeral and interment includes both being unable to pay and unwilling to pay.

Your questions relate to Scenario 3. They posit a situation in which the county has located a relative (*a*) who has a right under the statute to control over the disposition of the body, and (*b*) who has waived that right. Question two posits a relative who has waived by being able but “unwilling” to assume the liability for the decedent’s disposition. For, as noted above, one waives the right to disposition

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<sup>9</sup> 25A C.J.S. *Dead Bodies* § 13 (“The common-law right of sepulcher is the right of the next of kin to perform a proper burial, and it is also an action for the breach of that right.”). Though Arkansas courts have not used the term “right of sepulcher,” they clearly recognize the common-law right. *See generally Travelers Ins. Co. v. Smith*, 338 Ark. 81, 89–90, 991 S.W.2d 591, 597–98 (“A quasi-property right in dead bodies vests in the nearest relatives of the deceased, arising out of their duty to bury the dead....”); *Neff v. St. Paul Fire and Marine Ins. Co.*, 304 Ark. 18, 799 S.W.2d 795 (1990).

<sup>10</sup> The statute codifies the bundle of rights arising under the right of sepulcher, but limits the causes of action for the breach of those rights.

<sup>11</sup> Ark. Code Ann. § 20-17-102(e)(1)(B)–(C). The common-law right can also be waived. *See generally Dutton v. Brashears Funeral Home*, 235 Ark. 120, 126–27, 357 S.W.2d 265, 268–69 (1962) (“In the case of a dead body needing burial, the right of the spouse [to custody of the body and control over the time, place, and manner of burial] must be promptly asserted, *or the right to possession of the body of interment will be held to have been waived in favor of the next of kin.*”) (internal quotation omitted) (emphasis added); *see also* 22A Am. Jur. 2d *Dead Bodies* § 15 (“If the person who is primarily entitled to the right of disposal of the body of a deceased person does not exercise or relinquishes that right, it may pass to someone else”); *Teasley v. Thompson*, 204 Ark. 959, 165 S.W.2d 940 (1942) (addressing waiver by spouse); 22A Am. Jur. 2d *Dead Bodies* § 20 (“As in the case of the surviving spouse, the right of the next of kin to control the burial or select the place of interment may be waived.”).

(by statute) by, among other things, being “unwilling to assume the liability for the costs of such arrangements.”<sup>12</sup>

Question one posits relatives who have waived by failure to exercise control over the decedent’s body because they are unable (and thus willing) to pay the costs of the funeral and interment. While this is slightly less clear than question two, the failure to exercise control over the body certainly amounts to a common-law waiver.<sup>13</sup> It is my opinion that it also amounts to a statutory waiver, as the statutory language was intended to codify the common law in this respect.<sup>14</sup>

Accordingly, in my opinion, the answer to both questions is that the relatives have waived their right and that the waiver vests the county with the authority to order and pay for the body’s burial/cremation.

Sincerely,



Leslie Rutledge  
Attorney General

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<sup>12</sup> Ark. Code Ann. § 20-17-102(e)(1)(c).

<sup>13</sup> See 22A Am. Jur. 2d *Dead Bodies* § 15 (“If the person who is primarily entitled to the right of disposal of the body of a deceased person does not exercise or relinquishes that right, it may pass to someone else”).

<sup>14</sup> See, *supra*, note 10.