

31 Misc.3d 622, 922 N.Y.S.2d 914, 2011 N.Y. Slip Op. 21069
(Cite as: 31 Misc.3d 622, 922 N.Y.S.2d 914)

Supreme Court, Nassau County, New York.

In the Matter of the Appointment of GRACE D., as Guardian for the Personal Needs, and Vita P. and Tammy R. Lawlor, Esq., as Co-Guardians for the Property Management of Louis V.P., a Person in Need of a Guardian, now Deceased.

Feb. 22, 2011.

Background: Funeral home requested court order directing disposition and/or clarification as to which family member(s) had priority to decide disposition of deceased's remains.

Holding: The Supreme Court, Nassau County, [Joel K. Asarch, J.](#), held that burial, rather than cremation, was warranted.

So ordered.

West Headnotes

Dead Bodies 116 1

[116](#) Dead Bodies

[116k1](#) k. Right of possession and disposition in general. [Most Cited Cases](#)

Although the deceased's adult siblings, who wanted to cremate his remains, had statutory priority over any other surviving heirs for determining disposition of his remains, the deceased clearly indicated his intended wishes with regard to final resting place by his purchase of cemetery plot and permanent care several decades earlier.

*915 Grace D., pro se.

Vita P., pro se.

Tammy R. Lawlor, pro se.

[JOEL K. ASARCH, J.](#)

By Petition verified on August 13, 2009, VITA P. commenced a proceeding pursuant to Article 81 of the Mental Hygiene Law for the appointment of a Guardian for her brother, LOUIS V.P., an Alleged Incapacitated Person. Following a hearing conducted herein, the Court found LOUIS V.P. to be a Person in Need of a Guardian, appointed his niece and nominee, GRACE D., as the Guardian for his Personal Needs, and his sister, VITA P., and TAMMY R. LAWLOR, ESQ. as the Co-Guardians for his Property Management by Order and Judgment dated May 24, 2010.

The written Nomination by LOUIS V.P., sworn to on October 21, 2009, and considered by the Court pursuant to [Section 81.17 of the Mental Hygiene Law](#), specifically stated that "Vita P. is not to interfere with my personal needs guardian ... [and] she is not to interfere with any aspect of my daily life. If Vita P. oversteps her boundaries or causes trouble in my home life I will request her removal from any and all aspects of my guardianship." Furthermore, the Court suspended the Health Care Proxy dated January 26, 2009 nominating VITA P. as the Health Care Agent of LOUIS V.P., upon the qualification of the Guardian for the Personal Needs appointed therein.

On February 12, 2011, LOUIS V.P. passed away at 86 years of age. It appears that the surviving family members agreed upon the selection of a funeral home to assist with the funeral arrangements and paid the sum of \$3,200.00 on account of such services from the funds of LOUIS V.P.; however, GRACE D. and VITA P. apparently are at odds with regard to the final disposition of the remains ^{FNI}. Hence, the funeral home requested a court order directing the disposition and/or clarification as to which family member(s) had priority to make such decision. See [Public Health Law 4201](#)(8). On February 17, 2011, a hearing was conducted before the undersigned at which time the Court heard from the Guardian for the Personal Needs, GRACE D., and the Co-Guardians for the Property

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Management, VITA P. and TAMMY R. LAWLOR, ESQ., respectively. At the conclusion of such hearing, the Court issued a Bench decision, and the within formal Decision and Order follows:

FN1. Vita P. desires that her brother be cremated and that she transport his cremains to her home in the State of Vermont. Grace D. desires that her uncle be buried in the cemetery plot which he purchased for himself in 1975.

The law regarding “possession” of a dead body for preservation and burial expressly favors the surviving spouse, and subsequently the next-of-kin. See *Stahl v. William Necker, Inc.*, 184 App.Div. 85, 171 N.Y.S. 728 (1st Dept.1918). The closer degree of kinship that one maintains with the Decedent, the higher the possessory right. See Public Health Law Section 4201(2). However, cases dealing with rights of sepulcher (and the descending priority of surviving family members to make such decisions) recognize that the testamentary wishes of the Decedent regarding the disposition of his or her own remains are paramount. ***916** *In re Herskovits*, 183 Misc. 411, 48 N.Y.S.2d 906 (Queens Co. Sup. Ct.1944). It is only in the absence of this direction that the wishes of the family should be considered and heeded.

In this matter, LOUIS V.P. left no surviving spouse or issue. Therefore, his next of kin include his surviving siblings, VITA P. and OLINDA B. (second degree of kinship), and his niece, GRACE D. (third degree of kinship).

At the hearing, VITA P. testified that she and her sister, OLINDA B., each desire to be cremated. She further testified that she wanted to cremate her brother's remains, and transport the cremains to her bungalow in Vermont where she claims he experienced artistic and musical inspiration during various points in his life. Finally, she indicated that she wished for her ashes to be mixed with his after her passing. VITA P. claims that she previously discussed her own cremation with her brother during his lifetime, and while he did not disapprove religiously or morally, she admitted that he never indicated that he wished to have his remains cremated. Although OLINDA B. did not attend the hearing, VITA P. represented that her sister did not object to the cremation of LOUIS V.P..

GRACE D. testified that she desired that her uncle be buried as he intended in the catholic cemetery burial plot he purchased for himself some THIRTY-FIVE (35) YEARS ago (a copy of such Certificate with Privilege of Burial is attached hereto). She further testified that LOUIS V.P. was a religious man, who served as the Choir Director at a local church for several decades, and expected that he would be buried in the customary garb of a Knight of the Order of the Holy Sepulchre of which he was a member.

The Court notes that the parents of LOUIS V.P. and the predeceased brother of LOUIS V.P. (the father of GRACE D.) were each buried as opposed to being cremated.

In this instance, the Last Will and Testament of LOUIS V.P. does not indicate his desires with regard to his final resting place, but only mentions that his funeral costs be paid as an administrative expense prior to the distribution of his testamentary estate. Therefore, absent instructions to the contrary, his adult siblings, VITA P. and OLINDA B., would maintain statutory priority over any other surviving heirs for determining the disposition of his remains. However, LOUIS V.P. left a clear indication as to his intended wishes with regard to final resting place, as he purchased a plot in the Cemetery of the Holy Rood, Westbury, New York on July 8, 1975, and maintains a privilege of burial therein. Further, such purchase consisted of both the plot fee *and* permanent care, indicating his intention that such plot eventually be utilized and perpetually tended. Accordingly, as LOUIS V.P. passed away before the Guardians had the opportunity to permit him to participate in the creation of any funeral trust to be established for his benefit, the Court must rely upon the manifestation of his wishes to be buried in the funeral plot that he specifically purchased for his benefit several decades prior.

Finally, the Court notes that much of the concern voiced by VITA P. is based upon her perception of the “unreasonable” expenses involved with a viewing and wake, a funeral mass and burial, and any gathering of family and friends thereafter. She focused repeatedly upon the more economical route of cremation and the sale of the unused burial plot to possibly offset other outstanding bills. However, as it appears that LOUIS V.P. was not embalmed following his demise, the only option available at this time is a direct burial ***917** at the cemetery—thereby ensuring that the total funeral charges associated therewith shall be limited. In view of the foregoing, the Court grants the relief sought by GRACE D., and directs that LOUIS V.P. be afforded a proper and dignified burial in the manner in which he intended.

Accordingly, upon all the prior pleadings and proceedings heretofore had herein, and the Decision of the Court

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as spread on the record on February 17, 2011, and after due deliberation, it is

ORDERED, that the application of GRACE D. is hereby **granted** to the extent set forth hereinbelow; and it is further

ORDERED, that the remains of LOUIS V.P. shall be forthwith buried in the Cemetery of the Holy Rood, Westbury, New York, in the burial plot owned by him and located in Section 16, Range Y, Plot Number 97, and the additional cost of same in the sum of **\$2,350.00** shall be paid by the Co-Guardians for the Property Management (or either of them) from the funds of LOUIS V.P. by no later than February 25, 2011; and it is further

ORDERED, that GRACE D. shall arrange for the purchase of any religious burial garb and/or other ceremonial items typically utilized for the interment of a Knight of the Order of the Holy Sepulchre (or such other religious order of which LOUIS V.P. was a member), the cost of which shall be paid by the Co-Guardians for the Property Management (or either of them) from the funds of LOUIS V.P. by no later than February 25, 2011; and it is further

ORDERED, that the Co-Guardians for the Property Management shall pay the sum of \$750.00 from the funds of LOUIS V.P. for the cost of an appropriate grave marker for such plot; and it is further

ORDERED, that TAMMY R. LAWLOR, ESQ. shall submit to the Court a copy of the Certificate of Death of LOUIS V.P. within TEN (10) DAYS of the issuance thereof.

The foregoing constitutes the Decision and Order of this Court.

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