

The ashes tug-of-war: Who is entitled to possession of the ashes?

By IRDI Legal (June 2018)

As the saying goes '*where there is a Will, there's relatives*'!

It is not uncommon for the death of a loved to cause calamity between family members, not only over assets but over possession of the deceased's remains.

The legislative approach

In order to cremate a person who dies in Western Australia (**Deceased**), either the executor of the estate or the Deceased's next of kin are required to make an application to the Western Australia Cemeteries Board for a 'Permit to Cremate'. This cremation permit is in some cases arranged by the funeral directors on behalf of one of these parties.

Under section 8(3A) of the *Cremations Act 1929* (WA) (**Cremations Act**), a Permit to Cremate application can be made by:

- 1 an administrator;
- 2 a person acting with the written authority of and on behalf of an administrator; or
- 3 a person who can satisfy a medical referee that no application is being made by the administrator (and explains why not) and gives reasons why he is a suitable person to make the application.

In the event there is no Will (or executor willing to act) and no letters of administration have been granted, option 3 will apply. In this case, the *Cremation Regulations 1954* (WA) ranks in priority the '*nearest surviving relative*' entitled to apply for the cremation permit as being:

- the spouse or de facto partner living with the deceased immediately prior to the death;
- the legal spouse (in the event the Deceased was separated at death but never legally divorced);
- the son or daughter (if over 18);
- the parent; then
- siblings over 18.

Section 13 of the Cremations Act provides that:

- A person who applies for a cremation permit cannot do so knowing that the wife, partner or next-of-kin of the Deceased has objected in writing to the body being cremated **unless** the Deceased's Will clearly expresses a desire to be cremated; and

- It is the duty of the Administrator of a deceased person *'to use all reasonable endeavours to have the direction or desire contained or expressed in such will, codicil, memorandum or writing carried into effect'*.

In this case 'Administrator' means *any person having the lawful custody of the body of a deceased person* and 'administration' includes probate of a Will and letters of administration of an estate (section 2).

Under section 7 of the Cremation Act, ashes can only be removed from a crematorium by the person who obtained the Permit to Cremate.

The Courts approach

The general position at law is that human remains are not property so they cannot form part of an estate or be distributed in accordance with a person's Will. However, as a result of the labour applied during the cremation process, once remains are transformed into ashes they become property which can be owned and transferred.

If the Deceased has a Will, the executor has the absolute right (subject to limited exceptions) to decide how the body shall be disposed of.

In the case of *Milenkovic v McConnell* [2013] WASC 421, the Western Australia Supreme Court determined that the person entitled to receive the ashes is the person who obtains the permit for the cremation.

As outlined above, in most instances, the person who obtains the permit will be the person named as executor in the Will or the Deceased's next-of-kin (if there is no Will).

However, the executor's right to possession of the ashes does not mean that he 'owns' the ashes outright. Rather, he holds the ashes as trustee for the purpose of or dealing with them in an appropriate manner or distributing them under the Will. If the executor elects to give the ashes to someone else such as a family member, that person will become the proprietor of the ashes.

Steps to take

To ensure the Deceased's wishes are achieved and minimise the possibility of family disputes, relatives of the Deceased and funeral arrangers should ensure that before any steps are taken to apply for a Permit to Cremate:

- 1 If there is a Will, they consult with the executor of the Will so that any intentions of the Deceased (contained in the Will or any other document) can be taken into account. In this case, the executor should apply for the permit or else authorise a funeral arranger application. While the executor can authorise a next-of-kin application this should only occur if it is acceptable for the Deceased's ashes to then go to that person.
- 2 If there is no Will - they determine the identity of the *'nearest surviving relative'* who should apply for the cremation permit. The nearest surviving relative could also provide appropriate consent for the funeral arranger to apply for the cremation permit as an administrator (being a *person having the lawful custody of the body of a deceased person*).

How can I find out more?

IRDI Legal provides a thorough estate administration service which is tailored to your personal circumstances. Our experienced **Wills and Estates team** can assist you with all aspects of your estate planning and. Please contact us to find out more.