



# Funeral arrangement disputes

After someone passes away, it's not uncommon for disputes to break out, especially if the deceased person has not left a will.

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Making funeral arrangements for someone we love is not something we look forward to. Sadly, however, it's likely we'll all have to make them at some point, and probably when we're not in the best place emotionally and mentally. And in the upheaval that surrounds the passing of a family member or close friend, sometimes disputes arise over the arrangements for the funeral.

There are **two steps** we can all take now to make a difficult time simpler for our family and friends and reduce the possibility of disagreements forming when we pass away.

1. We can learn how the law works in relation to funeral arrangements.
2. We can make sure we leave a valid will that tells everyone what we want done when the time comes.

## Who gets to decide funeral arrangements?

Have you always thought that the spouse or children of the person who has died are automatically entitled to make decisions about the funeral and burial? While that is often how things work out, it's not always the case.

It depends on who the deceased person's legal personal representative is. If they made a will, they would have appointed someone as executor to handle the practical steps of settling their affairs and estate. If they died without a will, someone will be appointed as administrator of their estate to do the same things.

'Legal personal representatives' of a person who has died are the executors or administrators of their estates. It's the legal personal representative who is entitled to possession of the body and has the legal authority to make all funeral and burial decisions.

*"This is one reason why it is important to make sure you have a valid will: to appoint the person you would want making funeral decisions as your executor."*

## Determining the estate's administrator

Where a person dies without a will, it's referred to as 'dying intestate' or 'intestacy', and certain legal rules will apply. These rules of intestacy will determine how the person's estate is to be distributed.

Whoever is entitled to the greatest share of the estate may apply to be appointed as its administrator. (This appointment is known as 'Letters of Administration'.) The administrator of the estate performs the same role as an executor appointed under a will: they arrange for the disposal of the body, payment of estate debts and distribution of estate assets.

According to the rules of intestacy, if a person dies leaving behind a surviving spouse (which includes a husband, wife, de facto partner or civil partner) and children, the spouse is entitled to the entire estate. If the person dies without a spouse but with children, the children are entitled to the estate in equal shares.

The situation becomes more complex where a person dies with a spouse and with children from a previous relationship. The rules of intestacy are different in the States and Territories, but predominantly, the spouse is entitled to a 'statutory legacy' (in NSW this is approximately \$490,000 as at July 2021) and a share of the remainder of the estate. The other share of the remainder of the estate is divided equally between the deceased person's children.

Normally, this will mean that the spouse is entitled to the greater share of the estate, and that makes them the person most eligible to be appointed as the administrator of the estate.

If the estate is not greater than the statutory legacy, there will be nothing left to the deceased person's children.



## Disputes, and how to settle them

After someone passes away, it's not uncommon for disputes to break out in relation to what is done with the body, the funeral arrangements and the guest list, especially if the deceased person has not left a will.

In the case of intestacy, the administrator of the estate would normally settle these details. However, it's possible that someone other than the most eligible person may want to be appointed as the administrator of the estate. The appointment would then have to be decided in court.

To determine who is the best person to make the funeral and burial arrangements, the court will look at factors such as:

- the person eligible to be appointed as administrator under intestacy;
- the nature of the relationship between the parties and the deceased;
- any views expressed by the deceased whether verbally or in writing, although written wishes will be easier to prove;
- the views of the deceased's children;
- the deceased's religious, cultural and spiritual beliefs that relate to burial.

After considering these factors, the court may grant custody of the body and the authorisation to arrange the funeral and burial of the deceased to someone other than the eligible person.

*"Having a legally valid will can help to avoid estate disputes and legal proceedings after you have passed away."*

### Disputes over the body

If there is a disagreement over disposing of the body, either one of the parties to the dispute can apply to the court for a resolution. The court will consider these principles:

- If the deceased person appointed an executor in their will, it's the executor who has the right to make the arrangements for the body's disposal.
- The executor is expected to consider any wishes expressed by the person who died and to consult with family members, but there is nothing in the law to say they must do so.
- If the deceased did not have a will, the person eligible to be appointed as administrator can arrange for the disposal of the body.
- Where more than one person is eligible to be appointed administrator and they can't agree on what to do with the body, the court will favour the decision that results in burial without unreasonable delay.

These are not legal rules, but they are factors for the court to consider when adjudicating a dispute.

## Cremation v burial

Generally, there is no property ownership in human remains, which means that a spouse, next-of-kin or executor does not 'own' the deceased person's body. Rather, it's actually the executor appointed in the will who has the legal right to arrange what happens to the body. In fact, if someone else has taken possession or control of the body, the executor can even start court proceedings to recover it.

The executor can determine what is to happen with the deceased person's body – whether there will be a burial, cremation or another procedure – subject to regulations and laws relating to the disposal of bodies.

However, if the person who died left written instructions that their body is or is not to be cremated, it may be an offence for the executor not to follow those instructions.

### **For example, in New South Wales the Public Health Regulation 2012, regulation 77 states that:**

- A person must not cremate the body of a dead person if the person is aware that the proposed cremation would be contrary to a written direction left by the dead person.
- A person must not cremate the body of a dead person otherwise than in accordance with any written direction left by the dead person about the particular method of cremation that was or was not to be used.

If the body is cremated, the executor has a right to legal custody of the ashes. They decide where they are stored and whether they are scattered in a particular location or divided between family members.

If there is any dispute over this, the ashes can be stored at the crematorium until the question is resolved. (However, note that the crematorium may charge storage fees, and they might dispose of the ashes if they aren't collected within a certain time.)

If the body is buried, there does not have to be a headstone or memorial plaque on the grave. The executor decides whether there is and, if so, what is written on it, subject to any special requirements of the cemetery.



## Can you be barred from the funeral?

The executor or administrator of the estate is allowed to choose the location and date of the funeral. They can also decide who is invited and permitted to attend the funeral and who is not. There are a few points to note about this situation.

- It can be difficult for the executor or administrator to restrict access to the funeral if it's held in a public place.
- Even if the deceased has left written instructions in their will or another document about who they wish to attend their funeral, the executor does not have to follow those wishes.
- Although disputes can arise if a family member or friend is not notified of the death or invited to the funeral, there is no legal obligation for the executor to notify certain people and invite them to the funeral.
- If you have been excluded from the funeral, you could contact the executor and try to arrange to visit the grave at another time or date. You could also try suggesting mediation to settle the dispute.
- If the deceased person is buried in a public cemetery, the executor can't stop their family or friends from visiting the gravesite or placing flowers on the grave, as long as the visitor isn't breaking any rules of the cemetery.

## Paying for the funeral

The executor or administrator who arranges the funeral is also responsible for paying for it. If possible, they can arrange for payment to be made from the estate. This is usually done by giving the funeral invoices to the deceased person's bank or by applying to their superannuation fund for the payment to be made.

If someone other than the executor makes the funeral arrangements, they can ask the executor for reimbursement of 'reasonable funeral expenses'. What constitutes 'reasonable' expenses is based on having regard to the circumstances of the deceased. For example, if the deceased had a frugal, modest lifestyle or if the value of the estate is modest, the funeral expenses should also be modest and not extravagant. If the deceased did not express a wish to have his or her ashes scattered in a foreign country, it would most likely be unreasonable to request that the estate cover the costs for the executor to travel to that country. The deceased's persons culture and religion will also play a part: if the deceased did not have strong cultural ties or religious beliefs, it would be hard to justify expenses related to funeral proceedings associated with that culture or religion.

If the executor pays for the funeral from their own funds, they can be reimbursed from the estate if there is enough money there. Again, the reimbursement can only cover 'reasonable funeral expenses'.



# Leave your funeral instructions with your will

Most of us agree that making a will is one of the best ways we can look after the people we love when we're gone. We know that it will simplify the settling of our estate and save family and friends from additional stress and heartache. For their wellbeing, it's equally important that your record any preferences and views that you have in relation to your funeral arrangements and the method of disposal of your body and store this information with your will. What you assume will happen may not be the case – and it may not be what you want to happen.

You can include your funeral instructions in your will, however this is not recommended. Frequently the funeral is arranged and completed before the will is even read. Including your funeral instructions in your will can actually lead to disputes where the executors has arranged the funeral only to refer to the will at a later date and find different funeral instructions.

The main thing is for the appointed executor in your will to know your funeral wishes. You can record your funeral instructions in a separate document that you store with your Will. You may also provide a copy to your guardian appointed under Appointment of Enduring Guardian.

