



Burial or Cremation – who decides?

The death of a loved one is a time of grief, and an additional source of pain can emanate from conflict around how to celebrate their life and what to do with their remains. This has become more so as society is now much more diverse. Many people reject religion. Blended and cross-cultural families are common place. A diversity of opinion now exists about how a person should be honored through their funeral and burial arrangements.

In Australia, the common law position is settled – a person’s wishes in regards to the disposal of their body is not legally binding. This rule derives from 19th Century England when the law assumed people wished to have a Christian burial, and when cremation was regarded as distasteful.

There are only two ways in NSW that a body can be legally disposed of – burial or cremation. But who chooses whether you are cremated or buried? And who determines where your remains are placed?

If the deceased person has appointed an executor in their Will, it is their executor who has the right to the possession of, and custody of, the deceased’s body until it is buried or cremated, and who can determine where the remains are placed.

Where the deceased has not left a Will, the decision right regarding the funeral and the burial goes to the person most likely to be awarded the right to administer the deceased’s estate. In NSW, who this person is, is governed by the Probate and Administration Act and the Succession Act. The priority order of those persons is:

- The spouse of the deceased;
- One of the next of kin, being usually in order of priority the deceased’s adult children, parents, brothers and sisters, grandparents, uncles and aunts;
- If there is no next of kin, then another person appointed by the Supreme Court.

Where there is a dispute between 2 people having an equal claim to administer the estate, such as 2 parents of the deceased, the Court must consider the practicalities of the burial without unreasonable delay. This allows the court to consider other material factors including cultural factors and the wishes of the deceased.

The person with the right to dispose of the body, and the accompanying right to possess the body for the purpose of disposal, has the sole discretion as to how the body may be disposed of, provided they do not exercise their discretion unlawfully, or wholly unreasonably, or in a way that prevent family friends from reasonably and appropriately expressing affection for the deceased. They are expected to consult with other stakeholders, but are not legally bound to do so. For example, if you have expressly stated in your Will that you want to be cremated, it is unlawful for the executor to ignore your wishes and the executor can be subject to a criminal penalty.



The right to dispose of the body includes the right to possess the ashes, and to direct how the ashes are disposed of. The right to possess the ashes is a proprietary one, subject only to the qualification that the ashes should be treated with appropriate respect and reverence. Ashes can be:

- buried in cemetery in a plot or in a niche wall;
- preserved in a decorative urn and kept at home or some other favourite spot;
- scattered on private land, beach, river, public parks and at sea.

It is important to get permission from the owners of private land, the Trust of Parks and Reserves or from local council for parks, beaches and playing fields as scattering of ashes without that permission may contravene the provisions of the Protection of the Environment Operations Act 1997 in terms of air or water pollution.

Despite this Common Law rule, if you feel strongly that your body be disposed of in a particular way, you should still state this in your Will and choose an executor who is likely to comply with your wishes. You should also discuss this with them and your family at the time you make your Will so that they are aware of your specific wishes. If a dispute arises as to how a deceased's body is to be disposed of, the Courts have jurisdiction to determine the method of disposal and any directions made by you in your Will, although not binding, may nonetheless be influential in respect to the Court's decision.

If you need assistance in preparing a Will, have been appointed as an Executor and require assistance with an Estate, or have any query regarding an Estate, please contact [Lisa Delalis](mailto:lisa.delalis@batemanbattersby.com.au) of our office on 02 4731 5899 or email willsestates@batemanbattersby.com.au.