Funeral Arrangements and Feuding Families: Who Has the Legal Right to Decide?


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Families fighting over a loved one’s funeral arrangements is an increasingly common occurrence. We all know (from personal and professional experience) that death can bring out the worst in families, especially those who were already on difficult terms with each other. The funeral can often be the first contentious issue here—long before the thorny subject of inheritance. Aside from ‘the usual’ family squabbles (the 2013 film August: Osage County is a perfect example), more diverse relationships and family structures are also playing a role. One individual can leave behind a complex mix of personal and family ties when they die: for example, a spouse/civil partner; former spouse/civil partner; short or long-term cohabiting partner; children from different relationships; step-children; and parents and siblings to list but a few—each vying for priority.

In these situations, the scene is set for conflict over a range of things: whether the deceased should be buried or cremated; the type of funeral service and where to hold it; if opting for burial, which cemetery and in which grave (eg. existing family grave, or ‘new’ burial plot); following cremation, what happens to the ashes (should they be interred (if so where), scattered somewhere, kept at the home of a family member or divided between different relatives)? Further down the line, the wording on the deceased’s headstone or grave marker can be another source of family conflict—-I could spend this entire paper discussing commemoration disputes on their own, but that is something for another day.

For now, I would like to focus on funeral arrangements, and who has the legal right to decide these when families disagree. My reasons for choosing this go beyond my own fascination with the subject (having researched and written in this area for some time now, I’m always struck by the types of dispute that arise and the family dynamics that are laid bare here); I am acutely aware that many of you here today, working in the funeral industry, may be confronted directly with these conflicts on a regular basis. What advice do you give when grieving relatives ask who has the final say on what happens to their dead spouse, partner, child, parent, sibling etc?

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1 For example, in Re Campbell (Judicial Review) [2013] NIQB 32, proceedings were brought against Derry City Council by the deceased’s wife, following its decision to grant the right of burial over her husband’s grave to the deceased’s father and allow him (the father) to erect a headstone which did not mention the wife or the deceased’s role as a ‘loving husband’. The wife’s application was dismissed on the facts of the case.
Of course, the best approach is to encourage families to reach some sort of compromise, and resolve their disagreements as amicably and as quickly as possible. Yet, as we all know, consensus is not always possible at such an emotionally charged time- and disputes over funeral arrangements have ended up in the courts on more occasions than we might think. What I want to do here is to set out the legal position, the rules which judges apply when these cases come before them. For those of you faced with family funeral disputes, knowing what the outcome is likely to be allows clear advice to be given to warring relatives- and may even stop some of these conflicts from spiralling out of control, or descending into litigation.

Most of the discussion here will focus on England and Wales (though essentially the same rules apply in Northern Ireland). The position is slightly different in Scotland, and I will mention this at various points as I go through the paper. The first sections will look at disputes over funeral arrangements, in the immediate aftermath of someone’s death; the legal status of ashes follows a little later. At the start, it is worth stressing one thing: when these disputes end up before the courts, judges are simply ruling on who has the best legal claim to the corpse or ashes. These rules are relatively straightforward, although there is the odd ‘quirk’.

I. Funeral Directions Are Not Legally Binding

The first thing to point out- and something which often surprises people- is that an individual’s funeral instructions are not legally binding in the UK (though the position has now altered slightly in Scotland). The reasons are historical, and not all that satisfactory: for centuries, English law has decreed that dead bodies are not property; ² according to the old case of Williams v Williams³ (which is still followed today), one consequence of this rule is that funeral directions are not legally binding (since a dead body is not property, a person cannot bequeath it). So, explicit directions in a will or elsewhere (eg. a pre-paid funeral plan, personal correspondence) about whether someone wants to be buried or cremated, the type of funeral ceremony they would prefer etc. can be completely disregarded. This is something that myself and other have criticised, ⁴ and it is worth pointing out that other jurisdictions (eg. most US states, the Canadian province of British Columbia) have laws upholding funeral directions.⁵

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³ (1882) 20 Ch D 659.
⁵ Conway (n 4), ch 5. Law reform projects are currently underway elsewhere (for example, in the Australian state of Victoria), to make the deceased’s wishes the key determinant if families disagree.
However, feuding families should still consider what the deceased wanted. Firstly, funeral instructions give a clear reference point; surviving relatives may feel some sort of moral compulsion to put their differences aside and carry these out. Secondly, there are signs that English courts are being increasingly swayed by the deceased’s own wishes when resolving family funeral disputes. The case of *Burrows v HM Coroner for Preston* is a good example. Here, the remains of a 15-year-old boy who had committed suicide while detained in a young offender institution were released to the boy’s uncle (who he had lived with) instead of the boy’s estranged mother (a recovering heroin addict who had little contact with her son for years). She was intent on burying her son, despite knowing that he did not want this. The boy had made it clear on several occasions that he wanted to be cremated (he had mentioned, amongst other things, a fear of worms), and the uncle intended to fulfil his nephew’s wishes.

II. Legal Framework

No-one can claim ownership of the deceased’s body, as such. However, certain designated individuals have a legal duty to bury the dead; this carries a right to possession of the deceased’s remains and to make all the funeral decisions. The rules are based on old laws around the administration of estates; they set out a clear order of entitlement, and have been applied in numerous cases where courts have had to settle funeral disputes between warring relatives. Looking initially at England and Wales (and Northern Ireland), the legal position is as follows:

1. Where the Deceased Made a Will, the Decision Lies with the Executor

Where the deceased made a will, the final decision lies with the executor, who is entitled to possession of the body even before the formal grant of probate. In practice, the executor will usually leave the family to make the funeral arrangements (especially where the executor is not a family member, eg. the deceased’s friend or solicitor). However, if a dispute occurs over the arrangements, the law favours the deceased’s executor- even if this means overruling the wishes of immediate family. For example, in *Grandison v Nembhard* the executor was allowed to repatriate the deceased’s remains to his native Jamaica (in accordance with the deceased’s wishes), despite objections

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6 This seems to be driven, in part, by arguments under Articles 8 and 9 of the European Convention on Human Rights (right to private and family life, and right to freedom of religion respectively).
7 [2008] 2 FLR 1225.
8 See *Williams v Williams* (1882) 20 Ch D 659 and *Grandison v Nembhard* [1989] 4 BMLR 140.
9 *Buchanan v Milton* [1999] 2 FLR 844.
10 [1989] 4 BMLR 140.
from the deceased’s only daughter who wanted to bury her father in England where he had lived since 1960.

However, bear in mind the following two possibilities:

**I) Potentially Invalid Wills**

The executor rule may be disregarded if there are serious doubts over the validity of the will— for example, if the legal formalities for making a will were not complied with (eg. it was not signed or witnessed properly), or was made under duress.\(^{11}\) Here, the court can authorise someone else to make the funeral arrangements, though this assumes that the non-compliance issues come to light quickly and are raised in the immediate post-mortem period.

**II) Executor Declines to Act**

An executor can decline to act (for example, if an ‘independent’ executor is aware of family discord over the funeral arrangements and does not want to be involved), in which case the court must look to the next-of-kin framework which I will move onto now.

2. Intestate Deaths: Decision Lies with the Highest Ranking Next-of-Kin

If the deceased died intestate (which probably accounts for the vast majority of deaths in the UK, since statistics suggest that large numbers of people die without having made a will), the final decision falls on the highest ranked next-of-kin under intestacy laws.\(^{12}\)

There is a descending order of entitlement here, which runs as follows:

- Surviving spouse or civil partner\(^{13}\)- regardless of whether they have informally separated, or are living apart (though the legal position is different if the couple have divorced or formally separated: the survivor has no entitlement here)
- Children- including adopted\(^{14}\) and non-marital children\(^{15}\) as well as children born by assisted reproduction in a variety of scenarios (including posthumous reproduction)\(^{16}\)
- Parent(s)

\(^{11}\) University Hospital Lewisham Trust v Hamuth [2006] EWHC 1609 (Ch).
\(^{12}\) See Dobson v North Tyneside Area Health Authority [1996] 4 All ER 474. In England and Wales, see s 46 of the Administration of Estates Act 1925 for the current ranking.
\(^{13}\) Same-sex civil partners in the UK have the same legal rights as spouses under the Civil Partnership Act 2004.
\(^{14}\) Adoption Act 1976, s 39.
\(^{15}\) Children Act 1975.
\(^{16}\) Human Fertilisation and Embryology Act 2008, Part II.
- Sibling(s)
- Other specified relations in descending order of consanguinity (i.e. blood ties)

The highest ranking individual has the final say, though the following points are worth noting:

(i) The Emphasis is on Legally Designated Next-of-Kin

The designated individual must fall within the legal definition of next-of-kin on intestacy. For example, in *R (on the application of Haqq) v HM Coroner for Inner West London*\(^\text{17}\) the deceased was domiciled in England and already married when he entered into a ‘second’ marriage in Bangladesh; the fact that the second marriage was void under English law meant that the ‘first’ wife was entitled to her husband’s remains as the highest ranked next-of-kin.

Much more problematic is the fact that current intestacy rules in England and Wales (and Northern Ireland) do not recognise certain individuals as next-of-kin. The biggest gap is unmarried cohabitants, who may find that they have no legal rights to arrange their partner’s funeral if challenged by the deceased’s children, parents or siblings etc. A good example is *Holtham v Arnold*\(^\text{18}\) where the deceased’s estranged wife insisted on cremating his body despite the fact that he had left her and his six children years earlier, and was living with someone else. His long-term partner wanted to bury the deceased in accordance with what she claimed were his wishes. However, the court ruled for the wife as her husband’s next-of-kin.

This result would only be avoided if cohabiting partners (especially those in long-term, committed relationships) appointed each other as executor under their respective wills.

Step-children who were not adopted by the deceased are also excluded from the definition of next-of-kin here, and would have no say in the funeral arrangements for a step-parent.

(ii) Deaths of Infants/Minors

The duty to bury a dead child falls jointly on the parents.\(^\text{19}\) Disagreements seem to be common here, especially where the parents have divorced or separated (the child’s

\(^{17}\) [2003] EWHC 3366 (Admin).
\(^{18}\) [1986] 2 BMLR 123.
\(^{19}\) *Scotching v Birch* [2008] EWHC 844 (Ch).
death triggers one final and decisive custody dispute). What happens in those circumstances will follow shortly; but what about disputes between different sets of parents?

**Natural Parents vs. Adoptive Parents**

The rights of adoptive parents prevail over those of natural or biological parents- hardly surprising given the permanency of the adoption process and its legal consequences.\(^{20}\)

**Natural Parents vs. Foster Parents**

Natural parents will usually outrank foster parents, given that fostering tends to be a temporary care arrangement. In *R v Gwynedd County Council, ex p B*\(^{21}\) the court ruled in favour of the natural mother who wanted to bury her daughter beside the child’s father in the family burial plot, despite objections from the girl’s foster parents who had cared for her since she was a few weeks old and wanted to bury the child where she had lived for most of her life and had many friends.

However, foster parents might be preferred in certain circumstances- and a case decided just over a decade ago in Northern Ireland is a good illustration. *Re LL (Application for Judicial Review)*\(^{22}\) involved a dispute over a terminally ill 11-year-old boy, the child’s mother wishing to bury him in the same grave as her own grandfather, and the foster parents wanting to bury him in a different cemetery close to where the boy had lived with them and their three daughters since being placed in care seven years earlier. The court ruled in favour of the foster parents; the child had been freed for adoption without parental agreement two years earlier, and the mother (whose only connection with her son since he was taken into care had been a single visit and some goodwill cards) had not challenged the ‘freeing order’.(Another interesting feature is the fact that the child was still alive in this case, though terminally ill and expected to die within a very short time).

**(iii) Separating Equal Claims?**

Who gets the final say on the deceased’s funeral where two or more individuals have equal rights to decide- for example, siblings fighting over the funeral arrangements for a

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\(^{20}\) See *Buchanan v Milton* [1999] 2 FLR 844.

\(^{21}\) [1992] 3 All ER 317.

\(^{22}\) [2005] NIQB 83.
dead parent or another sibling;23 separated parents fighting over the fate of a dead child (usually an infant or minor child, but sometimes an adult child who dies without closer kin)? There have been a number of examples of this in the media in recent times- and for all the news attention that the cryonics case attracted last November, it was a basically a dispute between the separated parents of a 14-year-old girl over whether she should be cryogenically frozen (the mother was willing to go along with this, while the father objected).24

These are some of the trickiest cases for courts to deal with. Here, intestacy rules do not provide a solution because the parties have equal rights. Looking at the cases in which this issue has arisen, courts have been swayed by a number of factors in favouring one parent or sibling over another:

- The practicalities around burial/cremation without unreasonable delay can be considered. Courts might look at which party has already made provisional funeral arrangements, how far advanced they are, and whether the body will have to be moved any great distance.25

- The deceased’s ties to a particular place (both negative and positive) are also important. Is one person intending to bury the deceased close to where they or their family lived (and had emotional ties); if the deceased died suddenly and/or tragically, would it be acceptable to bury the deceased/scatter the ashes close to where they died?

A good illustration is *Fessi v Whitmore*26 where separated parents disagreed over the fate of their 12-year-old son’s ashes. The court awarded custody of the ashes to his mother for scattering in Nuneaton where the entire family had always lived; the father’s proposal to inter the ashes in Wales where he and his son had moved a few weeks before the child’s accidental death would cause ‘enormous distress’ because it was so near to the scene of the tragedy and so far away from where the boy had spent most of his life.27

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23 Assuming, in the latter scenario, that the dead sibling does not have legally closer kin (eg. spouse/civil partner, or children).
24 Re JS [2016] EWHC 2859 (Ch).
25 This has been a major factor in Australian cases dealing with the same subject, though the geographical distances for moving remains will be much greater here- see *Burrows v Cramley* [2002] WASC 47.
26 [1999] 1 FLR 767.
27 See also *Scotching v Birch* [2008] EWHC 844 (Ch) and *Hartshorne v Gardner* [2008] EWHC B3 (Ch).
• Courts may be inclined to rule for a custodial parent in disputes involving infant or minor children but this practice is by no means universal,\textsuperscript{28} and diminished levels of contact between parent and child are not always determinative. In \textit{Scotching v Birch}\textsuperscript{29} (where a mother had attempted suicide after killing her young son, in the midst of a bitter custody battle with the child’s father) the father’s wishes prevailed despite having had no contact with his son for several years, and the mother and her other children wanting to bury the boy elsewhere. The mother effectively forfeited her rights by killing her son.

• How far each parent/sibling lives from the chosen gravesite and ease of access for future visiting may be relevant, but is probably not decisive.\textsuperscript{30}

• The court will occasionally decide on the basis of which person had a closer relationship with the deceased. This takes us into difficult territory; as one English judge put it, choosing between two grieving parents on such a basis “requires the wisdom of Solomon, which I do not profess to have”.\textsuperscript{31} However, the court in the recent cryonics case ruled for the mother- and a major factor was that the mother was much closer to her daughter than the father was (father and daughter had had no face-to-face contact since 2008).

\section*{III. The Position in Scotland}

The law in Scotland has changed recently, following the passing of the Burial and Cremation (Scotland) Act 2016. This has shifted the rules (slightly) on who has the legal right to decide the funeral arrangements; these are now set out clearly in the legislation.

Where an adult dies and does not leave what is known as an “arrangements on death declaration” (effectively nominating a person to carry out the funeral arrangements, which courts can uphold, thus some credence to individual funeral directions), the deceased’s “nearest relative” can arrange for burial or cremation.\textsuperscript{32} Again, there is a legal hierarchy (though note that the executor no longer has any say):

• Spouse or civil partner (unless they were formally separated, or that person had deserted the deceased)

\begin{itemize}
\item \textsuperscript{28} In \textit{Fessi v Whitmore} [1999] 1 FLR 767 the father lost despite being the custodial parent.
\item \textsuperscript{29} [2008] EWHC 844 (Ch).
\item \textsuperscript{30} See \textit{Hartshorne v Gardner} [2008] EWHC B3 (Ch).
\item \textsuperscript{31} \textit{Hartshorne v Gardner} [2008] EWHC B3 (Ch) at [2]-[3].
\item \textsuperscript{32} 2016 Act, s 65.
\end{itemize}
• Cohabitng partner (where they couple were living together for at least six months before death- or before the deceased was admitted to hospital if he/she died there)

• Children (with step-children ranked equally here), then parents, then siblings, then grandparents- working down through other family categories; and (if no-one else qualifies), a long-standing friend of the deceased can step in.

The person who has the legal right to decide must be aged 16 or over.

For child deaths, the nearest relative is defined as the parent(s) or person(s) having parental rights/responsibilities in relation to the child, followed by the child’s siblings (if over 16), grandparents, and other listed relatives.\(^\text{33}\)

This has brought much-needed clarity to the law in Scotland, and updated it to reflect modern family structures.

### IV. Who is Legally Entitled to the Deceased’s Ashes?

Cremated ashes can be dealt with in all sorts of ways. Burial is an obvious option, as is scattering- though not just on the earth’s physical surface (space burial, offered by a number of American companies, blasts cremated remains into outer space, and was a fitting choice for the ashes of James Doohan who played Scotty in the original Star Trek series). Ashes can be kept at home, or they can be converted into all sorts of novel objects to memorialise the deceased. Who ‘owns’ the bespoke jewellery or glass vase raises all sorts of issues which go beyond the scope of this paper. What I want to focus on, instead, is who is legally entitled to the ashes immediately after cremation. Despite having agreed to cremate a loved one, claiming the ashes generates all sorts of family disputes. Here we need to distinguish between who is authorised to collect the remains from the crematorium, and who has the legal right to the ashes once this has occurred.

In England and Wales, regulation 15 of the Cremation (England and Wales) Regulations 2008, allows an application for cremation to be made by the deceased’s executor or a “near relative” aged 16 or over unless a satisfactory explanation is given for it being made by some other person. A “near relative” is defined as the surviving spouse or civil partner of the deceased, a parent or child of the deceased, “or any other relative usually residing with the deceased person”. The same regulations state that the crematorium must return the ashes to the person who applied for cremation or to someone that the

\(^{33}\) 1996 Act, s 66.
same person nominated to collect the ashes\textsuperscript{34} (which can be the funeral director). Part 3 of the Cremation and Burial (Scotland) Act 2016 deals with who can apply for cremation, and also sets out rules about making the ashes available to the applicant or a nominated funeral director.

So that deals with the crematorium releasing the ashes- but only that. It seems that the person with the strongest (and ultimate) legal claim to the deceased’s ashes is the person with the legal right to make the funeral arrangements: namely, the deceased’s executor (where the deceased left a valid will) or the deceased’s next-of-kin on intestacy. This individual has the legal right to possession of the deceased’s remains, and this also extends to ashes. So the executor or highest ranked relative can insist on having the ashes returned to them, \textit{despite not having applied for cremation}, and can decide whether to bury, scatter or otherwise dispose of the ashes- or to convert them into some sort of lasting memorial.

There are no direct English cases on this point; but there are a number of Australian cases (the law is substantively the same) which confirm that this legal right exists after the ashes have been released by the crematorium. For example, in \textit{Robinson v Pinegrove Memorial Park}\textsuperscript{35} a son had arranged for his father’s remains to be cremated (the widow and the other children all supported this), but subsequently contracted with the crematorium to place half the ashes in a commemorative rose garden; the other half was to be given to the widow for scattering in a park in Birmingham close to where the family had lived before moving to Australia. However, the widow wanted to scatter all of the ashes in England, according to her dead husband’s wishes. The deceased’s executor intervened on the widow’s behalf, claiming that the ashes should be released to him (at which point the executor would pass them to the widow). The court agreed; the son’s contractual arrangement with the crematorium was subject to the executor’s right to decide how the deceased’s ashes should be disposed of.\textsuperscript{36}

A few final points are worth noting here. First, where families are fighting over who gets the ashes, the courts will not (as a compromise solution) order ashes to be divided if one of the parties objects to this. This point was raised in the \textit{Fessi} case that was mentioned earlier, where the father was fundamentally opposed to his son’s ashes being split between himself and his wife. Secondly, there are rules around the disposal of ashes by crematoria, where ashes have not been collected and families have been notified about

\textsuperscript{34} 2008 Regulations, reg 30.
\textsuperscript{36} See also \textit{Doherty v Doherty} [2006] QSC 257 \textit{Milenkovic v McConnell} [2013] WASC 421.
this but failed to respond. Of course, this raises slightly different issues which are not being addressed here. Finally, an issue which has been mentioned to me several times is that of funeral directors holding onto ashes until funeral costs have been paid: there is anecdotal evidence of this practice occurring. This is something that should be treated with caution, since there is probably no legal right to retain ashes in this manner (unless there is some sort of term in the provision of service contract that expressly states that ashes won’t be released until funeral expenses paid- and even then I would be a little hesitant). If a corpse is not property, then it is difficult to see how post-cremation ashes can be classed as property in any legal sense. Also, old English cases decided centuries ago took the view that, if a corpse is not property, the deceased’s creditors cannot hold it as security until the deceased’s family pay off his debts; one suspects that the same rationale would apply to ashes. Of course, if a family cannot afford to pay outstanding funeral costs, they may be reluctant to approach a solicitor to represent them- though funeral directors who engage in this practice should be mindful of the negative publicity that these actions might generate. One practical way of avoiding this scenario would be for families to collect the ashes from the crematorium themselves.

**Conclusion**

Any family death is an emotionally charged event, and has the potential to resurrect old grievances and trigger new ones. Disputes over the funeral are just another example of this. Unfortunately, there is no way to prevent these disputes from happening; the best course of action is to encourage some sort of consensus or compromise, and to give some gentle advice on what the legal outcome is likely to be- in the hope that the dispute never goes this far. Hopefully, this paper will help with that task.

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37 2008 Regulations, reg 30; 2006 Act, s 53.
38 *R v Fox* [1841] 2 QB 246.