



THE VICTORIAN BAR INCORPORATED AND  
COMMERCIAL BAR ASSOCIATION

# **SUBMISSION ON FUNERAL AND BURIAL INSTRUCTIONS**

4 FEBRUARY 2016

## INTRODUCTION

The Victorian Bar Incorporated is the professional association of barristers who practise in Victoria. The Commercial Bar Association of Victoria (CommBar) is the representative body for Commercial Barristers at the Victorian Bar.

The Property and Probate Section<sup>1</sup> of the Commercial Bar Association ("PPS") has considered the Victorian Law Reform Commission ("VLRC") consultation paper which sets out the law in Victoria in relation to funeral and burial instructions and also reviews recent legal developments in domestic and international common law jurisdictions.

By virtue of practising in the area of the law of deceased estates and coronial law, the section heads of the PPS have had substantial experience of funeral and burial disputes in many presentations of them.

The PPS appreciates the opportunity to provide its views in relation to the questions raised throughout the paper which are for convenience set out below.

## RESPONSES TO QUESTIONS

### IF YOU HAVE BEEN INVOLVED IN A FUNERAL AND BURIAL DISPUTE, CAN YOU TELL US ABOUT YOUR EXPERIENCE?

In the main disputes arise in relation to:

- selection of the place at which a body is to be buried or ashes are to be placed;<sup>2</sup>
- the question of who is permitted to attend a funeral or memorial service;<sup>3</sup>
- the cost of the funeral or memorial service;<sup>4</sup>
- the cost of a monument, tombstone, headstone, ledger, cenotaph, plaque or other method of [memorialising](#) a deceased person;
- the names of the persons to be included by use of a method of [memorialising](#) a deceased person;<sup>5</sup>
- whether or not a person is the Senior Next of Kin (SNOK) for coronial purposes and the exercise of the powers and duties accorded to the SNOK most often in relation to decision making about autopsy or release of the body in the case of intestacy;<sup>6</sup>

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<sup>1</sup> R.D. Shepherd of Counsel, Chair, R.A. Edmunds of Counsel, Secretary and J.D. Catlin of Counsel, Monitor.

<sup>2</sup> The experience of Members of the PPS is that these matters are usually resolved within the family and do not result in litigation.

<sup>3</sup> The experience of Members of the PPS is that this issue is self-limiting as a result of the fact of the funeral taking place.

<sup>4</sup> The experience of Members of the PPS is that this issue is often not resolved early and one or more members of the family will pay for the funeral and then seek reimbursement from the personal representative for payment of a funeral expense, at which time the disputes will be again activated.

<sup>5</sup> The experience of Members of the PPS is that the disputes in 1(a)(iv)-(v) are usually resolved within the family and do not result in litigation, but where there is litigation involving the estate in other matters, they are resolved at mediation or no longer pursued.

<sup>6</sup> *Threlfall v Threlfall & Anor* [2009] VSC 283 (8 July 2009); *Carter v Coroners Court of Victoria & Anor* [2012] VSC 561 (9 November 2012)



- in the case of cremation, who is entitled to possession of the deceased's ashes for the time being or for the purposes of giving effect to the deceased's wishes;<sup>7</sup>
- the ownership of and rights to interment in a family grave, vault, mausoleum, niche wall or any other structure or plot used for the [interment](#) of [human remains](#). These often arise in the context of former spouses and those in a family whom have fallen out with others.<sup>8</sup>

The persons involved in a funeral and burial dispute often express a sense of entitlement to carry out the wishes of a deceased person, based on their assessment of their relationship with the deceased and alleged statements made to them by the deceased. The relationship and the statements made are often in dispute and an executor or administrator whom cannot resolve the dispute between the parties, must make a decision or apply to the Court for directions;<sup>9</sup>

There is an inherent propensity for funeral and burial disputes to arise because of the deceased's domicile at the time of death. Examples are deaths in prisons. Competing interests may be managed by allocation of resources for the funeral and memorial service held within the prison as well as outside the prison.

A testator may express a wish in their will that the life of deceased be celebrated by pilgrimage to be taken by friends of the deceased, the cost of which is estimated by executor in an amount which represents one quarter of the estate. Disputes between executor and family members as to whether the amount estimated to be the cost of carrying out the wishes of the deceased should be expended often arise.<sup>10</sup>

There is an incidence of persons with power to make decisions about disposal of the body intentionally omitting the names of family members on headstones, gravestones and memorial plaques, with a view to causing offence and grief to others. Once detected disputes arise and may be resolved by adding a name or name or rarely removing a name.<sup>11</sup>

There is a class of rare case in which there is a tripartite dispute between the person who has power to dispose of the body, a family member and a person with powers under the *Cemeteries and Crematoria Act 2003* to regulate rights of interment.<sup>12</sup>

Those involved in a funeral and burial dispute are often in the early stages of grief and are numbed and vacillating in stages of denial and anger. The anecdotal experience of assisting those involved in a funeral and burial dispute is that better outcomes tend to be achieved if a will or statement of wishes records the deceased's wishes in relation to disposal of the body. This is often because the document can be used as an aid in the process of persuading the disputants to join together to give effect to the deceased's wishes, and to accept them, rather than to seek to impose their personal views in the early stages of the grief process.

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<sup>7</sup> *Leeburn v Derndorfer* [2004] VSC 172 (4 June 2004).

<sup>8</sup> One of the members of the PPS is aware of one example of this presentation of a dispute, which resulted in litigation.

<sup>9</sup> *Keller v Keller* [2007] VR 667.

<sup>10</sup> Two of the members of the PPS are aware of this presentation of a dispute, which resulted in litigation.

<sup>11</sup> One of the members of the PPS is aware of several examples of this presentation of a dispute, which resulted in litigation.

<sup>12</sup> One of the members of the PPS are aware of this presentation of a dispute, which resulted in litigation.

## **IS THE LAW ON FUNERAL AND BURIAL INSTRUCTIONS SATISFACTORY AS IT IS?**

No. There is a strong basis to conclude that there is too much power and discretion given to legal personal representatives. These are exercised at a time when those potentially to be aggrieved by a disposal step are numbed and acting irrationally, which restricts their ability to take active steps to achieve that which the deceased may have actually wanted to occur in relation to their funeral, burial or cremation. In cases of intestacy, disputes as to whether a person is in fact a domestic partner of the deceased, are often too emotionally charged to be resolved easily. The end result is often litigation and in the interim usually interference in the grief process. The incongruence between the law in respect of powers given to those with power to dispose of a body by burial or cremation, the differences in the powers of executors who derive power from the will and administrators who must establish their title and the existence of a multitude of considerations including important cultural considerations, highlights the unsatisfactory nature of the current law.

## **SHOULD THE COMMON LAW POSITION ON FUNERAL AND BURIAL INSTRUCTIONS BE ENSHRINED IN LEGISLATION?**

No. There is no logical reason to enshrine unsatisfactory common laws in legislation. There is a need to ensure people are aware of the laws in legislation as in the context in the internet, the first point of reference for community members including lawyers, is usually legislation.

Some parts of the common law position should be retained and enshrined in legislation as set considered below.

## **SHOULD THE LAW OBLIGE A PERSON WITH THE RIGHT TO CONTROL THE DISPOSAL OF A BODY TO MAKE APPROPRIATE FUNERAL AND BURIAL ARRANGEMENTS AFTER TAKING INTO ACCOUNT:**

### **(A) THE WISHES OF THE DECEASED**

Yes, when the wishes of the deceased are recorded in any reliable form and are not revoked. If the instructions are not recorded in a will and there is a later will made, the instructions should be deemed non-binding if the will is not inconsistent with them and revoked if the will is inconsistent with them. When they are not recorded, problems often arise because family members and other persons close to the deceased have different recollections. The absolute obligation should not be imposed when the wishes are not recorded because a person with the right to control may not be able to ascertain what the wishes were. The insertion of the words *where practicable*, overcomes the problem.

### **(B) THE VIEWS OF THE FAMILY**

No. It is impractical and unreasonable to impose this obligation on the person, when the views of family members are often divergent, there are disputes within families about which family members should express views and the persons asked to express views often are not acting rationally. Imposing an obligation to seek the views of the family members and *where practicable* to take them into account is practical and reasonable. This will cover the case where the divergent views make it impractical to take them into account.

### (C) THE DECEASED'S CULTURAL OR RELIGIOUS BACKGROUND

Yes. A failure to take these matters into account can have far reaching consequences for family members and persons close to the deceased. The consequences of failing to dispose of the body in a manner required by cultural or religious background, which can often be failure to do so within a period of time, or otherwise, is inimical to assisting the bereaved to grieve. There is a basis to conclude that such a failure may predispose an estate to difficulties in administration.

### (D) THE NEED TO DISPOSE OF THE DECEASED WITHOUT UNDUE DELAY

Disposal of the body without undue delay should be expressed as a paramount consideration, to be taken into account when the deceased's cultural or religious background, requires that outcome. There should be an obligation generally imposed to take into account disposing of the body without undue delay, but the blunt insertion of a time by which there must be disposal is unlikely to promote better outcomes.

### (E) THE CAPACITY OF THE ESTATE TO COVER THE REASONABLE COSTS OF DISPOSAL;

The capacity of the estate to cover the costs of the reasonable disposal is usually related to the size of the estate. Where the estate is a small estate, the anecdotal experience is that disputes sometimes arise between family members in respect of the quoted cost of the funeral or memorial service, when one or more argue that the cost to be incurred is unreasonable. This is even when the wish of the deceased is expressed in a will or other document. Where the estate is large, these disputes are not as common. There is sense in requiring the person with the right to control the body to consider the capacity of a small estate to cover the reasonable costs of disposal, but less sense in the case of a large estate when more weight should be given to testamentary freedom. Perhaps the question may be better framed as, *"Whether the costs of disposal are reasonable taking into consideration the size of the estate and its capacity to cover the costs?"* In this form there is emphasis upon whether the costs of disposal are reasonable. Where the deceased has expressed a wish for disposal in a manner that will result in the incurring of a large debt, but the estate is large, there is no justification for the person to take into consideration reasonable costs of disposal, because what is reasonable is related to the size of the estate.

### (F) AND/OR ANY OTHER FACTORS?

Whether there is a later will which is inconsistent with the instructions. If the will is not inconsistent with them the mere fact of silence should revoke the instructions and render them 'non-binding' but where they are inconsistent they should be revoked *in toto*.

In s 8 of the *Coroners Act 2006* are factors to be considered for the purposes of this Act. Drawing upon these, some other factors to which a person with power to dispose of a body should have regard, as far as possible in the circumstances, may include:

- that the death of a family member, friend or community member is distressing and distressed persons may require professional support or other support;
- that unnecessarily lengthy or protracted decision making in relation to a funeral or burial may exacerbate the distress of family, friends and others affected by the death;

- that different cultures have different beliefs and practices surrounding [death](#) that should, where appropriate, be respected;
- that family members affected by a [death](#) should, where appropriate, be kept informed of the particulars and progress of the decision making process in relation to a funeral or burial;
- that there is a need to balance the public interest in protecting a living or deceased person's personal wishes with the public interest in giving effect to them or not;
- the desirability of promoting the administration of justice.

**IF THE LAW OBLIGES A PERSON WITH THE RIGHT TO CONTROL THE DISPOSAL OF A BODY TO MAKE AN APPROPRIATE DECISION AFTER TAKING INTO ACCOUNT CERTAIN FACTORS, SHOULD THAT PERSON HAVE A DUTY TO SEEK OUT THE VIEWS OF PEOPLE CLOSE TO THE DECEASED BEFORE MAKING A DECISION?**

Yes. For the reasons explained above the obligation should be to seek the views of the family members and people close to the deceased and *where practicable* to take them into account. Family members may not have been 'close' to the deceased. It is preferable to extend the obligation to seek the views of family members and people close to the deceased, where practicable.

**SHOULD PEOPLE BE ABLE TO LEAVE LEGALLY BINDING FUNERAL AND BURIAL INSTRUCTIONS?**

Yes. In a will or in *inter vivos* document or other reliable record. They must be revocable by later will or document. For the reasons explained above, a category of non-binding instructions, where a later but not inconsistent will is made, should be included. They should also be revocable by any other subsequent record of instructions.

**IF PEOPLE ARE ABLE TO LEAVE LEGALLY BINDING FUNERAL AND BURIAL INSTRUCTIONS:**

**(A) IN WHAT CIRCUMSTANCES SHOULD A PERSON CONTROLLING THE FINAL DISPOSAL OF A BODY BE EXEMPT FROM CARRYING OUT THE INSTRUCTIONS?**

- Where it is not practicable to do so.
- Only in the case of non-testamentary binding funeral and burial instructions, where the person is satisfied on reasonable grounds that the funeral and burial instructions were revoked.
- Where the estate is insolvent.
- Where a Court orders that they are discharged. In this event another person may be appointed.

**(B) SHOULD THERE BE A REQUIREMENT THAT THE INSTRUCTIONS BE CONTAINED IN A WILL, IN WRITTEN FORM, OR IN ANY FORM AS LONG AS THE EXPRESSION OF INTENTION IS RELIABLE?**

The instructions should be in any recorded form as long as the expression of intention is reliable and they are revocable.

**(C) SHOULD CHILDREN BE ALLOWED TO LEAVE INSTRUCTIONS AND, IF SO, AT WHAT AGE AND/ OR IN WHAT CIRCUMSTANCES?**

Yes. Minors aged 16 years and over, only if their instructions are in a written form and witnessed by a



legal guardian or other person with power to take a statutory declaration. There is a need to recognise that minors can make decisions in relation to funeral and burial matters, but there is also the risk that their intentions are thwarted because the evidence of them is unreliable. Providing there is clear evidence in writing of them, their wishes should be binding and revocable.

### **SHOULD PEOPLE BE ABLE TO APPOINT A FUNERAL AND BURIAL AGENT TO CONTROL THE FINAL DISPOSAL OF THEIR BODY?**

Yes. The reality of the lives of many people is that they are not suitable to be appointed as executor or administrator of an estate and are not suited to the work to be done to achieve the funeral and burial outcome desired by the appointor. The appointor may realise this and not want to burden their executor or administrator with doing what has to be done. The appointor may anticipate disputes and wish to avoid them. A person in custody may want certainty that their wishes will be followed, notwithstanding family members with whom they may have little contact will not assist them.

### **IF PEOPLE ARE ABLE TO APPOINT A FUNERAL AND BURIAL AGENT:**

#### **(A) SHOULD THEY BE REQUIRED TO OBTAIN THE AGENT'S CONSENT FOR THE APPOINTMENT TO BE VALID?**

Yes. Legal personal representatives are often not contacted when a will is made but that is an historical nuance in a society in which the knowledge making of a will is often sacrosanct. It is different in the case of a donee under enduring powers of attorney, financial or medical where the tasks are onerous. They must accept their appointment and consent.

The appointment of a person to carry out funeral and burial instructions is a potentially onerous task and unless there is a remuneration clause, the task may be a gratuitous one, subject to a claim for reimbursement of costs against the estate, and payment if it is solvent. The appointee should be fairly given the right to consent or refuse.

#### **(B) IN WHAT CIRCUMSTANCES SHOULD THE AGENT FORFEIT THE RIGHT TO CONTROL THE DISPOSAL OF THE BODY?**

- Where they are bankrupt and cannot incur debts of the type that may be incurred.
- When they are being investigated for causing the death of the deceased.
- Where a Court has made an order that they have forfeited the right to control the disposal of the body.
- Where they refuse to do that which is recorded as the wish of the deceased.

#### **(C) WHO SHOULD BE LIABLE FOR THE COSTS OF DISPOSAL AND WHAT, IF ANY, MEASURES ARE NEEDED TO MAKE THE ARRANGEMENT PRACTICAL?**

The estate of the deceased should be liable and the executor or administrator required to provide indemnity against estate assets for the costs of disposal. In the case of an insolvent estate, the appointee should be entitled to be released from the obligation. The executor or administrator should be required to notify the person of the death of the deceased. In the event that the person cannot be



found after reasonable search, then the legal personal representative should be given power to act as agent for the person for the purposes of doing that which was recorded as the wish of the deceased.

### **DO YOU HAVE AN ALTERNATIVE OPTION FOR REFORM (OTHER THAN THOSE IDENTIFIED IN QUESTIONS 3, 4, 6 AND 8) THAT YOU WOULD LIKE TO SEE ADOPTED IN VICTORIA?**

The law should provide for a combination of options 2, 3 and 4. It should allow people to leave binding but revocable funeral and burial instructions and/or appoint a funeral and burial agent to control the disposal of their body, which appointment is also revocable.

Where a person makes a will after having earlier recorded their funeral and burial instructions, the instructions should be deemed to be “non-binding” if the will is not inconsistent with them. In that event, the person disposing of their body should still be required to make appropriate arrangements after taking certain factors into account including the existence of the “non-binding” instructions. Where there is a later and inconsistent will or set of instructions, the penultimate instructions should be deemed to be revoked *in toto*.

Where a deceased did not leave instructions, or the instructions are non-binding in the events which have happened, the person disposing of their body should be required to make appropriate arrangements after taking certain factors into account, including non-binding instructions, subject to the reservations explained above.

### **WHICH COURT/S AND/OR TRIBUNAL SHOULD HAVE JURISDICTION OVER FUNERAL AND BURIAL DISPUTES AND WHY?**

The Supreme Court of Victoria has exclusive jurisdiction in Probate. The Probate List in the Common Law Division has jurisdiction over funeral and burial disputes. Many disputes of this type are in the context of other estate disputes. Applications can be determined quickly in this specialist list and judicial mediation referrals can be made. Despite the initial attraction to Tribunals because of accessibility and lower costs, there is a risk that there will be a lack of jurisdiction and power required to determine all of the disputes which must be determined in a funeral and burial dispute. It is sensible to require parties to first mediate before commencing a proceeding, as a pre-condition of filing a funeral and burial dispute proceeding in the Supreme Court.

### **HOW ACCESSIBLE AND EFFECTIVE ARE LOW-COST MEDIATION SERVICES FOR PEOPLE INVOLVED IN FUNERAL AND BURIAL DISPUTES, AND HOW COULD THEY BE MADE MORE ACCESSIBLE AND EFFECTIVE?**

The anecdotal experience in relation to low-cost mediation services for people involved in funeral and burial disputes is that they are not utilised. They appear not to be accessible because the disputes relate to estate issues and legal personal representatives seem to assume that they should first litigate in the Courts, and then mediate. They could be made more accessible by appointing sessional mediators with experience in estate litigation, and informing the community of their specialist expertise in this area. They could be made more effective by requiring there to be a certificate of attendance at mediation before filing a funeral and burial dispute proceeding in the Supreme Court, unless the Court otherwise orders.





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