

ASHES TO ASHES: WHOSE DUST?

The age old saying, “*Where there’s a Will, there’s relatives*” rings true, but notwithstanding the Will, who has the right to possess the deceased’s ashes?

The Cremations Act 2003 (the Act) establishes that the deceased’s executors are bound to follow the deceased’s instructions regarding whether he/she wishes to be cremated or buried. Those instructions are sometimes contained within the deceased person’s Will or may have been expressed to the family or executors personally.

Assuming the deceased has chosen cremation, and this direction has been fulfilled by the executors, who then is entitled to possession of the cremated remains? The Act is silent on this issue, but the case of *Doherty v Doherty* [1] assists in answering this burning question.

Background

Doherty involved a dispute between the deceased’s wife and his mother and sister over who was entitled to his ashes. The mother and sister believed that the deceased’s cultural tradition should bind his executors to return the ashes to his homeland of New Zealand to be spread across the countryside.

This disposal of the ashes wasn’t exactly opposed by the wife, however, the mother and sister’s departure with the ashes immediately after the cremation was what caused her the most distress.

Issue

The Court noted that ashes do not form part of the deceased’s estate. That is, ashes are not covered by sections of a deceased’s Will which may give the deceased’s assets to a particular person. The Court took the view that there is an order of priority in relation to disputed ashes and that the wife, being the deceased’s spouse, held ultimate priority to possession of his ashes.

Additionally, it was determined that the ashes are held on trust by the possessor who has certain obligations with respect to disposal of the ashes.

Decision

The Court ordered for the ashes to be held on trust by the wife. Additionally, the wife was not to take an indefinite time to spread the ashes in New Zealand as doing so would be against the

interests of the deceased's family.

What is clear from Doherty is that the executors of a deceased's estate normally become the trustees of the ashes after cremation as they will usually have the necessary priority.

Consequently, the trustees of the ashes have the following duties:

1. dispose of and deal with the ashes in the way that the trustees believe is appropriate;
2. consider any relevant directions in the deceased's Will; and
3. consider the wishes of the deceased's relatives or other parties that have an interest.

Whilst the principles to follow when determining who is entitled to possession of ashes are mostly straightforward, the merits of each individual case will decide the outcome.

This only emphasises the importance of making your wishes in respect of your ashes known and not left blowing in the wind - assuming you would prefer to be cremated.

Clifford Gouldson's Tax, Structures and Planning team would be happy to help you ensure that your wishes in this regard are clear.

And if you are involved in a dispute about a deceased person's ashes, or other estate-related matters, then Clifford Gouldson's [Litigation + Dispute Resolution team](#) are here to assist

[1] [2006] QSC 257

For more information contact our [Tax, Structures & Planning Team](#).

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