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| Managing a right of interment following the death of a right holder |
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# Purpose

Accurate, up-to-date right of interment records are critical to the effective management and operation of a public cemetery. It is important that the information captured in a cemetery trust’s right of interment register is correct and current because it forms the basis for the trust’s decision making in relation to its powers under the *Cemeteries and Crematoria Act 2003* (the Act) regarding:

* the power to approve or authorise the exercise of right holder entitlements (s. 77(4))
  + the interment of human remains at a place of interment
  + establishing or altering a memorial at a place of interment
  + removal of cremated remains or body parts from a place of interment
* managing the surrender of an exercised or unexercised right of interment (ss. 82–84)
* authorising a lift and re-position procedure (ss. 88–89)
* the cancellation of a right of interment (s. 91)
* managing and recording the transfer of a right of interment (ss. 79–80).

If these records are poorly kept or improperly maintained it can cause confusion and uncertainty for cemetery trusts, their staff and their customers.

The purpose of this fact sheet is to provide trusts and their staff with advice about:

* how to manage and update records when the original holder of a right of interment (right holder) dies
* taking instructions for the interment of the deceased right holder
* the rights and role of the executor and beneficiaries of the deceased’s estate in relation to the interment of the deceased
* information requirements for updating right of interment records
* the rights and role of the executor and beneficiaries in relation to establishing and altering a memorial
* the changing role of the executor and beneficiaries when an estate is finalised
* the need for trusts to develop their own policies and procedures for maintaining and updating right holder records when the original right holder dies.

# The interment of a deceased right holder

When a right holder dies a trust will generally receive a request from a funeral director, executor or family representative to inter the deceased in the plot they purchased. At the time of the funeral it is unlikely that the funeral director or family representative will be able to provide the trust with sufficient information to allow the trust to update its right of interment records with the name of the new right of interment holder.

## Sole holder

Where the deceased was the sole right holder, the following people can give the trust instructions on the use of the place of interment, depending on the circumstances:

* a person nominated to administer the deceased’s estate (such as an executor) because the right of interment forms part of the estate[[1]](#footnote-2)
* a representative nominated by the deceased’s family to manage the funeral arrangements, including a funeral director, family friend or member of the family.

## Joint holder

Where a right is owned jointly by one or more people (for example, husband and wife) and one of the joint owners dies, the deceased’s interest will pass to the remaining owner(s) by virtue of **the right of survivorship** and the remaining joint holder(s) may direct the trust regarding the interment and exercise of the right.

If a right is owned by multiple holders, the remaining joint holders may give the trust instructions regarding the interment and exercise of the right.[[2]](#footnote-3)

## Disputes

Under normal circumstances a funeral should proceed as directed by the family or their representative. However, if there is a dispute about the exercise of a right relating to a proposed interment, placement of a memorial, transfer of the right or any other matter relating to the exercise of the right, the trust should recommend the family seek mediation to settle the dispute before taking directions in regard to the right.

## Executor

The trust should note the executor or administrator of an estate will not necessarily become the new right holder and trusts should not update their records to reflect the executor or anyone else as the new right holder(s) without clear supporting evidence.

# Identifying the new right holder(s)

Identifying the new right holder(s) is a crucial part of the trust’s record validation process. If done properly, this step will clearly establish who is authorised to give the trust directions about the right and the place of interment in relation to future interments, memorials and exhumations.

Where the right was jointly held, according to the right of survivorship the deceased right holder’s interest in the right is extinguished and the right remains with the surviving right holder(s).

This is also the case where a deceased joint holder has named a beneficiary for the right of interment in their will. Such beneficiary would not inherit the deceased’s interest in the right and become a joint holder, because where the right of survivorship applies to a right of interment that is held by more than one person, the right would not form a part of the deceased’s estate and therefore cannot be inherited. Upon the joint right holder’s death their interest in the right is extinguished.

Where the deceased was the sole right holder, the right usually forms part of their estate and is inherited by the beneficiaries, as demonstrated in the following examples:

* If the deceased left a will that included a bequest gifting the right to an identified person(s), the recipient(s) of the bequest will inherit the right and become the new holder(s).
* If the deceased left a will that did not include a bequest gifting the right to an identified person(s), the right will form part of the residuary estate and is inherited by the beneficiaries of the residuary estate as identified in the will. The beneficiaries of the residuary estate become the new holder(s).
* If the deceased did not leave a will, the beneficiaries of the estate as determined by the laws of intestacy will inherit the right and become the new holder(s).

The process of distributing a deceased estate can take several months and be finalised long after an interment has taken place.

Once the estate has been settled the new right holder(s) is/are likely to be one or a number of beneficiaries. They should be able to provide the trust with documentary evidence showing they are the new right holder(s) – for example, a certified copy of the will or statutory declarations from the nearest surviving relatives of the deceased. If there are multiple beneficiaries, they become joint holders of the right of interment.

The trust should contact the executor or family representative at a reasonable time after the funeral to confirm the identity of the new right of interment holder(s) and then update their records accordingly.

## Evidence for updating the trust’s records

### The deceased holder was the sole identified right holder (in the trust’s records) and leaves a will

The trust will need a certified copy of the will that identifies the beneficiaries of the deceased’s residuary estate or, if applicable, the recipient(s) of a bequest gifting the right.

Where there is no bequest in the will gifting the right and there are multiple beneficiaries of the deceased’s residuary estate identified in the will, the trust will need to record each beneficiary of the residuary estate as a joint right holder.

### The deceased holder was the sole identified right holder (in the trust’s records) and did not have a will

Where the deceased right holder did not leave a will, prospective beneficiaries will generally apply to court for letters of administration. The trust will require a certified copy of the letter of administration granted by the court as evidence to confirm the new right holder(s).

Where a new right holder is not identified through a court-issued letter of administration the trust will need a statutory declaration from anyone claiming to be a new right holder. The statutory declaration must:

* address why they believe they have a claim
* confirm that to the best of their knowledge there are no other beneficiaries who can make claim to the right of interment
* note that if any legitimate claimants come forward the trust reserves the right to update its right of interment records to recognise them.

Where a trust is not satisfied that the information provided by an applicant is sufficient to have the right of interment record updated, it is not obliged to update its records. When rejecting an application, the trust should provide the reasons for its decision in writing and, where possible, be clear about what additional information is required to enable it to update its records.

# Memorialisation

The Act does not place restrictions on who can apply to establish or alter a memorial (s. 98). However, s. 98(2) of the Act provides that if there is a right of interment holder, their consent is required.

The executor of the deceased’s estate can arrange for a memorial to be established for the deceased right holder providing the application is made before finalising the estate. The executor will normally be following the wishes of the deceased when establishing a memorial, but they should also consider the wishes of the beneficiaries of the estate before their decision is finalised.

After an estate is settled an applicant will need the written consent of the holder(s) of the right of interment before the trust can allow a memorial to be established or altered. Where there are multiple joint holders, all those holders will need to give their consent to establish a memorial. For practical purposes multiple right holders may nominate a single right holder to act on their behalf, but the trust will need to have a written copy of this authority before taking direction from the nominated holder.

Where there are multiple holders and the applicant has a problem contacting them to seek their consent, the trust will need to establish via a statutory declaration that the applicant has taken reasonable action to contact the other holders before it provides permission to establish or alter a memorial. Reasonable action could include but is not limited to placing an advertisement in a local news publication or a search of the *White Pages*.

# Development of trust policies

The trust should develop its own clearly documented policies and procedures, consistent with this fact sheet, to guide its staff on how to identify and manage the transfer of a right of interment when the original right holder has died.

This policy should assist the trust and its staff to determine who is authorised to make arrangements for the interment of the deceased right holder and to provide consent to establish or alter a memorial or for a lift and re-position procedure. The trust should ensure that right of interment records are not permanently changed without sufficient evidence.

# Disputes

Occasionally there may be a dispute about who should become the new right holder. It is the responsibility of the disputing parties to resolve their differences before the trust updates its records. In such a situation the trust can refer its clients to the [Dispute Settlement Centre of Victoria](https://www.disputes.vic.gov.au) <https://www.disputes.vic.gov.au>.

# Diagram: Interment and memorialisation following the death of a right holder

Was the deceased holder the sole holder?

No.

The deceased right holder’s right is extinguished, and the right of interment remains with the surviving right holder(s).

Yes.

The right of interment forms part of the deceased’s estate.

Person making funeral arrangements provides evidence as to who is the executor or likely administrator of the estate and provides that person’s consent to the interment.

A memorialisation application is made at the same time as the interment application.

There is currently no holder, so holder consent is not required. The executor or likely administrator can make the application.

A memorialisation application is made after the interment.

Trust asks for information to confirm whether the estate has been finalised.

Estate is not finalised.

Estate is finalised.

The executor can make the application, but the consent of those who have inherited the right is required.

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1. There might not be clear documentation available about the person’s nomination, for example, if the will has not been located yet or if the deceased did not leave a will. If the matter is in dispute the trust may need to obtain evidence to its satisfaction (for example, through a statutory declaration) to confirm the identity of the administrator of the deceased estate. [↑](#footnote-ref-2)
2. If more than one joint holder remains, the trust may request a signed authority from all joint holders confirming their nominated representative. [↑](#footnote-ref-3)