

Post-Cremation Ashes: What's The (Updated) Legal Position?

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Introduction

When someone is buried, interment of the remains in the chosen gravesite is usually the end of the matter. With cremation, what happens at the crematorium is only part of the process: there is the issue of what happens to the ashes afterwards, and difficult questions arise in two basic situations. The first is where the deceased's family disagree over who is entitled to the ashes. The second is where ashes are being used as leverage to secure payment of outstanding funeral expenses. This article explores the legal position in both situations.

I. Families Fighting Over Ashes

Families fighting over funerals is an increasingly common occurrence; as well as the 'usual' family tensions when a loved one dies, there is the growth in second or blended families and the all-too-frequent disputes between e.g. adult children from different relationships, or children and a new spouse or partner. Even if they agree to cremate the deceased, the fate of the ashes can become a point of conflict.

This is a contentious issue, and one that many funeral directors are confronted with when individual clients ask what their legal rights are. Like any family dispute, funeral disputes are complex and cannot always be solved by discrete legal rules- and this is especially true when the dispute involves ashes. The law here is clearer than it has been, thanks to recent legislative changes; but there are still some 'grey areas'.

1. Initial Release of Ashes From the Crematorium

The legal position is slightly different in England and Wales, compared to Scotland. However, the first thing is 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". Regulation 30 in the original version of these regulations stated

that the crematorium had to return the ashes to the person who applied for cremation or to someone that the applicant nominated to collect the ashes.

However, regulation 30 was later amended by the Cremation (England and Wales) Amendment Regulations 2017. The changes are important, and were introduced to provide greater clarity and to improve cremation practice. Ministry of Justice ('MOJ') guidance on these regulations stressed that funeral directors are to be familiar with the regulations, and in a position to advise families about the practice at different crematoria, whether what the applicant wants is deliverable, and any issues which may arise about the application.

So, how does this affect what happens to the ashes? Under the amended version of regulation 30, the cremation authority must dispose of the ashes in accordance with the applicant's instructions for the ashes. These instructions can be given as part of the application for cremation (the cremation forms include a specific section on this), or given in writing by the applicant to the cremation authority, after the cremation. So the applicant might stipulate that he/she will collect the ashes or that the ashes are to be collected by the funeral director; or that the ashes are to be interred in a particular grave, or scattered in crematorium grounds. Alternatively, the applicant might state that the ashes should be held pending a final decision; but the applicant should indicate a date or period of time by which they will have decided what happens to the ashes and notified the cremation authority in writing (the applicant should, of course, be aware that the cremation authority may apply a charge for holding the ashes after a certain period).

Where instructions were not given by the applicant, or where the ashes were not collected as instructed by the applicant (though note that there is no set timeframe here for the anticipated collection- and the MOJ guidance notes do not specify one), the cremation authority may dispose of the ashes in accordance with the newly amended regulation 30(3). This says that "any ashes retained by a cremation authority must be decently interred in a burial ground or in part of a crematorium reserved for the burial of ashes, or scattered there". However, the amended regulations also state that the ashes cannot be scattered or interred "unless the cremation authority has made reasonable attempts to give the applicant 14 days' notice of their intention to do so". The authority should write to the applicant (ideally, the letter would be copied to the funeral director), notifying the applicant that the ashes are going to be scattered or interred within 14 days unless the cremation authority is informed otherwise; so, the onus is on the applicant to notify the authority of any change of address or contact details, and to provide alternative written

instructions for what should happen to the ashes. The written instructions would need to be received by the cremation authority before the expiry of the 14-day notice period.

The 2018 changes also introduced a new regulation (regulation 30(2)) which allows the cremation authority "in exceptional circumstances" to release the ashes to someone other than the applicant or the applicant's nominee. Any decision to do so is at the discretion of the authority; and while this is not something that we would expect to see happening often, there are a couple of situations in which it might prove useful. The first is where an applicant for a cremation has later been implicated in the death of the deceased, but refuses to permit the crematorium to release ashes to the deceased's family. The distress caused by this is obvious, and could now be avoided. The second, and much more commonplace scenario is where the applicant for cremation dies or becomes incapacitated before providing instructions for the ashes. According to the Cremation (England and Wales) Regulations 2008 Guidance, cremation authorities and crematorium managers can consider taking instructions from the applicant's executor or the administrator of their estate where the applicant has died. Where the applicant is incapacitated, we should probably assume that it is the person with power of attorney over the applicant's affairs, or their equivalent (though this is not entirely clear in the guidance notes).

So, this is now the position in England and Wales. In Scotland, broadly similar provisions now exist under Part 2 of the Burial and Cremation (Scotland) Act 2016 and the Cremation (Scotland) Regulations 2019, though the legal rules are a little different in some respects. An application for cremation must be made by the individual specified in the 2016 Act. For adult deaths, section 65 states that this will be the person nominated by the deceased to make the cremation arrangements, under an "arrangements on death" declaration. Failing that, the "nearest relative" of the deceased makes the arrangements, and there is a descending hierarchy starting with the deceased's spouse or civil partner, followed by a cohabiting partner of at least 6 months, then the deceased's child(ren), parent(s), sibling(s) etc. For child and infant deaths, section 66 simply refers to the "nearest relative" of the child, and defines this as the child's parent(s) or person(s) having parental responsibility for the child (though excluding a local authority), followed by the child's sibling(s), then grandparent(s) etc. Regulation 8 of the 2019 Regulations confirms all of this, when it comes to making an application for cremation.

Sections 51-56 of the 2016 Act deal with the handling of ashes, and again require the applicant for cremation to stipulate how the ashes should be dealt with (the cremation forms include a specific section on this). Where ashes are subsequently not collected, the Act requires the cremation authority to take reasonable steps to ascertain what the

applicant wants to happen (for example, whether the cremation authority is to retain the ashes until collection within a certain time, to retain for a further period of time, or whether the cremation authority is to dispose of the ashes). If the applicant fails to communicate this information, the cremation authority must either retain the ashes or dispose of them (section 53(6)). However, the 2019 Regulations add a lot of detail here, including specific time limits. For example, under regulation 13, the cremation authority must give 4 weeks' notice to the applicant (starting on the day after cremation) that the ashes are ready for collection; if the ashes are not collected, the cremation authority must give an extra 4 weeks' notice before being entitled to bury or scatter the ashes under regulation 14.

Section 54 of the 2016 Act also deals explicitly with funeral directors who have collected ashes from the cremation authority. Under regulation 12 of the 2019 Regulations, the funeral director must notify the applicant in writing, "as soon as reasonably practicable after collecting the ashes", that they are now available for collection. Where the applicant has failed to collect the ashes (within the specified time of 4 weeks), the 2016 Act states that the funeral director must take reasonable steps to find out what the applicant wants here (for example, is the applicant going to collect the ashes or should the funeral director return them to the cremation authority). If there is no response, the funeral director can return the ashes to the cremation authority under section 54(6). The onus then goes back to the cremation authority (under section 55) to ascertain the applicant's wishes, and (failing that) to retain or dispose of the ashes (as noted, burying or disposing of the ashes is dealt with under regulation 14). Again, the 2019 Regulations refer to a minimum 4 week period that must be observed before the next stage in the process of handling the ashes can be completed (see regulation 13). However, where the applicant, on the cremation forms, has simply opted for the cremation authority to dispose of the ashes, the authority is not obliged to wait for 4 weeks.

Like the amended regulations in England and Wales, there is more legal clarity in Scotland under the new legislation. However, the rules around ashes are much more comprehensive now in Scotland, and a number of different permutations are covered by the 2016 Act and the supplemental rules set out in the 2019 Regulations. What is written here, in this article, is a very superficial overview; for an in-depth analysis and excellent summary table and flow chart please refer to the Guidance Notes accompanying the 2019 Regulations and available at [Guidance-Cremation-\(Scotland\)-Regulations-2019.pdf](#).

2. Rights to Ashes Post-Release or Collection

So that deals with the release and collection of ashes from the cremation authority, and the legal rules around that. But where the ashes have been released to an applicant or a particular nominated individual, this raises another question: are they entitled to hold onto them, and to decide what happens to the ashes?

If the ashes are released to the applicant or a particular nominee, this does not mean that this particular individual has the final legal right to hold onto the ashes (in the event that there is some difference of opinion around what happens to the ashes). English law gives the legal right to decide the deceased's funeral arrangements to his/her executor (assuming the deceased left a valid will) or the highest ranking next-of-kin on intestacy (which is the surviving spouse or civil partner, followed by the deceased's children, then parents, then siblings etc.- but excluding the deceased's cohabiting partner or step-children, as the law currently stands). This individual has the legal right to possession of the deceased's remains, and this ultimately extends to the ashes. So the executor or highest ranked relative can insist on having the ashes returned to them, despite not having applied for cremation, and can decide whether to inter, scatter or retain the ashes.

There are no direct English cases on this point. However, cases decided in other jurisdictions whose laws are derived from the English legal system have confirmed that the executor or highest ranked kin on intestacy has the legal right to the ashes after they have been released by the crematorium. The best example is the 1986 Australian case of *Robinson v Pinegrove Memorial Park*. Here, 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 at the crematorium, which was located in the Sydney suburbs; 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.

By a process of extrapolation, one could argue that the position in Scotland would be the same, once the ashes have been released. As noted earlier, the 2016 Act sets out specific legal rules on who can apply for cremation, linking these to the defined statutory hierarchy of individuals who have the legal right to make the necessary arrangements on the death of an adult or a child under sections 65 and 66 of the Act respectively. The highest ranked

individual would, however, have a strong legal claim to the ashes in the event of a familial difference of opinion.

One final point is worth noting here. Where families are fighting over who gets the ashes, the courts will not (as a compromise solution) order the ashes to be divided if one of the parties objects to this. The English case of *Fessi v Whitmore*, decided in 1999, is authority on this point: here the judge refused to split the ashes of a dead child between the boy's parents, because the father was fundamentally opposed to this.

II. Ashes as Security for Funeral Debts?

Anecdotal evidence and various online postings have suggested that a small number of funeral directors are holding onto ashes, and using them as leverage to secure payment of outstanding funeral expenses. This is not standard practice within the funeral profession; more of the negative publicity has been targeted at local authorities who, faced with increasing numbers of funerals because the deceased's family are unable (or unwilling) to pay, are apparently refusing to hand over the ashes as a means of levering payment (and also as a means of deterring other families from having local authority funded funerals).

This is something that should be treated with caution, since there is probably no legal right to retain ashes in this manner. Because English law takes the view that a corpse is not property, it is difficult to see how post-cremation ashes can be classed as property in any legal sense. A number of old English also 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/her debts. The same rationale would almost certainly apply to ashes. One way of trying to circumvent this would be to include some sort of clause in the terms of service agreement that expressly states that the ashes will not be released until funeral expenses are paid in full. And while questions might be raised as to whether or not this was legally enforceable, it would have the benefit of being an open and 'up-front' part of the initial contract.

Funeral directors might be tempted to keep ashes until payment is made, for obvious reasons: funerals are expensive and families often make arrangements without thinking about where the money will come from or knowing what the value of the deceased's estate is; and funeral directors, especially those smaller firms, simply cannot afford to have bills unpaid. However, refusing to hand over the deceased's ashes is probably not the best way to ensure payment: legalities aside, the potential damage to reputation can be costly, and

it may be better simply to sue the contracting family members for non-payment of debts (though please bear in the mind the limitation periods around this).