

## Burials

### Burials where there is an executor

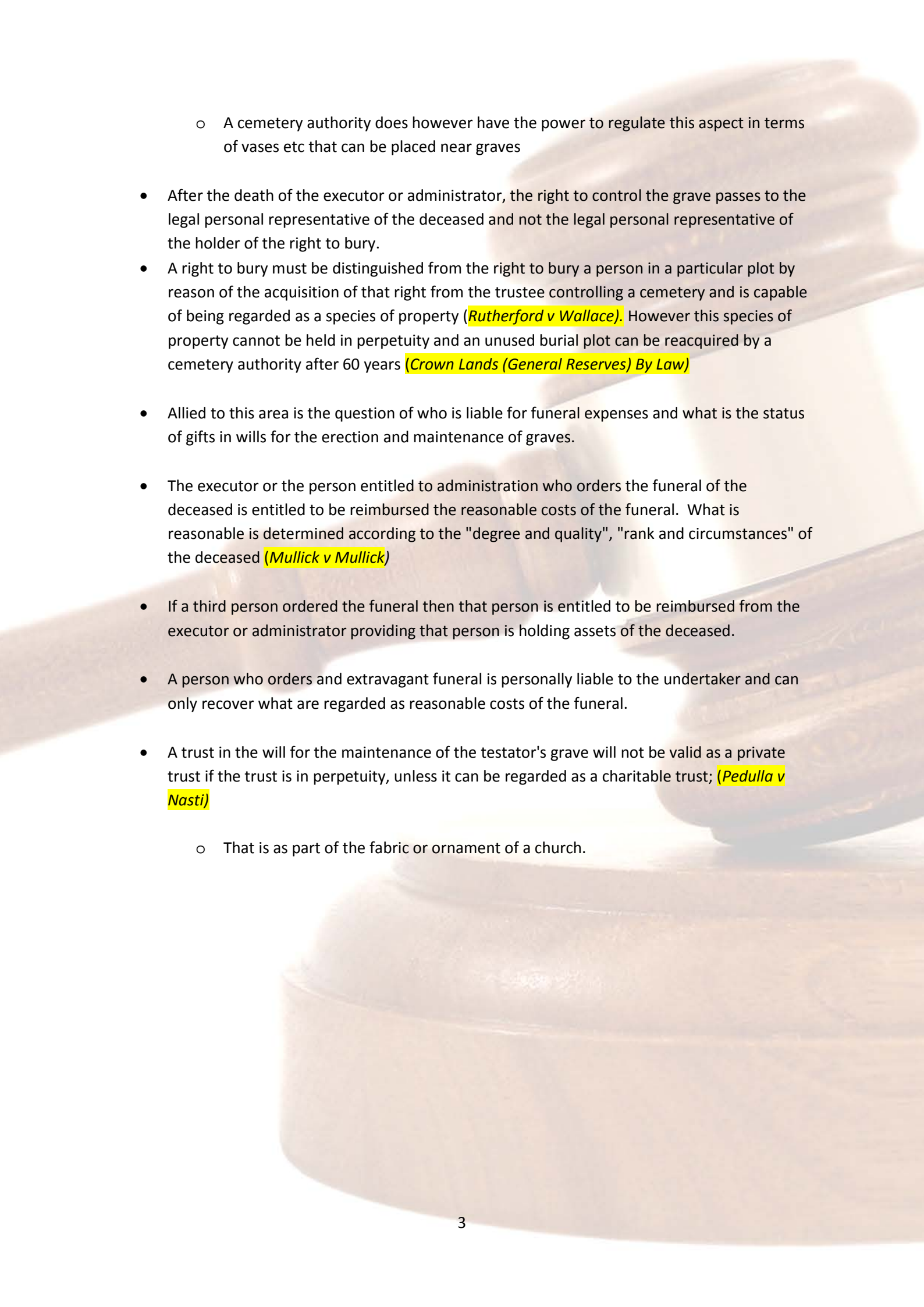
- The executor has the right to the custody and possession of the body for the purpose of burial (*Williams v Williams*). Thus, an action will lie at the suit of the executor to recover the body but only for this purpose (*Dobson v North Tyneside Health Authority*)
- The testator's wishes as to the funeral etc are not binding on the executor at common law, as the testator has no property in his/her own body. But, if a deceased leaves written instructions that his/her is not to be cremated then these are binding on the executor (Reg 34 of the *Public Health (Disposal of Bodies) Regulation 2002*)
  - *The Public Health Disposal of Bodies Regulation* makes numerous provisions with respect to the burial, cremation and handling of corpses. The most relevant of these is that a person must not place a body in any grave or vault unless that grave or vault is located in a public cemetery, a private cemetery or on private land where the area of landholding is 5 hectares or more and the location has been approved for that purpose by a local authority.
    - A person must not bury a body in or on any land if to do so would make likely the contamination of a drinking water supply or a domestic water supply. (*The Public Health Disposal of Bodies Regulation*)

### Burials where there is no executor

- The Next of Kin has the right to bury and if none the person whose house the deceased dies.
- A person who expends money on the burial of another has a restitutionary right to recover that expenditure from the estate of the deceased; (*Smith v Tamworth City Council*)
  - The executor has the right to bury
  - The testator cannot dictate what will happen to his/her body
  - The executor should consult with the relatives but is not bound to do so
  - If there is no executor then the person with the highest right to administration has the right to bury.
- This is said to be the 'common or usual' approach and may be departed from where cultural religious or spiritual considerations apply (*Jones v Dodd*)
  - These factors may take on greater weight in circumstances where there is unlikely to be any application for administration. However the 'common or usual' approach will

only be departed from in an extremely rare case (*Burrows v Cramley*; *Roma v Ketchup*)

- The surviving spouse or de facto is preferred to the children as administrator
- If two or more persons have an equal right to bury then the practicalities of an urgent burial prevail. This will particularly be the case where the deceased is an infant child and there is no prospect of administration being applied for (*AB v CD*)
- In the case of a child where the parents both have an equal right to bury but are in dispute, the court may favour the parent with the closest bond with the child (*AB v CD*)
- The right to bury a child belongs to the 'blood parents' over foster parents or carers (*Warner v Levitt*)
- A de facto spouse has a higher right to burial than other relatives of the deceased (*Burnes v Richards*; *Brown v Tulloch*)
- If no competent person, then householder of dwelling in which deceased dies has the right to bury.
- Cremation and burial are equivalent.
- A person who expends money on the burial of another has a restitutionary right to recover that expenditure from the estate of the deceased.
- A right of burial is not an easement but an irrevocable licence over the body in the ground.
- A cemetery authority can make reasonable by-laws for the maintenance and appearance of a headstone (*Crown Lands (General Reserves) By Law*)
- Subject to the by-laws the holder of the right to bury has power to decide the appearance and headstone of the grave. The right to bury and the rights attached to it relating to headstones etc. are not lost merely because the holder of the right to bury has authorised another to arrange the funeral (*Escott v Brikha*)
  - In this case the court declared a person to be the holder of the right to bury thus allowing them to alter the wording on the headstone.
- The reasonable cost of a reasonable headstone is recoverable from the deceased's estate.
- The holder of the right to bury cannot exclude friends and relatives from expressing their affection for the deceased in an appropriate manner such as placing flowers on the grave etc (*Crown Lands (General Reserves) By Law*)

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- A cemetery authority does however have the power to regulate this aspect in terms of vases etc that can be placed near graves
  - After the death of the executor or administrator, the right to control the grave passes to the legal personal representative of the deceased and not the legal personal representative of the holder of the right to bury.
  - A right to bury must be distinguished from the right to bury a person in a particular plot by reason of the acquisition of that right from the trustee controlling a cemetery and is capable of being regarded as a species of property (*Rutherford v Wallace*). However this species of property cannot be held in perpetuity and an unused burial plot can be reacquired by a cemetery authority after 60 years (*Crown Lands (General Reserves) By Law*)
  - Allied to this area is the question of who is liable for funeral expenses and what is the status of gifts in wills for the erection and maintenance of graves.
  - The executor or the person entitled to administration who orders the funeral of the deceased is entitled to be reimbursed the reasonable costs of the funeral. What is reasonable is determined according to the "degree and quality", "rank and circumstances" of the deceased (*Mullick v Mullick*)
  - If a third person ordered the funeral then that person is entitled to be reimbursed from the executor or administrator providing that person is holding assets of the deceased.
  - A person who orders and extravagant funeral is personally liable to the undertaker and can only recover what are regarded as reasonable costs of the funeral.
  - A trust in the will for the maintenance of the testator's grave will not be valid as a private trust if the trust is in perpetuity, unless it can be regarded as a charitable trust; (*Pedulla v Nasti*)
    - That is as part of the fabric or ornament of a church.

# Intestacy

## General

### Definition of intestacy

- Intestacy occurs when the deceased has failed to effectively dispose of property by a valid gift by will. Total intestacy is the failure to dispose of the entire estate. Partial intestacy is the failure:
  - to include all property in a valid will
  - of a specific gift
  - of a residuary gift

### Definition of intestate

- An intestate is a person who dies and either does not leave a will or leaves a will but does not dispose effectively by will all or part of his or her property (**s 102 Succession Act**). This means that the intestacy rules apply to partial intestacy.

### Entitlement to the whole of the estate

- A reference in this Chapter to an entitlement to the whole of the intestate estate is a reference to so much of the estate as remains after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate. (**s 103 Succession Act**)

### Testamentary freedom versus forced inheritance

- Common law – dominant theme in succession law in the last 200 years is testamentary freedom.
- Civil law – many jurisdictions have total or partial forced inheritance. These jurisdictions are based in Roman law notions of filial duties.

### Forfeiture rule

- A person who is otherwise a beneficiary under a will or a next of kin on intestacy may be prevented from inheriting from the deceased if they have unlawfully killed the deceased. (**In the Estate of Hall; Hall v Knight and Baxter**)
- The rule applies in cases of inheritance under a will (**Troja v Troja**) and on intestacy (**Re Jane Tucker**). It also applies where a person would succeed to property by reason of survivorship where one joint tenant unlawfully kills another (**Re Thorp; Real Property Act 1961**)



## Types of Spouses

### Definition of a spouse

- A spouse of an intestate is a person:
  - a.) who was **married to the intestate** immediately before the intestate's death, or
  - b.) who was a party to a **domestic partnership** with the intestate immediately before the intestate's death (**s 104, Succession Act**)

### Marriage and married spouse

#### Definition of marriage

- As defined in the **Marriage Act 1961 (Cth), s 5** 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life':
  - Easily proven by a marriage certificate
  - Irrespective of the length of marriage for the purpose of this law
  - If there is a divorce before intestate dies, then they are not a spouse
  - Separation does not bring marriage to an end

#### Definition of a domestic partnership

- A domestic partnership is a relationship between the intestate and another person that is a registered relationship, or interstate registered relationship within the meaning of the **Relationships Register Act 2010**, or a de facto relationship that a.) has been in existence for a continuous period of 2 years or b.) has resulted in the birth of a child (the child must have been born when intestate was alive)

### Domestic partnership – registered spouse

- Must have been in existence for at least 2 years
- Purpose of the Act is to try and provide a mechanism whereby primarily same sex partners can register their relationships albeit not a marriage relationship
- Also available to heterosexual couples although they don't usually utilise because they might as well get married or stay de facto

#### Eligibility for registration

- One adult must reside in NSW (**s 8, Relationships Register Act**)

- Must be as a couple i.e. monogamous and exclusive (s 8, Relationships Register Act)

### Restrictions on registration

- If one of the partners is married, registered under this act to someone else or is in a relationship with someone else or related to each other, they cannot have their relationship registered (s 8(3) Relationships Register Act)

### Cooling off period

- There is a cooling off period ending 28 days after the application is made (s 8, Relationships Register Act)

### Revocation of registration by events

- The registration of the relationship will be revoked on the death of a person in the relationship or on the marriage of a person in the relationship (s 10, Relationships Register Act)

### Domestic partnership – de facto spouse

#### Definition of de facto relationship

- Ordinary meaning of the term de facto relationship ‘they have a relationship as a couple living together, and they are not married to one another or related by family’ (s 21C(2) Interpretation Act 1987)
- A de facto relationship can exist even if one person is legally married or in a registered relationship with someone else
  - This is inconsistent with s 8(3) of the Relationships Register Act – however, it could occur if the person was registered first and then fell into a de facto relationship with someone else. This wouldn’t work if they were in a de facto relationship first and then want to be in a registered relationship with someone else.
- It can still be considered that a couple is living together even if it is not full time. Same with if the other person goes on a business trip or ends up in hospital for a long time; this does not end the de facto relationship.

#### Ending a de facto relationship

- This occurs when living together ceases with the intention to end the relationship

### Determining a de facto relationship

- Court can make up its own mind on the balance of probabilities on the basis of things such as the duration of the relationship, whether a sexual relationship exists, the ownership, use and acquisition of property, etc (21C(3) Interpretation Act 1987)
  - If two people are living together they will be considered as in a de facto relationship. This does not mean they will qualify as a spouse – for the purposes of the exam
- A person can die with more than one spouse

### Spouse's right to acquire property

- N.B. this does not apply when there are multiple spouses
- See section 115 of the Succession Act for more information
- See section 119 of the Succession Act for even more information