

Updating the register following the death of the interment right holder

Information on how interment rights pass from person to person following the death of the interment right holder

Purpose of this fact sheet

The purpose of this fact sheet is to provide guidance on:

- what happens to interment rights when a right holder dies
- what steps an operator should take to process applications to update the register following the death of a right holder.

Processes of updating the register

There are three sections of the Cemeteries and Crematoria Act 2013 (the Act) that describe what happens when a right holder dies. The process for updating the register is slightly different for each.

In broad terms, a right held by one person can be:

- bequeathed to another person in a will (**section 49**), or
- passed to a beneficiary of the estate via the laws of intestacy (**section 50**).

In either case, the right does not pass to the beneficiary until the register is updated.

If the right is jointly held, then these sections do not apply and a person's interest in the right **cannot** be bequeathed or passed on via the laws of intestacy. Instead, the right passes immediately to the surviving joint holders upon the death of a joint holder (**section 51**).

The sections of the Act that deal with updating the register following a death are shown in Table 1. An overview of the circumstances in which they apply is included in the table.

Table 1: Application of Act sections

Act section	Circumstance
49	Applies when a sole right holder had a valid will and bequeaths an interment right to another person or persons (either specifically or as part of their estate).
50	Applies when a sole right holder did not have a will (intestate) or did not bequeath their right.

Act section	Circumstance
51	Applies when a joint holder dies.
60A	Allows operators to decide on the holder of a right without an application, typically when the operator becomes aware of an error.
61	When more than one generation has passed since the death of the right holder, section 61 provides a way for their successors to 'inherit' the right; or When an application is made asserting that there has been an error in the administration of the right, leading to the wrong person being listed as the right holder.

Solely held rights can be bequeathed in a will (section 49 of the Act)

Section 49 applies when a sole right holder bequeaths a right to another person or persons in their will. In that will, the interment right could be specifically bequeathed to a beneficiary or included as part of the overall estate. The deceased must be the only holder listed on the register in respect of the right, or the only surviving joint holder listed in respect of the right.

A right holder can bequeath a right to one person or to two or more people. If the will specifies multiple beneficiaries, they will hold the interment right as joint holders.

An application made under **section 49** must be:

- made by the person or persons named as the beneficiary in the right holder's will
- accompanied by any fee an operator decides to charge to process the application (this should reasonably reflect the actual cost to process the application).

The beneficiary of a will is confirmed through the probate process. When considering an application under section 49, an operator should request appropriate evidence to confirm this which may include certified copies of the death certificate, the will and the grant of probate, identifying the applicant as the beneficiary.

Where the applicant is confirmed as eligible to be the right holder, the operator must update the register to reflect the new holder and issue a certificate for interment right to them.

EXAMPLE SCENARIO 1

A woman dies and leaves a will in which she bequeaths her entire estate, which includes her interment right, to her son. The son does not become the right holder until he applies to the cemetery operator to have the register updated.

The son makes an application under **section 49** to the operator. He supplies certified copies of his mother's death certificate, an extract from her will and the grant of probate. The cemetery operator updates the register to list the son as the right holder and issues him with an updated certificate for interment right.

The rules of intestacy apply to solely held rights not bequeathed (section 50)

Section 50 applies when a sole right holder does not have a valid will, or their will only covers a part of their estate and does not specifically bequeath the right. In this case, the right devolves as if the right holder had died intestate, even if the right holder left a will.

The deceased must be the only living holder listed on the register in respect of the right, or the only surviving joint holder listed in respect of the right.

The person (s) eligible to receive the right is determined by the *Succession Act 2006*.

This generally means a right would have passed to:

- the person's living spouse, or
- if they had no living spouse, their children, or
- if they had no children, their parents or siblings.

If multiple beneficiaries are identified, they will be entitled to hold the right jointly as joint holders.

An application made under **section 50** must be:

- made by the person or persons to whom the right passes according to the rules of intestacy
- accompanied by any fee the operator decides to charge to process the application (this should be reasonably reflective of the operator's actual cost to process the application).

When a person dies wholly or partially intestate, an administrator is appointed by the Court to administer and distribute the estate. When considering an application under **section 50**, an operator should request appropriate evidence. This may include certified copies of the death certificate, the will (if applicable), a letter of administration authorising the administrator, a statement from the administrator identifying the beneficiary.

Where the applicant is confirmed as eligible to be the right holder, operators must update the register to reflect the new holder and issue a certificate for interment right to them.

EXAMPLE SCENARIO 2

A man dies and does not leave a will. His three children are found to be the beneficiaries of his estate by the laws of intestacy. The children do not become the right holders until they apply to the cemetery operator to have the register updated.

The children jointly make an application under section 50 to the operator. They supply certified copies of their father's death certificate and the letter of administration.

The cemetery operator updates the register to list all three children as joint holders of the right and issues them with an updated certificate for interment right.

Jointly held rights pass immediately to surviving joint holders (section 51)

If an interment right is held jointly by multiple people, the death of any joint holder results in their interest passing to the surviving holders. In contrast to the processes described above for bequests and intestacy, this occurs automatically upon the death of the joint holder. For this reason, interests in jointly held rights *cannot* be bequeathed and the rules of intestacy do not apply to them. Only the last surviving joint holder, by virtue of having become the sole right holder, may bequeath the right.

There is no prescribed form or application process for the removal of a deceased joint holder from the register, but operators must update the register to remove the right holder as soon as practicable after being made aware of the death.

Once the register is updated, the operator must issue an updated interment right certificate to the surviving holders that reflects the change.

EXAMPLE SCENARIO 3

An interment right is held jointly by a married couple. When the husband dies, his wife automatically becomes the sole holder of the interment right.

While assisting the wife with the interment of the husband, the cemetery operator identifies that the register is now incorrect. The operator updates the register to remove the husband as a joint holder and issue a new interment right certificate to the wife.

Determinations under section 61

Sections 49 and **50** only apply where the living beneficiary of the deceased right holder (the person listed on the register) applies to have the register updated. If the beneficiary dies before updating the register, **sections 49** and **50** can no longer be used.

However, a successor of that beneficiary (where more than one generation has passed) may apply to the operator under **section 61** for a determination that they are now the holder of the right.

Determinations under section 61 are protected actions under section 68A of the Act. This means the operator will not be subject to civil liability for determinations made in good faith and in accordance with the Act.

Before updating the register, the operator must be satisfied that:

- the right would have passed to the applicant if the register had been updated to reflect the entitlement of each person ahead of them in the chain of succession; and
- the applicant has made any attempts to contact the right holder or possible right holders in accordance with the Reasonable Notification Guidelines.

The applicant must demonstrate to the operator how the right would have passed to them if each prior person with an entitlement under section 49, 50 or 51 had been recorded on the register. Operators may require evidence for these claims such as wills, death certificates, letters of administration etc.

Operators can also require that applications be accompanied by a statutory declaration attesting to the truth of all claims made.

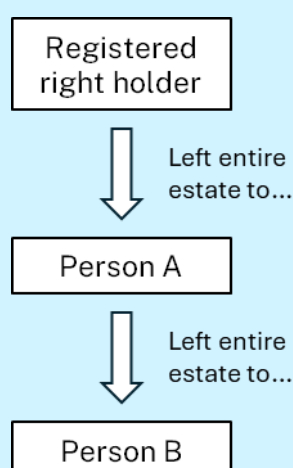
In cases due to the passage of time or for other reasons, it may not be feasible for applicants to source documentary evidence. In these cases, the operator (and the applicant) may assume that a solely held right would have passed according to the rules of intestacy as per the *Succession Act 2006* described above.

It is not the operator's role to adjudicate family disputes, and the operator may decline to determine a case where there is ongoing dispute or uncertainty as to the correct right holder. If the operator declines to determine a case, the operator should advise the applicant of the reason for doing so and specify what additional evidence would be required to make a determination.

Section 61 also provides a way for an application to be made asserting that there has been an error in the administration of the right, leading to the wrong person being listed as the right holder. As above, the applicant must provide evidence of how the right should have passed to them.

Operators are free to develop their own form for applications under section 61.

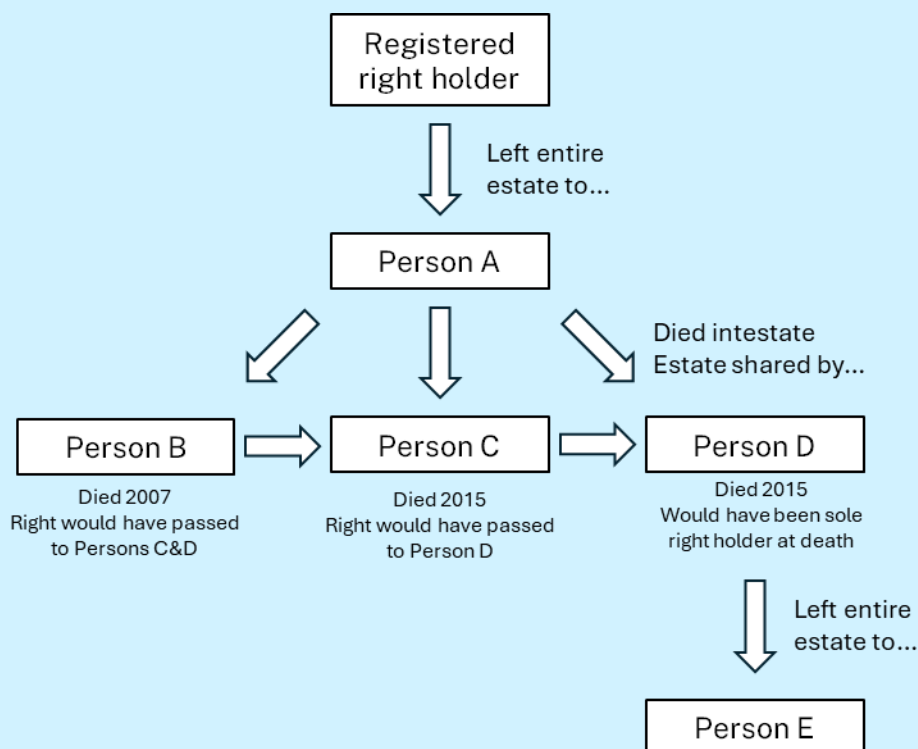
EXAMPLE SCENARIO 4



The right holder listed on the register died many years ago and left their entire estate to Person A. Person A was entitled to apply to the operator to update the register but did not, and so never became the right holder. Person A died and left their entire estate to Person B. Person B cannot make an application under **section 49** because Person A was never the holder of the right.

Person B applies to the cemetery operator under **section 61**, including certified copies of the wills of the registered right holder and Person A. The operator is satisfied that Person B has complied with the Reasonable Notification Guidelines and would have inherited the right if Person A had applied to update the register during their lifetime. The operator makes a determination that Person B is the holder of the right and issues them with an updated interment right certificate.

EXAMPLE SCENARIO 5



The right holder listed on the register died many years ago and left their entire estate to Person A. Person A was entitled to apply to the operator to update the register but did not, and so never became the right holder.

Person A died intestate, and Persons B, C and D were determined to be the beneficiaries of the estate. Persons B, C and D could not make an application under **section 49** because Person A was never the holder of the right. They could have applied for a determination under **section 61** that they jointly held the right, but they did not do this.

Person B died, then Person C, then Person D. If they had jointly held the right, it would have passed under **section 51** to Persons C and D jointly upon the death of Person B, and then to Person D as sole holder upon the death of Person C. As the sole holder, Person D would have been able to bequeath the right.

Person D left their entire estate to Person E. Person E cannot make an application under **section 49** because Person D was never the holder of the right.

Person E applies to the cemetery operator under **section 61**. They do not have access to the registered right holder's will but can demonstrate that Person A was their only child

and that the right holder had no spouse at the time of their death. They include a copy of the letter of administration of Person A's estate, identifying Persons B, C and D as the beneficiaries. They establish the order of death of Persons B, C and D using their death certificates.

The operator is satisfied that Person E has complied with the Reasonable Notification Guidelines, and would have inherited the right if Persons A, B, C and D had applied to update the register during their lifetimes.

The operator makes a determination that Person E is the holder of the right and issues them with an updated interment right certificate.

Determinations under section 60A

Section 60A allows operators to make a determination on the holder of a right without an application from a person asserting that they are the holder. This would typically be used only when the operator becomes aware of an error that has resulted in the wrong person being listed as a holder.

Determinations under section 60A are not protected actions under section 68A of the Act. This means that operators may be subject to civil liability for a determination.

Decision making regarding interments

Section 46(1)(a) of the Act (nature of interment right) says that the cemetery operator must "permit the interment of the remains of the person to whom it relates at the site in a cemetery identified in, or in accordance with, the interment right".

Where the deceased person is:

- specifically named as a person to be interred in that interment right; or
- part of a class of persons identified in the interment right;

then the right relates to that deceased person and they may be interred. The cemetery operator is not required to update the register with a new (living) interment right holder before conducting the interment. Nor is authorisation from an executor, administrator, or similar required – though somebody will need to complete the required application form.

There is no limit on how "classes of persons" may be described in an interment right. Examples may include "my spouse", "my children", "my descendants".

Where the above conditions are not met, a living interment right holder should be identified.

If the deceased interment right holder was a joint holder, the remaining holder(s) would become the holder under Section 51.

If the deceased interment right holder was not a joint holder:

- (if there is time to do so) the operator should follow the process outlined above under Section 49 or 50 to identify the correct interment right holder and update their register.
- if there is no time for this process but the operator wishes to proceed with the interment (for example with an immediate need to bury a deceased person), operators may choose to satisfy themselves that they are taking instruction from the person most likely to become the interment right holder.

In the latter case, important questions to ask of the person organising the interment would include:

- Did the interment right holder have a will? If so, who are the beneficiaries?
 - If there is a will, the person seeking to inter the person may be the executor of that will. This does not automatically mean that they are likely to become the interment right holder but should mean that they are aware of the contents of the will and can let the operator know who the beneficiaries are/who is likely to inherit the interment right.
- If there is no known will, did the holder have a spouse or children, and who are they?
 - If there is not a will, then the *Succession Act 2006* sets out who the beneficiaries are. These are most likely to be the spouse and children, as explained above.

Where there is more than one beneficiary, ideally all potentially beneficiaries should communicate with the operator to confirm their wishes about the interment.

An operator may wish to request a statutory declaration to validate this information and support their decision making around the interment.

As the erection of a memorial requires the explicit authorisation of the interment right holder (unless more than 5 years has passed and a person who is not the holder applies to erect a memorial under Section 70D), then identification of the correct living interment right holder will need to occur before authorisation of this kind can be provided.

Operators can reduce future uncertainty by ensuring right holders name all people or class of people who can be interred into an interment site at the time they purchase or transfer an interment right (as required by section 57).

Contact details

If you require further information, or have a specific query, please contact CCNSW.

Email: ccnsw.info@cemeteries.nsw.gov.au

Phone: 02 9842 8473

Mail address: Locked Bag 5022, Parramatta, NSW 2124

DISCLAIMER

This fact sheet does not constitute legal advice, and it should not be substituted for, or relied on, as legal advice. The scenarios included are examples only and are not exhaustive. You should always seek your own legal advice if there is a question as to how the law operates in specific circumstances.