



ILLINOIS CEMETERY & FUNERAL HOME ASSOCIATION

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MEMORANDUM

TO: ICFHA Member Cemeteries

FROM: Stephen S. Morrill
ICFHA Legal Counsel

DATE: April 22, 2016

RE: Properly Handling Consumer Requests to Bury Cremated Remains
Atop a Casket

This memorandum is intended to provide ICFHA member cemeteries with general guidance on how to properly handle a family's request to place cremated remains in a grave space (or more properly, a right of interment) that is already occupied with deceased human remains. Such requests often reflect a misunderstanding of the nature of the real estate interest that is conferred with a right of interment, and of the obligations owed by the cemetery to its consumer who is already interred therein. While the specific facts surrounding these requests will vary, the principles addressed in this memorandum should be relevant in any circumstance.

I. HONOR THE CONTRACT

Properly addressing this situation is a matter of following the cemetery's contract with the involved consumer. Among other things, in correctly handling the request, the cemetery should get answers to the following questions: (a) does the contract provide for single, double or multiple burial in the involved right of interment; (b) may the contract be amended to allow for double or multiple burial; and (c) who has the right to make the request for the second or subsequent burial. By honoring the contract rights, the cemetery will make the right decision, with dissatisfied family members always having the right to seek a court order to the contrary – and, of course, the cemetery should honor such court orders.

A. Is There a Contract Provision for Double or Multiple Burial

Of course, if the contract provides for double or multiple burial within the involved interment right, the request should be granted, provided the request is consistent with the contract terms. Oftentimes, the contract will identify the second or subsequent person who may be buried in the interment right (for example a spouse or any family member with a shared last name) or who may make the decision regarding the second burial (for example the next of kin consistent with the Affidavit of Heirship that is part of the contract).

If the contract language does not provide for a second or multiple burial within the involved right of interment, the request should be denied. In this situation, the consumer's bargain is for a single burial within the interment right, and granting the request disregards consumer expectations and violates contract rights. Further, once the original burial is completed, the cemetery has fulfilled its contractual obligations regarding burial, and any additional burial within the interment right is outside the cemetery's duty under contract.

Cemetery consumers do not "own" their grave spaces (again, more accurately their rights of interment), as they do their home. There is no "fee simple" right of ownership. A cemetery consumer may not build upon, tear down and rebuild upon, mortgage, or lease the right of interment as they might a residential (or "fee simple") property. There is no property tax identification number for a right of interment, only a tax number for the cemetery as a whole.

As reflected in the law for literally centuries, what cemetery consumers obtain is a "right of interment" – which essentially is a permanent easement right to occupy the grave space. The cemetery retains an ownership interest in its grounds, including all grave spaces. The cemetery may establish reasonable rules regarding the consumer's use of his or her right of interment, including headstone criteria and vault requirements. The cemetery may reasonably limit the hours of public access to the cemetery, and it retains the right to traverse the entire cemetery grounds for maintenance and other legitimate purposes.

The Illinois Supreme Court has held that, after burial, the relatives of a deceased person acquire certain rights that permit them to go to the grave of the deceased and give it attention, care for and beautify it. Smith v. Ladage, 397 Ill. 336, 74 N.E.2d 497 (1947). See also Bogner v. Villiger, 343 Ill.App.3d 294, 796 N.E.2d 679 (2003). Absent from the list of rights is any ability to disturb the gravesite, and place therein the cremated remains of another. Stated another way, there is no inherent right of heirs to double or multiple burial within a right of interment; unless it is granted by the cemetery contract with the involved consumer, there is no right to more than a single burial.

B. Possibility Of Amending The Contract

Even when the contract does not allow for double or multiple burial within a right of interment, there remains a possibility of amending the contract to allow for additional burial – but only before the right of interment is used. Such a contract amendment must, like the initial contract, be in writing; it must also be executed by the original contracting parties (*i.e.*, the cemetery and the original consumer). Remember that, absent contractual authorization to do so (either in the original contract or in a valid contract amendment), the cemetery would

deprive the consumer of his or her bargain (for a single burial in the right of interment) if it granted the request to place cremated remains atop a casket.

C. Who May Make The Request

Presuming that the contract does provide for double or multiple burial within the right of interment, and that no contractual restrictions have been placed on the identity of the second or subsequent person who may be buried therein, the cemetery should honor the request if made by the proper party. This party might be specifically identified in the contract with cemetery, or be the senior heir(s) as identified under the laws of heirship or the Last Will and Testament of the decedent. Pursuant to many state laws, heirship priorities might be: (a) first to the surviving spouse, from the marriage in effect at the time of death, provided that he or she is a competent adult; (b) then to a majority of the surviving and competent adult children; (c) then to the competent parents of the decedent; (d) then to heirs at law in declining order of heirship; and (e) then to the public administrator or other legally empowered official in the case of a decedent without heirs. Keep in mind that the Disposition of Human Remains Act (“DORA”) details only the right of disposition of the decedent’s remains, not of a decedent’s assets, so DORA may not govern the exercise of a consumer’s rights under a cemetery contract (keep in mind that there are two sets of consumer rights involved here, one related to the decedent in the casket and another related to the decedent in the urn). In honoring requests made by the proper party, sometimes multiple approvals are required, and sometimes intra-family conflict may result -- such as when a surviving spouse pursuant to a later marriage has different desires than the adult surviving children (the cemetery should use the Standard Cemetery Affidavit provided in the Illinois Cemetery Protection Act when obtaining documentation to prove heirship). In the end, by honoring the rights of heirship, the cemetery will make the correct decision and best avoid entanglement in family disputes.

D. The Role of Cemetery Rules and Regulations

Most cemeteries maintain rules and regulations that outline how the cemetery is operated. These rules and regulations may include restrictions on the hours of public access, limitations on the size and type of allowable markers and headstones, and the types of interment rights that the cemetery allows. Accordingly, many cemetery rules and regulations expressly allow for double or multiple burial in a single right of interment.

That double or multiple burial in a single grave space may be allowed in a cemetery does not mean they have been bargained for by any individual consumer. Whether double or multiple burial rights exist is a function of each separate contract, reflecting the deal made with each separate consumer, and not the general rules and regulations of the cemetery.

Where cemetery rules and regulations prohibit double or multiple burials in a right of interment, granting a family request to the contrary would be improper (unless the contract otherwise provided consistent with then-applicable cemetery rules).

During the legislative drafting of the Cemetery Oversight Act (“COA”), some argued that there should be a statutory limit on the number of burials may be allowed in a single right of interment (some thought the maximum should be three). While no such limit was enacted into law as part of COA, practical realities probably provide limits. Because of backhoe length, it may not be feasible to bury more than three caskets in a single right of interment; conversely, more than three sets of cremated remains may easily fit within a

traditional 36"x96" right of interment (though assuring adequate space for memorialization may practically limit the number of cremated remains that can fit within one right of interment).

E. Obey Court Orders

On occasion, through the use of the court system, parties may obtain different results that are "equitable" rather than "legal." That should never be of concern to the cemetery. Whenever presented with a court order, the cemetery can honor its dictates without concern for adverse legal repercussions to it. In those circumstances, the cemetery has no stake in the ultimate outcome, but only in following the law.

II. CEMETERY PROTECTION ACT

Section 16 of the Cemetery Protection Act reflects the discussion above, in that it specifies that interment rights pass to heirs only when they are unused:

When a multiple interment right owner becomes deceased, the ownership of any unused rights of interment shall pass in accordance with the specific bequest in the decedent's will. If there is no will or specific bequest then the ownership and use of the unused rights of interment shall be determined by a cemetery authority in accordance with the information set out on a standard affidavit for cemetery interment rights use form if such a form has been prepared. The unused right of interment shall be used for the interment of the first deceased heir listed on the standard affidavit and continue in sequence until all listed heirs are deceased. In the event that an interment right is not used, the interment right shall pass to the heirs of the deceased interment right owner in perpetuity. Except as otherwise provided in this Section, this shall not preclude the ability of the heirs to sell said interment rights, in the event that all listed living heirs are in agreement, and it shall not preclude the ability of a 2/3 majority of the living heirs to sell a specific interment right to the spouse of a living or deceased heir. If the standard affidavit for cemetery interment rights use, showing heirship of decedent interment right owner's living heirs is provided to and followed by a cemetery authority, the cemetery authority shall be released of any liability in relying on that affidavit.

(765 ILCS 835/16 (emphasis added)).

III. PERMIT REQUIRED

Whenever cremated remains are buried in Illinois, a Permit for Disposition of Dead Human Body is required. Any Illinois licensed funeral director or local registrar may issue this permit. (77 Ill. Admin. Code 500.50). It is unlawful for any cemetery to bury any human body, cremated remains, or any part of a human body without a permit authorizing such burial.

IV. CONCLUDING NOTE

The subject of death is highly emotional for many, and families can become quite passionate about burial rights and arrangements. Sometimes funeral directors or attorneys will engage with cemeteries as passionate advocates for the desires of their clients or customers. Whatever the situation, the cemeterian should remain calm and professional. In addressing family requests to bury cremated remains on top of a casket, the

cemetery must keep the interests of the original consumer foremost in mind – namely, the decedent already buried in the grave space. The cemetery must protect and secure the bargain of that consumer, and faithfully follow the terms of his or her contract.