

Closed Churchyards And Disused Burial Grounds

The Closed Churchyard Policy were adopted by Full Council at its Meeting held on 1 December 2015.

Introduction

1. This Note deals with the law relating to Closed Churchyards and disused Burial Grounds. A “Closed Churchyard” is a Churchyard belonging (but not necessarily physically attached) to a Parish Church of the Church of England which has been formally Closed by an Order in Council made by the Privy Council. A “disused Burial ground” is a place used, or intended to be used, for Burial purposes by any other person or body and which is no longer used for such purposes (and may include a Closed Churchyard). “Consecrated” means consecrated in accordance with the rites of the Church of England.

The closure of a Churchyard

2. Under the common law a Parishioner (a person resident in a Parish or a person who dies there) has a legal right to be buried in the Church of England Parish Churchyard. When a Churchyard becomes full, it is necessary for this right to be restricted or abrogated. Accordingly, under section 1 of the Burial Act 1853, the Privy Council may make an Order in Council to close a Churchyard for Burial subject to any exceptions specified in the Order. Such an Order is made (if at all) at the request of the Secretary of State for the Environment. The Grounds for making an Order are –
 - a) that further Burials would constitute a public health risk;
 - b) that further Burials would be contrary to decency;
 - c) that Burials should be discontinued for the prevention or mitigation of nuisance; or
 - d) there is no proper room for new graves.
3. An Order may permit further Burials, but only –
 - a) in existing walled graves or vaults which have rooms; and
 - b) in existing earthen graves where the top of the coffin is at least 3 feet below the normal level of the ground.
4. It is the view of the Department of the Environment that the interment of cremated remains is allowed in a Closed Churchyard, subject to obtaining a faculty (if required) where this can be done without disturbing human remains.

Responsibility for maintenance of a Closed Churchyard

5. Once a Churchyard is Closed, responsibility for maintenance falls on the Parochial Church Council (PCC) for the Parish in which the Churchyard lies pursuant to section 215(1), Local

Government Act 1972 (hereafter referred to as LGA 1972). The PCC is required to keep the Churchyard in decent order and its walls and fences (including gates) in good repair.

6. By virtue of s.215(2) of the LGA 1972, a PCC may at any time serve a written request on the Parish Council, to take over the maintenance of the Churchyard. Where two or more Parishes are grouped under a common Council, the request is served on the chairman of the Parish meeting of the relevant Parish in the group. Subject to s.215(3) of the LGA 1972 (see next paragraph), the Council or meeting takes over the maintenance three months after service of the request.
7. Within the three month period referred to above, the Council can pass on the maintenance responsibility to the District Council. The mechanism by which they can do that is by passing such as resolution and then giving notice of that resolution to the District Council and to the PCC. At the expiry of the three months (see paragraph 7) the District Council must take over the maintenance. If the three months period expires without the Council having made such a resolution, however, the District Council can no longer be *required* to take over the maintenance of the Churchyard although it has the *power* to enter into an agreement to do so pursuant to s.101 of the LGA 1972. Additionally (or alternatively) the District Council has the power to make a financial contribution towards the cost of maintenance pursuant to s.214(6) of the LGA 1972.
8. Whilst the statutory minimum period of notice under s.215(2) is three months, longer notice is usually given in practice - with at least twelve months being the norm where extensive repairs are needed. Such notice is required to enable the relevant Local Authority to budget and precept for any necessary expenditure.
9. If a Parish Council, whether formally or informally, to take over maintenance of a Closed Churchyard, a request should always be made to see the relevant Order in Council. It sometimes happens that the Churchyard in question, although no longer used for Burials, has not been formally Closed. In such a case, the Parish Authority is not obliged to take over responsibility, although it may contribute financially to expense of the PCC in relation to maintenance (s.214(6), LGA 1972). In practice, a Parish Authority would probably be well advised to seek to avoid a formal transfer of responsibility by offering financial assistance under s.214(6). By so doing, the PCC would remain responsible for maintenance with the Parish Authority helping financially.

10. If a formal request is received from PCC, should the Parish Authority resolve to hand on responsibility to the District Council? There are both advantages and disadvantages in doing. The advantages are –

- a) the Parish Authority has no functional/management responsibility for the upkeep of the Churchyard;
- b) the Parish Authority does not have to use its own financial resources for maintenance; and
- c) the Parish Authority does not have to employ staff or contractors to carry out maintenance work.

11. The disadvantages are –

- a) the District Council may (and probably will) treat the expense of maintenance of the Churchyard as a “special expense” under section 35 of the Local Government Finance Act 1992 chargeable only on the Council tax payers of the Parish;
- b) the cost of maintenance by the District Council is likely to be higher than that which the Parish Authority would incur because of the relative inefficiency of carrying out a small-scale job with a full-time work force or contractor; and
- c) the standards and policies of the District Council in relation to the upkeep of the Churchyard may not be to the liking of the Parish Authority or to the Local inhabitants.

12. On balance, the view that the disadvantages are likely to outweigh the advantages and therefore advises member Councils and meetings not to pass on responsibility to a District Council when a formal request is received under s.215(2) of the LGA 1972. Where responsibility has been passed on, it cannot formally be passed back to the Parish Authority, but an arrangement could be made with the District Council under s.101 of the LGA 1972 whereby the Parish Authority exercised the District Council’s powers, with or without a financial contribution in pursuance of s.214(6) of the LGA 1972.

The standard of maintenance for a Closed Churchyard

13. There is no statutory guidance on the appropriate standard to which a Closed Churchyard should be maintained. Advice given in a guide for Wardens is worth quoting –

“... to see that the Churchyard is kept in a decent and fitting manner, that is cleared of all rubbish, muck, thorns, shrubs and anything else that may annoy Parishioners when they come into it ...”

14. Responsibility for maintenance includes the maintenance of paths which cross a Churchyard up to the standard of “decent order” as well as cultivated and uncultivated areas. It is unclear whether the duty to maintain a Churchyard “in decent order” extends to a requirement to

ensure that tombstones and memorials do not present a danger to the public. Although there is certainly scope for argument on the issue, however, memorials probably extends to a duty to ensure that they do not topple over. Councils need to ensure that reasonable steps are taken to ensure the health and safety of employees working in Churchyards pursuant to their duties under s.2 of the Health and Safety at Work Act 1974. Their duties may well extend to ensuring that tombstones and memorials do not present a hazard.

15. Under s.6 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (in force from 1 March 1993), the powers, duties and responsibilities of a PCC with respect to the care and maintenance of Churchyards (both open and Closed) extends to all trees therein, including those proposed to be planted. When responsibility for maintenance of a Closed Churchyard is transferred to a Local Authority responsibility for trees is transferred as well. This means that the Parish Authority will have to keep trees trimmed etc and will be responsible for lopping or felling trees which are dangerous or diseased.
16. Responsibility extends to the repair of walls and fences. Often, walls, railings and gates are listed under the Planning (Listed Buildings and Conservation Areas) Act 1990 as being of historic or architectural interest. Consequently, the cost of repairs and maintenance is likely to be high.
17. The ordinary maintenance of monuments and tombstones is not the responsibility of the PCC or the Local Authority but of the owners, who are usually the heirs of the persons commemorated. Where the heirs or other owners cannot be traced, the PCC or Local Authority will have to take responsibility for dealing with dangerous monuments, since safety is part of keeping a Closed Churchyard in decent order (See LTN 64-Tombstones and Memorials). The removal of monuments, whether dangerous or not, requires the consent of the Church of England authorities (usually in the form of a faculty).
18. Responsibility for the Churchyard does not include responsibility for any Church, chapel or other building (such as a shed or bier house) in or adjacent thereto.
19. Whilst responsible for maintenance, the Parish Authority is not the owner or tenant of the Churchyard. It cannot therefore prevent the incumbent and the PCC from exercising their powers over the Churchyard (e.g. to allow the interment of cremated remains). The Parish Authority has no obligation to undertake improvements to the Churchyard.

Churchyard Regulations extract from diocese of Oxford

Interment in ground no longer open for burials

10.9 This category includes, but is not limited to, those closed churchyards, which, by Order in Council, are maintained at the expense of the local authority

10.10 The interment of cremated remains in a closed churchyard must be authorised by faculty

10.11 In the case of a churchyard maintained at the expense of the local authority, *in addition to a faculty* the consent of the local authority to such interment should first be obtained, and no monument may be erected to mark the place of burial without the like consent

Issuing Grant of Exclusive Right of Burial: Cremations only for closed churchyards

Whenever a new private grave is purchased the burial authority must issue a grant of right of burial (sometimes referred to as the grave grant or grave deed). This official document confirms with the purchaser their rights to burial within a defined grave space within the cemetery. (It should be noted that the rights of burial only are purchased and not the land itself, which remains the property of the burial authority.)

The document reflects the entry made in the Purchased Graves Register / Register of Grants as required by Schedule 2 Part 2 paragraph 1 of the Local Authorities' Cemeteries Order 1977.

It is common practice for the burial authority to keep a duplicate of the document issued on file.

Note: the right must only be issued for a period NOT exceeding 100 years as required by Article 10(2) of the Local Authorities' Cemeteries Order 1977.

Example Grant of Right of Burial

Hazlemere Parish Council

Grant of Exclusive Right of Burial

By virtue of the powers conferred by the Local Authorities' Cemeteries Order 1977 (hereinafter referred to as "the said Order") on burial authorities constituted under the Local Government Act 1972 Hazlemere Parish Council (hereinafter called "the Council") acting as a burial authority constituted under the said Act

in consideration of the sum of paid to the said Council
by.....
of.....
(hereinafter called "the Grantee")

DO HEREBY GRANT unto the said Grantee the exclusive right of burial in the Grave Space No.....in section.....
in.....cemetery situate at Holy Trinity Hazlemere HP15 7PZ (being a cemetery provided and maintained by the Council) to hold the same unto the Grantee for the term (term not to exceed 100 years) of.....years from the date hereof for the purpose of burial subject to the provisions of the said Order and to the orders, byelaws and regulations for the time being in force with regard to the management regulation and control of the said cemetery.

It is hereby certified that the transaction hereby effected does not form part of a larger transaction or a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £150,000.

Given under my hand this.....day of.....two thousand and.....

(Signed).....

Designation.....

Right to Erect a Memorial

Some burial authorities issue a separate document that relates specifically to memorial rights issued. This gives the flexibility to manage memorials independently of burials rights. In general the period of the memorial rights is limited to 30 years as this is seen as being a reasonable time in which to expect a properly installed memorial to remain standing and not become unstable and therefore dangerous.

Should a single document be issued for both burial and memorial rights for say 75 years it would follow that no action could be taken should the memorial become unstable and hazardous, except action designed to make it safe, during the period of the rights issued. This thinking was brought about due to the liabilities and duty of care placed on burial authorities in relation to dangerous memorials and the push to gain 30 year workmanship guarantees from memorial masons.

This position has moved somewhat recently with thoughts being transferred to memorial masons issuing guarantees of conformity to nationally accepted standards.

Example Grant of Rights to erect and maintain a memorial

Hazlemere Parish Council

Grant Of Rights To Erect And Maintain A Memorial

By virtue of the powers conferred by the Local Authorities Cemeteries Order 1977 (hereinafter referred to as "the said Order") on burial authorities constituted under the Local Government Act 1972 the Hazlemere Parish Council (hereinafter called "the Council") acting as a burial authority constituted under the said Act

in consideration of the sum of.....paid to the said Council by.....of (hereinafter called "the Grantee")

DO HEREBY GRANT unto the Grantee the right to erect and maintain a memorial on grave number.....in section..... in Holy Trinity Cemetery Hazlemere (being a cemetery provided and maintained by the Council) to hold the same unto the Grantee for the term of.....years from the date hereof for the purpose of erecting and maintaining a memorial subject to the provisions of the said Order and to orders, byelaws and regulations for the time being in force with regard to the management, regulation and control of the said cemetery and on such terms and subject to such conditions as the Council considers proper.

It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value of the consideration exceeds £120,000.

Given under my hand this.....day of.....two thousand and (Signed).....

Designation.....

Documents required by the Council to transfer the ownership of an exclusive right of burial where the original the original rights owner has died

The following describes the information that is required by the Council to enable the proper legal processing of applications for burials in grave spaces. If a Will has been left, grave rights are normally included in the residual estate of the deceased; they are seldom referred to directly.

References to Wills are references to Wills recognised as valid by the laws of England, Scotland and Wales. It should be remembered, however, that Scottish Law on intestacy is different from the law on intestacy in England and Wales, so if you are in doubt ensure reference is made to your own legal advisors who supply legal support for your Council.

1 If the deceased owner left a Will

If the deceased owner left a Will stating who the Grant of Exclusive Right of Burial should be passed to the person identified in the Will should provide the Council with:

- the **Grant of the Exclusive Right of Burial**
- the Grant of Probate – Probate is the document issued by the Court after the will has been proved in Court. It should be the original document bearing the Court Seal. A copy of the relevant part of the document can then taken and retained for the files
- if the person is not also the Executor of the will, an **Assent from the Executor(s) of the Will** giving the Grant of Exclusive Right of Burial to that person.

If the deceased owner left a Will of insufficient value to merit application to be made for Grant of Probate and someone wishes to claim the exclusive right of burial, then the Council should ask for:

- the **Grant of the Exclusive Right of Burial**
- the Death Certificate
- a **Statutory Declaration (see examples below)** detailing the relationship of the person claiming the right of exclusive burial to the deceased owner. See below.
- a **Form of Renunciation (see example below)** from all other people who would be entitled to claim the Grant of the Exclusive Right of Burial.

2 When there is no Will

If the owner of the rights dies without leaving a Will, this is generally referred to as dying intestate and the Council should ask for:

- the **Grant of the Exclusive Right of Burial**
- the Grant of Letters of Administration – letters of administration are granted to a person or persons who apply to the Court to receive permission to administer the estate of the deceased. The Letters of Administration should name the administrator/s and once again should bear the official seal of the Court. The relevant part of the document should be copied and retained on file. An Administrator of an estate has the same powers and responsibilities as an Executor
- if the person is not also the Administrator then an **Assent Form is required from the Administrator(s)** giving the Grant of Exclusive Right of Burial to that person.

If the estate is of insufficient value to merit application for Letters of Administration the Council should ask for:

- the **Grant of the Exclusive Right of Burial**
- the Death Certificate

- a **Statutory Declaration (see example below)** detailing the relationship of the person claiming the rights to the registered grave owner.
- a **Form of Renunciation (see example below)** from all other people that would be entitled to claim the Grant of Exclusive Right of Burial.

If a Statutory Declaration is to be used, it must comply with the Statutory Declarations Act 1835 and must be witnessed by a Commissioner for Oaths, a Solicitor, or a Magistrate. A form of Indemnity is not acceptable. A typical Indemnity Form states:

“I (state full name) of (state full address) hereby declare that I am the (state relationship) of the late (state full name of deceased). The said deceased died on (date) and the said Exclusive Rights of Burial has not been otherwise dealt with.

I am the proper person to exercise the burial and memorial rights in the said grave, and no other relative or person to my knowledge claims any right...and I hereby indemnify the Council against all claims and losses”

This will not stand up in a court of law and the burial authority may find themselves jointly or wholly liable for any damages as you are unable to be indemnified from something that is illegal. If you currently use an indemnity form on the transfer of burial rights this needs to be changed.

A statutory declaration is needed in place of an indemnity form. This normally seeks to identify just how the person who is to become the new owner of the rights, is the legally entitled next of kin to the current owner of the rights. A valid statutory declaration is made up of the following sections:

Section 1 - details of the person making the declaration. This may read:

*I (name of person making declaration) of (address)
in the (County, Unitary Council)
do solemnly and sincerely declare that (name of current owner), purchased/owned the exclusive Right of Burial, described in the Plan Book as Square (number) No (number) Grant (number) in the (and full address of cemetery), and that*

Section 2 – the body of the declaration explaining specific circumstances (detailed examples below)

Section 3 – the declaration in the presence of a Magistrate, Solicitor, or Commissioner for Oaths. This should read:

And I make this solemn declaration conscientiously believing the same to be true by virtue of the Statutory Declarations Act 1835

Signed *(name of person making the declaration)*

Declared at

in the of.....

This Day of, 20.....

Before me *(Magistrate, Solicitor, or Commissioner for Oaths)*

Due to the number of people now dying intestate (without a Will), the need for a statutory declaration is becoming a frequent requirement. They have many uses, some of which are as follows:

- Correction of mistakes made on the deeds, either during the life of the owner or after death. An example of Section 2 of the declaration may read as follows:

“the said *Frederick John Smith* shown on Disposal certificate Dis28 41894 dated 1st June 2000 issued by the registrar of births and deaths for the district of Newham is one and the same person as *John Smith* his name having been incorrectly given when the exclusive Rights of Burial was purchased and I make this declaration in order that the said *John Frederick Smith* may be buried in the said grave space on Monday 6th June 2000 as is his right as owner thereof AND FURTHER I hereby indemnify Hazlemere Parish Council and all its officers and servants from any liability whatsoever in this matter or arising there from”

- Transfer to spouse/partner when Letters of Administration have not been applied for. An example of Section 2 of the declaration may read as follows:

“the said *John Frederick Smith* died intestate leaving an estate that does not warrant applying for Grant of Letters of Administration THAT I the said *Ann Smith* am his lawful surviving wife and next of kin and therefore the present rightful owner of the said Right of Burial AND FURTHER I hereby indemnify

Hazlemere Parish Council and all its officers and servants from any liability whatsoever in this matter or arising there from”

- Transfer from a deceased owner who is widowed and one or more sons/daughters are jointly entitled to the ownership of the right. An example of Section 2 of the declaration may be as follows:

“the said *John Smith* died a widower intestate leaving an estate that does not warrant applying for Grant of Letters of Administration THAT *Colin John Smith Brian Alan Smith* and myself the said *Mary Ann Smith* are his only lawful surviving children and next of kin and therefore the present rightful owners of the said Right of Burial AND FURTHER I hereby indemnify Hazlemere Parish Council and all its officers and servants from any liability whatsoever in this matter or arising there from.”

- Transfer from a deceased owner who is widowed and, whilst one or more sons/daughters may be entitled, it has been agreed that only one will claim the right. This requires agreement from the other siblings and should be accompanied by a Form of Renunciation from the other siblings. An example of Section 2 of the declaration may be as follows:

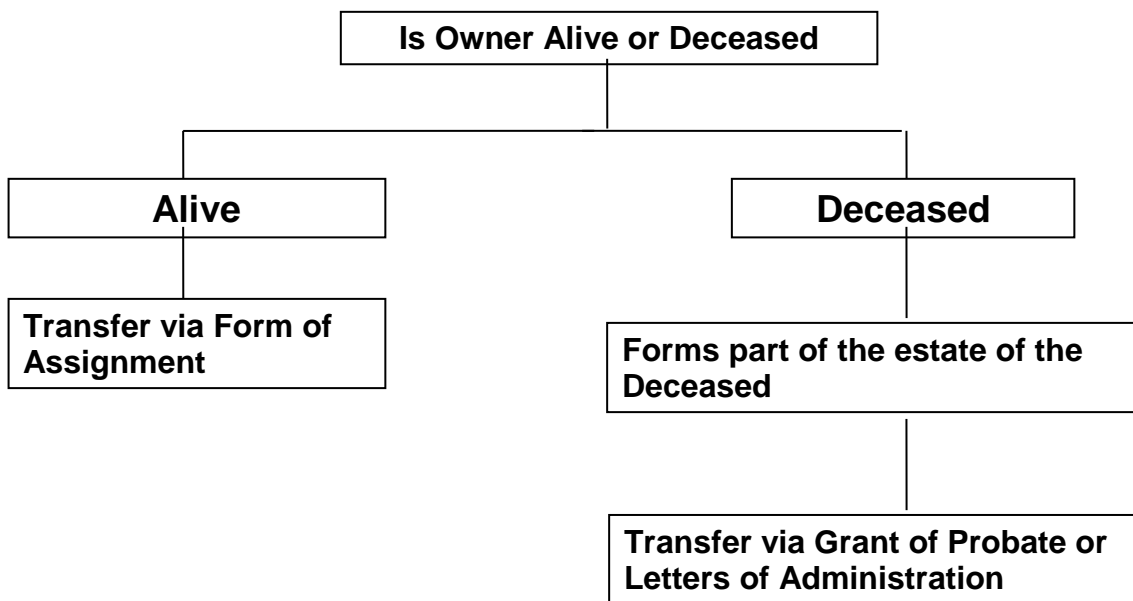
“the said *John Smith* died a widower intestate leaving an estate that does not warrant applying for Grant of Letters of Administration THAT *Colin John Smith Brian Alan Smith* and myself the said *Mary Ann Smith* are his only lawful surviving children and next of kin and therefore the present rightful owners of the said Right of Burial BUT *Colin John Smith* and *Brian Alan Smith* desire that the exclusive Right of Burial be vested solely in my name as *Mary Ann Smith* and have given their consent in the document attached hereto which I declare to be genuine AND FURTHER I hereby indemnify Hazlemere Parish Council and all its officers and servants from any liability whatsoever in this matter or arising there from.”

- Transfer of burial rights in accordance with a valid will, however, the will has not been proved in Court so there is no Deed of Probate. An example of Section 2 of the declaration may be as follows:

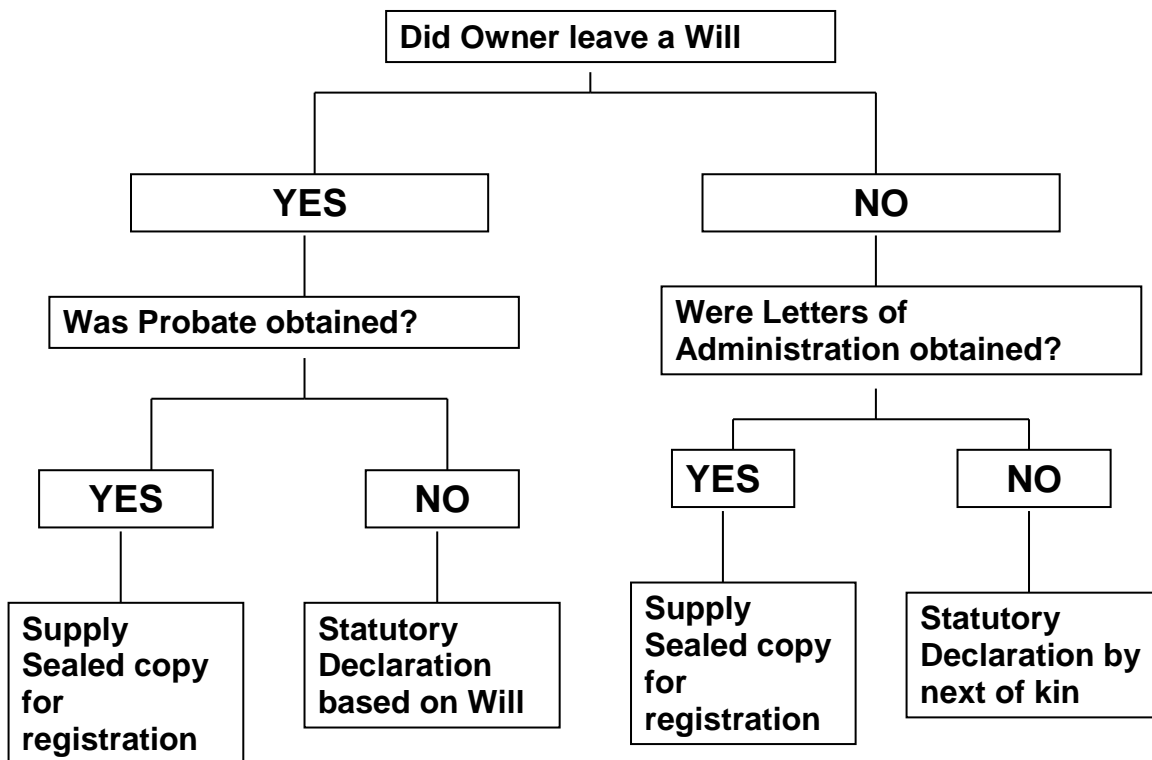
the said John Smith died leaving his last Will and Testament dated 5th February 1987 without codicil and which was not revoked in which I the said Brian Smith was named as sole executor BUT at the time of his death the said John Smith left an estate that did not warrant applying for Grant of Probate and I did not neither do I intend to endeavour to obtain Probate and in these circumstances I declare myself the said Brian Smith to be the present rightful owner of the said Right of Burial AND FURTHER I hereby indemnify Hazlemere Parish Council and all its officers and servants from any liability whatsoever in this matter or arising there from.

These are just a few examples of where a statutory declaration will be required, there are obviously many more scenarios, however, the statutory declaration should be an explanation of the reasons why a particular person or persons, are entitled to own the right.

To help cemetery staff find the correct documentation required for a transfer of rights the following charts will be of great use.



The following questions then guide the Council to identifying what specific documents are necessary:



Transfer of Exclusive Rights of Burial - Summary

- Burial rights do not give the owner title over the land. It is simply a right of burial and should include a right to erect a memorial.
- Periods for exclusive rights of burial are at the discretion of the authority, but must not exceed 100 years.
- Ownership can be in single or multiple names
- Written permission of the owner of the right must be obtained before the burial can take place. If the owner is deceased then transfer must take place before the burial of any person other than the (deceased) owner of the right can go ahead.
- Essential part of the administration process should be to identify when the owner of the right is buried into the grave and arrange for the transfer of ownership to the new owner of the right shortly after this.
- No written permission is required when the burial is that of the owner of the rights.
- Indemnity Forms are not legal documents and should not be used. Statutory declarations can be used as an alternative.
- A Statutory Declaration is very useful in the absence of legal documents such as a Grant of Probate or Letters of Administration, however, it is not an alternative to these.
- If the rights are not legally transferred, the burial authority is exposed to the likelihood of legal proceedings at some point in the future.

October 2015

To be reviewed November 2017