



9-1-1943

Legal Rights and Obligations to a Corpse

Peter F. Nemeth

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Peter F. Nemeth, *Legal Rights and Obligations to a Corpse*, 19 Notre Dame L. Rev. 69 (1943).

Available at: <http://scholarship.law.nd.edu/ndlr/vol19/iss1/6>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Legal Rights and Obligations to a Corpse. — "*To whom does this dead body belong?*" The question posed assumes a new importance with an increase in divorce, separations, family disruptions, and the victims of war. It is of interest to individual relatives of the dead, the attorney settling the estate and, especially, the American funeral director.

In the latter part of the nineteenth century, embalming was in its infancy, and the law seemingly well settled. Little controversy arose as to who had the obligation or right to bury a particular corpse. With the development of the art of embalming, the law on this topic expanded. Expansion brought change. Legislative enactments aimed to protect public health by expediting the burial of the deceased.

The interest in a dead person's body has long been recognized as a duty of the living although the nature of this interest has varied with the civilization of particular countries and peoples. In Egypt, where embalming was first practised on a large scale, the nature of the interest was twofold: first, from the religious standpoint the body was to reunite with its soul and therefore it should be preserved. A duty arose to preserve the body and place it in a sepulchre; second, the duty was placed on the family as is evidenced by family tombs of the Pharohs. The early dwellers here in America gave evidence of their belief in the duty to bury the dead by their peculiar method of building mounds in which they sought to preserve their families.

In modern times this duty is present if for no other reason than the protection of the living. However, the duty to bury is imposed by law.¹ If there is such a duty to bury the dead that duty must be placed upon someone. We must, therefore, assume, that where there is a duty to bury the dead there also must be a right to take possession of the body for the execution of the duty and that any interference with this right might be redressed by an action at law.

The nature of this possession would seem to be obscure at common law, which holds that there is absolutely no property right in a corpse, and the courts of the United States still refuse to treat a dead body as property in a material sense.² The dead body is not property that can be held, in the sense of being held for funeral costs;³ although it may be disposed of by provisions of a will,⁴ it is not a part of the estate; it is not subject to a gift causa mortis,⁵ and it is not larceny

1 Burns Statutes 1933 Sec. 35-106, Sec. 63-602, Sec. 35-115, Sec. 2211 Penal Law (N. Y.).

2 Orr v. Dayton & Muncie Traction Co. 1911, 178 Ind. 40. Renihan et al. v. Wright et al. 1890, 125 Ind. 536.

3 Jefferson Co. Burial Society v. Scott 1928, 218 Ala. 354 118 So. 644.

4 In re Thomas' Estate 1899, 56, Pac. 906. Enos v. Synder 1900, Contra, 63 Pac. 170.

5 Driscoll v. Nichols 71 Mass. 488-491, 1855.

to steal a corpse because it is not property.⁶ However, there must be a variance to the old common law rule that there is absolutely no property right in a dead body, to enable recovery of damages in certain cases. The right to the mere repose of the grave, although it is intangible and invisible, lacking the essential legal elements of (personal property), may nevertheless be property.⁷ This is the more liberal view taken by modern jurists challenging the common law view; and is based on the fact that whoever has dominion over a dead person's body should have some rights—and if he has exclusive rights for purposes of burial and protection of the body, these rights should be protected even if by a quasi-property right.⁸ Therefore, since the dead body is not real estate, as yet, nor attached to it, we must treat it as personal property.⁹

Now that it is definitely established that a right to burial exists and is a legal right protected by the courts¹⁰ the question arises: who has this quasi-property right? Who is entitled to enforce and protect these rights? It is only natural that a paramount right to the dominion over the dead person's body, exists in the surviving spouse.¹¹ However, the failure of the surviving spouse to promptly assert this right to the body needing burial constitutes waiver, particularly where the surviving wife was not living with the husband at the time of his death.¹² In cases of this kind, the deceased's wishes are expressly followed. Here again the law recognizes a property right, arising from the duty to bury the dead, requiring the survivors to take possession for the purpose of burial or lose that right.¹³

Those entitled to possession of the dead person's body after the spouse would be the parents, or in the case of a parent when there is a conflict between their issue, as between daughter and son, where one has maintained filial relations with the deceased parent for a number of years, and the other has not shown any affection for the parent, custody should then be awarded to the one maintaining such relationship.¹⁴

Thus we find that it is generally held that the bodies of the dead belong to the surviving relatives in order of inheritance and that they

6 *Toppin v. Moriarty* 44 Atl. p. 469 1899.

7 "The nature of rights in a dead body" 74 Penn. U. L. R. 404.

8 *Supra* note No. 2 it is held that there is no property in a dead persons body; however, the right to bury and preserve the remains is recognized and protected as a Quasi or psuedo property right.

9 *Bogert v. City of Indianapolis* 13 Ind. 134 1859.

10 *Aetna Life Ins. Co. v. Burton* 1938 12 N. E. 2d. 360; *Burns* 40-1227 Ind. Statutes.

11 No. 3 Ann cases 134; 14 Ann Cases 470; Ann cases 1918 D 733, 734.

12 *Southern Life & Health Ins. Co. et al. v. Morgan* 21 Ala. app. 5. 105 So. 161; 12 alr. 333.

13 *Ibid.* note No. 13.

14 6 Pa. Dist. Co. 275 (see C. J. New Sec. 42 p. 207).

are entitled to protect and enforce these rights as property rights¹⁵ even though they may be termed pseudo property rights. Where these rights are under contention the courts assume an equitable jurisdiction somewhat analogous to the jurisdiction over the care and custody of infants, making such dispositions as seem to be best and right under all circumstances.¹⁶

It is a fundamental legal concept that where there is a right there is a corresponding duty; the quasi-property right which entitles the heirs and survivors to the possession of the dead body is limited to the extent of the duty arising from sentiment and reverence to the memory of the deceased.¹⁷ Therefore the heirs or survivors entitled to possession of the dead body are responsible for a decent burial,¹⁸ and an action will lie against the heir or survivor, to whom a dead body is delivered for safekeeping, who fails to perform his duty.¹⁹

Today much of the discussion as to the person upon whom the duty of burial rests is eliminated by the funeral director who, upon authorization, removes the body of the deceased, and embalms it, thus assuming the duty of burial and leaving only the question as to who is liable for the expense. The liability for funeral expense should fall upon the person asserting the right to possession for the purposes of burial and consequently, wherever the law places the duty to bury, this duty brings a right to make charges against the assets of the estate.²⁰ Generally the liability for the funeral expense lies upon the person delegated by the deceased; the one to whom he gave his property, and if he had no property, then it falls to his legitimate heirs. Where the deceased dies intestate his administrator is liable for the funeral expenses; payable from the funds of the estate, however the right to assume possession of the deceased's body and the arrangement of his burial is vested in his heirs. Compensation for funeral or burial expenses is not due from the deceased as a debt.²¹ Where there is no estate, the funeral director may seek compensation from the county.²²

Some states hold that in the case of a married woman the obligation of her estate is paramount to the husband's duty.²³ In most states the

15 *Bogert v. City of Indianapolis* 13 Ind. 134 1859.

16 17 C. J. p. 1138 note No. 13.

17 56 Atl. 878; 125 Indiana 536.

18 *Pettigrew v. Pettigrew* 1904 Penna. Decent burial means a funeral which conforms to the living standards of the deceased. -Ex. banker leaves estate \$110,000. \$100. is not considered decent funeral; whereas, for an indigent or pauper it would be considered adequate.

19 125 Ind. 536 25 N. E. 822.

20 45 N. E. 748.

21 *Hildebrand v. Kinney Administrator* 172 Ind. 447 1909.

22 *Burns Indiana Statutes* 1933 Sec. 52-133.

23 *In re Van Zandt's Will* 247 N. Y. Supp. 441; 115 N. E. 492 *Hatton v. Cunningham* 162 N. Y. Supp. 1008; 1917. *In re Davis' Estate* 96 N. Y. Supp. 1106; 47 N. E. 407; 1905.

common law holds the husband liable. In Indiana it was held that the funeral director may proceed against the wife's estate, although the husband is ultimately liable.²⁴ In the case of an infant the father is liable if he is financially able.²⁵ Where the deceased is an infant survived by his mother only, the infant's estate, if any, would be liable,²⁶ if sufficient. If not, then the mother is responsible.²⁷ Where the father is insolvent, the infant's estate is liable for its funeral expense;²⁸ and, where there was no other source of payment, the infant's estate has paid for the father's funeral expenses.²⁹ If the deceased's estate be insolvent, it is held that the right and duty of payment of funeral charges is paramount to payment of the deceased's debts.³⁰

The basis for determining a decent burial is that the deceased's estate is liable to the extent of reasonable and necessary expenses in connection with his burial in accordance with his station in life.³¹ The cost of burial in case of the death of a wife or infant child may be said to flow from the father's duty to provide necessities for his wife and children.

When the deceased dies intestate the duty created by statute to bury the deceased, also provides, that the burial be at public expense when there are no relatives or friends willing to assume the obligation.³²

Now, that we have established the nature of the interest in the dead human body and found that those who are his legitimate heirs inherit duties and their accompanying legal rights, insofar as burial is concerned, we are faced with the problem that the deceased may have affected these interests and rights by his action prior to death, as to the disposition of his remains.

It is interesting to note that the funeral director may be delegated by the deceased prior to death, to assume the protection of the deceased's rights ordinarily vested in his survivors or his executors. This contract is known to the funeral director as a "pre-arranged funeral" by the terms of which the deceased's body is disposed of according to the laws of public health and sanitation; with special emphasis to the deceased's particular wishes in regard to the manner and method of disposal of his mortal remains. This right of the deceased to control the disposal of his own bodily remains after death, seems to be a property right;

24 Phillips et al. v. Tribbey et al. 1923 Ind. App. 141 N. E. 262.

25 Rowe v. Roper et al. 1899 23 Ind. App. 27.

26 In re Lyons Estate 1912 137 N. Y. Supp. 171.

27 Ibid. No. 26.

28 Mailten v. Mailten 1909 44 Ind. App. 559.

29 In re Nevilles Estate 1933 263 N. Y. Supp. 528.

30 In re Ellis' Estate 1920 179 N. Y. Supp. 873. Friedman v. Kelly 1933 266 N. Y. Supp. 717.

31 In re Billman's Will 257 N. Y. S. 491 1932; In re Davis' Estate 114 N. Y. S. 722 1905; In re Powers' Estate 134 N. Y. S. 967 1911.

32 Supra 263 N. Y. Supp. 528 1933.

insofar as he exercises dominion over his body by means of a legal document it is merely a right existing in the deceased, to dispose of his body, by delegating the living to protect his right.³³

In the absence of such a contract the deceased may have done practically the same thing by delegating his heirs to be, by will, to assume the duties and rights in connection with his burial.

Thus, we find that the nature of the interest in a dead person's body is a pseudo or quasi-property right³⁴ vested in his legitimate heirs and survivors in the order of inheritance of property,³⁵ creating in them a duty³⁶ to bury his mortal remains and giving them a right in law to protect this duty;³⁷ and finally that the deceased may, prior to death, have vested by legal document in anyone whomsoever he chooses the right to assume the dominion over his body for purposes of burial.³⁸

—*Peter F. Nemeth.*

33 86 S. E. 30; 113 Eng. Repts. 1007.

34 *Renihan et al. v. Wright et al.* 1390, 125 Ind. 536.

35 *Supra*, 13 Ind. 134.

36 56 Atl. 878 *Pettigrew v. Pettigrew*; *Supra*, 125 Ind. 536.

37 *Supra*, 12 A. L. R. 333. also *ibid.* 56 A. T. L. 878.

38 *Supra*, 257 N. Y. S. 491, 1932.