

Opinion No. 66-116

October 20, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Gary O'Dowd, Assistant Attorney General

TO: Mrs. Audrey Immel, State Registrar, Vital Statistics Division, Department of Public Health, Santa Fe, New Mexico

QUESTION

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Is the power of the State Registrar to issue permits prior to disinterment of a dead body in conflict with Section 40A-12-2 of the Criminal Code?

CONCLUSION

See Analysis

OPINION

{*157} ANALYSIS

Since 1937, the Department of Public Health has had the power to regulate the disinterment of the dead by virtue of Section 12-1-4 (12), N.M.S.A., 1953 Compilation, which provides that the health department shall,

Regulate the disposal, transportation, interment and disinterment of the dead, to such extent as may be reasonable and necessary for the protection of the public health and safety.

{*158} In Attorney General Opinion No. 2029, issued August 15, 1938, this office said that under the above quoted subsections the Department of Public Health may require its permission as a condition precedent to the disinterment of any dead human body, but that this did not mean that a court order would not be necessary where there were objections from third parties.

Subsequently, in 1961, the Legislature made it the duty of the State Registrar of the Division of Vital Statistics of the Department of Public Health to issue a permit prior to disinterment of a dead body or fetus except as authorized by regulation or otherwise provided by law. See Section 12-4-43 (D), N.M.S.A., 1953 Compilation, (P.S.). Two years later our new Criminal Code was enacted, Section 40A-12-2 of which made it a misdemeanor to knowingly disturb or remove the remains of any person permanently

interred, other than pursuant to an order of the district court. Section 40A-12-2, N.M.S.A., 1953 Compilation.

You have asked whether Section 12-4-43 (D) supra, and 40A-12-2, supra, conflict. It is the general rule that effect, if possible, must be given to both of two statutes covering the same subject matter, unless absolutely irreconcilable. **Atchison, T. & S.F. Ry. Co. v. Town of Silver City**, 40 N.M. 305, 59 P. 2d 351 (1936). Here we have two statutes covering the same subject, the disinterment of human bodies, which were enacted for different reasons and which may be construed consistently.

The Department of Public Health has two interests in the disinterment of bodies. First of all they have the interest of the public health and safety. Secondly, they have the interest of keeping a uniform system of burial statistics. The courts, on the other hand, have been given jurisdiction over all disinterments to guarantee that the wishes of the decedent and the rights and feelings of interested relatives may be heard before disinterment. Thus the health department and the courts each have a separate and distinct function.

However, even though the health department and the district courts each have separate and distinct functions it is apparent that conflicts may develop in the performance of these functions. When a district court orders disinterment a legal interest of the health department will of necessity be directly affected. For this reason we are of the opinion that the health department is a necessary or indispensable party in disinterment actions brought in the district courts of this state.