

## Opinion No. 38-2029

August 15, 1938

**BY:** FRANK H. PATTON, Attorney General

**TO:** State Department of Public Health Santa Fe, New Mexico. Attention: Miss Billy Tober, State Registrar and Bookkeeper

{\*261} We have your letter dated August 11th wherein you inquire generally as to the authority of the State Department of Public Health to give permission for the disinterment of dead human bodies.

In the absence of statute the general rule is that the disturbance of the resting place of a body and its removal therefrom is subject to the control and direction of a court of equity in a case properly before it.

The general rule with respect to the disturbance or removal of a dead body from its resting place, in the absence of statute, is stated as follows:

{\*262} "There is a distinction between the rights existing prior to burial, and those after burial, because after its interment the body is in the **custody of the law**, and a disturbance of its resting place and its removal is subject to the control and direction of a court of equity in any case properly before it. The right to have a dead body remain unmolested is not an absolute one; it must yield where it conflicts with the **public good** or where the **demands of justice** require such subordination. A court will not, however, order a body to be disinterred unless there is a strong showing that it is necessary and the interests of justice require it." 17 C. J. 1140.

In most jurisdictions the matter of disinterment of the dead is regulated by statute. In this state we have no express statutory regulation concerning this subject, but rather the regulation of the disinterment of the dead has been delegated by the Legislature to the State Department of Public Health in so far as public health and safety are concerned.

Section 4 of Chapter 39, New Mexico Session Laws of 1937, provides as follows:

"The State Department shall be responsible for the administration of the public health activities of the state as hereinafter provided, and in that respect shall:

\* \* \*

"(12) Regulate the \* \* \* disinterment of the dead, to such extent as may be reasonable and necessary **for the protection of the public health and safety.**

\* \* \*

"(19) Establish, maintain and enforce such rules and regulations as may be necessary to carry out the intent of this Act and to publish same."

It is to be noted that the foregoing statutory provisions do not delegate to the State Department of Public Health unlimited regulatory power covering the disinterment of the dead, but rather the Department is limited in its duties and powers to adopt and enforce rules and regulations pertaining to the disinterment of the dead only from the standpoint of the "protection of public health and safety".

From a public health and safety standpoint, therefore, the Department of Public Health may, by proper rule or regulation, require its permission as a condition precedent to the disinterment of any dead human body.

However, the mere fact that your Department may approve a disinterment from a public health standpoint does not constitute a waiver by the relatives of the deceased or others as to any non-public health objections that they may have to the disinterment.

In other words, your Department does not pass on the motives or legality of the disinterment from the standpoint of the rights of the owners of the burial lot or relatives of the deceased, or the rights of some cemetery association or religious congregation which may be maintaining some cemetery, etc. Your Department should be guided only from a public health and safety standpoint. All others must go further and in addition to the permit must be guided by the following enunciated principles:

"By the English ecclesiastical law, a body once buried could not be removed without license from the ordinary, and under the Roman law it was necessary to get the permission, in Rome, of the pontifical college, and, in the provinces, of the governor. In this country, also, the {263} consent of the owner of the grave or of the proper municipal or judicial authority has been held essential. Owing to considerations of the public health and welfare, and to respect for the dead and for the feelings of the survivors, the courts are reluctant to order or sanction the removal of a body after interment. The presumption against the right of removal grows stronger with the remoteness of connection with the decedent, and the court always has the right to require reasonable cause for removal and reinterment. \* \* \* But there is no universal rule governing the right of removal. Each case must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association." 8 R. C. L., page 691, Section 13. "In proper cases a court of equity will interfere by injunction, at the instance of relatives of the deceased, to prevent the unauthorized disinterment or removal of remains, and where a body has already been unlawfully removed equity may order that it be restored to the place whence it was taken. But equity will not interfere where the removal is in the exercise of police power or other legal authority, \* \* \*." 8 R. C. L., page 697, Section 20.

"The right of relatives of a deceased person to have his corpse remain undisturbed after burial must yield to the public interests, \* \* \*." 8 R. C. L., page 697, Section 21.

"If the owner of the land consents to the interment of the deceased in his property, he cannot afterward remove the body against the will of the next of kin or the surviving spouse. Furthermore, a failure to object for a long time precludes the owner from claiming that the interment was without his consent." 17 C. J. 1142.

"The owner of land where a corpse is buried is entitled to object to removal of the remains therefrom." 17 C.J. 1142. "The right to object to the removal of the remains may be lost by failing to make timely objection thereto." 17 C.J. 1142. "Except in cases of necessity or for laudable purposes the policy of the law is that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed." 17 C.J. 1139.

Of course, the statements of law last above quoted are not binding on your Department. However, they are listed here merely for your information because in the course of time applicants for permits to disinter bodies will undoubtedly inquire whether a permit from your Department gives them the undisputed right to remove the body regardless of objections from third parties that may be interested.

Trusting the foregoing sufficiently answers your inquiry, I am,

By: FRED J. FEDERICI,

Asst. Atty. Gen.