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The testamentary powers of an executor: Should property rights be granted in regard to the testator's body for ...

JULIA JURISICH STRICKETT

**THE TESTAMENTARY POWERS OF AN
EXECUTOR: SHOULD PROPERTY RIGHTS BE
GRANTED IN REGARD TO THE TESTATOR'S
BODY FOR THE PURPOSE OF BURIAL?**

SUBMITTED FOR THE LLB (HONOURS) DEGREE

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*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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I INTRODUCTION

Despite the increasing secularisation of Western death culture, traditional death rituals such as burial of the deceased's body and attending the burial site continue to be of significant social importance.¹ The act of burial is of particular importance in death rituals for two reasons. Firstly, burial "represents a social marking and recognition of the ending of a life"² and secondly, it acts as reassurance for living people that they too may have some control over their own burial when they die.³

Since September 2007, the New Zealand media has reported three high profile cases of "body-snatching" which involved the unauthorised removal and retention of the deceased's body by a Maori family member in disagreement of the proposed burial arrangements.⁴ The three cases highlighted the difficulties encountered when the executor or administrator of the deceased attempted to recover the body for burial. It has been acknowledged that, in such circumstances an executor's common law right to possession of the body may be insufficient to achieve the deceased's burial wishes.⁵ In response to this, the Bill of Rights / Human Rights division of the Ministry of Justice are seeking to evaluate the adequacies of the current legal mechanisms for effecting burial wishes.⁶ In addition to this, some relevant professionals have subsequently proposed vesting property rights in an executor as a viable means of securing possession.⁷

¹ Daniel Miller and Fiona Parrot, "Death, Ritual and Material Culture in South London" in Belinda Brooks-Gordon and others (eds) *Death Rites and Rights* (Hart, Oxford, 2007) 150

² Belinda Brooks, Gordon (ed), *Death Rites and Rights* above n 1, 1

³ Lisa Owen "Stand Off After Body Snatch" (6 March 2008) *6pm One News Report*

⁴ The case of James Takamore was reported by Martin Van Beynen "Family split over body's removal" (15 September 2007) *The Press* Christchurch at <http://www.stuff.co.nz>; The case of Ivy May Ngahooro was reported by Belinda Feek "'Snatched' body returned to family: Injunction makes body snatching burial 'criminal act'" (07 March 2008) *The Dominion Post* Wellington at <http://www.stuff.co.nz>; the case of Tina Marshall was reported by Ben Fawkes "Family irate as father takes body" (13 December 2007) *The Dominion Post* Wellington at <http://www.stuff.co.nz>.

⁵ Interview with Dr Cordelia Thomas, Senior-Legal Advisor for the New Zealand Bioethics Council (Kathryn Ryan, Nine to Noon, National – Radio New Zealand, 10 March 2008) at <http://www.radionz.co.nz/national/programmes/ninetonoon>; also see Sir Geoffrey Palmer's statement in "Body snatching case leads to review" (21 February 2008) *The Press* Christchurch at www.stuff.co.nz

⁶ Charlotte Boyer, Policy Analyst, for the Ministry of Justice, "Re: Property rights in human tissue / "body-snatching"" (9 July 2008) Email

⁷ Interview of Simon Manning, Funeral Director of Seddon Park Funeral Parlour (Pippa Wetzel, TV One Breakfast, 7 March 2008) at <http://tvnz.co.nz/content>

This paper will, firstly, seek to examine the legal ability of a testator to achieve his or her burial wishes. It will examine the nature of an executor's common law right to possession of the body with regards to the statutory regimes which become operative at the time of death such as the Coroners Act 2006 and the Administration Act 1969. It will also examine the nature of the executor's right to possession against the conflicting opinions of relatives. Subsequently, it will show that, even in cases where there is no dispute between family members, there are many factors which may limit the ability of a testator's to achieve his or her burial interest. A testator's burial interest is often subject to public interest and to the interests of his or her family.

Secondly, it will argue that when a body is removed and retained by a third party without authorisation, the legal rights given to an executor are insufficient to achieve the burial wishes of the deceased.

Thirdly, it will examine whether vesting property rights in the body is an appropriate means of achieving the testator's burial wishes. Upon examination of some of the key property paradigms, this paper will conclude that, although the human body does not automatically fall outside the common law description of property; according property rights in a corpse may prove problematic in practice.

Before proceeding with this paper, one must acknowledge the inaccuracy of "body-snatching" as a means of describing the unauthorised removal of a deceased family-member's body for burial. In contrast to the original "body-snatching" cases of the 18th and 19th Century for anatomical study, the three aforementioned cases of removal were motivated by grief, not by greed. Such an evocative term is, therefore, obstructive to a proper legal analysis of the current issue.

II THE LEGAL ABILITY OF A TESTATOR TO ACHIEVE HIS OR HER BURIAL WISHES

A Introduction

Belinda Brooks suggests that how society views death is determined by the legal rights conferred in regard to the treatment of the corpse after death.⁸ In New Zealand and throughout Western legal systems, liberal philosophy has essentially given rise to, and justifies the right of a *living* individual to have some degree of control over matters such as distribution of his or her estate and burial of his or her body once they die.⁹

Accordingly, the law has provided the testamentary instrument of a 'will' which creates and enforces this liberal concept of the 'individual'. As Sarah Cooper suggests, the creation of a will is "an act of faith in one's legal system that is founded upon the concept of the individual subject."¹⁰ A will is a document which is legally capable of disposing of a testator's property.¹¹ In order to have this legal capacity, a will must fulfil certain statutory criteria; it must appoint an executor,¹² the testator must have reached full capacity,¹³ and the will must satisfy specific statutory formalities.¹⁴

As the common law prescribes, the authorised executor of a will must, as his or her principle duty, "propound and maintain"¹⁵ the wishes of the deceased as evidenced by his or her will. Whilst this may include payment of debts and distribution of an estate amongst its heirs, it will also include the specific responsibility of organising burial of

⁸ Belinda Brooks, Gordon (ed), *Death Rites and Rights* above n 1, 1

⁹ This is in contrast to according rights to a *deceased* person, Price highlights the substantial disagreement regarding the extent of a dead person's ability to possess rights in David Price "Property, Harm and the Corpse" in *Death Rites and Rights*, above n 1, 200

¹⁰ Sarah Webster Cooper "Rites, Rights, Writing: Tintern Abbey" in *Death Rites and Rights*, above n 1, 136

¹¹ 22. Instruments over which probate may be granted, (4) Instruments Entitled to Probate, Part 1 The Grant of Probate or Administration, Administration of Estates Vol 1, *The Laws of New Zealand* as on the 28 August 2008

¹² See *Re Leese* (1862) 164 ER 1068; *Re Hornbuckle* (1890) 15 PD 149

¹³ s.9(1) Wills Act 2007; a person must be over the age of 18 to create a will unless he or she satisfies any requirement under s.9(2) – (4) Wills Act 2007

¹⁴ A will must be in writing, signed and witnessed in accordance with ss.11 – 12 Wills Act 2007

¹⁵ N Richardson, *Nevill's Law of Trusts, Wills and Administration* (LexisNexis NZ, Wellington, 2004), 485

the deceased.¹⁶ Accordingly, the common law entitles an executor to possession of the body for the purpose of burial.¹⁷

B The Executor's Common Law Right to Possession

1 An executor's right to possession will prevail over the wishes of relatives

Subject to some statutory regimes which will be discussed shortly, an executor's common law right to possession is generally paramount when dealing with the body after death.¹⁸ In cases where there is conflict between family members, funeral directors, for example, will view an executor's decision to be determinative of the specific burial arrangements.¹⁹ An example of this is the case of *Grandison v Nembhard*, where a testator's burial wishes were performed by his executor and later upheld by the courts against the wishes of the testator's daughter. Although this meant the body was to be transported from the United Kingdom back to the testator's country of origin, Jamaica, the executor has a "perfectly proper desire"²⁰ to carry out the testator's wishes according to his will. As stipulated by Vinelott J;²¹

...the executor must have a discretion as to the mode and place for the disposal of the corpse of the deceased and that on ordinary principles the court will not interfere with the exercise of that discretion unless it is exercised in a way which shows that he has not properly weighed the factors which ought to have been taken into account in that it is wholly unreasonable.

According to this statement, the courts cannot interfere with an executor in the performance of his or her testamentary duties, unless his or her actions are "wholly unreasonable." In light of the facts of the case, it appears as though the powers of the executor are very broad and the standard of unreasonableness is particularly high. In cases such as these, it is very likely that the testator will achieve his or her burial wishes.

2 The Executor's highly discretionary power

¹⁶ *Re Stewart* [2003] 1 NZLR 809 para [24]

¹⁷ *Williams v Williams* 20 Ch D 659

¹⁸ See *Grandison v Nembhard* 4 BMLR 140 (CD) Vinelott J

¹⁹ Interview of Simon Manning, Funeral Director of Seddon Park Funeral Parlour (Pippa Wetzel, TV One Breakfast, 7 March 2008) at <http://tvnz.co.nz/content>

²⁰ *Grandison v Nembhard* 4 BMLR 140 [para 22] as per Vinelott J

²¹ *Ibid*

Whilst the right to possession of the body for the purpose of burial normally achieves the testator's burial wishes, an executor's power of interment is highly discretionary and the burial wishes of a deceased person are only perceived to be 'directional' when an executor is making burial arrangements.²² Because of this fact, an executor has the power to override the wishes of the deceased when deciding burial arrangements. This is evident in the historic case of *Williams v Williams*, where the courts denied reimbursement to a friend of the deceased who carried out his desired cremation after a burial was carried out by his executors.²³

...the law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried.

This power, the courts explained, is not subject to any express wish of the deceased as any specification given is only a "direction which [can] not be enforced at law."²⁴ In his judgment, Kay J stated that the action failed for reasons which included the deceased's body was buried in accordance with his family's wishes, notwithstanding the fact that her own actions were fulfilling the deceased testamentary stipulations.²⁵

As Dr Cordelia Thomas, senior-legal advisor for the New Zealand Bioethics Council explains, it is likely the 'directional' nature of a testator's burial specifications is a policy consideration to prevent unreasonably lavish funerals which are beyond the means of the remaining estate.²⁶ Blackstone similarly stipulated that "[an executor] must bury the deceased in a manner suitable to the estate which he leaves behind. Necessary funeral expenses are allowed, previous to all other debts and charges . . ."²⁷ It appears, however, that the case of *Williams v Williams* was not decided upon financial grounds, rather the form of interment proposed by the testator was not favoured by the family or society at the time.²⁸ This demonstrates that, in cases where

²² *Williams v Williams* above n 17

²³ *Ibid*

²⁴ *Ibid*

²⁵ *Ibid*

²⁶ Interview with Dr Cordelia Thomas, above n 5

²⁷ *Williams Blackstone Commentaries on the laws of England*, bk. 2, ch. 32, p. 508

²⁸ The courts seem to prefer an ecclesiastical interment for the deceased because it was in accordance with the prevailing Christian societal views of the time and because it was favoured by the deceased's family; see *Williams v Williams* above n 17

the testator's burial wishes are against that of the family and are socially abnormal, the courts may uphold the executor's discretionary decision.

Another reason why the executor is given a discretionary power of interment is that the common law originally conferred this obligation of procuring a timely burial upon a deceased's executor as a means of ensuring public sanity.²⁹ As a matter of public interest, it is important that an executor is provided with this discretionary power because it provides the means for a more efficacious interment.

3 *Human Tissue Act 2008 – statutory powers to achieve testamentary wishes*

The testamentary will may often include specific information regarding the use of the deceased's body tissue after he or she dies. It is valuable, therefore, to include the use of tissue and organ donation in an examination of the executor's testamentary powers.

The recently enacted Human Tissue Act 2008 is one of the first statutory regimes to become operative after a person dies. The purpose of the Act is to regulate the collection and use of human tissue from an individual in accordance with the "autonomy and dignity of the individual"³⁰ and the cultural and spiritual values of the individual's family.³¹ It is important to recognise that this Act acknowledges the approval of both the deceased individual (as expressed when he or she was alive) and his or her family.

The Act appears to create fairly sound measures for ensuring the interests of the deceased individual are upheld. Providing "informed consent" is given by the deceased individual in accordance with s.9(1) and s.31(2) of the Act, the deceased's body may; undergo a post-mortem, be used for anatomical examination, research, public display, or in the development of therapeutic extracts.³² However, the definition of "informed consent" requires the deceased individual to have been aware of the *nature* of the use when he or she provided consent.³³ So whilst the Act does

²⁹Interview with Dr Cordelia Thomas, Senior-Legal Advisor for the New Zealand Bioethics Council (Kathryn Ryan, Nine to Noon, National – Radio New Zealand, 10 March 2008) at <http://www.radionz.co.nz/national/programmes/ninetonoon>

³⁰ s.3(a)(i) Human Tissue Act 2008

³¹ s.3(a)(ii) Human Tissue Act 2008

³² s.6 Human Tissue Act 2008

³³ s.9(1)(a) Human Tissue Act 2008

provide the deceased individual with a right to determine the use of his or her body tissue after death, it may be very difficult to obtain the exact consent required to satisfy section 9(1)(a). Alternatively, the deceased individual may nominate his or her executor to provide "informed consent" pursuant to s.31(2)(b).³⁴ It is only in the absence of these two scenarios that the deceased's family may legally "object"³⁵ to the use of his or her body tissue.

C Limitations to Achieving a Testator's Burial Wishes

Whilst the executor's right to possession is usually sufficient for achieving the testamentary wishes of the deceased; the executor's right to possession is affected by statutory regimes which become active after death has ensued.

1 The Coroners Act 2006

The Coroners Act 2006 places limitations upon the executor's common law right to possession of a corpse. The statute accords the police and designated coroner the right of possession when death has ensued in any "reportable" circumstance.³⁶ These include suicide, death in "unnatural or violent" circumstances, death whilst undergoing medical or dental treatment and death whilst in custody of a government agency exercising any of the specified statutory powers.³⁷ According to section 18(1), possession by the police extends from when "a member of the police first suspects on reasonable grounds"³⁸ that death occurred in any of the reportable circumstances prescribed until the body is reported to the designated coroner. Once this occurs, the coroner's right to possession operates until he or she orders the release of the body for burial.³⁹ Even once the body is returned to the executor after post-mortem, the Coroners Act 2006 allows for retention of body parts and samples providing the samples are "minute"⁴⁰ or "necessary for the purpose of post-mortem,"⁴¹ and the family has been advised.⁴²

³⁴ s.31(2)(b) Human Tissue Act 2008

³⁵ This will override the consent required under s.31(2)(c)

³⁶ s.13(1) Coroners Act 2006

³⁷ Ibid.

³⁸ s.18(1) Coroners Act 2006

³⁹ s.19(1)(b) Coroners Act 2006

⁴⁰ s.48(2)(a) Coroners Act 2006

⁴¹ s.48(2)(b) Coroners Act 2006

⁴² s.50(1) Coroners Act 2006

2 *The Administration Act 1969*

Even if the deceased's death does not warrant police or coroner custody, an executor's right to possession does not occur immediately upon death. Pursuant to the Administration Act 1969, an executor must apply to the High Court to make a grant of probate or letters of administration.⁴³ Once this has occurred, the deceased's will and appointment of the executor will be legally valid providing the court exercises its discretionary power of appointment in accordance with the testator's will.⁴⁴ The Act is also important as it declares the continuing jurisdiction of the courts to appoint a testamentary administrator in cases where the deceased has died intestate.⁴⁵ For the purpose of clarity, further references made to an "executor" will include an administrator who has been appointed by the courts, as their rights to the deceased's body are identical once administration has been granted.⁴⁶

3 *The unauthorised removal and retention of a corpse – another limitation to the executor's right to possession*

The final way in which the burial wishes of a deceased person may fail to be fulfilled is if the executor attempts to realise such wishes but is subsequently impeded from doing because an unauthorised removal and retention of a corpse by a person has occurred. There is a *legal* explanation for the unauthorised removal of a body; it subsists in the absence of robust legal rights conferred to the executor for the purpose of recovering a corpse.

The three recent cases of unauthorised removal and retention of a corpse were able to occur because executorial disputes are determined to be matters warranting a civil action.⁴⁷ The police in all three cases were unable to intervene because no criminal offence exists pertaining to the removal of a body for an alternative burial. The only criminal offence relative to the treatment of human remains provides the police with a means of intervention should a party engage in "misconduct in respect of human

⁴³ s.5(2) Administration Act 1969

⁴⁴ s.6(1) Administration Act 1969; s.5 Principal duty of the Court, (1) Jurisdiction, The Grant of Probate Part 1, Administration of Estates Vol 1, *The Laws of New Zealand* (accessed on 28 August 2008); s.5 Administration Act 1969

⁴⁵ s.6(1) Administration Act 1969

⁴⁶ Dr Cordelia Thomas Interview, above n 5

⁴⁷ Interview with Dr Cordelia Thomas, above n 5

remains.”⁴⁸ The provision’s effect is confined to situations where the party fails to dispose of the body pursuant to his or her legal duty, or improperly interferes or offers indignity to human remains.⁴⁹ Section 150 was not relevant to the removal of Tina Marshall’s body, for example, because her father was not offering indignity to her body, rather that he disagreed with cremating her body and so attempted to bury her in keeping with traditional Māori practise.⁵⁰

The unauthorised removal and retention of a body cannot, therefore, become a criminal offence until the executor made an application for a court injunction.⁵¹ Once a court injunction has been granted, the body may be exhumed.⁵² Offences relating to the burial of a body pursuant to the Burial and Cremation Act 1964 are inadequate in achieving the burial wishes of the deceased because they focus on person who removes the body and his or her unlawful behaviour, and they require the body to have been already buried before an offence can be committed.⁵³ For example, section 55 creates an offence for the unlawful exhumation of a body which would be applicable in circumstances where the body is already buried.⁵⁴ But the provision focuses on the punishment a person will receive, rather than specifying an automatic right for an executor or administrator to recover the body via police intervention.

Moreover, whilst the courts can provide the executor with a licence for exhumation, an executor still may not be able to achieve the intended interment service. In the case of Tina Marshall, for example, it was too late to have the body viewed by relatives by the time a licence for exhumation was granted.⁵⁵

⁴⁸ Crimes Act 1961, s.150

⁴⁹ Crimes Act 1961, s.150

⁵⁰ Heather du Plessis-Allan “Feud Over Body Intensifies” (13 December 2007) *6pm One News Report*; Tina’s paternal family buried her on ancestral land at Rangitukia on the East Coast of New Zealand, Ben Fawkes “Family set to apply to have body exhumed” (14 December 2007) *The Dominion Post* Wellington, at <http://www.stuff.co.nz>

⁵¹ Ben Fawkes “Family set to apply to have body exhumed” (14 December 2007) *The Dominion Post* Wellington, at <http://www.stuff.co.nz> (as stated by Ruatoria Sergeant, Hone Herewini)

⁵² Burial and Cremation Act 1964, s.51(1)

⁵³ To commit an offence the body must be buried by a person and then be unlawfully exhumed pursuant to Burial and Cremation Act 1964, s.55 or be unlawfully buried by an individual pursuant to Burial and Cremation Act 1964, s.54

⁵⁴ Burial and Cremation Act, s.55

⁵⁵ Heather du Plessis-Allan “Feud Over Body Intensifies” above n 51

There are several reasons which favour the evaluation of current testamentary law. Firstly, as stated by Russell Scott, “without a proper evaluation of the laws surrounding body parts and tissue, grave social damage could ensue and unacceptable practices may be solidified.”⁵⁶ Although speaking in favour of legislative clarification for medical and scientific use, Scott’s argument has particular relevance for the cadavers at the centre of death rituals. If the law in this area is not subject to evaluation, the unauthorised removal and retention of bodies is likely to reoccur because anguished family members may see this as a viable means of securing possession.

Secondly, Scott argues that allowing the legal status of the human body to remain unexamined may be detrimental to the reputation of people involved when disputes arise.⁵⁷ Whilst Scott uses the example of a medical practitioner facing homicide investigations or a civil action in regard to medical treatment of a deceased patient; the same argument is also applicable to the actions or inactions of the funeral director, executor, police and relatives of the deceased when an unauthorised removal occurs.

Similar to the unauthorised removal of a corpse, Scott argues that there are polarised views of organ usage and control. As demonstrated in the three recent cases, one side often argues for the “personal autonomy”⁵⁸ of the deceased individual,⁵⁹ whilst the other side argues for the collective or community good irrespective of the individual’s views.⁶⁰ Scott argues that in the case of organ donation, the former view may contravene the wishes of the deceased’s family but the later may fail to protect the interests of the individual.⁶¹ This argument too can be applied to human burials where the views of the deceased individual and family are at variance, or where family members of the deceased have different cultural values with regards to interment. Scott argues that more robust laws are required to obviate such disputes.⁶²

⁵⁶ Russell Scott, *The Body as Property* (The Viking Press, New York, 1981), 66

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, 91

⁵⁹ For example, in the case of Ivy May Ngahooro the deceased included in her will that she intended to be buried in Hamilton. Her executor and niece, name, was attempting to recovery the body to achieve this burial; Belinda Feek “‘Snatched’ body returned to family” (07 March 2008) *Waikato Times* at <http://www.stuff.co.nz>

⁶⁰ Russell Scott, above n 57, 91;

⁶¹ *Ibid.*

⁶² *Ibid.*

D Conclusion *It is a Corpse – the Practical Effect*

To conclude, it is important that the executor's common law right to possession and his or her power as nominee pursuant to the Human Tissue Act 2008 are usually sufficient for interment of the deceased in accordance with stipulated burial wishes. However, it must be also recognised that even in cases where the deceased's body is not removed, executorial powers are subject to other limitations, such as those contained in the Administration Act 1964 and the Coroners Act 2006. A deceased's burial wishes may also be limited by the executor's discretionary power and, in some cases, the interests of the relatives. In cases where there is an unauthorised removal, the executor's right to possession has proved to be insufficient when attempting to fulfil the burial wishes of the deceased.

... without consent²⁴ and with the intent to permanently deprive any owner of the body or any interest in the body.²⁵ 'Intent to permanently deprive' the executor of the body pursuant to section 219(2)(a) would be satisfied as the body would be incapable of being returned to the executor 'in the same condition'.²⁶

In accordance with the criminal offence of theft, those who removed a body owned by an executor would thus attract the corresponding criminal conviction of imprisonment not exceeding seven years,²⁷ and the executor could call upon relevant tortious remedies such as suing for conversion.²⁸ Not only would property rights convey more robust remedies to an executor, but the police could also invoke powers of search and seizure providing there is a 'reasonable belief' of possession.²⁹

However, for theft to apply to those who remove and reuse a corpse without authorisation, the human body must constitute 'property'.³⁰ Section 2(1) stipulates

²⁴ *Belinda Peak* "Shredded body returned to family" (07 March 2008) *Waikato Times* at <http://www.stuff.co.nz>; Dr Coriella Thomas, Radio NZ-interview, Interview of Simon Manning, Funeral Director of Seddon Park Funeral Parlour (Papa West, TV One Breakfast, 7 March 2008) at <http://www1.m3.co.nz>

²⁵ *Crimes Act 1961*, s.219(1) – not including post-mortem by consent.

²⁶ *Crimes Act 1961*, s.219(1)(a) and (b).

²⁷ *Crimes Act 1961*, s.219(a) (b).

²⁸ Interview with Dr Coriella Thomas, Senior-Legal Advisor for the New Zealand Bioethics Council.

(Kathryn Ryan, *News to Noon, National* – Radio New Zealand, 10 March 2008) at <http://www.radionz.co.nz/national/programmes/newsnow>

²⁹ *Crimes Act 1961*, s.224(1)(a)(i).

³⁰ *Crimes Act 1961*, s.219(1) – 'property' defined.

III THE BODY AS PROPERTY

A Property Rights in a Corpse – the Practical Effect

The three recent cases of corpse removal have brought into question the legal power of an executor to retain or recover a corpse. Subsequently, many involved parties such as affected families, funeral directors and some legal professionals have suggested vesting property rights in a body may be the legal solution.⁶³

If an executor were to be given property rights to the testator's corpse under consideration, the practical effect would be that the corpse would be legally capable of being stolen. Pursuant to section 219(1) of the Crimes Act 1961, the person who removed the body would have committed the criminal offence of theft as he or she would have taken or dealt with the body without consent⁶⁴ and with the intent to permanently deprive any owner of the body or any interest in the body.⁶⁵ 'Intent to permanently deprive' the executor of the body pursuant to section 219(2)(a) would be satisfied as the body would be incapable of being returned to the executor "in the same condition."

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⁶³ Belinda Feek "Snatched' body returned to family" (07 March 2008) *Waikato Times* at <http://www.stuff.co.nz>; Dr Cordelia Thomas, Radio NZ Interview; Interview of Simon Manning, Funeral Director of Seddon Park Funeral Parlour (Pippa Wetzel, TV One Breakfast, 7 March 2008) at <http://tvnz.co.nz/content>

⁶⁴ Crimes Act 1961, s.219(3) – taking does not include possession by consent

⁶⁵ Crimes Act 1961, s.219(1)(a) and (b)

⁶⁶ Crimes Act 1961, s.223(a)-(d)

⁶⁷ Interview with Dr Cordelia Thomas, Senior-Legal Advisor for the New Zealand Bioethics Council (Kathryn Ryan, Nine to Noon, National – Radio New Zealand, 10 March 2008) at <http://www.radionz.co.nz/national/programmes/ninetoon>

⁶⁸ Crimes Act 1961, s.224(1)(a)(i)

⁶⁹ Crimes Act 1961, s.219(1)

property to “include real and personal property, and any estate or interest in any real or personal property...and any thing in action, and any other rights or interest.”⁷⁰ Whilst it is evident parliament does not intend the Crimes Act to define ‘property’ exhaustively, the common law has generally precluded human tissue from being property on the grounds that it is incapable of being owned.⁷¹

B Common Law Status of the Human Body – “No-Property”

Haynes’s Case is often cited as being the first identifiable cases to articulate the legal status of a corpse as ‘no-property’.⁷² The case involved a person who removed from several graves, the winding sheets used to wrap the deceased and whether the person had ‘stolen’ the winding sheets from the deceased. It was held that taking the sheets could not constitute theft as a deceased person is not capable of owning property.⁷³ Magnusson, however, has suggested that the case has been incorrectly applied in subsequent cases as authority for that no property rights can subsist in a dead body.⁷⁴

Despite the rule’s uncertain legal conception, theorists such as Sir Edward Coke have also asserted that because corpse has assumed a spiritual status it is “nullius in bonis” or unable to be owned by anyone.⁷⁵ Subsequently, the rule that “the law recognises no property in a corpse”⁷⁶ has been extended to preclude a person from owning body tissue.⁷⁷

The reluctance of the legislature and common law to confer property rights upon an individual in respect of a human body is likely to be derived from an apprehension that a body would become commodified; thus affecting or diminishing the person’s own human dignity.⁷⁸

⁷⁰ Crimes Act 1961, s.2(1)

⁷¹ *Williams v Williams* (1882) 20 Ch D 659; *R v Price* (1884) 12 QBD 247; *Awa v Independent News Auckland Ltd* [1995] 3 NZLR 701; *R v Lynn* (1788) 100 ER 394; *R v Sharpe* (1857) 169 ER 959. There are some exceptions such as the “work and skills exception” which will be discussed subsequently

⁷² M Davies and N Naffine, *Are Persons Property?: Legal debates about property and personality* (Ashgate, England, 2001), 106

⁷³ *Hayne’s Case* (1614) 77 ER 1389, 1389

⁷⁴ Magnusson R, “The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions.” (1992) 18 Melb U LR 601 at 603

⁷⁵ Edward Coke, *Institutes of the Laws of England Part III* (Thames Baset, London, 1680) 203

⁷⁶ *R v Sharpe* 169 ER 959, 960

⁷⁷ *Moore v Regents*, 487

⁷⁸ Dr Cordelia Thomas Interview above n 5

C Exceptions to the 'No-Property' Rule - The 'Work and Skills' Exception

Although it is well established that no one may own a corpse or body tissue, the courts have allowed a limited number of exceptions. The seminal case of *Doodleward v Spence* created an exception to the no-property rule where a person had employed skill and labour with respect to a corpse.⁷⁹ In this case, the courts justified according property rights with respect to a stillborn two-headed foetus because a person formally in possession of the corpse had exercised skill and labour in its preservation.⁸⁰ As held by Griffith CJ;⁸¹

when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial...

In contrast to this, Gibson LJ in a later case disagreed that preservation of human tissue could legally transform it to constitute property. In *Dobson v North Tyneside Health Authority*, he stated that preservation of the deceased's brain was not analogous to embalming a corpse or preserving an anatomical specimen and so can not be accorded property status on the basis of the "work and skills exception".⁸² This demonstrates that a fairly high standard of skill and labour must be employed before human tissue can become to subject of property.

D Historical Exceptions

Whilst it is now well-established that humans are incapable of constituting property, most cultures have a history of human ownership.⁸³ Russell Scott describes historical slavery as "institutionalised" and "sophisticated" because it used social, legal and economic mechanisms present in society to maintain its system.⁸⁴

⁷⁹ *Doodleward v Spence* (1908) 6 CLR 406; see also *In re Organ Retention Group Litigation* [2004] EWHC 644 (QB) [para 148]

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, 414

⁸² *Dobson and another v North Tyneside Health Authority and another* [1996] 4 All ER 474 (CA) Peter Gibson LJ

⁸³ Ancient Romans could own 'potestas' and their progeny - Davies and Naffine above n 72; Russian landowners owned serfs until the Emancipation Reform of 1861; the Slavery Abolition Act was enforced throughout the majority of the British colony in 1833.

⁸⁴ Russell Scott, above n 57, 27

1 “Body-snatching” and the Anatomy Act 1832

Until a revival of anatomical study during the Renaissance era, studies of the human body conducted during the 2nd century formed the majority information accessed by early anatomists. However, during the 16th and 17th Centuries, the way in which anatomical study was conducted changed significantly, bringing a greater focus to the human body and its components as it exists rather than the human body as a vague and abstracted concept.⁸⁵

This new prevailing perception of how the human body should be studied created the need for a consistent supply of subjects. The dissection of human corpses was seen as the most effective and least harmful means of discovering anatomical systems and their function within the human body. In response to this need, King Henry VIII granted the Edinburgh Guild of Surgeons and Barbers the “annual right” to the bodies of four hanged felons.⁸⁶ Subsequently, the number of cadavers supplied was increased and the laws changed so that the corpses of convicted murders sentenced to execution were conferred for dissection.⁸⁷

This supply, however, failed to satisfy the growing number of corpses required by the medical profession; people then began exhuming the graves of the recently deceased and selling their corpses. As Ruth Richardson suggests, the increase in anatomical study is the “probable catalyst” for the commodification of the corpse⁸⁸

Despite body snatching being a discrete and largely isolated demand for human tissue in Western history,⁸⁹ the events of the 18th and 19th Century are highly popularised because of the peculiar status of the corpse at common law. Because cadavers are incapable of being owned, a body snatcher often evaded criminal liability for his or her actions as no offence of theft could be committed.⁹⁰

⁸⁵ Ruth Richardson *Death, Dissections and the Destitute* (Penguin, London, 1989) 32

⁸⁶ *Ibid*

⁸⁷ *Ibid*

⁸⁸ *Ibid*, 55

⁸⁹ Russel Scott, above n 57, 12

⁹⁰ *Ibid*, 58-59

In response to body-snatching, the legislature enacted the Anatomy Act 1832 to ensure an alternative and abundant source of cadavers for medical research and dissection. It allowed for medical researchers to use the 'unclaimed' corpses from public workhouses for dissection and study.⁹¹ The Act is very important because it highlights that the "inherent value" of the human body, as evinced by its 'no-property' status, has not always been treated consistently by the legal system. Indeed Ruth Richardson concedes that the Act was not designed to limit the effects of anatomical research to those who did not have a grieving family, rather those who were unable to pay for funeral expenses and resorted to a parish burial; "it was an *economic* decision" to provide the bodies of paupers than those who lacked a grieving family.⁹²

However, the retention of "unclaimed" corpses pursuant to the new legislation did not in fact extend to property rights, rather provided the medical profession with *use* of a corpse for a period of six weeks after which time the remains were required to be buried.⁹³

⁹¹ Ruth Richardson, above n 86, 121

⁹² Ibid, 186

⁹³ Ibid, 243

IV THE COMMON LAW CONCEPT OF PROPERTY

Whilst much thought and debate has been expended in the hope of decisively conceptualising property, there is still “no universal definition”⁹⁴ or checklist of elements that will, once satisfied, accord an individual property rights with respect to an object. This section will seek to highlight some of the main conceptualisations of property and determine whether a corpse is capable of fitting within these descriptions.

A Property as a Social Contract and the Regulation of Relationships

Thomas Hobbes is cited as one of the original modern-day property theorists.⁹⁵ His theories attempted to describe property as an instrument of social control. People, as Hobbes asserted, had an inherent need for power and control over things in their environment; but it was *reason* which motivated people to achieve these needs through constructed property norms.⁹⁶ Hobbes argued that a strong government and legal system created an environment that was conducive to social cultivation.⁹⁷ Therefore, people necessarily prescribed to legal norms such as property they were an efficient way of achieving a better way of life.

Hobbes’ rationale is well-suited to the current scenario because property rights would regulate the way in which an executor and the deceased’s family interacted. According to Hobbes’ theory, vesting property rights in an executor would stabilise social relationships and create a more ‘civilised’ funeral procedure.

F. W. Rudmin also extends Hobbes’ paradigm by specifying ‘dominance’ in social relationships as being a key motivation for property. As he contends, “ownership entails not only a private relationship between a person as owner and the property owned, but also an interpersonal, social relationship between the person as owner and other persons as non-owners.”⁹⁸ The relationship of particular importance to Rudmin

⁹⁴ C.M. Thomas *A Framework for the Collection, Retention, and Use of Human Body Parts* (Victoria University of Wellington, 2006), 10

⁹⁵ F Rudmin *Ownership as Interpersonal Dominance: A History and Three Studies of the Social Psychology of Property* (Queens University, Ontario, 1988)

⁹⁶ Ibid

⁹⁷ Thomas Hobbes *Leviathan*, ch. 46, p. 666 as cited in Robert P. Kraynak “Hobbes on Barbarism and Civilization” in *The Journal of Politics*, Vol. 45, No. 1 (February 1983) 86, 90

⁹⁸ F Rudmin above n 96, 61

is dominance or 'control of people' as it has historically been considered a particular attribute of possession and ownership.⁹⁹ Effectively, property rights would result in the executor having dominance during the interment process as interference with his or her rights would result in criminal liability pursuant to section 219(1) of the Crimes Act 1961.

B Property as an Exclusive Right

Renowned English jurist and philosopher, William Blackstone described property as "the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."¹⁰⁰ Salient in this famed quote is the authoritarian and exclusivity of property as a legal concept. Davies and Naffine state that, "[i]n one condensed thought, [Blackstone's] evocation of the absolute brings together the elements of exclusion, individual sovereignty...and assured individual identity in the figure of the 'one man.'"¹⁰¹ Whilst Blackstone's description of property may not reflect the extent of property rights with perfect symmetry, the concept of property as private control and autonomy has been very influential throughout Western political institutions.¹⁰² In conjunction with alienation, the exclusive possession of an object is considered to be one of the key features of property.¹⁰³

Indeed, common law property rights, although subject to restrictions, would confer upon the executor rights *in rem* or rights to the deceased's body. Rights *in rem* would allow an executor to achieve the deceased's burial wishes because they provide paramount control of the body against all other people including the deceased's family.

C The Effect of Property - Honoré's 'Bundle of Rights'

Rather than attempting to explain the motivations for property, British lawyer and jurist A. M. Honoré intended to describe property in terms of its practical effect on the individual. One of the most prevailing modern day property paradigms is Honoré's

⁹⁹ Ibid.

¹⁰⁰ Williams Blackstone *Commentaries on the laws of England*, bk. 2, ch. 32, p. 508

¹⁰¹ Davies and Naffine, above n 73, 34 - 35

¹⁰² Ibid, 35

¹⁰³ A M Honoré 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford, 1961) 113

'Bundle of Rights' which demarcates eleven rights which indicate a person's property interest with respect to an object.¹⁰⁴ The rights include the right to exclusively possess, enjoy, manage, alienate, to capital and to security, transmissibility (bequest) and the right to secure possession; but whilst they culminate to describe property relations, none are actually *necessary* to have legal recognition of a property right.¹⁰⁵ As Davies and Naffine describe, these rights are merely incidental to a declaration by the law that a particular right is a property right.¹⁰⁶

One must, therefore, question the extent to which these rights play a part in legally determining a person's property right with respect to an object. Almost all examples of ownership are subject to diffusion, and yet the courts still hold Honeré's bundle of rights to be indicative of property. In *Moore v Regents of the University of California*, for example, Justice Panelli's declined to accord property rights to Moore with respect to his excised body tissue for reasons including Californian legislation relevant to the disposal of human tissue after an operation eliminated "so many of the rights ordinarily attached to property that one [could not] simply assume that what [was] left amount[ed] to 'property' or 'ownership' for the purposes of conversion law."¹⁰⁷

And whilst Justice Mosk in his dissenting judgment argued that property rights can be of variable intensity, he did not deny that the most crucial of these rights need to be retained in order to legally identify a property right. Mosk cites a passage in *People v Walker* in which the judge likens the 'bundle of rights' to a tree that is able to retain its legal status despite being severely pruned.¹⁰⁸ One would argue that this metaphor has been used because it has prescribed limits; a tree cannot survive or be identified as a tree if it is cut back to the base of its trunk. Indeed the same must have been intended for property. A crucial element of one's property interest must be retained in order for property to still exist.

If the legislature were to alter the concept of property to include dead bodies for burial, restrictions to an executor's "bundle of rights" would be imperative. One such

¹⁰⁴ Ibid.

¹⁰⁵ Ibid. 107-147

¹⁰⁶ M Davies and N Naffine, above n 73, 37

¹⁰⁷ *Moore v Regent of California* 793 P 2d 479, 492 (Cal 1990) as per Panelli J

¹⁰⁸ Ibid, 510

right is that of alienation, which may be removed without altering one's ability to "own" something at common law. In *Mabo v Queensland*, Brennan J held that the inalienability of customary land should not deny its inhabitants the right to claim ownership. He stated;¹⁰⁹

[L]and in the exclusive possession of an indigenous people is not, in any private law sense, alienable property...there is no reason why that title should not be recognised as a burden of the Crown's radical title.

This proposition may be argued in favour of property rights for an executor. According to Brennan J, ownership can still endure even if fundamental property rights are restricted or even altogether destroyed. However, if an executor's right to the deceased's body became a 'property right', severe restrictions would need to be imposed to ensure the executor did not use those rights in a way that was inconsistent with the deceased's bodily dignity and the relatives interests. For example, an executor would be prohibited from alienating, using, and bequeathing the body to another person after he or she dies. The executor's "immunity from expropriation"¹¹⁰ (right to security) would also be disabled, along with a right to income and capital from the body. The cumulative effect of such restrictions would render the executor's proprietary right unrecognisable.

The only right required by the executor in cases of unauthorised removal of the body is the right to possession because it is protected by the criminal offence of theft. Therefore, if the legislature is intending to reinforce an executor's testamentary right to possession; all that is required is a criminal offence to be created which enables the body to be recovered by the police.

D Property as Ownership of the Market Value of an Object

Whilst property is often conceptualised by a layperson as the object owned by someone, the legal concept of property as a 'bundle of rights' describes the relationship between an object and the person who proclaims to own it. French economist and libertarian, Frédéric Bastiat progressed this notion one step further by

¹⁰⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 36 as per Brennan J

¹¹⁰ I. Goold, "Sounds Suspiciously like Property Treatment" in *The Mind, the Body and the Law* (Halstead Press, Sydney, 2007), 76

asserting that a proprietor simply has ownership of the *market value* of the object owned. As asserted in his main treatise on property, *Economic Harmonies*:¹¹¹

In their relation to one another, men are owners only of value, and value represents only services that are compared and voluntarily rendered and received. [O]n the one hand, this is the true meaning of the word *value*; and that, on the other, men never are, never can be, owners of anything except value, a conclusion to be drawn from logic as well as from experience.

And indeed, inextricably woven into the legal and layman's property paradigm is the notion of *value* as a means of justifying property demarcation and quantifying the corresponding punitive measures for theft. For example, in some countries, human blood has become an object to which property rights may be attached. In *Green v Commissioner*, the United States Tax Court determined that the taxpayer's rare type A-B-negative blood to be a "tangible product" for the purpose of attracting taxation when sold.¹¹² Whilst property rights are generally precluded from being attached to the human body and body parts, blood has been deemed an exception in the United States on the basis that it has a market value. In New Zealand, trading in blood and other controlled substances is prohibited¹¹³ unless an exemption is obtained from the Minister of Health.¹¹⁴

Another case which reaffirms this point is the aforementioned *Doodleward v Spence*. In *Dobson v North Tyneside Health Authority*, Peter Gibson LJ mused that the foetus in the *Doodleward* acquired a "pecuniary value" through work and skill performed on it, and it was this transformative value which justified an action in detinue.¹¹⁵

Another example of the value element that subsists within the property paradigm is the criminal punishment for theft. Pursuant to section 223 of the Crimes Act 1961, punishment is determined by the *value* of the object stolen. Depending on the expense

¹¹¹ Frédéric Bastiat, *Economic Harmonies* (Irvington-on-Hudson, New York, 1996) Ch 8, para 34 - 35 in <http://www.econlib.org/library/Bastiat/>

¹¹² *Green v Commissioner* 74 TC. 1229 (1980)

¹¹³ Human Tissue Act 2008, s.56

¹¹⁴ Human Tissue Act 2008, s.60

¹¹⁵ *Dobson and another v North Tyneside Health Authority and another* [1996] 4 All ER 474 (CA) Peter Gibson LJ,

of an item, a person who steals may receive anywhere between less than three months and up to seven years.¹¹⁶

According an executor property rights to a corpse can not be easily reconciled with the notion of market value for two practical reasons. Firstly, it would be very difficult to quantify the economic value of that body without recognising the illegal market value of human tissue. Although section 56 of the Human Tissue Act 2008 reaffirms that trading in human tissue is generally prohibited by law, the valuation of the human body as determined by an international private and illegal market still arguably persists. Russell Scott states that, “[d]ead or alive, the human body now has an intrinsic value. To be precise, that value inheres not in the body as an entity but in its component parts”¹¹⁷ In order to recognise an executor’s rights to a corpse as being property rights, one must acknowledge the illegal value of its “component parts.” Without such a valuation, the Crimes Act punishment for theft is unworkable.

Secondly, recognising the market value of an executor’s property rights would require the courts to make difficult decisions when convicting a person of theft. For example, if the deceased suffered from cancer his or her organs may not be worth as much as a person in full health. Because punishment for theft is based on the monetary value of the object stolen, a person convicted of theft may be punished with less or greater severity depending on the economic value of the corpse stolen. This would be an unfavourable outcome, particularly when attributing property rights have been suggested as a means of protecting the human integrity and autonomy of the person who has died. However, these reasons do not preclude a body from being conceptualised as property; they instead highlight that it would be a digression from the current legislative formulation of property.

E Property as an Expression of the Individual

As suggested by Sarah Cooper, “[a]ll forms of property, tangible, and intangible, covered by property law contribute to a persons’ identity”¹¹⁸ As mentioned earlier in this paper, the testamentary will is also underpinned by liberal perceptions of

¹¹⁶ Crimes Act 1961, s.223 (a) – (d)

¹¹⁷ Russell Scott, above n , 3

¹¹⁸ Sarah Webster Cooper “Rites, Rights, Writing: Tintern Abbey” in *Death Rites and Rights*, above n 1, 135-136

individual autonomy and identity. In light of this commonality, it is not surprising that some people have advanced property as being the best means of securing a testator's burial wishes.

Legal theorist and political philosopher, John Locke justified property as a way of reflecting one's autonomy and human dignity. In his well-known *Two Treatises of Government*, Locke stated that;¹¹⁹

“Through the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his.”

Subsumed in this quote is, firstly, the notion that individual autonomy and identity is expressed through an ownership of oneself and that necessarily rejects the idea of a person being the property of another. Secondly, the use of one's labour and skill with respect to an object justifies ownership of the external world. As Davies and Naffine describe, “[s]elf-ownership therefore provides a foundation for ownership of the external world.”¹²⁰

According to Locke's theory, a person may justify property rights with respect to an object, either because his or her work and skill (and, therefore, individual identity) has been employed or because the object is the person's body. Neither rationale for property can be used to justify or explain an executor's proprietary right to a corpse. It should be noted, however, that the argument of individual autonomy and identity has been advanced by legal professions who are in favour of according property rights to a person with respect to his or her body tissue.¹²¹ This argument normally arises in cases where tissue is removed from a living person and used in a manner inconsistent with his or her interests. The aforementioned case of *Moore v Regents* is a well-known example of such an occurrence.

¹¹⁹ J Locke, *Two Treatises of Government, Second Treatise*, Ch V, para 27, 287 – 288

¹²⁰ Davies and Naffine, above n 73, 4

¹²¹ C.M. Thomas *A Framework for the Collection, Retention, and Use of Human Body Parts* (Victoria University of Wellington, 2006), above n 95

It appears in these circumstances are much better suited to many of the property paradigms previously discussed. For example, in her article, "Sound Suspiciously Like Property Treatment," Imogen Goold convincingly demonstrates how human tissue may be accorded property status, and that Honoré's 'bundle of rights' such as that of possession, use, management and income can be and, in some cases, already attributed to human tissue in many circumstances without legal illogicality.¹²² Goold also argues that property rights have been awarded with respect to confined types of human tissue such as blood and cell lines because it reflects how society views these objects – as items of property.¹²³

Thomas proposes property rights to be accorded to an individual's body in conjunction with "reasonable restrictions" once its constituent parts have been excised.¹²⁴ Property rights are argued by Thomas as a "better alternative" to the current legal situation because they allow for a degree of *control* over body parts once in the hands of others, and prevent a "degradation of personhood" by protecting autonomy.¹²⁵

Whilst Locke's theory cannot justify an executor's proprietary right, it can justify the testator's proprietary right to his or her own body. If the legislature was to alter the legal status of human tissue so that every person owned his or her body, the logical progression of this would be that the executor could be conferred the testator's property rights to his or her body, in conjunction with the rest of the testamentary estate.

¹²² Imogen Goold, above n 111, 67 - 82

¹²³ Ibid, 66

¹²⁴ C.M. Thomas A *Framework for the Collection, Retention, and Use of Human Body* above n 95, 7

¹²⁵ Ibid

V EXAMINATION OF MAORI DEATH RITUAL

The examination of a multicultural society typically highlights a diverse range of responses towards death.¹²⁶ Because each of the three aforementioned cases of unauthorised removal involved a conflict between Maori and Pakeha cultural practice; social and cultural beliefs regarding the treatment of the dead are relevant for determining whether the human body deserves property demarcation. As stated by Cordelia Thomas;¹²⁷

New Zealand differs from other jurisdictions, in that Māori values are valued and respected, but there has been scant academic debate considering how Māori value about body parts might fit into a western individualistic paradigm.

Firstly, it is important to note that whilst procedure in Maori death rituals is often prescribed by the particular customs of each hapu or iwi, the general duties and expectations which attach to death and grieving are similar throughout Maori society.¹²⁸

A *Tikanga Maori and Customary Burial Ritual*

As described by the New Zealand Law Commission, “‘custom law’ is used as a phrase to describe the body of rules developed by indigenous societies to govern themselves.”¹²⁹ Whilst there is no perfect equivalent of ‘custom law’, “tikanga” is often used to describe the practices and underlying values regulating traditional Maori society.¹³⁰

Four of the major values which interweave to create tikanga Maori include whanaungatanga, mana, tapu, utu, and kaitiakitanga.¹³¹ Whanaungatanga is the most “pervasive” of all tikanga Maori values because it acknowledges the importance of

¹²⁶ Daniel Miller and Fiona Parrott, “Death, Ritual and Material Culture in South London” in *Death Rites and Rights* above n 1, 148

¹²⁷ C.M. Thomas *A Framework for the Collection, Retention, and Use of Human Body Parts* above n 95, 5

¹²⁸ Paratene Ngata, “Death, Dying and Grief” in M Schwass (ed), *Last Words: Approaches to Death in New Zealand's Cultures and Faiths* (Bridget Williams Books, Wellington, 2005) 29

¹²⁹ New Zealand Law Commission *Maori Custom and Values in New Zealand Law* (Study Paper 9, Wellington March 2001) para 67

¹³⁰ *Ibid*, para 68

¹³¹ *Ibid*, para 125. This is not an exhaustive list of values, and the particularities of each value differ slightly in each iwi.

relationships in Maori society.¹³² Whilst this includes relationships between people, it also denotes the relationship with one's whakapapa or ancestry, the spiritual world, and nature.¹³³ In accordance with the principle of whanaungatanga;

the individual was important as a member of a collective [in traditional Maori society]. The individual identity was defined through that individual's relationships with others. It follows that tikanga Maori emphasised the responsibility owed by the individual to the collective.¹³⁴

In relation to whanaungatanga, Williams and Hohepa contrast the general treatment of a corpse after death by both Maori and Pakeha cultures (as determined by the Law of Succession and disposition). Unlike the common law, which accords disposition of the body to one's surviving spouse, children, or executor in instances of a will, tikanga Maori denotes a dead body to be a taonga (treasure) of the deceased's greater social arrangement.¹³⁵ For particularly prominent Maori, multiple iwi of the deceased may become involved with the burial ceremony.¹³⁶ It is clear from this description that the communality of Maori burial practice is at odds with common law rules of disposition. It may also be argued that property rights, an even more robust form of exclusive possession, would contravene the collective nature of Maori burial practice to a greater extent than already experienced.

B The Spirituality of Maori Death Ritual

Ngata explains that, "[a] person who has died is a link between the living and the dead; people also grieve for those who have passed on earlier. The tangi and poroporoaki are given in the belief that the deceased will communicate these greetings to others in the spirit world."¹³⁷

He continues to explain that although death is an inevitable part of life, "decisions regarding the tangihanga and burial [in Maori society] are "hotly debated because they are so final."¹³⁸ This does not mean, however, that the unauthorised removal and

¹³² Ibid, para 130

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ P Hohepa & D Williams *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (Law Commission, Wellington, February 1996) para 19

¹³⁶ Ibid.

¹³⁷ P Ngata, above n 129 33

¹³⁸ P Ngata, above n 129, 32

retention of a deceased's family member is common Maori practice when disputes arise over burial of the body. When speaking to *Te Karere*, Te Wahapa Hurst stated that the unauthorised removal of a body is not in keeping with traditional Maori practice; rather a process of negotiation and consultation between the families should occur.¹³⁹ Therefore, allowing for an incorporation of tikanga Maori into the burial ritual of a bicultural family member would not permit the removal of the body without the consent of other family members. As highlighted, Maori burial often involves a process of negotiation, particularly when family members belong to different hapu or iwi.¹⁴⁰

Ngata also describes the divergence between the legal requirements imposed on a body such as a coroner's inquest and traditional Maori death ritual. Many Maori are opposed to the removal of body tissue after death as it contravenes their spiritual practice of returning to papatuanuku intact.¹⁴¹ The sterile environment in which medical procedures are carried out in are also at odds with Maori death ritual because they believe that the body of the deceased should be constantly attended by others before burial has occurred.¹⁴²

C Treaty of Waitangi

Because concerns regarding the adequacy of the executor's possessory right to the testator's body have arisen in the context of Maori-Pakeha intercultural disputes, the Treaty of Waitangi is an important factor if law reform is to occur. As stated by Chilwell J in *Huakina Development Trust*;¹⁴³

[t]here can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

¹³⁹ Te Wahapa Hurst (*Te Karere*) in Lisa Owen "Stand Off After Body Snatch" (6 March 2008) *6pm One News Report*

¹⁴⁰ *Ibid*; also above n 132

¹⁴¹ P Ngata, above n 129, 33

¹⁴² *Ibid*.

¹⁴³ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 per Chilwell J

Following rejection of the Treaty as a "simple nullity,"¹⁴⁴ much disagreement has emerged concerning the effect of the Treaty on the rights and responsibilities agreed to by both the Crown and Maori.¹⁴⁵ The majority of debate has arisen out of an acknowledgement that the te reo and English versions of the Treaty are very divergent in their descriptions of the rights and obligations assented to by each party. For example, the te reo version saw the Maori signatories ceding 'kāwanatanga,'¹⁴⁶ or governorship, to the Crown in return for retaining te tino rangatiratanga¹⁴⁷ which has been translated by Professor Sir Hugh Kawharu as being an "unqualified exercise of their Chieftanship [over their villages and...treasures...]"¹⁴⁸ In contrast, the English version appears to use these terms in the opposite context.

In accordance with *contra proferentem*, the international law convention of contract interpretation, the Treaty of Waitangi is interpreted in a manner consistent with its te reo translation because Maori were the party seeking to rely on the document.¹⁴⁹ Subsequently, the treaty has been determined by Dr Janine Hayward to hold four reconciling principles, "...of active protection, the tribal right to self-regulation, the right of redress for past breaches, and the duty to consult."¹⁵⁰ It is, therefore, the recognition and protection of treaty principles such as 'self-regulation' and the 'duty to consult' which serves to uphold tikanga Maori. As stated by Hohepa and Williams, "the Treaty is central to Maori succession issues in that Article 1 and 2 [of the Treaty] confirms Maori rights to maintain and support tikanga."¹⁵¹

1 Waitangi Tribunal

In 1986, the then current Waitangi Tribunal Chairperson identified Treaty claims to include, "...the maintenance of Maori language, customs, tradition and identity, not just the freedom to indulge in customary practices but, according to the claims, the

¹⁴⁴ *Wi Parata v Bishop of Wellington* (1877) 1 NZLRLC 14, para 8 Prendergast CJ

¹⁴⁵ New Zealand Law Commission *Maori Custom and Values in New Zealand Law* above n 130 para 337

¹⁴⁶ Waitangi Tribunal *Article One Maori Version of the Treaty of Waitangi* www.waitangi-tribunal.govt.nz/treaty/maori (accessed on 28 August 2008)

¹⁴⁷ Waitangi Tribunal *Article Two Maori Version of the Treaty of Waitangi* www.waitangi-tribunal.govt.nz/treaty/maori (accessed on 28 August 2008)

¹⁴⁸ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC)

¹⁴⁹ Waitangi Tribunal *Motunui Waitara Report* www.waitangi-tribunal.govt.nz/reports/ (accessed 28 August 2008)

¹⁵⁰ Waitangi Tribunal *Principles of the Treaty of Waitangi* <http://www.waitangi-tribunal.govt.nz/treaty/principles> (accessed 28 August 2008)

¹⁵¹ P Hohepa & D Williams above n 136, para 12

right to the state assisted propagation of them.”¹⁵² The Waitangi Tribunal is responsible for determining whether individual claims are inconsistent with the “principles” of the Treaty. One treaty principle central to the context of burial is the promise of protection of Maori custom and values.¹⁵³ Accordingly, any law reform pertaining to executorial rights over the deceased’s body should consider protecting Maori burial customs and incorporating a degree of self-governance for Maori to carry out burial arrangements in accordance with customary practice. If this does not occur, the Waitangi Tribunal may investigate and make recommendations regarding any legislative reform determined to be inconsistent with Treaty principles.¹⁵⁴

Further argument in favour of incorporating tikanga Maori into succession law subsist in the case of *Attorney-General v New Zealand Maori Council*. This case held that Treaty principles may still be a relevant consideration when exercising a discretionary power (such as those of an executor when burying the testator’s body), even if the power does not stipulate an express reference to the Treaty is required.¹⁵⁵

In addition to this, the *Muriwhenua Land Report* held that, “[t]he Tribunal has drawn attention...to the importance of decision-makers giving equal weight to the Maori worldview, the Maori value system, and Maori law and policies.”¹⁵⁶ This suggests that an executor dealing with the body of a person who was both Maori and Pakeha should give equal weight to both sets of cultural practices.

D *Laws of Succession in regard to Tikanga Maori*

In their report, “The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession,” Hohepa and Williams sought to identify the areas of law which “are likely to be a major concern for Maori”¹⁵⁷ As a result, the paper identifies the Administration Act 1969 as an example of a statutory regime which is dissatisfactory for Maori, firstly, because it conflicts with Maori practices and laws,¹⁵⁸

¹⁵² ET Durie “The Waitangi Tribunal: Its Relationship with the Judicial System” (1986) NZLJ 235, 236

¹⁵³ New Zealand Law Commission *Maori Custom and Values in New Zealand Law* above n 130 para 339

¹⁵⁴ Waitangi Tribunal Act 1975, s.5(1)(a)

¹⁵⁵ *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129

¹⁵⁶ New Zealand Law Commission *Maori Custom and Values in New Zealand Law* above n 130 para 344

¹⁵⁷ P Hohepa & D Williams above n 136 para 2

¹⁵⁸ *Ibid*, para 5

and secondly, it can be seen by Maori as a breach of the Treaty because it does not provide for Maori autonomy.¹⁵⁹ The paper also acknowledges that without recognising the inherent differences between Maori and Pakeha perspectives of succession, issues with the current law, such as an executor's sole right to possession of a corpse, cannot be effectively resolved.¹⁶⁰

It is also important to note that the executor's powers are not absolute, rather are subject to different statutory regimes and, therefore, the testator's right to his or her desired burial is not automatic. The discretionary nature of executorial powers is also another impediment to a testator achieving his or her specified burial.

In cases where the testator's body is retained without authorisation, it has been shown that the current testamentary powers of possession are insufficient when the executor is trying to recover the body for burial. Although law reform in this area would be beneficial, according property rights to an executor is not appropriate for two reasons. Firstly, although social regulation would justify property rights in such a circumstance, according property rights would be subject to so many restrictions it would become unrecognisable as 'property'. Out of the classic incidents of property, exclusive possession and the non-subsisting right to recovery is all that is needed for an executor to achieve his or her testamentary objective. Secondly, there is no justification for awarding property rights to an executor according to Lorde's property paradigm unless the legislature altered the status of the human body so that every person could own his or her own body.

Finally, it is important that any statutory reform take into consideration tikanga Maori and afford protection to traditional Maori burial practices as assured by the Treaty of Waitangi. As stated by the New Zealand Law Commission,¹⁶¹

Increasingly over the last twenty years there has been a discernible push from Maori and other quarters for Maori custom law to be applied in a number of different areas of general law, including family law, criminal justice, and administration of land. The principal source of the demand is the Maori determination to own, conduct and process that are essentially Maori in managing things Maori.

¹⁵⁹ Ibid, para 13 Law Commission *Maori Custom and Values in New Zealand Law* (1992) 120 para

¹⁶⁰ Ibid, para 6

VI CONCLUSION – STATUTORY REFORM

Upon analysis of the executor's current testamentary powers and some of the key western law property paradigms, it appears inappropriate to accord property rights to an executor in respect of the testator's body. Firstly, it must be acknowledged that in most cases the testamentary powers of an executor are sufficient for achieving the burial wishes of the deceased. It is also important to note that the executor's powers, are not absolute, rather are subject to different statutory regimes and, therefore, the testator's right to his or her desired burial is not automatic. The discretionary nature of executorial powers is also another impediment to a testator achieving his or her specified burial.

In cases where the testator's body is removed without authorisation, it has been shown that the current testamentary powers of possession are insufficient when the executor is trying to recover the body for burial. Although law reform in this area would be beneficial, according property rights to an executor is not appropriate for two reasons. Firstly, although social regulation would justify property rights in such a circumstance, according property rights would be subject to so many restrictions it would become unrecognisable as 'property'. Out of the eleven incidents of property, exclusive possession and the corresponding right to recovery is all that is needed for an executor to achieve his or her testamentary objective. Secondly, there is no justification for awarding property rights to an executor according to Locke's property paradigm unless the legislature altered the status of the human body so that every person could own his or her own body.

Finally, it is important that any statutory reform take into consideration tikanga Maori and afford protection to tradition Maori burial practice as assured by the Treaty of Waitangi. As stated by the New Zealand Law Commission;¹⁶¹

Increasingly over the last twenty years there has been a discernible push from Maori and other quarters for Maori custom law to be applied in a number of different areas of general law, including family law, criminal justice, and administration of land. The principal source of the demand is the Maori determination to use structures and processes that are essentially Maori in managing things Maori.

¹⁶¹ New Zealand Law Commission *Maori Custom and Values in New Zealand Law* above n 130 para 117

VII APPENDICES

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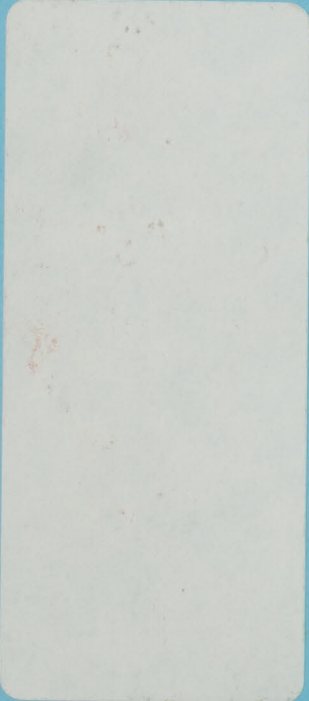
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