



WHOSE SKIN IS IT ANYWAY?

Julia Burns and Matthew Watson consider the implications of new services in England and Wales allowing individuals to preserve tattoos after death

→ KEY POINTS

WHAT IS THE ISSUE?

Tattoos are increasingly popular and culturally significant. Services now exist allowing individuals to preserve their tattoos after death so that they can be gifted to loved ones.

WHAT DOES IT MEAN FOR ME?

This is a completely new legal issue. There is currently no guidance from the court or elsewhere for practitioners faced with this issue.

WHAT CAN I TAKE AWAY?

The law is uncertain. This article suggests some answers by applying existing principles to this new issue.

TATTOOS ARE MORE popular than ever, with individual tattoo artists gaining critical acclaim for complex works. This is giving rise to legal issues similar to those found in the conventional art world, such as claims to protect intellectual property rights.

Tattoos can live on after death. The practice of preserving tattooed skin has existed since the Neolithic period. In May 2019, the BBC reported on the National Association for the Preservation of Skin Art (NAPSA) in Cleveland, Ohio. Since 2015, NAPSA has offered a service allowing individuals to gift their tattoos to family members after death. In 2018, NAPSA began advertising its services in England.

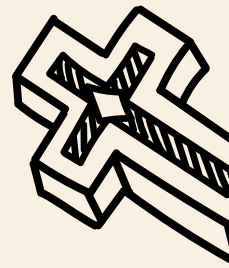
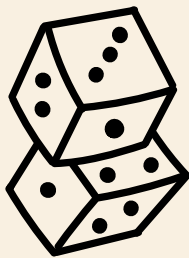
With more individuals wanting to leave tattoos as preserved pieces of art to loved ones, we consider the implications under

English and Welsh succession law. Does turning tattoos into preserved objects mean they can be treated for inheritance purposes like conventional artwork?

DIMINISHING SQUEAMISHNESS

The problem starts with the issue of ownership. Does a person with a tattoo own anything to give? As the England and Wales Court of Appeal held in *Yearworth v North Bristol NHS Trust*,¹ 'the common law has always adopted the same principle: a living human body is incapable of being owned'. Hence, a person cannot dispose of their own body through their will. Common-law courts have, however, become steadily less squeamish about the notion that body parts might be capable of being property.





A now well-established exception was where work had been carried out on a body part post-death. In *Doodeward v Spence*,² the High Court of Australia decided that a preserved human specimen kept by a doctor was property capable of being sold by his executors on his death. Griffiths CJ explained that the 'lawful exercise of work or skill' on a body or part of a body meant it had 'acquired some attributes differentiating it from a mere corpse'.

That reasoning led to the conviction of the defendant in *R v Kelly*³ for stealing body parts from the Royal College of Surgeons of England's anatomical specimens department. Rose LJ observed that 'the common law does not stand still' and 'on some future occasion' the courts may hold 'that human body parts are capable of being property', where they have 'a use or significance beyond their mere existence'.

In the past decade, common law has gone further. In *Yearworth*, the England and Wales Court of Appeal held that six sperm donors were the legal owners of their frozen sperm for the purposes of a damages claim by them against North Bristol NHS Trust, which had destroyed the samples. Lord Judge LCJ said developments in medical science 'require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body'.

That reasoning was taken a stage further in *Roblin v Public Trustee for the Australian Capital Territory*.⁴ The Australian court upheld a testator's gift in his will of his frozen sperm held in a fertility clinic. The mere fact that the subject of the gift was formerly part of the testator's body did not prevent it from being property capable of being bequeathed.

The distinguishing feature of all these decisions is that the body part became property only after being removed or separated from the body. If a tattoo is only removed and preserved post-death, how can a testator dispose of it by will? At the point of the death, the testator would have no property in the tattoo.

THE PRs' POSITION

An answer might lie in considering how personal representatives (PRs) might approach a direction in a will to preserve and gift a tattoo. Subject to the court's power to determine responsibility for disposing of bodies, PRs are charged with determining how and where a body should be disposed of and making arrangements.

The deceased's wishes about how their body should be disposed of are not binding, but also not irrelevant. In the English case of *Re JS (Disposal of Body)*,⁵ the applicant child, diagnosed with terminal cancer,

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wanted to be cryogenically frozen after death. Her mother was willing to carry out the procedure, but her father objected.

Jackson J called the child's wishes 'relevant, perhaps highly so'. He made a pre-death appointment of the mother as PR under s.116 of the *Senior Courts Act 1981*. Although Jackson J could not order the mother as PR to dispose of the body in a particular way, he made injunctions restraining the father from obstructing the mother from arranging for the applicant's body to be cryogenically frozen.

Re JS sets a precedent for the court facilitating 'unusual' methods for disposing of bodies. NAPSA removes and preserves customers' tattoos in the mortuary, shortly after death and before the body is buried or cremated. Following *Re JS*, while a PR may not be obliged to carry out a tattoo preservation procedure, the court might, if there was a dispute, make orders facilitating such a procedure, particularly where the deceased had made a direction to that effect in their will.

A BEQUEST BY THE BACK DOOR?

If PRs carried out a tattoo preservation procedure, what is the status of the preserved tattoo? Following *Yearworth*, it is hard not to conclude that it is property. If that is right, who owns it?

On the present state of the authorities, the answer might be the PRs as instigators of the preservation procedure. However, testators can authorise their PRs to incur greater than ordinary funeral expenses. In this event, the costs of a tattoo preservation procedure might be regarded as part of those expenses.

If PRs carried out a procedure at the expense of the estate, in accordance with a direction in the will, why should the

preserved tattoo not be an estate asset? It is not necessarily unorthodox. If 'A' during his life buys goods from 'B', but delivery of those goods takes place after A's death, the goods are treated as assets of the estate, even though A had no property in them when he died. Why then, if A contracts with an organisation like NAPSA to remove his tattoo after death, should that tattoo not also be an asset of the estate?

If PRs did hold the preserved tattoo for the estate, how should they dispose of it? If the will directs how it should be disposed of, an attractive answer is to say: in accordance with that direction. This would leave the unusual situation where a will might contain a direction to carry out a tattoo preservation procedure, which is not binding, and a gift of the preserved tattoo, which is binding, if the PR chooses to carry out the procedure. This odd result suggests it would be more coherent simply to extend the common law to regard a tattoo as property capable of disposition by will.

A DUTY TO PRESERVE?

The possibility of preserving tattoos raises another question. Could a personal representative (obliged to preserve and realise the estate's assets) ever be liable for failing to commission a tattoo preservation procedure? A preserved tattoo might have considerable value that residuary beneficiaries or creditors of insolvent estates would have an interest in compelling the PRs to realise.

If the preserved tattoo does not become an asset until the preservation procedure is carried out, the answer is no. However, that is somewhat unsatisfactory, particularly if it were settled that the resulting tattoo was held for the estate.

CONCLUSION

It is unclear whether NAPSA has yet carried out its procedures in England. Nevertheless, common-law courts may not be far away from having to grapple with the questions such procedures raise. Can I gift my tattoo? Could my PRs be obliged to realise my tattoo? Who owns the preserved tattoo? Common law's strength is its ability to adapt to new social developments; treating preserved tattoos as art that can be disposed of in the same manner as any other chattel may be one of them.

¹ [2010] QB 1 ² (1908) 6 CLR 406 ³ [1999] QB 621
⁴ [2015] ACTSC 100 ⁵ [2016] EWHC 2859 (Fam)



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