

Cryonics wreaking havoc with estate planning

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A cryonics facility is set to open soon in NSW. This will throw the associated ethical, legal and practical dilemmas before the public and the courts.



“Cryonics is the process of freezing a body at the moment of its death with the hope that it will be brought back to life at some future time.”¹

Until someone creates a youth potion from the movie *Death becomes her*,² people will continue to expire. Most of us know the myth of Walt Disney being cryopreserved and that he might one day be revived; although this was later confirmed to be an unsubstantiated rumour, there are several hundred people and pets who have been cryopreserved until medicine is sufficiently advanced to revive them.

Cryopreservation is the process of freezing the corpse or the brain within seconds of death to -196°C with the intention of retaining the body or brain in that state until either medicine can cure and reverse the condition which brought on death, or brain data can be uploaded into an artificial robot-like body.

In 2014, scientists revived minute animals that had been frozen for over 30 years.³

Russian billionaire Dmitry Itskov says that by 2035, it will be possible to upload a human mind into computers and live forever in these android bodies.⁴

The website of the biggest cryonics facility says “calling someone ‘dead’ is merely medicine’s way of excusing itself from resuscitation problems it cannot fix today ... Cryonics is conservative care that acknowledges that the real line between life and death is unclear and not currently known. It is humility in the face of the unknown”.⁵

Until recently, there were only four cryonic preservation facilities, and they are located in the United States and Russia:

- (1) Alcor in Arizona;
- (2) the Cryonics Institute in Michigan;

- (3) the American Cryonics Society in California; and
- (4) KrioRus in Russia.

These companies make no promises that there is life after death, and consider that their “patients” are donating their bodies for scientific research.⁶

For those wishing to undergo cryopreservation, the patient has to either go through palliative care in a hospital near one of these facilities or go to considerable expense to have a local hospital preserve the body sufficiently before being transported to the facility. Cryopreservation is available only to long-term committed members, it is not available suddenly to an interested patient or family members and is not an alternative to burial or cremation.

The town of Holbrook in New South Wales is set to house the first cryonics facility in Australia, where Stasis Systems Australia have built such a facility. It will cost around \$90,000 to have your body cryopreserved.⁷

While this raises a lot of questions, including whether \$90,000 is enough to sustain a body over an infinite amount of time until science resolves a way to revive the body, there are mind-blowing questions for estate planners!

Senior Lecturer Heather Conway of the School of Law at Queen’s University Belfast summarised some of the legal issues and they are expanded on below.⁸

What is the status of the corpse during its time in the deep freeze?

At common law, there is no property in a corpse, the legal representative of the deceased simply has the legal duty to dispose of the body and, for that purpose, has the right to possession of the corpse subject to the legislative provisions

prescribing who can physically hold the body and how, as well as where and how it can be disposed of.⁹ For example, a body may only be buried or cremated in designated areas.

Does the frozen body have any legal rights? Is it like an embryo or foetus or an unborn baby that has some rights, but not all, and their rights are not natural ones, but derive from legislation?

Or is the frozen body a method that is part of the “work and skill” exception principle derived from the seminal case of *Doodeward v Spence*?¹⁰ Notably, Egyptian mummies were categorised as the property of the museums which held them.

How long should a frozen body be stored, and who has the responsibility to decide to thaw or destroy the body without reanimating it?

Is it a financial decision of the facility once the ingoing payment made by the patient is depleted? Is it the decision of the next of kin or an impartial ethical ombudsman? Should there be a time period, eg if medical advances have not achieved revival techniques within 200 years?

How are the perpetuity periods for trusts affected? Should the facility have been built in South Australia, instead of NSW, where there is no 80-year perpetuity period?

What happens if the facility becomes bankrupt or ceases to operate? Should the body be thawed out and buried or cremated, or transferred to another facility? And at whose expense?

What happens if the body is damaged while frozen? What is the loss suffered by the frozen body, loss of a chance or loss of life? Who is accountable and to whom?

Who is going to police that the entire industry is not a hoax preying on the hopes and fears of the vulnerable dying?

If a claim is made by a dissatisfied beneficiary on an estate, how does that affect funds that may be set aside for preservation of the frozen body?

What if further funds are required for the upkeep of the frozen body? Can the legal representative or descendants be approached for the further funding?

Could a reanimated corpse reclaim assets that they owned in life, but that had been inherited by family members on “legal” death? Could inheritance laws be undone?

There is an obvious clash between the existing laws of inheritance and the idea that the deceased person may come back to life and require the return of the assets.

In most jurisdictions, legislation exists to protect legal representatives, family, beneficiaries and missing people presumed dead who return and wish to reclaim their assets. Such cases are extremely rare, tracing principles very complex and difficult to apply and enforce.

Such a case occurred in the US in the 1960s when Lawrence Joseph Bader, a married cookware salesman with three children and another on the way and on the brink of bankruptcy went missing in a boating accident and was presumed drowned. His wife collected his life insurance and social security payments and was about to marry another man when Fritz Johnson was recognised by an acquaintance seven years later as the missing man. Fritz was a television personality, had done quite well, married another woman and they had a child together. This caused serious problems for both the first and second wives. Despite extensive testing, it was not concluded whether Larry was an amnesiac, hoaxer or schizophrenic.

How would laws operate if the frozen person was married prior to cryopreservation and the deceased’s spouse remarries? Would that marriage still be valid when the former partner returns from the dead?

There are various entanglements which would need to be reversed should a person be so revived.

Or is the revival like being born again and starting from scratch without any ongoing rights from a previous existence?

As far as we know, only two jurisdictions, France and the Canadian state of British Columbia, have legislated that cryonics is not legal. However, in most other countries, including Australia, this space is entirely unregulated and brand new territory for succession lawyers.

Interestingly, there has already been case law around this technology coming out of the United Kingdom.

In the case of *Re JS (Disposal of Body)*,¹¹ a 14-year-old girl, referred to as JS, was diagnosed with a rare form of cancer. She had extensively researched cryonics in the hope that resuscitation and a cure may be possible in the future. She expressed to her parents that it was her wish to be transported to a US cryonics preservation facility after her death so that her body could be preserved.

JS’ mother and father had divorced and the father had not seen his daughter for eight years; JS refused contact with her father and did not want him to have detailed knowledge of her medical condition. The father’s position vacillated during proceedings; initially, he was concerned about the costs attached to JS’ decision, later, he had ethical dilemmas that: “Even if the treatment is successful and [JS] is brought back to life in let’s say 200 years, she may not find any relative and she might not remember things and she may be left in a desperate situation given that she is only 14 years old and will be in the United States of America”. Later still, he acceded to his daughter’s wishes, subject to being able to see his daughter, but this was rejected by JS and her mother.¹²

The court made it clear in its judgment that this particular case was not a precedent for other cases, and that the case was not about whether cryonic preservation has a scientific basis or whether it is right or wrong, nor was the court approving of or encouraging cryonics.¹³ Subsequently, the court made the following orders:¹⁴

- a specific order permitting the mother to continue to make arrangements during JS’ lifetime for the preservation of her body after death;

- an injunction in personam preventing the father from applying for a grant of administration in respect of JS’ estate, making or attempting to make arrangements for the disposal of JS’ body, and interfering with arrangements made by the mother in respect of the disposal of JS’ body; and
- a prospective order under s 116 of the *Senior Courts Act 1981* (UK) (or, alternatively, under the inherent jurisdiction), to take effect upon JS’ death, appointing the mother as sole administrator of her estate and specifically that the mother shall have the right to make arrangements for the disposal of the body and to decide who should be permitted to view it.

This case was not about cryonics, but about minors not having rights to make wills or decisions about the disposal of their bodies. Because JS was a minor and her parents could not agree, she required court authority to permit her to decide what should happen to her body if she died. Had JS been an adult, she would have made a will and there would have been some obligation on her legal representative to follow her directions (although, in most jurisdictions in Australia, funeral directions are not binding or enforceable, this very issue is currently under review in Victoria by the Law Reform Commission). However, this case threw cryonics into the limelight — its ethical, legal and practical dilemmas.

Together with the construction of the Holbrook facility, the devastating current trends of incurable illnesses taking young people, and substantial estates being left by younger people due to life insurance and rising land prices, cryonics are likely to come up before the Australian courts before too long.

It will be fascinating to see how the courts handle the various novel ethical questions, presumably, until legislated otherwise, existing scientific principles about the finality of death will prevail.

What is doubtless is that particularly careful and clever estate planning will be required by the patient, and legal representatives will need to protect themselves and the beneficiaries by seeking Benjamin orders¹⁵ from the courts before distributing the estate. Such orders will have the effect of depriving the

returned person of the right to reclaim their assets or to seek compensation from the legal representative.

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- 10 [1908] HCA 45.
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- 12 *Ibid* at [21].
- 13 *Ibid* at [30].
- 14 *Ibid* at [41].
- 15 *Re Benjamin; Neville v Benjamin* [1902] 1 Ch 723.