No. 93273-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Reinterment of the Remains of Kyril Faenov

MARINA BRAUN,
Petitioner,

v.

LAUREN SELIG, MARTIN SELIG and
TEMPLE DE HIRSCH SINAI,
Respondents.

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I
(Court of Appeals No. 72948-9-I)

RESPONDENT TEMPLE DE HIRSCH SINAI'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review should be denied. Kyril Faenov died in May 2012 without leaving burial instructions. His widow, Lauren Selig, selected the cemetery where he was laid to rest, consistent with her statutory priority under RCW 68.50.160(3).

More than two years later, his mother, Marina Braun, petitioned the superior court to allow the removal of Mr. Faenov's remains from the Seattle cemetery where he is buried, so that she could relocate him to a cemetery close to where Ms. Braun resides in Portland. Ms. Braun argued that the superior court should exercise equitable authority to determine whether a decedent's remains should be disinterred from its cemetery plot and relocated at the request of a person who is lower on the statutory priority ranking (Ms. Braun, as his mother) than the person who was entitled to decide the matter originally (Ms. Selig, as his widow).

Following extensive briefing and argument on Ms. Selig's motion to dismiss, the King County Superior Court dismissed Ms. Braun's petition. The Court of Appeals affirmed. *In re Faenov*, __ Wn. App. __, __ P.3d __, 2016 WL 2865188 (May 16, 2016).

The Petition fails to present a constitutional question, and it fails to establish that the courts below misapplied Washington law. The Court of Appeals correctly interpreted and applied chapter 68.50 RCW and

specifically applied the rule of decision dictated by RCW 68.50.200 ("Permission to remove human remains"). In determining that Ms. Braun could not state a claim for disinterment where Mr. Faenov's widow declined to consent to the removal and relocation of her husband's remains, the court of appeals did not deprive any court of "jurisdiction."

There are no conflicting decisions of different panels or divisions of the court of appeals; there is no widespread confusion created by applying the statutory hierarchy to the parties' dispute. Nor does the Petition present a question of substantial public interest. The Court of Appeals opinion correctly interpreted and applied chapter 68.50 RCW, concluding that the same hierarchy applicable to initial decisions regarding a decedent's remains continues to be applicable to disinterment of those remains, and that Ms. Selig's refusal to consent to the relocation of Mr. Faenov was determinative under Chapter 68.50 RCW.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Court of Appeals acted in accordance with the Washington Constitution when it applied RCW 68.50.200 to affirm the dismissal of Ms. Braun's petition.

2. Whether the Court of Appeals correctly applied RCW 68.50.200, which grants Ms. Selig, as the decedent's surviving spouse,

priority over Ms. Braun, as his mother, in decisions regarding interment and exhumation.

III. COUNTERSTATEMENT OF THE CASE

Mr. Faenov died on May 25, 2012. He left no burial instructions. (CP 133.) His widow, Ms. Selig, decided to lay Mr. Faenov's body to rest at the Hills of Eternity Cemetery in Seattle's Queen Anne Hill neighborhood in a plot purchased on her behalf by her father, Martin Selig. (CP at 133.) The cemetery is owned by Temple De Hirsch Sinai ("TDHS"), a not-for-profit synagogue. (CP at 519, 277, 137.) Mr. Selig and TDHS entered into a contract granting "the right of perpetual interment." (CP at 139.)

RCW 68.50.200 provides that (other than when initiated by a coroner) human remains may be removed from a cemetery with "the consent of the cemetery authority and the written consent of the following in the order named: (1) The surviving spouse or state registered domestic partner . . . ." RCW 68.50.200 also provides a process for seeking permission from the superior court if the required consent "cannot" be obtained, provided, however, "[t]hat the permission shall not violate the terms of a written contract or the rules and regulations of the cemetery authority."

In 2014, unhappy with Ms. Selig's refusal to consent to relocation of Mr. Faenov's remains, Ms. Braun filed a petition seeking the superior court's permission to exhume Mr. Faenov's body so that he could be reburied in

Portland. Ms. Braun's petition asserted that the superior court should make the equitable decision regarding where Mr. Faenov should be buried. (CP at 7.)

Following extensive briefing and oral argument, the superior court dismissed Ms. Braun's petition with prejudice. (CP at 581, 622.) Ms. Braun appealed. The Court of Appeals upheld the superior court's decision, ruling that the statutory hierarchy adopted by the Legislature in 1943 did not provide Ms. Braun with any equitable right to override Ms. Selig's decisions regarding the disposition of Mr. Faenov's remains. Op. at ¶¶ 44–45.

IV. ARGUMENT AGAINST REVIEW

The Court of Appeals opinion does not raise a significant question of law under the Washington Constitution; nor does it involve an issue of substantial public interest that should be resolved by this Court. Nothing in the decision below, which applied the statutory hierarchy of RCW 68.50.200, poses any challenge to a superior court's jurisdiction. Instead, the decision applied the rules the Legislature established for private requests to remove human remains from a cemetery plot. Indeed, the Court of Appeals exercised its jurisdiction when it analyzed chapter 68.50 RCW and applied it to Ms. Braun's petition. The Court of Appeals' opinion followed established methods of statutory interpretation, was consistent with

preexisting principles, and reached a result in accord with public policy. The court of appeals' decision in this matter should not be reviewed by this Court.

A. The Court of Appeals Did Not Deprive the Superior Courts of Jurisdiction When It Applied RCW 68.50.160 and RCW 68.50.200's Statutory Hierarchy to Dismiss Ms. Braun's Petition.

Ms. Braun argues that the Court of Appeals ran afoul of Article IV, § 6 of the Washington Constitution, which vests superior courts with jurisdiction to hear cases in equity. This argument is a red herring.[1] Nothing in the statutory scheme governing the disposition of human remains divests the superior courts of jurisdiction; nor did the Court of Appeals announce any rule depriving the superior court of jurisdiction. Indeed, RCW 68.50.200 does not say anything at all about "jurisdiction" (equitable or otherwise). Rather, it replaced the common law's deference to the decisions of a decedent's "next of kin" with a clear statutory hierarchy amongst those "next of kin." The legislature chose to provide surviving spouses with rights that are superior to those of parents. Accordingly, the superior court reviewed

[1] For example, Ms. Braun cites *Bowcutt v. Delta North Start. Corp.*, 95 Wn. App. 311, 319, 976 P.2d 643 (1999), for the proposition that "the Legislature is constitutionally prohibited from abrogating or restricting . . . [the] equitable powers" of superior courts. Pet. at 8. In *Bowcutt*, however, the issue was whether a private plaintiff could seek an injunction under our state's "Little RICO Statute" to enjoin foreclosure of a deed of trust. *Bowcutt*, 95 Wn. App. at 316. The *Bowcutt* court found a legislative intent to provide injunctive relief to private victims of criminal profiteering. *Id.* at 318–19. In that case, the substantive right and the alleged violation were clear; the issue was the plaintiff's path to relief. *Id.* at 316. Here, the issue is whether Ms. Braun actually has any substantive right or entitlement to the relief she seeks; the trial court and the court of appeals ruled that she does not.

Ms. Braun's petition and concluded that, under RCW 68.50.200, she did not have a legal or equitable right to override her daughter-in-law's decision. The Court of Appeals affirmed. In short, the courts did not refuse to exercise jurisdiction; they simply found that our law does not provide Ms. Braun a right that entitles her to relief.

1. The Court of Appeals Did Not Offend the Constitution by Recognizing that the Legislature May Prescribe a Rule of Decision.

The Legislature enacted RCW 68.50.160 and RCW 68.50.200 to modify aspects of the common law. RCW 68.50.160(3) requires the wishes of a decedent to be followed unless they are unreasonable or unexpressed, in which case authority to dispose of the body vests in the surviving spouse if there is one. Similarly, RCW 68.50.200(1) requires that the decision to exhume a body be made by the surviving spouse if there is one. Neither statute suggests that courts lack jurisdiction to hear claims to construe, apply, or enforce these provisions.[2] Courts have this jurisdiction, and the superior court and Court of Appeals exercised jurisdiction when they denied Ms. Braun's petition.

[2] Nor did the Court of Appeals hold that the statute stripped any court of jurisdiction. To the contrary, the opinion noted that chapter 68.50 RCW refers to the "permission by the superior court" and "court proceeding." Op. at ¶¶ 26–27.

The Court of Appeals did nothing to divest the superior court of jurisdiction. It simply upheld the superior court's proper interpretation and application of RCW 68.50.200. This is an exercise of jurisdiction:

> When the court interprets the law, even though it be statutory, in applying it to the facts of a case before it, it has exercised its *jurisdiction* in the sense in which it was meant by the constitution. . . . When the action is heard before a superior court, its jurisdiction has not been invaded by the fact that it must determine the rights and remedies of the parties according to the rules laid down by the legislature.

Roon v. King Cnty., 24 Wn.2d 519, 529-30, 166 P.2d 165 (1946) (Mallery, J., concurring specially) (emphasis original); *see also State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996) (jurisdiction is the power to hear and determine a case); *Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (a court has jurisdiction when it has the "authority to adjudicate the *type of controversy* involved in the action" (emphasis original) (internal quotation marks omitted)).

Were "jurisdiction" the same as "result," many decisions would be subject to delayed collateral attack on jurisdictional grounds. This Court has rejected similar arguments before. *Marley*, 125 Wn.2d at 539 ("A court . . . does not lack subject matter jurisdiction solely because it may lack authority to enter a given order."). And it has explained that there is a difference between legal error and jurisdictional defect. *State v. Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996) ("[T]he court [has] rejected the argument that an

order outside the relevant statutory mandate is void, reasoning that such an analysis transforms mistakes as to statutory construction, *i.e.*, errors of law, into jurisdictional issues.").

In sum, the Court of Appeals' conclusion that "a general equitable common law cause of action for exhumation did not survive the legislature's enactment of the provisions now codified as chapter 68.50 RCW," Op. at ¶ 44, was in accord with the Washington Constitution and this Court's prior holdings. It respected the rule of decision expressly prescribed by the Legislature while still exercising jurisdiction to entertain the case. And it validly explained why the Legislature chose to supplant a common law general equitable cause of action with clear and consistent statutory criteria.

2. The Legislature Is Entitled to Establish the Substantive Law Governing Controversies of This Type.

Ms. Braun argues that the Court of Appeals offended the Washington Constitution by holding that a general equitable cause of action for exhumation can be modified by statute. This Court has previously held that a statute may validly supplant equity:

> [M]any of what were originally equitable rights have by statutes been made legal rights; and, so far as we are aware, there is no judicial authority for holding that the statutory transformation of an equitable right into a legal right is an encroachment upon the equitable powers of the court.

Casco Co. v. Thurston County, 163 Wn. 666, 669–70, 2 P.2d 677 (1931). Similarly, it is the role of the Legislature to establish public policy by enacting laws. *Rousso v. State*, 170 Wn.2d 70, 75, 239 P.3d 1084 (2010) ("It is not the role of the judiciary to second-guess the wisdom of the legislature which enacted this ban. The court has no authority to conduct its own balancing of the pros and cons . . . . It is the role of the legislature, not the judiciary to balance public policy interests and enact law.").

B. The Court of Appeals' Interpretation of RCW 68.50.200 Does Not Provide a Basis for Review.

Ms. Braun argues that the Court of Appeals wrongly interpreted chapter 68.50 RCW. It did not. The decision in this case is one of only two published cases citing RCW 68.50.200.[3] The Court of Appeals correctly interpreted the statute in accord with common sense and public policy.[4] So Ms. Braun must also argue that the opinion involves "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). It does not because the opinion conflicts with no other case law.

1. The Court of Appeals Correctly Interpreted RCW 68.50.200.

[3] The other case is *Bellevue Masonic Temple, Inc. v. Lokken*, 75 Wn.2d, 537, 538, 452 P.2d 544 (1969) (per curiam). *Bellevue Masonic* used common law equitable principles to address a controversy that is not subject to RCW 68.50.200's order of priority. *See id.*

[4] The Court of Appeals noted the legislative intent "to decrease future discord and enhance consistency of result." Op. at ¶ 44. Its opinion held: "By creating the hierarchy in subsection .160(3) and maintaining it in section .200, the legislature modified the common law. It [sic] doing so, it supplanted the earlier general right of the next of kin to, in the absence of testamentary intent, resort to equity in an attempt to control and direct a decedent's burial, putting in its place the clearer, more specific, statutory kinship hierarchy." Op. at ¶ 44.

The Court of Appeals properly construed RCW 68.50.160 and RCW 68.50.200 together, and held that "the legislature intended both the right to decide [how to dispose of remains] and the financial responsibilities attendant thereto to be effective and meaningful for more than one day." Op. at ¶ 24. This conclusion makes sense. It would be absurd to imagine that our Legislature adopted a scheme under which the surviving spouse controls initial disposition pursuant to RCW 68.50.160(3) but that, immediately following interment, another family member is authorized to seek the court's "substitute consent" to change that disposition. The Court of Appeals avoided this reading of the statute and the invitation to frequent, protracted and emotionally fraught litigation that would result from it.

More than that, the Court of Appeals' construction of RCW 68.50.160(3) and RCW 68.50.200 heeded an established principle of statutory construction. The two statutes were passed into law together in 1943. *See* General Cemetery Act, Laws of 1943, ch. 247 § 29, 1943 Wash. Sess. Laws 743, 746 (originally codified at Rem. Supp. 1943 § 3778-29). As this Court has noted, "Statutes in pari materia should be harmonized so as to give force and effect to each[,] and this rule applies with peculiar force to statutes passed at the same session of the Legislature." *Ralph v. State Dep't of Natural Res.*, 182 Wn.2d 242, 264, 343 P.3d 342 (2014) (internal

quotation marks omitted). The Court of Appeals correctly applied this principle.

2. The Court of Appeals' Decision Does Not Challenge Any Applicable Case Law.

Ms. Braun cites *Bellevue Masonic Temple, Inc. v. Lokken* for the proposition that "[a] controversy involving reinterment is equitable in nature." 75 Wn.2d 537, 538, 452 P.2d 544 (1969) (per curiam). But *Bellevue Masonic* did not address the issue that is central to this case: a challenge by Mr. Faenov's mother to the choices made by Mr. Faenov's widow. In *Bellevue Masonic*, an undedicated burial ground was filled with graves that were unmarked or in disrepair. *Id.* at 537. The issue in *Bellevue Masonic* was not the order of priority for decisions regarding removal of remains, or even whether it was appropriate to disinter the multitude of remains at Pioneer Cemetery. Instead, the decision regarding disinterment of all plots had already been made and was not contested by any person. Thereafter, the heirs of a particular decedent sought assurances about the precise location of reburial at the new cemetery. *Id.* at 538. In that context, the Court noted: "[T]he courts have broad discretion in determining the *details of the reinterment procedure*." *Id.* (emphasis added). *Bellevue Masonic* does not contradict the holding in the opinion below that "a general equitable common law cause of action for exhumation did not survive the legislature's

enactment of the provisions now codified as chapter 68.50 RCW." Op. at ¶ 44.

3. Ms. Braun's Reliance on Pre-Statute Common Law Is Misplaced.

Ms. Braun's appeal to equity is misplaced. Even if the Legislature had not codified the substantive law governing Ms. Braun's petition, there is no common law rule that grants a parent the right to overrule a spouse with regard to disposition of a decedent. In *Wood v. E.R. Butterworth & Sons*, 65 Wn. 344, 118 P. 212 (1911), this Court held that "it is now well settled that a widow is entitled to control the burial of her deceased husband, as against his next of kin." *Id.* at 347. In *Wood*, the trial court overrode the widow's wishes only because it concluded that she was improperly attempting to subvert the decedent's own frequently expressed instructions as to where he wanted to be buried. *Id.* at 348. The normal result under common law that, except when she is in conflict with her husband's own expressed burial decisions, a widow is entitled to control the ongoing disposition of his remains, is now embodied in RCW 68.50.200.

The Court of Appeals' harmonization of RCW 68.50.200 with RCW 68.50.160(3) also accords with the common law, which vested the control over disposition of remains and control over exhumation in the same person. In another pre-statutory decision, *Herzl Congregation v. Robinson*, 142 Wn.

469, 253 P. 654 (1927), this Court summarized the common law: "[T]he right to protect the remains includes [1] the right to preserve them by separate burial, [2] to select the place of sepulture, and [3] *to change it at pleasure*." *Id.* at 473 (emphasis added). The Court in *Herzl* permitted the parent to determine the place of burial only because there was no surviving spouse. There is no common law precedent that would have permitted Ms. Braun to exhume Mr. Faenov and relocate his remains over the objection of his widow. Nor is there anything unconstitutional about a statute that codifies the same result.

4. Ms. Braun's Other Arguments Do Not Support Supreme Court Review.

Ms. Braun argues that the last sentence of RCW 68.50.200 and the notice provision in RCW 68.50.210 are incompatible with an interpretation that harmonizes RCW 68.50.160(3) and RCW 68.50.200. Pet. at 12. But as the Court of Appeals pointed out, the language in RCW 68.50.200 provides for a circumstance in which all the kin listed in the statute are no longer living. Op. at ¶ 26. The opinion also notes that RCW 68.50.210 ensures that if there are multiple persons on a rung in the order of priority described in RCW 68.50.200, each receives notice. Op. at ¶ 27. Ms. Braun argues that the Court of Appeals' holding is incorrect because it would deny the superior court "authority" to hear reinterment petitions where there are living persons

described in the statutes' order of priority. Pet. at 12. Again, Ms. Braun's use of the word "authority" conflates the court's jurisdiction to construe and enforce a statute with the notion of an unfettered freedom to craft a result that is not permitted by the statute. *See supra*, p. 7.

The superior court will always have jurisdiction to hear petitions on controversies arising under RCW 68.50.200. Indeed, parties may be keen to invoke that jurisdiction to resolve dispute such as "who" is a surviving child or sibling, or what should be done when parents disagree or siblings disagree. In all such controversies, however, the court must still follow the governing statutes. That a court must apply a statute does not mean that it lacks "authority."

Ms. Braun also contends that the opinion confers upon the cemetery an absolute veto over the wishes of people described in the statutory order of priority. The Petition provides no citation to a paragraph in the opinion that supports this contention. *See* Pet. at 13. Nor does this necessarily follow. Although RCW 68.50.200 does refer to the "consent of the cemetery authority," the Court of Appeals noted that RCW 68.50.220 provides a limited exception to the strict adherence in cases involving "investigation of an individual's cause of death, potential criminality, or a threat to the public health." Op. at ¶ 30. Further, Ms. Braun presented no evidence of a cemetery

authority ever having taken an independent position on disinterment that conflicts with that of the individual who has statutory priority.

Ms. Braun also attacks the harmonized reading of RCW 68.50.160(3) and RCW 68.50.200, pointing to minor language differences. *See* Pet. at 13–14 & n.7. For example, she notes that, when applicable, RCW 68.50.160(3)(d) requires agreement on burial arrangements by a "*majority* of the surviving adult children of the decedent." *Id.* (emphasis added). Similarly, RCW 68.50.160(3)(f) speaks to requiring a "*majority* of the surviving siblings of the decedent" to agree on burial arrangements. *Id.* (emphasis added). In contrast, RCW 68.50.200(2) and (4) require unanimity from both children and siblings. But as noted by the Court of Appeals, "there was a strong common law presumption in favor of repose." Op. at ¶ 33. This unanimity requirement reinforces the public policy of disturbing the place of burial as infrequently as possible. There is no reason for this Court to review a decision that reinforces that public policy.

Ms. Braun also points out that RCW 68.50.200 does not contain RCW 68.50.160(4)'s language regarding murder and manslaughter. Pet. at 14 n.7. Yet while the inclusion of this language in RCW 68.50.160 sensibly prevents a slayer from making a quick and unsupervised decision to cremate

or otherwise dispose of remains, the same concern does not apply in the context of RCW 68.50.200.[5]

Finally, Ms. Braun suggests that if the definition of "disposition" means "transfer to the care of possession of another," then RCW 68.50.160(3) should not grant a right to control a decedent's remains beyond the initial disposition (i.e., the transfer to the cemetery on the day of burial). The Court of Appeals correctly rejected that reading, as it would undermine the Legislature's purpose in providing the same clear statutory order of priority in both RCW 68.50.160(3) and RCW 68.50.200. For this reason, as well, this Court has no good reason to review the Court of Appeals' decision.

V. CONCLUSION

This Court's review is not merited. The dispute between Ms. Selig and Ms. Braun, while important to each of them, does not provide the Court with an opportunity to correct a grievous precedent that would be an injustice to the public beyond these two litigants. This Court's time can be better spent on different matters that truly impact those beyond the immediate controversy.

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[5] Nor do Ms. Braun's elaborate hypotheticals involving murdering spouses and subsequent marriages, warrant a grant of review by this Court. *See* Pet. at 14 n.7. Our Slayers Act, chapter 11.84 RCW, addresses and resolves the first hypothetical; and RCW 68.50.160(3)(b) resolves the second hypothetical. Ms. Braun recites her other hypotheticals followed by the rhetorical question, "may the court hear the dispute?" *See* Pet. at 16. The answer, of course, is "yes": the court may hear the dispute, and the court will resolve it in accordance with the governing law. In any event, these hypotheticals are unlikely to occur and Ms. Braun's invitation to frequent disputes is what the Legislature sought to avoid.

The Court of Appeals correctly interpreted and applied RCW 68.50.200 to reject the petition of a parent who disagrees with the interment choices of a surviving spouse, based on the substantive law established by the Legislature. By affirming the superior court's jurisdiction to review and dismiss the petition, the Court of Appeals did not offend the Washington Constitution. The Court of Appeals exercised jurisdiction and followed the command of the Legislature in declining to order a remedy that it unquestionably had the jurisdiction to order. The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 15th day of July 2015.

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By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on July 15, 2016, I caused to be served a copy of the foregoing document to the following person(s) in the manner indicated below at the following address(es):

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Executed on the 15th day of July 2016 at Seattle, WA.

Lou Rosenkranz