

**RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE**

Aug 15, 2016, 3:56 pm

RECEIVED ELECTRONICALLY

No. 93273-5

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 72948-9-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

FILED

AUG 23 2016

WASHINGTON STATE
SUPREME COURT

In re the Reinterment of the Remains of Kyril Faenov

MARINA BRAUN,

Petitioner,

vs.

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

Respondents

AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW
(RAP 13.4(h))

Professor Karen E. Boxx
WSBA No. 13435

University of Washington
School of Law
William H. Gates Hall
Box 353020
Seattle, Washington 98195

FILED AS
ATTACHMENT TO EMAIL



ORIGINAL

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS CURIAE.....1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT2

 A. RCW 68.50.160(3) does not grant a perpetual right to control
 human remains.....2

 B. RCW 68.50.200 grants courts broad, flexible equitable authority
 to consider disinterment petitions on their merits.....8

IV. CONCLUSION10

TABLE OF AUTHORITIES

CASES

<i>Beatty et al v. Kurtz et al</i> , 27 U.S. 566 (1829).....	9
<i>Bellevue Masonic Temple, Inc. v. Lokken</i> , 452 P.2d 544 (Wash. 1969)....	10
<i>Harris v. Borough of Fair Haven</i> , 721 A.2d 758 (N.J. Super.Ch. 1998)	9
<i>Herzl Congregation v. Robinson</i> , 253 P. 654 (Wash. 1927)	10
<i>Manaray v. Brady</i> , 197 P. 624, (Wash. 1921)	10
<i>Pierce v. Proprietors of Swan Point Cemetery</i> , 10 R.I. 227 (1872).....	9
<i>Pulsifer v. Douglass</i> , 94 Me. 556, 48 A. 118 (1901).....	4
<i>State v. Clifford</i> , 142 P. 472 (Wash. 1914).....	10
<i>Yome v. Gorman</i> , 242 N.Y. 395 (Ct. App. N.Y. 1926)	10

STATUTES

RCW 68.50.160	passim
RCW 68.50.200	passim
RCW 68.50.270	5

OTHER AUTHORITIES

Black's Law Dictionary, Sixth Edition (1991).....	4
Cremation Association of North America Industry Statistical Information http://www.cremationassociation.org/?page=IndustryStatistics	4
Marsh, Tanya, and Daniel R. Gibson. <i>Cemetery Law: The Common Law of Burying Grounds in the United States</i> (2015)	9
Session Laws of the State of Washington, Twenty-Eighth Session (1943) http://leg.wa.gov/CodeReviser/documents/sessionlaw/1943pam1.pdf ...	2

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Karen E. Boxx is a Professor at the University of Washington School of Law. Her areas of teaching and research include wills and trusts, community property, elder law, and conflict of laws. She has been active throughout her legal career in legislative review and reform in Washington, most recently chairing a Task Force revising the Washington trust laws (adopted in 2011 and revised in 2013) and assisting in the adoption of the Washington Uniform Power of Attorney Act in 2016. She assisted then Representative Cal Anderson in amendments to RCW 68.50.160 enacted in 1993.

Professor Boxx appears in this court as *amicus curiae* on a pro bono basis and in her individual capacity. She does not appear as the representative of her employer or either the petitioner or respondent.

In this case, the Court of Appeals interpreted two 73-year old statutes. The Court: (i) discovered a perpetual right in RCW 68.50.160; and (ii) interpreted RCW 68.50.200 as depriving the courts of their long-standing equity jurisdiction over disinterment. Both of these statutory interpretations run contrary to well-established understandings of the statutes as well as common law principles. This Court should accept review to decide two fundamental questions: (1) Whether the superior court has the jurisdiction, pursuant to RCW 68.50.200, to hear

disinterment petitions on their merits, or whether the Legislature intended to deprive the courts of that historical authority; and (2) Whether RCW 68.50.160(3) grants a perpetual right to control remains *after* disposition. The Court of Appeals' decision is a limitation on the courts' authority that will have far-reaching implications for funeral directors, cemeteries, and families in Washington.

II. STATEMENT OF THE CASE

Amicus curiae adopts the facts as set out in the petition for review.

III. ARGUMENT

A. **RCW 68.50.160(3) does not grant a perpetual right to control human remains.**

The Court of Appeals did not need to interpret RCW 68.50.160 in order to decide this case. In doing so, it erroneously concluded that the grant of the right to control the disposition of human remains “was a grant of perpetual control.” (Opinion at 11) This interpretation of the statute is unsupported by the express language of the statute and well-established principles of common law.

RCW 68.50.160 was adopted by the Legislature in the 1943 General Cemetery Act. (Session Laws at 743-774) RCW 68.50.160 was originally codified as 1943 c 247 § 29. (Session Laws at 746) The original statute is set forth in Appendix 1. The statute has changed

significantly since 1943, but the operative language remains unchanged. RCW 68.50.160(3) sets forth the order of priority to determine who shall have “the right to control the disposition of the remains of a deceased person.” No express language in the statute suggests whether the person granted the right to *control the disposition* of human remains is also granted the right, in perpetuity, to control those remains *after* disposition.

The Court based its discovery of the perpetual right on: (i) the Legislature’s use of the word “vest” in the statute; (ii) a misunderstanding of well-established common law principles; and (iii) a mistaken understanding of the meaning of the kinship priority lists in the General Cemetery Act.

The Court of Appeals analyzed the meaning of the word “vest” in the operative phrase—“the right to control the disposition of the remains of a deceased person *vests* in...the following in the order named.” (Opinion at 10) Utilizing a dictionary definition of the word “vest,” the Court of Appeals noted that “the right granted is immediate, legally enforceable, and pertains to ‘present or future enjoyment.’ In this way,” the Court concluded, “the right to control burial circumstances that ‘vests’ under subsection .160(3) is a perpetual right.” (Opinion at 10) The Court ignored the words preceding “vests” in that phrase—“the right to control the *disposition* of the remains of a deceased person.” The word

“disposition” is not defined by Washington law. *Black’s Law Dictionary* defines “disposition” as “[a]ct of disposing; transferring to the care or possession of another. The parting with, alienation of, or giving up property.” (*Black’s Law Dictionary* 471) *Black’s* defines “dispose of” as “[t]o exercise finally, in any manner, one’s power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away.” (*Black’s Law Dictionary* 471) These definitions speak to transition and change, not perpetuity. By its plain language, RCW 68.50.160(3) grants only a temporary “right to control the disposition” of human remains that ends when the disposition is complete.

This reading of the plain language of RCW 68.50.160(3) is consistent with the long-standing common law principle that “[a] dead body, after burial, becomes a part of the ground to which it has been committed.” *Pulsifer v. Douglass*, 94 Me. 556, 48 A. 118, 119 (1901). Finding a perpetual right of control in RCW 68.50.160(3) is even more inconsistent with the prevailing disposition practice in Washington—cremation. In 2015, Washington had the second highest cremation rate in the United States, at 75.5%. (Cremation Association of North America (“CANA”) Industry Statistical Information). There is no legal requirement in Washington that cremated human remains be buried or scattered. They

may be held indefinitely and distributed or dispersed at any time. “Control” of remains after disposition by cremation is therefore a logistically different proposition than “control” of remains after disposition by burial. RCW 68.50.270 was enacted in 1977 to address the question of who has the right to possess cremated human remains. The statute provides that

The person or persons determined under RCW 68.50.160 as having authority to order cremation shall be entitled to possession of the cremated human remains without further intervention by the state or its political subdivisions.

If the Legislature believed that RCW 68.50.160(3) granted a perpetual right to control human remains, the enactment of RCW 68.50.270 would have been unnecessarily duplicative.

Finally, the Court of Appeals mentioned several times that the “order named” in RCW 68.50.200 is “the same statutory kinship hierarchy as is set forth in [RCW 68.50.160(3)].” (Opinion at 11, 15-16) This is factually incorrect. The side by side comparison of RCW 68.50.160(3) and RCW 68.50.200 in the Petition illustrates the stark differences. [Petition at Appendix B] The “statutory kinship hierarchy” in RCW 68.50.160(3) includes a number of people not referenced in RCW 68.50.200 and disqualifies many people who would not be disqualified by RCW 68.50.200.

In its attempt to reconcile RCW 68.50.160(3) and RCW 68.50.200 by declaring that “subsection .160(3) grants a perpetual right that is recognized in section .200,” the Court of Appeals introduces significant uncertainty to the established understandings of both statutes. (Opinion at 15-16) For example, RCW 68.50.160(3) denies the right to control the disposition of remains to a person if they are charged with certain crimes in connection with the death of the decedent. RCW 68.50.200 does not. Assume that the surviving spouse is charged with killing the decedent. The decedent leaves surviving minor children and parents. Pursuant to RCW 68.50.160(3), the surviving spouse and the minor children are disqualified, and the right to control disposition passes to the surviving parents. If the parents choose burial, the Court’s interpretation of RCW 68.50.160(3) would grant the surviving parents a perpetual right of control that is in conflict with RCW 68.50.200. If the surviving spouse is then cleared of the crime and wants to move the remains, under the Court’s interpretation of RCW 68.50.160 this would not be allowed. Another circumstance that the Court failed to consider is where the decedent leaves disposition instructions. RCW 68.50.160(3) grants the decedent priority over the wishes of all living kin. The Court’s interpretation of RCW 68.50.160(3) would grant the decedent a perpetual right to control his or her own remains. At the same time, the Court’s interpretation of RCW

68.50.200 would allow the surviving spouse, children, parents, and siblings—all of whom were trumped under RCW 68.50.160(3)—the right to consent to disinterment. The Court’s respective interpretations of the two statutes are irreconcilable.

The Court noted, without the benefit of any legislative history, that “[i]n creating [the statutory kinship hierarchy], the legislature took it upon itself to designate ‘winners’ and ‘losers’ among kin, obviously hoping to decrease future discord and enhance consistency of result.” (Opinion at 20) Based on limited facts of the present case, the Court chose to designate a single “winner”—the surviving spouse who sits atop the kinship priority lists in both RCW 68.50.160(3) and RCW 68.50.200. But as the above examples illustrate, the significant differences between the two kinship priority lists will inevitably give rise to inconsistent “winners” and “losers.” The Court failed to acknowledge the inevitable conflict and therefore offered no guidance to funeral directors, cemeteries, and courts. The Court’s discovery of a perpetual right in RCW 68.50.160(3) will only increase future discord and inconsistent outcomes. This Court should accept review of the petition to correct the Court of Appeals decision and confirm the courts’ equitable authority to consider disinterment petitions.

B. RCW 68.50.200 grants courts broad, flexible equitable authority to consider disinterment petitions on their merits

The Court of Appeals concluded that “absent evidence of a decedent’s expressed wishes regarding the disposition of that person’s remains—the pertinent statutes do not provide a decedent’s parent with the authority to request a court order authorizing the exhumation of the decedent’s remains over the objection of a surviving spouse.” (Opinion at 2) The Court reached this conclusion by conflating several issues and fundamentally misinterpreting RCW 68.50.200.

RCW 68.50.200 was adopted, along with RCW 68.50.160, as part of the 1943 General Cemetery Act. It was originally codified as 1943 c 247 § 33. (Session Laws at 747-8) The original statute is set forth in Appendix 1. RCW 68.50.200 provides that disinterment may take place with the consent of the cemetery authority and the written consent of one of the next of kin, in the order of priority of spouse, children, parents, and siblings. The Court of Appeals interpreted the written consent requirement as the equivalent of the grant of veto power—as long as one of the named kin is alive and objects to disinterment, the courts have no authority to hear a disinterment petition and to decide the matter on its merits. (Opinion at 2)

This interpretation of RCW 68.50.200 rests on the Court's conclusion that RCW 68.50.160(3) grants a perpetual right to control remains *after* disposition. It is unsupported by the express language of the statute and is contrary to centuries of common law doctrine granting the courts equitable authority to determine whether disinterment is appropriate. *See generally* Marsh, Tanya, and Daniel R. Gibson. *Cemetery Law: The Common Law of Burying Grounds in the United States (2015)*, 362-380. The courts' equitable jurisdiction over the dead was established by the United States Supreme Court nearly two centuries ago. *Beatty et al v. Kurtz et al*, 27 U.S. 566 (1829). *See also* *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227 (1872). The principle is consistently reasserted by modern courts.

It is true, also, that the Superior Court possesses equitable jurisdiction, as a general matter, over the dead. This means ... that once a body is buried it is deemed to be in the custody of the law and the removal or disturbance of those remains lies, when not otherwise provided by legislation, within the court's equitable powers.

Harris v. Borough of Fair Haven, 721 A.2d 758, 762 (N.J. Super.Ch. 1998). The Legislature has not expressly disavowed the courts' equitable jurisdiction over the dead and the Court erred when it concluded otherwise.

In addition to the present case, Washington has only four reported appellate cases concerning petitions for the disinterment of human remains. In each of these four cases, this Court acted in accordance with its common law equity jurisdiction and decided the case on its merits. Three of those cases pre-date RCW 68.50.200. *Herzl Congregation v. Robinson*, 253 P. 654, 654 (Wash. 1927); *Manaray v. Brady*, 197 P. 624, 625 (Wash. 1921); *State v. Clifford*, 142 P. 472, 473 (Wash. 1914). One, *Bellevue Masonic Temple, Inc. v. Lokken*, 452 P.2d 544, 544 (Wash. 1969), was decided after RCW 68.50.200 was enacted. This Court should accept review to reconfirm the courts' long-standing equitable jurisdiction over disinterment.

IV. CONCLUSION

The Court of Appeals' radical interpretation of RCW 68.50.160(3) creates an inconsistency with RCW 68.50.200 and will increase confusion as to application of the statutes. In the influential disinterment case of *Yome v. Gorman*, 242 N.Y. 395 (Ct. App. N.Y. 1926), Justice Cardozo warned that "[o]ne may not fix their values in advance, for in so doing one would overlook the varying force of circumstance." The common law principles of equity are flexible because they recognize the varying force of circumstance. There is no evidence to support the Court of Appeals' conclusion that the Legislature intended to establish a perpetual right to

control remains or to deprive the courts of equitable jurisdiction over disinterment. In fact, the Legislature's amendments to RCW 68.50.160 since enactment have consistently moved away from rigid kinship priority to allow for the "varying force of circumstance." This Court should accept review to correct the Court of Appeals' erroneous interpretation of RCW 68.50.160(3) and RCW 68.50.200.

RESPECTFULLY SUBMITTED this 15th day of August, 2016.



By: Karen Boxx, WSBA No. 13435

University of Washington
School of Law
William H. Gates Hall
Box 353020
Seattle, Washington 98195

Appendix 1

Sec. 29. The right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent, vests in, and the duty of interment and the liability for the reasonable cost of interment of such remains devolves upon the following in the order named:

- (a) The surviving spouse.
- (b) The surviving children of the decedent.
- (c) The surviving parents of the decedent.

The liability for the reasonable cost of interment devolves jointly and severally upon all kin of the decedent hereinbefore mentioned to the same degree of kindred and upon the estate of the decedent.

Sec. 33. The remains of a deceased person may be removed from a plot in a cemetery with the consent of the cemetery authority and the written consent of one (1) of the following in the order named:

- (1) The surviving spouse.
- (2) The surviving children of the decedent.
- (3) The surviving parents of the decedent.
- (4) The surviving brothers or sisters of the decedent.

If the required consent cannot be obtained, permission by the Superior Court of the county where the cemetery is situated is sufficient: *Provided*, That the permission shall not violate the terms of a written contract or the rules and regulations of the cemetery authority.

CERTIFICATE OF SERVICE

I, Nicola Derbyshire, hereby certify that on August 15, 2016, I served a copy of the foregoing document (*Amicus Curiae Memorandum in Support of Review*) on the parties listed below in the manner shown:

John P. Zahner, WSBA #24505 (via e-mail & U.S. mail)
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Phone: 206-447-4400 (main)
Fax: 206-447-9700
Email: zahnj@foster.com
Attorneys for Lauren Selig and Martin Selig

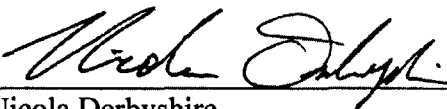
Gail E. Mautner, WSBA #13161 (via e-mail & U.S. mail)
Lane Powell PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98111
Phone: 206-223-7000 (main)
206-223-7099 (direct)
Fax: 206-223-7107
Email: mautnerg@lanepowell.com
Attorneys for Temple de Hirsch Sinai

Karen R. Bertram, WSBA #22051 (via e-mail)
Kutscher Hereford Bertram Burkart PLLC
705 2nd Ave., Suite 800
Seattle, WA 98104
Phone: 206-382-4414
Fax: 206-382-4412
Email: kbertram@khbblaw.com
Attorneys for Marina Braun

Matthew N. Menzer, WSBA #21665 (via e-mail)
705 2nd Ave., Suite 800
Seattle, WA 98104
Phone: 206-903-1818
Fax: 206-903-1821
Email: mnm@menzerlawfirm.com
Attorneys for Marina Braun

I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Dated this 15th day of August, 2016.



Nicola Derbyshire

OFFICE RECEPTIONIST, CLERK

From: Nicola Derbyshire <nderbyshire@khbblaw.com>
Sent: Monday, August 15, 2016 3:47 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Karen Bertram; Matt Menzer; zahnj@foster.com; mautnerg@lanepowell.com
Subject: In the Matter of the Reinterment of the Remains of Kyril Faenov; Marina Brun v. Lauren Selig, Martin Selig, and Temple De Hirsch Sinai; No. 93273-5
Attachments: 2016-08-15 Amicus Curiae Memorandum.pdf; 2016-08-15 Motion of Amicus Curiae Karen Boxx.pdf

Re: In the Matter of the Reinterment of the Remains of Kyril Faenov; Marina Brun v. Lauren Selig, Martin Selig, and Temple De Hirsch Sinai

Washington Supreme Court No. 93273-5

Filed by Karen R. Bertram, WSBA No. 22051, Attorneys for Petitioner Marina Braun

Dear Clerk:

Per Karen Bertram's request, I am attaching the following documents for filing with the Supreme Court regarding the above-named matter:

1. Motion of Amicus Curiae Karen Boxx, for Leave to File Memorandum in Support of Petition for Review
2. Amicus Curiae Memorandum in Support of Review

Sincerely,

Nicola Derbyshire
Legal Assistant
Kutscher Hereford Bertram Burkart PLLC
Hoge Building, Suite 800
705 Second Avenue
Seattle, WA 98104-1711
Telephone: (206) 382-4414
Facsimile: (206) 382-4412
E-mail: nderbyshire@khbblaw.com

KUTSCHER
HEREFORD
BERTRAM
BURKART

KHBB
Law