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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re the Reinterment of the Remains of Kyril Faenov

MARINA BRAUN,

Appellant,

v.

LAUREN SELIG, MARTIN SELIG and TEMPLE DE HIRSCH SINAI,

Respondents.

APPELLANT'S CONSOLIDATED REPLY BRIEF

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I. INTRODUCTION

Respondents incorrectly assert that the surviving spouse has an exclusive right to control the remains of her husband and repeatedly state that the court has “limited authority” regarding reinterment decisions. (TDHS Br. 1-3, 7, 12, 17.) However, RCW 68.50 and Washington case law give trial courts broad equitable authority to consider petitions for reinterment, even where a cemetery authority and surviving spouse have refused to grant their consent.

The Selig Respondents admit that “the trial court was required to balance a variety of equitable factors,” but contend that the record before the trial court was fully developed. (Selig Br. 13, 15.) On the contrary, the record shows that the equitable merits of the reinterment Petition was never raised by the parties or the court as a potential ground for summary judgment, and therefore Ms. Braun was denied the notice and opportunity to be heard on these issues. Likewise, Ms. Braun was prevented from doing any discovery on the relevant equitable issues.

Respondent Temple De Hirsch Sinai (“TDHS”) goes so far as to invent a term of art, referring to the court’s authority to grant reinterment as “substitute consent.” (TDHS Br. 8, 11, 20.) The court’s broad authority to order reinterment is not substitute consent for the decedent’s next of kin, and neither RCW 68.50 nor the common law use the term. The

principles followed by the courts in applying the common law remain the same in applying RCW 68.50. If a dispute arises among relatives as to the disposition of remains, the trial court must look at the particular facts and circumstances to make an equitable determination. The trial court erred by not permitting Ms. Braun to present all the evidence of the particular facts and circumstances in this case.

II. CORRECTED STATEMENT OF FACTS

Respondents' briefs misstate and mischaracterize certain facts, as well as court orders, which are corrected below.

A. Ms. Braun Was Not Invited to Submit Declarations to Defend Her Petition.

Respondents inaccurately assert that the "trial court invited the parties to submit any affidavits necessary to decide whether Ms. Braun's Petition should be allowed or dismissed." (Selig Br. 2.) Likewise, they misrepresent the trial court's September 29, 2014 Order by arguing that it permitted Ms. Braun to submit any additional declarations or affidavits needed to defend the Petition. (Selig Br. 11.)

On September 5, 2014, the trial court granted the Seligs' Motion to Stay Discovery on the basis of the Seligs' assertion that the "Motion to Dismiss can be granted purely on the legal arguments and the declarations that have been presented without the need for further declarations or other

evidence.” (CP at 356.) The trial court then requested supplemental briefing on four questions “in accordance with CR 56(c).”¹ (CP at 356-357.) Ms. Braun filed a Motion for Clarification/Reconsideration in which she asked, *inter alia*, whether the court’s request for supplemental briefing contemplated the parties filing “supporting affidavits” or “other documentation” as referenced in CR 56(c). (CP at 362.) The trial court responded in its September 29, 2014 Order Regarding Briefing Schedule that additional declarations or affidavits “may be filed in support of the additional briefing.” (CP at 365.)

The trial court did not invite Ms. Braun to submit declarations “needed to defend the Petition” or “necessary to decide whether the Petition should be allowed or dismissed.” (Selig Br. 2, 11.) The trial court unambiguously stated in its September 5, 2014 Order that discovery was being denied, in part, to determine whether the matter could be decided “purely on the legal arguments and declarations that have been presented and without the need for further declarations or other evidence...” (CP at 356.) The September 29, 2014 Order merely clarified that the Court would allow the parties to submit additional declarations related to the questions the trial court asked the parties to address in the

¹ Included in these four questions was whether Ms. Braun had waived her right to object to Mr. Faenov’s place of interment. (CP at 357.)

supplemental briefing, particularly the question posed regarding a potential waiver.

B. Kyril's Friends Properly Marked His Grave.

Respondents' assertion that some of Kyril's friends placed a headstone on his grave without obtaining permission from Ms. Selig is misleading. (TDHS Br. 4.) In reality, Kyril's friends reached out to Ms. Selig to ask about a headstone for Kyril's grave. (CP at 37.) When their questions went unanswered, Kyril's friends contacted Martin Selig, who purchased the plot, and Mr. Selig gave them permission to install a headstone. (CP at 37.) Moreover, Kyril's friends waited until after the one-year anniversary had passed and then, when Ms. Selig still had not marked the grave with a headstone, they paid for a simple headstone to be installed. (CP at 38.)

C. Ms. Braun Effectively Disputed Many of Ms. Selig's Factual Assertions.

The Seligs' brief is replete with facts that have been affirmatively disputed by Ms. Braun. The Seligs claim that following Kyril's burial, Ms. Braun disappeared from Ms. Selig's life and the lives of her two young daughters. (Selig Br. 1.) Ms. Braun attempted to reach out to both Ms. Selig and her mother to spend time with them and her granddaughters, but Ms. Selig responded negatively to these overtures. (CP at 463-465.)

Ms. Selig states she contacted Ms. Braun, informed her of the location of the burial, and that Ms. Braun did not object. (Selig Br. 5.) At no point following Kyril's death, however, was Ms. Braun or Kyril's father involved in the decision of where to bury Kyril or informed of this decision by Ms. Selig. (CP at 462-463, 499-500.)

Contrary to Respondents' claim that Ms. Selig and Ms. Braun had a single communication after Kyril's funeral (Selig Br. 6.), the record accurately reflects multiple communications between the two in the weeks immediately following the funeral. (CP at 464-465.) Likewise, Ms. Braun introduced evidence suggesting that Ms. Selig made the decision to move her family to Los Angeles prior to Kyril's death, which Ms. Selig denies. (CP at 466-467.) (Selig Br. 7.) On summary judgment, these factual disputes should be viewed in the light most favorable to Ms. Braun.

D. There is No Permanent Headstone.

After Ms. Braun filed her Petition for Reinterment, Ms. Selig claimed that she left Kyril's grave unmarked for over two years because she was waiting for her daughters to be old enough to help her design a headstone. (CP at 135.) She then had an "interim" headstone installed prior to the hearing on the motion. (CP at 91.)

The Seligs now claim that a permanent headstone has since been installed. (Selig Br. 8.) Not only is this claim unsupported by the record, it is untrue. Ms. Braun has photographic evidence demonstrating that the the “interim” headstone installed after the Petition was filed has not been replaced, but remains at Kyril’s grave. Should the Court wish to review this evidence pursuant to RAP 9.11, Ms. Braun will promptly present it.

III. ARGUMENT

A. **RCW 68.50 Must Be Construed in Harmony with Common Law.**

RCW 68.50 was not written as a substitute for the prior common law. To determine the intent of a statute, the Court is charged to give meaning to the spirit and purpose of the statute, the first step being to ascertain what the common law was and then determine whether the statute is in derogation of that common law. *Wichert v. Cardwell*, 117 Wn.2d 148, 154-156, 812 P.2d 858 (1991). Only where the provisions of a later statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be enforced will the statute be deemed to abrogate the common law. *State ex rel. Madden v. Public Util. Dist.*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973).

RCW 68.50 is not a remedial statute enacted to abolish the prior common law. Respondents admit that the language of RCW 68.50 does nothing to abrogate the principles of the prior common law. (TDHS Br. 12.) There is nothing in the prefatory language of RCW 68.50 indicating

that it was enacted to remedy prior common law. Because RCW 68.50 and common law are congruous, they must be read in harmony. Likewise, the common law principles applied by Washington courts are relevant and applicable in this matter.

Although Respondents acknowledge that RCW 68.50 does nothing to abrogate the common law, they consistently argue that the principles applied by the court in *Wood v. E.R. Butterworth & Sons*, 65 Wash.344, 118, P.2d 212 (1911) are inapplicable because Washington law changed with the codification of RCW 68.50. (TDHS Br. 14.) The principles applied in *Wood* remain the law in Washington. As such, when there is a dispute regarding interred remains, no hard and fast rule can be universally applied, it is inherently equitable and the court must make its decision based on all the attending facts and circumstances of the matter. *Wood* at 347.

B. Under Washington Common Law Courts Have Broad Authority Over Interred Remains.

Respondents are incorrect. Washington common law does not give the surviving spouse the exclusive right over interred remains. (TDHS Br. 12.). Consistent with the general common law, in Washington the common law right of the next of kin is characterized as a right “to control and direct the burial of a corpse and arrange for its preservation.” *Whitney v. Cervantes*, 182 Wn. App. 64, 70, 328 P.3d 957, 960 (2014), citing *Guilliume v. McCulloch*, 173 Wash. 694, 696, 24 P.2d 93 (1933). The purpose of that right necessarily concludes upon burial or other

disposition. *Herzl Congregation v. Robinson*, 142 Wash. 469, 473, 253 P. 654 (1927). In *Herzl Congregation*, the decedent's parents applied for permission to disinter their son's body and reinter it in a different cemetery. The cemetery refused to give its consent and sought an injunction to prevent the reinterment. 142 Wash. at 470. Although *Herzl Congregation* appears to support a next of kin's right to control the disposition of a family member's remains after interment, it is important to note that there was no dispute between family members regarding whether the remains were to be disinterred. The holding in *Herzl Congregation* is inconsistent with the principle that the right to control human remains ends at interment, but provides a common corollary that the next of kin have superior rights over a third party, such as the owner of a cemetery.

Consistent with the common law doctrine that it codified, RCW 68.50.160 grants an individual the right to control the disposition of another's remains. It does not grant that individual, however, the exclusive right to control those remains after that initial disposition, or interment.

C. The Court Has Broad Discretion Under RCW 68.50 to Make Equitable Determinations About Reinterment.

Respondents incorrectly contend that courts only have limited authority over interred remains pursuant to RCW 68.50.200. (TDHS Br. 7; 17.). RCW 68.50.200 outlines the requirements to obtain the legal authority to conduct a reinterment. The language of RCW 68.50.200 is permissive, not restrictive. It begins with the statement that "human

remains may be removed...” RCW 68.50.200. This permissive lexicon reinforces the equitable jurisdiction of the court over interred remains because it implies that the statute establishes *one* lawful process, as opposed to the *only* lawful process. For example, RCW 68.50.220 provides:

RCW 68.50.200 and 68.50.210 do not apply to or prohibit the removal of any human remains from one plot to another in the same cemetery or the removal of [human] remains by a cemetery authority from a plot for which the purchase price is past due and unpaid, to some other suitable place; **nor do they apply to the reinterment of human remains upon order of court.**

RCW 68.50.220 (emphasis added). This language necessarily means that the court’s common law equitable jurisdiction over reinterment is not preempted by RCW 68.50.200.

RCW 68.50.200 then provides that “[i]f the required consent cannot be obtained, permission by the superior court of the county where the cemetery is situated is sufficient.” The statute does not differentiate between consents that “cannot be obtained.” TDHS has misleadingly argued that the Court has equitable jurisdiction over the reinterment petition only if: (i) the cemetery authority has consented; and (ii) the other required consenting party “cannot provide consent, due to either unavailability or lack of capacity.” (CP at 377-378.) The argument, however, is inconsistent with the express language of RCW 68.50.210, which provides that if permission of the court is sought, notice of application to the court shall be given to the cemetery authority and “to the

persons not consenting.” This language anticipates that a petitioner may apply for permission even if one or more of the named parties refuses to grant it.

The California courts have interpreted the analogous California statute to permit the court to hear reinterment petitions if the cemetery authority or named kin withhold consent. *See, e.g., Mitty v. Oliveira*, 111 Cal. App. 2d 452, 457, 244 P.2d 921 (1952). In 2005, the California Court of Appeals considered a case in which a surviving spouse sought to disinter his wife’s remains over the objections of her brother, who was the owner of the crypt in which her remains resided. *Maffei v. Woodlawn Mem’l Park*, 130 Cal. App. 4th 119 (2005). The Court of Appeals began by noting that the trial court had authority under Cal. Health & Safety Code § 7526 “when the cemetery withholds consent.” *Id.* at 121. It then concluded that the Cal. Health & Safety Code 7526 “grants the trial court broad discretion, sitting in equity, to consider the particular facts of each case in deciding whether to grant permission to disinter the remains of a deceased person.” *Id.* at 122.²

Although the 1927 *Herzel Congregation* decision pre-dates the Washington Legislature’s enactment of RCW 68.50.200, a 1969 Washington case affirms the statement in *Herzel Congregation* that “[a]

² California Health and Safety Code § 7525 and § 7526 are substantially identical to RCW 68.50.200 except that RCW 68.50.200 includes the language related to written contracts. Cal. Health and Safety Code § 7525 provides the statutory hierarchy for consent and Cal. Health and Safety Code § 7526 states that “[i]f the required consent cannot be obtained, permission by the Superior Court of the county where the cemetery is situated is sufficient.”

controversy involving reinterment is equitable in nature [and] [a]s such, **the courts have broad discretion in determining the details of the reinterment procedure.**” *Bellevue Masonic Temple, Inc. v. Lokken*, 75 Wn.2d 537, 538, 452 P.2d 544 (1969), *citing Herzel Congregation v. Robinson*, 142 Wash. 469, 253 P. 654 (1927) (emphasis added). The clear language of RCW 68.50.200 and the holding of *Bellevue Masonic Temple* reinforce the long-standing equitable authority of the courts with respect to reinterment in Washington.

D. Ms. Braun was Never Given a Fair Opportunity to Argue Her Equitable Case for Reinterment on the Merits.

Respondents sidestep Ms. Braun’s argument that she did not receive notice or opportunity to be heard on the equitable merits of her Petition. Respondents impliedly concede that the motion for summary judgment only addressed whether the statute allowed for reinterment in light of the contract between Mr. Selig and the cemetery. (Selig Br. 2.) Neither Respondent disputes the fact that the equitable merits of the Petition were not raised by either themselves or the trial court prior to the hearing on the motion for summary judgment.

Nevertheless, Respondents contend that because Ms. Braun submitted fact declarations and argued that the Petition should be eventually decided on equitable standards, she was given adequate notice and opportunity to be heard on the merits of the entire case. (Selig Br. 14; TDHS Br. 31-32.) Respondents attempt to disregard the reality that the motion before the trial court (as well as the many pages of related and

supplemental briefing submitted by all the parties) did not request a ruling on the equitable merits of the Petition, and the trial court did not provide the parties notice at any time before its ruling that the pending motion would be expanded to address the merits.

A finding that Ms. Braun was given adequate notice and opportunity to be heard on the merits simply because she submitted declarations in support of her Petition and relating to the legal issues properly before the Court would undermine the fundamental purposes of requiring notice and an opportunity to be heard on potentially dispositive matters. The initial set of declarations were submitted with the Petition to provide Respondents and the trial court with sufficient context as to why Ms. Braun was seeking reinterment. (CP at 15-19, 34-38.) The second set of factual declarations addressed the potential waiver issue that the trial court specifically asked the parties to address, and certain inaccurate statements made in Ms. Selig's declaration. (CP at 462-467, 499-501.)³ Ms. Braun was never given notice that she needed to present evidence or argument in response to a summary judgment challenge to the equitable merits of the Petition because the merits of the Petition were never placed at issue by the Respondents or by the trial court.

³ The Declaration of Professor Tanya D. Marsh was submitted to the trial court under ER 702, and to assist the court in placing the applicable Washington law in its proper historical and legal context. Professor Marsh's declaration sets forth pertinent "legislative facts" which may be judicially noticed by the trial and appellate courts to assist them in interpreting the law. 5 TEGLAND, WASHINGTON PRACTICE, §501.16 (2014); *Wyman v. Wallace* 94 Wn.2d 99, 103, 615 P.2d 452 (1980).

As Ms. Braun argued in her opening brief, the requirements of notice and opportunity to be heard are fundamental principles of both Washington and Federal law. (Braun Opening Br. 24-26.) The importance of these principles can be seen in the consistent refusal of Washington courts to allow parties to raise new arguments or grounds for summary judgment in a reply brief. *See White v. Kent Medical Ctr.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991); *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 616, 15 P.3d 210 (2001).

Ms. Braun's limited arguments in briefing to the trial court that the Petition should ultimately be decided on its merits according to certain equitable standards does not satisfy the opportunity to be heard requirement. Similarly, just because Ms. Braun referenced the equitable standards the Court should utilize in a future evidentiary hearing to determine the merits does not prove that the trial court properly applied those equitable standards. Respondents point to several sections of briefing to argue that Ms. Braun "presented her equitable arguments." (TDHS Br. 31 and fn 3.) However, in none of these sections was Ms. Braun arguing summary judgment should be denied on the merits of the Petition under the applicable equitable standards. Instead, Ms. Braun was arguing that the motion for summary judgment should be denied on the legal issues raised by Respondents, and that she should be granted discovery so that in the future the case could be fairly decided.⁴

⁴ The Temple claims that Ms. Braun made her equitable arguments in her Opposition to Motion for a Protective Order (CP at 295-297.), Opposition to the Motion

Respondents further argue that Ms. Braun's initial request for a show cause hearing on the Petition is inconsistent with her argument that she did not have an adequate opportunity to be heard on the merits. (Seligs Br. 14.) This argument misconstrues the proper procedure for a show cause hearing. Washington courts have held in several different contexts that show cause hearings must contain certain minimum requirements including the right "to confront and cross-examine any adverse witness and to present evidence and oral argument in support of his claim or defense." *State ex rel. Burleigh v. Johnson*, 31 Wn. App. 704, 708, 644 P.2d 732 (1982), quoting *Rogoski v. Hammond*, 9 Wn. App. 500, 506, 513 P.2d 285 (1973). Further, "[a]ll methods of discovery allowed in other civil actions are available in show cause proceedings. If a respondent raises a defense or presents evidence of a factual dispute, the cause may be continued for discovery and a full evidentiary hearing." *Id.* at 709.

The fact that Ms. Braun initially filed for a show cause hearing does not mean that she was relinquishing her rights to fully engage in

to Dismiss (CP 385-405.), and in the Marsh Declaration (CP 406-461.). (TDHS Br. 31 fn 3.) In her Opposition to the Motion for a Protective Order, Ms. Braun argued that the discovery she submitted to the Seligs is, in part, relevant because it pertains to the equitable standards the trial court will eventually need to apply. Similarly, the cited portions of Opposition to the Motion to Dismiss and the Marsh Declaration only addressed the contention that the common law equitable standards should be applied in the future to the merits of the Petition.

discovery and to be heard at an evidentiary hearing before a decision on the merits of her Petition was reached.

Ms. Braun filed her Petition and then requested the related order to show cause as the most efficient and cost-effective way to bring the matter before the Court, and to potentially achieve an expeditious resolution.⁵ If Respondents did not object to reinterment, the Petition would have been simply granted. And if Respondents opposed the Petition, the show cause hearing would most likely have been taken off the calendar and/or replaced by a later evidentiary hearing or trial where all parties could present their cases after engaging in full discovery. Ms. Braun would have exercised her rights at the show cause hearing to call witnesses to testify, to cross-examine witnesses for the Respondents (especially Ms. Selig) and to present additional evidence in rebuttal.

Ms. Braun was never given the opportunity to fully and fairly present her case for reinterment under the appropriate equitable standards. This case should be remanded to the trial court for discovery and an appropriate hearing on the merits.

E. The Trial Court Abused its Discretion by Denying Ms. Braun Discovery.

The trial court's decision to preclude all discovery prior to a ruling on the merits unfairly limited Ms. Braun's ability to establish the record

⁵ RCW 68.50.200 provides that the superior court can provide permission for the reinterment of a body, and RCW 68.50.210 discusses an "application to the Court" for such permission, with related notice of 10-15 days to the cemetery authority and "persons not consenting." The statute does not provide any further guidance or procedures for one to follow in order to obtain this permission.

and present her case. “It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff’s claims or a defendant’s defense.” *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009). Summary judgment is improper without providing the parties an opportunity to discovery of the relevant evidence. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 524, 20 P.3d 447 (2001).

The trial court’s error does not become harmless merely because some declarations were filed and a partial factual record was developed without the benefit of discovery. Ms. Braun produced facts relevant to a number of pertinent equitable factors from her own knowledge and investigation. But without discovery, it was impossible for Ms. Braun to present evidence on a number of important equitable issues. These issues include for example, whether Kyril and Ms. Selig’s marriage was effectively defunct at the time of his death, what plans Ms. Selig actually had, if any, to memorialize Kyril and his gravesite, and whether there were any plans for Mr. Faenov to be buried in Seattle near family. Without discovery, critical evidence on these and other important factors could not be considered by the trial court.

Likewise, without discovery, Ms. Braun was hamstrung in her efforts to demonstrate that many of Ms. Selig’s statements to the trial court were inaccurate or false. Based on her own knowledge and investigation, Ms. Braun was able to call into question the veracity of certain of Ms. Selig’s statements, but she should have been allowed to

conduct the essential discovery needed to fully challenge the excuses and rationales Ms. Selig presented to the trial court to explain her conduct.

Respondents argue that the trial court's denial of discovery was permissible because the trial court stated that no facts could have been produced in discovery to alter its decision to dismiss the Petition. (Selig Br. 15, 17; TDHS Br. 29-30.) The Court's statement that it had all the evidence it needed to rule on the merits should not be the deciding factor. If anything, the trial court's statement that no discovery was needed bolsters Ms. Braun's argument that the trial court applied the wrong equitable standard to the Petition, failed to weigh all the relevant equitable factors, and ignored the standards applicable to judging a motion for summary judgment on the merits.

F. The Trial Court Erred by Not Properly Balancing the Equitable Factors.

The trial court should never have reached the merits of the Petition at the summary judgment hearing because the issue was never raised by the parties or the court, and because no discovery had yet taken place. Even if the merits had been ripe for the trial court to rule on, the court applied an incorrect standard when it dismissed the Petition.

Respondents disagree with each other about the standard the trial court should have applied to the merits of Ms. Braun's Petition. (Selig Br. 13; TDHS Br. 23.)

The Seligs agree with Ms. Braun that the appropriate standard for a trial court in determining a reinterment controversy is set out in *Wood v.*

E.R. Butterworth & Sons, 65 Wash. 344, 18 P. 212 (1911) (Selig Br. 13; Opening Br. 21.), and requires a balancing of a variety equitable factors. In *Wood*, the Supreme Court explained that such a controversy required a balancing of equitable factors because no general rule can be applied absolutely in all cases and that the result should be dependent upon the particular facts of the case. *Id.* at 347-48.

In contrast, TDHS argues that the trial court should only have granted reinterment if Ms. Braun could demonstrate “reasonable necessity” favoring reinterment. (TDHS Br. 23.) The standard advocated by TDHS relies on a mischaracterization of the applicable law. TDHS misinterprets *Wood* to hold that “Washington courts allow the wishes of the surviving spouse to be overruled only when there is clear evidence that the choices made are contrary to the decedent’s wishes.” (TDHS Br. 23.) (emphasis in original). The Court in *Wood* came nowhere close to declaring such a rule.

In *Wood*, the required equitable balancing was resolved largely by following the wishes of the decedent, but the court unambiguously stated that no hard and fast rule exists that can be applied to all cases, but rather that such disputes “must be determined by principles of equity and such considerations of propriety and justice as arise out of the particular circumstances of the case.” *Wood*, 65 Wash. at 347-348. The trial court committed reversible error when it failed to follow this equitable standard when it ruled on the merits of the Petition on summary judgment. (Opening Br. 27-30.)

G. The Factual Record Does Not Support Dismissal on Summary Judgment Under the Proper Equitable Standard.

Respondents argue that the factual record is sufficient to uphold the trial court's denial of the Petition on the merits. (Selig Br. 13; TDHS Br. 22.) This argument ignores the facts that Ms. Braun did not receive fair notice or an opportunity to be heard and that Ms. Braun was deprived of any discovery on the relevant equitable issues. Even without considering these glaring errors, the factual record before the trial court, taken in the light most favorable to Ms. Braun, provides more than enough evidence to survive a motion for summary judgment.

The factual record before the trial court included the following: Ms. Selig took multiple affirmative steps to quickly erase Mr. Faenov's name and memory, including taking down his memorial website, changing the last names of their children, and making it clear to Ms. Braun that she was to not be in contact with the Selig family, including her grandchildren. In Portland, Mr. Faenov would be buried among close family members and loved ones. None of Mr. Faenov's family remain in Seattle. Ms. Selig failed to memorialize Mr. Faenov's grave with a headstone at the one year anniversary of his death. When friends of Mr. Faenov installed such a headstone after that one-year anniversary, Ms. Selig had it ripped out of the ground and left only scarred earth in its place. Ms. Selig purposely left Mr. Faenov's grave unmarked for more than two years. Evidence in the

record also called into question the state of Mr. Faenov and Ms. Selig's marriage at the time of his death.⁶ (CP 466-467.)

Given the factual support in the record, and taking all inferences in favor of Ms. Braun, there is more than sufficient evidence to survive summary judgment under the appropriate equitable standard. (Opening Br. 29-30.)

H. The Court's Exercise of Its Equitable Jurisdiction Under RCW 68.50 Would Not Violate the Terms of the Interment Agreement.

Respondents argue that under RCW 68.50.200 “[i]f the terms of a written contract would be violated, the court cannot provide substitute consent.” (TDHS Br. 20.) This argument is irreconcilable with the terms of RCW 68.50.200. All written conveyances of interment are written contracts. But it is not reasonable to conclude that under RCW 68.50.200 a request for reinterment would violate all interment agreements, including those like the agreement in this case that do not expressly prohibit reinterment. In other states, courts have differentiated between written contracts based upon whether they prohibit reinterment or not. *See, e.g. Wolf v. Rose Hill Cemetery Ass'n*, 832 P.2d 1007, 1009 (Colo. App. 1991) (holding that when considering a petition for reinterment, a court should take into account “whether a written contract between the cemetery and decedent or next of kin exists that discusses rights of removal.”). In

⁶ This evidence included facts showing that Ms. Selig changed her last name from Faenov to Selig eight months before Kyril died (CP 465-466.), and tending to show that Ms. Selig had made concrete plans to move to Los Angeles before Mr. Faenov's death. (CP 466-467.)

another case, the children of a deceased couple petitioned the court to permit the reinterment of their parents from a Jewish cemetery. Citing Jewish law, the cemetery refused to permit the reinterment. The court discussed the role of a court of equity in resolving such disputes:

The cemetery of the defendant is maintained pursuant to the authority of the laws of this state, and, in the absence of a regulation adopted by the defendant as to who shall determine the right of removal, such right must be determined, when presented to a court of equity, upon equitable grounds, and not by the Jewish law. Ecclesiastical law is not a part of the law of this state, nor are equitable rights to be determined by it; on the contrary, when a court of equity exercises its powers, it does so only upon equitable principles, irrespective of ecclesiastical or any other law. ... **It may be that if an agreement were made with a cemetery association that remains there interred could not thereafter be disinterred, a court of equity would enforce the agreement; or, if a religious corporation had a rule, to which a member subscribed, that if his remains were interred in a cemetery controlled by it they could not thereafter be removed, that a court of equity would refuse to exercise its powers to decree removal. But that is not this case. There was no agreement that the remains of Adela would not, after interment, be disinterred. Nor had she subscribed to any rule of the defendant which prevented such removal, unless that fact be inferred from her membership alone, which is insufficient.** That the court had the power, under the findings of the referee and the facts developed by the evidence, to decree a removal is sustained by numerous authorities.

Cohen v. Congregation Shearith Israel in City of New York, 114 A.D. 117, 119-20, 99 N.Y.S. 732 (App. Div. 1906), *aff'd*, 189 N.Y. 528, 82 N.E. 1125 (1907). (Emphasis added).

The Washington Cemetery Act permits cemetery authorities to enter into agreements that expressly prohibit reinterment. RCW 68.24.110 (“[R]ights of interment may be subject to other limitations, conditions, and

restrictions as may be part of the declaration of dedication by reference, or included in the instrument of conveyance of the plot or rights of interment.”) In 1943, the Legislature passed the Cemetery Act which: (i) provided conveyances of interment rights should be by written contracts; (ii) permitted cemetery authorities to enter into written contracts which expressly prohibit reinterment; and (iii) provided in RCW 68.50.200 that a Court may not grant permission to disinter if it would violate a “written contract or the rules and regulations of the cemetery authority.” If the Legislature intended that the mere existence of a conveyance of interment rights would preempt the Court’s equity jurisdiction, it need not have made any reference to the rules and regulations of the cemetery authority — they would have been irrelevant.

Any broader construction of the term would be inconsistent with the common law and the express language of related statutes. There is no evidence that the Legislature intended to preempt the Court’s long-standing equitable jurisdiction over reinterment in cases such as this where there is a written conveyance of interment rights that is silent on reinterment.

I. There Is No Clear Public Policy Preventing Reinterment.

Ignoring the applicable Washington case law, Respondents argue that public policy precludes reinterment in this matter as it condemns the

disturbance of human remains except for a “necessary” or “laudable purpose.” (Selig Br. 21.)⁷

Any asserted public policy must be clear and truly public. *Sedlacek v. Hillis*, 145 Wn.2d 379, 389-390, 36 P.3d 1014 (2001). Drafting a statute is a legislative function, not a judicial function; therefore, the court should not create public policy, but rather recognize only clearly existing public policy under Washington law. *Id.*

Similar to the present case, in *Herzl Congregation v. Robinson*, 142 Wash. 469, 253 P. 654 (1927), the funeral arrangements for the decedent were made by someone other than an individual included in RCW 68.50 and the cemetery where the decedent’s remains were originally interred took an unusually personal interest in whether or not the remains of a decedent should be permitted to be moved to a cemetery where other family members were interred. Likewise, permitting Ms. Braun to reinter her son’s remains at a Jewish cemetery where his family members are buried and where his grave will be permanently and properly memorialized as required by Jewish tradition is not a violation of public policy.

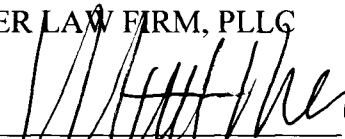
⁷ Respondents support their expression of “public policy” with citation to an untitled ALR 2d article, and three out-of-state opinions.

IV. CONCLUSION

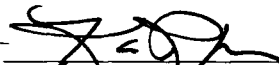
For all the foregoing reasons, Ms. Braun requests that the Court reverse the trial Court's November 21, 2014 Order Dismissing the Petition, and remand to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 22nd day of September, 2015.

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CERTIFICATE OF SERVICE

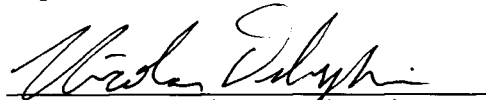
I, Nicola Derbyshire, hereby certify that on September 22, 2015, I served a copy of the foregoing document (*Appellant's Consolidated Reply Brief*) on the parties listed below in the manner shown:

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

Dated this 22nd day of September, 2015.



Nicola Derbyshire, Legal Assistant