IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN THE MATTER OF THE REMAINS OF
JAMES DAVID GHOSTLEY, DECEASED.

DAVID CARL GHOSTLEY,
Petitioner/Appellee,

v.

VALERIE RUNDELL,
Respondent/Cross-Petitioner/Appellant.

No. 2 CA-CV 2018-0197
Filed January 22, 2020

Appeal from the Superior Court in Pima County
No. PB20181396
The Honorable Cynthia T. Kuhn, Judge

AFFIRMED

COUNSEL

Snell & Wilmer L.L.P., Phoenix
By Bradley R. Pollock
Counsel for Petitioner/Appellee

Gillespie, Shields, Goldfarb & Taylor, Phoenix
By Kristina Reeves and April Maxwell
Counsel for Respondent/Cross-Petitioner/Appellant

OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Valerie Rundell ("Mother") appeals from the probate court's ruling ordering the cremation of the remains of James David Ghostley ("the decedent"), her son with appellee David Carl Ghostley ("Father"), from whom she is divorced. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 The decedent, an unmarried adult, died in October 2018. He did not leave written directives regarding the disposition of his remains. His girlfriend discovered his body and, two days later, signed a directive ordering his cremation, which she believed Father had authorized. When Mother learned her son's body had been retrieved by a funeral home for cremation, she contacted the home to object to the cremation. Mother also sent a cease-and-desist letter, demanding the funeral home refrain from cremating her son's body without a court order. Father then filed a petition with the probate court requesting a hearing to determine the disposition of his son's remains.

¶3 The probate court heard the matter in November 2018. At the hearing, the decedent's girlfriend testified she understood he "wished to be

cremated and laid to rest in the places that he loved." She further testified that on the day she discovered the body, she called Mother and informed her of the death. During their conversation, she told Mother she "kn[e]w that [the decedent] wanted to be cremated." She stated that Mother "was clearly heartbroken and distraught" at this suggestion. When she told Mother she thought the ashes should be split three ways, Mother replied, "no, no, my beautiful boy. I'm not ready to make these decisions." Mother also said she "wanted time to think and to speak to her rabbi and make sure [cremation] was spiritually okay."

¶4 Father testified his son had "made [him] acutely aware that he wanted to be cremated," and he "understood that [his son] wanted to be spread over places that he loved."[1] Father also testified that "in [his] state of grief and super-high anxiety, [he] was feeling an urgent need to have [his son's] remains purified according to [his son's] wish." This led Father to actively pursue cremation despite being aware of Mother's objection. Father further testified, "I'm here today on my son's behalf. I'm not here for myself. I know what my son wanted and I'm hoping that my son gets his wishes. This is about his wishes, not mine."

[1]Father appeared at the hearing telephonically, as he resides outside of Arizona.

¶5 Mother testified she had "suffered emotional hardship just thinking about [her son's cremation] already. I don't think I could bear that. That's my son's body." She explained that her objection to cremation was rooted in her religious beliefs, and she did not want to separate her son's remains. She also testified that even if her son had wished to be cremated, she would seek to bury him. She believed it was her "responsibility to observe [her] faith" and its "clear instruction," and her "responsibility as a mother" was to carry out the scriptures, even if her son did not understand them. Mother stated she did not believe her son would opt for cremation if he knew his mother "wanted to bury him and he knew the emotional torment this has put [her] through."[2]

¶6 The probate court found the decedent "wished to be cremated and that cremation is reasonable and that his wishes do not impose an emotional or economic hardship on any party." It then ordered the body be cremated and the cremains be divided between Father and Mother, with Mother "retaining the right to decline her distribution." The court also noted its order was "not intended to disallow either parent/recipient to

[2] The probate court also heard testimony from A.O., a friend of Mother's and the decedent's. A.O. did not attest to any knowledge of the decedent's wishes regarding burial or cremation. He testified that the decedent was close with his mother and had a strained relationship with his father. He also testified that he and Mother practice the same religion, and that his understanding is that the religion dictates burial, not cremation.

further distribute any cremains as they deem app[]ropriate." The court issued a *nunc pro tunc* order the following week to add the finality language required by Ariz. R. Civ. P. 54(c).

¶7 Mother appealed the order. Upon Mother's motion, the probate court stayed the cremation pending resolution of this appeal and ordered the body embalmed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101.

Discussion

¶8 "We will not set aside the probate court's findings of fact unless clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of witnesses." *In re Estate of Zaritsky*, 198 Ariz. 599, ¶ 5 (App. 2000). But "[w]e review the court's legal conclusions *de novo*." *Id*. We likewise conduct statutory interpretation *de novo*. *In re Estate of Travers*, 192 Ariz. 333, ¶ 11 (App. 1998). "When the statutory language is clear and unequivocal, the court must abide by it." *Id.* If an ambiguity exists, "we attempt to determine legislative intent by interpreting the statute as a whole, and consider 'the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose.'" *Aros v. Beneficial Ariz., Inc.*, 194 Ariz. 62, 66 (1999) (quoting *Zamora v. Reinstein*, 185 Ariz. 272, 275 (1996)).

The Probate Court's Authority Under A.R.S. § 36-831.01

¶9 Mother first argues the probate court lacked authority under A.R.S. § 36-831.01 to order cremation based on its determination of her son's wishes regarding the disposition of his remains. The parties do not cite, and we are not aware of, any jurisprudence interpreting § 36-831.01.

¶10 Sections 36-831 and 36-831.01, A.R.S., govern who bears the power and responsibility of directing the disposition of human remains in Arizona. Section 36-831 establishes the order in which "the duty of burial devolves in various circumstances."[3] *Griffen v. Cole*, 60 Ariz. 83, 89 (1942) (interpreting a former version of § 36-831). As applied here, under § 36-831(A)(5), the decedent's parents share equal responsibility for ordering final disposition of his remains. Section 36-831(D) further provides that if a category listed in subsections A(3)–(9) contains more than one member, "final arrangements may be made by any member of that category unless that member knows of any objection by another member of the category." In the case of an objection, "final arrangements shall be made by a majority of the members of the category who are reasonably available." § 36-831(D).

¶11 Thus, § 36-831(D) sets forth a scheme which (1) contemplates that the closest relatives, friends, or institutions to the deceased will make

[3]Former Ariz. Code Ann., § 43-5202 (1939).

the ultimate decisions regarding the disposition of his remains and, to that end, (2) articulates a hierarchy of decision-making authority when the deceased's relatives or caregivers might disagree as to that disposition. But § 36-831(D) does not provide any criteria for identifying which decision-maker prevails when, as here, decision-makers in the same category disagree and no majority consensus exists. *See* § 36-831.

¶12 Under such circumstances, A.R.S. § 32-1365.02(J) authorizes "a court of competent jurisdiction" to resolve disputes between persons listed in § 36-831(A) "concerning the right to control the disposition, including cremation, of a decedent's remains." Here, the probate court understood this statutory role as including the power to referee the underlying dispute between Mother and Father.

¶13 It could be argued that § 32-1365.02(J) only authorizes the probate court to determine which of the two equally situated decision-makers should have ultimate control over the disposition. That narrower understanding of the probate court's authority finds some support in the language of the statute. As noted, § 32-1365.02(J) describes the court's authority as the power to resolve disputes "concerning the right to control the disposition." *Id.* But other provisions of the statutory scheme were designed to comprehensively resolve the comparative statutory standing of any litigants. *See* § 36-831(A)(1)–(13). And, § 32-1365.02(J) uses

broad language to describe the authority of the probate court to resolve disputes among persons who have such standing. Indeed, it authorizes the court to resolve "*[a]ny dispute . . . concerning* the right to control the disposition." § 32-1365.02(J) (emphasis added). The available legislative history also suggests that the provision was designed to provide sufficient judicial authority to resolve all species of disputes over the disposition of remains. *See* S. Fact Sheet for S.B. 1023, 48th Leg., 1st Reg. Sess. (Ariz. 2007) (changes would require "disputes regarding disposition of a dead body to be resolved by the parties involved or in court" and would allow funeral establishments to bring suit in court to expedite "dispute[s] involving disposition of remains"). We conclude that this broad language, read in the context of the statutory scheme and the pertinent legislative history, authorizes trial courts to resolve the merits of underlying disputes between litigants of equal statutory standing.

¶14 Our reading comports with the express purpose of the statute in providing our courts with such authority: "to expedite the resolution of a dispute among the parties." § 32-1365.02(J). As a practical matter, our courts could not assist equally situated litigants without squarely addressing the merits of their disputes as to disposition of remains. Here, for example, the probate court would have no criteria to break the impasse without conducting fact-finding and taking argument regarding the

decedent's wishes and the parents' respective claims of emotional hardship. *See* § 36-831.01(A) (setting forth criteria for authorized decision-maker in determining disposition of remains). We conclude the court did not exceed the legislature's grant of authority, expressed in § 32-1365.02(J), when it took the only conceivable steps to expeditiously assist the parties in resolving their dispute.

¶15 We further conclude that those authorized to make a decision retain discretion to either reject or comply with the decedent's wishes when those wishes would impose the requisite level of economic or emotional hardship. Under the unique circumstances here, where the statutorily empowered survivors have reached a stand-off, the court must weigh these factors. Accordingly, we hold that courts retain the discretion to determine both whether a hardship exists pursuant to § 36-831.01(A) and whether that hardship is sufficiently pronounced to override a decedent's wishes.

Probate Court's Finding of No Emotional Hardship

¶16 Second, Mother argues the probate court erred in its application of § 36-831.01 by concluding it could disregard her "sincere religious beliefs in determining if the cremation of her son's body would cause her to suffer emotional hardship." We disagree, and find no error in the court's weighing of factors under § 36-831.01.

¶17 Before conducting fact-finding, the probate court was confronted with a legal question that is not expressly resolved by the statutory scheme: how should a decedent's remains be disposed when the decedent's wishes, if followed, would impose some emotional hardship on an authorized decision-maker? Section 36-831.01(A) provides that the decedent's wishes must be followed "if they are reasonable and do not impose an economic or emotional hardship." But it does not further define what constitutes hardship, nor does it address whether such a hardship necessarily overrides a decedent's wishes.

¶18 Mother contends that any showing of emotional distress by an authorized decision-maker that authentically arises from the prospect of disposing of remains in conformity with the decedent's wishes would authorize the decision-maker to deviate from those wishes. But, in applying the meaning of the words "emotional hardship" as used in § 36-831.01(A), we must consider the purpose of those words in the context of that specific provision and the broader statutory scheme for burials. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 24, at 167 (2012) (because "[c]ontext is a primary determinant of meaning," specific language must be understood in "logical relation" to entire text).

¶19 By its very title, "[d]isposition of remains; *duty to comply with decedent's wishes* . . . ," § 36-831.01 suggests a decedent's wishes take priority in the determination of disposition of final remains. § 36-831.01 (emphasis added); *see State v. Barnett*, 142 Ariz. 592, 597 (1984) (although "headings are not part of the law itself, where an ambiguity exists the title may be used to aid in the interpretation of the statute"). And, the statute plainly instructs that parties *shall* comply with a decedent's reasonable wishes, absent emotional or economic hardship, establishing a presumption that a decedent's wishes should be followed.

¶20 This context compels the conclusion that a party's distress concerning the disposition of a decedent's remains, however sincere, constitutes an "emotional hardship" only when it is sufficiently weighty to overcome the statutory presumption favoring a decedent's wishes. And, such a showing of hardship merely authorizes, but does not require, the decision-maker to override the decedent's wishes. *See* § 36-831.01(A) (implying option of overriding decedent's wishes but stating no requirement to do so); *see also* Scalia & Garner, *supra*, § 8, at 93 ("Nothing is to be added to what the text states or reasonably implies.").

¶21 Therefore, the probate court did not err in making the factual determination that Mother's distress arising from her son's wishes to be cremated did not rise to the level of "emotional hardship" as contemplated

by § 36-831.01. We defer to a trial court's factual findings unless they are clearly erroneous. *In re Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, ¶ 21 (App. 2014). "In reviewing a trial court's findings of fact, we do not reweigh conflicting evidence . . . , but examine the record only to determine whether substantial evidence exists to support the trial court's action." *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13 (1999). It is not our function "to reweigh the facts or to second-guess the credibility determinations of the judge who had the opportunity to evaluate the witnesses' demeanor and make informed credibility determinations." *In re Estate of Newman*, 219 Ariz. 260, ¶ 40 (App. 2008).

¶22 Although the record certainly reflects that Mother was upset at the prospect of her son's remains being cremated and divided, the record contains substantial evidence to support the court's determination that this distress was not sufficient to outweigh her son's wishes. Mother testified that her distress stemmed primarily from her professed religious beliefs, the sincerity of which we do not purport to question here. However, even assuming the probate court credited Mother's testimony, nothing compelled the court to elevate Mother's religious beliefs above the wishes of her son. Notably, the record reflects that decedent was also religious, and his own spiritual beliefs could have played a role in his decision to be cremated. Therefore, we cannot say that on the record before us the court

erred in failing to find Mother's distress, and its basis, sufficient to constitute emotional hardship cognizable under the statute.

Common-Law Right of Sepulcher

¶23 Finally, Mother asks us to find the probate court erred by failing to apply the common-law right of sepulcher when determining the appropriate manner of her son's disposition. But the Arizona statute directly on point overrides any common-law doctrine to the extent it varies from that doctrine. *See Campbell v. Thurman*, 96 Ariz. 212, 214 (1964) ("Where statutes and rules exist covering the situation it is unnecessary and improper to look to the common law for inherent powers."). Because we have determined the court acted within its authority to make a factual determination under § 36-831.01, we do not address the right of sepulcher further.[4]

Costs on Appeal

¶24 As prevailing party on appeal, Father is entitled to request costs on appeal. A.R.S. § 12-341; Ariz. R. Civ. App. P. 21(b).

Disposition

¶25 For the foregoing reasons, we affirm.

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[4]Nor would the common law doctrine necessarily compel a different result. *See* 22A Am. Jur. 2d *Dead Bodies* § 20 (Nov. 2019 Update) (jurisdictions recognizing sepulcher doctrine do not uniformly apply principles of equity in resolving disputes among those authorized to dispose of body).