

RENDERED: OCTOBER 11, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001595-MR

ANGELA MARIE HALL,
HEATHER RENEE HOLLIDAY, AND
JERRY LEE STAMPER JR.

APPELLANTS

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 11-CI-00353

GENE MULLINS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

MOORE, JUDGE: Angela Marie Hall, Heather Renee Holliday, and Jerry Lee Stamper, Jr., appeal from a Knott Circuit Court judgment holding that Gene Mullins, the spouse of their deceased mother, has the paramount right to control the burial or disposition of her remains. After extensive review of the arguments

and the record in this case, we find no error on the part of the trial court and we affirm.

Anna Marie Mullins passed away intestate on July 5, 2011, at the age of forty-five. She resided at Lotts Creek in Knott County, Kentucky, at the time of her death. She left behind her surviving spouse, Gene Mullins, to whom she had been married for seven years, and her three children, the appellants.

After her death, Mullins's body was temporarily interred, by agreement of the parties, in a mausoleum at Mountain Memory Gardens in Knott County. It is unclear whether this was due to a land dispute that prevented burial elsewhere, or to the inability of the parties to agree as to a final resting place.

The appellants subsequently filed a petition to relocate her remains to a burial plot in Dogwood Cemetery, Lotts Creek, on land which they own. Mullins, on the other hand, wished to relocate her body to Rowe Cemetery, his family cemetery, located near Irishman, Kentucky.

Following a hearing, the trial court held that Mullins as the surviving spouse had the paramount right to select the place of interment of his late wife's body, at least in the absence of a different provision by the deceased. This appeal by the children followed.

It has long been the general rule in Kentucky that the surviving spouse has the paramount right of interment of the deceased body of their spouse.

Most of the adjudged cases in this country are to the effect that the husband has the right in preference to the next of kin to select the place where the wife's remains

shall be buried, and that the wife has the like right as to the husband's remains. That paramount right in the husband and wife is in consonance with the custom of the country, respected by general sentiment, and has the support of reason. There is a tender and more affectionate relationship between husband and wife than between either and other relatives. In life there is a constant companionship, a continued mutual and dependent relationship, and such ministrations in sickness and death that can be given by no other.

Neighbors v. Neighbors, 65 S.W. 607, 608 (Ky. 1901).

The appellants argue that under *Brake v. Mother of God's Cemetery*, 65 S.W.2d 739 (Ky. 1933), an estoppel may apply to prevent a body from being moved, even by a surviving spouse, once it has been interred. In *Brake*, the decedent's widow consented to his burial in a plot owned by his parents, at their expense. She later moved to a neighboring state and filed suit, seeking to have her husband's remains disinterred and removed to a nearby cemetery. His parents defended on the ground of estoppel based on the widow's alleged acquiescence to the burial of their son at the original site. The *Brake* court suggested that the right of a surviving spouse to inter the remains might not be paramount when the body had already been laid to rest. In such cases, a court could consider "the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association." *Id.* at 740. The *Brake* court ultimately found that the facts did not support an estoppel, because the widow had acquiesced to the burial by the parents when she was laboring under great mental strain and stress. *Id.* at 741.

The appellants argue that the trial court should have considered the factors set forth in *Brake*, such as the disturbance of the grave; the wishes of the decedent; and their rights and feelings as family members, to estop Mullins from interring the remains at Rowe Cemetery. They also argue, in the alternative, that their mother's body should be allowed to remain at Mountain Memory Gardens as her final resting place. The appellants suggest that Mullins might try to prevent them from visiting their mother's grave if she is interred at the cemetery of his choice, although as the trial court found, there was no evidence introduced to show a basis for their belief, and Mullins testified that he would not interfere with or restrict the appellants' right to visit the grave.

The factors listed in *Brake* are not applicable in this case because there was no final interment of the remains. The trial court found, based on substantial evidence in the record, that the parties had agreed that the remains should be placed temporarily at Mountain Memory Gardens until they could be buried. The trial court's order states that "[t]he testimony of all parties was clear and undisputed that Mountain Memory Gardens was to be a temporary resting place only for the body of Mrs. Mullins." Under these circumstances, the paramount rights of Mullins as the surviving spouse are unaffected, since the remains were never permanently interred at Mountain Memory Gardens. The trial court correctly concluded, as a matter of law, that no precedent was introduced of an instance in which a court in Kentucky had granted a paramount right of interment to another over the wishes of a spouse.

The judgment of the Knott Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dinah Lynn Bowling
Hindman, Kentucky

BRIEF FOR APPELLEE:

Kevin W. Johnson
Hazard, Kentucky