

**INTESTATE ESTATE OF THE DECEASED MACARIO CARRILLO.
ROSENDA ALMEIDA VIUDA DB CARRILLO, PETITIONER AND
APPELLEE, VS. CORAZON EDELMIRA CARRILLO DE GALANG,
GRACIA CARRILLO, AND ROMU...**

G.R. No. 45320. January 26, 1939

Ponente: IMPERIAL, J.

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IMPERIAL, J.:

Macario Carrillo died in the City of Manila on May 17, 1931, leaving as next of kin, his widow, Rosenda Almeida, the appellee, and his three children by his first marriage, Corazon Edelmira Carrillo, Romulo Carrillo and Gracia Carrillo, the appellants. With the consent of all the relatives, the appellee caused the remains of the deceased to be buried in the private lot of the Intengan family in the North Cemetery, Manila, to be transferred later after a period of three years but not more than five, upon paying P100 for the use of the lot. Later on, in the Court of First Instance of Manila, the intestate proceedings of the decedent were commenced, special proceedings No. 39632, and in the project of partition submitted by all the co-heirs, and approved by the court, said co-heirs agreed upon the following:

"(6) Out of love for her late husband, Macario Carrillo, the party of the first part (Rosenda Almeida) undertakes to pay the expenses of the last illness of the decedent, such as medicine, physician's fees and nurses; costs of the funeral and the care of the tomb."

Sometime in January, 1936, the appellee built a mausoleum in Biñan, Province of Laguna, for the remains of her late husband. Shortly before the expiration of the period of five years for the exhumation of said remains, the appellants secured the consent of the appellee to have the remains of the deceased transferred to the Ermita Church in Manila. As she was made to understand that such transfer would only be temporary and that it would be easier to retransfer the remains from that place to the mausoleum, which she had built in Biñan, the appellee gave her consent. Having been informed by her lawyer that she should not have given her consent, she withdrew it, and inasmuch as the appellants were about to remove and transfer the remains, the appellee moved the court to enjoin the appellants from removing the remains to the Ermita Church. The motion was duly heard and thereafter the court made permanent the preliminary injunction which had been issued, and ordered the appellants to abstain from removing the remains of the deceased and transferring them to another place. Thereupon, the appeal was perfected,

The only question raised in the three assignments of error made by the appellants, is whether⁴ or not they have a better right than the appellee to disinter the remains of the deceased and transfer them to the place they had chosen. The court held that the appellee's right, as the widow, is preferred, as may be gathered from the spirit of section 1103 of the Revised Administrative Code and from some American cases. We hold that the court correctly decided the case and did not commit any of the assigned errors.

In this jurisdiction there is no express law which determines the preference, among the next of kin of a deceased,

with regard to the disposition of his remains.

Leaving aside for the moment the law upon the matter and the American cases, to which we will later on refer, we believe that the agreement between the parties is decisive of the controversy. The parties agreed in the partition approved by the court that the widow, the appellee, out of love for her late husband, would undertake the care of his tomb. The word tomb, which in this case means the grave where the body of the deceased was buried, for at the time of the partition-agreement Macario Carrillo had already died, has been used without any restriction or limitation, and it should be interpreted as meaning both the grave at the North Cemetery and that which might be determined after the five-year period for the conservation of the remains of the deceased. If the intention of the parties referred only to the burial of the deceased in the North Cemetery for five years, which is the maximum period allowed by law, this idea could have been easily expressed.

We hold, then, that under the terms of said agreement, the appellee has a better right than the appellants, and the latter cannot object to the transfer of the remains of the deceased by the appellee to the mausoleum she built in Biñan, Laguna.

The appellants allege that the appellee consented to the transfer of the remains to the Ermita Church and that now she cannot validly oppose it. We find no merit in this contention because it appears that the appellee erroneously gave her consent, for she was made to believe by the appellants that the transfer of the remains to the Ermita Church would only be temporary, and that her consent thereto would facilitate the subsequent transfer to the mausoleum in Biñan.

In this jurisdiction there is no law that expressly determines the right to the care, possession and disposition of the remains of a deceased. Section 1103 of the Revised Administrative Code of 1917, quoted by the court, provides that the obligation to bury the remains of a deceased, falls, firstly, on the surviving spouse; if the deceased was not married, the obligation falls upon the closest next of kin; and if he dies with no surviving relative, the burial is the concern of the authorities of the municipality where he died. This legal provision has no direct application to the controversy, for the simple reason that it refers to the burial of a dead body, which is not the case here. However, it is being mentioned merely to point out that even in this case the right of the surviving spouse is considered preferred and superior to that of the next of kin. In the United States of America the superior and preferred right of the surviving spouse to the burial and any other legal disposition of the remains of the husband or of the wife has always been held undisputed. "It is generally conceded that on the death of a husband or a wife, the primary and paramount right to possession of the body and to control the burial or other legal disposition thereof is in the surviving spouse, and not in the next of kin, at least in the absence of a different provision by the deceased." (15 Am. Jur., par. 9, p. 834; *Southern L. & Health Ins. Co. vs. Morgan*, 21 Ala. App., 5; 105 So., 161; *Enos vs. Snyder*, 131 Cal., 68; 63 Pac, 170; *O'Donnell vs. Slack*, 123 Cal., 285; 55 Pac, 906; *Boyle vs. Chandler*, 33 Del., 323; 138 A., 273; *Louisville & N. R. Co. vs. Wilson*, 123 Ga., 62; 51 S. E., 24; *Anderson vs. Acheson*, 132 Iowa, 744; 110 N. W., 335.) "The surviving spouse is entitled to select the place of burial and the place of reinterment if the remains are removed after burial." (15 Am. Jur., par. 9, p. 834.) "The better rule seems to be, however, that if the widow has not waived her right, she may, against the objections of the next of kin, remove her husband's body, after interment, to another place of sepulture." (15 Am. Jur., par. 21, p. 843; *Bunol vs. Bunol*, 12 La. App., 675; 127 So., 70; *Hackett vs. Hackett*, 19 L. R. A., 558; 49 Am. St. Rep., 762.)

For the foregoing reasons, the appealed order is affirmed, with costs in this instance against the appellants. So ordered.

Avancena, C. J., Villa-Real, Diaz, Laurel, Conception, and Moran, JJ., concur.

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