[2018] ECC S&N 1

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWELL AND NOTTINGHAM

Before: the Chancellor

IN THE MATTER OF BINGHAM CEMETERY

and

IN THE MATTER OF THE PETITION OF JOAN THETIS ALLSOP

JUDGMENT

Introduction and Procedure

1. By this Petition the petitioner, Joan Thetis Allsop, seeks the exhumation of the remains of her daughter Valerie Allsop and her husband Eugene Arthur Allsop.

2. I expressed the view that it was expedient to determine this Petition by written representations. The Petitioner has, through her solicitors, given her written consent to that course. The representations consist of the documentation accompanying the Petition, and submissions made by her solicitors, following my invitation to indicate what exceptional circumstances might justify granting the Petition.

The facts

3. The Petitioner's family have their roots in the village of Gamston. Valerie Allsop ('Valerie') and Eugene Allsop ('Eugene') are buried in consecrated ground at plot 888 in Bingham Cemetery, which was apparently a usual burying-place for residents of Gamston. It is about seven miles away from Gamston. Valerie died of gastroenteritis, aged six months, in 1948. I understand that her mother was in hospital at the time and was unable to attend the funeral. Obviously, Valerie could not herself make any provision for her burial. I have not heard that the choice of Bingham cemetery for her grave was in any sense unintended. Eugene died in 1989. Immediately before his death he was not living with his wife, because he had disabilities making it more convenient for him to live with his daughter and son-in-law. He was buried in the same plot as Valerie.

4. The Petitioner's daughter and son-in-law have now bought two grave plots in Wilford Hill Cemetery, West Bridgford, about one mile away from Gamston. The intention is that they will in due course be buried in one of them, and the Petition is to enable the remains of Eugene and Valerie to be exhumed from Bingham Cemetery and reburied in the other plot, where the Petitioner too could be buried when her time comes.

5. The Petition is accompanied by written consent on behalf of the authorities of both Bingham and Wilford Hill Cemeteries. It also has the formal written consent of the Petitioner's daughter, who lives in Gamston, and her son, who lives in Cropwell Bishop, which is about four miles from Bingham Cemetery and about nine from Wilford Hill Cemetery (one sensible route being through Gamston). Neither the Petitioner nor any member of her family has

indicated any difficulty in visiting the grave in Bingham Cemetery: indeed, it is evident from the foregoing that the various places concerned are quite close together. What is said on the Petitioner's behalf is that the family, as a Gamston family, has no real link with Bingham, although the latter was, at the time, designated as the local cemetery. If the Petition is granted, it will provide an opportunity for the creation of a family grave at Wilford Hill, with other members of the family in due course in an adjacent grave. It is said that the circumstances of the unexpected death of Valerie as a child, before her parents, the fact that at the time of Eugene's death there had been no discussion of a family grave, the present situation of their bodies in a community with which the family has no links, and the intention to create a family grave are, or together amount to, exceptional circumstances.

The law

6. The starting-point is that Christian burial is to be seen as permanent, because it is the act of committing the remains or the ashes of the departed into the hands of God. There is therefore a presumption against exhumation. That is the clear consensus of all the English cases, of whatever age and of both Provinces. Whether or not there is reason to doubt the applicability of these propositions to the Church Universal, as suggested by Bursell, (2017) 19 Ecc LJ 169 at 191-2, there can be no doubt that they apply to burials (including burials of ashes) according to the law of the Church as established in this Realm. This starting-point remains the law as set out by the Court of Arches in Re Blagdon Cemetery [2002] Fam 299, ('Blagdon') as well as in the leading authority in this Province, Re Christ Church Alsager [1999] Fam 142 ('Alsager'), a decision of the Chancery Court of York. In Blagdon the Court had the advantage of a memorandum provided specifically for the case by the Bishop of Stafford, expressing, amongst other sentiments to the same effect, the view that 'a reluctance by the Consistory Court to grant faculties for exhumation is well grounded in Christian theology'. One would not wish to differ, but an endorsement of the law and tradition of the ages was not necessary for the Court's decision.

7. It follows that where there has been a burial in consecrated ground, accompanied as it will have been by the rites of the Church with the words of commendation of the departed to God and committal of the person's remains to burial or cremation, permission for exhumation is not given by the Court on demand. That has never been the case: see Blagdon at [20] and Re Smith [1994] 1 All ER 90 at 93. Rather, it is for the Petitioner in each case to establish some special circumstances that merit an exception from the general rule of the finality of Christian burial. As Edwards QC Ch expressed the position in Re Church Norton Churchyard [1989] Fam 37, 'the finality of Christian burial must be respected even though it may not be absolutely maintained in all cases'.

8. As the Court noted in Blagdon, the formulation of any objective test is not free from difficulty. That court expressed doubts about the viability of a test set out in Alsager at 149, that the Court should determine whether

> 'there is a good and proper reason for exhumation, that reason being likely to be regarded as acceptable by right-thinking members of the Church at large'.

9. As the Court of Arches observed, it may be somewhat difficult to ascertain the views of 'the right-thinking members of the Church at large'. In Blagdon itself, therefore, the Court gave its view that the test is simply one of exceptionality, and set out a number of factors that

might in individual cases bear on whether the circumstances, taken as a whole, were so exceptional as to outweigh the presumption and allow exhumation to be permitted.

10. The relationship in the Northern Province between the Alsager judgment and that in Blagdon cannot be regarded as fully answered by the observation of the Dean in Re St Nicholas Sevenoaks [2005] 1 WLR 1011 at [12] that for the purposes of precedent the Court of Arches and the Chancery Court of York should be treated as 'two divisions of a single court', for two principal reasons. The first is that although that sentiment is reasoned and at first sight may appear to be reasonable, it is difficult or impossible to reconcile with s 1(2) of the Ecclesiastical Jurisdiction Measure 1963. This issue is dealt with in detail in the judgment of Bursell QC Ch in Re St Chad's Bensham [2016] ECC Dur 2, and leads persuasively to the conclusion that a Chancellor in the Northern Province continues to be bound by Alsager as a decision of the Chancery Court of York.

11. Secondly, even if were correct to say that the two appellate courts should be treated as divisions of a single court, that would not of itself resolve any conflict that there may be between Alsager and Blagdon, or indeed between any two other decisions. There is of course no suggestion that either of the two courts has authority over the other: either the jurisdiction of each is confined to its own Province or, on the hypothesis under consideration, they are of parallel jurisdiction. The general rule is that, as a matter of judicial comity and in order to promote certainty in the law, a court follows a previous decision of another court of parallel jurisdiction unless satisfied that it was plainly wrong. The decision in Blagdon does not include a conclusion to that effect about Alsager: and a mere doubt or difference of view would not typically be regarded as justifying a departure from what had already been laid down, and the creation of an inconsistent line of authority. If the decisions are not reconcilable the expected approach in either Province would be to follow Alsager as the prior authority, treating Blagdon, if necessary, as an unfortunate outlier, noting that there could be no suggestion that it impliedly overruled Alsager, as there was no power to do so.

12. The conclusion has in my judgment to be that Alsager is to be followed in the Northern Province, either because, as a decision of the Chancery Court of York, it is binding, or because as a binding decision of the quasi-bidivisional appellate court it has temporal priority over Blagdon and has not been overruled or determined to be clearly wrong.

13. It seems to me, however, that the judgments do not need to be seen as in conflict with one another, despite the observations made from time to time that the Alsager test may be slightly weaker than that applied in Blagdon. It cannot have been envisaged in Alsager that the question should be answered by reference to the personal convictions of unidentified churchpeople rather than by reference to the law. Nor, despite Blagdon at [30], can it have been envisaged that a petitioner would be required to establish by evidence what right-thinking members of the Church at large (not merely in the parish or the diocese) might be expected to think: see, for analogous tests in other areas of the law, Re St Chad's Bensham at [22]. The test is a hypothetical one, and in order for a member of the Church to be 'right-thinking' in the sense envisaged by Alsager, he or she would need to be imbued with the principles and practice relating to this area of the law. There is every reason to suppose that in each Diocese the Chancellor properly represents such persons and their views; and there is no doubt that it is for the Chancellor to decide whether an exhumation should be permitted. The Chancellor will make that decision by considering whether it is right to make an exception to the presumption of permanence. The Alsager test indicates that there is an

assessment to be made, by reference to the law and traditions of the Church, and I would not be inclined to read it more literally. In the Northern Province Blagdon can stand at least as a decision of high authority entitled to great respect and likely to be of considerable assistance.

Making a case for exhumation

14. The various decided cases each consider a different factual matrix; and many of them make observations on the weight attaching to individual factors in the context of the individual case. In Blagdon at [37] the factors listed as establishing exceptionality on the facts of that case were (i) the sudden and unnatural death of the Petitioners' son (in an industrial accident, aged 21) at an age when he had expressed no view about where he would like to be buried; (ii) the absence of a link between him and the community in which he was buried; (iii) his parents' lack of a permanent home at the time of his death; (iv) enquiries shortly after his death about the possibility of moving his remains when his parents had acquired a permanent home; (v) their living for several years in a permanent home and their purchase of a triple-depth plot that could accommodate their son now and themselves in due course. The general factors discussed were medical reasons, lapse of time, mistake, local support, precedent and the creation of a family grave: not all of them were said to be persuasive in all cases.

15. It is perhaps inevitable that those trying to put together a case for exhumation should be tempted to do so by reference to the facts and the apparently successful factors in other cases; and it is, I think, fair to say that the submissions in the present case have been formulated by reference to the facts of Blagdon. The temptation to treat other cases, even Blagdon or Alsager, as a pointer to what is likely to be regarded as exceptional is to be resisted. Like cases are no doubt to be decided alike, and the decided case offer guidance on the determination of the issues, which ought to be applied in the interests of consistency. But precedent operates in the area of law, not of fact. The facts of every case are different. The question is whether the circumstances as a whole establish the exceptionality. Whether an individual factor can be given the same headline description as a factor in another case is unlikely to be of very great assistance. It cannot even be said that if factors capable of bearing the same descriptions as all the factors listed (i)-(v) in the previous paragraph could be identified in another case, an exhumation would be allowed, especially if the ages, the distances or the history of the parents' occupation were different; and an analogy would be more dangerous still if one of the factors was absent. What is worse, an attempt to fit factors within the descriptions used in other cases may cause some matters to be regarded as unimportant or unlikely to be influential, when in truth they are not. Even the clear and general guidance that can be found in such decisions as Alsager and Blagdon cannot be regarded as comprehensive: as has been said in a number of contexts, guidelines are not to be treated as tramlines. The only fixed principle is that the circumstances as a whole, properly evaluated and considered, will need to establish that it is right to make an exception to the presumption of permanence.

Discussion and decision

16. The present Petition is motivated by a wholly new plan, which, if implemented, will involve the remains of Valerie and Eugene being exhumed from consecrated ground and (subject to Home Office Licence) reinterred together in a new grave in which the Petitioner also will be buried. In order to determine whether an exceptional case for the disturbance of those

remains has been made out, I take into account the relevant factors, including those specifically considered in the decided cases.

17. The written representations invite me to consider the proposal as one for the establishment of a family grave, taking into account also that there will be room in the adjacent plot at West Wilford for two other members of the family. That characterisation is very difficult to adopt on the facts of this case. The usual case where exhumation is sought on the basis of the creation of a family grave involves the exhumation of the remains of one person, to be re-interred in a place where other members of the family are or will be buried. Here there is already a family grave, already containing the bodies of two members of the Petitioner's family; and the Petitioner's submissions accept that the Petitioner herself could also be buried in that grave. So the scheme is not really the creation of a family grave, but the moving of a family grave to another burial ground where an adjacent plot will be occupied by other members of the family. In my judgment the general arguments in favour of family graves do not apply to an arrangement of this sort. There is no saving in space; and family unity can be as well expressed by the Petitioner's being buried, in due course, in the grave already occupied by her daughter and her husband.

18. There is here no question of any mistake having affected the choice of resting-place of either Valerie or Eugene. There is no evidence even of a mistake in the perhaps wider sense adopted by Singleton QC Ch in her recent judgment in Re David Ernest Newton deceased [2018] ECC She 1. If any decisions were made at the times of the deaths of Valerie and Eugene, they are unrecorded. There is no evidential basis for saying that the Petitioner (or, in the case of Valerie, both her parents) made a choice that they would not have made if better advised. They simply followed the usual custom of the place at the time, which was that Gamston's dead were buried at Bingham. A subsequent change of mind, or a new plan, is of little or no weight in establishing the exceptional circumstances needed to justify exhumation.

19. It is sometimes said (and it was said in Alsager) that the passage of time counts against exhumation from consecrated ground, although the decided cases demonstrate many exceptions to that principle, if it is one. In the present case a considerable amount of time has passed, even since Eugene's burial. I take that into account. I prefer, however, to treat it not as a separate free-standing issue but as confirmation of the lack of any mistake or other factor that might have led to earlier corrective action being taken.

20. I take next the point that the graves are in a community with which the family has no links. This is a clear example of an attempt to match submissions to a point that was regarded as of weight in Blagdon. In Blagdon the Petitioners' son's grave was in the place where they happened to be at the time of their son's death. They were not part of the community there except as short-term residents; their son had in truth nothing to do with the place at all; and it was a very long way from their eventual home. The position is quite different here. The graves are at Bingham because that is where, or one of the places where Gamston's dead went at the relevant time. Bingham cemetery is to this extent the burying-place of the very community to which the Petitioner and her family have always belonged. It is true that it is not in Gamston itself, but nor is the proposed resting place for the family. Presenting the point under the headline taken from the facts of Blagdon is misleading. The fact that Bingham cemetery is not in Gamston is a factor with no weight in this case.

21. One of the factors in Blagdon was that the Petitioner's son died before his time and before he had expressed any view about where he might be buried; and so the same is said here about Valerie. The truth is that it could be said with equal accuracy about the grave of any infant. In my judgment this factor adds nothing to the Petitioner's case. In Blagdon, the lack of discussion of a burying-place before Stephen's death was accompanied by evidence that there had been enquiries quite soon thereafter about the possibility of exhumation; but in the present case, if there had been anything in this point, it would, I consider, be wholly eroded by the lapse of time since Valerie's death, before any query was raised. This is an eloquent example of the sterility of the process of taking isolated factors from other cases.

22. Similarly in the case of Eugene, the simple fact is that there had been no discussion of a family grave before his death or at any time shortly afterwards, although he was buried with Valerie. The decision now to create a small family area in West Wilford cemetery because grave plots have been bought there is simply part of the background to this Petition, rather than being a reason why it should be granted: it is the question, not part of the answer.

23. I have carefully considered whether the presentation of the solicitors' submissions under Blagdon heads has obscured any factors that ought to be taken into consideration. I have not been able to detect any that are of weight. No reliance is specifically placed on the consent of family members, which in Blagdon was said to be a factor that is of importance; but in truth it is the absence of consent that is likely to be of importance. As I remarked at the beginning of this section of the judgment, the proposal is wholly new, and there is in the facts no trace of earlier attempts to reconsider the resting-places of Valerie or Eugene, or to have a family agreement about where the dead should rest. There is, further, no evidence of any difficulty for any member of the family in visiting and tending the graves at Bingham that would be alleviated if they were at West Wilford. There is, as is conceded, no necessity for the proposed exhumations in order for the Petitioner to rest with her husband and daughter when her time comes: her body can be buried in the existing family grave at Bingham.

24. This is a case in which the original decisions and interments were not tainted by any mistake, and no necessity for the exhumations has been established at any level. The proposal is not motivated by any objectively desirable end, but solely by the personal wish of the Petitioner and her family to move the grave of Eugene and Valerie from one place to another. In my judgment no good and proper reason has been advanced for these exhumations, and there is accordingly no such reason that is likely to be regarded as acceptable by right-thinking members of the church at large. I shall therefore refuse this Petition.

Consequences

25. In the light of this judgment it may be that the Petitioner will choose that after her death she is to be buried in the grave at Bingham. If so, there will probably be some disturbance of the remains of Valerie and Eugene, which is technically an exhumation. It is convenient to say now that unless anything unexpected happens in that process, I would regard the technical exhumation as *de minimis* and not requiring a Faculty: the whole contents of the grave must be treated with reverence and any human remains reburied.

26. I have been told nothing about memorials. There was no Petition to remove any memorial from Bingham, so I assume that there is none there. If there is no memorial at Bingham and the Petitioner is to be in due course buried in one of the new plots at West Wilford, it may

be appropriate to seek permission for any memorial erected to her to include reference to Eugene and Valerie and to the fact that they are buried at Bingham.

The Worshipful Mark Ockelton MA BD

Chancellor of the Diocese of Southwell and Nottingham

15 February 2018