

**Neural Citation Number: [2019] ECC StA 2**

**IN THE CONSISTORY COURT OF THE DIOCESE OF ST ALBANS**

**IN THE MATTER OF: CHESHUNT CEMETERY (No 3)**

**PETITION NUMBER 754**

**And IN THE MATTER OF THE PROPOSED EXHUMATION OF TED  
TWILLEY, DECEASED**

---

**J U D G M E N T**

---

1. By a petition dated 15 April 2019, and presented on 17 April 2019, the petitioners, Mrs Karen Twilley, and her husband Mr Robin Twilley, apply to exhume the cremated remains of their late son, Ted Twilley (“Ted”), who died on 14 January 2004, aged 2 days. The petitioners seek to exhume the cremated remains of their son from the consecrated part of Cheshunt Cemetery, and, if so permitted, intend to re-inter the remains in the unconsecrated part of the same cemetery.
2. At the petitioners’ election, and as was their right, I held a Consistory Court hearing on 16 September 2019. I heard oral evidence from both petitioners, and very helpful submissions from their Counsel, Ms Caroline Daly. After taking time to consider my decision I informed the parties that I proposed to grant their petition, but that I would give my detailed reasons later.
3. Ted was the second child of the petitioners. He was born by emergency caesarean section on 12 January 2004 at 31 weeks due to a placenta abruption. Two days later he suffered a massive brain haemorrhage, and his parents had to make what Mrs Twilley described in her statement as: “the heart-breaking decision to turn off his life support machine.” On 14 January 2004, Ted died in his mother’s arms.
4. As I have said above, I heard oral evidence under affirmation from Mrs Twilley, who confirmed the truth and accuracy of what she had said in her statement dated 8 September 2019. Mr Twilley followed and, also on affirmation, confirmed the truth of what his wife had said. I was impressed, in particular, by the evidence of Mrs Twilley, and found both her and her husband to be honest and accurate witnesses.

5. After his death Ted was taken to Birmingham Hospital for an autopsy. Thereafter, once the body had been returned to the petitioners, it was cremated on 2 February 2004. On 3 June 2004, the cremated remains were interred in an identified plot in consecrated ground in Cheshunt Cemetery.
6. The petitioners had to arrange the funeral. Neither of them had any previous experience of doing such, and they were unaware of the various options open to them. I was told, and readily accept, that the whole experience was highly distressing and upsetting for the whole family. For the funeral arrangements Mr and Mrs Twilley instructed the Enfield branch of Co-op Funeral Care. They found the staff very helpful. They had recommended to them a priest from Chase Farm Hospital, the Reverend Tom Baron (referred to as "Father Tom"), who was apparently experienced in dealing with funerals of young children and babies. Crucially, they were not told that they could have a non-religious funeral, and at that one conducted by a non-religious person, such as a humanist. I accept this evidence, and find that either the possibility of a non-religious funeral was not mentioned, or if it was (which I consider less likely), it was not expressed in such a manner that the petitioners misunderstood what was being said. I do not seek to blame anyone for what happened, and I suspect that the Co-op officials never considered or realised that the Twilleys might want a non-religious funeral. Doubtless, they thought that by recommending Father Tom they were suggesting someone whom they knew to be sympathetic, and well qualified to conduct the funeral of a baby, and all that such entailed.
7. The petitioners have no complaint about Father Tom, nor as to the manner in which he conducted the funeral. He visited them at their home, and discussed with them their wants for the funeral. They explained to him, and I accept, that they did not want any hymns or prayers, as they did not have any religious beliefs. They gave him a poem to recite and some words to say, and he complied with these requests.
8. Before the interment of Ted's ashes in June 2004, Mr and Mrs Twilley visited Mr Jim Duncan, the manager of Cheshunt Cemetery, to make appropriate arrangements, and to select a plot. Mr Duncan showed them a row of small plots, and explained that the area was for the burial of small children and babies. Mr and Mrs Twilley were happy to agree to this location, which they did. Unfortunately, nothing was said about the area being consecrated land, which it was, nor about the fact that opposite was unconsecrated land and a plot in which Ted's ashes could easily have been interred. In short, neither petitioner appreciated or realised that Ted's ashes were being interred in consecrated land, and/or what the effect of that was. It follows that neither petitioner

appreciated or realised that the interment could just as easily have been in unconsecrated land. They did not know that the cemetery contained plots of consecrated and unconsecrated land more or less adjacent to each other; still less did they know what the difference between the two areas was. As Mrs Twilley put it in her statement: "We thought that this was the area (ie the consecrated land) where Ted was to be buried as there were other children and babies next to him. We were happy with this location at the time because it was near other small children. Neither Mr Duncan nor anyone else explained to us that this side of the cemetery was consecrated, and the other side was unconsecrated. He didn't give us a choice of another plot and he only showed us this one plot. Rob and I are both atheists and if Mr Duncan had explained that it was consecrated ground and what consecrated meant we would have refused that plot for our son." I accept this evidence.

9. I find that from the outset there was a fundamental mistake of fact on the part of the petitioners as to the nature of the plot in which they agreed to have the ashes of Ted interred. The question then arises what would the petitioners have done had they known the full facts and of the various options available to them, and in particular that Ted's ashes could have been just as easily interred in unconsecrated land? To put it another way, what if anything, would they have done differently? This was answered decisively and unequivocally by Mrs Twilley in her oral evidence, when she said; "We would not have let him be put there had we known (that it was consecrated land, and that there were other options readily available)."
10. In answer to the question why she wanted the exhumation, Mrs Twilley said that after her death she wanted to be buried, or to have her ashes interred, next to her son, and that not being a religious person she wanted this to be in unconsecrated land. When asked why, if she had no religious beliefs, it should matter where she was interred, she said immediately: "I'm not religious. It's hypocritical going into the ground where you don't have that religion." I accept and respect that. She was further asked, why she should want to be buried or interred next to her son if she herself had no religious belief, and gave the answer: "He's on his own. As his Mum I should be buried with him, with him again. My other children will go off and have families of their own. It's just my wish to be with him. I don't want him being on his own." Having seen and heard Mrs Twilley give evidence, I am left in no doubt that she was genuine in her sentiments, and that she was telling me the truth. Furthermore, the petitioners were married in Broxbourne Civil Hall in a non-religious ceremony, and have two surviving children, neither of whom has been baptised, nor has either gone to a school with any particular religious affiliation.

11. My views are to some extent reinforced by the very fact that the petitioners have had to make such an effort and indeed to incur costs and expense to take the matter this far. The matter has already been heard once, and has been appealed to the Court of Arches, about which I will say more below. The legal process has clearly taken its toll on the petitioners. Mr Twilley runs a building business, for which Mrs Twilley does the books. They have two other children, Alfie, aged 17 years, and Darcee, aged 14 years. They are clearly a close family. They live next door to Mrs Twilley's parents, whilst Mr Twilley's parents live in Islington, London. They visit the plot where Ted's ashes are interred every other week, or so.
12. Evidence has been provided from the funeral director that Ted's ashes were placed in an impervious polythene bottle before being interred, with the result that there will have been no decay, albeit 15 years have elapsed since the original interment.
13. I also have before me an email, dated 27 March 2019, from Mr Duncan, Cemeteries Manager of Broxbourne Council, confirming that there is suitable unconsecrated ground available in the cemetery where the cremated remains of Ted could be reinterred, and that there is sufficient space available to allow for the subsequent interment of Mrs Twilley's ashes, in the fulness of time.
14. The principles which I have to apply when dealing with an application for an exhumation from consecrated ground are well known and were laid down by the Court of Arches in **Re Blagdon Cemetery 2002 Fam 299**.
15. I have a discretion, but the presumption is that the burial of human remains in consecrated ground is permanent. This is the starting point when dealing with the discretion. The presumption arises from the Christian theological tradition that burial, or as here, the interment of cremated remains, is to be seen as the act of committing the mortal remains of the departed into the hands of God as represented by His Holy Church.
16. Thus it is that the Court can only depart from the principle of permanence if the petitioners, on whom the burden of proof lies, can establish, on the balance of probabilities, special circumstances which allow an exception to that principle.
17. The Court of Arches in **Blagdon** (supra) helpfully identified certain factors which may assist in deciding whether exceptional circumstances have arisen such as to permit the remains to be exhumed. These

include medical reasons (which do not apply here); lapse of time, mistake, precedent, and the desirability of encouraging the establishment of family graves. It is, though, important to bear in mind that the factors identified by the Court of Arches are not determinative, nor are they of necessity exhaustive. They are guidelines rather than tramlines as to how the Court should exercise its discretion.

18. I have said that medical reasons do not arise here, which is correct. However, because of the loss to these petitioners of a baby of just two days, there has been even more grief and pain caused, over and above that which is naturally caused by the death of any loved one.
19. The question of a family grave does not arise in the present case, and so I have no need to address it.
20. Delay is a factor, but as was made clear in **Blagdon** (supra) it is not automatically fatal to the prospects of success of a petition. I do not consider the delay to be decisive on the particular facts of the case. As I have recited above, there is good evidence to show that the ashes will not have decayed. Thereafter, and much more importantly, I have to bear in mind that the petitioners were under a misunderstanding as to the position for many years. That they did not seek to act earlier can easily be explained by the fact that they did not know to do so, as they were wholly unaware of the situation.
21. In my judgement, as I have made clear above, mistake has occurred. In the first place the mistake relates to the fact that petitioners, not having been told, did not realise that they could have had a non-religious funeral for their son. This was compounded by their not being told that there were consecrated and unconsecrated areas adjoining each other in the cemetery, and what the differences between such were. In turn this meant that they could not and did not make an informed decision about where they wished Ted's ashes to be interred.
22. For the avoidance of any doubt, I am further satisfied that the mistake was operative on the minds of both petitioners, and that they would never have agreed to Ted's ashes being interred where they were had they known what that entailed, and been made aware of the available alternatives. The mistake was similar to that postulated by the Consistory Court in **In The Matter of Hither Green Cemetery 2018 ECC Swk 3**, where Petchey Ch stated: "There is however another category of mistake which arises when a person does not know that the ground in which the remains have been interred is consecrated. If he or she **had** known, the person concerned would not have organised the burial in the consecrated ground. In these circumstances there is an

operative mistake, which the Court of Arches said would justify exhumation.” Reference was made to an earlier decision in **Re Crawley Green Road Cemetery, Luton 2001 Fam 308**, where a widow who was a humanist would not have arranged for the burial of her husband in consecrated ground if she had known of its status. The faculty was granted. The facts in that case were not far removed from those of the instant one. I am satisfied that this is not a “change of mind” case.

23. In my judgment, there is nothing on the highly unusual facts of the instant case, that could possibly be said to suggest that an undesirable precedent is, or is at risk of, being created.
24. I was referred to the recent decision of **In The Matter of a Petition by Keith and Ann Hinkley 2019 ECC Swk 1**, where Petchey Ch expressed the view that: “Whenever a child predeceases his or her parents, difficult issues may arise as to the appropriate arrangements in respect of his or her remains,” and he went on to say that in such circumstances, the Consistory Court should be prepared to show “appropriate flexibility.” The facts of that case were different from those in the matter before me, but I fully endorse the sentiments therein expressed. The petitioners are supported in what they seek to do by their two other children. These are all matters which I take into account, as I am entitled when exercising my discretion whether or not to grant the petition.
25. In view of my findings I do not need to consider the provisions of **Articles 8 and 9 ECHR** and the **Human Rights Act 1998**, though I think it unlikely that they are, of necessity, engaged.
26. At this juncture I feel it appropriate to go back in time to address the process of how the matter came to be before me.
27. By an earlier petition presented on 8 December 2017, the petitioners sought to exhume the ashes of Ted because they were intending to move, first to Royston, about 28 miles away from their current home, and after a few years, perhaps to Cyprus. They wanted to keep the ashes at home and possibly take them with them to wherever they settled. The petitioners represented themselves before the then Deputy Chancellor de Mestre QC, who concluded that the petitioners had not so much made a mistake but had had a change of mind as to the appropriate place for the interment of Ted’s ashes. The learned Deputy Chancellor was clearly and rightly also concerned as to the lack of certainty about the future re-interment of Ted’s ashes, reminding herself that permanence of burial (or interment) is the norm where consecrated land is involved, and that the Court of Arches in **Blagdon** (supra) had

specifically said; "...remains are not to be regarded as "portable" at a later date, because relatives move elsewhere and have difficulty visiting the grave." The petition was refused.

28. The petitioners sought leave from the Consistory Court to appeal. This was refused. Subsequently on 26 October 2018, the Dean of the Court of Arches granted permission to appeal on the following basis: "1. Permission is given to appeal on the grounds: (a) That the Deputy Chancellor was wrong (para 15) to categorise the Appellants' case as: "one of change of mind rather than a (potentially operative) type of mistake...., namely a lack of understanding as to the significance of interment in consecrated ground"; (b) That the Deputy Chancellor thereby failed to consider whether this mistake was capable of constituting exceptional circumstances within the law as laid down in **Re Blagdon Cemetery 2002 Fam 299** and/or to explain why this was not so."
29. The Dean went on to note that the petitioners, who had raised the issue of mistake for the first time in any depth at the Consistory Court hearing, rather than on the papers, were effectively seeking to amend the basis of petition through the appeal process. This was so also because the petitioners, post the Consistory Court hearing, had abandoned their thoughts about moving home, because of the educational needs of their children. He suggested that the petitioners might consider submitting a further petition on the basis now advanced. The petitioners who, as I have said above, were unrepresented previously, were unaware that they could not easily raise a new issue on an appeal. Thus it was that a fresh petition was presented, and that the matter came before me. The petitioners, for their part, are content to give an undertaking to have Ted's ashes reinterred in unconsecrated land in the same cemetery. This, of course, removes the "portability" argument and/or concern.
30. I am satisfied that the petitioners' change of heart about moving has been properly thought through, and is genuine. Additionally, I have to say that I suspect that both the earlier Court, and also the petitioners were hampered by the lack of assistance from Counsel. This was and is an emotionally difficult case to argue for anyone; for the petitioner parents, not used to ecclesiastical legal procedure, it must have been daunting in the extreme. Even with the very able assistance of Ms Daly of Counsel, Mrs Twilley understandably found giving evidence before me an emotional and difficult experience. I suspect that at the earlier hearing, and in the prior preparation for that hearing, she was incapable, by herself as a litigant in person, of doing her cause full justice. I am wholly satisfied that it is right and proper for me to admit and to take into account, as I have, the evidence of mistake referred to above.

31. In these very particular circumstances, I am satisfied that this is a case where I can take an exceptional course, and exercise my discretion so as to authorise the exhumation of the cremated remains of the late Ted Twilley so that they may be reinterred in unconsecrated ground but in the same cemetery. I cannot accede to the submissions on costs made on the petitioners' behalf. Whilst I appreciate the difficulties that the petitioners, as litigants in person, faced, the fact is that they have changed their position. I consider that the usual order for costs is appropriate.
32. Accordingly, I direct that a Faculty is to issue as sought, but with the following conditions, namely that:
- (1) The exhumation be effected with due care and attention to decency, early in the morning, and with the plot screened from the view of the public.
  - (2) The reinterment be forthwith, in unconsecrated ground in the same cemetery. The petitioners must give a written undertaking to this effect as a condition of this faculty being issued.
  - (3) The petitioners must pay the Registry and Court costs of and incidental to the petition, in the usual way. There shall be a correspondence fee to the Registrar as I direct.

**John Gallagher**  
**Deputy Chancellor**  
**2 October 2019**