

**IN THE CONSISTORY COURT OF THE DIOCESE OF DURHAM  
IN THE MATTER OF AYCLIFFE WEST CEMETERY  
AND STANLEY BRAITHWAITE DECEASED**

JUDGMENT

1. Mr Stanley Braithwaite died on 25<sup>th</sup> January 2016 at the age of 88. His funeral took place at St Clare’s Church in Newton Aycliffe, and following a cremation his remains were interred in consecrated land at Aycliffe West Cemetery. By a petition dated 28<sup>th</sup> January 2022, the adult children of Stanley Braithwaite, being a brother and sister, seek a faculty to exhume his ashes. They do not wish to inter his remains elsewhere, but instead propose to scatter his ashes, together with the ashes of his recently deceased wife, at a particular spot in the Lake District near a caravan park where the family often used to go on holiday.
2. The petition was advertised on the West Cemetery noticeboard, and no objections were received. A letter from the Town Clerk of Great Aycliffe Town Council confirms that the council have no objection and would carry out the exhumation reverently, in accordance with any directions given by the Consistory Court and the local medical officer of health.
3. The petitioners submitted with the petition a statement written by the brother, Mr Stephen Braithwaite. He wrote:

*“Long before my Dad died, he and I used to talk about him dying. One of the main things that used to get discussed was the fact that he wanted his ashes scattered in a certain place that was significant to our family. This was a specific place in the Lake District where we used to have our family holidays.*

*He always said that there was no point in being buried. One of his reasonings for this was that he had a friend who said to him that [he] went to the cemetery every week to place flowers on the grave of his wife. My Dad asked him if he had done this whilst his wife was alive, to which he replied ‘no’. My Dad said perhaps he should have done so as it was a waste of time doing this when someone was dead. My Dad was very practical about these things, which is why he told me of his wishes for his ashes to be scattered rather than for them to be interred.*

*When my Dad did die and we were discussing the funeral arrangements with the funeral directors, the funeral directors asked what we would like to have done with*

*the ashes. They gave us the options. We did feel that we had to decide on one of these options almost immediately, meaning that we had no time to discuss it fully and the decision was made whilst we were still getting over the shock of our Dad dying.*

*Before I could state what my Dad's preference was, my Mam and sister said that they wanted the ashes to be buried in a plot at Aycliffe West Cemetery. Unfortunately, because of the situation and the emotional state of my Mam, I did not object to this even though I knew it was against what my Dad really wanted. I did not bring up the subject again and consequently my Dad's ashes were interred, much to my constant regret as I felt that I had really let him down. In the end the ashes were interred the week after his funeral.*

*Much later, I was discussing this with my sister and she too stated that she had regretted it almost immediately but that she had not said anything for fear of hurting my feelings. Once I knew this, I looked into seeing how I could perhaps look at rectifying our mistake. Once I found out that the ashes were interred on consecrated ground, I realised that the procedure would be complicated, so I did not progress with it. My thinking was that I would wait until my Mam died and then pursue it.*

*My Mam died November 2021 and I now want to make the application for a faculty to exhume my Dad's ashes which will allow us to be able to scatter Mam and Dad's ashes in the place that my Dad wanted. I think this is a good opportunity to rectify the mistake that we made in January 2016.*

*I look at this issue in two ways: one practical the other emotional. On a purely practical basis, it makes no sense to make the same mistake twice. If the faculty is denied, we will have to place my Mam's ashes alongside those of my Dad's. That will mean disturbing the ashes of my Dad in any case. In our opinion, it would be much better to disturb Dad's ashes to allow for his original wishes to be respected than for them to be disturbed in order to make the same mistake again. My Mam also said that she would prefer to have her ashes and Dad's ashes scattered together rather than be put into the same plot as my Dad's.*

*From an emotional point of view, this would help to alleviate regret that we have all had in our original decision. I never go to the cemetery to see my Dad's stone because I have the same thinking as he had and it is just too much of a reminder to me that I should have spoken up before we did what we did."*

4. When the petition was received, the diocesan registry contacted the petitioners to clarify two matters: had their father left a Will or any express wishes, and were his remains in a casket? The reply was that their father had executed a Will in 2004 containing the following provision: "I desire my body be cremated...and my ashes disposed of by my trustees", and that his ashes were contained in an oak casket.

5. The principles I must apply in deciding this petition are to be found in the case of *Re Blagdon Cemetery* [2002] Fam 299, a decision of the Court of Arches which, by virtue of s 14A of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, is treated as if it were a decision of the Chancery Court of York.
6. The Court of Arches in *Blagdon* held that the disturbance of remains which have been placed at rest in consecrated land can be allowed only in exceptional circumstances. There is a general presumption of permanence arising from the initial act of interment. The Court of Arches explained at paragraph 21 of its judgment: *“This presumption originates in the Christian theology of burial. This theology underlies the consecration of land especially for burials, and it is present in every funeral service and burial of a body or interment of cremated remains according to the rites of the Church of England.”*
7. Whether the facts in a particular case warrant a finding that the case is to be treated as an exception is for the Chancellor to determine on the balance of probabilities, and it is for the petitioner to satisfy the Consistory Court that there are exceptional circumstances which justify departing from the norm that a Christian burial is final.
8. A copy of the judgment in *Blagdon* was sent to the petitioners by the diocesan registry, and their attention was drawn to the requirement that they would need to show exceptional circumstances if they were to succeed. They were notified that the court was considering dealing with the petition by way of written representations rather than at a hearing, and they were invited to make further written representations having had an opportunity to consider the judgment in *Blagdon*.
9. In response to this invitation, a further eloquent supplementary written submission was sent by the brother on behalf of both petitioners. That written submission relies on mistake as the ground for seeking exhumation. The petitioners contend that there was the original mistake by the brother in not speaking up at the time when the funeral arrangements were being discussed, and then there was the sister’s mistake later in not raising the issue when she too had regrets about the initial decision that had been made. The brother suggests that one of the reasons why they made the mistake was:

*“The fact that we do not recall being made aware that the ashes would be placed in consecrated ground. In fact, my understanding was that cremated ashes were buried in unconsecrated ground and that consecrated ground was used for full body burials. I certainly do not recall being informed that we could have had the ashes buried in unconsecrated ground. Although, as I have said, I would not have been aware of the level of impact between the two, if I had been informed of those impacts, I would certainly have requested burial in unconsecrated grounds knowing that I could eventually exhume the remains without having to petition for a Faculty.”*

10. The brother goes on to state in the supplementary written submission that his father provided in his Will for the funeral service to be conducted at St Clare's Church in Newton Aycliffe. He suggests that this was not because his father was a religious person, but because the church was more local than the nearest crematorium, enabling more people to attend the funeral and to pay their respects.

11. He deals with the emotional aspect of the case in this way:

*“Although we are not making this petition based on any medical reasons, it has to be said that the mistake we made has impacted on our emotional well-being.....what upsets me is the fact that I let [Dad] down very badly. He made it very clear on numerous occasions what his wishes were and I failed to make sure that they were carried out. On my account because I am very aware that I made a big mistake in not taking care of his wishes and in my sister's case because she gets upset knowing that she is partly responsible for this error. She does visit Dad's grave because she feels responsible for the error that we made. However, because of this reason, it causes her much distress when she does visit. This is something we think about a lot. We cannot go back in time and change it but we can try our best to rectify the mistake.”*

12. The brother discloses that he and his sister did at one stage discuss with their mother their wish to exhume their father's ashes and scatter them:

*“Around 2019, my sister and I came to the conclusion that we should research how we could get Dad's remains exhumed and have his wishes met. When I discovered that the remains were in consecrated ground and I determined what the process was, we decided to discuss it with my Mam. I had not discussed this with her before but she understood what we were wanting to do and she agreed that that was what my Dad would have preferred. Her only stipulation was that she would want her ashes with my Dad's no matter where they were placed. My Dad's special place is also special to my Mam. It is in a specific spot in the Lake District near to where we had a caravan. However, I did not want to go through the process whilst she was still alive because it would have meant her having to take a big part in getting it resolved. My sister and I agreed that we should wait for my Mam to die and then start to try and get the exhumation approved.”*

13. The petitioners submit that because the ashes will be scattered there would be no concerns about ensuring that any new grave would be properly cared for in the future – a concern which is a factor for the Court to consider in accordance with the guidance set out in *Blagdon*. The petitioners question whether the church's theology has changed over the years, pointing out that St Cuthbert's body was initially buried in Lindisfarne and then transported for many years from Lindisfarne to Durham via further burial and exhumation at Chester-le-Street. I fear the petitioners have misunderstood the point in issue. The Court of Arches in *Blagdon* raised the concern about the future care of any new grave

following exhumation because the Consistory Court has a duty to protect the remains of all those entrusted to its jurisdiction when interred in consecrated land. Likewise, the monks entrusted with the care of St Cuthbert's body were anxious to protect it against invading Vikings, who were liable to leave a trail of devastation and destruction wherever they went.

14. Although the petitioners here principally rely upon a mistake, I must consider all relevant factors to consider if there are exceptional circumstances to the general presumption of permanence, based on the Christian theology of burial.

15. The Court of Arches in *Blagdon* gave the following guidance in relation to mistakes:

*“...a change of mind as to the place of burial on the part of relatives or others responsible in the first place for the interment should not be treated as an acceptable ground for authorising exhumation...”*

*Sometimes genuine mistakes do occur, for example, a burial may take place in the wrong burial plot in a cemetery or in a space reserved for someone else in a churchyard. In such cases it may be those responsible for the cemetery or churchyard who apply for a faculty to exhume the remains from the wrong burial plot or grave. Faculties can in these circumstances readily be granted, because they amount to correction of an error in administration rather than being an exception to the presumption of permanence, which is predicated upon disposal of remains in the intended not an unintended plot or grave. A mistake may also occur due to a lack of knowledge at the time of burial that it was taking place in consecrated ground with its significance as a Christian place of burial. For those without Christian beliefs it may be said that a fundamental mistake had been made in agreeing to a burial in consecrated ground.”*

16. Applying the principles set out in *Blagdon*, the grounds relied upon by the petitioners do not amount to a mistake. Instead, there has been a collective change of mind, and *Blagdon* makes it clear that a change of mind as to the place of burial on the part of relatives should not be treated as an acceptable ground for authorising exhumation. In accordance with the petitioners' father's express wishes set out in his Will, the funeral took place according to Church of England rites. His ashes were shortly afterwards interred in consecrated land, in accordance with Canon B38.4(b) following a church funeral. It was a collective decision, made by the petitioners at the time in consultation with their mother, that the ashes should be interred in consecrated land. And at the time, it was their mother's wish that her ashes too would in due course be interred next to her husband's ashes at Newton Aycliffe West Cemetery. I understand and appreciate the regret which the petitioners now share, and the guilt they now feel because they believe they did not carry out their father's wishes, but they should not reproach themselves – the Will did not

specify that the ashes were to be scattered in the Lake District, and the decision they came to at the time was with the agreement of their mother.

17. The fact that they did not fully realise the effect of interment in consecrated land is a factor, but it does not make this an exceptional case. Regrettably, all too often family members may not fully understand the consequences of interment in consecrated land. As the Court of Arches noted in *Blagdon* at paragraph 26, the difference between consecrated and unconsecrated land is not widely known or understood:

*“Many people choosing to have their relatives or friends buried in a churchyard or in the consecrated part of a local authority cemetery may have little or no understanding of the Christian theology of burial”.*

18. In *Hither Green Cemetery* [2018] ECC Swk 3 at paragraph 20 Petchey Ch put the matter in this way:

*“If exhumation is permitted in these circumstances, the Court would be saying that exceptional circumstances sufficient to justify exhumation arise simply from the fact that the Petitioner did not know at the time of burial that the land was consecrated (or did not appreciate the legal consequences of such consecration). Such cases are complicated by the fact that inevitably the Petitioner will say that if he or she had known at the time of burial or interment that the fact of burial or interment in consecrated land would be to inhibit a subsequent (and not hypothetical) change of mind, they would not have organised the burial or interment in consecrated ground. However this is not the same thing as a mistake operative at the time of the decision as to arrangements as to burial or interment.”*

19. There is a further relevant factor to take into consideration. I am not satisfied that the petitioners’ proposal to scatter their father’s ashes, if exhumation is permitted, is appropriate. The ashes would be scattered at a particular spot in the Lake District and dispersed wherever the wind, rain and other elements might take them. It is inconsistent with the Christian theology of burial, with its emphasis on permanence in a final resting place. It also appears to be outside the provisions of Canon B38.4(b) where the scattering of ashes is not provided for following cremation.

20. However, I note that there seems to be a divergence in approach amongst Chancellors as to whether it is appropriate to grant a faculty to enable ashes to be scattered following exhumation from consecrated land. Cases such as *Re Bromsgrove Old Cemetery* (2010), *Re Bromsgrove Cemetery* (2013) and *Re St. Bartholomew Naunton Beauchamp* [2019] ECC Wor 5 (all decisions in the Worcester Consistory Court) have granted faculties enabling ashes to be scattered. Other Consistory Court cases have refused faculties where the scattering of ashes was to take place following exhumation. Ockleton Ch at paragraph 32 of his judgment in *In the Matter of Ordsall Churchyard* [2019] ECC S&N 1 observed there could be no faculty if the intention was to scatter the ashes following

exhumation, because the treatment of the remains would not accord with the Church's view about the permanence of Christian burial and the respect due to human remains.

21. Eyre Ch in *Re St Swithun Cheswardine* [2015] at paragraph 7 onwards explained that:

*“The Court is concerned not just with the permanence of interment but also with the fact that remains which have been interred in consecrated land have been committed to the protection of the Church. Exhumation can only be permitted even in exceptional circumstances if the Court can be satisfied that appropriate arrangements are in place for the continuing protection of the remains. This concern was articulated in the context of a proposal for the scattering of cremated remains by McLean Ch in Re Stocks (1995) 14 CCCC 21, 5 Ecc L J 527. In this decision in the Sheffield Consistory Court the learned chancellor explained that the Court would not allow remains once interred to be lightly disturbed and that it would require reinterment to be in a location where there would be equivalent protection. This was because the Court had to be concerned to ensure the continuing security and safe custody of the remains which had been committed to the care of the Church. McLean Ch refused an application for the exhumation of cremated remains with a view to scattering them in the Hope Valley in Derbyshire 3 (even though he accepted that such scattering was what the deceased person in that case had wished). In so doing he said that “To allow disinterment in order that the ashes be scattered would ... strike at the root of the principles of security and safe custody.*

*The Court of Arches did not address this point in terms in Re Blagdon Cemetery but it did make it clear that the continuing security and safe custody of the remains in question was a very important consideration when a Consistory Court was deciding whether or not to allow exhumation. Thus at paragraphs 13 – 16 the Court explained that re-interment in land which was neither consecrated nor under the control of a local authority (where similar protection would be given) would be problematic because of concerns as to the permanence of the protection which was to be provided to the remains in question. Such concerns apply with even greater force where what is proposed is the scattering of cremated remains which are currently interred in consecrated land. It follows that the approach of McLean Ch remains applicable and that it is difficult to envisage circumstances in which it will be appropriate to allow remains to be exhumed for the purpose of their subsequent scattering.”*

22. I agree with the above reasoning and approach of Eyre Ch in *Re St Swithun Cheswardine*.

Conclusion:

23. The petitioners now regret the earlier decision taken to have their father's remains interred. Their wish now to scatter his ashes in the Lake District together with the ashes of their mother is a change of mind as to the appropriate form of disposal of their father's

remains. That change of mind does not mean that there was a mistake at the time of the original interment, and it is not an exceptional circumstance within the meaning of *Blagdon*. Furthermore, the fact that the intention is for the remains to be scattered following exhumation is another reason why exhumation should not be permitted. The petition is therefore refused.

Adrian Iles  
Chancellor

1<sup>st</sup> April 2022