Neutral Citation Number: [2025] ECC S&N 3

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWELL AND NOTTINGHAM

Before: the Chancellor

IN THE MATTER OF BINGHAM CEMETERY (No 2)

and

IN THE MATTER OF THE PETITION OF RITA HARBURY-CARLISLE

JUDGMENT

Introduction and procedural matters

1. By this petition the petitioner, Mrs Rita Elizabeth Harbury-Carlisle, otherwise Lady Rita Harbury-Carlisle, ('Rita') seeks the exhumation of the remains of her sister Valerie Allsop ('Valerie') and her father Eugene Arthur Allsop ('Eugene') from their grave in Bingham cemetery.

2. No party has sought a hearing. This petition is suitable for determination on the basis of written submissions and I so determine it.

3. The intitulement is in the form it is, because this is the second time that there has been a petition for the exhumation of the remains of Valerie and Eugene. The former petition was by Joan Thetis Allsop ('Joan'), their mother and wife respectively. That petition was refused: the judgment is at [2018] ECC S&N 1. There was no challenge to that decision by way of appeal or otherwise. In the course of this judgment I shall have to say something about the former proceedings and what arises from them. At this point it sufices to say that the background facts and the law set out below are largely repeated from that judgment, which is not said to have been other than correct.

The family background

4. The Allsop family have their roots in the village of Gamston. The nuclear family with which I am concerned is that of Joan and Eugene. They had three children, Valerie, Rita and their brother, called, like his father, Eugene Arthur Allsop. Rita is now the only survivor.

5. Bingham cemetery was apparently a usual burying-place for the residents of Gamston. Valerie died of gastroenteritis, aged six months, in 1948. Her mother was in hospital at the time and was unable to attend the funeral. She was buried in consecrated ground at plot 888 in Bingham cemetery. Her father ('Eugene') died in 1989. He was buried in the same plot as Valerie.

6. Rita and her husband have bought a burial plot in Wilford Hill Cemetery, West Bridgford for themselves. They have also bought the plot next to it. That plot was bought with the intention of using it for Eugene and Valerie if their exhumation was authorised, and then for Joan when her time came. Although the previous petition was refused, and therefore there was no exhumation, after Joan's death the family took the decision not to bury her with her husband and Valerie, but in the plot at Wilford Hill. The present petition seeks again the exhumation of Eugene and Valerie with the intention of re-burying them with Joan.

The law

7. In my earlier decision I set out the law applicable to petitions of this sort. In doing so I attempted to determine how a court in the Northern Province should respond to the apparent differences in approach between the decision of the Court of Arches in Re Blagdon Cemetery [2002] Fam 299, and that of the Chancery Court of York in Re Christ Church Alsager [1999] Fam 142. I noted at [10]-[11] that treating the two decisions as effectively of parallel jurisdiction, as had been suggested, did not resolve any conflict between them. The suggestion became law by the insertion of s 14A into the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, with effect from 1 March 2019. But it seemed (and seems) to me that although there are differences, they are capable of resolution, even though it now must be the case that, for the reasons given at [11] in the earlier decision, Alsager would appear to have superior authority. I say that despite the fact that Alsager is rarely referred to in post-2019 exhumation decisions.

8. Be that as it may, there can be no room for doubt as to the principles. 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. 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 persons remains (whether as a coffin burial or ashes) to burial, permission for exhumation is not given by the Court on demand. 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.

Res judicata

9. As there has been a previous decision on whether the exhumation of Eugene and Valerie should be permitted, it is a proper matter for consideration whether the Court should determine this petition afresh, or whether the matter should be regarded as res judicata, that is to say finally determined by the previous decision. The applicability of the latter doctrine in the Consistory Courts has recently been considered by Burns KC Ch in Re Brookwood Cemetery (No 2) [2024] ECC Gui 3. That was a case where a petition for exhumation had been refused by the Deputy Chancellor; the petitioner then issued a new petition seeking the same relief, but adding to and changing the arguments said to support the case. Although the learned Chancellor expressed at [18] that the question was whether 'it is permissible to consider a second petition seeking the same relief', it is clear that that was not in fact the question with which he was concerned. He was concerned with whether it is permissible to consider a second petition by the same petitioner seeking the same relief.

10. His resolution of the question before him, referring not only to the modern doctrine of res judicata but to the principle that 'nobody [as defendant] should be vexed twice in the same matter', makes it clear to my mind how difficult it is to carry the doctrine from the common law to an ecclesiastical court. For in an ecclesiastical cause of this sort there is no defendant (although there may exceptionally be a party opponent) – but abuse of process is a matter between the parties, and it is for the defendant to establish any abuse of process: see Johnson v Gore-Wood & Co [2002] 2 AC 1 per Lord Bingham, in the passage cited in Brookwood. Further, as in the present case, but not, in the ecclesiastical jurisdiction, limited to exhumation petitions, an issue may be raised again by a person different from the previous petitioner, the latter alone being capable of being bound by issue estoppel or res judicata.

11. A possible comparison is with Re Cheshunt Cemetery (No 3) [2019] ECC StA 2, not cited in Re Brookwood Cemetery (No 2), although earlier proceedings by the same petitioners relating to the same issue (Re Cheshunt Cemetery (No 2) [2018] ECC StA 2; [2018] EACC 4) are discussed there. The original exhumation petition was refused by De Mestre QC as Deputy Chancellor. She also refused permission to appeal. The petitioners applied to the Court of Arches for permission to appeal, indicating also that they would wish, if permission were granted, to advance and rely on arguments and matters not raised below. In particular, they would seek (if permission to exhume was granted) to rebury the ashes immediately in unconsecrated ground, rather than to keep them unburied for a period as had been originally proposed.

12. The Dean granted permission on the basis that it was arguable that the Deputy Chancellor erred in law. He declined at that stage to decide whether to allow the petitioners to 'change the basis of their petition' because that would depend on whether, in due course, the court hearing the appeal was prepared to allow new evidence to be called. Noting in his reasons that the petitioners should not assume that they would be allowed to do so, he observed as follows:

> 'As an alternative to pursuing the appeal it remains possible for the Applicants to request the consistory court to set aside the refusal decision under rule 20.3(1)(a), with a view to reconsideration of their revised proposal …; or if the consistory court refuses an application to set aside, to submit a further petition on that basis.'

13. It appears that the appeal was not pursued. There was a new petition, determined by Gallagher Dep Ch as Re Cheshunt Cemetery (No 3). At [27]-[29] he narrated the history, but did not mention whether there had been any application to set aside the earlier judgment, or whether an application had been refused. He simply said that the Dean 'suggested that the petitioners might consider submitting a further petition on the basis now advanced'. Evidently he was not troubled by the Dean's apparent view that the petitioners ought first to seek the setting-aside of the earlier judgment, and submit a further petition if that was refused. Evidently also (for there is no mention of the matter) he was not troubled by the question of res judicata, perhaps because of what the Dean had written.

14. In Re Brookwood Cemetery (No 2), Burns Ch may not have considered the differences and difficulties mentioned at [10] above. In any event he gave as his general conclusion at [27] and [29]:

> 'I am satisfied that the principles of res judicata and the rule against abuse of process apply in the Consistory Court. Where the cause of action is the same, a second

> petition falls within the res judicata [sic]. It is impermissible to present a new petition for a faculty to carry out the same works as has already been determined in a judgment on a previous petition.
> ...
> Therefore I cannot consider the fresh petition unless it is just and expedient to set aside the Judgment of the Deputy Chancellor.'

15. This is, of course, more or less the opposite of what the Dean wrote, and what happened, in Re Cheshunt Cemetery (No 2) and Re Cheshunt Cemetery (No 3). There the Dean seems to have thought that a fresh petition would be available if the earlier decision was not set aside, and subsequently in the consistory court a fresh petition was considered (and allowed) without any thought of setting aside the previous decision. The learned Chancellor appreciated the difficulty, but concluded that his decision was consistent with Re Brookwood Cemetery (No 2). At [28] he distinguished the latter case on the basis that the new (envisaged) petition

> 'was not an application that had already been determined by the Consistory Court but a petition for a different faculty. ... The fact that the second petition was anticipated to be for a different faculty explains why the Arches Court said that a further petition could be submitted even if [sic] the Consistory Court refused an application to set aside. It was not a case of applying for precisely the same outcome on different or additional grounds as in the present petition, but a petition for something that was materially different.'

16. I am sorry to have to say that I do not understand that. It does not seem to me to reflect the facts of the Cheshunt cases. Both petitions sought a faculty for exactly the same works, that is to say the exhumation. (No faculty was required for the reburial or other proposed treatment of the remains.) The difference between the two was not in the relief sought, which was identical in the two, but in the reasons why it should be granted, which were, in the second petition, more likely to be regarded as acceptable by a consistory court. That is exactly the sort of post-decision development of a case that, if res judicata applied, would be prohibited.

17. The regrettable outcome of this discussion is that the position is wholly uncertain. Re Brookwood Cemetery (No 2) decides that the doctrine of res judicata applies in the consistory courts, and that a second petition for the same relief can be considered only on the basis that it seeks to set aside the earlier decision, and can be granted only if it would be right to set that decision aside. As there stated, that rule appears to extend to all cases where the relief has been sought previously, even if by a person different from the present petitioner. The view of the Dean in Re Cheshunt Cemetery (No 2) was that a new petition for the same relief can be considered even if (or perhaps only if) an application for the previous decision to be set aside has failed: in other words, if there has been a decision that it would not be right to set the earlier decision aside. Re Cheshunt Cemetery (No 3) appears to apply a rule that a new petition by the same petitioners for the same relief but supported by different arguments can be considered regardless of any application to set aside the earlier decision.

18. In these circumstances I am not obliged by judicial comity to follow Re Brookwood Cemetery (No 2). In any event, its attempted extension to all subsequent proceedings seeking the same relief even by a different petitioner is obiter, and is not justified by the

arguments considered. Such a conclusion realistically requires the judgment to be regarded as a judgment in rem, binding the world. That possibility is not considered by any of the cases, and is beyond what can be considered here.

19. I do not rule out the possibility that the court of its own motion might decline to redetermine an issue on which there had already been a fully-reasoned and applicable decision: such action might be based on the ground that the new proceedings were simply repetitious and that no useful purpose would be served by spending time on them. Alternatively, the court might decline to consider the matter afresh and instead simply repeat its earlier decision. These are possibilities that might be explored in another case.

This petition and its consideration

20.The present case seeks the same relief as was sought in Re Bingham Cemetery, but the petitioner is different. The present petitioner could not have appealed against the earlier decision; nor could she have applied to set it aside. I do not consider that either res judicata or abuse of process in the inter partes sense apply at all. I shall determine the petition on its own merits, but in doing so I shall draw material from the material put forward by members of the same family in the earlier case and the unchallenged decision in the earlier judgment. It is clear from the papers that Rita, the present petitioner, was fully aware of the earlier proceedings; she gave her consent to the earlier petition and knew what was being said in support of it.

21. The principal basis for the earlier petition was that it was intended to create a family grave at the newly-purchased plot at Wilford Hill, the one next to Rita's. In refusing the petition I noted that as there was no burial there yet, the arguments often seen as supporting the creation of a family grave do not apply. The position now is that Joan, the petitioner in the earlier case, died subsequently and was buried in that plot at Wilford Hill. She could (so far as I am aware, and as accepted in her solicitor's arguments) have been buried with her husband and Valerie at Bingham, and that would indeed be a family grave. The present petition asserts that Joan 'could never rest knowing the family were apart, and it is now the sincere wish to reunite them all'. The petitioner also says that it was Joan's 'dying wish that one day dad [Eugene] and Valerie would join her and we [sic] could all be together'. Given Joan's clear indication I do not know why the family chose to separate her by burying her away from her husband and Valerie, but the decision to do so says something about the family's actual perception of the value of her wishes. I do not think that it provides any real reason of itself for exhuming Eugene and Valerie. Indeed, it is not open to the petitioner to try to force a fait accompli in this way – particularly, perhaps, if the means of doing so involves ignoring wishes that are said to have been important. The truth of the matter is that at the time of Joan's burial the family knew that the decision of this court was that the remains of Eugene and Valerie should be allowed to rest undisturbed, and they made their decision against that background.

22. A number of other members of the wider family are buried at Wilford Hill, it is said twelve in all. There is a clear argument in the papers supporting the present petition that burying members of the same family in the same cemetery, even in different graves, has some sort of metaphysical value. I reject that argument. The only value that it might have is the wholly sublunary one of ease of visiting. There is no doctrine recognised by the Church or this court that there is any advantage to the deceased in burial in any particular place, whether or not

with, or near, those whom the deceased has loved on earth. Family graves are encouraged chiefly because our stewardship of the earth's resources encourages us to save space if possible. That is the encouragement the family rejected in their decision on Joan's burying-place.

23. There are also suggestions that the grave at Bingham cannot readily be visited, or maintained, by the family. I give very little weight to that in determining whether those buried there should now be exhumed. It is far from clear what the difficulty is. In a recent letter Rita says that she and her husband 'visit the graves [at Wilford Hill] every day, maintaining the grave and cutting the grass around 20 graves each week.' This is of course many more than the graves of their own family members. Their devotion and public spirit is to be commended, but it does not show very clearly that it would be difficult for them to visit and care for the grave of Rita's father and sister a few miles further away.

24. Elsewhere in the papers there is a clear indication that the reason for the petition is simply the convenience of the petitioner: 'travelling to Bingham is becoming increasingly difficult for my husband and I', although the same sentence refers, in a different context, to 'all of the remaining family members'. It is clear that as well as energy to maintain graves, Rita and her husband have family support available to them. It is well-established that difficulty in travelling to visit a grave does not constitute a justification for removing the remains to a place that (for the moment) would be more convenient. For recent decisions, see for example Re St Helen Edlington (2014, Diocese of Lincoln); Re Holy Cross Epperstone [2020] ECC S&N 1; Re Burnley Cemetery [2021] ECC Bla 2; Re St Peter & St Thomas Stambourne [2023] ECC Chd 4. The latter two decisions in particular are on facts strikingly more disadvantageous to their petitioners than anything said in the present case.

25. It is also said that Bingham is a community in which the family do not have any roots and with which they have no connexion. I dealt with this point in the earlier judgment. As noted above, the people of Gamston were often buried at Bingham. It was the normal, or a normal, place for them. Although the family lived in Gamston, not Bingham, Bingham is not an alien place: it is the place where their neighbours were buried too.

26. The only other relevant factor mentioned now is an assertion by the petitioner that 'Bingham cemetery is consecrated, although we were not told this at Bingham at the time of Eugene's passing'. I suppose it is being suggested that there was a mistake in burying Eugene in consecrated ground. I place no weight at all on this assertion. Joan, Eugene's widow, was professionally represented in the earlier proceedings and there was no hint of a mistake by anybody, although her solicitors clearly did their best to find arguments under all the heads that had previously been found to constitute circumstances justifying exhumation. I have no doubt that those making the decision to bury Eugene in the same grave as Valerie knew that that grave was in consecrated ground. Even now it is not said that there was any lack of information in relation to Valerie's burial.

27. One other factor is the passage of time. In Alsager it is stated that the passage of time counts against exhumation. In the earlier decision I remarked that its force is likely to be in showing that there was not, at the time of the original burial, any mistake or other circumstance that was seen to need correction. Further time has passed since the earlier

decision. Nothing that has happened since begins to show that the exhumation of Eugene and Valerie should now be allowed.

Decision

28. Neither separately nor together do the points advanced by the petitioner constitute special circumstances displacing the presumption of the permanence of Christian burial. The petition is refused. The remains of Eugene and Valerie must rest undisturbed on earth, while their souls remain in the hand of God.

C M G Ockelton MA BD
Chancellor
3 July 2025