In the Consistory Court of the Diocese of Worcester:
Archdeaconry of Dudley

Bromsgrove Cemetery
Faculty petition 13/64

Proposed exhumation of the cremated remains of Mrs Kathleen Muriel Harris

Judgment

Introduction

1. This Judgment concerns a Petition dated 3rd August 2013 by Mrs Amanda Jane Jermain ("the Petitioner") of 123 Wendell Road, London W12 9SD seeking the authority of the Court for the exhumation of the cremated remains of Mrs Kathleen Muriel Harris from Bromsgrove Cemetery Plot 2056B and the removal of the grave and headstone. It is proposed that Mrs Harris's remains will be scattered with those of her husband elsewhere.

2. The Petitioner, Mrs Amanda Jane Jermain, is the daughter of Mrs. Harris.

3. As the Petition contained somewhat concise reasons, I offered the Petitioner the opportunity of an oral hearing[1]. The Petitioner indicated that she wished to take up the offer of a hearing. Accordingly, the Consistory Court sat in London on 9th December 2013 at which the Petitioner and her husband appeared. The petition was unopposed.

The facts

4. Mrs. Harris died on 22nd April 1999. She was cremated on 30th April 1999, one day after what would have been her wedding anniversary. Her cremated remains were buried in a casket in Plot 2056B at Bromsgrove Cemetery within the week.

[1] The Faculty Jurisdiction Rules 2000 rr 17 and 26(1) do not expressly permit a Chancellor to refuse an unopposed petition without a hearing.

5. Plot 2056B is on consecrated ground.

6. Mrs. Harris's husband died on 19th February 2013. His brother, Brian Harris, died a few weeks later.

7. The Petitioner, her husband and the widow of Brian Harris are the only surviving adult members of the family.

8. There are no objectors.

9. The Petitioner's father has been cremated but his ashes remain with the undertaker pending resolution of this application.

The grounds for exhumation

10. Mrs. Harris's husband increasingly believed that he had acted hastily and irrationally in the short period between the death of his wife and the burial of her cremated remains.

11. The Petitioner explained that her father felt that he had not been thinking ahead at the time. He increasingly came to regret this enormously.

12. The Petitioner's father had always wished that his cremated ashes should be combined with those of his wife and that they should be scattered together.

13. It was only towards the end of his life that the Petitioner's father became aware that there was a process by which he could rectify his error. However, his intentions were overtaken by illness and frustrated by his own death.

14. In response to a question that I asked, both the Petitioner and her husband replied that Mrs. Harris would have been less inclined to have been buried in consecrated ground

than her husband. I formed the view that this thought had influenced the Petitioner's increasing concern at the precipitate action he had taken at the time of his wife's death.

15. Although she could not be sure, the Petitioner believed that her father had been unaware at the time of burial that the land upon which Plot 2056 B was located was consecrated land.

16. The Petitioner and her husband explained that neither Mrs. Harris nor her husband held any religious beliefs.

Exhumation: the general law of the Church of England

17. *In re Church Norton Churchyard* (also reported as *In Re Atkins*)[2] was decided on 9th November 1987. It concerned the Petition of a widow who wished, some 12 years after interment, to exhume the cremated remains of her husband from the unkempt part of the churchyard of a parish into which they had moved and to re-inter the ashes in a new plot in a cemetery where other family grave or graves were situated and near where she intended to return to live. A faculty was granted.

18. The Chancellor reviewed the approach of the Courts to exhumation over the preceding 150 years. The principle was identified:

> "The court then should begin with the presumption that, since the body or ashes have been interred in consecrated ground and are therefore in the court's protection or, in the words of *Wheatley on the Book of Common Prayer*, 'safe custody', there should be no disturbance of that ground except for good reason. There is a burden on the petitioner to show that the presumed intention of those who committed the body or ashes to a last resting place is to be disregarded or overborne. The finality of Christian burial must be respected even though it may not be absolutely maintained in all cases. The court should make no distinction in this between a body and ashes and should be careful not to give undue weight to the undoubted fact that where ashes have been buried in a casket their disinterment and removal is simpler and less expensive than disinterment of a body and is unlikely to give rise to any risk to health.
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> The Court must take account of changes in the incidence of cremation in the last two generations. More than two-thirds of those dying in England are now cremated. There are also good reasons for believing that society has become more mobile. The Court should resist a possible trend

[2] [1989] Fam 37; [1989] 1 All ER 14, Edwards QC Ch. at p.19f

> towards regarding the remains of loved relatives and spouses as portable, to be taken from place to place so that the grave or place of interment of ashes may be the more easily visited.
>
> Notwithstanding these general principles cases occur in which the discretion to grant a faculty should be exercised. ... Some instances may, nevertheless, be mentioned.... Errors occur and bodies and ashes are placed in the wrong grave. Interment of both bodies and ashes are sometimes, for understandable reasons, conducted before all relevant considerations are weighed. A family mausoleum or group of graves may be overlooked; the wishes of the deceased may not be known at the time of burial or fully taken into account.…
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> The wish of the personal representatives or next of kin of the deceased to remove the body or ashes from one part of a churchyard to another or from one churchyard to another for reasons which appear to the Court to be well founded and sufficient is, on the authorities, a ground for the grant of a faculty….. In every case the arguments for the grant of a faculty must be weighed against the general principles already mentioned … "

This case was also referred to by the Court of Arches decision *In Re Blagdon Cemetery*.[3]

19. In *Re St Mary Magdalene, Lyminster*[4], Edwards QC Ch applied his previous decision *In re Church Norton Churchyard*[5] to an application concerning portability of remains (and not to an existing family grave). He posed the question: "has the petitioner shown that there are sufficient special and exceptional grounds for the disturbance of two churchyards". He did not express this test to be any different from "reasons which appear to … be well founded and sufficient" in his earlier decision.

20. In both *Re Christ Church Alsager*[6] and *Re Blagdon Cemetery*[7], the appeal courts have emphasised that exhumation does not involve a question of doctrine, ritual or ceremonial, but that the normal rule is that burial in consecrated land is permanent, and that a faculty will only exceptionally be granted for exhumation.

21. In particular, the Court of Arches in *Blagdon* commented on "the variety of wording … used" as demonstrating a difficulty in identifying appropriate wording for a general test in what is essentially a matter of discretion.

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[3] *Blagdon* at p.307, para.34.
[4] (1990) 9 Consistory and Commissary Court Cases 1.
[5] Also reported as *In Re Atkins* [1989] Fam 37; [1989] 1 All ER 14.
[6] [1999] Fam 142, decided on 10th July 1998.
[7] [2002] Fam 299, decided on 16th April 2002.

22. The Court expressed the normal rule as follows:

> "We have concluded that there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted. Exceptional means "forming an exception" … and guidelines can assist in identifying various categories of exception. 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. …
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> We consider that it should always be made clear that it is for the Petitioner to satisfy the consistory court that there are special circumstances in his/her case which justify the making of an exception from the norm that Christian burial, that is, burial of a body or cremated remains in a consecrated churchyard or consecrated part of a local authority cemetery, is final. It will then be for the chancellor to decide whether the Petitioner has so satisfied him/her."[8]

23. There has, therefore, been a re-formulation of the test for the discretion to grant a faculty to exhume remains. It has changed from 'good reason' to 'exceptional circumstances' – although at para. 35 the Court in *Blagdon* reverted to "special circumstances". However, it has not gone further than requiring reasons forming an exception from the normal rule. There is no requirement to show *very* special circumstances. In the present context the words used mean no more than reasons "forming an exception" to the expectation of finality or permanence of burial.

24. It is now for the Petitioner in each case to demonstrate that, on the balance of probabilities, there should be an exception to the norm that the burial, whether in a churchyard or in the consecrated part of a cemetery, is final.

Possible exceptions to the presumption that burial is permanent

25. Whilst the general rule is that burial in consecrated ground is final, that is not an absolute rule; and there will be exceptions. The Chancery Court of York in *Alsager*, some four years before the decision of the Court of Arches in *Blagdon*, expressed this principle as follows:

> "The chancellor will need to bear in mind that the Petitioner must prove the good and proper reason to the usual standard applicable in faculty cases, namely on a balance of probabilities. Various factors will help him in deciding whether or not this has been done. It is not possible to list all the factors which may be relevant. However, experience has shown that some factors recur frequently, some arguing for a faculty and some against.

[8] *Blagdon* at pp. 306-7, paras, 33-35.

> Although mistaken advice by a funeral director or anyone as to the likelihood of a successful petition in itself is unlikely to carry much weight a mistake by the Petitioner or by a third party, such as an incumbent, churchwarden, next of kin, an undertaker, or some other person, e.g. as to locality, may be persuasive to the grant of a faculty. Other matters which may be persuasive are medical reasons relating to the Petitioner; that all close relatives are in agreement[9]; and the fact that the incumbent, the parochial church council and any nearby residents agree. That there is little risk of affecting the sensibilities of congregations or neighbours, may be persuasive although in practice this is not likely to apply to municipal cemeteries.
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> The passage of a substantial period of time will argue against the grant of a faculty. Public health factors and improper motives, e.g. serious unreasonableness or family feuds will be factors arguing against the grant. If there is no ground other than that the Petitioner has moved to a new area and wishes the remains also to be removed this is likely to be an inadequate reason. In normal circumstances if there is no intention to re-inter in consecrated ground this will be a factor against the grant of a faculty. If the removal would be contrary to the intentions and wishes of the deceased; if there is reasonable opposition from members of the family; or if there is a risk of affecting the sensibilities of the congregation or the neighbourhood, these will be factors arguing against the grant of a faculty.
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> The chancellor will need to weigh up all the relevant pointers, for and against, whether illustrated here or not, and then answer the question which we have stated."[10]

26. The list of factors was not intended to be an exclusive list. The general approach then advocated was that the chancellor must weigh up all the relevant pointers, for and against, "whether illustrated here or not", on a balance of probabilities.

27. The words requiring a simple balancing exercise are not repeated in *Blagdon* for a good reason. There is a difference between the question being considered in *Alsager* ("is there 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?"[11]) and that in *Blagdon* ("are there special circumstances which justify the making of an exception from the norm that Christian burial is final?"[12]).

28. The task is now, therefore, one of identifying exceptions and no longer one of merely balancing different considerations[13]. For example, the mere fact that no one objects; or

[9] Not supported *In Re Blagdon*; see below.
[10] *Alsager* at pages 149E-150B
[11] *Alsager* at page 149C.
[12] *Blagdon* at page 307D, para.35.
[13] *In Re Blagdon* changed from the approach set out *In re Christ Church, Alsager* to the approach that exhumation will only be exceptionally granted: *Blagdon* pages 306H-307A, paras. 32-33.

that all close relatives are in agreement; or that the incumbent, the parochial church council and any nearby residents agree; or that there is little risk of affecting the sensibilities of congregations or neighbours are all neutral circumstances rather than circumstances justifying an exception to be made. Such matters do not amount to an exception, whether considered singly or together. Whilst they would weigh in any balance to achieve a simple 'acceptable' or 'not acceptable' answer, that is not the balance to be achieved when one is searching for something special or exceptional. For example, I do not consider that it could be said that a lack of objection was in any way a special or exceptional circumstance.

29. The Court of Arches in *Blagdon* set out matters that had been considered in *Alsager*, as follows:

> "The Chancery Court of York in *Re Christ Church Alsager* considered various factors which can arise in connection with a petition for a faculty for exhumation. Many of these have arisen in this appeal and we have had the benefit of argument upon them. We consider them in turn."[14]

30. *Blagdon* then listed and considered six specific categories of circumstances that had been weighed in the balance, for and against, when determining the question in *Alsager*:

(i) Medical / Change or residence	(in support)
(ii) Lapse of time	(not determinative)
(iii) Mistake	(in support)
(iv) Local support	(not determinative)
(v) Precedent	(for or against)
(vi) Family grave.	(in support)

31. This list was not accepted as being determinative. For example, (iv) local support was rejected as being a determining factor and was said to normally be irrelevant when looking for special justification[15]; (ii) lapse of time was not considered as itself being capable of being determinative; nor could it count as something that could be a special or exceptional circumstance.

32. The only identified factors capable of being determinative on the present facts are (iii) mistake and (v) precedent.

[14] *Blagdon*, at page 307E, para.36.

Precedent

33. The Court of Arches held in *Blagdon* that:

> "… precedent has practical application at the present day because of the desirability of securing equality of treatment, so far as circumstances permit it, as between petitioners"[16]

34. No argument based upon precedent has been put forward by the Petitioner.

35. Nevertheless, I have considered precedent in the following ways:

(a) available decisions at the time of interment;

(b) previous decision in respect of Bromsgrove Cemetery;

(c) previous decisions within the Diocese;

(d) creation of precedent for the future.

a) Available decisions at the time of interment

36. At the time of interment in 1999, the precedents available suggest that exhumation would have been authorised, if good and proper reasons so allowed, on a balance of probabilities.[17]

37. I consider it relevant to give weight to equality of treatment to petitioners themselves over time as well as to have regard to equality of treatment between petitioners.

b) Previous decision in respect of Bromsgrove Cemetery

38. The Chancellor gave Judgment on 27th July 2010 granting petition 09/77 to exhume ashes from consecrated ground at Bromsgrove Old Cemetery. The application relied upon the deceased having wished for his ashes to be scattered but they had instead been buried. His widow wished to rectify her erroneous decision to have his ashes interred. There was no suggestion that either the husband or the wife were non-believers. The Petitioner also said that at no time during 2008 had she been made aware that the land at Bromsgrove Old Cemetery was concentrated.

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[15] *Blagdon*, at page 309F, para.36.
[16] *Blagdon* at page 310B, para. 36(v).
[17] *Alsager* and see para. 26 above.

39. The decision taken referred to the failure to notify the Petitioner of the consequences of burial in consecrated land and her strong feeling that she had made a mistake in having her husband's remains buried.

40. Although the evidence of Mr and Mrs Jermain is not that of Mr. Harris, I believe them when they tell me that he regretted enormously the action he had taken whilst acting hastily and irrationally during the few days after the death of his wife. I also believe them when they tell me that he did not know about the process for exhumation.

41. The facts of these two Petitions seem indistinguishable to me and precedent alone would suggest that this faculty be granted.

42. I am aware that the earlier decision of the Chancellor has been subject to some comment to the effect that the Church of England does not or might not recognise the scattering of ashes as a reverent disposal and that it might not be consistent with the Act of Convocation passed by York Convocation on 23rd May 1951 or the decision *In Re John Stocks (deceased)* (1995) 4 ELJ 527; or Canon B38 4(b) (Of the Burial of the dead). The petition in *Re John Stocks* was refused on the basis that "to allow disinterment in order that the ashes be scattered would, however, strike at the root of the principles of security and safe custody".

43. I am asked to authorise the exhumation of the ashes of a non-believer from a plot in consecrated land. I am not asked to authorise the future treatment of those remains. How they are treated in the future is not before me. I do not consider that it is necessary or seemly for me to seek to 'hang-on' to the cremated remains of someone who did not wish to be and should not have been buried in consecrated land.

44. Had the facts been different and had there not been evidence of non-belief, there might be reason for me to consider how the safe custody principles (or the norm of permanence) might be guaranteed; or whether the scattering of ashes might not be considered to be as permanent and as final as the burial or strewing of ashes in consecrated land.

45. In the previous Judgment in respect of Bromsgrove Old Cemetery reference was made to the decisions *In Re Putney Vale Cemetery*; *In Re Crawley Green Road Cemetery*

Luton[18] and *In Re Durrington Cemetery*[19] which concerned the Human Rights (Article 9 etc) aspects of exhumation cases such as this. In the light of *Dodsbo v Sweden*[20] these considerations might be engaged. I would find it hard, as a matter of logic, to distinguish between the rights of particular religious denominations; Humanists; and non-believers in respect of scattering ashes once they had been exhumed. However, I do not need to consider these matter for the purposes of this Judgment.

c) Previous decisions within the Diocese

46. I have considered the judgments in respect of the other petitions within this Diocese that have been given since the decision *In Re Blagdon*. With the exception of the Bromsgrove Old Cemetery they do not relate to facts similar to those under consideration on this Petition.

47. Reference is made in Bromsgrove Old Cemetery at para. 28 to *In Re Hagley Cemetery* given on the same day:

> "28 In the judgment issued by this Court *In Re Hagley Cemetery*, also issued on the same day as judgment in this case, I made a plea that:
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> > "those in this Diocese responsible for burials - both incumbents and (especially) the managers of municipal cemeteries - should ensure that, for so long as the Church of England retains its position as to the permanence of burial in consecrated ground, the relatives and dependents of those being buried are clearly informed as to the problems that will attend any attempt at seeking exhumation."
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> In this case, the Council has stated that it will review its policies to ensure that families are in future informed that the Cemetery is consecrated, and what are the consequences of that. This reassurance is welcomed."

I note that this was written some years after the interment of Mrs Harris's ashes.

d) Creation of precedent for the future

48. I do not consider that this decision will create any harmful future precedent since it follows existing precedent.

49. Accordingly, I find that precedent justifies a similar decision to issue the faculty sought on the similar facts of this Petition.

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[18] [2001] Fam 308.
[19] [2001] Fam 33.
[20] [2006] European Court of Human Rights

Mistake

50. Although a genuine mistake as to location of a grave or the status of the land (consecrated or not and the significance of this) can be a ground for exhumation,

> "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."[21]

51. Mistake relates to a decision made at the time of burial or interment.

52. The evidence is that no change of mind has occurred in this case. The mistake made was to inter the cremated remains of Mrs Harris in consecrated ground. I accept that such burial is not one that she would have wished for and that her husband was justified in seeking to rectify his mistake before he died. Thereafter, the Petitioner has sought to rectify her father's mistake.

53. In *Blagdon* the Court identified a category of mistake as:

> "36(iii) ... 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. This could have been a sufficient ground for the grant of a faculty to a humanist *In re Crawley Green Road Cemetery, Luton* [2.001] Fam 308 and to orthodox Jews in *In re Durrington Cemetery* [2.001] Fam 33, without the need for recourse to the Human Rights Act 1998. The need for greater clarity about the significance of consecrated ground in cemeteries, in particular, is demonstrated by these examples and we reiterate our plea for more readily available information so as to reduce the chances of such mistakes occurring again in the future."

54. The facts in this case accord with those considered to be a form of mistake in *Blagdon*.

Conclusion

55. For the reasons set out above. I am satisfied that the Petitioner has made out a case on the balance of probabilities, that there are exceptional or special reasons justifying the making of an exception to the norm that the burial of a body in consecrated ground is final.

56. Accordingly, I exercise my discretion to authorise a faculty to issue in the terms sought.

Robert Fookes

Deputy Chancellor 13th December 2013

[21] *Blagdon*, at page 308G.