In the Consistory Court of the Diocese of Worcester:

Archdeaconry of Dudley

Bromsgrove Old Cemetery:

Faculty petition 09-77, relating to proposed exhumation of William Henry Bartram

Judgment

Introduction

1. This is a petition by Mrs Dorothy Bartram for the exhumation of the ashes of her late husband Mr Walter Bartram from Bromsgrove Old Cemetery to enable them to be scattered.

2. Mr Bartram died on 22 March 2008. His body was cremated, and the ashes were buried on 8 April 2008 in the Cemetery. The Cemetery – or at least the relevant part of it – is consecrated, and thus subject to faculty jurisdiction.

3. I have considered it expedient to determine this petition on the basis of the written representations that have been made, without the need for an oral hearing.

Reasons said to justify the exhumation

4. Mrs Bartram, in a statement date 22 October 2009, expressed as follows the reasons for the proposed exhumation:

> "My husband, Walter Bartram, was paralysed and confined to a wheelchair for the last 15 years of his life, due to a tragic accident. During this time he endured a life of severe restriction and immobility, as you can imagine.
>
> Throughout these years he longed to be free and he passed onto me his wishes that when he died her wanted to be cremated and have his ashes scattered so that at last he could be free.
>
> When he died, I was so consumed with grief and loneliness that I made the decision to have his remains interred, so that I would have somewhere to visit him and feel close to him, which I now realise was very selfish of me.
>
> Now after time, I feel extremely guilty and saddened that I did not carry out his final wishes – to be free at last – and I therefore would like to rectify this. I would also like to add that at no time was I made aware that the land was consecrated."

5. The other members of Mr and Mrs Bartram's family have given their consent in writing to the proposed exhumation.

6. The District Council, as the owner of the Cemetery, has given its consent to the proposed exhumation, subject to the grant of a faculty.

Exhumation: the general law of the Church of England

7. The law of the Church of England governing the determination of petitions for exhumation has been authoritatively laid down by the two appeal courts in *Re Christ Church Alsager*[1] and *Re Blagdon Cemetery*.[2]

8. Strictly speaking, only the latter is binding on this Court, as it is in the southern province; but the former will obviously be highly influential. Thus – shortly after the decision in *Alsager* – I noted in *Re St Mark, Fairfield* that:

[1] [1999] Fam 142.
[2] [2002] Fam 299.

> "a judgment of the Chancery Court of York technically binds only consistory courts in the northern province, and is therefore only of persuasive force in relation to this Court.[3] I am satisfied, however, that there is no reason why the practice of consistory courts in one province of the Church of England should be different in relation to this topic from that of courts in the other province – indeed I should have thought that it is highly desirable that practice should be, as far as possible, uniform. I therefore take this opportunity to adopt the decision in *Alsager* and, as far as it goes, the guidance set forth in it."[4]

9. These decisions both emphasise that the normal rule is that burial in consecrated land is permanent, and that a faculty will only exceptionally be granted for exhumation. In particular, the Court of Arches in *Blagdon* expressed the principle 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. …
>
> 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." [5]

10. It is thus up to the petitioner in each case to demonstrate that there are special circumstances to justify the making of an exception to the norm that the burial of a body – whether in a churchyard or the consecrated part of a cemetery – is final.

[3] See *St Mary, Tyne Dock (No 2)* [1958] P 156 at 169.
[4] 1999, unreported.
[5] *Re Blagdon Cemetery* [2002] Fam 299, at paragraphs 33-35.

Possible exceptions to the presumption that burial is permanent

11. It is clear that 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* 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.
>
> 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; 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.
>
> 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.
>
> 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."[6]

12. It will be noted that this makes it clear that the list of factors is not intended to be an exclusive list. However, it does make clear the general approach to be adopted –

[6] P 149E.

namely, that the chancellor must weigh up all the relevant pointers, for and against, "whether illustrated here or not".

13. The Court of Arches in *Blagdon* then elaborated upon that, 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."[7]

14. It then listed and considered six specific categories of circumstances that could be considered as "exceptional", namely

    (i) Medical reasons
    (ii) Lapse of time
    (iii) Mistake
    (iv) Local support
    (v) Precedent
    (vi) Family grave.

15. It is sometimes implied that this is an exclusive list, but close examination of the passage quoted above at paragraph 13 above makes it plain that the list of six specific factors in *Blagdon* is no more an exclusive list than is the slightly more discursive list in *Alsager*. However, it does provide at least a starting point for the consideration of any particular petition; and I accordingly consider in turn each of the six factors mentioned.

(1) Medical reasons

16. It is likely that in the case of many if not most or even all petitions for exhumation the petitioners will feel very strongly that they want the remains in question to be

[7] Para 36.

removed from their present resting place – otherwise they would not trouble the court in the face of the clear presumption against such petitions being granted. It follows that there will inevitably be considerable distress where a petition is not granted. However, the Court in *Blagdon* said that medical reasons would have to be very powerful indeed to create an exception to the norm of permanence.

17. In the present case, Mrs Bartram frankly expresses her guilt at having failed to put into effect her husband's express wishes. And I have no doubt that she would be distressed, and would continue to feel guilt, if her petition were to be unsuccessful. But I am not persuaded that she has made out a case purely on that basis.

(2) The lapse of time

18. The second matter raised in *Blagdon* is the amount of time that has elapsed since the interment of the body or ashes in question. The present petition relates to a burial less than eighteen months earlier, so there was not undue delay in applying for a faculty; as against which, lack of delay does not of itself justify a faculty being granted. Thus the promptness with which this petition was brought does not of itself justify a faculty being granted – any more than the delay in its determination justifies it being refused.

(3) Mistake

19. As regards the third matter, mistake, the Chancery Court in *Alsager* provided guidelines as follows:

> "(2) Where a mistake has been made in effecting the burial, for example a burial in the wrong grave, the court is likely to find that a good reason exists, especially when the petition is presented promptly after the discovery of the facts.
>
> (3) In other cases it will not normally be sufficient to show a change of mind on the part of the relatives of the deceased, or that the spouse or another close

relative of the deceased has subsequently been buried elsewhere. Some other circumstance must usually be shown."[8]

20. The Court of Arches in *Blagdon* then expanded upon the guidance in *Alsager* as follows:

> "We agree with the Chancery Court of York that a mistake as to the location of a grave can be a ground upon which a faculty for exhumation may be granted. We also agree that 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. …"[9]

21. The category of "mistake" envisaged in the passage quoted above is thus principally a administrative or procedural mistake on the part of those responsible for the cemetery or churchyard. The present case seems to me to be not so much a mistake of that kind but rather simply a "change of mind", which is clearly identified as not being sufficient to justify exhumation.

22. As against that, it is clear from Mrs Bartram's statement that she now considers that she made a mistake at the time of the interment – that is, she made a decision that she now considers she should not have done. It is true that she has changed her mind since the initial decision to bury her husband's ashes, but that change of mind arises not so much from a passing fancy as a serious wish to rectify what she now realises to have been an error an her part at the time she made that initial decision. This case is

[8] *Alsager*, at para 148.
[9] *Blagdon*, at para 36(iii).

therefore very different from the "portable remains" cases, where the bereaved wish to move interred remains to a new burial site for their own convenience.

23. On its own, the circumstances identified above would not seem to be sufficient to amount to a "mistake", in the sense in which that word is used by the Court of Arches in *Blagdon* in the passage cited at paragraph 20 above. However, the Court in that case went on to identify a further category of "mistake", as follows:

> "… 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*[10]) and to orthodox Jews (in *Re Durrington Cemetery*[11]*)*, 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."[12]

24. This was considered in the context of the burial of Roman Catholics by the Southwark Consistory Court in *Re Putney Vale Cemetery*[13] and by this court in *Re Hagley Cemetery*.[14] Both of those cases, like the present one, concerned a proposed exhumation from the consecrated section of a municipal cemetery. In each it was decided that, because the petitioner had been unaware that the ground in which the body had been buried was consecrated, the principle enunciated in *Blagdon* in relation to humanists and Jews applied equally to Roman Catholics.

25. But as a matter of strict logic the same principle would also apply to anyone – of any religion or denomination or none – who was not aware that a burial area was consecrated, or who did not fully appreciate the significance of consecration. This

[10] [2001] Fam 308.
[11] [2001] Fam 33.
[12] *Blagdon*, at para 36(iii).
[13] 30 April 2010.
[14] 27 July 2010.

approach should therefore be treated with considerable caution, as it is probable that very many of those who commit the bodies their loved ones for burial have little if any knowledge or appreciation of consecration or its effects.

26. In the present case, however, Mrs Bartram has explicitly stated that at no time was she made aware that the ground in which her husband was buried was consecrated. And this is corroborated by a brief statement from the Council that the family were not aware that the ground in which the ashes were buried had been consecrated. It is in any event likely to be true – if she had been made aware that the ground was consecrated, and (perhaps more significantly) that the consequence of that was that it would be very difficult to obtain consent to exhume his body, she might well have had second thoughts, in the light of her husband's known preference for having his ashes scattered. Ashes could, after all, be buried at any time in the future if she wanted that; but, once buried, it could be problematic to exhume them.

27. I have therefore come to the conclusion that Mrs Bartram's explicit statement that she was not made aware that the Cemetery was consecrated, coupled with her strong feeling, entirely understandable, that she had done the wrong thing in having her husband's ashes buried, together constitute a set of circumstances such that this case should be treated as an exception – whether or not it strictly comes within the definition of "mistake" in the sense intended by the Court in *Blagdon*. Even if it does not fall within that definition, as I have already noted, the list of possible exceptional circumstances was not intended to be an exclusive one.

28. In the judgment issued by this Court in *Re Hagley Cemetery*, also issued on the same day as the judgment in this case, I made a plea that

> "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."

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.

(4) Local support

29. The Court in *Blagdon* explained that support from the close relatives of the deceased is very significant; but what the Court was there identifying was essentially a factor that potentially weighed *against* granting a petition – so that if close relatives of the deceased disagreed about the appropriateness of exhumation, that would evidently be a powerful reason for refusing the grant of a faculty; but support from close relatives would not of itself amount to an exceptional circumstance.

30. It follows that the fact that in this case the close family of Mr and Mrs Bartram have given their assent to the proposed exhumation of their father's body does not amount to an exceptional circumstance.

(5) Precedent

31. It is of course important that all such petitions are treated on an equal basis. That is why it is necessary that each should be considered carefully on the basis of the relevant principles of law. However, a decision to allow exhumation in the present case would not operate as a precedent, save to emphasise that each petition must be determined on the basis of its own facts.

(6) Family grave

32. Finally, an intention to create a family grave may be relevant, albeit not automatically determinative. That is irrelevant in the present case.

Conclusion

33. For the reasons set out above, I am satisfied that Mrs Bartram has made out a case on the balance of probabilities, that there are special circumstances to justify the making of an exception to the norm that the burial of a body – whether in a churchyard or the consecrated part of a cemetery – is final.

34. A faculty should therefore issue as sought.

CHARLES MYNORS

27 July 2010