

Neutral Citation Number: [2021] ECC Bla 2



Faculty - Exhumation – Existing Family Grave – No Evidence of Operative Mistake - Faculty Refused

Petition No: 29 of 2021

**IN THE CONSISTORY COURT OF
THE DIOCESE OF BLACKBURN**

Date: Easter Monday, 5 April 2021

Before:

THE WORSHIPFUL DAVID HODGE QC, CHANCELLOR

In the matter of:

BURNLEY CEMETERY

THE PETITION OF MRS MAY ANDREWS

Determined on the papers and without a hearing

The following cases are referred to in the Judgment:

Re Bingham Cemetery [2018] ECC S&N 1
Re Blagdon Cemetery [2002] Fam 299
Re Chesbunt Cemetery (No 3) [2019] ECC StA 2
Re Christ Church, Alsager [1999] Fam 142
Re St Andrew, Leyland [2021] ECC Bla 1
Re St. Mark, Winsbill [2020] ECC Der 4

JUDGMENT

Introduction and background facts

1. This is a petition dated 6 March 2021 by Mrs May Andrews for a faculty authorising the exhumation of the cremated remains of her late husband, Mr Thomas William Andrews (**the deceased**), from consecrated ground at Burnley Cemetery and their re-interment in a proposed family grave plot which the deceased's family are in the course of purchasing in the Compass Garden of Remembrance at Torrisholme Cemetery, Morecambe. The late Mr Andrews died on 15 February 2015, aged 82. His remains were cremated at the Lancaster and Morecambe Crematorium on 25 February 2015; and his cremated remains were interred in the existing family grave plot at Burnley Cemetery on 10 April 2015. The interment was apparently arranged by one of the deceased's three children, Mr Darren Andrews.

2. The existing grave plot contains the remains of the deceased's parents, Mr Thomas William Andrews (who died on 30 November 1950), Mrs Ellen Andrews (who died on 25 September 1957) and the deceased's brother-in-law, Mr Gilbert Baxter (who died on 29 March 1965). By a letter dated 25 March 2021, Burnley Borough Council Burial Authority, who govern and control Burnley Cemetery, have given their consent to the petitioner's request for the deceased's cremated remains to be exhumed from their existing grave and taken away from the Cemetery to be interred elsewhere. By an email of the same date, a Cemeteries Support Assistant from the Directorate for the Communities and the Environment at Lancaster City Council has confirmed that, following the exhumation of the deceased's remains, the City Council have no objection to the petitioner's request for those cremated remains to be re-interred in the Compass Garden of Remembrance at their Torrisholme Cemetery, subject to the usual interment documentation being completed and produced to the City Council's offices by the petitioner once the arrangements have been made. I am told that the petition has the support of the deceased's three adult surviving children. The petitioner, who is 82 years of age, has confirmed that she is content for this petition to be determined on the basis of written representations.

3. According to the petition, at the time when the deceased sadly passed away at The Royal Lancaster Infirmary, he and his family had been living in Morecambe for over 30 years. At the time of his passing, the family had not received any advice and they had not been sure what to do next after the deceased had been cremated at the Lancaster and Morecambe Crematorium. Following a family discussion, it was decided that the urn containing the deceased's ashes should be interred in his family's existing grave in Burnley Cemetery. Close family and friends attended the deceased's interment, which took place without any form of religious service (and thus without any words formally commending the deceased to God). The petitioner is said to be currently in the process of buying a family plot at Torrisholme Cemetery, near Morecambe, which is to be her final resting place. The petitioner is now 82 years of age and travelling has become more difficult for her. She wishes her husband's ashes and the urn to be brought home to Morecambe to be interred in this new family grave as it would give the petitioner a great feeling of contentment to be able to visit her husband at Torrisholme Cemetery and to know that, when her time comes, they can both rest in peace together. At the time of the deceased's interment, the family had not been aware that the grave was in consecrated ground as they had not been the original purchasers of the grave plot and they had not been aware of any difficulties there might be in moving the deceased's cremated remains.

4. When I first received the petition, on 25 March, I indicated that further information was required in support of the petition, namely:

(1) How many children of the marriage are there? Do they all know about, and consent to, the petition?

(2) Who was proposed to be interred in the new family grave? Were they all in agreement with that proposal?

(3) Was it possible for the petitioner's remains to be interred in her husband's existing grave? If not, why not?

(4) Was there any further information the petitioner would wish to rely upon in support of her petition or which would tend to show that the case was one where, exceptionally, exhumation should be permitted?

(5) Was the petitioner content for me to deal with the petition on the basis of written representations or would she want there to be a hearing (even if only virtually by Zoom, Teams or some other virtual digital medium, due to the pandemic)?

(6) Were there any further representations the petitioner would wish to make?

I asked the Registry to emphasise that I was not seeking this further information in order to be difficult in any way; but rather that I might be satisfied that there were exceptional circumstances that would justify exhumation, and to ensure that this had the support of the deceased's close family members. I was merely seeking to ensure that the petitioner should put forward the fullest possible case. I also indicated that even if a faculty were to be granted, it would not take effect until the Registry should have received proof of the purchase of the new family grave plot and had certified that this was satisfactory.

5. The petitioner responded by email on 26 March; and this was forwarded to me on 30 March 2021. There were three children of the marriage, all of whom were said to consent to the petition. When her time should come, the petitioner would wish to be interred with the deceased in the new family grave, and all were said to be in agreement with this proposal. It was possible for the petitioner's remains to be interred in her husband's family grave, but the petitioner and the rest of her family had lived in Morecambe for the past 35 years, and at this time travelling to visit the deceased's grave had become more difficult for the petitioner. However, the reason the petitioner was hoping to be granted permission for her husband's ashes to be exhumed was for her contentment, so that she and her husband would be together when her time should finally come in the new family plot that she was currently purchasing. To support the petition, the petitioner was "*hoping that the family convenience and contentment will help in this exceptional exhumation petition being permitted, thank you*". The petitioner stated that she was happy for me to deal with the petition on the basis of written representation; and she confirmed that she had no further representations that she wished to make.

The applicable law

6. The principles which the court has 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. I have recently reviewed some of the authorities

that have followed on from that decision in this court's judgment in *Re St Andrew, Leyland* [2021] ECC Bla 1 to which reference should be made for a fuller exposition of the law in this sensitive, and often emotionally charged, area. In summary, the court has 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. Thus it is that the court can only depart from the principle of permanence if the petitioner, on whom the burden of proof lies, can establish, on the balance of probabilities, special circumstances which would allow an exception to that principle. The courts have helpfully identified certain factors which may assist in deciding whether exceptional circumstances exist which would enable the burden to be discharged so as to permit human or cremated remains to be exhumed. One such factor is whether there has been a mistake as to the place of burial, although it has also been said that a mere change of mind as to the place of burial on the part of the relatives or others responsible for the interment should not be treated as an acceptable ground for authorising exhumation. Another relevant factor is whether the proposed exhumation is to facilitate the re-interment of the remains in a family grave. This is something to be encouraged because family graves express family unity and are environmentally friendly in ensuring an economical use of land for interments.

7. In my earlier judgment in *Re St Andrew, Leyland* [2021] ECC Bla 1, I explained (at paragraph 10) why I found it helpful to consider the decisions of consistory courts in earlier cases, not as precedents slavishly to be followed, or even as tramlines guiding my way forward, but as affording potentially helpful indications as to how the particular circumstances of other, similar, but not identical, cases have been viewed when considering whether it is right to make an exception to the principle of permanence. I reminded myself of the desirability of securing equality of treatment, so far as circumstances should permit, as between petitioners, and of treating similar cases in similar ways, avoiding over-fine distinctions; but also that ultimately the duty of this court is to determine whether the circumstances of the present case, properly considered and evaluated, are such as to justify making an exception to the presumption of the permanence of Christian burial.

8. In *Re Cheshunt Cemetery (No 3)* [2019] ECC StA 2 the petitioners were atheists who had been deeply upset when they discovered that the cremated remains of their baby, Ted, had been interred in a consecrated part of the cemetery when there had been an adjacent, unconsecrated area available. Neither the funeral directors nor the burial authority's officer, who had dealt with the interment, had explained that Ted was being laid to rest in consecrated ground, what that meant, or that an alternative, but unconsecrated, plot was available. Deputy Chancellor Gallagher (in the Diocese of St Albans) determined that there had been a fundamental mistake of fact on the part of the petitioners as to the nature of the plot in which they had agreed to have the ashes of their baby interred; and he granted a faculty for their exhumation and re-interment. At paragraphs 21 and 22 the Deputy Chancellor found both: (1) That a mistake had 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."

(2) 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 had they been made aware of the available alternatives.

9. In *Re Bingham Cemetery* [2018] ECC S&N 1 the petitioner wished to exhume the remains of her baby daughter (who had died in 1948) and her husband (who had died in 1989) from Bingham Cemetery, a few miles from her home in the nearby village of Gamston. At the time of the interments, Bingham had been the place where people from Gamston were normally interred. The petitioner and her daughter and son-in-law had purchased two plots in Wilford Hill Cemetery, about one mile away from Gamston. The intention was for the petitioner's daughter and son-in-law eventually to be buried in one of the plots at Wilford Hill and for the remains of the petitioner's husband's and infant daughter to be transferred to the other grave, in which the petitioner herself would in due course be buried. Chancellor Ockelton (in the Diocese of Southwell and Nottingham) considered that there were no exceptional circumstances to justify the exhumations, and he therefore refused to grant a faculty. He rejected arguments founded upon the creation of a family grave and mistake. The usual case where exhumation was sought on the basis of the creation of a family grave involved the exhumation of the remains of one person to be re-interred in a place where other members of the family were, or would be, buried. The instant case was not one of wishing to move human remains to a family grave, but rather of exhuming human remains from an existing family grave in which it was possible for the petitioner's remains to be interred in due course. Nor was there any question of a mistake having affected the choice of resting-place of either the baby daughter or the petitioner's husband. If any decisions had been made at the times of their deaths, they were unrecorded; and so there was no evidential basis for saying that the petitioner (or, in the case of the baby daughter, both of her parents) had made a choice that they would not have made had they been better advised.

10. In *Re St. Mark, Winshill* [2020] ECC Der 4 the petitioner had sought a faculty to authorise the exhumation of the cremated remains of his father from the churchyard and their re-interment in the cremated remains section of a nearby cemetery. The deceased's wife, who had died recently, had wanted her cremated remains to be interred in the cemetery; and the petitioner wished to unite the cremated remains of his father with those of his mother in the same grave. Deputy Chancellor Clarke (in the Diocese of Derby) determined that there were no exceptional reasons to justify the grant of a faculty for the exhumation of the deceased's remains. At paragraph 8 he said that the father

“... is buried in a churchyard which contains other members of his family and, in my judgment, it is entirely appropriate that he should remain there. The fact that his remains have been there for over twenty years is supportive of my decision, as is the fact that it is possible for Mrs Joyce's remains to be laid to rest alongside those of her husband, since her cremated remains have not yet been interred.”

This case resembles *Re Bingham Cemetery*. It was not a case of wishing to move human remains to a family grave, but rather of exhuming human remains from an existing potential family grave in which it was possible for the cremated remains of the petitioner's mother to be interred.

11. In *Re St Andrew, Leyland* [2021] ECC Bla 1 the petitioner wished to have the cremated remains of her husband exhumed from the churchyard at Leyland and re-interred in a family grave in the churchyard at Wrea Green which contained the remains of four members of his family. This had been her husband's wish but the petitioner had had her husband's remains interred at Leyland whilst she had been in a state of shock as a result of his sudden death and she had not acted rationally or in accordance with his wishes. The petitioner wished her cremated remains in due course to be buried in the family grave together with the cremated remains of her

husband. I considered that there were exceptional circumstances which justified granting a faculty. First, the re-interment would be into an existing family grave; and, secondly, there had been a mistake on the part of the petitioner in burying her late husband's remains in the churchyard at Leyland since he had expressed a wish to be buried in the family grave at Wrea Green, and she now wished to give effect to his wishes.

Conclusion

12. Whilst I entertain every sympathy for the petitioner and her wishes, I am afraid that she has not discharged the burden which rests upon her of establishing special circumstances which would justify the court in allowing the deceased's remains to be exhumed from the existing family grave at Burnley Cemetery and re-interred in the new family grave which she proposes to create in Torrisholme Cemetery. Diocesan Chancellors are very much alive to the difficulties which litigants in person face when presenting, and prosecuting, exhumation petitions without the benefit of professional legal advice. It is for this reason that the printed prefatory notes to the standard form exhumation petition for the Diocese of Blackburn explain that any exhumation is only allowed if there are exceptional circumstances; and go on emphasise that: "*It is therefore important that you give full details of the facts on which you rely as showing that the circumstances of your application are exceptional.*" It is also why it is my usual practice (as I did in the present case) to require the Registry to write to any petitioner inquiring whether there is "... *any further information the petitioner would wish to rely upon in support of her petition or which would tend to show that the case was one where, exceptionally, exhumation should be permitted?*" Despite all this, no sufficient evidence of special circumstances has been produced in the present case.

13. As I am sure the petitioner herself recognises, the time spent, and the inconvenience and difficulties experienced, in travelling from Morecambe to Burnley, even at the age of 82, do not amount to special circumstances such as to justify the exhumation. These difficulties should have been apparent at the time the decision was taken to have the deceased's cremated remains interred in the family grave in Burnley Cemetery rather than at a cemetery in, or near, Morecambe.

14. This is a case like *Re Bingham Cemetery* and *Re St. Mark, Winsbill* where the petitioner seeks to exhume her late husband's remains from an existing family grave, in which it would be perfectly possible for her remains to be laid to rest, in order to create a new family grave elsewhere. It would involve removing the deceased's cremated remains from the grave in which they have rested, with the remains of his parents, for the past six years. I do not consider that the wish to create a new family grave elsewhere justifies the disturbance of an existing family grave, at least where it is still capable of accommodating, in due course, the remains of the deceased's closest surviving relative.

15. I acknowledge that a lack of understanding of the significance of interment in consecrated ground is capable of constituting exceptional circumstances which may justify permitting human remains to be exhumed and re-interred elsewhere. That is clear from, and exemplified by, the case of *Re Cheshunt Cemetery (No 3)*. The petitioner says that at the time of the deceased's interment, the family had not been aware that the existing family grave in Burnley Cemetery was in consecrated ground as they had not been the original purchasers of the grave plot and they had not been aware of any difficulties there might be in moving the deceased's cremated remains from this grave. However, there is no evidence that, had they known of these facts, they would not have arranged for the deceased's cremated remains to be interred in the family grave at Burnley Cemetery together with the remains of his parents. There is therefore no evidence of any **operative** mistake on the part of those who had arranged for the interment.

There is no evidential basis for saying that the petitioner (or anyone else involved in arranging for the deceased's interment) had made a choice that they would not have made had they been better advised. In this respect, the case is very different from the *Cheshunt* case, where the Deputy Chancellor accepted the petitioners' evidence that they would not have let their baby's remains be laid to rest where they were had they known that it was consecrated land, and that there were other options readily available to them. The Deputy Chancellor was also satisfied that there was nothing, on the highly unusual facts of that case, that could possibly be said to suggest that an undesirable precedent was, or was at risk of, being created.

16. The present case is very different from the *Leyland* case, where the petitioner was seeking, at the end of her life, to rectify a mistake she had made in burying the remains of her husband in a grave which she had chosen to suit her own convenience, and contrary to his wishes, by re-interring them in the existing family grave where he had wished to be laid to rest.

17. I consider that the circumstances of the present case, properly considered and evaluated, are not such as to justify making an exception to the presumption of the permanence of Christian burial and therefore the *Blagdon* test is not satisfied. For what it is worth, I also consider that the alternative test, formerly laid down and applied in *Re Christ Church, Alsager* [1999] Fam 142, of the existence of a good and proper reason for exhumation which most right-thinking members of the Anglican church would regard as acceptable is also not satisfied.

18. Without in any way seeking to shoehorn my decision in the instant case into the tramlines of any previously decided authority, I consider that the present case is similar, in material respects, to the cases of *Re Bingham Cemetery* and *Re St. Mark, Winshill* (where exhumation was rightly refused), and very different from the cases of *Re Cheshunt Cemetery (No 3)* and *Re St Andrew, Leyland* [2021] ECC Bla 1 (where exhumation was permitted). I consider that the principle of promoting equality of treatment as between different petitioners who are similarly placed supports my decision to grant this petition. I also consider that were I to allow this petition, an undesirable precedent would be, or would be at risk of being, created.

19. The court therefore refuses a faculty for the exhumation of the cremated remains of the late Mr Andrews from the existing family grave in Burnley Cemetery and their re-interment in Torrisholme Cemetery. For pastoral reasons, I waive any fee to which I may be entitled for this judgment.

David R. Hodge

His Honour Judge Hodge QC
Chancellor
Easter Monday, 5 April 2021

POSTSCRIPT: 6 April 2021

20. On the morning of 6 April 2021 I received an email from the Registry informing me that after I had already completed and despatched my judgment, they had received an email from one of the petitioner's sons, Mr Mark Andrews, at about 5.27 on the afternoon of 5 April, informing them that he had just been looking at the deeds for his father's family grave and they only permitted four people to be interred in the plot, meaning that there would be no space to accommodate the petitioner's remains when her time came. Because this was of potential

significance to one of my grounds for refusing a faculty, I immediately instructed the Registry to defer releasing my judgment and to refrain from issuing any faculty refusal or other order pending receipt of a copy of the grave deed. I also asked the Registry to inquire, as a matter of urgency, whether the petitioner had known of this restriction in terms of numbers and why she had thought that her remains could be laid to rest in the existing family grave.

21. This afternoon the Registry received a further email from Mr Mark Andrews stating that Burnley Cemetery had confirmed that the family grave originally had space for four full burials or six sets of ashes. Since there had already been three full burials and one set of ashes had been laid to rest there, there would, after all, be sufficient space to accommodate the petitioner's ashes in due course. It followed that the information originally provided to the court had been correct. Because of the potential importance of this information, the Registry immediately invited Mr Mark Andrews to *"obtain definite clarity from Burnley Cemetery regarding the position"*. Mr Mark Andrews's response was that he had *"contacted Burnley cemetery again and as much as I would like to say differently because it's not the result we want, they have confirmed that she would be able to be interned, but as all the family have lived in Morecambe for over 35 years she is hoping that they can both be here in the new family plot"*.

22. Mr Mark Andrews is to be commended for his honesty because, as he says, it is not the result the family had wanted. However, the factual basis upon which my original judgment was founded has been confirmed. There are therefore no grounds for me properly to reconsider my decision, either on the basis that my order has not yet been perfected or under rule 20.3 of the Faculty Jurisdiction Rules 2015 (as amended). My earlier judgment therefore stands. I regret the pain that this decision will cause the Andrews family.