

Neutral Citation Number: [2019] ECC Nor 2

IN THE CONSISTORY COURT OF THE DIOCESE OF NORWICH

In the Matter of the Petition of AS, KM, EW and NM

-and-

In the Matter of the Proposed Exhumation of the Mortal Remains of the late MAS from the Churchyard of St. Nicholas, East Dereham

THE JUDGMENT OF THE CHANCELLOR– REDACTED – FOR PUBLICATION

Etherington QC, Ch:

1. It is only necessary to read the title to this judgment to know that what lies behind this petition is a deep personal tragedy for the petitioners and family of the late MAS. I have had this in mind throughout my consideration of this application. Having considered all the relevant principles relating to publication, I have concluded there is no particular reason in favour of revealing the actual names of the Petitioners and the deceased and many reasons against it, including the potential additional and unjustified distress that might be occasioned the Petitioners for no tangible public interest except knowing something for its own sake. I have made certain other redactions to make less likely the identification of the parties concerned.
2. MAS tragically died within a few hours of his premature birth at the James Paget Hospital in Gorleston, Norfolk on (a date in the 1980s). He was interred in the churchyard of St. Nicholas, Dereham. This is consecrated ground.
3. The proposal in the Petition was for the casket containing his ashes to be exhumed and re-buried in the garden of his father's property. His father is AS, the principal Petitioner. The other Petitioners are MAS's three sisters.
4. AS tells me that MAS's death was a deeply traumatic experience from which he and his wife never fully recovered. I can only imagine a fraction of what they must have felt. To say it was clearly a devastating experience for them is doubtless a major understatement of their feelings.

5. AS says that it was his wife's wish (she has now herself passed away) and his desire that, should one of them pass away, to move MAS's remains to a family plot in the garden of the family property. His wife had expressed the wish following her death to be buried in their "beautiful garden" or so that she could be in the midst of the family where the grandchildren played when they visited. She sadly died just over a year ago and it is now felt time to bury her ashes and reunite them with those of their son. The garden is unconsecrated ground.
6. I have read a letter from Sheila Hanmer, churchwarden of St. Nicholas, Dereham. She relates that the vergers are confident it is possible to pinpoint the space allotted to MAS and I accept that. She tells me that, at first, she instinctively wanted to help the family which I entirely understand. However, she had not appreciated that it was intended for MAS to be reburied in the garden of the family home and she finds it difficult to endorse the request to take MAS's remains that have lain for so long in consecrated ground and rebury them in unconsecrated ground. The Reverend Gillian Wells, one of the two Team Vicars, has shared these concerns but is prepared to support the proposal on pastoral grounds.
7. I have some discretion in making the decision, but I have also to take into account the law on this subject. The principles are set out in the case of "*Re Blagdon Cemetery*" [2002] Fam 299, [2002] 4 All ER 482 which was heard before the Arches Court of Canterbury (the appellate court for this diocese in the ecclesiastical jurisdiction) before Cameron QC (Dean), Clark QC and George QC, Chs. At paragraph 20 of the Judgment, the general principle is set out thus:

"Lawful permission can be given for exhumation from consecrated ground...However, that permission is not, and has never been, given on demand by the consistory court. The disturbance of remains that have been placed at rest in consecrated land has only been allowed as an exception to the general presumption of permanence arising from the initial act of interment."

8. The Court of Arches went on to say that many Chancellors (prior to the case it was considering) had emphasised the finality of Christian burial and this is also true of the years since 2002 up to and including the present day. It then went on to consider how to determine when an exceptional circumstance or circumstances has arisen such as would justify exhumation. The burden of so proving lies upon the Petitioner(s).

9. The Chancery Court of York in "*In re Christ Church, Alsager*" [1999] Fam 142 considered exceptions that might arise. This is not, and cannot be, a closed category of potential situations. Sometimes one fact may establish the exception, sometimes it may be a combination of circumstances. The same may also be true in reverse: one factor, or several circumstances, may tell against exhumation.
10. When I first considered this Petition, I felt deeply sympathetic towards AS and his daughters. However, I was also troubled, in the same way as Mrs. Hanmer, about the proposal to move MAS's remains from consecrated to unconsecrated ground (after such a long period).
11. In these circumstances, I directed that I would give further consideration to the matter and, having formed the view that this Petition was eminently suitable to be decided on the papers before me if the Petitioners agreed, I requested that the Petitioners inform me in writing if they were content with that course. I also directed that should they agree that the Petition could be decided in this way they might make any further representations in writing that they wished.
12. AS, in an email dated October 9, 2019, consented in writing to my deciding the Petition on the papers and made further written representations on behalf of the Petitioners.
13. As in the original Petition, AS presents his case thoughtfully, succinctly and clearly and I am grateful to him for assisting me further.
14. He makes these points. First, he says the family considered keeping the ashes in the casket at home until a suitable location had been found. He and his wife were supported in their immense grief by the curate at Dereham, the Reverend Robert Gilleon. Part of that support was to suggest that MAS's ashes should not be kept at home as this might have an adverse effect on his mother's health. I see the force in that suggestion.
15. AS goes on to say that he and his wife decided that MAS's ashes should remain buried until such time as one of them should pass away. It was AS's wish to be reunited with his wife (should she predecease him) and MAS. In their mind, it appears that Dereham was never intended to be a permanent location and AS says it was their understanding that MAS's ashes could be moved at a later date.
16. I would be very surprised if that understanding came from any clergyman or churchwarden. There is a strong presumption that Christian burial in consecrated ground is final and permanent.

17. AS and his wife considered the garden was the best choice for their burial as two of the Petitioners (their daughters) had had their weddings there and it was a focal point for other family events such as baptism of grandchildren. Arrangements have been made for the land in question to remain in the family after AS's death.
18. AS tells me that he is now aware of the concern regarding the movement of MAS's ashes to unconsecrated land. This understanding seems to have occurred because of general knowledge that ashes can and have been scattered in all kinds of locations. That is true. However, it is not permitted in churchyards where ashes are buried in a similar way to other interments although (as in this case) sometimes in an area of the churchyard reserved for that purpose. I do not suggest that AS should have been aware of this distinction and I accept that he, and his late wife, were not.
19. He goes on to say, in a constructive spirit, that should this point prove to be "a deciding factor" he would prefer to move the ashes to a shared plot with his wife and ultimately himself in the churchyard at St. Andrew, Colton (the church at which his wife's funeral was conducted) rather than simply leave MAS's ashes at Dereham. He understands that he would need permission to do this. He believes his wife would concur with his wishes, and I have no reason to think otherwise.
20. **Decision.** Cases involving decisions to be made on applications for the exhumation of the remains of children are never easy to decide. The court is entering the realm of some of the deepest emotional feelings that any human being can experience. It has to consider the duty it has to perform as a court and also the feelings of the human beings that its decision will affect.
21. At first sight, applying the principles of Christian burial and of the associated case law, the Petition has substantial hurdles to cross. The first of these, apart from one thing, is the absence of any general ground for allowing the application. I find that such mistake that occurred in the belief and understanding of the Petitioners about Christian burial was one formed in the minds of AS and his wife rather than as a result of any error made by the church. Second, the period of burial, which is very considerable, whilst not an absolute bar to the Petition succeeding, is a very important factor. Third, the reason for wanting the exhumation is to satisfy a particular wish of AS. This is clearly important to him, but is not a compelling reason. On the original proposal, it would also involve removing MAS's remains that have remained undisturbed for thirty-four years from consecrated ground to unconsecrated ground. Whilst I am very sympathetic to AS's application I must refuse it. The combination of

factors that are unfavourable for allowing the exhumation in the circumstances disclosed here are too great for that to be possible.

22. I turn now to AS's alternative proposal made in the event that his original application failed. First, it is important that he has been prepared to engage in thinking about a constructive alternative and that has weighed considerably with me in considering it. This is for two reasons: one, it shows to me the particular strength of feeling he has in wishing MAS's remains to be reunited with those of his parents and, two, it shows AS's understanding of a principle that may or may not be his own but which he accepts is engaged in making this decision: the finality of Christian burial.
23. Some of the objections (delay, finality) are still present but one important new feature has emerged: the desire to unite the ashes of his late son with those of his late wife and himself in one plot of *consecrated* ground. It is an extension of what is clearly both a profound and understandable wish that the remains of AS and his wife should lie together with those of their late son combined with a recognition of the issues that his original application raised.
24. The law does recognise the significance of the burial of family members together particularly in a tragic case such as this one where the need will be correspondingly greater. I accept that St Andrew, Colton is the church where, for particular reasons, he would wish the three remains to be interred. I cannot compel that church to allow this, but I hope it will give consideration to the particularly sad circumstances of this case.
25. Accordingly, I grant the Petition of AS and his fellow Petitioners to permit the exhumation of the mortal remains of MAS, subject to the following conditions:
 - a. The exhumation is only permitted if there is an undertaking by AS that MAS's remains are to be re-interred in consecrated ground together with those of his mother and in a plot where AS's own remains are permitted to be interred following his own death. Whilst St Andrew Colton is the preferred location I cannot and do not compel this, but I do make it a condition that the ground must be consecrated ground.
 - b. The exhumation of MAS's remains is to be carried out in a reverent and seemly manner at a time and in a way calculated least likely to cause disturbance to existing remains and any alarm or distress to any unconnected party observing the exhumation by chance.
26. The Faculty in those terms should pass the Seal.

27. I reiterate my sympathy to AS and all of the Petitioners and, whilst I cannot grant the Petition as they originally wished, I hope that by granting the Faculty in the terms that I have, AS and his remaining family may have some peace.

31st October 2019