

**IN THE CONSISTORY COURT OF THE
DIOCESE OF SOUTHWARK**

PUTNEY VALE CEMETERY

PETITION BY MRS ELENA GUADAGNO

JUDGMENT

Introduction

1. This matter relates to a petition received in the Registry on 13 July 2009. It is made by Mrs Elena Guadagno and requests permission to exhume the remains of her late husband, Mr Pasquale Guadagno from Grave 28/484 in Putney Vale Cemetery. That grave is situated in consecrated ground, and it is because of that fact that my permission is required. Mrs Guadagno's petition is supported by her 2 sons and 4 daughters.
2. In circumstances which I explain below, I delivered an Interim Judgment in this matter on 31 March 2010. On 16 April 2010 I had the opportunity of hearing representations from Mrs Guadagno in respect of that Interim Judgment, and this final judgment takes into account those representations. At the hearing on 16 April 2010 Mrs Guadagno was assisted by her daughter, Ms Enza Guadagno, and her son-in-law, Mr Philip Booth. I am grateful to them for the dignified and restrained way in which they addressed the sensitive issues arising.

The facts

3. The facts of this matter are as follows.
4. Mr Guadagno came from an Italian family. He was a Roman Catholic, and his family are Roman Catholics.
5. Mr Guadagno died on 21 September 2008. As regards his funeral, one option that his widow and children considered was that his remains should be interred in Italy. However cost was a deterrent to this. Further, Mrs Guadagno and the considerable number of members of her family living in England wanted to be able to visit his grave. Accordingly the arrangements were made on the basis that his remains would be interred in England.
6. As I understand it, Ms Enza Guadagno, took the lead in discussing the funeral arrangements with a representative of Garner's Funeral Services Limited as her mother is elderly. They explain as follows:

Ms Enza Guadagno made arrangements with us for the funeral of her father at Putney Vale Cemetery. We carry out our clients instructions regarding the grave which will be used and she was advised to speak to the cemetery direct in order to purchase the grave of her choice. The question of consecrated/unconsecrated ground did not arise nor did the suggestion of a mausoleum. The purchase and site of any grave is entirely between the client and the cemetery office.

We do not suggest to clients which graves they should purchase as this is a personal matter and is for the client to discuss with the cemetery.

As different cemeteries and councils have differing facilities available the client is advised to seek guidance from the cemetery of their choice and if a specific location is desired to visit the cemetery in person. This is exactly what was told to Ms Guadagno and which, I understand, she did.

I guess that, after a certain point, discussions were on the basis that Mr Guadagno's remains would be buried in a plot in Putney Vale Cemetery, the undertakers being able to advise that a space would be available there. Ms Guadagno confirms that nothing was said by the undertakers about whether such a space would be consecrated. Given this fact, nothing was of course said about what the effects of consecration would be.

7. Ms Guadagno personally went to see someone at Putney Vale Cemetery. She tells me:

I was asked [by the undertakers] where my family and I wanted to bury Dad, these questions were answered and we [were] advised to go to Putney Vale. When arriving at Putney Vale, I spoke to Peter's wife - I am unable to recall her name — and the only information that I was given, was [as] to where available plots were ie 26/27/28. After viewing these plots I decided to go with 28 and informed her of this choice. At no time was I informed of whether the ground was consecrated or not or if there were any other options such as the mausoleum.

8. Mr Peter Tutt, Senior Cemeteries Officer and Registrar at Putney Vale Cemetery does not take issue with this account. He tells me:

The selection of graves is not available at Putney Vale and when families come and want to know where graves are we only offer the choice of which Block they would like, so we do not have much contact or discussion regarding regulations or consecration.

As the interment took place on 26th September 2008 it is very difficult to remember exactly the discussion with the Guadagno family when they came to look at the graves. Often as is this case when the religion is Catholic they ask if the ground is Catholic and we explain that the priest will bless the grave at the time of committal.

The question regarding consecration is never mentioned by my staff, in the 35 years that I have worked for the authority it has never been a concern when a grave is purchased, as generally it is forever and exhumation as you know is rare.

9. Mr Guadagno's funeral service was conducted by Canon Richard Quinlan, the family's parish priest who ministers at the Church of Our Lady of Pity and St Simon Stock,

Hazlewell Road, Putney. This was on 28 September 2008. Afterwards Mr Guadagno's remains were buried in Putney Vale Cemetery.

10. After the interment, Mrs Guadagno felt she had made a mistake. She discovered that at Putney Vale Cemetery there was a mausoleum. Burial in such a mausoleum is a common practice and she expressed the view to her children that this is what she wanted to happen in respect of her late husband's remains. The thought began to trouble her that she had not done what her late husband would have wished.¹ On this basis she petitioned to exhume her late husband's remains and for them to be interred in the mausoleum at Putney Vale Cemetery.
11. After the petition was lodged it emerged that what Mrs Guadagno really wanted was for Mr Guadagno's remains to be exhumed, cremated and for her then to keep them with her at home. The remains of Mr Guadagno's parents and two brothers are interred in a mausoleum which forms part of a wall in the cemetery at Maiori on the Amalfi coast. The idea is that in due course, after Mrs Guadagno's death, her remains would be cremated and that then both Mr and Mrs Guadagno's remains would be taken to Italy and interred at Maiori.
12. As I understand it, the Roman Catholic Church does not recognise that consecration has any significance (other, of course, than legal significance under the law of the Church of England, forming part of the general law of England) – ie for the Roman Catholic

¹ I have before me a doctor's letter dated 25 June 2009. It does no more than record the fact that Mrs Guadagno was very much affected by her husband's death and would like his remains to be moved. It falls short of being a medical justification for the exhumation. In her letter, to the Registry, Ms Guadagno has emphasised her judgment that this matter has affected her mother's health. I have no difficulty in accepting that it is an ongoing concern which causes Mrs Guadagno stress. In the absence however of a medical report I cannot find that there is a medical reason supporting the petition.

Church it has no theological significance or status in Roman Catholic canon law. Accordingly before a burial of the remains of a Roman Catholic takes place in ground which does not form part of a Roman Catholic cemetery (and thus has been already blessed), that ground is first blessed.² This raises the possibility that whatever the position under the law which I have to apply, there could be a potential objection to exhumation based on Roman Catholic canon law – because the plot was blessed before the remains were interred in it. This might ultimately be a matter which is irrelevant as far as I am concerned but it did seem to me important at least to discover what the attitude of the Roman Catholic authorities was.

13. A letter dated 10 November 2009 from the Most Reverend Kevin McDonald, Archbishop of Southwark to Father Quinlan makes clear that the Roman Catholic authorities have no objection to exhumation in the circumstances that arise. More specifically, there is no objection to Mr Guadagno's ashes being kept by Mrs Guadagno in a safe at home. Father Matthew Dickens, Chancellor of the Archdiocese of Southwark, wrote to the Registrar on 22 January 2010 conveying the view of Bishop John Hine³ as follows:

No safeguards are specified for the protection of ashes – however it is assumed that they will be kept in a dignified manner.

14. Father Quinlan tells me:

As regards safeguarding the ashes of Mr Guadagno, may I say that I have the assurance of his daughter, Enza, that they will be kept in a safe in the family home and given respect as the remains of a sacred person. When the time comes for his widow to die, her ashes will be united with his, and taken to the family tomb in Italy. This is not an uncommon practice. At the entombment of both ashes, the local priest will be invited to be present to bless and pray at the place of committal. I know this assurance will be honoured by the family.

² See Canon 1240 of the Roman Catholic Canons.

³ Archbishop McDonald has retired.

15. Diocesan Guidance in respect of this diocese (ie the Anglican Diocese of Southwark)

issued by Chancellor George in 2003 provides as follows:

Once a body or ashes have been buried in consecrated ground (whether in a churchyard or in a municipal cemetery), they may not be exhumed save with the authorisation of a faculty granted by the Chancellor, which will never be granted unless there are special circumstances which justify the making of an exception to the norm that Christian burial is final. Nevertheless, there has been throughout the country an increasing number of petitions for exhumation, often in far from exceptional circumstances such as where widows have moved home and can no longer readily visit the grave of their former husbands, or where parents have moved and are unable to visit the graves of a child who has predeceased them. In some cases incumbents appear to be advising applicants that permission will readily be forthcoming; this is particularly so in the case of incumbents to whose parishes the surviving spouse or parents have moved and who are prepared to make available space for reinterment. It is important that incumbents and funeral directors inform those planning burial in consecrated ground that this is a final disposal and that the vast majority of petitions for exhumation will necessarily be rejected as a matter of law.

Moving to a new area is not an adequate reason for removing remains as well, and any medical reasons relied upon by a petitioners would have to be very powerful indeed to create an exception to the norm of permanence, for example serious psychological problems where medical evidence demonstrates a link between that medical condition and the question of location of the grave of a deceased person to whom the petitioner had a special attachment.

There are, however, two situations in which the prospects of obtaining a faculty for exhumation are less remote. The first is where a genuine mistake has occurred, for example where a burial took place in the wrong plot in a cemetery; or where there was 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. The second is where exhumation takes place with a view to reinterment in an existing or proposed family grave

The law

16. The most authoritative statement of the law relating to exhumation is contained in the judgment of the Court of Arches in *In re Blagdon Cemetery*⁴.

⁴ [2002] Fam 299.

17. As regards the principles involved, the Court of Arches said:

33. 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” (Concise Oxford Dictionary, 8th ed (1990)) 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.

34 The Chancery Court of York in In re Christ Church, Alsager [1999] Fam 142, 148 quoted part of the judgment of Edwards QC Ch in In re Church, Norton Churchyard [1989] Fam 37 on the subject of the discretion of the consistory court. In that passage Edwards QC Ch said “there should be no disturbance of that ground except for good reason.” In a later decision, In re St Mary Magdalene, Lyminster (1990) 9 Consistory and Commissary Court Cases, Case 1 the same chancellor used somewhat different language in saying “the question may be thus stated: has this petitioner shown that there are sufficient special and exceptional grounds for the disturbance of two churchyards?”

35. The variety of wording which has been used in judgments demonstrates the difficulty in identifying appropriate wording for a general test in what is essentially a matter of discretion. 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.

18. Note that the reason why in paragraph 33 of its judgment the Court of Arches said that there was much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted is because the Court was applying a different test to that which had been articulated by the Chancery Court of York in *In Re Christ Church, Alsager*.

19. The Court went on to consider a number of factors which could potentially arise in connection with a petition for exhumation. These were:

(i) medical reasons;

- (ii) lapse of time;
- (iii) mistake;
- (iv) local support;
- (v) precedent;
- (vi) family grave.

20. As regards (i), I have already explained why this is not a case where medical reasons fall to be considered.

21. As regards (ii), it seems to me that no special issue arises. A comparatively short time has elapsed since Mr Guadagno's remains were interred, so no objection arises on the basis that it is, in effect, too late to petition.

22. As regards (iii), the Court of Arches said:

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 [2001] Fam 308 and to orthodox Jews in In re Durrington Cemetery [2001] 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.

23. *In re Crawley Green Road, Cemetery, Luton* was a case where a humanist had died and following a humanist funeral was buried in the consecrated part of Crawley Green Road Cemetery, Luton. The widow of the deceased was unaware that the place where her

husband's remains were interred was consecrated.⁵ Bursell Ch justified exhumation by reference to the Human Rights Act 1998. The Court of Arches was saying that the decision could be justified by reference to the mistake which had occurred as to the status of the land where the burial took place without needing to refer to the 1998 act. *In re Durrington Cemetery* concerned a member of the Jewish faith who had been buried in consecrated ground where, as in *In Re Crawley Green Road Cemetery, Luton*, the Chancellor (Hill Ch) justified exhumation by reference to the Human Rights Act 1998.

24. The Report is silent as to whether there had been a mistake as to the status of the land where the deceased remains had been interred, but evidently there may have been.⁶
25. As regards (iv), it is important that the petition is supported by all of Mr Guadagno's family – I would be unlikely to grant a faculty in a case such as this unless all family members supported it.
26. As regards (v), the Court of Arches held that precedent was a relevant matter:

In our view, precedent has practical application at the present day because of the desirability of securing equality of treatment, so far as circumstances permit, as between petitioners.

In so holding, it approved what George Ch had said in the Consistory Court of this Diocese in *In re West Norwood Cemetery*.

⁵ The circumstances do not appear from the Report.

⁶ Acting as an advocate, Hill Ch appeared in *In re Blagdon Cemetery*, as indeed did I. I cannot now recall what, if anything, was said about the circumstances in *In re Durrington Cemetery*.

27. In *In re St Bartholomew, Horley*⁷, I observed of this comment:

23. *In this approach, the Court of Arches was apparently differing from the Chancery Court of York in In re Christ Church, Alsager where the Court had regard to the possibility of creating a precedent as irrelevant. It may be, perhaps, that in In re Christ Church, Alsager the Court was only really seeking to emphasise that each case is decided on its own facts, which will inevitably be different from the facts of another case.*

24. *The Court of Arches is the appeal court governing the southern province in which the Diocese of Southwark lies, but its comments are, I think, strictly speaking, obiter dicta. However this may be, insofar as there is a difference of approach, I prefer that of the Court of Arches, which reflects the approach adopted by George Ch in this diocese.*

28. As regards (vi), the Court of Arches commended family graves. This matter arises indirectly in that if exhumation is permitted, it will ultimately facilitate burial in what is in effect a family grave.

29. Finally I should refer to *In re Lambeth Cemetery* (6 July 2003) decided in the Consistory Court of this Diocese by George Ch. This concerned a case of a Roman Catholic who had been buried in consecrated ground and where *when the burial took place [his family] had no understanding of the significance of burial in consecrated ground*. A faculty permitting exhumation issued.⁸

Preliminary consideration

30. The position being that Mrs Guadagno and her family did not know that the land in which Mr Guadagno's remains were interred was consecrated, it seems to me that a mistake was made which justifies making an exception to the norm of permanence of Christian burial. If the Roman Catholic authorities had been of the view that, from the

⁷ Judgment dated 16 February 2010.

⁸ *In Re South London Crematorium, Streatham* (25 October 2002) another decision in this Court by George Ch also concerned a Roman Catholic buried in consecrated ground but in that case there was a positive misunderstanding that exhumation would be possible after 10 years to enable the remains to be taken to Ireland. A faculty issued in that case also.

perspective of their canon law, exhumation was inappropriate, then an interesting situation might have arisen: namely whether it would be appropriate to seek to uphold Roman Catholic canon law by reference to the law of the Church of England, both systems of law having the same origin and ultimate justification. I note that in the passage from *In Re Blagdon Cemetery* set out at paragraph 17 above, the Court of Arches was enunciating what it perceived to be the principle of Christian burial and did not contemplate that there might be differing views among Christians about this. This case demonstrates that there may be differing views or at least, seemingly, about the application of those Christian principles. However this may be, as far as concerns the position as regards a person who has agreed to burial in consecrated ground without appreciating its significance – or even knowing that the ground was consecrated – I see no reason to distinguish between a humanist (the position in *In re Crawley Green Road Cemetery, Luton*) and a Roman Catholic (the position here).

31. I do not think that the petition derives significant support as regards any of the other factors identified by the Court of Arches in *In Re Blagdon Cemetery* and set out above. In *In Re Blagdon Cemetery*, the Court clearly identified mistakes as to the significance of burial in consecrated ground as an appropriate basis on which a petition for exhumation may be founded, and accordingly I do not think that to permit exhumation in the present case establishes a precedent – it is simply an example of a defined exception within what I think are narrow limits.
32. However, to hold that there is no objection in principle to exhumation in this case is not a complete answer to all the issues raised by the petition. I have to be satisfied that the arrangements proposed in respect of the disinterred remains are satisfactory.

33. In *In re Blagdon Cemetery* the proposal was that the remains should be re-interred in the unconsecrated part of a municipal cemetery. The Court of Arches found that this was satisfactory for reasons which it explained:

13. Prior to the Burial Act 1857 (20 & 21 Vict c 81) consistory courts, as a matter of practice, declined to grant a faculty authorising remains buried in consecrated ground to be reinterred in unconsecrated ground. The reason was that, per Dr Tristram QC Ch, in In re Talbot [1901] P 1, 5: “by so doing they would be sanctioning the removal of remains from a place of burial under the special protection of the ecclesiastical courts to a place of interment under the protection of no court.”

14 That particular objection was removed when unconsecrated land became subject to statutory control on the introduction of a licensing system under section 25 of the Burial Act 1857. This was a new system of protection for remains buried in unconsecrated ground, which provided that remains could not be removed without permission from the Secretary of State. Thus remains in unconsecrated ground became protected just as remains in consecrated ground had been, and continue to be, under the protection of the consistory court and removable only under faculty, that is by permission of the court.

15. Apart from this legal protection afforded to remains in the unconsecrated part of a cemetery, it can generally be assumed that local authorities carry out their legal responsibilities for care and maintenance of their cemeteries. Thus, if remains are to be removed from the consecrated ground of a churchyard, or the consecrated part of a cemetery, and to be reinterred in the unconsecrated part of the same or another cemetery it is reasonable for the consistory court to conclude, certainly in the absence of evidence to the contrary, that the new grave will be cared for in a seemly manner and will be protected in this sense.

34. As regards re-interment in unconsecrated ground which is not in a local authority cemetery, the Court of Arches said:

17 In the present case the principle of suitability of reinterment in unconsecrated ground, in the absence of any available consecrated ground, is not an issue for the reasons we have already given. However, because of the two different systems of legal control, if a faculty is granted permitting the exhumation of Steven’s remains from Blagdon Cemetery it will also be necessary for a Home Office licence to be obtained to permit the transfer of his remains to the new grave in Stowmarket Cemetery. This is because a faculty alone is sufficient to authorise exhumation from consecrated land, but a Home Office licence as well as a faculty is required where an

exhumation is proposed from consecrated land but reinterment is proposed into unconsecrated land.

35. The Court did not address a possible situation in which the remains were not re-interred.

36. I know that the Roman Catholic bishop has raised no objection to Mr Guadagno's ashes being kept at home by Mrs Guadagno and indeed Father Quinlan tells me that this is not an uncommon practice (albeit as a stage before interment in a final resting place). Nonetheless I do not view the arrangement as intrinsically satisfactory. I understand that Mrs Guadagno and her family would undertake to keep the ashes safe and I am sure that they would do so. Thus my concern is not primarily as to security of the remains. Rather it seems to me that it would not be according human remains the respect that is appropriate to permit their exhumation from the ground to the sort of situation here proposed. I am aware, of course, that it may be said that if the mistake had not been made, Mr Guadagno's remains would not be subject to my jurisdiction, and that out of the available options, Mrs Guadagno might have kept them at home. I am also aware that issues involving the law of human rights potentially arise here. Nonetheless, for good or ill, Mr Guadagno's ashes have been in effect entrusted to me (or my jurisdiction) for safe keeping and I am not persuaded that it would be right in all circumstances to grant a faculty as prayed. Apart from anything else – and I bear in mind that I would no doubt emphasise the special circumstances of the case were I to grant a faculty as prayed – it seems to me that it would be an unfortunate precedent.

Submissions at the hearing on 16 April 2010

37. The substance of what is set out at paragraphs 30 to 36 above was set out in my Interim Judgment dated 31 March 2010 – I indicated, with reasons which were then provisional, that I would be prepared to grant a faculty permitting exhumation, but that I was not minded to approve the arrangements proposed. Mrs Guadagno took the opportunity which I then afforded her to make oral representations to me. Mrs Guadagno explained through Ms Guadagno and Mr Booth that they took a different view as to the appropriateness of keeping the ashes at home, but there was essentially nothing further to be said about that. I have to reach a conclusion as to which of two differing views is right. On this issue I should however add that I asked the Archdeacon of Wandsworth, Ven Stephen Roberts, to express his view and that he, too, expressed reservations about what was proposed.
38. Against this background, what was said at the hearing focused on the practical issue of how my concern could be addressed. There were evidently a number of options. One would have been internment in the mausoleum at Putney Vale cemetery. Another would have been for the remains to have been taken to Maiori immediately after exhumation and cremation. However Mrs Guadagno's favoured course was for the remains to be exhumed and cremated and interred in the grounds of the church of Our Lady of Pity and St Simon Stock in Putney. I indicated that I thought that this was appropriate, and Mrs Guadagno has since confirmed that what is proposed is acceptable to Father Quinlan.

39. Of course, it is possible that the remains could, after their disinterment from consecrated ground, subsequently be moved from the grounds of the Church of Our Lady of Pity and St Simon Stock and kept in circumstances thereafter which I would regard as unsatisfactory (eg at home) but this is evidently not Mrs Guadagno's intention, and I think that, for practical purposes, it can be entirely discounted.

Conclusion

40. For the reason set out in paragraphs 33 to 36 above, I am not prepared to grant a faculty which would permit the exhumation of Mr Guadagno's remains and the storage of his ashes at home. I am however prepared to grant a faculty which will permit their exhumation, subsequent cremation, and interment in the grounds of the church of Our Lady of Pity and St Simon Stock, Putney. It would be envisaged that the remains would be taken to Italy after the death of Mrs Guadagno, although there would of course be no requirement that this should happen.⁹ The re-interment of Mr Guadagno's remains in the grounds of his church seems to me an appropriate course, Mrs Guadagno having been ignorant at the time of the burial of her late husband's remains that they were being interred in consecrated ground. I would prefer that any re-interment would be final. Nonetheless I do not think that I can reasonably insist on this ie require that Mr Guadagno's remains should now be taken to Italy – a solution which does not commend itself to Mrs Guadagno because, of course, she continues to live in England. A faculty could, I suppose, be refused now with an intimation that it would be granted in the future ie after Mrs Guadagno's death; but I do think that the issue has to be addressed one way or the other now. Thus although I do not regard the solution that I am permitting as being entirely satisfactory, it is one which does, in the unusual

⁹ It is the practice in this Diocese for cremated remains to be interred by pouring into the ground, ie not preserved within the casket. It seems to me that, in this particular case, interment within the casket will be appropriate as facilitating their eventual repatriation to Italy.

circumstances of the case, reflect both the particular concerns of Mrs Guadagno that the matter be resolved and also of those of this Court in seeking to maintain the principle of the permanence of Christian burial.

41. I should add that it is my understanding that Mrs Guadagno will still require the licence of the Secretary of State for Justice, because the grounds of the church of Our Lady of Pity and St Simon Stock are not, of course, consecrated.¹⁰ I would imagine that there would not be any difficulty about this.

42. Before I end this judgment, I need to revert to something that was said in *In re Blagdon Cemetery*, and which is set out at paragraph 22 above. The Court of Arches emphasised that it wanted to see information to be available so that, if land is consecrated, this fact would be clearly understood and the consequences also clearly understood. I echo the need for greater clarity. It is to be expected that in a society which for the time being seems to become increasingly secular, people will not have any appreciation that land is consecrated or what the consequences of consecration may be. Thus I hope that the Archdeacons in this diocese will take the opportunity to remind incumbents that they need to emphasise these matters. I shall ask the Registrar to send copies of this judgment to the managers of municipal cemeteries and to take appropriate steps to bring it to the attention of undertakers.

PHILIP PETCHEY

Chancellor

30 April 2010

¹⁰ See section 25 of the Burial Act 1857.