

IN THE CONSISTORY COURT OF THE DIOCESE OF LIVERPOOL
IN THE MATTER OF ALLERTON CEMETERY
AND IN THE MATTER OF DAVID POWELL (deceased)

JUDGMENT

1. David Powell ("the deceased") died on 17 April 2017 and his cremated remains were buried in an oak casket on 27th of April 2017 in grave number 1410 row RC23 in Allerton Cemetery Liverpool.
2. The Petitioner, Andrew Powell, is the son of the deceased. He seeks a faculty for the exhumation of his late father's remains and for these to be reinterred into a new plot. I understand that there is no objection to this matter being dealt with without a formal hearing.
3. Although the cemetery is largely unconsecrated, this is not a case where a Ministry of Justice licence is required, and the Consistory court has jurisdiction because the relevant plots are in consecrated ground.
4. The petition is supported by a detailed letter setting out the circumstances:
5. The deceased was interred in the Petitioner's mother's family grave. It is clear that the deceased and his wife had a long and happy marriage having met at the age of sixteen and married at the age of eighteen. The Petitioner explains that when his father died, his mother (who is sadly now very unwell with lymphoma) was unable to make informed decisions regarding the planning of her late husband's funeral. It was clearly a very upsetting time for her. The Petitioner tried to offer as much help as he could, but unfortunately owing to some disagreements within the family, the Petitioner himself did not attend his late father's funeral. His uncle (his mother's brother) assisted and helped with

the decisions, and it appears it was agreed that the easiest course of action would be to lay the deceased's cremated remains in his widow's family plot as there was a space available. The option for a new plot would have caused more stress to the deceased's widow and further expense at the time. Unfortunately, little thought appears to have been paid to the fact that there was only one space remaining in this family plot.

6. The Petitioner goes on to state that in the intervening years, his mother has very much regretted this decision and constantly asks if she can be laid to rest with her late husband. It appears from the petition that the Petitioner's mother has talked candidly about her own death and firmly believes that she will be reunited with her late husband when she dies. The Petitioner's mother wishes for her late husband's ashes to be reinterred in a new plot so that in due course they can be laid to rest together.
7. In the circumstances, I must consider whether the criteria for an exhumation of the cremated remains of the deceased are satisfied, to enable the re-interment of his ashes in a new plot.
8. The Registrar wrote to the Petitioner on 27 June 2023 and has carefully set out the principles which are applied in the Consistory court, referring to the two lead judgements namely *Re Blagdon Cemetery* [2002] 4 All ER 482 and *Re Christ Church Alsager* [1999] Fam. 142. These are judgements delivered in the Arches Court of Canterbury and the Chancery Court of York (respectively the appellate (appeal) courts for the Southern and Northern Provinces).
9. Although there are numerous Consistory court judgements, essentially the court has a discretion as to whether to grant a faculty.
10. The starting point for the exercise of such discretion was conveniently explained by Steel Ch in *Re Matheson (decd)* [1958] 1 WLR 246, when he stated: "from the earliest times, it has been the natural desire of most men that after their death, their bodies shall be decently and reverently interred and should remain undisturbed. Burial in consecrated ground secured this natural desire, because

nobody so buried could lawfully be disturbed except in accordance with a faculty obtained from the church court. As all sorts of circumstances which cannot be foreseen may arise which make it desirable or imperative that a body should be disinterred, I feel that the court should always be slow to place any fetter on its discretionary power or to hold that such fetter already exists. In my view, there is no such fetter, each case must be considered on its merits, and the Chancellor must decide, as a matter of judicial discretion, whether a particular application should be granted or refused."

11. There is a presumption against exhumation. This derives from the Christian theology of burial that the disposal of the dead, whether by way of burial or cremation, has an aura of permanence about it. In his paper *Theology of Burial* (which was considered by the Court in *Blagdon*) the then Bishop of Stafford, the Rt Rev Christopher Hill wrote: "the funeral itself articulates very clearly that its purpose is to remember before God the departed; to give thanks for their life, to commend them to God the merciful redeemer and judge; to commit their body to burial/cremation and finally to comfort one another." He went on to explain; "The permanent burial of the physical body/the burial of cremated remains should be seen as symbolic of our entrusting the person to God for resurrection. We are commending the person to God, saying farewell to them (for their "journey"), entrusting them in peace for the ultimate destination with us in the heavenly Jerusalem. This commending, entrusting, resting in peace does not sit easily with "portable remains", which suggests the opposite; reclaiming, possession, and restlessness; a holding on to the "symbol" of a human life rather than a giving back to God. In general, therefore, the reluctance to agree to faculties for exhumation is well grounded in Christian theology and eschatology. It is also right generally from the point of view of the mourner, who must learn to let go for their psychological and spiritual health."

12. The principles set out in the authorities further state that a change of mind or a general desire that family members be buried together is usually insufficient

(for the grant of a faculty), and a delay caused by the passage of time will make it less likely that such exhumation will be allowed without very compelling reasons. This court is often faced with requests for the reinterment of mortal remains which are well intentioned and borne out of the deep-seated love and commitment to the family members who have passed away, and the desire to ensure peace of mind and the reuniting in death of those who have been together in life. The request is often made to fulfil the wishes of the deceased. However, as already stated, the importance of the permanence of Christian burial cannot be understated. The peaceful rest of the departed is to be of paramount importance and the court should not be swayed out of the undoubted sympathy which is held for the family of those who have passed away and the additional grief which might be caused by the refusal of an application for exhumation.

13. So, the question arises in what circumstances should a court allow the disturbance of remains as an exception to such presumption of permanence. In *Alsager*, the court stated the critical question for a Chancellor is "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? If there is, he should grant faculty. If not, he should not."

14. Likewise in *Blagdon*, the Court of Arches stated: "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) 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 the variety of wording that has been used in judgements 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 (burial of a body or cremated remains) is final. It will then be for the Chancellor to decide whether the petitioner has so satisfied him/her.”

15. Having set out the position as a matter of ecclesiastical law, I am aware that across a broad range of reported cases involving such petitions for exhumation, there has emerged an acknowledgement that in these complex situations, there are considerations which can carry greater weight and allow a more flexible approach. One particular feature is the creation of a family grave as indeed was the justification in the *Blagdon* case, whether as an encouragement for the environmentally sensible use of burial that and/or benefits which can be derived from family unity, and particularly where there have been strong family relationships. It is not uncommon (as is the case in this petition), that space can run out in an established family grave which causes hardship and distress for those who subsequently lose loved ones. This was acknowledged in a similar case of *Astwood Cemetery (Gormley) [2016] ECC Wor 1* (Mynors Ch) where a faculty was granted in a not dissimilar situation to the present one, and where the spouses died within a few years of each other and there was insufficient space in the grave in which the husband’s cremated remains had been interred.
16. In this diocese, the former Chancellor (Sir Mark Hedley Ch) in the matter of *St Margaret’s Orford (Cyril Jones decd) [2016] ECC Liv 4*, allowed an application for the exhumation and reinterment of the late husband’s cremated remains in the family grave of his more recently deceased wife and where there had been problems of space and sufficiency for other family members. The delay in that case was exceptionally greater than in the present (some 25 years), although the Chancellor noted that an explanation had been provided that the widow had thought it inappropriate during her lifetime to make an application for exhumation, leaving it to her surviving children to create the family grave.

17. Having carefully considered this petition and the legal principles, I am persuaded on the balance of probabilities that the threshold for exceptional circumstances is satisfied. The delay is relatively short, being some six years, and the explanation provided by the petitioner is both convincing and understandable. Not only was the petitioner's mother the main carer for her late husband for the last eleven years or so of his life, but also the effect of the deceased's passing, and his widow's state of mind clearly impacted upon the decisions which she had to make at that difficult time. I accept unequivocally her belief that she was persuaded to adopt the easiest course of action and to inter her late husband's remains, paying little thought to the fact that the then family grave had only one space remaining. The petitioner's mother and late father clearly had a long and committed marriage and is a justification for their burial together. The proximity of the plots, whilst enabling anyone visiting to pay their respects without inconvenience, would still raise the question as to why the deceased (and his widow in due course) were buried separately when a new plot is available for them to be laid to rest together.
18. Accordingly, I am satisfied it is appropriate to grant a faculty for the exhumation of the cremated remains of the deceased and reinterment in a new plot. The exhumation and reinterment should be carried out within six months, and I make this a condition of the faculty.

District Judge Ian Knifton

Deputy Chancellor, Diocese of Liverpool

31 July 2023