IN THE COURT OF CHANCERY OF YORK

IN RE CHRIST CHURCH, ALSAGER

Constitution:

Auditor of the Chancery of York,
Chancellor Thomas Coningsby QC,
Chancellor Rupert Bursell QC.

J U D G M E N T

This is an appeal from the decision of Chancellor Lomas sitting in the Consistory Court of Chester. The facts are briefly as follows: the Appellant's father, Arthur Davies, died on the 12th February 1981 and was cremated; his ashes were interred in the Garden of Remembrance in the churchyard of Christ Church, Alsager. The Appellant's mother, Sarah Ellen Davies, died in 1995; although she had been received back into the Roman Catholic Church shortly before her death her body was buried in the same churchyard about 90ft - some 30 paces or so - away from her husband's ashes.

The Appellant is the only relative of the two deceased and wishes that the remains of his parents should rest together in the same grave. He describes his request as simple and sincere. That it is sincere cannot be doubted. Since his mother's remains could not be buried in the Garden of Remembrance compliance with his wish would involve exhumation of his father's ashes. The Appellant discussed his wish with undertakers in 1995 and asked them to make the necessary application. For reasons that are not the fault of the Appellant no petition was made until May 1997.

T[h]e undertakers mistakenly assured him that there should be no difficulty and the Appellant believed that, although exhumation is a serious matter, it was a straightforward case. We do not in any way criticise the Appellant and, not knowing all the facts, we cannot criticise the undertakers. However, we shall take steps to ensure that the terms of this judgment are brought to the attention of undertakers generally. The vicar, the Reverend John Varty, had no objection as long as all application forms and consents were in order. The hearing took place on the 3rd September 1997. In addition to the Appellant the learned Chancellor heard evidence from the vicar who accepted that he had not treated the matter sufficiently seriously at the outset. He also heard evidence from the Archdeacon of Macclesfield, the Venerable Richard Gillings, as to the basic theology contained in and reflected by the funeral service of the Anglican Church. This the Archdeacon divided into four elements; thanksgiving for the life of the departed; the commendation of the soul of the departed; the committal of the mortal remains; and the pastoral care of the bereaved. He emphasised that the importance of pastoral care of those who mourn must always be borne in mind but stressed that the Court was right to exercise care in considering whether to authorise the exhumation of remains once interred in consecrated ground. In the event and for reasons to which we will return the learned Chancellor refused the petition.

Whether a hearing is necessary:

The Appellant has requested that this appeal should proceed on written representations only and without the need for a hearing

b' ~ore this Court. In addition to a short written representation he has also sought to place before us the following documents: a copy of a statement he apparently read at the hearing at first instance; a letter from the crematorium manager of the Crewe Cemetery and Crematorium stating that 32 exhumations were carried out in that cemetery between February 1997 and January 1998; and a letter dated the 24th November 1997 from the undertakers stating, in greater detail than in their letter of the 3rd July 1997, why they envisaged no practical problems in removing his father's casket and contents in its complete state.

There is no express provision in the Ecclesiastical Jurisdiction (Faculty Appeals) Rules 1965, S.I. 1965/251, for a hearing on written representations alone even if (although not the case here) the original hearing was disposed of on the basis of written representations pursuant to Rule 25 of the Faculty Jurisdiction Rules 1992, No. 2882. Usually an oral hearing would be held but here there are no objectors, no other interested parties and the Appellant does not require to make representations in person. In such a case the cost of a hearing would be quite unjustified and possibly oppressive unless this Court believed it would be assisted in some way by an oral hearing. In our opinion that is not the case here. We believe that the Court may properly give directions that the appeal shall be decided upon the written representations without a Court hearing. Those directions we have given. In so doing the Court relies on its inherent right to regulate its own procedure providing that directions to this end do not affect any

substantive law and are not in any way contrary to any existing rules, neither of which is the case here.

Whether we should receive additional evidence.

The only evidence that would add to the facts adduced before the Chancellor would be the letter from the crematorium manager. Under Rule 8(1) of the 1965 Rules further evidence can only be called "in exceptional circumstances" and this normally means that the evidence could not have been adduced in the lower court: *In re St. Gregory's, Tredington* [1972] Fam 236 at p.241 per Deputy Dean Newsom QC. Clearly evidence similar to that of the crematorium manager could have been so adduced and in the circumstances we cannot pay attention to her letter; however, we would point out that, even if admissible, her evidence would not have taken the matter further unless it had been specifically directed to exhumations from consecrated ground. In this connection it is important that petitioners and undertakers should appreciate that whilst it is the law of the land that a faculty, and only a faculty, is required for exhumation out of consecrated ground into consecrated ground in other circumstances a Home Office licence will be required possibly in addition to a faculty. The attitude of the Home Office will not be that of the Chancellor. It is underestood by this Court that the Home Office will normally grant a licence for exhumation. The Chancellor, however, must follow Ecclesiastical law and, acting within that law, must make a judgment. It should be emphasised that his decision must be reached in a judicial way.

Whether the case involves a question of doctrine, ritual or ceremonial.

The Chancellor has certified, pursuant to Rule 3(5) of the Ecclesiastical Jurisdiction Measure 1963 that this case does not "involve a question of doctrine, ritual or ceremonial". We agree. This certification seems to us of particular importance in this case as it underlines the fact that the evidence of the Archdeacon, although concerned with the theology of burial, did no more than emphasise in addition to the pastoral side of burial services that the committal of mortal remains is of substantial importance. In other words his evidence underscored the theological reason for the protective jurisdiction of Ecclesiastical Courts in consecrated ground.

The Chancellor's Decision:

The Chancellor was faced with one variation of a problem which is becoming increasingly frequent. We are aware that the problem has caused considerable difficulties for Chancellors and differing approaches by them. Accordingly we are pleased that this appeal gives us the opportunity to express the view of the Appeal Court. In so doing we are conscious that we have the very considerable advantage of being three and being able together to consider the various conflicting approaches. We hope and believe that this judgment will assist all Chancellors, both in this and in the Southern province.

In his judgment the Chancellor stated:

"It is particularly important ..... that I should emphasise that applications of this kind are never a

> formality and that the primary duty of this Court is to safeguard the remains..... once interred in consecrated ground and that there should be no disturbance of such remains save for good and sufficient reason. It is of the greatest importance that a situation should not arise where it is thought that, provided the mechanical forms of application are complied with, remains may be transported from one place to another at the wish of those surviving the deceased."

He then continued to quote from a decision of his own in ***In re St. Peter's Churchyard, Oughrington*** [1993] 1 WLR 1440 at p.1442 (subnom). ***Re Smith*** [1994] 1 All E.R. 90 at p.93:

> "In my judgment it is clear that both men and women desire and hope that when after their death their remains have been decently and reverently interred they should remain undisturbed. Where the burial has taken place in ground consecrated in accordance with the rites of the Church of England it is clear that the intention of all those taking part is that earthly remains of the deceased are to be finally laid to rest once and for all."

For our purposes it is not necessary to quote further from the Chancellor's decision. Suffice it to say that he did not find good and sufficient reasons for acceding to the Appellant's request for exhumation.

The Grounds of Appeal:

In his Notice of Appeal the Appellant gives the Grounds of his Appeal as:

> "1. With regards to Point 1 - my father's remains were placed in an Oak Casket with an inner plastic liner. This plastic liner can be buried for many decades without deterioration (this is a proven scientific fact - See Appendix B). Chancellor Lomas did not ask for confirmation of the practical aspects of the interment and therefore could not take them into account in his Judgment.
> 2. With regards to Point 2 - Alsager Church cemetery is approximately 6 miles from Crewe Cemetery where 32 exhumations were carried out during the last 12 months. I agree with Chancellor Lomas that granting authorisation of exhumations is a very serious process that must be investigated correctly. However, with

> the facts presented in Appendix C I do not believe that authorisation of my application was creating a precedent in the Crewe/Alsager area. As a parishioner who supports my Church it does appear from the facts that I am being subjected to unfair discrimination".

He argues that when these matters are taken into account, there is no valid reason for the application to be refused. As to (1) we see no reason to think that the Chancellor failed to take into account these factors which are well-known and did not require any confirmation. As to (2) although not explicitly stated, this is clearly a reference to the evidence of the crematorium manager and therefore to that passage in his judgment when the Chancellor spoke of his concern that a precedent would be created if he were to permit the exhumation sought. Although a Chancellor must have a consistent policy there can of course be no question of him by a decision on the facts creating a legal precedent. As will become apparent the Chancellor will be faced with the same question each time he considers a request for exhumation. In addition it is clear that, in his written representations, the Appellant also appeals on the ground that the Chancellor failed to place any, or any sufficient, reliance on the evidence of the undertakers as to the practicalities of the exhumation in the particular case.

The Law:

Although applications for exhumation are common, at least in a number of dioceses, with an increasing number of cases concerning caskets containing cremated remains, there is no reported relevant case in either this Court or in the Court of Arches. A number of cases at first instance has been reported in the law reports and further cases are summarised in the Ecclesiastical Law Journal or, unreported, may be found in the Middle Temple Library. We see no value in stating and examining all those cases. However, to set the background it may be useful to quote from some earlier decisions.

In In re Dixon [1892] Probate 386, Dr. Tristram set out the law in this manner (at p.393):

> One result of being buried in consecrated ground is that the site is under the exclusive control of the Ecclesiastical Courts, and no body there buried can be moved from its place of interment without sanction of a Faculty to be granted upon the application of the executors or members of the family, for reasons approved by the court or upon application of other parties on the ground of necessity or of proved public convenience, - and then only for re-interment in other consecrated ground."

This states the general principle but is of little assistance in indicating the reasons which should be approved by the Court. Further, although re-interment in other consecrated ground would normally be necessary it is possible to think of circumstances e.g. the scattering of ashes at sea, where this might not be so: see *Re Stocks deceased* [1995] 4 Ecc.L.J. 527; The Times 5th September 1995. We are not concerned with applications upon the grounds of necessity or of proved public convenience and do not here consider such cases further.

In *In re Matheson* [1958] 1 WLR 246; 1 All E.R. 202; Chancellor Steel stated (at p.204):

> "From the earliest time it has been the natural desire of most men that after death their bodies should 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 in the Consistory 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 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."

It should be emphasised that the discretion referred to is a

l' al discretion which must be applied judicially and is not a discretion in the sense that the word is frequently given in common speech.

In *In re Church Norton Churchyard* [1989] Fam 37 (Subnom.) *Re Atkins* [1989] 1 A.E.R.14 Chancellor Quentin Edwards QC stated (at p.19):

> "The discretion has undoubtedly been expressed to be quite unfettered. It is to be exercised reasonably, according to the circumstances of each case, taking into account changes in human affairs and ways of thought but always mindful that consecrated ground and human remains committed to it should, in principle, remain undisturbed.
> The court then should begin with the presumption that, since the body or ashes have been interred in consecrated ground and are therefore in the courts' protection or, in *Wheatley's* words, 'safe custody', there should be no disturbance of that ground except for good reason. There is a burden on the petitioner to show that the presumed intention of those who committed the body or ashes to a last resting place is to be disregarded or overborne. The finality of Christian burial must be respected even though it may not be absolutely maintained in all cases. The court should make no distinction in this between a body and ashes and should be careful not to give undue weight to the undoubted fact that where ashes have been buried in a casket their disinterment and removal is simpler and less expensive than the disinterment of a body and is unlikely to give rise to any risk to health. .....
> The court should resist a possible trend towards regarding the remains of loved relatives and spouses as portable, to be taken from place to place so that the grave or place of interment of ashes may be the more easily visited."

Finally we refer to *In re Stocks - deceased* [1995] 4 Ecc. L.J. 527; The Times 4th September 1995, a decision of Maclean Ch. We commend the guidance given by the Chancellor, which is reformulated by us, but only in minor ways, as follows:

1. Once a body or ashes have been interred in consecrated ground, whether in a churchyard or in a consecrated section of a municipal cemetery, there should be no disturbance of the remains save for good and proper reason.

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.

4. The passage of time, especially when this runs into a number of years, may make it less likely that a Faculty will be granted.

5. No distinction is to be drawn between a body and cremated remains, except insofar as the processes of decay may affect a coffin more than a casket containing ashes and may also affect the sensibilities of a congregation or neighbours.

6. It is immaterial whether or not a Home Office licence has already been obtained.

The Question for Chancellors:

Bearing in mind that it is the applicant who seeks to disturb the accepted norm we are satisfied that the critical question for the 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

t' re is he should grant a faculty. If not, he should not.

To the end of assisting the Chancellor to a proper decision we recommend that when the application is made it should be accompanied by a plan of the graveyard or cemetery showing the church building, [if appropriate]; any residential dwellings within close proximity; and the situation of the grave from which the remains are to be removed. Upon receipt of the application the Chancellor should consider whether he needs a resolution of the P.C.C.

The Chancellor will need to bear in mind that the applicant 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 re-occur 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 applicant or by a third party, such as an incumbent church warden, 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 applicant; that all close relatives are in agreement; and the fact that the

incumbent, the P.C.C. 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 applicant 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.

Conclusion:

This Court has power to substitute its own discretion for that of the chancellor and, if satisfied that the chancellor's discretion is based on an erroneous evaluation of the facts taken

as whole, it should allow the appeal: *In re St. Gregory's, Tredington* [1972] Fam 236. As has been indicated, the essential question for the chancellor was: Has the petitioner shown 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? We consider that the decision of Chancellor Lomas, although differently expressed and seeming to stress some matters which we do not find helpful, was broadly in line with the law as previously understood and as stated in this judgment. Further, he made no errors in his findings of fact. Accepting the law as we have stated it to be we have unanimously decided that the Chancellor's decision was not in error. In reaching our decision the most weighty factors have been:

1. The father's remains have remained undisturbed for some 17 years;
2. Only a very short distance separates the two places of interment each of which is within the same consecrated curtilage; so that the mortal remains of both of the Appellant's parents have been committed - although at different points of time - to God's care in this churchyard.

We believe we understand why the Appellant came to suspect that he had been subjected to unfair discrimination; we trust that he will now appreciate that this was not so.

There will be no order for costs.

John Owen	Thomas A Coningsby	Rupert D H Bursell
10 July 1998	10 July 1998	10 July 1998