Neutral Citation Number: (2019] ECC Swk I

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF THE CHURCHYARD OF ST ANDREW'S CHURCH HAM

AND IN THE MATTER OF A PETITION BY KEITH AND ANN HINKLEY

JUDGMENT

I. This is a petition by Keith and Ann Hinkley for a faculty to exhume the cremated remains of their daughter, Carla Hinkley, from the churchyard of St Andrew's Church, Ham. This is in order that the remains may be re-interred in Kingston Regional Cemetery in Tasmania.

2. The Priest in Charge of the Parish of St Andrew Ham and the churchwardens have given their consent.[1]

3. The facts of this matter are that Carla Hinkley was born on 7 November 1979 and sadly died four months later (on 20 March 1980) from congenital heart disease. Her remains were cremated and the ashes were interred, in an urn, in the churchyard on 28 March 1980.[2] In I987 Mr and Mrs Hinkley moved permanently to Australia. They have been living at the same address in Blackmans Bay, Tasmania ever since.

4. Mr and Mrs Hinkley wish in due time to be buried in the same grave in Kingston Regional Cemetery and they wish Carla's remains to be interred with them. It is the wish that this should happen which has led to this petition.

5. Mr and Mrs Hinkley have acquired the right for their remains in due time to be buried in Kingston General Cemetery and the company that operates that cemetery have confirmed that it will be possible for Carla's ashes to be interred there also. Mr and Mrs Hinkley's current intention is that they only wish Carla's ashes to be interred in Kingston General Cemetery after the remains of whichever of them shall first die shall be interred there. I do not know if the part of Kingston General Cemetery in which Mr and Mrs Hinkley have acquired rights is consecrated or not; I shall proceed on the basis that it is not.

6. The norm of Christian burial is permanence and permission for exhumation is granted only exceptionally.[3] However the re-interment of remains in a family grave may be exceptional circumstances justifying exhumation or at least comprise part of those exceptional circumstances. In *In re Blagdon Cemetery*, Cameron QC, Dean of the Arches, said:

> *The concept of a family grave is, of course, of long standing. In a less mobile society in the past, when generations of a family continued to live in the same community, it was accepted practice for several members of a family to be buried in one grave. Headstones*

[1] There is no resolution of the PCC to similar effect. However in the circumstances I do not think that this is necessary. The importance of having a view from the parish is essentially that I can have the assurance that there is nothing in the general circumstances that the Petitioners have not told me about that might affect my consideration of the matter.

[2] The current Chancellor's Guidance encourages interment of ashes by pouring into a hole in the ground. I think that the interment of Carla's ashes in 1980 pre-dated this guidance.

[3] See In re Blagdon Cemetery [2002] Fam 299, especially paragraphs 28 and 33.

give a vivid picture of family relationships and there are frequent examples of one or more children predeceasing their parents due to childhood illnesses, which were incurable. Burials in double or treble depth graves continue to take place at the present time. They are to be encouraged. They express family unity and they are environmentally friendly in demonstrating an economical use of land for burials.

7. I considered the scope of the "family grave exception" in *In re Peters' Petition*.[4] In that case I said:

> *43. In* In re Alan Brown decd (2008) 27 Consistory and Commissary Court Cases, case 11 *(which was not a family grave case) McClean QC Ch observed, at para 9:*
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> > *"[In* In re Blagdon Cemetery*] the Arches Court attached some importance to the proposal in that case to create a 'family grave, evidenced by the purchase of a triple-depth grave. In common with some other chancellors, I do not find this part of the Blagdon judgment very clear ...' "*
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> *44. Moreover the cases show that chancellors have applied it in different ways.*
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> *45. The obvious reading of the Blagdon case is that, in accordance with para 33 of its judgment, the Court of Arches was, by way of a guideline, identifying the creation or consolidation of a family grave as one of a number of categories of circumstance in which it might be appropriate to make an exception to the norm of permanence of Christian burial. That reading would receive support from the reference in para 38 with approval to* In re St James's Churchyard (1982) 4 Consistory and Commissary Court Cases, case 25, *which was a case in which the only ground relied upon was the fact that the exhumation was to a family grave.*
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> *46. However, doubt arises in respect of such a reading by reference to* In re Blagdon Cemetery [2002] Fam 299, paras 37-38*. If all that was required to justify exhumation was the creation or consolidation of a family grave, it would not have been necessary for the court to have referred to the other four factors identified in para 37 (or, alternatively, it could have referred to the first four factors as being additional matters justifying exhumation). In para 38 there would have been no need to add the proviso, "provided special reasons were put forward for the lapse of time since the date of burial".*
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> *47. Moreover, in practical terms, if the creation of a family grave were sufficient of itself to justify exhumation, it would be possible to invoke it in every case where exhumation was sought. It might of course be said of the typical situation - where the remains of a widow or widower are being moved to a new grave where it is intended that the husband or wife should be interred in due time - do not involve the creation of a family grave but (1) it achieves economy in the use of burial space; (2) it is expressive of family unity; and (3) in many if not most cases it would be possible to find willing family members (children and in-laws) who would readily agree to be buried in due time in a family grave.*
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> *48. If, with this in mind, the factors relevant to exhumation identified in the Blagdon case are re-examined, it will be seen that the court was nowhere saying that the creation of a family grave was of itself a sufficient reason justifying exhumation, but that only that it was a relevant matter.*

[4] [2013] PTSR 420.

49 It seems to me that this is the true reading. Moreover, following the approach adopted in para 37 of the judgment and the proviso identified in para 38 of the judgment, it seems to me that in any case which involves the consolidation of a family grave the question must arise as to why the remains were not interred in that grave in the first place; and that in any case that involves the creation of a family grave, the question must be asked as to why a family grave was not established at an earlier date.

50. Thus I agree with McClean Ch in In re Mallinder deed 25 Consistory and Commissary Court Cases, case I *that the Blagdon case [2002] Fam 299 does not establish any special rule in "family grave" cases; however, if the passage of his judgment that I have quoted were taken to suggest that the creation or consolidation of a family grave is not relevant at all (which superficially at least it might do), I do not think that such an interpretation of the Blagdon case is correct.*

51. The practical problem remains for chancellors as to how much weight should attach to the creation or consolidation of a family grave. Absent authority and as a matter of principle it seems to me that the weight attaching to this factor should be much the same in all cases. The way I would approach the matter is to say that: (1) if there are reasons why the remains were not interred in the family grave in the first place or why the family grave was not established at the time of the burial; and/or (2) there are other factors justifying a departure from the norm of permanence, then the fact that the exhumation is to a family grave counts as an additional factor in its favour, i.e., as being economical in the use of grave space and as expressive of family unity.

52. It is impossible to foresee every case and, accordingly, I would not want to be categorical, but I would not generally regard the consolidation or creation of a family grave of itself as sufficient to justify exhumation. This is because, despite the benefits arising out of the consolidation or creation of family graves, to hold that consolidation or creation of such a grave were sufficient would undermine the norm of permanence.

8. It seems to me that in the present case Mr and Mrs Hinkley are not 'just" relying upon the creation of a family grave as exceptional circumstances justifying the exhumation of Carla's remains. I think that whenever a child predeceases his or her parents, difficult issues may arise as to the appropriate arrangements in respect of his or her remains. Even if the child's parents do not have a job or jobs which are likely to take them away from the area in which they are currently living (as in In re Blagdon Cemetery, where the father was a publican), there can be no certainty for anyone that they will continue to live in the same town or area or even country. However, if they are interred in consecrated ground, then they become subject to the jurisdiction of the consistory court which, as I have explained, will not lightly grant permission thereafter for their exhumation. In these circumstances, in respect of cremated remains, one possibility will be to defer interment of the ashes. However this denies the child's parents the comfort of a ceremony which symbolises committing their child to God (while at the same time dealing appropriately with his or her earthly remains); and the Church would not want to encourage the non-interment of ashes.

9. Accordingly it seems to me that, in appropriate circumstances, the Consistory Court should show what I would describe as appropriate flexibility. Obviously one would not wish to see a situation in which ashes were being moved from place to place on each occasion the child's parents moved. On the other hand, if it does appear that his or her parents have now a settled home, the objection that the remains are being treated as portable cannot apply. In the present case it is obvious that the family grave exception is not being colourably relied upon to

facilitate exhumation in circumstances where it would otherwise be objectionable (e.g., simply to facilitate visiting) because Mr and Mrs Hinkley do not want the exhumation to take place until after one or other of them has died. It also seems to me pertinent that Mr and Mrs Hinkley now live in Australia. The petition would not have the same weight if they lived in the next parish or in, say, Yorkshire.

10. Paragraphs 8 and 9 above seek to analyse a situation where, as a matter of impression, what Mr and Mrs Hinkley want to do seems reasonable. I am concerned, nonetheless, that I might be considered to be acceding to a view that somehow there is something positively wrong with Carla's ashes being interred many thousands of miles away from where her parents are ultimately buried. There is nothing wrong about it and the fact that the interment was in consecrated ground emphasises Carla's place within the community of the church (and not alone and separated from her parents). I recognise nonetheless that what parents and next of kin wish to happen to remains in circumstances like the present is something deeply personal which, if possible, should be respected. I am also concerned that this case will be viewed as a precedent. Obviously it may, and I shall deal with any case where it is relied upon on its merits in due course. It is worth saying, however, that just because some of the facts of such a case are comparable with the facts of this case, that does not mean that a faculty will necessarily issue.

11. I do not consider that the fact that the re-interment proposed appears to be unconsecrated ground is material. This was the situation in *In re Blagdon Cemetery*. The point is that it is unlikely that having been once re-interred the ashes will thereafter be further disturbed. It will be possible for a priest to bless the plot before the ashes are re-interred.

12. As I have noted Mr and Mrs Hinkley do not want to exhume Carla's ashes upon the grant of a faculty but after the death of one or other of them. As a matter of principle it is undesirable that a faculty should not have attached to it a condition within which it is to be executed. In the present case, I direct that the relevant period should be 25 years. It would always be possible for an application to be made to extend that period were it to be necessary, I do recognise that circumstances may change and in the event, Mr and Mrs Hinkley may not wish to execute the faculty. There is no obligation upon them to do so - a faculty is a permission and a person who has the benefit of a permission does not have to act upon it. If, on reflection, they wish to organise for Carla's ashes to be exhumed and re-interred in Tasmania while both of them are still alive, there is no objection to this; however this will be on condition that the ashes are re-interred in Kingston Regional Cemetery as soon as reasonably possible after their exhumation.

PHILIP PETCHEY

Chancellor

24 January 2019