

RE MARJORIE KENNEDY DECEASED

JUDGMENT

1. Marjorie Kennedy [‘the Deceased’] died on 10 March 1992, over 22 years ago, and on 16 March 1992 her remains were interred at Southern Cemetery Manchester. Her husband John Kennedy [‘the Petitioner’], who is now aged now 88 years, seeks a faculty to exhume such remains and to re-inter them at Mill Lane Cemetery in Cheadle.
2. Some brief explanation of the background facts is necessary.
3. In his Petition the Petitioner states that he now resides in Heald Green Cheadle and ‘would like my wife’s remains to be re-interred in a cemetery which is much nearer to my residence’. His three children support his application on the ground that their father would find it much easier to visit their mother’s grave if her remains were re-interred in Cheadle and that the Petitioner is finding it increasingly difficult to access Southern Cemetery.
4. The undertakers confirm that the coffin containing the Deceased’s remains will be in a satisfactory condition to be exhumed from Southern Cemetery and re-interred at Cheadle and that, since no other remains are interred in the existing grave, no other remains will be disturbed.
5. Although I am not told the distance between Southern Cemetery and Mill Lane Cemetery, my own knowledge of the area together with reference to local maps reveals that the distance cannot be much more than about 6 miles and the journey time by car cannot be much more than 15 minutes.
6. Having set out the factual background I turn to the legal principles which I must apply.
7. I have a discretion as to whether I should grant a faculty. The starting point for the exercise of such discretion was conveniently explained by Steel Ch in *Re Matheson (Decd)* [1958] 1 WLR 246, at 248, when he stated :

‘From the earliest times it has been the natural desire of most men that after death their bodies shall be decently and reverently interred and should remain undisturbed. Burial in consecrated ground secured this natural desire, because no body 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.’

8. However, 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. So in *Theology of Burial* the then Bishop of Stafford, the Rt Revd Christopher Hill, wrote :

‘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’.

9. This was cited in *In Re Blagdon Cemetery* [2002] 3 WLR 603, at 609 : the revised text is at 7 Ecc LJ 447.

10. A similar approach appears in the *Guidance for best practice for treatment of human remains excavated from Christian burial grounds in England* [English Heritage / Church of England 2005] which states :

‘In summary, it is central to Christian theology that, after death, the human body ceases to have any significance for the ongoing resurrected spiritual life of the individual. However, following death, the physical remains should be treated with respect and reverence, even though ultimately it is the fate of the soul, rather than of the physical remains, which matters.’

11. Such presumption also exists in English secular law which provides that there is no ownership of human remains, that it is a criminal offence to disturb human remains without lawful permission and that there is no legal right to exhume human remains. Such reflects a secular culture in which the norm is that the remains of a deceased person should not be disturbed once they have undergone the initial act of interment.

12. The question thus arises : in what circumstances should a court allow the disturbance of remains as an exception to such presumption of permanence.

13. In *Re Christ Church Alsager* [1999] 1 All ER 117 the Chancery Court of York concluded, at 122, that when determining an application to grant a faculty for an exhumation 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. In *In Re Blagdon Cemetery* the Arches Court of Canterbury observed that there were practical difficulties associated with the test formulated in *Re Christ Church Alsager* and, at 610, concluded thus :

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 edn, 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.

...

35. The variety of wording that 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.

15. The court went on to consider various factors which may be argued in support of an exhumation, including medical reasons, lapse of time and mistake.

16. As to the factor of medical reasons, the court stated, at 611 :

'If advancing years and deteriorating health, and change of place of residence due to this, were to be accepted as a reason for permitting exhumation then it would encourage applications on this basis. As George QC Ch pointed out in *Re South London Crematorium* (27 September 1999, unreported) :

'Most people change place of residence several times in their lives. If such petitions were regularly to be allowed, there would be a flood of similar applications, and the likelihood of some remains (and ashes) being the subject of multiple moves.'

Such a practice would make unacceptable inroads into the principle of permanence of Christian burial and needs to be firmly resisted. We agree with the Chancery Court of York that moving to a new area is not an adequate reason by itself for removing remains as well. Any medical reasons relied upon by a petitioner would have to be very powerful indeed to create an exception to the norm of permanence, for example, serious psychiatric or 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.'

17. The guidance confirmed in *Re Blagdon Cemetery* was confirmed in *In Re St Nicholas Sevenoaks* [2005] 1 WLR 1011.

18. Applying the test in *Re Blagdon Cemetery*, I turn to consider the facts of this case. For me to grant this faculty I must be satisfied that it is established by the Petitioner, on a balance

of probabilities, that the facts here justify an exception to the general presumption of the permanence of Christian burial.

19. I regret to conclude that, having carefully considered all representations made to me, I am not so satisfied. My reasons for so concluding may be summarised thus.

20. Firstly, it is over 22 years since the Deceased's cremated remains were interred at Southern Cemetery. Although I am satisfied that such a long period does not *automatically* lead to the conclusion that I should refuse this application, in my view it is a not insignificant factor which I should take into account in reaching my decision.

21. Secondly, this is not a case where medical reasons are, or could be, argued to justify the exhumation. Whilst I readily accept that the Petitioner is now in his late 80's and is finding it difficult to visit his wife's grave and that his application is supported by each of the Deceased's children, I do not think that such is a sufficiently good reason for me to grant a faculty sought, particularly when the place where it is desired to re-inter the Deceased is such a relatively short distance from Southern Cemetery.

22. Thirdly, although in some cases faculties have been granted to allow family members to be brought together into a single grave - see *In Re St James' Churchyard, Hampton Hill* (1982) 4 Consistory and Commissary Court Cases, case 25 and the decision in *In Re Blagdon Cemetery* - this does not seem to me to be what is sought in this case.

23. In my judgment to grant the faculty sought in this case would be to allow an exception to the presumption of the permanence of Christian burial when I find that no such exception is warranted by the facts.

24. Accordingly, I decline to exercise my discretion to grant such a faculty and this petition is dismissed. In accordance with the practice of the court, the Petitioner must pay the court fees incurred in relation to the petition.



GEOFFREY TATTERSALL QC

Chancellor of the Diocese of Manchester

31 July 2014