

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK
IN THE MATTER OF LAMBETH CEMETERY
AND IN THE MATTER OF A PETITION BY AM

JUDGMENT

Introduction

1. After some thought, I have anonymised this judgment. As will be seen the family involved has experienced extended trauma. I would not want the reporting of the judgment to add to that; I can see that (if not anonymised) it might do so. Before issuing the judgment I explained to the petitioner what I proposed to do and, appreciating the reasons for so doing, she and her family are content with this course.

The facts

2. This is an application by AM for a faculty to permit the exhumation of the remains of her brother FM from a plot in the consecrated area of Lambeth Cemetery. It also seeks permission to exhume the cremated remains of her grandfather, GM, whose remains were interred in the same plot after his subsequent death and the cremation of his body.
3. More than 50 years ago, FM was brutally murdered at the age of eight. His parents, BM and CM were distraught. Understandably given CM's distress and the passage of time, CM cannot now recall the detail of how the arrangements that were made at that time. CM has a memory that the undertakers explained that the plot was being offered to them without payment; this is borne out by the deed that BM and CM were given in respect of the grave. They were then living in South London, although the Cemetery was not particularly convenient for visiting in terms of their then house. A minister officiated at the burial but CM has no recollection of being told that the plot was consecrated or what the consequences of consecration were. BM has sadly died recently but, before his death, BM was suffering from vascular dementia and could not recall the detail of what happened at the relevant time.
4. The deed that was given to BM and CM provided that Lambeth LBC were
... to hold [the grave space] unto [BM], BM's personal representative and their assigns as the Council shall approve for a term of 50 years from the date of this grant for the purposes of burial or burial of cremated remains subject nevertheless to the fees and regulations in force now and from time to time with regard to the interment in and the management of the said cemeteries, and particularly to the right of the Council to resume possession of the said grave space as set out in the regulations made by the Council with respect to the said Cemetery and [BM] agrees with the Council to comply with the said regulations during the said term¹.
5. I shall have to consider the terms of the deed further in this judgment but at this point I should observe that any re-use of the grave space after 50 years would be conditional upon a faculty being granted for these purposes.

¹ This invariably described as an Exclusive Right of Burial.

6. After FM's funeral BM and CM found it difficult to live in the proximity of where he had died and they moved to Kent; but they would return each weekend to the Cemetery.
7. In 1991 CM's father, GM, died and his cremated remains were interred in the plot.
8. In 2019, BM and CM were in touch with the Cemetery because they were moving to live with two of their two daughters (AM and DM). At this time they were informed, what they did not hitherto know, namely that the right of burial that BM enjoyed would come to an end in 2033 if not renewed.
9. The limited nature of BM's legal interest in the grave stimulated a discussion as to what was to happen to grave. These discussions have taken place against the background that the health of BM and CM had declined. I have explained about BM's health and, now, his sad death. CM is disabled. CM does not drive and it is very difficult for CM to visit the Cemetery.
10. In these circumstances, CM would like to arrange the exhumation and cremation of the remains of FM; and also the exhumation of those of GM. The ashes would then "return home" in AM's words – to be kept together in the home that their daughters have made for them². AM tells me that CM (as well as the family) would derive much comfort from this³. All the family (which seems to be a close one) support these arrangements.
11. I have asked about what is proposed to happen after CM has died. AM tells me that the plan is that the remains of BM will be cremated and kept at home with those of FM and GM; on the death of CM, CM's remains will be similarly cremated and kept at home. When AM and DM themselves die, instructions will be left for their nieces and nephews to scatter what will then be six sets of cremated remains.

Consideration

Introduction

12. It is worth beginning this judgment by noting that I am only concerned with the remains of FM and GM. What arrangements CM and AM and DM decide to make in respect of their remains when the time comes is a matter entirely for them. I note that, if they wish, their cremated remains (if they choose cremation) may be kept at home and scattered at any time thereafter.
13. It will be seen that there are two aspects to this application, namely
 - (i) whether in principle a faculty should be granted for the exhumation of the remains of FM and GM; and
 - (ii) whether the arrangements that are proposed for the treatment of the remains thereafter is satisfactory.

It is axiomatic that if I did not consider that the arrangements that are proposed for the treatment of the remains to be satisfactory, I would not grant a faculty.

² BM and CM's third daughter, Rose, also now lives with them.

³ At the time that the petition was made BM was still living.

Whether in principle a faculty should be granted for the exhumation of the remains of FM and GM

14. I turn first to the guidance provided to the Court by decided case law. Summarised and set out in *Re Blagdon Cemetery*⁴, this is in essence simple. The norm of Christian burial is permanence and permission for exhumation is only granted exceptionally.
15. It is worth spending a moment reflecting on the reason why the Consistory Courts have taken this approach and why, on appeal, it has been endorsed by the Court of Arches and Chancery Court of York. I fear that it might sometimes appear to be an arbitrary rule imposed to make things difficult for relatives after the death of a dearly loved parent or child. It is not. It exists because of the respect that is properly given to the remains of the dead. Thus the Consistory Courts have resisted any idea that after burial remains are portable. It is not sufficient that the family of a person who has died has moved away and finds it difficult to visit. Maintenance of the principle can seem hard in any particular case but that is the way that rules often operate and the discretion exercised by Chancellors has in practice mitigated what might be seen to unreasonable strictness.
16. The permanence of burial both reflects the theology of Christian burial and also is reflected in it (the two ideas go hand in hand). Thus it is about how we grieve the loss of a loved parent or child or someone who has been near to us. It was put like this by Bishop Christopher Hill:
*The permanent burial of the physical body/the burial of cremated remains should be seen as a symbol 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 their ultimate destination, with us, the heavenly Jerusalem*⁵.
17. Someone who professes the Christian faith, reflecting on this will appreciate what is involved; and someone who does not may still, I think, be essentially in sympathy with it. Everyone – whether a Christian or not - will agree that human remains should always be treated with respect; and most, if they ever thought about it, would appreciate that this means that exhumation should be restricted. But not everyone who is buried in consecrated ground is a Christian and, even for Christians, it is not a necessary approach⁶.
18. It will be seen that the application of the principle of the permanence of Christian burial may present problems in the case of non-Christians and, more broadly, anyone who does not agree with it. It is one thing if a non-Christian is buried in consecrated ground and his family know both that it is consecrated and also the consequences of consecration (that permission for exhumation thereafter will only be granted exceptionally). In these circumstances he or she may be said to have accepted the rules which apply to burial in this location⁷. It is rather different if they do not know that the land is consecrated and/or the consequences of consecration if it is. It is for this reason that there are cases decided by the Consistory Courts, whereby if a non-Christian is buried in consecrated ground in circumstances with a lack of understanding as to legal status of that land, this may form the basis for a successful subsequent application for

⁴ [2002] Fam 299 (Court of Arches).

⁵ Set out at paragraph 23 of *In re Blagdon Cemetery*.

⁶ They can point to different burial practices adopted in some places in Europe where, after a period, bones are placed in an ossuary. I do not however think that these practices reflect treating human remains with less than respect.

⁷ It is for this reason that it is particularly important that, in arranging a burial or interment of ashes in consecrated land, the relatives of the deceased should be told both that the land is consecrated and the consequences of this. This was stressed in *In Re Blagdon Cemetery* (see paragraph 26).

exhumation on the grounds that exceptional circumstances exist⁸. In the present case I do not think that it is likely that anyone explained to BM and CM that the land was consecrated and, in any event, in the circumstances, I do not think that they would have gone into the consequences of consecration. Even if they had explained about consecration and its effects, I think it unlikely that BM and CM would have been able to take the information in or make informed judgments in respect of it.

19. Of course in any particular case, a Court may guess that the lack of knowledge would have made no difference: with full knowledge the family would still have made the same decision. If the Court could be confident that this was the case, the lack of knowledge could be said to be an inadequate basis for permitting exhumation. But it seems to me that consideration of what the family might have done becomes completely unrealistic in a case like the present. With the benefit of hindsight, BM and CM should have arranged FM's burial in unconsecrated ground against the possibility that, consistent with their own beliefs, they might in the future want to seek exhumation of those remains. However at the time of FM's death this would not have been something that they were thinking about.
20. There is another aspect of the matter which falls to be considered. The European Convention on Human Rights has effect in English law by virtue of the Human Rights Act 1996. Article 8 of the European Convention on Human Rights seeks to ensure respect for family life. It may be the case - as *In re Blagdon Cemetery* suggests - that the Article 8 has no general application to exhumation cases⁹. However I find it hard to say in the present case that, if I were decline to permit the exhumation of FM's remains, such an order would not have the effect of interfering with the family's life. Such an interference may indeed be justified in any particular case (of which the present may be one) but the existence of the right does point up the care with which the discretion of the court to permit (or refuse) exceptions must be considered in any particular case.
21. It will be seen that different considerations apply to the exhumation of the remains of GM as opposed to the exhumation of the remains of FM. I raised this with the family and they have said that they are content to leave the decision about GM's remains to me. It seems to me that, having made a decision to permit the exhumation of FM's remains, it would not be appropriate to insist that GM's remains stay where they are: they would not have been interred there had FM's remains not been first interred in that place; and at the time of the interment the family were still ignorant of the significance of the plot being consecrated even if they were aware (or might have been aware) of the fact of its consecration. I note that both burials took place a significantly long time ago but this is not a case where there has been delay; and, to my mind, after a certain point delay makes exhumation more seemly than otherwise¹⁰.
22. Finally though difficulty of visiting may not be a sufficient justification for exhumation, it does mean that a proposal which overcomes this difficulty does represent a benefit to grieving relatives; and although having remains at home would not be something that would commend itself generally, in this and perhaps other cases it may be a genuine comfort.

⁸ An example is *In re Hither Green Cemetery* [2018] ECC Swk 3, a case decided by this Court.

⁹ And see *Dodsbo v Sweden* (2006), European Court of Human Rights.

¹⁰ There may be some cases where there may be difficulty in identifying the remains after an extended period but that is not suggested to be the case here.

23. All the above represents the justification for the exhumation of the remains of FM and GM. I turn to consider whether the arrangements that are proposed for the treatment of their remains after exhumation is satisfactory.

Whether the arrangements that are proposed for the treatment of the remains is satisfactory

24. In his discussion of the theology of Christian burial Bishop Hill contrasted the symbolism of permanence with its opposite:

This commending, entrusting, resting in peace does not sit easily with 'portable remains', which suggests the opposite: reclaiming, possession, and restlessness; a holding onto the 'symbol' of a human life rather than a giving back to God.

25. The family as yet do wish to hold on to the symbol of FM's life that his ashes represent; for reasons which I can understand. But in due time his ashes (and those of GM) will be scattered. On the face of it, this is an intrinsically satisfactory way of disposing of human remains and both Christians and non-Christians may find appropriate symbolism in it. Moreover the family can urge upon me that, if it is appropriate for exhumation to be permitted on the basis that they were not aware that the burial site was consecrated or of the consequences of consecration, it is for them to consider what is or is not appropriate as regards the disposition of FM and GM's ashes. I have considerable sympathy with this view.

However there is a particular issue as regards the scattering of ashes which I need to address.

26. Cremation is addressed in canon law by Canon 38. The relevant provision is as follows:

3. Cremation of a dead body is lawful in connection with Christian burial.

4. (a) When a body is to be cremated, the burial service may precede, accompany, or follow the cremation; and may be held either in the church or at the crematorium.

(b) The ashes of a cremated body should be reverently disposed of by a minister in a churchyard or other burial ground ... or on an area of land designated by the bishop for the purpose of this sub-paragraph or at sea.

27. It seems that, although the practice of cremation began in England at the end of the nineteenth century and was the subject of legislation in 1902, it was not formally considered by the Church of England until 1943. In that year the Convocation of Canterbury decided that there was no objection to the practice and that there was much to commend it, *provided that due safeguards for decency and reverence are exercised*. In 1951 the Convocation of York took the same view as to the acceptability of cremation. However it was more specific:

... the ashes of a cremated body should be disposed of in consecrated or dedicated ground. This may be done

(a) by burial;

(b) by strewing them reverently on the surface of the ground and covering them lightly with earth;

(c) by enclosing them, after obtaining the necessary faculty, in a part of the church or other consecrated building set apart for the purpose.

To scatter ashes broadcast on either consecrated or unconsecrated ground without covering them is a method which may be unseemly or irreverent and cannot be recommended.

28. In the light of the Canon and the two resolutions of the Convocations, the advice of the Legal Advisory Commission is that:

*It is unlawful for an Anglican minister to scatter (as opposed to strewing) cremated remains **as to do so is irreverent** (emphasis supplied).*

29. It is apparent that the correctness of the Commission's view is entirely dependent upon whether scattering is or is not reverent. With respect to the Commission, I do not think that this is demonstrated by reference to resolution of Convocation of York¹¹. Moreover the language of that resolution is that of recommendation not prescription; and the use of the word *may* indicate that its view was that scattering is not always irreverent.
30. I do not think that the scattering of ashes is intrinsically irreverent; and I would be confident that, in due time, FM and GM's ashes will be reverently scattered by their family. There can be no absolute security for this; in this context it is as well to remember that although, obviously, human remains should always be treated with reverence, the souls of the persons whose remains they are do not reside within them – in the words of the Psalmist, the ashes are but dust¹².
31. Canon 38 (4) (b) does raise another matter, namely the location of any disposal of ashes. It does not envisage the disposal of ashes in any location other than consecrated ground or land set aside for the disposal of ashes. However it is not an Act of Parliament. What it seems to me it is addressing is what a Minister needs to do, the ashes having been committed into his hands; and quite obviously it is directed to a first disposal. I think that it would be too narrow a reading to interpret the canon so as to forbid the disposal of ashes other than in consecrated ground or similar after their exhumation has been found to be in principle permissible on the basis that those connected to them do not want them to be in consecrated ground. What of course the family are saying is that, in the circumstances, the ashes should not be subject to the effects of consecration nor, also, to the application of canon law. In principle I think that this argument is correct and that canon law should not re-impose a restriction that consecration, properly considered, does not. Not without some hesitation, I have decided that neither does it do so in practice.

Conclusion

32. I have inquired of the Cemetery and it seems that no practical issues arise by way of objection to what is proposed. Accordingly, I give permission for a faculty to issue in the terms prayed: for the remains of FM to be exhumed and thereafter cremated; and for the remains of GM to be exhumed. I hope that what will happen in the light of the faculty will indeed bring some comfort to the family.

Concluding remarks

33. There are two matters about which I should make further observations.
34. First, I should say something more about the terms on which Lambeth LBC grants rights in respect of consecrated plots in the cemetery. It might seem that, on the face of it, granting burial rights on the basis that such rights have a limited duration cuts across the concept of the permanence of Christian burial.

¹¹ I recognise that the practice is irreverent may be the independent view of the Commission itself.

¹² The words of the Canon postdate the resolutions of the Convocations of Canterbury and York. It would have been possible for the Canon specifically to refer to burial and strewing as the only appropriate means of disposing of ashes. However it may not be correct that the draftsman had the possibility of scattering in mind when drafting the canon. The canons of 1964 and 1969 provided for ashes to be *interred or deposited*.

35. This is not so and the remains will remain subject to the protection of the Consistory Court after the expiry of the burial right granted by Lambeth LBC. This provision in respect of the consecrated part of local authority cemetery reflects what happens in respect of a “traditional” consecrated churchyard. There grave space goes on being used over and over again. The remains there interred are never exhumed but are displaced as necessary and appropriately re-arranged within the churchyard to facilitate on going burials¹³. As regards a local authority cemetery, in a similar way, grave spaces become available for re-use after the burial right that has been purchased has expired. (If a family purchase an extension of the right and go on doing so, it need never become available for re-use). However the expiry of the burial right does not automatically give Lambeth LBC the right to re-use the grave. Such re-use (usually be way of a process known as “lift and deepen”) is dependent the grant of a faculty.
36. What perhaps might be thought to be potentially misleading is that a person who is invited by a local authority to extend the term of a right of burial is unlikely to appreciate in full the implications of the termination of the right. He or she is perhaps unlikely to think (if such a person directs his or her mind to it) that at the conclusion of the term, the remains of a loved one will be inappropriately disturbed¹⁴; on the other hand they will rightly recognise that the position as to the terms of the burial have changed and, in particular, that any memorial may be removed. In practice, owners of burial rights who wish to see the grave together with its memorial preserved as it is will pay for an extension of the term; those who are content for the grave to be re-used in due course will not. I cannot say that the position is altogether satisfactory. The current law of burial and cremation is being looked at by the Law Commission but this is not, I think, a specific aspect of the matter which they have looked at. If the somewhat complicated legal position is raised by the owner of burial rights, it will be open to Lambeth LBC (and any other local authority in a similar position) to refer to this judgment for an explanation of the position.
37. The second matter relates to the guidance contained in the Legal Opinions. It might be appropriate for the Commission to look again at its advice and if perhaps it disagrees with the view that I have expressed in this judgment to expand what it says about the matter. I recognise that this may be a matter about which opinions may differ and that a change in the advice (and with it, received practice as regards ashes derived from cremation) may be a matter of some significance. I understand that the position in this Diocese is that ministers are advised, with reference to the Opinions, that it is indeed unlawful for a minister to scatter ashes. While the advice is extant, I would not suggest not giving that advice, although it would be appropriate also to refer an inquirer to this judgment.

PHILIP PETCHEY

Chancellor

20 May 2025

¹³ In practical terms the presence within the churchyard of memorials does present an impediment to the re-use of the burial space. However their removal and re-location within the churchyard (often along the walls) has happened in many places.

¹⁴ Of course anyone who is concerned can always inquire of the local authority.