Neutral Citation Number: [2016] ECC Swk 12

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF A PETITION FOR A FACULTY TO EXHUME THE REMAINS OF MICHAEL MCGRORY FROM LONDON ROAD CEMETERY, MITCHAM

BETWEEN:

MICHAELA MULHERN, KATHLEEN MULHERN AND EILEEN MCMAHON Petitioners

- and –

BERNADETTE MCGRORY AND RICHARD MCGRORY

Parties Opponent

JUDGMENT

Introduction

1. This is a petition received in the Registry on 2 April 2015 by Michaela Mulhern, Kathleen Mulhern and Eileen McMahon for permission to exhume the remains of Michael McGrory from a plot in London Road Cemetery, Mitcham. The plot is consecrated. Ms McMahon, who is a Fellow of the Institute of Legal Executives and Director of the Firm of McMahon Solicitors Limited acts on behalf of Michael McGrory, in circumstances which I shall come to explain.

2. The petition is opposed by Bernadette McGrory and Richard McGrory, who are the sister and brother of the deceased. I held a hearing into the matter on 15 June 2016. Ms McMahon appeared on behalf of the deceased and Michaela Mulhern and Kathleen Mulhern represented themselves. Bernadette McGrory and Richard McGrory were represented by Mr Desmond Murphy SC QC, of the Irish and Northern Irish Bars.

3. I need to explain the background. I shall generally refer to the late Michael McGrory as "Michael", Michaela Mulhern as "Michaela", Kathleen Mulhern as "Kathleen" and Bernadette McGrory as "Bernadette" and Richard McGrory as "Richard". No disrespect is intended thereby; it is simply that it makes the judgment easier to read and to understand.

Background facts

4. Michael McGrory was born on 12 April 1973. He had a difficult upbringing which included seven years (from the age of 3 to 10) in a childrens' home. Subsequently he suffered from mental health problems and sadly took his own life on 9 January 2009. He was buried in a grave in London Road Cemetery, Mitcham in which the remains of his brother (Alex) had previously been interred (in 2008).

5. As is well known, in the course of the 1980s and 1990s there emerged in the Republic of Ireland many cases of abuse in children's homes and similar institutions. To provide compensation to the victims in circumstances where civil claims might be difficult, the State established a compensation scheme, which it funded. This was by virtue of the the Residential Institutions Redress Act 2002. The scheme was administered by the Residential Institutions Redress Board.

Before his death, Michael had made a claim to compensation under the Act. After his death, the Act permitted his partner, Joanne Penfold, to continue the claim and on 30 September 2009, the Board made an award in respect of abuse it was satisfied that Michael had experienced at the childrens' home. However Ms Penfold was not entitled to the money. It appears that, absent an application to the High Court, the award would have lapsed. Having been notified of the situation by Ms Penfold and believing that Michael had had two children (but not, at this stage knowing very much about their identity or whereabouts), Ms McMahon made an application to the High Court in Dublin in order to protect the position.

6. On 19 April 2010, Peart J made the following order

IN THE MATTER OF THE RESIDENTIAL INSTITUTIONS REDRESS ACT 2002

AND IN THE MATTER OF AN APPLICATION ON BEHALF OF MICHAEL MCGRORY (DECEASED)

Upon motion of counsel for the Applicant made unto the Court this day ex parte and on reading the Affidavit of Eileen McMahon filed in Court this day and the documents and exhibits therein referred to

And on hearing counsel

The Court doth approve the award[1] *on behalf of the dependants of Michael McGrory deceased*

And the Court doth direct that the Residential Institutions Redress Board to forthwith pay into Court and to the credit of this action the award and that the funds be invested and the dividends thereon be accumulated until further order.

It will be seen that Ms McMahon was acting on behalf of Michael, and that Peart J accepted that she was so acting.

7. There followed a period in which Ms MacMahon investigated the position. In due course Michaela and Kathleen made contact with her. They believed that Michael, with whom they had lost contact in 2007, was their father, although his name did not appear on their birth certificates. On 7 January 2014, there was a hearing before the Residential Institutions Redress Board. I am not sure of the status of this hearing. However that may be, the Board heard evidence as to the paternity of Michaela and Kathleen and "indicated formally" that, had Michaela made an application at an earlier stage under section 9 (1) of the 2002 Act, it would have been "more than satisfied to proceed" with the application in the name of Michaela[2]. It appears to me that the reason why the Board expressed this view is that it considered that Michaela and Kathleen were Michael's daughters. However whatever view it took about this matter, it also made it clear that the destination of the award was a matter for the High Court and not for it.

8. DNA testing involving the comparison of the DNA of Michaela and Kathleen with that of Bernadette McGrory (which has in fact been carried out) is not conclusive of whether they are

[1] The text of the order identified the amount of the award. The Residential Institutions Redress Act 2002 does not permit publication of this detail in Ireland. I have redacted the order accordingly.

[2] The Board explained that Kathleen could not have done so because at the time she was a minor.

Michael's children. Joanne Penfold retained some of Michael's clothing but it has not been possible to isolate any DNA from it.

9. Against this background, on 25 March 2014, Eileen McMahon obtained an order from Peart J sitting in the High Court in Dublin as follows:

IN THE MATTER OF THE RESIDENTIAL INSTITUTIONS REDRESS ACT 2002

AND IN THE MATTER OF AN APPLICATION ON BEHALF OF MICHAEL MCGRORY DECEASED

Upon motion of counsel for the Applicant made ex parte unto the Court this day and on reading the affidavit of Eileen McMahon filed in Court this day and the documents and exhibits therein referred to

And on hearing said Counsel

IT IS ORDERED that the Residential Institutions Redress Board doth discharge all reasonable expenses arising from:

(i) the proposed exhumation and proposed DNA testing of Michael McGrory deceased lying at Mortlake Cemetery (otherwise known as Hammersmith New Cemetery) in the London Borough of Wandsworth, Greater London, England

(ii) the controlled DNA testing of Michaela Mulhern and Kathleen Mulhern for the purposes of establishing the paternity of the said Michaela Mulhern and Kathleen Mulhern in respect of their putative father the said Michael McGrory deceased.

And the Court doth reserve the costs of this Motion and Order.

Ms McMahon tells me that before the Court on this occasion were copies of the DNA tests that had been carried out together with a statement by Professor Allan Jamieson of the Forensic Institute, Glasgow explaining why that testing was inconclusive and why he considered that only a sample from the remains of Michael would provide a suitable reference sample.

10. Evidently what Peart J envisaged is that following the exhumation and DNA testing, the matter would come back to Court. If it had been established that Michaela and Kathleen were the daughters of Michael, it would make the appropriate consequential orders. For some reason the order that was made identified the wrong cemetery. Accordingly the matter was referred back to the Court.

11. On 14 May 2015, the Preisident of the High Court, Kearns J, made the following order:

IN THE MATTER OF THE RESIDENTIAL INSTITUTIONS REDRESS ACT 2002

AND IN THE MATTER OF AN APPLICATION ON BEHALF OF MICHAEL MCGRORY DECEASED

Upon Motion of Counsel instructed by Eileen McMahon Solicitor for Michael McGrory deceased in the presence of counsel for the legal personal representative of the estate of Michael McGrory Deceased

And on reading the Affidavit of Eileen McMahon filed in Court this day and the documents and exhibits referred to therein and on hearing said respective Counsel

IT IS ORDERED that

1. *the Order made herein dated 24 March 2014 be varied at paragraph (i) thereof to reflect that Michael McGrory deceased is lying at London Road Cemetery Mitcham (section 3 grave number 13783) under the London Borough of Southwark rather than Mortlake Cemetery (otherwise known as Hammersmith New Cemetery) in the London Borough of Wandsworth Greater London England*
2. *the commencement of the hearing (fixed for 4 June 2015 for 2 days) be adjourned until after the exhumation of the said deceased has taken place*
3. *the application for a case management/direction hearing be refused*
4. *the execution on foot of the within Order [sic] be stayed for a period of twenty eight days from the date hereof.*

12. The reference to the personal representative of the estate of Michael McGrory is to either Bernadette or Richard or both: this emerges from an order of the High Court dated 20 January 2014, which is as follows:

THE HIGH COURT (PROBATE)

Before the Honourable Mr Justice O'Neill

Sitting in open Court at the Four Courts, Dublin

20 January 2014

IN THE ESTATE OF Michael Christopher McGroary deceased

On Motion of Counsel for Bernadette McGroary and Richard McGroary the Applicants herein and on reading the Notice of Motion filed on 28th day of November 2013 and the affidavit of Bernadette McGroary sworn on 13th day of November 2013 and the documents and exhibits therein referred to

And hearing said Counsel and Counsel for the estate

And the Court being satisfied that the said Bernadette McGroary and the said Richard McGroary are the nearest next of kin of the deceased

IT IS ORDERED by the Court that the said Bernadette McGroary and the said Richard McGroary the applicants herein be at liberty to apply for a Grant of Letters of Administration Intestate in the estate of the said deceased

AND IT IS FURTHER ORDERED that the applicants recover their costs out of the estate of the said deceased and that such costs be taxed and ascertained in default of agreement[3].

13. It is clear (and Mr Murphy confirms) that Kearns J made the order on 14 May 2015 having heard counsel for the personal representatives[4]; that it was clear as to the distinction between Eileen McMahon as representing Michael for the purposes of the Residential Institutions Act 2002 and the role of his personal representative; and was content that Eileen McMahon could properly represent Michael for the purposes of the Residential Institutions Redress Act 2002. Bernadette and Richard appealed against that part of the order adjourning the commencement of the proceedings until after the exhumation had taken place. There was not an appeal against the first part of the order (providing for the substitution of the London Road Cemtery for the Mortlake Cemetery).

14. On 4 June 2015, Kelly J made the following order:

COURT OF APPEAL

BEFORE MR JUSTICE KELLY

IN THE MATTER OF THE RESIDENTIAL INSTITUTIONS REDRESS ACT 2002

AND IN THE MATTER OF AN APPLICATION ON BEHALF OF MICHAEL MCGRORY DECEASED

The appeal herein against that part of the Order of the High Court (The President) made on 14 May 2015 adjourning the hearing of the matter in the High Court (fixed for 4 June 2015) being listed for directions this day

Whereupon and on reading the Notice of Appeal filed on 15 May 2015 and the Respondents Notice filed on 18 May 2015

And on hearing counsel for Bernadette McGrory and Richard McGrory (referred to in Court this day as the First and Second Named Notice Parties and appellants) and counsel instructed by Eileen McMahon Solicitor for Michael McGrory deceased and Michaela Mulhern and Kathleen Mulhern) referred to in Court this day as the Third and Fourth Named Notice Parties) appearing in person

And the Court being informed that the First and Second Named Notice Parties are withdrawing their Appeal

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3 The order uses a different spelling of McGrory but there is no doubt that Bernadette and Richard McGrory are meant.

4 The use of the singular seems to be a typographical error.

IT IS ORDERED that the appeal be struck out and that the First and Second Named Notice Parties do pay to the Solicitor for Michael McGrory deceased the costs of the appeal to be taxed in default of agreement

AND IT IS FURTHER ORDERED that the said First and Second Named Notice Parties do pay the Third and Fourth Named Notice Parties their out of pocket expenses in appearing in Court this day.

The proceedings before the Consistory Court

15. Before setting out the history of the proceedings before this Court, it is appropriate that I should set out rule 1 and part of rule 17 of the Faculty Jurisdiction Rules 2013[5].

Rule 1 is as follows:

1.1.— Overriding objective
(1) The overriding objective of these Rules is to enable the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as practicable—
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways that are proportionate to the importance of the case and the complexity of the issues; and
(d) ensuring that it is dealt with expeditiously and fairly.

1.2. Application by the court of the overriding objective
The court must seek to give effect to the overriding objective when it—
(a) exercises any power given to it by these Rules; or
(b) interprets any rule.

1.3. Duty of the parties
The parties are required to help the court further the overriding objective.

1.4.— Court's duty to manage cases
(1) The court must further the overriding objective by actively managing cases.
(2) Active case management includes—
(a) encouraging the parties and any other persons concerned in the proceedings to co-operate with each other—
(i) in the conduct of the proceedings, and
(ii) in resolving, as far as possible, matters that are in dispute between them;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues (if any) need full investigation and a hearing in court and accordingly disposing of others summarily or on consideration of written representations;
(d) deciding the order in which issues are to be resolved;
(e) fixing timetables or otherwise controlling the progress of the case;
(f) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(g) dealing with as many aspects of the case as the court can on the same occasion;

[5] SI 2013 No 1916. The present matter is governed by these rules rather than the 2015 rules, since the petition was filed before 1 January 2016. The 2015 are to the same effect.

(h) dealing with the case without the parties needing to attend court;
(i) making effective use of technology; and
(j) giving directions to ensure that the resolution of a case proceeds quickly and efficiently.

1.5. Case management powers
The court's case management powers are set out in Part 17.

16. Rule 17 is as follows:

17.1.— The court's general powers of case management
(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or by any other enactment or any powers it may otherwise have.
(2) Except where these Rules provide otherwise, the court may—
(a) extend or shorten the time for compliance with any rule or court order (even if an application for extension is made after the time for compliance has expired);
(b) give permission to a party to amend any pleading or other document on such terms (including as to the giving of further public notice) as it considers just;
(c) adjourn or bring forward a hearing;
(d) require a party or a party's legal representative to attend the court;
(e) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
(f) direct that part of any proceedings be dealt with as separate proceedings;
(g) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
(h) consolidate proceedings;
(i) try two or more sets of proceedings on the same occasion;
(j) direct a separate trial of any issue;
(k) decide the order in which issues are to be tried;
(l) exclude an issue from consideration;
(m) dismiss or give judgment on any proceedings after a decision on a preliminary issue;
(n) order any party to file and serve an estimate of costs;
(o) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

17. Against the background of the order of the Irish High Court dated 21 March 2014, Ms McMahon has petitioned in this Court for a faculty to exhume the remains of Michael so that DNA testing may be carried out. She petitions in her role as representing Michael (or, perhaps more accurately his interests), under the Residential Institutions Redress Act 2002. Those interests are separate from those of Michael's estate, which is represented by Bernadette and Richard. As has been seen from the orders of the Irish Courts, Irish law contemplates this separate representation. In these circumstances I see no problem in Ms McMahon petitioning in the Consistory Court on behalf of Michael (or his interests).

18. Michaela and Kathleen also petition because they have a potential interest in the award under the Residential Redress Act 2002 and because, now that the matter has been called into question, they want definitively to establish whether Michael is their father.

19. On the face of it, this seems a reasonable basis for justifying a faculty to permit exhumation. Thus when on 29 April 2015, I gave directions in the matter I said

...if all the interested parties agreed, I would be minded to permit exhumation to permit DNA testing, provided it was likely to resolve the issue of whether Michaela Mulhern and Kathleen Mulhern were Michael McGrory's daughters. This would be on the basis that the particular circumstances of the case were exceptional. If Michaela Mulhern and Kathleen Mulhern are indeed Michael McGrory's daughters they should not be at risk of being deprived of his estate because of absence of proof. Moreover, and I think that ultimately this is the most important aspect of the case, I think that, the matter now having been called into question, they are entitled to know whether Michael McGrory is their father. This is irrespective of any entitlement to his estate.

20. I added

This is my preliminary view based on my understanding of the facts and the law. But I should make it clear that it is a preliminary view, without having heard argument (or conceivably evidence) to the contrary.

21. It seemed to me that the High Court in Ireland had proceeded on the basis that, if Michael's remains were exhumed, it would assist in the determination of the question as to whether Michaela and Kathleen were his daughters. However unless DNA testing was capable of assisting in determining this question, it would be pointless to order exhumation. Accordingly I did ask to be informed about this. That information was supplied by a letter dated 10 August 2015 written to Ms McMahon by Professor Allan Jamieson of the Forensic Institute, Glasgow. In that letter Professor Jamieson explained that DNA testing could prove positively that Michaela and Kathleen are not Michael's daughters. Second

... it can provide only a very high probability, but not scientific certainty, that they are [his daughters]. In my view, although I am not a lawyer, I believe that the result will be sufficient to enable a fair decision by the Court.

22. By a Form 5 dated 7 June 2015, Bernadette and Richard McGrory became parties opponent, setting out their reasons for objecting to exhumation. They considered that Eileen McMahon had no capacity to act in the matter and that there was no evidence to support exhumation. By a letter dated 22 July 2015, Eileen McMahon responded and in due course submitted the letter dated 10 August 2015 from Professor Jamieson. She also took the point that she was not satisfied that Bernadette and Richard were the siblings, or full siblings, of Michael.

23. By Directions dated 9 October 2015, I said:

It seems to me that what I need to do at this stage is to review the proceedings in the light of the matters set out above, namely:

- *the fact that Ms McMahon is recognised by the Irish Courts as acting on behalf of Michael McGrory deceased; and*

- *the fact that DNA testing would be able to establish a high probability that Michaela and Kathleen Mulhern are Michael McGrory's daughters.*

(I appreciate that, in theory, either of these facts might be contested. However the first is a matter which emerges from the documentation, as I have set it out; the second is a matter which

causes me no surprise reflecting as it does the view of the "man on the street" as to these matters).

I also review the matter in the light of the fact that I appreciate that the view of Bernadette McGrory and Richard McGrory is that Michaela and Kathleen Mulhern are not Michael McGrory's daughters.

Against this background, it is hard to see why Bernadette and Richard McGrory object to the exhumation proposed: Ms McMahon has authority to act in this matter and a DNA investigation is likely to resolve the matter at issue. The points taken by Bernadette and Richard McGrory in their Form 5 (Particulars of Objection) have, on the face of it, been addressed.

24. I then referred to the overriding objective under the Faculty Jurisdiction Rules 2013 to deal with cases justly and made the following direction:

... I do direct that Bernadette and Richard McGrory, acting by their solicitors, Canny Corbett do within 28 days hereof submit a short statement setting out the reasons why, in the light of the matters set out in this Direction, they continue to object to the exhumation of the remains of Michael McGrory. In the light of that statement I will consider what further directions are necessary in accordance with the overriding objective.

25. By a submission dated 23 October 2015, Richard and Bernadette made a submission which it is appropriate that I should set out in full:

(1) Having carefully considered the Directions Notice of 9 October 2015 in this matter we would respond as follows:

a. At paragraph 3 it is asserted that Eileen McMahon continued to act for Michael McGrory in his claim before the Redress Board, although he was deceased. She was entitled to do so in law as the claim was already in situ. Once the claim was adjudicated, that ended her involvement. Since 2010 she has had no authority to act in the case, as she has had no client and no specific authority from the High Court in Ireland to so act. Repeatedly in the period 2014-15 she claimed that she had been so authorized. Finally on Thursday 4 June 2015 in the Court of Appeal she admitted openly she did not act for the Mulherns. Furthermore we finally saw for the first time the order of Mr. Justice Peart which deals only with costs and not with the appointment of Eileen McMahon as a person entitled to seek orders in court. However it also became clear that morning that despite not having a client, she was closely collaborating with the Mulherns. It is our contention that the only persons with an interest in exhumation are the Mulherns and the McGrorys. Eileen McMahon is not instructed by them and cannot present a petition on their behalf. Further she has not authority to engage expert witnesses or incur expenses against the McGrorys. She has over 18 months held her self out as being entitled to become involved in the case while at all times evading the central issue: who is instructing her? And hiding behind her assertion that she is assisting the Redress Board in assuring that the deceased's award reaches the correct beneficiaries, something that she has no business interfering with, particularly when the redress board have their own solicitors capable of making such determination. Furthermore, Ms McMahon chooses to interfere with the determination process and show preference with certain claimants over others, because it suits her overall involvement when applying for her costs whilst intermeddling in the Estate of Michael McGrory Deceased, to which she has absolutely no involvement in or instruction

from any of the interested parties. We submit that her involvement of Professor Jaimeson again is in an effort to muddy the water and add further unnecessary expense to proceedings. We further submit that this abuse and manipulation of the legal system has carried on too long and should now be stopped.

(2) We cannot of course object to the Mulherns continuing with the Petition but the question then arises whether or not they have an arguable case to override the principal norms of burial law in the Anglican faith. They volunteered a DNA test in Northern Ireland which was properly carried out by an accredited organization. See copy DNA results herewith. Furthermore, when they expressed their dissatisfaction with same, another test was offered. This was not taken up. In addition there is no credible independent evidence that Michael McGrory might be the father beyond hearsay evidence in a psychiatric hospital.

We further more submit that whilst the deceased enjoyed the friendship and company of females, it was always felt by his siblings that he was a homosexual and followed that particular lifestyle. Whilst in the foster care with Mary and Sean Gallagher of Single Street, Bundoran, Co. Donegal, Ireland, he confided in his foster mother that he believed he was gay and intended to follow that lifestyle. His foster mother submits that she was not surprised to be told this by Michael because it was something she ha suspected for some time and his flamboyant demeanour and dress-sense tended to support her view of him,

Accordingly, given the gravity of what is being sought there must be a preliminary application (similar to that of applying for leave for judicial review) whether their application has reached that modest threshold or not. The application needs to be made by the Mulherns, and not by Eileen McMahon who does not represent them. If the Court accepts that there is an arguable case, it should go to a full hearing almost immediately. The McGrory family are completely opposed to the exhumation of their brother's grave primarily on religious belief grounds and secondly they offered to assist the Mulherns with further DNA testing, but the Mulherns chose not to proceed with this.

(3) Accordingly Bernadette and Richard McGrory for the reasons outline and under Article 6 of the Human Rights Act seek first;

a) A preliminary hearing to stop all further involvement in the matter by Eileen McMahon and
b) An order striking out the claims of the Mulherns on the ground that in fact and in law they have no arguable case;
c) That the present proposal to exhume the body of Michael McGrory is in direct contravention of Anglican Church Doctrine
d) That the reasoning of the Chancellor that Eileen McMahon is recognized as acting on behalf of Michael McGrory is flawed and misconstrued. She cannot act for him as he died late 2008; she was at most asked to find potential claimants; she was not and could not be authorized to act for the Mulherns. This is the application of the Mulherns, not the estate of Michael McGrory, never mind the deceased.

26. Subsequently, Eileen McMahon made an application on 14 December 2015 to the High Court in Dublin for the order dated made to be varied. No order was made on that application and the matter was adjourned generally with liberty to re-enter.

27. On 6 April 2016, I made further directions. I decided that no basis appeared on which it would have been appropriate to strike out the petition. I directed that there should be a hearing. Further I

made an order, defining the issues about which I wished to be addressed. It is appropriate that I set out the relevant part of the directions[6]

I want argument to focus on the relevant issues.

I remind myself that under the Faculty Jurisdiction Rules 2013 I am required to further the overriding objective to deal with cases justly. This includes, so far as practicable:

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways that are proportionate to the importance of the case and the complexity of the issues; and
(d) ensuring that it is dealt with expeditiously and fairly.

Under the Rules, the parties are required to help the court further the overriding objective; and I am required to further the overriding objective by actively managing cases.

It seems to me that two particular matters arise.

First, it is evident that the Parties Opponent are still taking the point that Eileen McMahon is not entitled to act in this matter. It seems to me that this is a matter that does not concern me. If the Irish Courts are content that she should act on behalf of Michael McGrory in connection with the claim that he has under the Residential Institutions Redress Act 2002, that is a matter for those Courts. She comes to this Court on the basis that she is seeking an order consequential upon an order that she has obtained from the Irish High Court. In any event, Eileen McMahon is one of three petitioners and even if she ceased to be a party to the proceedings, they would still continue on foot, being pursued by Michaela and Kathleen Mulhern. Accordingly at the hearing I do not wish to hear any argument about the entitlement of Eileen McMahon to act in this matter. Similarly, I do not wish to hear any arguments about the capacity of Bernadette and Richard McGrory to act in this matter. They are the personal representatives of Michael McGrory and, even if they were not, they consider that they are entitled to his estate and have elected to become parties to these proceedings. They are entitled to make the argument in front of me that I should not grant a faculty to permit the exhumation of Michael McGrory's remains.

Second, it is clear that the basic facts are not in dispute, nor what is set out in Professor Jamieson's letter dated 10 August 2015. Accordingly it will not be necessary to hear evidence and the hearing can be confined to legal submissions. I consider that the matter need not occupy the court for longer than one day.

The submissions of the parties

28. Ms McMahon points out that the petition is only made following orders made in the Irish Courts which are made on the basis that exhumation to permit DNA testing is appropriate; and that her petition is to facilitate that envisaged exhumation. More particularly, the petition is only being made in circumstances where there are no other sources of Michael's DNA (for example, from

[6] I also made directions about skeleton arguments and the arrangements for the hearing which I need not here set out.

his clothing). Following *In re Blagdon Cemetery*[7], she accepts that an order permitting exhumation should only be exceptionally be made, but submits that the circumstances in the present case are exceptional. She draws my attention to the following passage in *In re St Nicholas, Sevenoaks*[8], where the Court of Arches said:

> *It is apparent to this court that scientific advances are such that new techniques are increasingly likely to be called in aid to establish a variety of matters. DNA testing is well known to be of assistance in criminal investigation (a matter in which the coroner has jurisdiction to order exhumation from consecrated ground). It may be used for identification of a body that has been discovered whose identity is not clearly known, as in the case of the Tsarina and her family.* ***The justification put forward for conducting a DNA test may have practical consequences such as inheritance rights*** *or other property issues. The reasons may be many and varied but the common element, if an application is to succeed, is the proof of a good reason for the exhumation in order to carry out a DNA test*[9] (emphasis supplied).

29. Ms McMahon says that the Court evidently envisaged that a case such as the present might justify an order for exhumation. In the passage set out the Court had gone on to say *There can be no proper authorisation on the basis of a whim or idle curiosity* but, Ms McMahon submitted, the present case (unlike the Sevenoaks case itself) was not one of a petition based on a whim or idle curiosity. Finally, Ms McMahon relied on paragraph 48 of the judgment of Scott Baker J in *Rose v Secretary of State for Health.*

> *Respect for private and family life has been interpreted by the European Court to incorporate the concept of personal identity (see* Gaskin v United Kingdom *(1989)12 EHRR 36). Everyone should be able to establish details of his identity as a human being (*Johnston v Ireland *(1987) 9 EHRR 303 para 55). That, to my mind, plainly includes the right to obtain information about a biological parent who will inevitably have contributed to the identity of his child. There is in my judgment no great leap in construing Article 8 in this way. It seems to me to fall naturally into line with the existing jurisprudence of the European Court.*

30. Michaela and Kathleen adopted what Ms McMahon had said. They said that the petition was not about money. They were sure that Michael was their father and they wanted this to be proved.

31. Mr Murphy accepted that the background facts as set out above were accurate. He also accepted that determining an entitlement to an inheritance could provide exceptional circumstances justifying exhumation. However he submitted that it was not sufficient simply to assert that the exhumation was necessary to determine an inheritance. His argument was that there was no evidence before the Court upon which it could properly act.

32. He relied particularly on the headnote in from the judgment of the Court of Arches in *In re St Nicholas, Sevenoaks:*

> *... the basic principle was that only when* ***special circumstances*** *had been proved to the satisfaction of the court would a faculty be granted permitting exhumation of human*

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[7] [2002] Fam 299.

[8] [2005] 1 WLR 1011.

[9] See paragraph 30.

remains which had been interred in consecrated ground; that in determining ***the test of special circumstances was not the scale of what was proposed but the credibility of the reasons put forward for the exhumation****, whether special circumstances had been established the court had to carry out an evaluation of the evidence, and* ***the evaluation was not to be any less rigorous because the proposed interference with remains was small****; that the test for the grant of a faculty was* ***not the sincerity and strength of a petitioner's desire to find out about his forbears*** *but whether* ***on the evidence he had proved a cogent and compelling case for*** *the exhumation sought, and an interest in genealogy alone could not justify exhumation for what might simply be a speculative exploratory expedition; that although there was a probability that access could be gained to the vault of the deceased and a specimen of DNA could be obtained from the remains, thus enabling potentially successful DNA testing to be carried out, that in itself did not constitute justification for doing so; that a desire, in the absence of any records, to investigate by means of DNA a possibility of the parentage of a grandfather did not engage the right to respect for private and family life guaranteed by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in any event, because of the remoteness of the relationship the petitioner sought to have investigated, no breach of article 8 could be established by a refusal to grant a faculty; and that on a consideration of all the evidence placed before the court the petitioner had failed to prove on a balance of probabilities that there was a real likelihood of a connection between the deceased and L, or that an exception should be made to the presumption that a body once interred should not be disturbed* (post, paras 13, 15, 29, 33, 34, 58-61).

33. In Mr Murphy's submission, so far from the Petitioners having shown special circumstances justifying exhumation, there was essentially no evidence at all on which the Court could act – that is, evidence going to show that Michaela and Kathleen were the daughters of Michael. He pointed out that Michaela and Kathleen had not given evidence, although they had been given the opportunity to do so.

34. Mr Murphy also asserted that Professor Jamieson's letter dated 10 August 2015 was not admissible, so that I could not properly conclude that DNA testing would be likely to establish whether Michaela and Kathleen were Michael's daughters.

35. Ms MacMahon accepted that the burden of proof was on the petitioners but disputed that she had to prove that Michaela and Kathleen were Michael's daughters. She had not sought to lead evidence about these matters in the light of my directions dated 6 April 2016.

Consideration

36. It cannot be the case as a matter of law that this Court has to be satisfied that Michaela and Kathleen are the daughters of Michael before making an order which would permit exhumation: nothing in statute or case law so provides. If in fact it were already clear that Michaela and Kathleen were Michael's daughters there would evidently be no reason to order exhumation; but of course Mr Murphy does not resist an order permitting exhumation on this basis. I think that what Mr Murphy's submission comes to is this, namely that he says that it would not be **appropriate** to make an order without there being evidence that on the balance of probabilities Michael was the father of Michaela and Kathleen; or (putting the point another way) there would not be a proper factual basis upon which the Court could act unless there were such evidence. I think, further, that he submits that even if it were not necessary for the Petitioners to prove as

much as this, nonetheless what they have proved is an insufficient basis upon which to make the proposed order.

37. It seems to me that in no case can the Consistory Court act without having a requisite factual basis for so acting. I put the matter in this way because in the usual case (one that is unopposed), there will not be a hearing and the Chancellor will proceed on the basis of written material which is not formally proved or subject to attestation of its truth. In ordinary language one would describe this material as the evidence but I can see that, strictly speaking, it can be said that it does not enjoy this status. However, where no-one is objecting to the grant of a faculty, there is no need for a Chancellor formally to require proof of documents and it would be a waste of money for him to do so. In a contested case, matters are rather different and potentially everything could be in issue and the Petitioners (who have to prove their case) might be "put to the proof" by the parties opponent. However there is bound to be some common ground and a Chancellor will want to indentify it in order to avoid the waste of time and costs in requiring proof of matters which are not in dispute. This was the process that I was engaged in when I made my directions on 6 April 2016. As will have been seen I was able to identify basic facts that were not in dispute. It seems to me those facts provide the basis on which I may properly make an order for exhumation.

38. Let me explain why.

39. It seems to me that the order dated 25 March 2014 is highly relevant.

40. Mr Murphy at one stage argued that this order was conditional, so that all that it was doing was making provision for the payment of the expenses connected with the exhumation and DNA testing if either of these took place. Even looked at in this narrow way, it would have demonstrated that the Irish Court, charged with determining the appropriate destination of the €80,530 paid into Court thought it appropriate that these costs should be funded. But in fact it goes further. It actually envisages that the exhumation and DNA testing will take place to assist in its determination. Mr Murphy says that it was an *ex parte* order. This of course is apparent, but the order dated 14 May 2015 was *inter partes*. To this Mr Murphy says that the matter then at issue was the emendation of the order dated 25 March 2014 by the substitution of a different cemetery. The appeal against that part of the order adjourning the commencement of proceedings (which was abandoned) was in relation to a procedural matter and did not go to the merits of the order.

41. It is clear that the High Court in Ireland has taken the view that in order to determine who is entitled to the award of the Residential Institutions Redress Board it is appropriate that there should be DNA testing of a sample taken from Michael's remains; and it has taken this view based on evidence presented to it. Bernadette and Richard evidently consider that the order dated 25 March 2014 should not have been made but they did not pursue an application to set it aside or to appeal it. I think that I should accord a high degree of respect to the order dated 25 March 2014. There is a comity between courts which, in the present case, means that I should work on the basis that the decisions of the Irish Courts are made on a proper basis. This does not mean that I **necessarily** should accept that the order of a court of a jurisdiction even as well respected as that of the Republic of Ireland is made on a proper basis but it does mean that I should so accept it unless cause be shown otherwise. In the present case it seems to me that so far from cause being shown otherwise, the order dated 25 March 2014 was well made. Indeed had I been

aware of the full background I might perhaps not have asked in my directions dated 29 April 2015 for further information about DNA testing. As it is, of course, the letter dated 10 August 2015 written by Professor Jamieson to Ms MacMahon, reiterating the views he had earlier expressed for the benefit of the Irish High Court, goes to support that order. By my order dated 6 May 2016, I did not require Professor Jamieson to be called as a witness and it seems to me that this was a proportionate order of case management in the circumstances. What he said was in no wise surprising or seemingly controversial.

42. I think that Mr Murphy was correct to accept that determining an entitlement to an inheritance could provide the special circumstances justifying exhumation. Given this and in the light of the view I take of the order dated 25 March 2014, it seems to me that the proper basis exists for me to make an order permitting exhumation.

43. This is sufficient to decide the present case. However the case is about more than an inheritance. Michaela and Kathleen wanted to emphasise to me that, from their point of view, what was of most importance was not the money but knowing whether Michael was or was not their father. This seems to me completely understandable. Doubts as to the paternity of Michaela and Kathleen having been raised, I consider that there would have to be very strong reasons to refuse to permit exhumation in circumstances where the DNA testing which exhumation would facilitate would be likely to resolve those doubts. In the *Sevenoaks* case, the petitioner was seeking to establish that his grandfather was the illegitimate son of Princess Louise, a daughter of Queen Victoria. Such a possibility was supported by a long held belief in the Petitioner's family but by no evidence (or by no evidence of any weight). In these circumstances, the petition was speculative. The present petition is not speculative. In *In re St Nicholas, Sevenoaks*, the Court of Arches distinguished *Rose v Secretary of State for Health* on the basis that case had been concerned with the disclosure of records already in existence with reference to the characteristics of a biological parent as opposed to the facts before them which concerned an investigation by means of DNA as to the possibility of the parentage of a grandfather[10]. In these circumstances, the Court held that Article 8 was not engaged. The present case does not concern the disclosure of pre-existing records. Nonetheless if it were necessary to do so, I would hold that Article 8 is engaged. Thus, if I were otherwise minded to refuse the petition, Article 8 might have caused me to re-examine the postion. But I am not so minded. I think that Michaela and Kathleen's natural desire in the circumstances to know whether Michael is their father is a sufficient reason to justify exhumation of Michael's remains without the need to invoke the protection of the Human Rights Act 1998.

44. Finally, I think there is merit in testing my conclusion by reference to the position were I to reject the petition. The Irish High Court would have to determine who was entitled to the sum paid into court without the assistance of DNA evidence which would be likely to be determinative. Whatever the outcome of those proceedings, Michaela and Kathleen would be likely to feel a continuing doubt as to their paternity. I would be upholding the principle that a Christian burial should not be disturbed without good cause but, self evidently, that principle does permit of exceptions. Richard and Bernadette would have the comfort of knowing that their brother's remains had not been disturbed but, on the other hand, it is hard to see why in the present circumstances they are so opposed to the exhumation. They evidently believe that Michaela and

[10] See paragraph 34.

Kathleen are not the daughters of their brother; if they are correct, DNA testing is likely to demonstrate this. It seems to me that the consequences of refusing the petition would be very unsatisfactory.

Precise terms of the order

45. Although the Court of Arches stressed in *In re St Nicholas, Sevenoaks* that it was not the scale of what was proposed that was determinative, it is important to note that what is proposed does not involve an exhumation which is permanent. After the remains have been removed to a mortuary, the necessary samples can be removed within a short period and the body re-interred. I require such re-interment to happen as soon as reasonably practical. As to the samples, I direct that they should be removed under the direction of Professor Jamieson and that any part of the sample that is not used in the testing should be reinterred within the grave as soon as possible. Richard and Bernadette should have the opportunity to instruct an expert to carry out separate testing on their behalf. Thus I direct that the exhumation shall not take place for a period of 28 days within which period Richard and Bernadette should notify the Court whether they do want their own expert to take samples. If they do, I will then make further directions.

46. There will in any event be liberty to apply in respect of the implementation of this order. It goes without saying that I require the exhumation to be carried out with due regard to sensitivity of the operation, the details of which should be sorted out between the undertaker (Rowland Brothers) and the manager of the cemetery (the London Borough of Merton).

47. The Petitioners would normally pay the costs of the Court. If they seek any different order, they should make an application within 21 days. If any party wishes to make an order in respect of party and party costs, they should similarly make an application within 21 days.

Conclusion

48. The present case has a certain resonance, coming as it does shortly after DNA testing revealed that the biological father of the Archbishop of Canterbury, Most Revd Justin Welby, was not Gavin Welby, who had brought him up. The Archbishop wrote:

> *My experience is typical of many people. To find that one's father is other than imagined is not unusual. To be the child of families with great difficulties in relationships, with substance abuse or other matters is far too normal.*

49. I know that Michaela and Kathleen believe that Michael was their father and fervently hope that this may be proved to be so. But this cannot be certain. In the present case there undoubtedly have been and are difficulties in the relationships in the family concerned in this case. If the DNA testing is decisive, it will be necessary for Michaela and Kathleen or Richard and Bernadette to come to terms with a result which, at present, they cannot contemplate. But however important it is to know about one's true parentage (and the Archbishop did not say it was unimportant), the Archbishop stressed in his case that at the most profound level nothing had changed: he found himself in Jesus Christ and not in genetics. I do not know anything about what Michaela and Kathleen believe but the Church believes that they are ultimately important for what they are in themselves and not because of their human parentage. I hope that they may come to feel this in the days that lie ahead, whatever the outcome of the DNA testing.

PHILIP PETCHEY
Chancellor
15 July 2016