Neutral Citation Number: [2019] ECC Wor 5

In the Worcester Consistory Court

Archdeaconry of Worcester: Parish of Naunton Beauchamp: Church of St Bartholomew

Faculty petition (19-10) relating to the exhumation of the cremated remains of Mrs Kathleen Etty-Leal

Judgment

Introduction

1. Mrs Kathleen May Etty-Leal moved from Hertfordshire to Naunton Beauchamp in Worcestershire after the death of her husband in 1981, to be with her grandchildren – all of whom apparently now live elsewhere.

2. In due course, she died, on 7 October 1993. She left four children – Mrs Sarah Worboys, Mr Charles Etty-Leal, Mr Christopher Choombala and Ms Anne Nilavhadanananda. Mrs Worboys lives in Suffolk, and is the present petitioner. Mr Etty-Leal lives elsewhere (apparently in the UK). Mr Choombala and Ms Nilavhadanananda now live in Thailand.

3. A funeral service was held at St Bartholomew's Church at Naunton Beauchamp, followed by a cremation. Mr Etty-Leal and his wife went to the crematorium, while the mourners, including Mrs Worboys and Mr Choombala, went direct to the wake. Ms Nilavhadanananda was not at the funeral.

4. Mrs Etty-Leal's husband's ashes had been buried at Stoke Poges. Her ashes were buried in the churchyard at Naunton Beauchamp, in a china urn. This was done at the insistence of the then wife of Charles Etty-Leal, even though Mrs Worboys pointed out several times that it was a mistake to bury her ashes, as she had always wished them to be spread over her homeland, with her ancestors, in the Welsh hills. The petitioner was invited to explain why the wishes of Mrs Etty-Neal's daughter-in-law had prevailed over those of her four children, but she was unable to do so.

5. It is thought that the ashes are likely to be still in good condition.

The present proposal

6. Mrs Worboys now seeks a faculty to allow Mrs Etty-Neal's ashes to be exhumed, and then scattered in the hills north of Newtown in Montgomeryshire (now Powys), where her ancestors come from. There was a plaque commemorating the interment; this would be removed.

7. She explains that "ever since the funeral I have wanted to right this wrong for my mother, but have been unable to do anything until recently, when my brother

and sister-in-law were divorced, and I found my brother is in total agreement with me, as are our half-brother and sister in Thailand."

8. Charles Etty-Leal, who describes himself as "next of kin to Mrs Etty-Leal and registered owner of the grave plot", has confirmed in writing that he is happy for the ashes to be exhumed and scattered in Wales. I have seen statements from Mr Choombala and Ms Nilavhadanananda, in which they say (in identical terms) that they remember their mother speaking of wishing her ashes to be spread over the Welsh hills and not being put underground, as she was extremely claustrophobic.

9. The PCC of Naunton Beauchamp has no objection to the proposed exhumation, but offers no further comment.

10. The views of Mrs Etty-Leal's former daughter-in-law are not known – and have not been sought.

11. Mrs Worboys also pointed out that, if the petition were to be granted, that would release a plot that could be used by another resident of Naunton Beauchamp.

The law

12. The general position in law is as explained in the decisions of the church appeal courts in *Christ Church, Alsager* [1999] Fam 142 and *Blagdon Cemetery* [2002] Fam 299. The Chancery Court of York in *Alsager* first emphasised that, once a body or ashes have been interred in consecrated ground, there should be no disturbance of the remains save for good and proper reasons. It also noted that, although re-interment in other consecrated ground would normally be necessary, it is possible to think of other circumstances, such as the scattering of ashes at sea, where this might not be so. The Court then considered various factors that might be relevant, some arguing for the grant of a faculty and some against.

13. That decision was reviewed by the Court of Arches in *Blagdon*, along with a number of decisions of consistory courts, and in the light of a consideration of the theology of burial, on the basis of a paper by Bishop Christopher Hill. The Court emphasised again that "permanence of burial is the norm in relation to consecrated ground" (para 27), but 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' …, 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" (para 33).

14. The Court identified six particular types of 'exceptional circumstances', noting the following points:

    (i) the fact that it is impossible or unreasonably difficult for relatives to visit the grave of the deceased is not a relevant factor;

(ii) the passage of a substantial period of time will argue against the grant of a faculty, but will not alone be determinative;

(iii) the discovery of a mistake at the time of burial may justify the grant of a faculty; but not simply a change of mind on the part of relatives or others;

(iv) local support (including that of the PCC) is not a determining factor; but the views of close relatives are very significant;

(v) the possibility of creating a precedent is relevant, because it is desirable to ensure that similar petitions are dealt with, as far as possible, in the same manner; and

(vi) the possibility of creating a family grave is a factor in favour of allowing a petition.

15. There have been a large number of decisions in consistory courts throughout England in the 17 years since the decision in *Blagdon*, most of which (around 140 in number) are recorded on the website of the Ecclesiastical Law Association. Many have directly concerned the particular issues noted in that case, summarised above. And in the majority of cases, a petition has been refused – particularly where relatives have sought to move human remains for reasons that could be summarised as "convenience" or "change of mind".

16. But a number have been allowed. As well as those arising from a mistake at the time of burial, cases have involved a wide variety of circumstances that have been considered by chancellors to be "exceptional". In particular, I note several cases in the Diocese of Southwark in which exhumation has been permitted, partly on the basis of a consideration of the different theological and cultural perspectives of those from a Buddhist tradition.

Theology

17. I have mentioned already that the decision of the Court in *Blagdon* was partly on the basis of a reflection on the theology of burial by Bishop Christopher Hill. That has subsequently been published, in a slightly expanded form, at (2003-2004) 7 Ecc LJ at 447. In his paper, Hill looks at the theology and practice of Christian burial, and then reflects as follows:

> "There must be reverence and respect for human remains, but they are not ultimately what matters. The permanent burial of the physical body or 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 … 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."

18. It may be noted that most of this passage is quoted in the judgment in *Blagdon*, but not the first and the last sentences.

Procedure

19. A faculty petition that has, as in this case, attracted no objections, is normally determined on the basis of written representations without further ado. However, where a chancellor is unwilling simply to grant a faculty, or considers that a decision on the basis of written representations is inappropriate, the petitioner must be offered a chance to appear at an oral hearing (see Faculty Jurisdiction Rules 2015, r 14.1).

20. In this case, I first invited the Deputy Registrar to seek from the petitioner further information in writing, so that I could if possible proceed to grant a faculty. I am grateful for her assistance in responding to that invitation, and I have summarised above the information she supplied. He also drew attention to the legal position as summarised at paragraphs 12 and 13 above. However, once I had all the factual information I needed, I was still not convinced that the petitioner had demonstrated that the circumstances were sufficiently "exceptional" to justify the grant of a faculty. I accordingly offered her a chance to be heard.

21. Mrs Worboys stated that she did not wish to appear at an oral hearing. As she put it,

> I would <u>not</u> have been able to stand before you with [the Deputy Registrar] in attendance, without crying during the whole proceedings, because to me this is an extremely and extraordinarily emotive subject for me.

22. She also re-emphasised her principal point:

> Having her body or ashes put underground was abhorrent to my mother and I had reminded my brother of that at her funeral: Her wishes were not adhered to then so I wish, for her, that you will release her ashes in accordance with her wishes, now.
>
> My mother moved to Naunton Beauchamp, from Hertfordshire, solely to be near her grandchildren, only living there for about ten years at the most and now not one member of her family live anywhere close to visit her regularly; I feel she must be extremely lonely.
>
> So, please release her ashes to spread over her beloved Welsh Hills (as was her wish) and bring some joy to all of us, including her. My half-brother and half-sister (blood relatives as well), being Buddhists, would also be extremely happy for this to happen as they give the ashes of their loved ones to the sea and do not bury them."

23. In those circumstances, I am content to determine the petition on the basis of written representations.

Discussion

24. It is clear from the above analysis that, from both a legal and a theological standpoint, the normal rule is that the interment of a body or cremated remains

is to be regarded as permanent. It follows that a faculty should only be granted exceptionally for exhumation. Is this case exceptional?

25. Some of the factors mentioned by Mrs Worboys do not amount to exceptional circumstances, sufficient to justify a faculty – in particular, those in the second paragraph of the extract from her representations at paragraph 22 above.

26. On the other hand, I note the underlying basis of her concern is that the decision to bury her mother's ashes was made wrongly at the outset. This was, in other words, not a question of the relatives changing their mind, but knowing from the outset that they were being forced to make a decision that their mother would not have wanted and that they would always consider to be wrong.

27. I have already noted that it is not clear why the wishes of Mrs Etty-Leal's daughter-in-law were allowed to override those of her four children, but people are often under considerable stress at the time of a close relative's death. Mrs Worboys, in answer to a question from me as to what might be the daughter-in-law's views on the present proposal, said simply "not applicable". She is in any event now divorced from Mr Charles Etty-Leal, and is therefore no longer a member of the immediate family.

28. I have noted that all four children are entirely in agreement – which is a factor mentioned in *Blagdon* as being in favour of allowing exhumation. And two would be particularly happy, as to scatter the ashes as proposed would be in line with their Buddhist customs. I do not give the latter point great weight, but it is in favour of allowing the petition.

29. Perhaps most significantly, I observe the evident distress of Mrs Worboys herself – even 26 years after her mother's death. She clearly has no wish to "hold on" to her mother's remains, to use Bishop Hill's phrase – this is, in other words, not a "portable remains" case. And whilst it is "generally" right that mourners should learn to let go, it appears that she will be unable to do so until her mother's ashes have been scattered as proposed; only then, it seems to me, will she be able to recover her psychological and spiritual health.

Conclusion

30. In considering whether petitioners have made out a case for the circumstances of a proposed exhumation being 'exceptional', there will inevitably be borderline cases; and I consider that this is one such. But I am, on balance, satisfied that the circumstances in this case are exceptional, such that a faculty should issue to allow the ashes to be exhumed, to be disposed of without further delay as proposed.

CHARLES MYNORS
Chancellor

9 December 2019