IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF THE GARDEN OF REMEMBRANCE, ST EDWARD, KING AND CONFESSOR, NEW ADDINGTON

AND IN THE MATTER OF A PETITION BY MONICA MCGOWAN

JUDGMENT

Introduction

1. This is a petition by Mrs Monica McGowan for a faculty to exhume the cremated remains of her father, Mervyn Ferdinands, from the Garden of Remembrance in the churchyard of the church of St Edward, King and Confessor, New Addington. It is proposed that the remains should be re-interred in the grave of Mrs McGowan's mother, Mrs Irma Ferdinands, in Springvale Botanical Cemetery, Springvale, Melbourne, Australia. The part of the cemetery in which Mrs Ferdinands' grave is situated is consecrated. The petition is supported by all Mr Ferdinands' surviving children, by the Incumbent (Fr Martin Powell SCP) and Parochial Church Council of St Edward's Church, New Addington. It is also supported by Fr Anthony V Poole who is the parish priest of St Christopher's (Anglican) Church in East Bentleigh, Victoria, who conducted the funeral service of Mrs Ferdinands. Fr Poole would conduct a service for the re-interment of Mr Ferdinands' remains if the petition be granted. The Ministry of Justice has indicated that in the circumstances a licence under section 25 of the Burial Act 1857 will not be required, but I think that Mrs McGowan will need to check that this advice does hold good where exhumation to consecrated ground abroad is proposed. In any event, I do not imagine that there would be a difficulty about a licence if required.

2. Having read the papers, I formed the preliminary view that this would not be an appropriate case in which to grant a faculty. It would not have been appropriate to dismiss the petition without giving Mrs McGowan the opportunity of a hearing before me, and she took advantage of that opportunity. The hearing took place on 14 October 2013. I am grateful both for the clarity and also the restraint with which Mrs McGowan presented her case. In the light of a fuller appreciation of the facts of the case, and upon further reflection, I have decided that it is appropriate that a faculty should issue.

The facts

3. On 22 October 1924, Mervyn Ferdinands and Irma Hufton were married in All Saints' Church, Bangalore in India. At the time of his marriage, Mr Ferdinands was living in Travancore where he worked in the rubber plantations, and the first three of Mr and Mrs Ferdinands' children were born there. Thereafter they moved to Secunderabad where Mr Ferdinands worked as Treasurer and Secretary of St John's Anglican Church and Mrs Ferdinands taught in St Anne's Church of England School. It was here that their remaining ten children were born. The Petitioner, their penultimate child, was born in 1943.

4. At the time of his retirement in 1959, Mr Ferdinands was Superintendent of the Bishop Whitehead Institute for Soldiers, an establishment run by the Church of England. Mr and Mrs Ferdinands then moved to live in Calcutta, where their two eldest sons lived.

5. The Petitioner, who had qualified as a secretary, married in 1964 and moved to England. Of her surviving nine brothers and sisters, two now live in the USA, one is still in India (but with residency rights in New Zealand) and six are in Australia. She is now widowed and of her three children, two live in Australia and one in Canada.

6. Mr and Mrs Ferdinands came to visit the Petitioner in England in 1965, 1967 – 1968 and in 1972. These were extended holiday visits, and in 1972 they were planning to go home before the onset of winter because Mr Ferdinands had not liked the English winter that he experienced in 1967 – 1968. Sadly, however, while in England Mr Ferdinands was diagnosed as having terminal cancer and he died in the Mayday Hospital, Croydon on 1 January 1973. His body was cremated and his remains interred in the Garden of Remembrance in the churchyard of St Edward, King and Confessor, New Addington. Before his death, the Vicar and Curate of that church – the Revd Alan Simper and the Revd Christopher Scott respectively – would bring Mr and Mrs Ferdinands communion at home.

7. Only Mrs McGowan and one other sister were able to attend the funeral.

8. After the death of Mr Ferdinands, Mrs Ferdinands stayed on with Mrs McGowan for a while before returning to India, where she lived until 1982, at which point she moved to Australia. However, until she was prevented by her health in the late 1980s, Mrs Ferdinands came regularly back to England to visit Mrs McGowan and her husband's grave. She died in 1999 and, as stated above, was buried in Springvale Botanical Cemetery.

9. Mrs McGowan has now decided to emigrate to Australia, to be near five of her remaining brothers and her younger sister. She wishes to take the remains of her father with her so that they can be interred with the remains of her mother.

The law

10. In *In re Matheson*[1] Steel J observed

> *From the earliest times it has been the natural desire of most men that after death their bodies should be decently and reverently interred and should remain undisturbed*[2].

11. This accords with the Christian theology of burial. This was summarised by the then Bishop of Stafford, the Rt Revd Christopher Hill, in a paper which he prepared for the Court of Arches in the case of *In re Blagdon Cemetery*[3]. In that paper Bishop Hill said:

> *The funeral itself articulates very clearly that its purpose is to remember before God the departed; to give thanks for their life; to commend them to God the merciful redeemer and judge; to commit their body to burial/cremation and finally to comfort one another ... 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. 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."*

This passage was quoted by the Court of Arches in *In re Blagdon Cemetery* and approved by it[4].

12. The reference to "portable remains" is to a class of case with which most Chancellors will be familiar. A good recent example is the case of *In re Thornton Cemetery*, which is a case from the Diocese of Bradford[5]. This was a petition by the widow in respect of the remains of her

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[1] [1958] 1 WLR 246.

[2] See p248.

[3] [2002] Fam 299.

[4] See paragraph 24.

[5] It was decided by Walford Ch on 27 February 2013.

husband, who had died two years previously and whose cremated remains had been interred in Thornton Cemetery in Bradford. Her petition said:

> *... we are all moving to Bridlington and all his family are over there. So we want to take him with us. Otherwise there will be no-one here for him. It is too far to travel as no-one drives.*

The petition was refused.

13. In 1998 in *In re Christ Church, Alsager*[6], the Chancery Court of York had occasion to consider an appeal against the decision of the Chancellor of the Diocese of Chester who had refused a petition for exhumation. As well as considering the facts of that particular case, it gave some general guidance, suggesting that the appropriate test to be applied was

> *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?*

14. As regards "portable remains" the Court observed:

> *If there is no ground other than that the petitioner has moved to a new area and wishes the remains also to be removed this is likely to be an inadequate reason*[7].

15. The facts to which the test enunciated by the Court was applied were as follows. In 1981 the petitioner's father had died and his remains cremated and interred in the consecrated Garden of Remembrance in the churchyard of Christ Church, Alsager. In 1995, the petitioner's mother died and was buried about ninety feet way. Her remains were buried rather than cremated (and thus not buried in the Garden of Remembrance) because shortly before her death she had been received back into the Roman Catholic Church. The petitioner believed (erroneously) that the Roman Catholic Church did not permit cremation. These matters were not held to amount to a good and proper reason for exhumation.

16. I note, finally, in respect of *In re Christ Church, Alsager* that the Court considered that the possibility of creating a precedent was irrelevant[8].

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[6] [1999] Fam 142.

[7] See p149H.

17. Shortly after the judgment in *In re Christ Church, Alsager* the Court of Arches had occasion to consider the principles governing exhumation in *In re Blagdon Cemetery*, to which I have already referred. This case concerned the remains of Steven Whittle, who had been tragically killed in an industrial accident at the age of 21. His father, Frank Whittle, was a publican, who during his working life moved from time to time to manage public houses in different parts of the country. At the time of Steven's death his father was working in Blagdon, Somerset and his son's remains were interred in the cemetery there. In due course Mr Frank Whittle and his wife retired to Stowmarket in Suffolk. They bought a triple depth grave in the cemetery there and it was their intention, if a faculty to exhume Steven's remains were granted, that Steven's remains and, in due course, their remains should be interred in that grave.

18. Differing from the Chancery Court of York, the Court of Arches suggested that the following was the appropriate general approach to petitions seeking exhumation of human remains:

> *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 ed (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*[9].

19. The Court made some observations about a number of factors that can arise in relation to exhumation cases. As regards "portable remains" cases, it said:

> *We were shown a medical certificate relating to Mr Whittle's health in the context of his inability to drive from Stowmarket to Blagdon so that he and his wife might visit Steven's grave. Mr Whittle is receiving appropriate medication and, as a senior citizen, he is in no different a predicament than many thousands of his age group who find that advancing years have an effect on certain aspects of life, including travelling. In so far as Briden Ch treated the petition of Mr and Mrs Whittle as one seeking exhumation of Steven simply in order to visit*

[8] See p150D.

[9] See paragraph 33.

> *his grave more easily, we cannot fault his conclusion that this was not a sufficient reason for exhumation. Mr Hill wisely abandoned any reliance upon Mr Whittle's state of health in the course of his argument at the hearing of this appeal. 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 In re South London Crematorium(unreported) 27 September 1999 :*
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> *"Most people change place of residence several times during 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."*
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> *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*[10].

20. It will be noted that refusal of such petitions involves harshness to individual petitioners. It is easy to accept as a matter of principle what Bishop Hill says about "letting go" as opposed to "holding on" but it is of course difficult for some people to let go. They derive great comfort from visiting the grave of their deceased relative, particularly when the deceased has died in tragical circumstances or tragically young. (*In re Thornton Cemetery* concerned the remains of a husband who had died tragically young). However this may be, the one matter that certainly is clear in this difficult area of law is that a faculty should not normally issue in a "portable remains" case.

21. The Court of Arches in *In re Blagdon Cemetery* also made some observations about family grave as a factor:

> *Both Mr Hill and Mr Petchey*[11] *invited us to regard the death of Steven at such early age, and the circumstances of his sudden death and burial, as unnatural and thus creating special circumstances in themselves. The intention of Mr and Mrs Whittle, they said, is*

[10] See paragraph 36 (i).

[11] Counsel for the Appellants and amicus curiae respectively.

essentially to bring Steven's remains to a family grave. In the normal course of events, they would have expected to predecease him and be the first occupants. The concept of a family grave is, of course, of long standing. In a less mobile society in the past, when generations of a family continued to live in the same community, it was accepted practice for several members of a family to be buried in one grave. Headstones give a vivid picture of family relationships and there are frequent examples of one or more children predeceasing their parents due to childhood illnesses, which were incurable. Burials in double or treble depth graves continue to take place at the present time. They are to be encouraged. They express family unity and they are environmentally friendly in demonstrating an economical use of land for burials. Normally the burial of family members in the family grave occurs immediately following the death of the particular member of the family, whereas in this case Steven's remains will have to be disturbed after many years in order to inter them in a new family grave.

22. As regards precedent the Court said

> *We do not accept ... that precedent should play no part in the decision making process in the consistory court. We are aware that the common law doctrine of precedent was not historically part of canon law, and that on the facts of In re Christ Church, Alsager the Chancery Court of York considered the possibility of creating a precedent as irrelevant. However, we consider that Edwards QC Ch was right in In re St Mary Magdalene, Lyminster (1990) 9 Consistory and Commissary Court Cases, case 1 to have regard to the effect of setting a precedent. More recently in George QC Ch in In re West Norwood Cemetery(unreported) 6 July 2000 was right in saying: "Whilst the focus must be on the particular circumstances of the individual petition, the court's approach has to take account also of the impact its decision is likely to have on other similar petitions." In our view, precedent has practical application at the present day because of the desirability of securing equality of treatment, so far as circumstances permit it, as between petitioners*[12].

23. I should say at this point that I agree with what the Court of Arches said about precedent. It seems to me that it is, however, the very necessity to treat like cases alike – with the possibility of fine distinctions arising – that has given rise to particular difficulty in this field.

24. The Court decided to permit exhumation. Its reasoning was as follows

[12] See paragraph 36 (v).

> *... we have concluded that there are special factors in this case which make it an exception to the norm of permanence which we have explained earlier in this judgment. These factors are: (1) the sudden and unnatural death of Steven at an age when he had expressed no view about where he would like to be buried; (2) the absence of any link between him and the community in which he was buried; (3) his parents' lack of a permanent home at the time of his unexpected death; (4) his parents' inquiries of their solicitor shortly after Steven's death about the possibility of moving his remains once they had acquired a permanent home; (5) having lived in Stowmarket for several years as their permanent home and having become part of the local community, their purchase of a triple depth burial plot in Stowmarket Cemetery*[13].

25. In my judgment in *In re Peters's Petition*[14], I had to consider whether the establishment of a family grave could of itself justify exhumation. For reasons which I set out at length in that case I said that essentially it could not. Those reasons may be summarised by saying that

- if the creation of a family grave were sufficient, every "portable remains" case could be readily turned into a creation of family grave case; and

- although there were passages in *In re Blagdon Cemetery* which if read in isolation could be taken as suggesting that the creation of a family grave would of itself be sufficient to justify exhumation, the judgment did not require such a reading; and that such a reading was not to be preferred since it would undermine the clear position taken in respect of portable remains cases.

26. I could have added that although the Court of Arches criticised the reasoning in *In re Christ Church, Alsager* it did not suggest that the decision itself was wrong.

27. In three judgments in other Dioceses that have been delivered since my judgment in *In re Peters's Petition*, what I said in that judgment has been criticised. Theses cases are *In re Camp's Petition*[15], *In re Kenilworth Cemetery*[16] and *In re St Mary, Trentham*[17]. It will be for

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[13] See paragraph 37.

[14] [2013] PTSR 420.

[15] [2013] PTSR 953 (Consistory Court of the Diocese of Worcester: Fookes Dep Ch).

[16] Consistory Court of the Diocese of Coventry (5 June 2012): Eyre Ch.

others – and ultimately, perhaps, for the Court of Arches – to decide whether or not I was correct in what I said in *In re Peters's Petition* and I think that it would be inappropriate and unhelpful for me to seek in this judgment to respond to the criticism that it has attracted. I am, however, naturally concerned that it might be possible that there could be a different outcome to a petition depending on the diocese in which the petitioner lived. This would be of concern in any event, but any difference of approach is now a matter of which petitioners will be aware in the light of the fact that judgments in the Consistory Courts are generally available on the internet and may readily be cited by petitioners (as Mrs McGowan has done before me).

28. As regards the three cases where *In re Peter's Petition* was criticised, it seems to me that exhumation could have been justified in all of those cases on the basis of mistake of one kind or another, so that the decisions may be justifiable without the emphasis that they give to the creation or consolidation of a family grave of itself[18].

29. There have been a number of other cases involving exhumation since my judgment. I need only refer to two[19]. The first is *In re John Ashton McGarry deceased*[20], a case decided in the Consistory Court of the Diocese of Manchester. The basic facts were that the petitioner wished to remove the remains of his father who had died in 1992 from consecrated ground so that they could lie with the remains of his mother who had died in 2011 and whose remains were interred elsewhere. Tattersall QC Ch said

> *On the facts here I am persuaded that sufficient special circumstances, namely the desire to re-inter the cremated remains of both the deceased and his widow in a family grave, exist to justify my making an exception from the norm that Christian burial is final*[21]

However, I think this needs to be read in the context of the fact recorded elsewhere in that judgment that it was reasonable for the remains of the deceased's widow not to have been

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[17] Consistory court of the Diocese of Lichfield (12 June 2012): Eyre Ch.

[18] In *In re Camp's Petition*, the consolidation of a family grave was one of two, alternative, reasons for granting the faculty; the second reason was mistake. It is fair to say that Fookes Ch preferred reason relying on the consolidation of a family grave.

[19] Neither refer to *In re Peters's Petition*, which was decided only shortly before these cases were decided.

[20] 3 April 2013.

[21] See paragraph 25 of his judgment.

buried with his remains[22]. Tattersall QC Ch was not saying that the creation of a family grave could by itself justify exhumation. One may be reasonably confident in this conclusion because otherwise he would, on the face of it, have granted a faculty for exhumation in the case of *In re John Albert Corry deceased*[23] where the facts were similar but there was no reason why the remains of deceased's wife should not have been buried with those of her husband at the time of death.

30. The second is *In re Bourne Abbey Churchyard*, decided in the Consistory Court of the Diocese of Lincoln[24]. The petitioners' father had died in 2008 and his cremated remains had been interred in the churchyard of Bourne Abbey. Their mother had died in 2011 and her cremated remains had been interred in a cemetery in Harlow where most of the family lived. Bishop Ch permitted the exhumation of the petitioners' father's remains on the basis that it involved the creation of a family grave. Although not referred to as part of the reason for permitting the exhumation, the petitioners' parents had never "put down roots" in Lincolnshire and their family were all in Essex.

Consideration of the facts of the present case

31. The reason why, on my initial reading of the papers, I did not feel that this was an appropriate case in which a faculty should issue was because I considered that there was too little in the case to distinguish it from the "portable remains" cases. On reflection, I consider that this was too harsh a judgment.

32. There are three particular matters which make the present case potentially different from the sort of portable remains case, namely:

- Mrs McGowan's new home in Australia will be a very long way from England

[22] Tattersall QC Ch held that the reason why it was reasonable for the remains of the deceased's widow not to have been interred with the deceased's remains was the poor state of the deceased grave. In these circumstances his holding that the state of the grave did not justify exhumation may at first sight seem surprising. Nonetheless he was considering the same fact in a different context. Chancellors have been generally resistant to permitting exhumation because of the condition of the deceased's grave because they consider that they would soon find that they were standing on a very slippery slope.

[23] 27 July 2012.

[24] 19 June 2012.

- Mrs McGowan's father died when he was on holiday in England (this was a matter that I had not appreciated from the papers)

- Mrs McGowan's mother did not wish to be cremated and so her remains could not be brought to England to lie with those of her husband.

It is appropriate to add that, as a family grave case, it counts in favour of the proposal that there will be economy in the use of grave space – a plot for the interment of cremated remains will be made available in the Garden of Remembrance; and that it is expressive of family unity.

33. Taking each of these three matters in turn, I think that in emotional terms it is possible that Mrs McGowan and her relatives in Australia may feel very remote from Croydon but it is of course only one (albeit long) jet flight away. To take an English example, Cornwall is very distant from Northumberland and, without the benefit of access by car, Bradford may feel very distant from Bridlington. It does seem to me that it is relevant that Mr Ferdinands was not domiciled in this country when he died, but his remains had to be interred somewhere and their interment was not intended to be temporary. Finally, it does not seem to me very likely that Mrs Ferdinands' remains would have been brought to England whatever her views about cremation; and of course in *In re Christ Church, Alsager* suggests that objection to cremation will not assist a petition for exhumation. (As far as I know, the remains of Mrs Ferdinands' could have been interred in the Garden of Remembrance at New Addington, although it might not have been possible for them to be interred together with those of Mr Ferdinands).

34. However, standing back, I think that the facts of the case show a re-focusing of the family of Mr Ferdinands in Australia so that it was not reasonable for Mrs Ferdinands' remains to be interred in England; and that the family was not focused in this way 1975 when Mr Ferdinands died. These matters together provide the explanation why it is that the remains of Mr and Mrs Ferdinands are buried separately when their children would prefer that they were buried together. I consider that these matters are, in terms of *In re Blagdon Cemetery,* reasons for making an exception from the norm of the permanence of Christian burial; and to them, of course, must be added those matters which always speak in favour of creation of a family grave, namely economy in the use of grave space and the expression of family unity. The facts are distinguishable from those of "portable remains" cases like *In re Thornton Cemetery,* Bradford, and it will be seen that I have adopted the same approach as Tattersall QC Ch in *In re John Ashton McGarry.* I have reservations about the reasoning *In re Bourne Abbey Churchyard* and it seems to me that the wider facts present a weaker case than the facts that I have had to consider. Nonetheless it can be justified as an example of similar circumstances to

those which I have had to address and where I have decided that it is appropriate to grant exhumation.

35. Accordingly, in the circumstances, I direct that a faculty should issue.

PHILIP PETCHEY
Chancellor
23 October 2013