



Neutral Citation Number: [2020] ECC Oxf 2

Faculty – Exhumation of human remains of a baby boy interred in a churchyard at Tilehurst, Reading in April 1993 for re-interment in a family grave in County Kildare, Ireland

Application No: 10756

IN THE CONSISTORY COURT
OF THE DIOCESE OF OXFORD

Date: 20 February 2020

Before:

THE WORSHIPFUL DAVID HODGE QC, CHANCELLOR

In the matter of: ST MICHAEL'S CHURCH, TILEHURST

And: THE PETITION OF BENDAN TOBIN AND HILARY TOBIN

Determined on paper

The following cases are referred to in the Judgment:

Re Blagdon Cemetery [2002] Fam 299

Re Humphreys deceased [2019] ECC Man 1

Re St Helen's, Boutham [2019] ECC Lin 9

Re St James Bulkington [2019] ECC Cov 3

JUDGMENT

Background facts

1. This is a petition dated 4 February and lodged on 10 February 2020 by Brendan and Hilary Tobin, who live in Carbury, County Kildare, Ireland to exhume the mortal remains of Brendan's baby son, Alex, which were laid to rest in the churchyard of St Michael's Church, Tilehurst, Reading on 8 April 1993. Without intending any disrespect to them, I will use their first names in this Judgment in the interests of clarity and concision. Alex had been born on 18 January 1993 and he died (a 'cot death') on 2 April 1993, less than three months later. Alex's mother was Brendan's first wife, Susan (born Daff). The petitioners say that Brendan had expressed the wish for Alex to be buried in Ireland but he agreed with Susan that he should be buried in Tilehurst.

2. Brendan (who is 63 years of age) was born and bred in Carbury and in 1985 he moved to Reading for work. He settled there, met and married Susan. They had two children in addition to Alex: an elder son, Rory (born in 1991), and a daughter, Aisling (born in 1994). Sadly, the marriage did not survive and Brendan and Susan were divorced in 1996. At that time Rory and Aisling were living with their mother and her parents in Guernsey although Brendan had joint custody of the children and he maintained regular contact with them. Following his divorce, in 1999 Brendan made what he says was the very difficult decision to return to Ireland knowing that he would have to leave Alex behind him in Reading. Brendan wanted to be able to provide a "second home" for Rory and Aisling when they visited him for holidays and at Christmas and other festivals. In returning to Ireland, Brendan thought that he would enjoy the support of his immediate family and, at the same time, that Rory and Aisling would be able to maintain their relationship with their paternal grandparents and their many cousins. The petitioners describe this as a very hard decision for Brendan to make. By the time he returned to Ireland, Brendan had met his present wife, Hilary (his co-petitioner), in 1997 and they moved to Ireland together, accompanied by Hilary's daughter, Hannah (born in 1991). In May 2000 Rory and Aisling came to live with the petitioners in Ireland, completing the family unit as it is today. The petitioners were married in 2001. Rory and Aisling maintained contact with their mother and her family, with regular visits to Guernsey. Sadly, their mother passed away in 2006 but they still make regular visits to Guernsey, maintaining good contact with their late mother's remaining family. Whenever possible, the petitioners have made regular visits to Alex's grave over the years and they have tried their best to maintain it. The situation is said to have always brought tremendous sorrow to Brendan.

3. In July 2018 Brendan was diagnosed with pancreatic cancer. He has undergone two operations in an attempt to remove the tumour but both were unsuccessful. Late last year Brendan was told that there was no more that could be done for him and he is now receiving palliative care. A letter dated 16 January 2020 from a consultant in palliative medicine at St Brigid's Hospice in County Kildare describes his pancreatic cancer as "terminal". Brendan's illness has crystallised the situation over Alex's grave and it is said that it would give Brendan great peace to bring him "home". The petitioners have recently purchased a double burial plot (for up to six people) in the consecrated cemetery of the local family church at Derrinturn in Carbury. The plot has been purchased with the intention that Alex's mortal remains will be re-

interred there and that both petitioners will be buried there in due course, close to immediate family members. It is said that this will provide comfort to their surviving children, Rory, Hannah and Aisling. There is evidence from the cemetery registrar that the plot has been registered for Alex's interment.

4. The court has received supportive, and moving, letters from each of Rory, Hannah and Aisling in support of the petition. It has also received a joint letter of support from Susan's brothers, Colin and Peter Daff. The letters from Rory and Aisling both emphasise the importance of this matter to the whole family, and particularly to their father, and that the decision to present this petition has not been taken lightly. They talk of their sorrow at the fact that as none of their immediate family remain in England, it has long been in the minds of all the family that Alex's grave has been left alone, without appropriate visitation and care. They contrast this with the position of their own mother's grave in Guernsey, where her friends and family regularly visit and leave flowers. Rory states that as his maternal grandfather (now deceased) and grandmother were, and are, not religious people, it is of no concern to them where Alex's grave is located but it is of concern to him, his sister and his father, who are religious. Aisling says that her late mother was not religious and Aisling strongly believes that "... she would back this up, especially given what my family is currently going through and the position we find ourselves in". Rory states that they "... wish to bring [Alex] close to us, to a family plot where we can care for the grave, where we can visit and where he will no longer be alone". He concludes by stressing that "... this is not a decision which has been taken lightly and I fully understand the seriousness of the request I am making. However, I would not be writing this letter if as a religious man I did not believe it to be the right decision in my heart."

5. The court has also received a letter dated 20 January 2020 from the rector of St Michael's Church, Tilehurst which records her "great sympathy with the family, especially given Mr Tobin's illness". The rector recognises that their feeling that Alex is not close to them is "a real source of grief". The rector concludes:

"I share the church's substantial reservations about the 'portability' of remains, and strongly agree that family relocation on its own should not be sufficient grounds for a faculty to be granted. However that is not the only issue at play here and I do wonder whether the additional facts of Mr Tobin's illness, the very young age at which Alex died, the sense that he is 'going home' rather than a more general move, and the intention to reinter into a family grave over which discussions have already been held with the parish priest might together tip the balance in favour of granting the request. If the Chancellor were minded to agree, I would have no objection."

The proper approach

6. As Chancellor Bishop recently explained in *Re St Helen's, Boutham* [2019] ECC Lin 9 at paragraph 5:

"An application to bring together the remains of close family members, particularly when one of the family is a very young child, will always be considered with the greatest care and understanding of the pastoral context."

In that case, the Chancellor refused to grant a faculty to exhume the remains of the petitioner's daughter and re-inter them in a grave reserved near to her mother's grave because he was not

satisfied that, with the passage of time, it would still be possible to recover any remains of a 16 months old child who had been buried 53 years previously in an unmarked grave. In the present case, there is not the added complication of an unmarked grave; but with this decision in mind, the court caused the Registry to inquire of the petitioners about the likely condition of the coffin, and also how it was proposed to carry out the exhumation and to transport Alex's mortal remains to Ireland for their re-interment. The petitioners confirmed that they had consulted a funeral director in Ireland concerning the re-interment who had confirmed that the coffin was likely to be in a poor condition and that he would propose placing the existing coffin into a new one. He also indicated that he would liaise with a funeral director in England (probably the one who had conducted the original interment) and that a representative would bring Alex's mortal remains to Ireland in a private ambulance. That seems to be as satisfactory a response to the court's queries as it could hope for.

7. The law the court must apply is founded upon a Christian understanding of what the burial of a human body or its cremated remains signifies. The principles by which an exhumation from consecrated ground is permitted were set out by the Court of Arches in the case of *Re Blagdon Cemetery* [2002] Fam 299. The principles laid down in that case were summarised by Chancellor Tattersall QC in *Re Humphreys deceased* [2019] ECC Man 1 at paragraphs 11 and 12 as follows:

11.1. The court has a discretion whether to grant a faculty for an exhumation but the starting-point in exercising that discretion is the presumption that Christian burial is permanent, that human remains should not be portable, and that a faculty for exhumation should only exceptionally be granted. [para 20]

11.2. The presumption of the permanence of Christian burial flows from the theological understanding that burial, or the interment of cremated remains, is to be seen as the act of committing the mortal remains of the departed into the hands of God, as represented by His Holy Church. [para 21]

11.3. This presumption derives from the Christian theology of burial that the disposal of the dead, whether by way of burial or cremation, has an aura of permanence about it. So in *Theology of Burial* the then Bishop of Stafford, the Rt Revd Christopher Hill, stated:

‘The permanent burial of the physical body / the burial of cremated remains should be seen as symbolic of our entrusting the person to God for resurrection. We are commending the person to God, saying farewell to them (for their `journey`), entrusting them in peace for the ultimate destination, with us, in the heavenly Jerusalem. This commending, entrusting, resting in peace does not sit easily with `portable remains`, which suggests the opposite: reclaiming, possession, and restlessness; a holding on to the `symbol` of a human life rather than a giving back to God. ... In general, therefore, the reluctance to agree to faculties for exhumation is well grounded in Christian theology and eschatology. It is also right generally from the point of view of the mourner, who must learn to let go for their psychological and spiritual health’. [para 23]

11.4. ‘Exceptional’ means ‘forming an exception’ [*Concise Oxford Dictionary*, 8th ed (1990)] and guidelines can assist in identifying various categories of exception. Whether the facts of 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. [see para 33]

11.5. It is for the Petitioner to satisfy the court on the balance of probabilities that there are special circumstances which constitute good and proper reason for making an exception to the norm that Christian burial in ground which has been permanently set aside as sacred by the act of consecration of a bishop of the Church of England is final. [para 35]

12. The guidelines provided by the Court of Arches at para 36 of its judgment may be summarised as follows:

12.1. Advancing years, deteriorating health and moving to a new area are not in themselves adequate reasons for permitting exhumation. Any medical reasons relied upon by a petitioner 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.

12.2. As to the factor of medical reasons, the court stated:

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

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

Such a practice would make unacceptable inroads into the principle of permanence of Christian burial and needs to be firmly resisted. We agree with the Chancery Court of York that moving to a new area is not an adequate reason by itself for removing remains as well. Any medical reasons relied upon by a petitioner would have to be very powerful indeed to create an exception to the norm of permanence, for example, serious psychiatric or psychological problems where medical evidence demonstrates a link between that medical condition and the question of location of the grave of a deceased person to whom the petitioner had a special attachment.’

12.3. The passage of a substantial period of time since burial will not in itself be fatal to a petition, although it might be potentially relevant in assessing the genuineness of the petitioner's case.

12.4. Although mistake as to the location of the grave or, in certain circumstances, as to the significance of burial in consecrated ground could be a good and proper reason, mere change of mind as to the place of burial by those responsible for the interment could not.

12.5. Although the views of close relatives were a very significant factor, the amount of local support for the petition would normally be irrelevant.

12.6. In view of the desirability of securing equality of treatment between petitioners so far as circumstances permitted, the court has to take into account the impact its decision is likely to have on other similar petitions. The Court of Arches referred to ‘the desirability of securing equality of treatment, so far as circumstances permit it, as between petitioners’.”

8. At paragraph 13 of his judgment, Chancellor Tattersall QC noted that:

“... in some cases faculties have been granted to allow family members to be brought together into a single grave: see *In Re St James` Churchyard, Hampton Hill* (1982) 4 Consistory and Commissary Court Cases, case 25 and the decision in *In Re Blagdon Cemetery*. However, the facts in those cases were very different:

13.1. In *St James Churchyard, Hampton Hill*, a faculty was granted for an exhumation 50 years after the deceased’s death so they could be interred in a family plot in Canada.

13.2. In *In Re Blagden*, a faculty was granted in respect of the burial resulting from a sudden and unnatural death of deceased at age of 21 when he had unsurprisingly not expressed any view as to where he might be buried, where there was an absence of any link between him and the community in which he was buried and the parents` did not have any permanent home at the time of his death.

9. This court notes that at paragraph 37 of its judgment in *Re Blagdon Cemetery*, the Court of Arches

“... 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.

The court considers that of these factors, (1) and (5) are present, but (2), (3) and (4) are absent in the present case. This court also notes, and would emphasise, the observations of the Court of Arches in *Re Blagdon Cemetery* (at paragraph 40) that in allowing the appeal

“... it should not be assumed that whenever the possibility of a family grave is raised a petition for a faculty for exhumation will automatically be granted. As in this case it is to be expected that a husband and wife will make provision in advance by way of acquisition of a double grave space if they wish to be buried together. Where special circumstances are relied upon in respect of a child who has predeceased his or her parents, it will be insufficient if there is simply a possibility of establishing a family grave. As in this case there would have to be clear evidence as to the existence of the legal right to such a grave if no family member was already buried in it.

10. The petitioner in *Re Humphreys deceased* wished to have the cremated remains of her father (who had died in 2007) exhumed from a churchyard near Bolton and reinterred in the churchyard at Warburton with the as yet uninterred cremated remains of her mother (who had died in 2018) because the petitioner's parents had started life as a married couple in Warburton and a number of members of the family lived there. Chancellor Tattersall QC could find no exceptional circumstances to justify departing from the general principle that burial should be regarded as permanent. Amongst the reasons given for his decision not to grant a faculty, the Chancellor observed that the petitioner's mother had chosen to have her husband's remains interred at the churchyard near Bolton and she had regularly visited the grave there until her own death. At paragraph 29 the Chancellor concluded that

"... to allow this application would be to approve a practice of regarding cremated remains as 'portable' and that to do so would encourage such applications, which I am not willing to do".

11. In the recent case of *Re St James Bulkington* [2019] ECC Cov 3 the petitioner sought a faculty to authorise the exhumation of the remains of her daughter and her husband from a churchyard in Warwickshire with a view to them being re-interred in a churchyard in Norfolk. The petitioner's daughter had lived only one day and had been buried fifty years ago. The husband's cremated remains had been interred in the same churchyard nineteen years ago. Seven years ago, the petitioner, who had suffered serious health issues, had moved to Norfolk to be near her family and she wished in due course to be buried with the remains of her daughter and her husband in Norfolk, where her remaining family would be able to maintain the grave. She was concerned about being unable to visit the churchyard in Warwickshire regularly and maintain the grave there. Applying the principles laid down in *Re Blagdon Cemetery*, Chancellor Eyre QC could not find sufficient exceptional grounds to justify the grant of a faculty. At paragraph 11 the Chancellor noted that deliberate decisions had been made to bury both the daughter and the husband in the churchyard in Warwickshire and, in the case of the husband, in that particular grave. He also noted that it would be possible for the petitioner's remains to be placed in the grave in Warwickshire in due course. Those were amongst the factors which were said to be highly relevant by way of background. At paragraph 10, the Chancellor noted that in *Re Blagdon Cemetery* the Court of Arches had identified matters which could be capable of being exceptional circumstances for present purposes but also those which are not capable of being such. He noted that at paragraph 36 (i) the court had made it clear that the fact that visits to a grave were prevented by "advancing years and deteriorating health and change of place of residence due to this" was not something which could amount to an exceptional circumstance justifying exhumation. In order to amount to exceptional circumstances medical problems would have to be related to the location of the grave in question. This court notes that Chancellor Eyre QC did not address the petition that was before him specifically in terms of the bringing together of family members in a family grave, no doubt because the petition was not presented to him on that basis in view of the possibility (which he regarded as a highly relevant factor) that the petitioner's own remains could be interred in the grave in Warwickshire in due course.

Decision and reasons

12. The court is satisfied that it is expedient for this petition to be determined upon a consideration of the documents that are before the court. Upon receiving the petition, the court had caused the Registry to email the petitioners to inquire whether they were content for the court to deal with the petition without the need for a hearing, bearing in mind that they were resident in Ireland, and whether they wished to submit any further written representations to the court. The response was that they were content for the court to deal with the petition in that way and that there was nothing further they could think of that they would wish to add to their application.

13. The court has a discretion to permit the human remains of Alex Tobin to be exhumed but the starting point in exercising that discretion is the presumption of the permanence of Christian burial. That presumption flows from the understanding that burial (or the interment of cremated remains) is to be seen as the act of committing the mortal remains of the departed into the hands of God as represented by His Holy Church. It must always be exceptional for exhumation to be allowed; and the Consistory Court must determine whether there are special circumstances justifying the taking of that exceptional course in the particular case (the burden of establishing the existence of such circumstances being on the petitioner in the case in question).

14. Decided cases are informative in showing how the court's discretion has fallen to be exercised in particular factual situations because the legal principles of certainty, fairness and justice dictate that similar cases should be disposed of in similar ways. However, no two cases are precisely similar, and in each individual case the task of the court is to ask itself whether the petitioner has demonstrated that there are sufficient special factors in the case which justify treating it as an exception to the norm of the permanence of Christian burial. The court notes that this is not a case where there was any mistake as to the location of Alex's grave: whilst Brendan would have wished for Alex to be buried in Ireland, he had agreed with his mother that Alex should be buried in Tilehurst. The court would also wish to emphasise its disapproval of any attempt to treat mortal or cremated remains as 'portable', or to sanction any assumption or understanding that whenever the possibility of a family grave is raised, a petition for a faculty for exhumation will automatically be granted. Family relocation on its own should never be sufficient grounds for a faculty to be granted; and the concept of a family grave should not be treated as the equivalent of a "Get out of jail free" card, leading automatically to a faculty authorising the exhumation of human remains. In the present case, however, and largely for the reasons given by the rector of St Michael's Church in her letter to the court cited at paragraph 5 above, the court is satisfied that the petitioners have established the existence of sufficient special factors which justify treating it as an exception to the norm of the permanence of Christian burial. These factors are: (1) the sudden and unnatural death of Alex at an age when he was too young to have been able to understand, form or express any view about where he would wish to be interred; (2) the return, in 1999, of Alex's father (with the woman who was to become his second wife and her daughter) to his roots in Ireland where shortly thereafter he was joined by Alex's two siblings; (3) the firm roots the family have established in that community over the past 20 years such that it has become their permanent family home; (4) the lack of any family connection or ties to the Reading area, or even to the United Kingdom, for a period in excess of 20 years; (5) the purchase of a double family burial plot in the consecrated cemetery of the local church where Brendan first received the sacraments with the firm and settled intention that Alex should be re-interred there and that both the petitioners should be buried there, close to

immediate family members; (6) the practical impossibility (due to his family links with Carbury and the lack of any ties to Tilehurst) of Brendan's remains being placed in the grave in Tilehurst in due course; and (7) the recent diagnosis of Brendan's terminal pancreatic cancer and all that that entails.

15. Critically, the court is satisfied that by acceding to this application it would not be doing anything to approve a practice of regarding mortal remains as 'portable' or to encourage future applications founded upon that ground. The court notes that Alex's surviving close relatives strongly support the petition, and that the rector of the church where he is buried has no objections to the proposed exhumation. The court is also satisfied that there is a genuine reason for the delay in making the present application, which has been precipitated by the recent diagnosis of Brendan's terminal illness, crystallising long-standing, and deep-rooted, feelings of concern, guilt and regret.

16. Finally, the court bears in mind that the common vision of this Oxford diocese is to become a more Christ-like Church, proclaiming itself to be contemplative, compassionate and courageous for the sake of God's world. The court must apply the law; but in doing so it should act with courage and compassion.

17. Accordingly the court grants a faculty for the disinterment of the mortal remains of Alex Tobin from their grave in the churchyard of St Michael's Church Tilehurst and their re-interment within Burial Plot 3/17-18 of Derrinturn Cemetery subject to the following conditions:

(1) that the disinterment and subsequent re-interment will be carried with all due reverence and dignity and (subject hereto) in accordance with the recommendations of reputable and competent funeral directors;

(2) that the disinterment will be carried out early in the morning and screened from public view;

(3) that the re-interment will be carried out as soon as reasonably practicable thereafter;

(4) that all necessary secular authorities are obtained and all conditions thereof, and any applicable byelaws, are complied with.

18. For pastoral reasons, the court waives its fee for this Judgment.

The Worshipful Chancellor Hodge QC

20 February 2020