Neutral citation number: [2018] Ecc Bla 1

Petition number 73 of 2017

In the Consistory Court of the Diocese of Blackburn

In Re: Torrisholme Cemetery, Lancashire

Before His Honour Judge David Hodge QC, Deputy Chancellor

Between:

Leanne Marie Rhodes

Petitioner

and

Kevin Rhodes

Party Opponent

JUDGMENT

The facts

1. By a petition dated 5 July 2017, and lodged with the Diocesan Registry on 27 July 2017, the petitioner, Mrs Leanne Marie Rhodes, who lives in Shipley, West Yorkshire, seeks a faculty authorising her to exhume the body of her late baby son, Dion Jon Rhodes ("Dion"), from consecrated ground within Torrisholme Cemetery, Lancashire, and to re-inter the body in consecrated ground at Charlestown Cemetery, Baildon, West Yorkshire. Dion died, aged only 12 weeks old, on 27 October 2002 and he was interred in his present grave on 1 November 2002. The petition was supported by letters from (1) the Cemeteries Officer of Lancaster City Council identifying the grave number, confirming that no other interments have taken place within the grave, consenting to the exhumation on condition of production of the original grave deed relating to the grave plot and the relevant exhumation licence application, and providing details of how any exhumation would proceed; and (2) the Bereavement Services Officer of Bradford MDC confirming that they had been approached by a funeral care company in respect of the reburial of Dion in Charlestown Cemetery, Baildon, and were happy for the reburial to take place once the appropriate faculty had been given. From the evidence provided in the petition, I am satisfied that any re-interment will be carried out in an appropriate and decent manner.

2. The reasons provided in the petition for seeking the removal and re-interment of the body were that the petitioner was not in good health, that she now resided in West Yorkshire and that she was no longer able to visit the grave in Lancashire. By re-burying Dion in a local cemetery, the petitioner felt that she could visit her son, thus helping with the loss of her baby. The petitioner had not been coping with the loss of her baby son and she had moved

away from Lancashire to be near her family for support but she was now ready to move on, and by bringing her son closer to her she felt that this would help with her fragile mental state. The petition identified Kevin Rhodes as a near relative of Dion who either objected or would, in the opinion of the petitioner, be likely to object to the proposed removal of Dion's body if he were aware of the application.

3. On receipt of the petition, I caused the Diocesan Registrar to write to the petitioner on 4 August 2017 asking her a series of questions so that I could properly consider her petition. The letter apologised in advance if the petitioner found some of the questions to be improper or intrusive but explained that the law required good and proper reasons for exhumation which would be likely to be regarded as acceptable by right-thinking members of the Church at large. (This is the *Alsager* test which applies to exhumation cases in the northern Province of York: see paragraphs 14 and 15 below.) The letter also invited the petitioner to submit any further representations as to why she believed that there were good reasons for the exhumation to be permitted, and sought confirmation whether she would wish the Court to decide the petition based on written representations or whether she would prefer a hearing. The letter concluded by stating that Court would decide whether any near relation should be given special notice of the petition in the light of the petitioner's further representations.

4. On 14 August 2017 the Registry received a letter dated 10 August 2017 from Carmelina's Funeral Care. They had been asked by the petitioner to respond on her behalf due to her current state of health. The letter explained that the petitioner was Dion's mother and that Mr Kevin Rhodes was her father. Dion had two adult sisters, Lauren Rhodes, aged 22, who lived in Bradford and Kylie Rhodes, aged 19, who lived in Shipley, both in West Yorkshire. Both sisters were said to be aware of the petition and gave their consent. Mr Rhodes had not yet been informed of the position and, due to her state of health, the petitioner would prefer the funeral care company to contact him if necessary. The petitioner believed that if Mr Rhodes did object, "it will be on the grounds of mental cruelty to her and her children". Dion had passed away when only 12 weeks old. He had been born with hypoplastic left heart syndrome ("HLHS") and had undergone heart surgery at the age of 1 week. His death had been from a combination of HLHS and pneumonia. Dion had been interred at Torrisholme Cemetery because at the time both of his parents had been living in the area. Since then they had both moved back to the Shipley area of West Yorkshire. The petitioner had returned there in February 2006. The cemetery was said to be 76 miles away from the petitioner's present home and the journey took approximately 2 hours each way. The petitioner had last visited Dion's grave on his birthday, 30 July 2017. When she had lived in the area the petitioner had visited the grave a minimum of once a week but due to the distance and her health, she could no longer manage to do so, and was now only able to visit Dion's grave approximately 3 times a year. The petitioner was said to suffer from fibromyalgia, haemoplegic migraines, trapped lumber nerves and disability to the left knee. In addition to her general practitioner, she was said to be under the care of a consultant gynaecologist, a consultant urologist, and a pain management specialist. The proposed grave plot at Charlestown Cemetery was a double grave as the petitioner intended to be buried there when she died.

5. The letter from the funeral care company recorded that the petitioner was happy for the Court to decide about the exhumation of Dion and his being laid to rest in Charlestown

Cemetery. (In a later undated letter, written in response to a letter from the Diocesan Registry dated 18 December 2017, the petitioner expressly confirmed that she was content for judgment to be given on the basis of written representations.) The letter of 10 August 2017 explained that when the petitioner had moved back to the Shipley area she had done so to be with her family for support and that she had intended to apply for Dion's exhumation when she had first moved back but due to financial constraints that had not been possible. She had also felt that at that time she was not mentally strong enough to seek help to arrange for Dion to be brought over to Shipley. At that time, the petitioner had still been physically able to travel regularly to Torrisholme to visit Dion but over the last few years her physical health had deteriorated, leading to a reduction in her visits due to the pain caused by her trapped lumbar nerve and fibromyalgia. Mentally the petitioner was said to be struggling with the knowledge that she was not well enough to face the journey regularly; and by having Dion's body resting within a 10 minutes' journey time she felt that she would be able to cope and heal a lot better, enabling her to visit Dion more regularly if she so wished. The petitioner was now financially able to afford the re-interment and she also had the full support of her partner and family members. The petitioner was said to have found it distressing to receive the Registry's letter and she had requested that all future correspondence should be sent directly to the funeral care company for them to keep her up to date with how things were progressing.

6. Upon receipt of the funeral care company's letter I determined that Dion's father, Mr Kevin Rhodes, who now also lives in Shipley, West Yorkshire, had such a sufficient interest in its subject-matter that special notice of the petition should be given to him; but due to the sensitivity of the matter, I directed that the funeral care company should write to him first to prepare him for the formal notice from the Registry. Once this had been done, acting pursuant to rules 6.6(4) and 9.1 of the Faculty Jurisdiction Rules 2015 ("the FJR") on 8 September 2017 I dispensed with public notice of the petition and directed that Mr Kevin Rhodes was to be given special notice of the petition and served with copies of the petition and all supporting and relevant documents pertaining to it. This was duly done under cover of a letter from the Registry dated 14 September 2016. Mr Kevin Rhodes responded by letter dated 5 October 2017 stating that he was "absolutely and utterly disgusted" by the proposed exhumation and refused his consent to it. His letter took issue with a number of the points which had been made on behalf of the petitioner in the letter from the funeral care company. Mr Rhodes said that, unlike the petitioner, he did not drive but nevertheless he made the journey to the cemetery by two trains and a taxi each way. Mr Rhodes also had medical complications, including a pacemaker, epilepsy and cataracts but he still travelled to see his son and no amount of pain could keep him from tending to his resting place. Despite working full time (unlike the petitioner who had stated that she was unemployed) Mr Rhodes travelled to see Dion every few months and had visited his grave in February, May, July (twice), and August and would be travelling for the anniversary of Dion's death and again at Christmas. Mr Rhodes was more than willing to tend to Dion's grave more frequently if the petitioner could not travel; but Mr Rhodes could not understand how the petitioner could travel abroad in early October 2017 if she suffered great pain in travelling to Lancaster. Mr Rhodes did not accept that the petitioner had moved back to Shipley to be with her family because at the time her mother had still been living in Morecambe. Rather the petitioner had moved back to Bradford to be with her new partner, who happened to be Mr Rhodes's brother. The plot in which Dion was buried was a double plot and Mr Rhodes

had always stated that he would wish to be buried with Dion so that he was not alone. Mr Rhodes wished to point out that regardless of their failed marriage, he was and always would be, Dion's father, and Dion was their child and not just the petitioner's son. Mr Rhodes believed that the petitioner (who, it was said had always been difficult over, for example, Mr Rhodes's liability for child support payments) was only making the present application out of malice because he had been able to create a new life and had two young children of his own. Mr Rhodes concluded his letter thus: "Dion was laid to rest in Torrisholme cemetery after a short life and should be left to rest in peace, the thought of exhuming his small body (which I can't imagine there will be much left) is a harrowing thought, he has the right to rest in peace and removing him from his final resting place is morally wrong – you cannot just go around digging up a tiny deceased baby and move him – the thought of this happening is very distressing and making me ill. I will fight for Dion as I would for any of my living children."

7. On 2 November 2017 Mr Kevin Rhodes formally objected under FJR 10.3 (in Form 5) to the proposed exhumation of Dion's body and its relocation to Bradford and he thereby became a party opponent in the faculty proceedings. His grounds of objection reiterated the points made in his previous letter; and he made the further point that Dion would now have been 15 years old, and the petitioner had had 15 years to make the present application: Dion "has been laid to rest for 15 years in Torrisholme cemetery; that is his final resting place and home".

8. On 24 November 2017 the petitioner served a reply to Mr Rhodes's grounds of objection under FJR 10.4 (in Form 6) relying upon an attached letter dated 22 November. The petitioner reiterated many of the points she had previously made. She pointed out: (1) that all family members were now resident in the Bradford district, including her mother; and (2) that the plot in Torrisholme cemetery had been purchased, and was held, in the petitioner's name and was for only two people, something of which Mr Rhodes had been aware at the time. The petitioner stated that she was aware that Mr Rhodes tended their son's grave but to make it easier for the whole family to spend more time with Dion, particularly on special days of remembrance, it would be better for Dion to be in the area where all the family was. It would also mean that Mr Rhodes's two younger children would be able to visit easily and get to know about their half-brother. The petitioner only wished to be able to tend their son's grave, and to spend as much time with him, as possible. The petitioner said that she held no malice towards Mr Rhodes for the fact that he had started a new life and had two young children. It had been her decision not to try to have any more children after being told that there was a 50/50 chance of any more babies suffering from the same condition as Dion. The petitioner felt that it would be "morally wrong" to leave Dion in Torrisholme, away from all those who loved him. The thought of not bringing Dion to Bradford to his family was said to be making the petitioner and her daughters ill, and had resulted in one of them being diagnosed with stress and depression, necessitating medication, and had caused her to separate from her fiancé. Bringing Dion home to the Bradford district would enable Mr Rhodes's children (who had never known Dion) to visit his grave, as well as their father. The petitioner was said to be very happy in her new life and just wished to bring Dion to a place where the members of his family on both sides presently lived. There were now no family members living within the Torrisholme district. The petitioner felt that many of the points raised by Mr Rhodes were not valid reasons for his objections, and that past events in their

relationship should be put behind them so as to bring Dion home to where all his family now lived.

9. On 18 December 2017 I caused the Registry to write to the petitioner and to Mr Rhodes to ascertain whether they were content to rely upon the representations already submitted to the Court or, if not, whether they wished to provide any further representations for me to consider before I came to my judgment. The letter also noted that both parties had confirmed that they would be content for judgment to be given after receiving written representations rather than an oral hearing, and sought their written confirmation of this when replying to the Registry's letter.

10. The petitioner's undated letter in response expressly confirmed that she was content for judgment to be given after receipt of written representations. She also indicated that her two daughters would both be happy to set out their views in writing but that she was happy for me to decide the case without their written representations unless I would like to hear from them. I did not consider this to be necessary because, although the two daughters clearly knew about the proceedings, they had not sought to become parties to them, and their views had already been sufficiently clearly communicated to the Court by their mother.

11. Mr Rhodes's lengthy undated letter in response repeated many of the points he had previously made. He reiterated that he was "appalled and disgusted" that Dion's exhumation should even be considered. He had been born, and had sadly passed away, at an early age, in Morecambe where he had been laid to rest in Torrisholme cemetery for the past 15 years. Morecambe had been Dion's home, and it was his final resting place, and not Bradford, which had never been his home. Mr Rhodes's letter expressly confirmed that he wished for my decision to be made after receiving written representations rather than an oral hearing; and he concluded with the plea that the "right decision" should be made for Dion "to be left at peace instead of being dug up and moved to a place that is not his home".

12. Upon receiving these letters, I was satisfied that both parties had expressly agreed in writing to this petition being determined on consideration of written representations and that such a course was expedient. Neither party desired an oral hearing; such a course would inevitably be distressing for both parties and would be likely to produce more heat than light; and, in any event, there were no material disputes of fact that would require resolution after cross-examination. However, it did not seem to me that either party had made it sufficiently clear that they were content to rely upon the representations previously submitted to the Court (which already seemed to me to be more than adequate) or whether they would wish to provide any further representations before I made my determination. I therefore directed the Diocesan Registry to write to both parties stating that: (1) I considered it to be expedient to determine this petition on consideration of written representations; (2) the parties having agreed in writing to this course, under FJR rule 14.1 I ordered that the proceedings were to be determined on consideration of written representations; and (3) whilst I would determine the petition upon consideration of the written representations already submitted to the Registry, I would afford each of the parties a final opportunity to submit any additional written representations within 14 days after the date of the letter. Letters in these terms were duly sent to the parties on 25 January 2018. The letters concluded by inviting either party to contact the Diocesan Registry if they had

any queries about the contents of the letter. The Registry has received no further representations from either party in response to these letters.

13. I am sorry that the process of producing this judgment has been so protracted, and has resulted in so many rounds of correspondence. This must have added considerably to the distress and anguish inevitably felt by both parties because of the subject-matter of this petition. However, I fear that the delay has been necessary in order both to comply with the requirements of the FJR, and to enable this Court to be satisfied that both parties have had ample opportunity to put all the matters upon which they would wish to place reliance before the Court. I am also acutely aware that, inevitably, one of the parties to this petition will be deeply disappointed, and saddened, by my decision. The Court is faced with a binary decision whether to refuse or to allow the petition where, inevitably, no compromise is possible. I can only hope that the disappointed party will be able to take some minor comfort from the knowledge that the Court has reached its decision impartially and dispassionately (but with due deference to the sensitivity of the issue before the Court) in the light of the established law, and with both parties having done all that they possibly could to get their differing points of view across to the Court to assist it in its difficult decision.

The Law

14. In my judgment, the law which applies to the determination of this petition is clear. In the case of *In Re Christ Church, Alsager* [1999] Fam 142, the Chancery Court of York (the Appeal Court for the northern Province of York) held that the test to be applied in exhumation cases was whether there was a good and proper reason for exhumation, that reason being likely to be regarded as acceptable by right-thinking members of the [Anglican] church at large, while bearing in mind the presumption of the permanence of the burial in consecrated grounds of human bodies or remains. In the later case of *In re Blagdon Cemetery* [2002] Fam 299 this test was viewed with a degree of criticism by the Arches Court of Canterbury (the Appeal Court for the southern Province of Canterbury), which held that a faculty for exhumation of a body or remains interred in consecrated ground should only be exceptionally granted, and preferred to formulate the test in terms of whether there were exceptional circumstances justifying exhumation, again bearing in mind the presumption of permanence. In both cases the respective Appeal Courts set out certain guidelines to assist in identifying various categories of exception to the general presumption of the permanence of human burials, while recognising that such guidelines should not be treated as amounting to binding precedents. One such guideline is that whilst the lapse of time cannot be regarded as determinative in relation to any proposed exhumation, the passing of a substantial time since the original interment will point against the grant of a faculty for exhumation. Another is the concept that human remains should not be regarded as "portable", in the sense that it is likely to be an inadequate ground for exhumation that the petitioner has moved to a new area and wishes the remains to be removed there as well. The authorities accord due respect to the general sense that it is not right and fitting to be disturbing the dead, who should be left to rest in peace.

15. In the case of *In re St Chad's Churchyard, Bensham* [2016] ECC Dur 2, [2017] Fam 68, Chancellor Bursell QC, sitting in the Durham Consistory Court, held that in dioceses within the northern Province of York (which includes the Diocese of Blackburn), it was the more

flexible *Alsager*, rather than the *Blagden*, test which should be applied in exhumation cases. The Chancellor recognised that in many, if not most, cases the two tests would lead to the same conclusion, but that it was possible that the *Alsager* test might, in a few cases, be slightly less draconian in its application from a petitioner's point of view. In agreement with Chancellor Bursell QC, I agree that, as a matter of precedent, it is the *Alsager*, rather than the *Blagden*, test that I should apply to the present petition, but subject to this qualification: that I consider that the right-thinking member of the Anglican Church would regard it as unacceptable that there should be any significant difference in approach to exhumation petitions depending upon whether the body or remains lie in consecrated ground within the two different Provinces of the Church of England, at least in the absence of evidence of some good local reason for such a difference, and that I should seek, insofar as I can do so, to reach the same result as I would if I were to apply the *Blagden* test. Having applied the *Alsager* test, I therefore propose to apply the *Blagden* test by way of cross-check and, if appropriate, to revisit, and, if appropriate, confirm my original conclusion if I should find that the application of the two tests would produce any difference in the result.

16. In the recent case of *Re David Ernest Newton* [2018] Ecc She 1, Chancellor Singleton QC, sitting in the Sheffield Consistory Court (within the northern Province of York), had to consider a petition by a son to exhume the cremated remains of his father from the parish where the father had spent his early childhood, and to re-inter them with the cremated remains of his recently deceased mother in a double plot in the grounds of Rotherham Crematorium, opposite which his parents had lived for 45 years. During her lifetime, the petitioner's mother had regretted her decision to have her husband's remains interred in the parish where he had lived as a boy, and she had expressed the wish that her remains, and those of her husband, should be buried together in the cemetery they had both known so well. In the course of her judgment, the Chancellor noted that in the theology of the Anglican Church, burial was symbolic of entrusting the deceased to God and commending, saying farewell, and entrusting them to rest in peace. These concepts were inconsistent with an idea that human remains could be portable. In addition to the Anglican Christian sources of those principles, there was also said to be a similar presumption of permanence to be found in English secular civil law. Chancellor Singleton QC noted that one of the *Blagdon* categories of possible exception to the general presumption of the permanence of human burials was exhumation for the purpose of placing a deceased person's remains within a family grave. The question of what did and did not constitute a justifiable family grave case was said to have been exhaustively considered in a number of cases, from which Chancellor Singleton QC derived the need to avoid permitting an approach which rendered the remains of deceased persons "portable", and thereby offending against both the theological concept of a burial representing a final entrustment of the deceased to God, and equally against the secular assumption of permanence. It was also said to be clear from the decided cases that in this difficult and sensitive area, the facts of each case had to be carefully considered, and that, apart from the broad principles to be discerned from *Blagdon*, there were not any easily gleaned rules about particular fact-situations.

17. In the case before her, Chancellor Singleton QC decided that the petition should succeed. She considered that the reasons for granting it satisfied both the *Blagdon* test of being "exceptional" and the *Alsager* test of there being a "good and proper reason such that most right-thinking members of the church would agree". The Chancellor said that she had

cautioned herself against importing, or introducing, a concept of the remains of a deceased person being generally portable. In the particular case, she had concluded that an elderly bereaved woman had made an understandable, but clear, mistake in selecting St Lawrence's churchyard in Tinsley as the proper place for her husband's cremated remains to be laid to rest. Although that location had had the most connection to her husband's childhood home up to the age of 10, all his life thereafter had been rooted in the Rotherham area, and particularly the area where the Rotherham Crematorium was located. The husband had lived with his wife during their near half century of marriage there. His house for more than 45 years had been there. Their friends had been there. He had walked and enjoyed the countryside there. His friends' funerals had been there and, indeed, his own funeral had taken place there. The Chancellor was satisfied that had the father expressed any wish, it would have been for his remains to be laid to rest in what was undoubtedly his home area. It was also said to be highly significant, and important, that, as she had approached the end of her own life, his widow herself had realised the mistake, perhaps contemplating her own wishes both to be laid to rest with him, and to be laid to rest in the place where they had lived their lives together. Chancellor Singleton QC therefore granted the faculty sought.

My decision

18. In the present case, there is no evidence that either of Dion's parents failed to appreciate that he was being buried in consecrated ground, or that they were unaware of the implications of this (although I recognise that many lay people have no knowledge of the consequences in law of being laid to rest in consecrated ground). This is not a case where any mistake was made in laying Dion's small body to rest in its present grave space. Dion was laid to rest in the place where both of his parents were then living. Although the new proposed burial plot is a double grave, this is also true of the existing grave space, so this cannot properly be considered as a case where exhumation is motivated by the family's desire to create a true family burial space. This is not a case (such as the recent case before Chancellor Eyre QC in the Lichfield Consistory Court of *Re St Peter, Edgmond* [2017] ECC Lic 4) where the deceased's remains were to be reburied in a family grave in the same cemetery. Here the petitioner is seeking to treat her dead baby son's remains as "portable" and thereby challenge the concept of the permanence of Christian burial (although I am prepared to assume that she does not view matters in these terms). The petitioner is doing so because both of her deceased baby son's parents have since moved back to the Shipley area of West Yorkshire and she no longer considers that she is physically well enough to visit her late baby son's existing grave. She feels that if her baby son's body is re-interred close to her new family home, she will be able to visit his grave and this will help her to cope with the loss of her baby son, who had only survived for 12 weeks. Ultimately, the petitioner would wish to be buried with her son in a new double grave plot close to her new family home. The petitioner is supported in her wishes by Dion's two adult sisters. However, she is vehemently opposed by Dion's father, who is firmly of the view that Dion should remain in the grave space in which he has lain for the last 15 years and in the place which was his only home during his all too short life. Mr Rhodes is adamant that Dion should "be left at peace instead of being dug up and moved to a place that is not his home".

19. In my judgment, this petition fails and should be dismissed. In this intensely fact-sensitive and difficult area, the reasons advanced for granting the faculty sought by the petitioner satisfy neither the *Alsager* test of there being a good and proper reason for the exhumation

and re-interment of Dion's dead body with which most right-thinking members of the Anglican church would agree nor the *Blagdon* test of being "exceptional". In my judgment, Mr Rhodes's reaction of horror at the thought of Dion's dead body being disturbed after more than 15 years and re-interred in a place with which he had no connection during his all-too short life so that his mother can visit him there, and in the face of opposition from his father, would be shared by most right-thinking members of the Anglican church. The unhappy circumstances of the present case, however tragic, and however much one may sympathise with both parents at their loss of a baby son at such a young age, and with the petitioner in the situation in which she now finds herself, can hardly be described as exceptional. This is a very different case from the case of *Re Newton* decided by Chancellor Singleton QC.

20. As I have made clear, I sympathise with the petitioner. She should not regard my decision as in any way representing a victory for Mr Rhodes – for there are no victors in a case such as the present - but rather as a principled application of established legal principles to a difficult and fact-sensitive situation. But in my judgment, for the reasons I have given, the outcome is clear: This petition is dismissed.

His Honour Judge David Hodge QC

Deputy Chancellor

20 February 2018