IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF WANDSWORTH CEMETERY

AND IN THE MATTER OF A PETITION BY MAGDALEN REES

JUDGMENT

Introduction

1. This is the petition of Mrs Magdalen Rees to permit the exhumation of the remains of Henry, her stillborn son, from the consecrated part of the Wandsworth Cemetery in order to allow their re-interment in the consecrated part of Magdalen Hill Cemetery, Winchester.

2. Having read the papers, I formed the preliminary view that this would not be an appropriate case in which to grant a faculty. However, it would not have been appropriate to dismiss the petition without giving Mrs Rees the opportunity of a hearing before me, and she took advantage of that opportunity. The hearing took place on 18 November 2013. She was accompanied by her husband, Mr Dudley Rees. I am grateful both for the clarity and also the restraint with which Mrs Rees 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. Mrs Rees was married in 2004. She was then working in Chelsea as a nanny to a family who had three children and although she had to live "on site", she had the use of a large self-contained flat. This is where she and her husband began their married life together. At the end of 2005, Mrs Rees was expecting a baby and she and her husband began looking for house. They found a three-bedroomed maisonette in Wandsworth which they agreed to buy, subject to contract. They were not proposing to live in it immediately, but at some point in the future when their child would be a bit older and the job in Chelsea came to an end (the three children were all growing up). During this time Mr Rees was working in Slough.

4. On 22 June 2006, their baby was stillborn. This was completely unexpected. A funeral for the child, whom they called Henry, was held in Chelsea Old Church and his remains were

interred in Wandsworth Cemetery. This was because Mr and Mrs Rees were, of course, expecting to move to Wandsworth. They acquired the rights in respect of a "four person" grave, anticipating that, in the future, their remains would also be interred there.

5. Shortly thereafter, the purchase of the maisonette fell through – all sorts of problems began emerge and it proved impossible to resolve them.

6. Happily, Mrs Rees gave birth to a healthy girl in May 2007, although the baby, Sienna, was born prematurely and after a very stressful pregnancy. Throughout all this time Mr and Mrs Rees remained on the books of Wandsworth estate agents, looking for a house to buy in Wandsworth. However this was at a time of escalating property prices and they were never able to find the sort of house that they wanted at a price which they could afford.

7. In February 2009 Mrs Rees's job in Chelsea came to an end when the youngest child whom she was looking after went off to boarding school and Mr and Mrs Rees had to move. They rented a small two-bedroomed flat in Wandsworth. In November 2009, Mr Rees started his own IT business, working from home. In May 2010, Mrs Rees gave birth to a second healthy girl, Lila, after a difficult pregnancy.

8. At this point the need to move to somewhere bigger became pressing. Although they liked Wandsworth very much and Sienna was happily at school there, reluctantly they gave up the idea of buying a property there. In December 2011 they rented accommodation in Winchester (although continuing to live in Wandsworth during the week) and in March 2012 they moved permanently to Winchester, having bought a four bedroomed town house there. They attend worship at the historic chapel of the Hospital of St Cross, which serves as the parish church of the parish of St Faith. They are fully committed to church life there, and Mrs Rees runs the toddlers' group which meets during the main Sunday service. They like living in Winchester. Mrs Rees helps her husband in running the business but is also still able to work part time in looking after children. They feel settled and, as far as they can see, they will not be looking to move from the area. Nonetheless, as they readily accepted, it is not always possible to predict what may be required in the future in that regard. Mrs Rees did point out that they have waited a year before bringing a petition, and apart from discussing the matter fully with her husband, she had discussed it with Revd Mark R Birch, Priest in Charge of the parish. He and the Master of the Hospital are warmly supportive of the petition.

9. I need to mention that when Mrs Rees lived in Wandsworth, she was able to look after Henry's grave, planting seasonal flowers upon it. She has not been able to do this in the same way now that she has moved, and so a visit, when it does take place, does not afford so much comfort to her. Mrs Rees told me that the reason why she particularly wanted Henry's grave to be near at hand to where she lived was because she did not want to lose the sense of him being part of the family. She believed that he was still alive, although he no longer enjoyed an earthly life, and that the presence of his grave near to where they lived would help the family to appreciate that.

The law

10. In *In re Matheson, deceased*[1] Steel Ch stated:

> *From the earliest time it has been the natural desire of most men that after death their bodies should be decently and reverently interred and should remain undisturbed. Burial in consecrated ground secured this natural desire because no body so buried could lawfully be disturbed except in accordance with a faculty obtained from the consistory court. As all sorts of circumstances which cannot be foreseen may arise which make it desirable or imperative that a body should be disinterred, I feel that the court should be slow to place any fetter on its discretionary power or to hold that such fetter already exists. In my view there is no such fetter, each case must be considered on its merits and the chancellor must decide as a matter of judicial discretion whether a particular application should be granted or refused*[2].

11. Steel Ch was stating the norm of permanence, at the same time as emphasising that there may be circumstances where exceptions are properly made to it. In *In re Church Norton Churchyard*[3], Edwards QC Ch considered the circumstances in which exceptions might properly be made. He said:

> *The discretion has undoubtedly been expressed to be quite unfettered. It is to be exercised reasonably, according to the circumstances of each case, taking into account changes in human affairs and ways of thought but always mindful that consecrated ground and human remains committed to it*

[1] [1958] 1 WLR 246.

[2] See p248.

[3] [1989] Fam 37.

> *should, in principle, remain undisturbed. The court then should begin with the presumption that, since the body or ashes have been interred in consecrated ground and are therefore in the court's protection or, in [the words of Wheatly on the Book of Common Prayer (1858), p. 856], 'safe custody,' there should be no disturbance of that ground except for good reason. There is a burden on the petitioner to show that the presumed intention of those who committed the body or ashes to a last resting place is to be disregarded or overborne. The finality of Christian burial must be respected even though it may not be absolutely maintained in all cases ...* [4]

12. He added

> *The court should resist a possible trend towards regarding the remains of loved relatives and spouses as portable; to be taken from place to place so that the grave or place of interment of ashes may be the more easily visited*[5].

13. In *In Re Christ Church, Alsager*[6], Sir John Owen, Auditor, delivering the judgment of the Chancery Court of York in an exhumation case 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].

14. In *In re Blagdon Cemetery*[8] the Court of Arches examined the principles which should govern petitions for the exhumation of remains that have been buried in consecrated ground. The Court had the benefit of a paper on the "Theology of Burial" prepared by the Right Reverend Christopher Hill, who was then Bishop of Stafford. Bishop Hill drew attention to the fact that

> *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*

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[4] See p43.

[5] Ibid.

[6] [1999] Fam 142.

[7] See p149.

[8] [2002] Fam 299.

judge; to commit their body to burial/cremation and finally to comfort one another.

15. He went on to explain more generally that:

> *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.*

16. In the light of Bishop Hill's restatement of these theological principles, the Court of Arches reiterated the position that permanence should be the norm of Christian burial, and that permission for exhumation should only exceptionally be granted. It gave guidelines to assist in the determination of other cases. One of those guidelines was that precedent was a relevant matter. This was because of the desirability of securing equality of treatment as between petitioners, as so far as circumstances permit it. The Court addressed portability in the context of what it said about possible medical reasons for exhumation:

> *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 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*[9].
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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].

Consideration

17. It seems to me that the first matter to observe about this petition is that at the time that Henry was stillborn, Mr and Mrs Rees did not have a permanent home in Wandsworth, and that their ambition to find one was frustrated through no fault of their own. Nor, in fact, did they have a permanent home in Chelsea – they knew that they would have to leave there at some time in the not too distant future. Moreover, although one cannot describe the stillbirth of a baby as tragic in the same way as the death of someone who has lived and has had his or her life cut short, there can be no doubt that it can be just as unexpected (and in this case was); in terms of trauma, it must be similar to the tragic death of a baby shortly after birth.

18. The upshot of this is that, although Mr and Mrs Rees would have had to organise the burial of Henry's remains, whether they had a permanent home or not, it meant that when they did find a permanent home, the remains of Henry were not where they would have liked them to be. Further, this was in circumstances where the necessity for the burial had arisen in unexpected and tragic circumstances. Accordingly, the case has some similiarity with the facts of *In re Blagdon Cemetery*. Mr Whittle, who, with his wife, were petitioners in that case, was a publican who could expect to move to different places in the course of his working life and did, in fact, do so. His 21 year old son was tragically killed in an industrial accident, and he arranged for his remains to be buried in the village where he then lived. Mr and Mrs Whittle's petition, which was granted, was to permit their son's remains to be reinterred in Stowmarket where they had found a permanent home. As in *In re Blagdon Cemetery,* the case that I have to consider is not a simple "portable remains" case, where the sole justification for

[9] See p307.

[10] See paragraph 36 (v).

exhumation is that the deceased's next-of-kin have moved and want to take with them his or her remains.

19. I also think that it is relevant that Henry was stillborn – or, to put it another way, I think that the traumatic circumstances of Henry's stillbirth, as continued to be experienced in the lives of Mr and Mrs Rees, are relevant circumstances in considering Mrs Rees's petition.

20. The grounding of the Church's resistance to exhumation lies in respect for the wishes of the dead and, more broadly, the sort of considerations that were identified by Bishop Hill in the paper that he submitted to the Court in *Blagdon.* The first matter is not specifically relevant in the present case – baby Henry never lived independently of his mother – but the second evidently is relevant. The idea is that burial is symbolically about letting go and thus in assisting people to let go; the idea involved in moving remains is the reverse. I have no reason to question what the Bishop wrote and I do in fact find it entirely convincing. As a Chancellor, however, I have to address the question of how to uphold the principles that he enunciates while at the same time trying to deal pastorally with individual cases. The difficulty exists because, whatever the theory, people do have difficulty in "letting go". Pushed to its logical conclusion, after a funeral, the relatives of someone whose remains were buried in consecrated ground would never go back there. However we know that they do go back, and derive comfort from being able to do so. I cannot regard this as in any way unnatural or not in accordance with Christian theology. Of course, many people do not go back or go back rarely and in due course there may be no-one at all who visits the grave. Yet many people do go back. Often those graves which are maintained particularly beautifully are those of a child who has died in tragic circumstances.

21. It seems to me that in the way that I have explained, Mrs Rees is finding it difficult to "let go" and the particular reason is the continuing trauma of the fact that Henry was stillborn. The strength of her feeling in this matter is illustrated by the fact that, after much reflection and recognising, as she does, the value of the norm of the permanence of Christian burial, she still brought this petition: in circumstances where she now has found a permanent home and is able there to live a fulfilled life with her two healthy children and her husband. She explained to me that, despite everything, she still found it difficult to cope with the status quo.

22. It is possible, although she would not feel it as such, that I could be helping Mrs Rees by refusing to grant her petition. However, I do not think that it can be my role to embark upon what would be in effect an exercise in amateur psychology in this regard. I have no evidence on which I could base such a judgment one way or other. I think that having discussed the matter with her husband and her parish priest, she must be the judge of what she considers

will best assist her and her family. Rather, I think it is necessary for me to consider, in the absence of the sort of strong medical justification that was referred to in *In re Blagdon Cemetery,* whether I should discount the pastoral considerations that it seems to me that do arise in this case. By pastoral considerations I mean the case for permitting an exception to the norm based on the difficulty that Mrs Rees has in coming to terms with the loss of her baby. This is a matter of particular importance because, as *In re Blagdon Cemetery* recognises, cases of this kind can properly be regarded as precedents.

23. I do not think that the absence of strong medical evidence requires me to disregard the pastoral considerations, which in the present case seem to me to point to the grant of a faculty. It seems to me that the Court of Arches had in mind the "ordinary" case where there were no special circumstances surrounding the death of the person whose remains it was sought to move; and certainly did not have a stillbirth in mind.

24. Accordingly, I will grant this petition because of the fact that Mr and Mrs Rees did not have a permanent home in Wandsworth at the time of the burial of their stillborn son and because of the tragic circumstances of that stillbirth, with which Mrs Rees is still trying to come to terms. These reasons represent circumstances which make it appropriate to make an exception to the norm of Christian burial. I do also take account of the fact that the effect of my judgment is to "free up" a four person grave in Wandsworth Cemetery in circumstances where there is a shortage of grave space. Nonetheless, in the scale of things, I do not regard this as a weighty matter leading me to my conclusion.

25. I am loath to prolong this judgment but because of the potential for the case to be viewed as a precedent, I do need to add some further words. The first matter is that it may be observed that if for some reason Mr and Mrs Rees were to move from Winchester, it might appear that circumstances would arise in which a second exhumation might be appropriate. Obviously Mr and Mrs Rees hope that they do not have to move from Winchester and they do not envisage circumstances in which they would; but of course it is not possible to have any certainty about matters of this kind. Further, they do not envisage that if they did have to move away, they would seek a further exhumation. A petition in these circumstances would evidently be weaker than the present one. More particularly, I think that there would properly be an extreme reluctance to grant a petition for a second exhumation. I think that anyone may feel, whatever his or her views about a particular case, that, in appropriate circumstances, it may be proper to permit exhumation from a place which, for whatever reason, has come to seem wrong to one that seems right; but that there can only be one opportunity to get it right. Otherwise I think that it really would look as if the Court were countenancing portability. The

second matter I want to make some observations about is whether, in an appropriate case, pastoral considerations might of themselves be sufficient. It does not after all take very much to envisage a case which is like *In re Blagdon* but where Mr and Mrs Whittle had been permanently settled in Blagdon; or like the present case, but where the petitioner was permanently settled in Wandsworth at the time of the burial. I think all I can say is that a Chancellor would have to consider such a case on its merits. I cannot discount the possibility that a Chancellor might grant such a petition; on the other hand he or she might feel that the need to uphold the norm of Christian burial had to outweigh the pastoral considerations in that case. I do not think that what *In re Blagdon Cemetery* says about medical considerations necessarily precludes the grant of a faculty in such a case. I would add that in exhumation cases the justification and facts upon which that justification are based are often not straightforward and it is unusual for a case to be entirely without merit. The task for a Chancellor in any particular case is to decide whether that case has sufficient merit.

PHILIP PETCHEY
Chancellor
22 November 2013