

**IN THE CONSISTORY COURT OF THE DIOCESE OF PETERBOROUGH
IN THE MATTER OF WELTON ROAD CEMETERY, DAVENTRY AND
SANDRA CLEAVER DECEASED**

BETWEEN

DAVENTRY DISTRICT COUNCIL

First Petitioner

-and-

JENNIFER MARY PHILLIPS (NEE AUSTIN)

Second Petitioner

-and-

RACHEL SONIA DUCKER

Party Opponent

Chancellor David Pittaway QC:

Background

1. The petition arises because of a mistake made by Daventry District Council (“the Council”) in permitting the burial of the cremated remains of Mrs Cleaver in a plot in the consecrated section of Welton Road Cemetery, Daventry, reserved for Mrs Phillips. Mrs Phillips had purchased the exclusive right to be buried in the plot adjacent to the grave of both her parents, Mr and Mrs Dodson, in November 1987. Mrs Ducker acquired the right of burial to the same plot in October 2015, shortly before the interment of her mother, Mrs Cleaver’s, cremated remains on 5th November 2015. Mrs Phillips now seeks a faculty requiring Mrs Cleaver’s cremated remains to be exhumed and reinterred elsewhere to enable both her and her husband to be buried in the plot after they have died. Mrs Ducker, Mrs Cleaver’s daughter, objects to the

proposed exhumation. Mrs Phillips has rejected alternative plots offered to her by the Council. The cemetery is managed on behalf of the Council by Enterprise Managed Services, however, the Council accept full responsibility for the mistake that has occurred.

2. The original petitioner was the Council, who after the mistake was drawn to their attention by Mrs Phillips, incorrectly made an application to the Ministry of Justice for exhumation, before appreciating that it was necessary for them to apply for a faculty. Mrs Cleaver's cremated remains are interred in consecrated ground within Welton Road Cemetery. There were several errors surrounding the Council's attempts to remedy the situation, which could, with more care, have been avoided. For example, amongst others, the original letter to Mrs Ducker specified the wrong plot number and the alternative plot offered was not available.
3. Mrs Cleaver's family opposed the Council's petition and Mrs Ducker became a party opponent. Subsequently I invited Mrs Phillips to apply to become a petitioner, and I granted the application on 3rd July 2017. Originally all three parties agreed to the matter being dealt with by written representations, however, Mrs Phillips subsequently withdrew her consent and asked for an oral hearing. The parties attended mediation but were unable to reach an outcome that was satisfactory to both families.
4. Following directions, the petition was heard in the Church of St Mary the Virgin, Badby on 20th September 2017. Oral evidence was heard from Mrs Lewis, on behalf of the Council, Mrs Phillips and her husband, Mr Phillips, and Mrs Ducker and her brother, Mr Cleaver. I should add that as Mrs Phillips is now a petitioner, the Council seeks no relief. The Diocesan Registry had also received a large number of letters both in support of and in opposition to the petition. After the hearing I visited the graveyard at St Mary the Virgin, Badby and Welton Road Cemetery, Daventry.
5. As I indicated at the end of the hearing, whatever decision I reach in this unfortunate case will cause further distress either to the family of Mrs Cleaver or Mrs Phillips.
6. The conclusion which I have reached is that the proper course is for me to direct that Mrs Cleaver's cremated remains are exhumed and returned to Mrs Ducker to be reinterred or otherwise disposed of as she wishes, in consultation with the rest of her family.

Law

7. As I was reminded in helpful submissions from Ms Nicola Preston and Mr Mark Hill QC the principles of law to be applied are well-established and are not in dispute. I have been referred to several authorities, both old and new, including ***In re Christ Church, Alsager*** [1999] Fam 142, 149 and the recent decision ***In re Fairmile Cemetery, Lower Assendon*** [2017] ECC Oxf 2. In my judgment, the principles I should follow are clearly set out in ***In Re Blagdon Cemetery*** [2002] Fam 299. I am required to exercise my discretion in accordance with those principles. Although I have found the cases I have been referred to helpful in demonstrating how other chancellors have exercised their discretion, in my view, these cases are largely fact sensitive. Mr Hill has also referred me to Dr Christopher Hill's article: "A Note on the Theology of Burial in Relation to Some Contemporary Questions" 7 Ecc LJ 447, which provides a useful theological background to my decision making.
8. The starting point is that the interment of Mrs Cleaver's cremated remains in plot A239 was unlawful and contrary to art 10(6) of the ***Local Authorities Cemeteries Order*** 1977. I should add that there is no distinction in canon law between a corpse and the ashes of a cremated body and both should be accorded the same dignity in interment, ***In re Church Norton Churchyard*** [1989] Fam 37. The underlying principle to be applied is that Christian burial or interment is regarded as permanent and that a faculty for exhumation should only be granted for good and proper reason. Before I turn to ***In re Blagdon***, I should also add that the Chancery Court of York considered various factors which can arise in connection with a petition for a faculty for exhumation in ***In re Christ Church, Alsager*** [1999] Fam 142, 149. The Court held that a mistake in effecting the burial is likely to constitute good reason, and gave as an example a burial in the wrong grave, and said that was especially true where the petition was brought promptly after discovery of the facts.
9. The principles to be applied were thoroughly reviewed in ***In re Blagdon Cemetery*** [supra], where it was confirmed that a faculty would only be exceptionally granted, where there were special circumstances which constituted an exception to the norm that Christian burial was final. The court considered that whether the facts of a particular case should be treated as an exception is for the Chancellor to determine on the balance of probabilities. The court also concluded that the amount of local support should not operate as a determining factor and will normally be irrelevant.

10. At paragraph 35 D Cameron QC Dean of the Arches said:

“The variety of wording which has been used in judgments demonstrates the difficulty in identifying appropriate wording for a general test which is essentially a matter of discretion. We consider that it should always be made clear that it is for the petitioner to satisfy the consistory court that there are special circumstances in his/her case which justify the exception from the norm that Christian burial, that is burial of a body or cremated remains in a consecrated churchyard or consecrated part of a local authority cemetery, is final. It will then be for the chancellor to decide whether the petitioner has so satisfied him/her.”

11. At paragraph 36 (iii) G-H Cameron QC Dean of the Arches said:

“We agree with the Chancery Court of York that a mistake as to the location of a grave can also be a ground upon which a faculty for exhumation may be granted. ... Sometimes genuine mistakes do occur, for example, a burial may take place in the wrong burial plot in a cemetery or in a space reserved for somebody else in a churchyard. In such cases it may be those responsible for the cemetery or churchyard who apply for a faculty to exhume the remains from the wrong burial plot or grave. Faculties can in these circumstances readily be granted because they amount to a correction of an error in administration rather than being an exception to the presumption of permanence, which is predicated upon disposal of remains in the intended not the unintended plot or grave.”

Facts

12. Mrs Phillips’ father, Mr Dodson, died in June 1987. His widow purchased plot A240 in the cemetery. The plot was a double plot intended for both of them. Mrs Dodson died in 1991 and was buried with her husband. Mrs Phillips is the only child of Mr and Mrs Dodson. Shortly after her father’s death she purchased plot A239, being the closest plot available to Mr Dodson’s grave. The purchase gave Mrs Phillips an exclusive right to be buried in the plot for a period not exceeding 100 years. Contrary to the terms of the purchase, the Council sold the right to be buried in plot A239 to Mrs Ducker in October 2015 and Mrs Cleaver’s ashes were interred in the plot on 5th November 2015. It is apparent that the Council failed to record the sale to Mrs Phillips properly in

1987. I should add that the masterplan produced at the hearing appeared to me to be still less than satisfactory.

13. Prior to her death, Mrs Cleaver worshipped regularly at the church of St Mary the Virgin, Badby. Her husband, Mr Cleaver, continues to live in the village. He is not in good health and did not attend the hearing. The unchallenged evidence is that a wooden cross was placed on the grave on the day Mrs Cleaver's remains were interred. A flower vase was placed on the grave a week later. Fresh flowers were regularly placed on the grave throughout this period. I accept that Mrs Phillips did not notice the interment of Mrs Cleaver's cremated remains from 5th November 2015 until 2nd October 2016. Mr Hill understandably perhaps did not cross examine Mrs Phillips because he did not wish to cause her unnecessary distress, however, the reason she did not notice the wooden cross is unclear. Having visited the cemetery I consider that it is unlikely that Mrs Phillips would not have noticed the wooden cross if she had visited the grave with the frequency she said in her witness statement that she had done. Once Mrs Phillips had noticed the presence of the wooden cross she contacted the Council promptly. It is perhaps hardly surprising that these proceedings have had a deleterious effect on both Mrs Phillips and Mrs Ducker's health and on the health of other members of their respective families. A letter from Mrs Ducker's general practitioner to this effect has been obtained, which I have seen.
14. Once it had been brought to their attention the Council apologised for the error made by their cemetery contractors. They made that apology again at the hearing. They have offered other plots in the Welton Road Cemetery in both consecrated and unconsecrated ground for Mrs Cleaver's cremated remains to be re-interred. None of which are acceptable to Mrs Ducker or her family.

Discussion

15. As I said at the outset of this judgment I have concluded that Mrs Cleaver's cremated remains should be exhumed and reinterred elsewhere. I have listened carefully to the submissions made by Ms Preston and Mr Hill QC as to how I should exercise my discretion and I have reached my conclusion for the following reasons. I do not consider that it is necessary to set out their short submissions in this judgment beyond the matters set out below.

16. It is clear to me that the interment of Mrs Cleaver's cremated remains in plot A239 was unlawful and contrary to art 10(6) of the ***Local Authorities Cemeteries Order*** 1977. In my view, Mrs Phillips remains entitled to be buried in plot A239, having purchased the right of burial in 1987 with the intention of being buried adjacent to her parents. Having heard Mrs Phillips give oral evidence, I am satisfied that remains her intention. As I have already said, I accept that she did not notice that Mrs Cleaver's cremated remains had been interred in the plot behind her parents' grave until October 2016. I am satisfied that she raised the issue with the Council promptly once she did become aware of what had occurred.
17. Mr Hill QC forcefully submits that neither Mrs Ducker nor members of her family wish Mrs Cleaver's interred remains to be removed from where she was laid to rest on 5th November 2015. Much of his criticism, however, is directed at the conduct of the Council, with which I have some sympathy.
18. Whilst the principle is undoubtedly established that the presumption is that once interred there must be exceptional circumstances for an exhumation to take place, it is well-established that a mistake can amount to an exception. In my view, what has taken place in this case is a paradigm example of the type of mistake that the Court of the Arches envisaged in ***In re Blagdon Cemetery*** [supra].
19. Analysing the lasting harm this mistake has caused, I have in mind that both families had requested burial plots close to their family members, Mrs Cleaver's parents and aunt and uncle are buried nearby, and Mrs Phillips purchased the burial rights to the plot behind her parents' grave.
20. In my view, the greater harm will be caused to Mrs Phillips and her family by permitting Mrs Cleaver's cremated remains to remain in the plot than to Mrs Ducker and her family by leaving her remains there. Although it was not raised at the hearing it seems to me that if I were to permit Mrs Cleaver's cremated remains to remain and, in due course a memorial was erected, there would be a permanent reminder to Mrs Phillips every time she visited her parents' grave that she would have been buried in plot A239 but for the Council's mistake. Moreover, she would go to her grave in the knowledge that her long expressed wish to be buried behind her parents' grave had been frustrated. Her witness statement explains that she had also discussed her intention with her mother before she died. Although it was submitted that she could be buried with her parents, she had purchased a double plot in which she and her

husband would be buried, if she married again, which she has done. I do not consider burial in her parents' grave as being a satisfactory solution.

21. I accept that the exhumation of Mrs Cleaver's cremated remains will clearly cause great upset to Mrs Ducker and her family but, in my view, once they have found an alternative place either in the Welton Road Cemetery, or in the graveyard of St Mary the Virgin, Badby, or if necessary another location, that unhappiness will pass, given time. I do not think that it would be beneficial to Mrs Cleaver's family to know that every time they visit her grave that she was buried there by mistake. Nor is it beneficial that they should be concerned that when they do attend, Mrs Phillips or another member of her family may be visiting Mr and Mrs Dodson's grave. Mrs Phillips refers in her witness statement to this having occurred on two occasions already, on one of which Mrs Ducker's family held themselves back whilst the other family was at the grave. In my view, it would cause unnecessary stress and distress, distracting both families from the proper purposes of visiting the graves, namely to provide them with an opportunity to reflect on their lives together, whilst they stand beside the graves where their remains are buried or interred.
22. I reject Mr Hill's submissions that Mrs Phillips has an adequate remedy in respect of an infringement of her exclusive burial right, contrary to art. 10 (6) of the ***Local Authorities Cemeteries Order*** 1977, either by pursuing a complaint to the Local Government Ombudsman or bringing a claim in the civil courts for damages. In neither case will those remedies alter the position that Mrs Phillips will not be buried in her chosen plot unless and until the exhumation of Mrs Cleaver's cremated remains takes place.
23. In my view the balancing exercise I am required to undertake favours remedying the Council's error at this stage and cutting the Gordian knot that presently binds these families together. The letters in support of and in opposition to the exhumation demonstrate the strength of feeling within the community on both sides but do not assist me in reaching this difficult decision.
24. In these circumstances I direct that Mrs Cleaver's cremated remains be exhumed within a period of three months from the date of this judgment and returned to Mrs Ducker to be reinterred or otherwise disposed of as she wishes, in consultation with the rest of her family.

25. At an early stage the Council offered to contribute £1,500 towards the costs of each of the parties. I indicated at the hearing that I would receive submissions in writing as to costs once this judgment had been handed down. Although I was prepared to determine this case on the basis of written representations, I consider that the oral hearing that took place has been beneficial in enabling me to reach my decision. I therefore direct that the Council should show cause as to why they should not pay the other parties' costs to be assessed by the Diocesan Registrar, if not agreed. The Council should file written submissions within 14 days of the handing down of this judgment, and only if they object to paying the costs on the basis set out above should it be necessary for the other parties to file written submissions within seven days thereafter.

13 October 2017