



Neutral Citation Number: [2020] ECC Oxf 5

Faculty – Exhumation of husband buried in 1982 for re-interment in same churchyard next to wife buried in 2015 – Mistake – Effect of lapse of time

Application No: 10759

IN THE CONSISTORY COURT
OF THE DIOCESE OF OXFORD

Date: 13 March 2020

Before:

THE WORSHIPFUL DAVID HODGE QC, CHANCELLOR

In the matter of: ST MARY, WOOTTON

And: THE PETITION OF DAVID MARK HEWLETT

Determined on paper

The following cases are referred to in the Judgment:

Re Blagdon Cemetery [2002] Fam 299

Re St. John Washborough [2019] ECC Lin 6

Re St Michael's Church, Tilehurst [2020] ECC Oxf 2

JUDGMENT

Background facts

1. This is a faculty petition lodged on 3 February 2020 by Mr David Mark Hewlett, the sole surviving adult child of Marcus John Hewlett, seeking the exhumation of the mortal remains of his late father from the churchyard of St Mary's Church, Wootton, and for them to be re-interred in the same churchyard next to the existing grave of his late widow, Mrs Edith Hewlett, the petitioner's mother.

2. The petitioner's father, Mr Marcus Hewlett died on 18 August 1982, aged 68, and was buried in the churchyard on 23 August 1982. The petitioner's mother, Mrs Edith May Hewlett, reserved a burial space in the churchyard by faculty dated 4 February 1983 so that when her time came she could be buried next to the mortal remains of her late husband. Mrs Hewlett died on 9 February 2015, aged 94. When preparing her reserved plot for burial, it was found that part of that plot was taken up with the remains of another burial and so there was not enough space to bury her there. As a result, Mrs Hewlett was laid to rest in another part of the churchyard, and the churchwardens set aside an empty plot next to her grave so that her late husband could be re-buried there. The petitioner initially contacted the Registry by letter dated 2 September 2015 requesting the exhumation and re-interment of his late father's remains. Mr Hewlett was provided with a letter from the Registry setting out the steps he needed to take to apply for his late father's exhumation. That exchange of correspondence concluded with a letter from the Registry to Mr Hewlett dated 9 October 2015, which made it clear that it would be necessary for him to petition the court for a faculty if he wished to pursue his request. The petitioner's next contact with the Registry was a telephone call in 16 January 2019, followed by a letter dated the following day. It was not until February of this year that any petition was lodged by Mr Hewlett. The petitioner appears to have taken the view that it was for the church, and not for him, to sort the matter out, whilst the church took the view that it was for the petitioner to make the appropriate faculty application to the court. In his letter accompanying the petition Mr Hewlett states that, so far as the family are concerned,

“... the problem is down to the church for not following the burial plan, plot, map or register and down also to the undertakers for doing the same”.

In his earlier letter to the Registry dated 17 January 2019 the petitioner states that the church and the undertakers were equally at fault in not reading the plan properly before digging the grave next to the grave of his late father.

3. Further details of the background are set out in a memorandum dated 17 February 2020 from the Rector, the Reverend Stephen Jones. He explains that the problem with Wootton churchyard is that, because of the very stony ground, successive gravediggers have been unable to dig “double-depth” graves. Consequently, if a member of a family wishes to be buried next to a loved one, they must reserve an adjoining grave space. After the burial of Mr Marcus Hewlett on 23 August 1982, his wife, Mrs Edith Hewlett reserved, by faculty, a space alongside him. Unfortunately, sometime later (in 1984) that space was taken for the burials of Sydney and Evelyn Portlock. Following Mrs Edith Hewlett's death, her burial was arranged to take place on 3 March 2015 but the gravedigger could not dig in her reserved space. Understandably, the

family were upset and they received pastoral care and support from the Rector and church members. The family eventually agreed to Mrs Hewlett being buried in another part of the churchyard, with a view to her husband's remains being exhumed and reburied next to his late wife. Images of the two graves are attached to this judgment. The Parochial Church Council consented to the family going ahead with this faculty application. Mr David Hewlett and the Rector completed a petition form. The Rector told him to return the form to the Diocesan Registry and he assumed that Mr Hewlett had done so. Sometime later, Mr Hewlett complained that he had heard nothing from the Registry. It then appeared that he had not been in touch with the Registry, and thereafter nothing happened for some time. Later, the Rector understands that Mr Hewlett told the Registry that he (the Rector) would complete and sign the petition. With the support of the PCC the Rector refused to do so, and the PCC refused to take any responsibility for the application. The Rector passed on this message to Mr Hewlett. Owing to other commitments, Mr Hewlett did not pursue the matter for quite some time; but he returned to the issue during the course of 2019. Following the intervention of the Assistant Archdeacon, Mr Hewlett was encouraged to ask for the appropriate form and to complete and submit it, which he has now done. At an Extraordinary Meeting of the PCC held on Sunday 23 February 2020 it was unanimously resolved:

“... to give David Hewlett and family consent to apply for the exhumation and reburial of the body of Mr Marcus Hewlett in Wootton churchyard. The PCC accept no responsibility or liability for the planning, organisation and cost of the exhumation and reburial. Consent is given subject to the reinstatement of all affected areas of the churchyard, to the reasonable satisfaction of the PCC.”

Although no record of it has been found, the Rector believes that a similar resolution had been passed by the PCC at the time the problem first came to light in 2015.

4. The Rector records that although he can understand the family's feelings about what has happened, his personal view is that he does not feel that exhumation is necessary. The petitioner's parents are buried in the same churchyard and, from a theological point of view, they are now in the same place. He notes that neither of the two Hewlett graves have been visited for a long time and no memorial stones have been erected for them, apart from a very small stone vase on Mr Hewlett's grave.

5. It is clear that a mistake was made in burying Mr and Mrs Portlock in such a way as to prevent the burial of Mrs Edith Hewlett's body in the space which she had expressly reserved next to the grave of her late husband. The result has been to prevent the implementation of the reservation faculty which Chancellor Boydell had granted on 4 February 1983. It is not clear precisely how this mistake has come about; but the court is satisfied that the fact of a mistake has been clearly demonstrated.

The proper approach

6. The law the court must apply to the present petition is founded upon a Christian understanding of what the burial of a human body (or its cremated remains) signifies. This court has recently considered the legal principles according to which the court may permit the exhumation of mortal remains from consecrated ground in its judgment in the case of *Re St Michael's Church, Tilehurst* [2020] ECC Oxf 2 at paragraphs 6 to 11, to which reference should be made for a full consideration of the effect of the decision of the Court of Arches in the leading case of *Re Blagdon Cemetery* [2002] Fam 299. 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. 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. 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 the *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’.

7. 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 normal rule 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. At paragraph 35 of their judgment in *Re Blagdon Cemetery*, the Court of Arches had adverted to:

“... the difficulty in identifying appropriate wording for a general test in what 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 making of an 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.”

Earlier, at paragraph 33, the Court had explained that ‘exceptional’ means ‘forming an exception’ [*Concise Oxford Dictionary*, 8th ed (1990)] and that guidelines could assist in identifying various categories of exception. So far as relevant to the present petition, the guidelines provided by the Court of Arches (at paragraph 36 of their judgment) may be summarised as follows:

- (1) The passage of a substantial period of time since burial will not in itself be fatal to a petition, although it may be potentially relevant in assessing the genuineness of the petitioner's case.
- (2) Although mistake as to the location of the grave or, in certain circumstances, as to the significance of burial in consecrated ground can be a good and proper reason, mere change of mind as to the place of burial by those responsible for the interment cannot. The Court of Arches noted:

“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 someone 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 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 an unintended plot or grave.”

(3) Although the views of close relatives are a very significant factor, the amount of local support for the petition will normally be irrelevant.

(4) In view of the desirability of securing equality of treatment between petitioners so far as circumstances permit, the court has to take account of 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. The present case bears some similarity to the case of *Re St. John Washborough* [2019] ECC Lin 6. There the petitioners' parents had intended to be buried in the same reserved double grave plot. The petitioners' mother died in 2008 and was buried in their chosen grave. When the petitioners' father died in 2019 it was discovered, a few days before the funeral, that the grave of their mother had not been dug sufficiently deep to accommodate a second burial and so, as a “temporary measure before both parents could be united in the single grave which they had chosen” the father was buried in another part of the churchyard. Three months after the father’s funeral the petitioners sought a faculty to authorise the exhumation of their mother's body so that a double depth grave could be dug to accommodate the burial of their father's body. Chancellor Bishop accepted that a mistake had been made in that the instructions to dig a double depth grave in 2008 had not been followed, and that the “wholly exceptional circumstances” which had arisen in that particular case justified the grant of a faculty for the double exhumation and re-interment of both bodies, conditional upon it being possible to dig the mother's grave to a double depth, failing which the mother's remains could be exhumed and re-interred in her husband's grave. In the course of his judgment, the Chancellor addressed the following factors which supported the submission that special circumstances had arisen which might permit the remains of the petitioners’ late parents to be exhumed:

(1) Lapse of time: The Chancellor was quite satisfied that the family did not realise that the depth of their mother’s grave prevented their father from being buried there until 2019. This was only made clear to them shortly before their father’s funeral. They were then faced with making a difficult decision at a very difficult time. The petitioners had acted speedily in bringing the petition forward. Although the mother had been buried in 2008, there had been no lapse in time since the facts had become known to the petitioners.

(2) Mistake: Where there had been a simple error in administration, such as burial in the wrong grave, faculties for exhumation could readily be granted. In the instant case there had been a mistake made on the part (so it would appear) of the 2008 gravedigger in either failing to dig the mother’s grave to a sufficient depth or failing to tell anyone that only a single depth gave could be dug. The Chancellor would have expected that the undertakers in 2008 would have come to realise at some stage before the mother’s

interment that her grave had only been dug to a single depth. It was clear that the settled intention of both parents had been that they should be buried together in a particular grave. It was not clear whether this was impossible at the place where the mother had been buried because of a sub-stratum of rock or poor drainage, or whether there were no problems in digging the grave to a double depth.

(3) Precedent: In *Re Blagdon Cemetery* the Court of Arches had held that it was appropriate to consider the effect of precedent, if the application were to be granted, because of the desirability of securing equality of treatment, so far as circumstances should permit, between petitioners. The Chancellor expressly took this issue into account.

(4) Family grave: In *Re Blagdon Cemetery* the Court of Arches had also held that the use of family graves was to be encouraged both because they expressed family unity and they were environmentally friendly in demonstrating an economical use of land for burials. It was clear that both parents had wished to be buried together, in effect in a family grave. That could be still achieved with a single exhumation of the mother's remains and her interment in her husband's new grave; but that was not what the petitioners wanted, and it had not been the intention of the parents that they should be buried in the grave where the father was currently interred.

However, there are two features that distinguish that case from the present. First, in that case the petitioners had acted speedily in bringing the petition forward within three months after the father's funeral whereas here there has been a lapse of time of some five years. Secondly, the exhumation of the mortal remains of the petitioner's late father and their re-interment next to the grave of his late mother will not strictly result in the creation of a family grave but rather in the creation of two family graves next to each other.

Decision and reasons

9. 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 caused the Registry to email the petitioner to inquire whether he was content for the court to deal with the petition without the need for a hearing and whether he wished to submit any further written representations to the court. The response was that the petitioner was happy for the matter to be determined on the papers he had submitted and there was nothing further to add other than that "the story is there".

10. Having given preliminary consideration to the petition the court invited the Registry to contact the petitioner and inform him that it was very concerned about his delay in pursuing the matter in response to the Registry's letter of 9 October 2015. The court indicated that it would welcome any representations he might wish to make about the issue of his delay in pursuing the faculty application given that lapse of time is a relevant factor in assessing the genuineness of a petitioner's case. He was also invited to respond to the Rector's concerns that neither of the two graves would appear to have been visited for a long time and that no memorial stones had been erected for them, apart from a very small stone vase on Mr Hewlett's grave. The petitioner's response (written from his home in Somerset) was, first, that the delay was not really down to him but rather to the church and the diocese and that he had not sought to put any pressure upon them because he had been looking to them to sort the problem out. Secondly, the petitioner had been unable to visit the grave as often as he would have wished because his

wife was Chinese and, as a result of difficulties with the Home Office over her immigration status, they had both been spending long periods of time in China. They had visited both grave plots when they had been back in the country. The petitioner had not wanted to erect two gravestones until his parents' remains had been reunited which he had thought should have been done by now. The letter from the petitioner concluded (correcting obvious errors):

“It makes us feel it has been on purpose that we get fed up and let it go. We haven't so we would like this problem resolved by you as soon as possible. The last time we went to mum's grave it was still like someone had dumped a wheelbarrow full of rubble on top, as it was when she was first buried. The graveyard is in such a mess, overgrown, needs work done on it.”

A postscript reads:

“I hope you understand my writing: The responsibility is with the church.”

11. In the present case the court clearly has a discretion to permit the human remains of the petitioner's late father to be exhumed to enable them to be re-interred in the vacant grave space that has been left next to the grave of the petitioner's late mother because a genuine mistake has clearly been made in not ensuring that the grave space expressly reserved by the petitioner's mother remained capable of accommodating her coffin. This is not strictly the correction of an error of administration of the sort contemplated by the Court in *Re Blagdon Cemetery* because the human remains which are sought to be exhumed (those of the petitioner's father) have been interred in their intended grave plot and it is the human remains of the petitioner's mother that have been laid to rest in an unintended grave plot. However, the subtlety of that distinction is not one that should lead the court to take a different approach to the mistake that has undoubtedly occurred. It is not the fault of the petitioner (or his late mother) that the ground conditions in the churchyard mean that the creation of a double grave is not now possible: that has always been the case and the petitioner's mother had appreciated that and had sought to address the difficulty to which this gave rise by reserving a grave plot next to that of her late husband. The delay of five years in presenting this petition does concern the court but its relevance really goes to the issue of the genuineness of the petitioner's case. The court does not accept that the petitioner could have been left in any doubt as to what he should have been doing in the light of the Registry's letter to the petitioner of 9 October 2015, which had made it clear that it would be necessary for Mr Hewlett to petition the court for a faculty if he wished to pursue his request for his late father's remains to be exhumed and re-interred elsewhere in the churchyard. Nevertheless, it is clear that the petitioner genuinely feels that the responsibility for remedying the present situation lies with the church; and the court notes that in *Re Blagdon Cemetery* (at paragraph 36 (iii)) the Court of Arches did say that in cases of genuine mistake:

“... 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.”

The court is also sympathetic to the Rector's personal view that exhumation is not strictly necessary because the petitioner's parents are buried in the same churchyard and, from a theological point of view, they are now in the same place. However, the petitioner clearly does not share that view; and since he is in no way responsible for the mistake that has undoubtedly occurred, he will be entitled to feel resentment if that mistake is not rectified in the same way that it has in similar cases. In *Re Blagdon Cemetery* the Court of Arches recognised (at paragraph 36 (v)):

“... the desirability of securing equality of treatment, so far as circumstances permit it, as between petitioners.”

The court is satisfied that by acceding to this application it would not be creating an undesirable precedent or doing anything to approve a practice of regarding mortal remains as ‘portable’ or encouraging future applications founded upon that ground. The court bears in mind that the common vision of this Diocese of Oxford 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; and in doing so it should act with compassion.

12. For these reasons, the court grants a faculty for the disinterment of the mortal remains of the late Mr Marcus Hewlett, and their re-interment in the vacant grave plot in the same churchyard next to that of his late wife, subject to the following conditions:

- (1) that the disinterment and subsequent re-interment will be carried with all due reverence and dignity and (subject thereto) 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; and
- (4) that any necessary secular authorisations are obtained and all conditions thereof are complied with.

The exhumation and re-interment are to be carried out within the next three months (or such further time as the court may, for good reason, permit) and at the expense of the petitioner.

13. For pastoral reasons, the court waives its fee for this judgment. There will be no order as to costs save that the petitioner will pay the prescribed fee and also any correspondence fees of the Registrar and any expenses incurred by the court.

The Worshipful Chancellor Hodge QC

13 March 2020

Mrs Hewlett's Grave



Mr Hewlett's Grave

