

Neutral Citation Number: [2021] ECC Por 3

IN THE CONSISTORY COURT OF THE DIOCESE OF PORTSMOUTH

In re St Peter and St Paul, Wymering

And in re Frederick Saunders, deceased

His Honour Philip Waller CBE, Chancellor

9th December 2021

JUDGMENT

Introduction

1. Frederick Saunders died on 1st July 1994 and his cremated remains were interred in the burial ground of St Peter and St Paul, Wymering, Cosham, Hampshire (Plot No. C1) on 9th July 1994.
2. By her petition date 2 September 2021 Mr Saunders' daughter, Mrs June Windebank, seeks a faculty authorising the removal of her late father's remains from the present plot to a plot at Waterlooville Cemetery. The petition is supported by Mr Saunders' widow, Mrs J Saunders, and no objections to it have been raised.
3. The intention, if a faculty is granted, is that the late Mr Saunders' cremated remains be re-interred in a plot or area set aside for the family, where Mrs Saunders (who is aged 92 years) wishes her remains to be laid in due course. It is her strong wish that she and her late husband be re-united in burial in Waterlooville Cemetery.
4. In her statement in support of the petition, Mrs Windebank has set out a number of concerns about the present location of her father's remains which she contends justify their removal. In summary, she says that:
 - (i) Her late father's remains were not buried in the plot expected by the family and the present plot was not chosen by them;
 - (ii) Her mother, and the family, wish the remains to be interred in a family plot, where her mother's remains can, in due course, be laid;
 - (iii) The present burial place is not suitable; it is poorly maintained and has a remote and isolated feel, which is not conducive to visiting.
5. Before turning to these matters in more detail it is necessary to consider the status of the churchyard and burial ground of the church of St Peter and St Paul.

The churchyard

6. There are two parts to the churchyard and burial ground: the main churchyard which surrounds the church and a burial ground ("the new burial ground") situated opposite the church at the junction of Medina Road and Cow Lane.

7. It transpires that the new burial ground, in which Mr Saunders' remains were interred, had been closed a few weeks before the interment, by an Order in Council made under the Burial Act 1853 on 18th May 1994.
8. The effect of the Order was that further burials were, and are, prohibited, except as specifically provided under the terms of the Order. In relation to cremated remains, interment in a closed churchyard may only take place in prescribed circumstances.
9. The Church of England (Miscellaneous Provisions) Measure 1992, which was in force at the relevant time, provided at section 3(1) that:

"A person who has a right of burial in the churchyard or other burial ground of a parish shall have a right of burial therein of his cremated remains: Provided that a person shall not have a right of burial of his cremated remains by virtue of this section in a churchyard or burial ground which has been closed by an Order in Council except in accordance with a faculty authorising the burial or in an area which has been set aside by a faculty for the burial of cremated remains generally."

[The proviso to this section has been re-enacted in similar terms in the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 88(3)]

10. In the present case, the Order in Council contains no exception allowing for further burials or the interment of cremated remains in the new burial ground and there is no record of any faculty having been sought or granted either for the interment of Mr Saunders' remains or for the interment of cremated remains generally. Accordingly, I am satisfied that the interment of the late Mr Saunders' remains in the new burial ground was in breach of section 3 of the 1992 Measure.
11. The fact that the interment was irregular does not itself provide a ground for exhumation or obviate the need for a faculty for that purpose: see *In re St John, Dipton* [2011] PTSR D29, per Bursell QC Ch. The breach could have been, and still could be, remedied by the retrospective grant of a faculty, but that would not accord with the family's wishes.
12. The present petition for exhumation must be determined on its merits, but in my judgment, the closure of the burial ground and irregularity of the interment are relevant to that determination. since they affect the ability of the family to achieve their wish for the late Mr Saunders' remains to be included in a family burial plot. While a faculty could be sought for the interment in the current plot of the remains of Mrs Saunders or other family members in due course, that is unlikely to be an acceptable course for the family, given their concerns about the suitability of the plot itself.

The legal framework

13. The principles underlying the exercise of the court's powers in relation to exhumation are set out in the judgment of the Court of Arches in *In re Blagdon Cemetery* [2002] Fam 299. At [35] the Dean of the Arches, delivering the judgment of the court, said:

"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."

14. Particular consideration is required where re-interment is to be in unconsecrated ground. In *Blagdon* itself, where the re-interment was to be in unconsecrated ground, the Court, after referring to the protection afforded to remains interred in unconsecrated ground by section 25 of the Burial Act 1857, said this at [15]-[16]:

"15. Apart from this legal protection afforded to remains in the unconsecrated part of a cemetery, it can generally be assumed that local authorities carry out their legal responsibilities for care and maintenance of their cemeteries. Thus, if remains are to be removed from the consecrated ground of a churchyard, or the consecrated part of a cemetery, and to be re-interred in the unconsecrated part of the same or another cemetery it is reasonable for the Consistory Court to conclude (certainly in the absence of evidence to the contrary) that the new grave will be cared for in a seemly manner and will be protected in this sense.

16. Re-interment in unconsecrated ground which is not in a local authority cemetery is a different matter. No general inference of the suitability for reinterment in such land can properly be drawn by the Consistory Court. Questions about proper care of the new grave in the future and the prospects for visiting access by future generations would need to be addressed by those involved in such cases, and in turn examined with care by the Consistory Court in deciding whether or not to exercise its discretion to grant a faculty for exhumation."

15. In the present case, the proposed re-interment would be in unconsecrated ground in a local authority cemetery and, while the court must consider whether there are circumstances which, exceptionally, justify exhumation for that purpose, it is not necessary for the court to examine arrangements for the care of and access to the new grave.

16. I turn now to consider the circumstances relied on in support of the petition in the present case.

The grounds for seeking exhumation and re-interment

(i) The circumstances of the interment

17. It is not altogether clear how the late Mr Saunders' remains came to be interred in the new burial ground. Mrs Windebank says that she was informed by the funeral directors that this part of the churchyard was closed and that the family understood that the interment would be in the main churchyard, in an area where cremated remains are laid. However, when it came to the interment, they found it was taking place in the new burial ground. She says that the family were present, but she did not feel able to raise the matter then. Once the burial had taken place she did not think there was anything which could be done about it. The result is that her late father's remains are not interred in a place chosen by the family.
18. Mrs Windebank says she was not informed at the time of the implications of the closure of the burial ground and did not discover the true position until enquiries were made about the possibility of interring her mother's remains there. An error in the burials register about her father's name and the number of the burial plot has added to her distress at the situation, though that it not directly relevant to the present petition.

(ii) The proposed re-interment and the family's wishes

19. Mrs Windebank says that her mother, and the family, wish the late Mr Saunders' remains to be interred in a family plot in Waterlooville Cemetery, where her mother's remains can, in due course, be laid. The family have secured a plot in the cemetery (originally number G40004, but now identified as G30028) which is in unconsecrated ground maintained by Norse South East (Norse) on behalf of Havant Borough Council. Norse has confirmed that Mr Saunders' remains can be interred there. The plot is near the place where Mrs Windebank's late husband's remains are laid.
20. The prospect of Mrs Saunders' remains being interred in a place separate from those her late husband is a cause of considerable distress for her and for the family and her greatest wish is for them to be re-united in burial.

(iii) The location and condition of the current plot

21. Mrs Windebank expresses concern about the area in which her father's remains are interred. She says it is in a rather remote part of the churchyard and poorly maintained and she feels intimidated and unsafe when she visits.
22. The incumbent, the Rev'd Amy Webb, does not object to Mrs Windebank's request, though she does not agree with her description of the condition of the burial ground. She does not consider it to be remote, but understands Mrs Windebank's wish for her father's remains to be moved to Waterlooville so that her parents' remains can in due course be buried together.
23. I have not considered it necessary to visit the site, but have the benefit of photographs provided both by Mrs Windebank and by the incumbent. Some caution is needed in interpreting photographs which inevitably give only a partial view of the burial ground, but I can understand that Mrs Windebank feels that her father's burial site is not ideal, placed alone at the foot of what is now a large tree and liable to become overgrown. However, if this were the sole reason for wanting her father's remains to be moved, it would not, in my judgment amount by itself to special circumstances justifying exhumation.

Discussion and conclusion

24. This is an unusual case, in which the particular combination of features has led me to conclude that there are, here, special circumstances which justify the proposed exhumation and re-interment.
25. First, the circumstances surrounding the original interment were unsatisfactory and irregular. While the fact that the churchyard had already been closed is not itself a ground for exhumation, it has left the family feeling understandably unhappy with the current situation and wishing to rectify it to enable Mr and Mrs Saunders to be reunited in burial. If the current position remains, the alternatives for the family would be (a) to seek a faculty in due course permitting Mrs Saunders' remains to be interred in the present plot; or (b) to accept that Mr and Mrs Saunders' remains would be interred in separate cemeteries. I am satisfied that either of these courses would cause significant distress for the family and would not provide an acceptable solution to

their concerns, the first because it is not the plot they would have chosen and the other because it would mean the separation of Mr & Mrs Saunders' remains. In my judgment it would not be fair or reasonable to put the family in the position of having to choose one of these options.

26. Second, the family's wish for family members to be interred with or close to each other in one place is reasonable and entirely understandable, from both a practical and (more importantly) an emotional perspective. The proposed place of re-interment is entirely appropriate and would enable the family to fulfil that wish, in a manner which is not possible in the present location.

27. Third, while not sufficient by itself, Mrs Windebank's concern about the location and condition of her late father's grave, is understandable and contributes to her overall distress at the present situation.

28. There are, though, two other matters which require consideration:

(i) *Unconsecrated ground*

Exhumation from a burial place in consecrated ground for the purpose of re-interment in unconsecrated ground requires particular justification. There is no evidence about the availability of a plot in consecrated ground, but the family's choice of a plot in Waterlooville Cemetery is prompted by family connections and is, in my judgment, reasonable. There is no reason for concern about the care and protection of the remains there.

(ii) *Lapse of time*

The lapse of time since Mr Saunders' interment is relevant to my determination and calls for some explanation. However, the family's belief that there was nothing they could do and their realisation, only recently, of the implications of burial in a closed churchyard are in my judgment sufficient to explain why action was not taken sooner. The proposed exhumation would not present any practical difficulties and could be undertaken without undue disturbance to the remains themselves.

29. In my judgment, neither of these matters is of sufficient concern to outweigh the factors I have identified as justifying the exhumation.

30. Balancing all those factors, I am satisfied that they amount to special circumstances which justify the proposed exhumation of the remains of the late Mr Saunders and their re-interment in the chosen plot in Waterlooville Cemetery and accordingly I direct that a faculty shall issue for that purpose.