THE CHANCERY COURT OF YORK
APPLICATION BY PETITIONER FOR LEAVE TO APPEAL
FROM THE CONSISTORY COURT OF THE DIOCESE OF CHESTER
(HIS HONOUR JUDGE DAVID TURNER QC)

CAUSE OF FACULTY RELATING TO THE CHURCHYARD OF STRETTON, ST MATTHEW

PETITIONER:
CHRISTINE MARY MARSHALL

PARTIES OPPONENT:
(1) LORNA BETTLES
(2) KATE HARDIE
(3) JILL MORRIS

DECISION

1. This decision is in respect of an application by the petitioner, Christine Mary Marshall, for leave to appeal against the judgment of the chancellor of the diocese of Chester, dated 4 August 2015, following written representations. The chancellor refused leave to appeal on 28 August 2015

(i) The factual background

2. The chancellor had before him a petition to reserve space, for 30 years, in burial plot 783 in the churchyard of Stretton, St Matthew in which, in due course, her cremated remains may be placed.

3. A single depth grave on burial plot 783 was dug out, with the appropriate consent, and in it was buried the body of David Bettles, who had died on 10 July 2013 aged 66. He had been the husband of Lorna Bettles, the first party opponent. She was the principal beneficiary (and also, it would seem, executrix) under the deceased's will, which had been made in 1993. The second and third parties opponent, Kate Hardie and Jill Morris, are their adult daughters. Lorna Bettles also organised the funeral and paid for the headstone which has been erected.

4. The marriage appears to have broken down by about 2007. The petitioner and the deceased became intimate in late 2010, having known one another for 40 years, and shared a home from August 2011 until the deceased's death. Lorna Bettles began divorce proceedings, but did not pursue them.

5. When they were partners, the petitioner and David Bettles regularly worshipped at Stretton, St Matthew; and the petitioner's parents are buried in the same row in the churchyard as burial plot 783.

6. At the heart of the petitioner's request lies a conversation which she claims took place in this churchyard in March 2013, in which David Bettles is said to have expressed to her a clear wish to be buried there and to have the petitioner's remains

placed with his when she died. There is some dispute whether this conversation took place, and the chancellor made no finding of fact on that matter.

7. The petition had the support of the incumbent, churchwardens and the Parochial Church Council. It was also supported by the deceased's two sisters who believed that their late brother would have wanted the petitioner's remains placed with his.

8. The party opponents' objection to the petition is founded upon a sense that a marriage of over 40 years is not to be compared with an intimate relationship of no more than three years, and the confusion and upset that will be occasioned to the family, including the grandchildren.

9. The party opponents are also concerned that the petitioner will in due course seek to add her name to the headstone, something which the petitioner denies, saying that all she envisages for herself is only a memorial plaque on the ground.

(ii) The judgment from which leave to appeal is sought

10. In his judgment the chancellor set out the background; emphasised that no parishioner had a right to a particular position in a churchyard; and said that the court was required to exercise a discretion in a case where there was "a disproportionately painful and manifestly personal disagreement between parties, who in their different ways all loved the deceased and still cherish his memory" (para 37).

11. His judgment concluded as follows:

> "41. Reservation of a grave space remains, as I have said, a discretionary remedy. That discretion must be exercised judicially. I must attempt to judge, however, imperfectly, where any balance of hardship or upset may fall most heavily in a case such as this.
>
> 42. I feel compelled to respect the objections of the deceased's wife and daughters here to what is requested.
>
> 43. I do not doubt Mrs Marshall's sincerity in petitioning as she does but, in my discretion, I refuse her petition. I believe it is likely to cause greater distress to more people over a longer period of time and that would not be right.
>
> 44. It would, in my judgment, be wrong, in the face of opposition from members of a deceased's natural and marital family, to place pressure upon them to accept, without their agreement, into a family member's grave, the remains of another person, however close that person may have been to the deceased.
>
> 45. It follows that the petition must be dismissed….."

(iii) Two observations

12. Unmentioned by the chancellor was an unusual aspect of this petition. To seek reservation of an unoccupied grave space is relatively common. Much less common is what happened here, namely to seek to reserve a right to inter ashes (or even a second body) in an already occupied grave. Some chancellors might have

considered that the grant of faculties in such circumstances was generally undesirable, the question of whether (and if so whose) ashes should be interred in an already occupied grave being a matter better decided when that person has died. That is particularly so when the petition is opposed (as was here the case).

13. In all faculty proceedings, the ordinary presumption "in favour of things as they stand" is applicable, though it can of course be rebutted depending on the particular nature of the proposals (see *In re St Alkmund, Duffield* [2013] Fam 158 para 87, and authorities there cited). In the present case the chancellor did not refer to this presumption, which could have supported his conclusion that the more appropriate outcome was to refuse the petition.

(iv) Petitioner's grounds for leave to appeal

14. Rule 6(3)(b) of the Faculty Jurisdiction (Appeals) Rules 1998 ("the 1998 Rules") provides that an application for leave to appeal to the Dean must be accompanied by (inter alia) "the…documents referred to in rule 5(2)". Those documents are:

> "(a) a short and concise statement in writing in numbered paragraphs identifying those parts of the judgment to which the proposed appeal relates; and
>
> (b) the proposed grounds of appeal in writing".

Rule 6(3)(c) provides also that there should be:

> "a short and concise statement in writing in numbered paragraphs of the reasons relied upon by the applicant in support of the application to the Dean for leave to appeal".

The reason for the additional rule 6(3)(c) statement is that in refusing leave to appeal the chancellor may have given reasons to which the proposed appellant wishes to refer in its latest statement.

15. Amongst the various statements submitted by the petitioner are two versions of a document headed "Statement for the proposed grounds of appeal", received by the Provincial Registry on 10 September and 24 September 2015 respectively, which appear to constitute versions of the rule 5(2) documents (combined into a single document). There are also two statements headed "statements accompanying appeal", received on the same two dates, which presumably constitute versions of the rule 6(3)(c) statement. I doubt any of these could properly be described as "short and concise", as required by the rules

16. A would-be appellant also has the right to make further representations in writing under rule 6(5) before the Dean can determine the application for leave. These were made by the petitioner in an undated document, which set out the petitioner's reasons for believing that the first party opponent would not have wanted to be buried with her estranged husband, and for assuming that she herself could be buried in the way the deceased had asked her to be.

17. Although numerous other minor criticisms are made by the petitioner of the chancellor's judgment, her principal proposed grounds of appeal appear to be that:

(a) the chancellor had not appreciated the length of time she had known the deceased.

(b) the chancellor should have appreciated that no one had expected there to be any objection to the faculty sought by the petitioner, and should have give no weight to the late suggestion that the first party opponent may wish her own cremated remains to be interred in plot 738.
(c) the chancellor wrongly exaggerated the distress which the grant of the faculty would cause to the deceased's family.
(d) the chancellor wrongly accorded weight to the views of the Revd Jane Garside, minister of St John's United Reform Church, Warrington (where Mr and Mrs Bettles had married and later worshipped regularly over many years) who supported the view of the party opponents that the faculty should be refused.
(e) the chancellor should have found that the conversation between the petitioner and the deceased took place in March 2013, and should have discounted altogether the suggestion of the second party opponent to the contrary.
(f) the chancellor gave excessive weight to the length of the marriage between Mr and Mrs Bettles.
(g) the chancellor wrongly gave weight to the fact that the first party opponent had paid for the funeral and headstone.
(h) the chancellor wrongly struck the balance between the distress on both sides.

(v) Test for leave to appeal

18. Before leave to appeal can be granted there must be a real prospect that, if leave were granted, the appeal would succeed, or there must be some compelling reason why the appeal should be heard (see *St Mary's Churchyard, White Waltham* [2010] PTSR 274 para 16). This test is now repeated in rule 22.2 of the Faculty Jurisdiction Rules 2015 ("the FJR 2015"), which will come into force on 1 January 2016, replacing the 1998 Rules.

19. To stand a real prospect of success there must be a real chance of showing that the decision of the chancellor was wrong, or unjust because of some serious irregularity in the proceedings below (see rule 27.11(2) of the FJR 2015, which merely reiterate the way in which the jurisdiction of the provincial appeal courts has long been exercised, as to which see *Duffield* para 53). In this context "wrong", which derives from the language of CPR 52.11(3)(a), means that the court below (i) erred in law or (ii) erred in fact or (iii) erred (to the appropriate extent) in the exercise of its discretion.

20. Challenges to the exercise of a chancellor's discretion are extremely difficult to bring. Of course a chancellor may not simply do as he pleases. There is no such thing as a wholly unfettered discretion, since even discretionary proceedings "ought to be limited and bound with the rule of reason and law" (see *Rooke's Case* (1598) 5 Co Rep 99b). This chancellor correctly recognised that his discretion "must be exercised judicially" (para 41).

(vi) Analysis of proposed grounds of appeal

21. I consider each of these briefly:

(a) the chancellor had not appreciated the length of time she had known the deceased.

I accept that the chancellor did not refer to any relationship before 2009. It is unclear whether the materials before him included any reference to a 40 year friendship, or to the fact (as now asserted by the petitioner) that the deceased told her in 2009 that he had loved her for 40 years. According to the rule 6(5) representations of the second party opponent "Mrs Marshall was not friends with my dad for 40 years, they had met when Dad had worked at her parents' house in the late 1960s and then did not meet again until 2005 when they worked together briefly. They did not start a platonic friendship until 2009…". Whatever the truth of the matter, it would not arguably constitute an error of fact or law, nor would it amount to a fatal flaw in his the exercise of his discretion.

(b) the chancellor should have appreciated that no one had expected there to be any objection to the faculty sought by the petitioner, and should have give no weight to the late suggestion that the first party opponent may wish her own cremated remains to be interred in plot 738.

Whether anyone anticipated an objection at the time of the petition is irrelevant to anything the chancellor had to, or did, decide. Whilst the chancellor referred (at para 9 of his judgment) to it appearing that the first party opponent may entertain an expectation of being buried in burial plot 783, there is no indication that his decision was grounded in any way on such an expectation. This ground is unarguable.

(c) the chancellor wrongly exaggerated the distress which the grant of the faculty would cause to the deceased's family.

Although the family's distress "does not ring true to the Petitioner", who now says that the daughters "demonstrated no distress when he was alive rather they demonstrated anger and resentment of a nature to hurt their father in their need to make it clear to their father that they disagreed with his choice to leave their mother", the chancellor had to reach conclusions on the basis of the written representations before him (which he summarised at paras 31-33 of his judgment). His conclusion that there would be distress to them was not only one which he could reasonably reach on the materials before him; it was also one he was virtually bound to reach. There is nothing arguable in this ground.

(d) the chancellor wrongly accorded weight to the views of the Revd Jane Garside, minister of St John's United Reform Church, Warrington (where Mr and Mrs Bettles had married and later worshipped regularly over many years) who supported the view of the party opponents that the faculty should be refused.

The chancellor simply recorded the minister's support for the party opponents, and that her statement that the first party opponent "had taken responsibility for, and funded funeral arrangements, had chosen and paid for a suitable memorial and had negotiated acceptably 'neutral' wording in an endeavour to accommodate Mrs Marshall's feelings" (para 15). Whilst there is now a dispute about the extent of any negotiations on the wording on the head-stone, there is no indication in the judgment that the role of this URC minister materially influenced the chancellor's decision. That would in my opinion not be arguable.

(e) the chancellor should have found that the conversation between the petitioner and the deceased took place in March 2013, and should have discounted altogether the suggestion of the second party opponent to the contrary.

Without an oral hearing, it is difficult to see how the chancellor could have made a finding in relation to this disputed matter. However, there is nothing in his judgment to suggest that the chancellor doubted the honesty and good faith of the petitioner. Nor is there anything to suggest that he attached any weight in the exercise of his discretion to the suggestion of the second party opponent that the conversation had not taken place. This ground is unarguable.

(f) the chancellor gave excessive weight to the length of the marriage between Mr and Mrs Bettles.

The length of the marriage was a matter of fact, and one to which the chancellor was entitled to attach weight, particularly when considering the issue of distress to the deceased's widow and daughters. There was no arguable error here.

(g) the chancellor wrongly gave weight to the fact that the first party opponent had paid for the funeral and headstone.

The petitioner now asserts that she had gone to see the incumbent three days after David Bettles' death "to pay for the grave". It is unclear whether this was mentioned in the written representations before the chancellor, nor whether it was in fact, as this claim suggests, the petitioner who paid for the digging of the grave. The petitioner also now asserts that "the inscription was never discussed with [her] although [she] had with humility, written months before to Lorna Bettles suggesting collaboration. The letter received no reply". In assessing the family's "greater distress" (para 43), there is no indication that the chancellor was in any way influenced by the fact that the party opponent had paid for the funeral and the headstone, or by any negotiations as to its wording. This ground therefore is unarguable.

(h) the chancellor wrongly struck the balance between the distress on both sides.

Even had the chancellor found that the distress to the petitioner would be greater than the distress to the first party opponent, he would still have had to take account of the distress to the daughters and of the fact that this was likely to last for a longer period than her own distress, because of their relative ages. He was also entitled to accord weight to the "opposition from members of a deceased's natural and marital family" (para 44). The chancellor's judgment is not arguably flawed in this respect.

(vii) Conclusion

22. Accordingly I can see nothing which even arguably shows that the chancellor's judgment was "wrong" in the way that has been defined above. Nor is there is no suggestion of any serious or other procedural irregularity. Accordingly the application for leave to appeal must fail.

(viii) Costs

23. Unless any submission in writing to the contrary is received within 14 days hereof, under rule 6(4) of the 1998 Rules the petitioner shall pay by 31 December 2015 the court costs of this application, to include correspondence fees of the registrar if approved by me. It appears unlikely that the parties opponent have incurred any recoverable costs in making representations in writing to the Dean in respect of the application for leave to appeal, but if they (or any of them) wish to claim such costs from the petitioner, they must submit the claim or claims in writing to the Provincial Registrar, quantifying the amount claimed within 14 days hereof. If any submissions are made by any party in relation to costs, they shall be copied to the other parties at the same time as they are submitted to the Provincial Registrar.

(ix) Observations

18. There are three final observations I should make:

(a) The chancellor plainly recognised that his decision on the petition, whichever way it went, "will inevitably disappoint and distress one or other 'side' (para 38). Nothing in my decision should be taken as under-estimating the disappointment and distress it will cause to the petitioner.

(b) The petitioner has made it clear in her documentation that she has been advised that her application for leave to appeal is unlikely to succeed. She goes on to state: "If I fail the process then my reward is that I tried…. with integrity and good purpose". Nothing in this decision should be taken to cast doubt on her motives.

(c) The petitioner's rule 5(2) materials ended as follows:

> "Perhaps a second ruling on from this Appeal should be that anyone at all should be precluded from being interred with David Bettles in that plot along with a preclusion of any changes to the inscription to the head stone already in place. In that way David Bettles could rest in peace to some extent".

It may be some reassurance to the petitioner that no one else (including the first party opponent) can lawfully be interred in burial plot 783 without either a faculty or a consent under powers delegated by the chancellor. And likewise any change to the inscription on the head stone would require authorisation.

CHARLES GEORGE QC
Auditor

9 November 2015