



Faculty – Exhumation – Local authority cemetery – Exhumation of cremated remains to facilitate second burial in existing grave – Re-interment in nearby Garden of Remembrance - Faculty granted

Petition No: 10841

IN THE CONSISTORY COURT
OF THE DIOCESE OF OXFORD

Date: Sunday, 13 June 2021

Before:

THE WORSHIPFUL DAVID HODGE QC, CHANCELLOR

In the matter of:

St Saviour's Cemetery, Hungerford

THE PETITION OF MRS JANE GLEN

Unopposed petition determined on the papers and without a hearing.

The following cases are referred to in the Judgment:

Re Blagdon Cemetery [2002] Fam 299

Re Burnley Cemetery [2021] ECC Bla 2

Re Christ Church, Alsager [1999] Fam 142

Re Mitcham Road Cemetery, Croydon [2021] ECC Swk 2

Re St Andrew, Leyland [2021] ECC Bla 1

JUDGMENT

Introduction and background facts

1. This is an unopposed faculty petition dated 7 June 2021 seeking permission to exhume the cremated remains of Mrs Maureen Leyland (‘the deceased’) from a grave plot in the consecrated area of St Saviour’s Cemetery, Hungerford. The deceased died on 28 January 2004, aged 74, and on 5 February 2004 her cremated remains were interred in the same grave as her elder daughter, Mrs Christina Pearce. Mrs Pearce had died on 11 January 2001, aged only 40, and she was laid to rest on 19 November 2001 in a new double grave space paid for by her husband. The petitioner is the sister of Mrs Pearce and the deceased’s only surviving issue. She is also the deceased’s personal representative. Mrs Pearce was survived by her husband, Mr Tony Pearce, and two children, who are both now adults. At the date of the petition, Mr Tony Pearce was dying of terminal cancer and when I first received the petition, by email on the morning of Tuesday 8 June 2021, I was informed by the petitioner that he had “gone rapidly downhill and has only hours, or a few days, at most now” to live. Sadly, he passed away that same morning and his family have started to make the necessary funeral arrangements. Mrs Pearce’s grave is a double grave plot and was originally dug with a view to accommodating Mr Pearce’s remains when his time came. What the petitioner seeks, with the support of Mr Leyland (the deceased’s widower), the late Mr Pearce, and Mr and Mrs Pearce’s two adult children, is to exhume the cremated remains of the deceased with a view to their re-interment in a new cremated remains plot in the same cemetery, only a few metres away from their present resting place, where the cremated remains of the deceased’s widower (the petitioner’s father), who is now 90 years of age and in relatively good health, can be interred when his time comes. This will allow the human remains of the late Mr Pearce to be united with those of his late wife, in accordance with the family’s original intentions at the time of Mrs Pearce’s interment.

2. In addition to the petition, I have an explanatory letter from the petitioner and letters in support from Mr Leyland, the late Mr Pearce, and his two adult children. (Mr Pearce’s letter is dated 1 June 2021 and in it he describes himself as “terminally ill” and states his “wish to be buried with my late wife”.) All of the writers speak to their wish to see the remains of Mr Pearce re-united with those of his late wife, and, when his time comes, the cremated remains of Mr Leyland re-united with those of his own late wife. This is clearly a very close-knit and loving family whose members say that they all regularly visit the existing grave and view it as a very special place to come to and remember their loved ones. I also have a letter dated 7 June 2021 from the Deputy Town Clerk of Hungerford Town Council confirming that the Town Council, as the burial authority for St Saviour’s Cemetery, consents to the deceased’s ashes being exhumed from their existing grave and re-interred in the Cemetery’s Garden of Remembrance.

3. Having given the petition my preliminary consideration, the same afternoon I directed the Registry to write to the petitioner expressing my deep sympathy for all the family at this time of great sadness to them and passing on my condolences. I explained that I was sorry to add to the family’s grief but that I required further information, as follows:

- (1) Would the presence of Mrs Leyland’s ashes prevent the late Mr Pearce from being buried in his wife’s grave?

- (2) If so, was this appreciated at the time when Mrs Leyland's ashes were interred there?
- (3) If so, why were the ashes interred there when it must have been appreciated that this would prevent Mr Pearce from being buried there?
- (4) If Mr Pearce could be buried in the grave with Mrs Leyland's ashes remaining there, could Mr Leyland's ashes also be interred there in due course.
- (5) After some 17 years, would it be possible safely to exhume Mrs Leyland's ashes from the grave and re-inter them in the memorial garden?
- (6) Could Mr Leyland's ashes be interred there with his late wife's ashes in due course?
- (7) How did the petitioner wish me to dispose of the petition? Did she wish me to deal with the matter without a hearing? Did she want to serve any written representations, or was she content for me to deal with the matter on the documents?

4. The petitioner responded by email the following afternoon answering the questions as best she could as follows:

(1) Will the presence of Mrs Leyland's ashes prevent the late Mr Pearce from being buried in his wife's grave? Hungerford Town Council have responded thus: Our cemetery regulations state: 'No private grave will be made deeper than 7ft (2.13 metres). This allows two earth burials. In addition, up to six sets of cremated remains are permitted per full burial plot.' This means that Mr Pearce can be buried in his wife's grave, along with Mrs Leyland's ashes. Mr Leyland's ashes can also be interred there at a later date.

(2) If so, was this appreciated at the time when Mrs Leyland's ashes were interred there? I genuinely don't know the answer to that question. When my mother died in Cheshire, I was in Ascot with young twin boys and going through a difficult divorce with no local family support so I was not involved in the process. Mr Pearce would have been looking after the cemetery aspect as he was the owner of my sister's grave. I didn't have the opportunity to ask Tony as when I last saw him on 22 May he was very ill and very emotional and was unable to speak no more than a few words to me. He had only been diagnosed as terminally ill the week before.

(3) If so, why were the ashes interred there when it must have been appreciated that this would prevent Mr Pearce from being buried there? I know that my mother had asked for her ashes to be with my late sister in the last days of her life. Again, this is a genuine response, I don't think anyone wanted to say 'no' to her or thought about the long term issue that we are now facing. In hindsight, it would have been much better to say to my Mum that her ashes would be placed in a different part of the cemetery. From recent conversations with my niece and nephew and Mr Pearce's sister, I understand that Mr Pearce believed that Mrs Leyland's ashes could be moved.

(4) If Mr Pearce can be buried in the grave with Mrs Leyland's ashes remaining there, can Mr Leyland's ashes also be interred there in due course? See the answer to point 1 above.

(5) After some 17 years, will it be possible safely to exhume Mrs Leyland's ashes from the grave and re-inter them in the memorial garden? Hungerford Town

Council's gravedigger believes that it will be possible to safely exhume Mrs Leyland's ashes. However, this is obviously something they won't know for sure until they re-opened the grave. I do know Mrs Leyland's ashes were in an oak casket from the funeral director's invoice at the time and a copy of this can be submitted if needs be.

(6) Can Mr Leyland's ashes be interred there with his late wife's ashes in due course? It is my Father's wish, mine and his grandchildren, that this is the case. We all strongly believe that the husband's and wives should finally be laid to rest with each other. Indeed they will only be metres apart. My Father, Mr Leyland, and I are very comfortable that my Mother would be happy with the decision should the petition be granted.

The petitioner confirmed that she was happy for me to deal with this matter without a hearing and to make my decision on the documents. She was happy to provide further evidence or answer more questions if needs be. The petitioner's email concludes: "I understand the seriousness of my petition and the consideration time that is needed. If possible, is there any chance of having some guidance on the likely outcome fairly soon even if it is not fully confirmed. I know that Mr Pearce's sister has an appointment with the funeral director tomorrow so obviously the burial decision is crucial to deciding the location and decision on where Mr Pearce is laid to rest. It is particularly distressing for my niece and nephew, Kate and Jack Pearce, to think that their Father's final wish may not be granted."

5. At my direction, the Registry wrote to the petitioner by email the following morning stating that my understanding of her further email was that Mr Pearce could be buried in his wife's grave, along with Mrs Leyland's ashes; and Mr Leyland's ashes could also be interred there at a later date. I indicated that if this course were acceptable to the petitioner, I would be prepared to grant a faculty permitting the temporary removal of the deceased's ashes to facilitate the burial on the basis that they were immediately re-interred in the same grave. The Registry asked for the petitioner's thoughts as soon as possible.

6. The petitioner's email response was as follows:

"I appreciate this is a very serious matter. I wouldn't have submitted the petition without a lot of joint deliberation between the Pearce and Leyland families. My niece and nephew lost their mother, Christina Pearce, when they were very young. At 26 and 27 years respectively, they are still young to now be without both parents. It was their late father's last wish that he was buried alongside his late wife.

Kate and Jack firmly believe that it should be just their Mum and Dad in the grave together and my father and I agree. St Saviour's Cemetery has played a big part in enabling Kate and Jack to come to terms with the loss of their Mum and strongly believe that they will gain strength from knowing their Mum and Dad are together at last. It does not feel right to both of them, my Dad and myself to have Tony, Christina, my mother and ultimately my father in the same grave.

Even if my Tony Pearce was buried in the same grave, it would still involve disturbing the grave if my Mum's ashes were still there. We are just asking if whilst the grave was disturbed already, that my mother's ashes are simply moved approximately 8 - 10 metres into the Garden of Remembrance. This way Kate and Jack can feel that they have made their Dad's final wish happen and hopefully come to terms with their very sad loss.

I can only say that Kate and Jack are utterly devastated at the thought that this might not happen. I am happy to talk further about this matter or provide any other material/information if needs be.”

7. I am sorry that the family have been subjected to this intrusive series of questions from me at their time of grief and whilst they are mourning their recent loss of Mr Pearce. I would have wished to spare them this further intrusion but sadly it was necessary in order for me to determine the petition and for them to progress the funeral arrangements.

8. I am satisfied that any near relatives of the deceased still living consent to the proposed faculty being granted and I therefore dispense with the giving of public notice under FJR 6.6 (3). Having regard to the overriding objective, I consider that it is expedient to determine this petition on consideration of written representations instead of by a hearing.

The applicable law

9. The principles which the court has to apply when dealing with an application for an exhumation from consecrated ground are well known and were laid down by the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299. I have recently reviewed some of the authorities that have followed on from that decision in my judgment (as the Chancellor of Blackburn) in *Re St Andrew, Leyland* [2021] ECC Bla 1 to which reference should be made for a fuller exposition of the law in this sensitive, and often emotionally charged, area. In summary, the court has a discretion to permit such an exhumation; but the presumption is that the burial of human remains in consecrated ground is permanent. This is the starting point when dealing with the discretion. The presumption arises from the Christian theological tradition that burial or, as here, 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. Thus it is that the court can only depart from the principle of permanence if the petitioner, on whom the burden of proof lies, can establish, on the balance of probabilities, special circumstances which would allow an exception to that principle. The courts have helpfully identified certain factors which may assist in deciding whether exceptional circumstances exist which would enable the burden to be discharged so as to permit human or cremated remains to be exhumed. One such factor is whether there has been a mistake as to the place of burial, although it has also been said that a mere change of mind as to the place of burial on the part of the relatives or others responsible for the interment should not be treated as an acceptable ground for authorising exhumation. Another relevant factor is whether the proposed exhumation is to facilitate the re-interment of the remains in a family grave. This is something to be encouraged because family graves express family unity and are environmentally friendly in ensuring an economical use of land for interments.

10. In my earlier judgment in *Re St Andrew, Leyland*, I explained (at paragraph 10) why I find it helpful to consider the decisions of consistory courts in earlier cases, not as precedents slavishly to be followed, or even as tramlines guiding my way forward, but as affording potentially helpful indications as to how the particular circumstances of other, similar, but not identical, cases have been viewed when considering whether it is right to make an exception to the principle of permanence. I reminded myself of the desirability of securing equality of treatment, so far as circumstances should permit, as between petitioners, and of treating similar cases in similar ways, avoiding over-fine distinctions; but also that ultimately the duty of this court is to determine whether the circumstances of the present case, properly considered and

evaluated, are such as to justify making an exception to the presumption of the permanence of Christian burial.

11. In *Re Mitcham Road Cemetery, Croydon* [2021] ECC Swk 2, the petitioners had applied for the temporary exhumation of the cremated remains of their brother, Cedric, from their father's grave, so that their mother could be buried in the same grave. The brother's cremated remains would then be returned to the father's grave immediately after the mother's burial. Chancellor Petchey (in the Diocese of Southwark) granted a faculty permitting this. He explained that the petitioners had discovered that the position of the ashes within the grave obstructed the burial of their mother's remains. At paragraph 5 Chancellor Petchey said this:

“Permanence is the norm of Christian burial and permission for exhumation is granted only exceptionally. However this is a case where a mistake has occurred through no fault of the Petitioner or her family; I note moreover that Cedric's ashes are to be removed only temporarily before being returned to the same grave from which they are to be exhumed. I rather doubt in these circumstances if the rigour of the inhibition on exhumation has application. If exceptional circumstances are required, I hold that they exist and accordingly I direct that a faculty should issue.”

12. I have no doubt that the approach of Chancellor Petchey involved a principled application of the law governing exhumation from consecrated ground which I should be prepared to follow. I share Chancellor Petchey's doubts as to whether in such a case the rigour of the inhibition on exhumation has any application; but if exceptional circumstances are required, they clearly exist in a case of temporary exhumation with a view to facilitating a further burial, with the exhumed remains being returned immediately to the same grave from which they are to be exhumed. It was with this authority in mind that I had indicated to the petitioner that I would be prepared to grant a faculty permitting the temporary removal of the deceased's ashes to facilitate the burial of Mr Pearce on the basis that they were immediately re-interred in the same grave.

13. The present case differs from *Re Mitcham Road Cemetery, Croydon* because here the petitioner wishes the deceased's exhumed cremated remains to be re-interred approximately 8 to 10 metres away from their present resting place, in the Garden of Remembrance of the same Cemetery. This will create a separate grave for Mr and Mrs Pearce and allow the cremated remains of Mrs Andrews to be united separately with those of her surviving husband when his time comes, all in accordance with the wishes of all of the family members. Should this make any difference? In my judgment, it should not. As the petitioner has pointed out, if Mr Pearce is to be buried in the existing grave, the deceased's ashes will be disturbed if they are still there. Given that the grave already has to be disturbed, why should the deceased's ashes not simply be moved approximately 8 to 10 metres into the Garden of Remembrance so that Mr Pearce's adult children can feel that they can give effect to their father's final wishes and, hopefully, come to terms with their very sad loss. In one sense, this is a case, if not of mistake, certainly of inadvertence, since no consideration appears to have been given, at the time of the interment of the deceased's ashes, to how this might impact in the future upon the pre-determined intention that Mr Pearce's human remains should, in due course, be able to be laid to rest with those of his late wife, who was taken from the family at such a relatively young age. The Pearce family should in no way be penalised for the unforeseen consequences of acceding to the deceased's wish to be laid to rest with the last remains of her deceased elder daughter. The need to disturb the deceased's cremated ashes in any event, in order to effect the interment of Mr Pearce's remains,

and the proximity, to the existing grave, of the place where the exhumed cremated remains are to be laid to rest, together constitute special circumstances allowing an exception to the principle of the permanence of Christian burial. In the light of these two factors, I do not consider that, by allowing this petition, any undesirable precedent will be, or will be at risk of being, created. For what it is worth, I also consider that the alternative test, formerly laid down and applied in *Re Christ Church, Alsager* [1999] Fam 142, of the existence of a good and proper reason for exhumation which most right-thinking members of the Anglican church would regard as acceptable, is also satisfied.

14. I am conscious that in the recent case of *Re Burnley Cemetery* [2021] ECC Bla 2, as the Chancellor of Blackburn, I refused a petition for a faculty authorising the exhumation of the cremated remains of the petitioner's late husband from consecrated ground at Burnley Cemetery and their re-interment in a proposed family grave plot, which the deceased's family were in the course of purchasing in a garden of remembrance in a cemetery near Morecambe. In one sense, that case bears some resemblance to the present case because there the petitioner was seeking to exhume her late husband's remains from an existing family grave, in which it would be perfectly possible for her own remains to be laid to rest in due course, in order to create a new family grave elsewhere. I did not consider that the wish to create a new family grave elsewhere could justify the disturbance of an existing family grave, at least where it was still capable of accommodating, in due course, the remains of the petitioner as the deceased's closest surviving relative. I considered that the circumstances of that case, properly considered and evaluated, were not such as to justify making an exception to the presumption of the permanence of Christian burial; and I therefore determined that the *Blagdon* test was not satisfied. For what it was worth, I also considered that the alternative test, formerly laid down and applied in *Re Christ Church, Alsager*, of the existence of a good and proper reason for exhumation which most right-thinking members of the Anglican church would regard as acceptable, was also not satisfied. I considered that were I to allow that petition, an undesirable precedent would be, or would be at risk of being, created.

15. The *Burnley* case is clearly distinguishable in that, unlike the present case, there was no necessity to disturb the cremated remains of the petitioner's late husband, and it was not proposed to move them by only a few metres within the same cemetery. By allowing this petition, I do not consider that I am falling into the errors of either failing to accord equality of treatment to different petitioners, or of treating similar cases in different ways.

Conclusion

16. For these reasons, the court grants a faculty for the exhumation of the cremated remains of the late Mrs Leyland from their existing grave in St Saviour's Cemetery, in order to facilitate the interment of Mr Pearce's remains, and their re-interment in the Garden of Remembrance of the same Cemetery, as near as possible to the existing grave, and in a place able to accommodate the cremated remains of Mr Leyland when his time comes. The exhumation and the re-interment are to be conducted with all due reverence, and in a seemly manner, by a qualified funeral director. The re-interment is to follow as soon as reasonably practicable after the exhumation, and it is to be conducted according to the rites and practices of the Church of England. The period allowed for the proposals to be implemented will be six (6) months from the date of the grant of the faculty.

17. For pastoral reasons, I waive any fee for this written judgment.

David R. Hodge

The Worshipful Chancellor Hodge QC

The Second Sunday after Trinity, 2021